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The Credibility of the Court of Arbitration for Sport

Chui Ling Goh*
Jack Anderson**

ABSTRACT

Established in 1983, the Court of Arbitration for Sport (the "CAS") has since been recognized as the "world's supreme court for sports."[1] It is, however, neither a "court" in the public law sense of the term nor "supreme," given that its decisions can be challenged at the Swiss Federal Tribunal and even at the European Court of Human Rights. The CAS has also faced criticism for its lack of independence and impartiality, the mandatory consent nature of its jurisdiction and its questionable and limited contractual legitimacy. These criticisms have been raised occasionally but largely unsuccessfully by aggrieved parties seeking to quash CAS awards in the courts. Nevertheless, the legal challenges and questions as to the CAS's credibility as an arbitral body persist.

This Article seeks to critically assess the principal criticisms of the CAS by comparing its practices with those of ordinary courts and commercial arbitration institutions. This paper will show that procedurally – with the exception of an egregious gender and geographical imbalance in and on its arbitration lists – the CAS's practices appear compliant with the norms of international arbitration. The paper seeks to facilitate a more informed dis-

* Ph.D. Candidate, LL.M. (Melbourne Law School), LL.B. (National University of Singapore), Advocate and Solicitor (Singapore). The author is privileged to have worked with Professor Jack Anderson on this paper and thanks him for his insightful guidance and mentorship.

** Professor of Law, Melbourne Law School, University of Melbourne.

[1] *See* Foreword by H.E. Judge Kéba Mbaye at M. Reeb, DIGEST OF CAS AWARDS II 1986-1998 (1998).

cussion about, and appreciation of, the CAS than has recently existed and to prompt meaningful reform of the CAS to the ultimate benefit of its users (and especially athletes).

I. Introduction

In 1981, Juan Antonio Samaranch, the President of the International Olympic Committee ("IOC"), envisioned creating a sport-specific jurisdiction within an arbitration tribunal devoted to resolving all disputes directly and indirectly relating to sports.[2] Samaranch thought that a specialized body, providing "flexible, quick and inexpensive" adjudication methods,[3] was necessary to adjudicate the increasingly complex array of transnational and cross-border disputes relating to both Olympic and professional sport.[4] Two years later, the IOC ratified the Court of Arbitration for Sport ("CAS"), since self-described as the "world's supreme court for sport"[5] and subject to Swiss law.[6] Since 1983, the role of the CAS has expanded.[7] No longer seen as simply a vassal of the IOC,[8] the CAS is globally accepted, albeit sometimes uneasily, as the final arbitrator of sporting disputes.[9]

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[2] *See* Court of Arbitration for Sport, *History of the CAS*, TAS/CAS, https://www.tas-cas.org/en/general-information/history-of-the-cas.html [https://perma.cc/2KYT-K8SZ] (last visited May 30, 2022).

[3] *Id.*

[4] *See* Raffaele Poli, *Africans' Status in the European Football Players' Labour Market*, 7 Soccer & Soc'y 278–91 (2006); Wladimir Andreff & Paul D. Staudohar, *The Evolving European Model of Professional Sports Finance*, 1 J. Sports Econ. 3, 257–76 (2000).

[5] Foreword by H.E. Judge Kéba Mbaye at Reeb, *supra* note 1.

[6] *See* Matthieu Reeb, Digest of CAS Awards, 2000-2003 (2004).

[7] The CAS has expanded since 1983, from the inclusion of the CAS Ad Hoc Division in 1996, to the Ad Hoc Anti-Doping Division in 2016, and the permanent CAS Anti-Doping Division in 2019. *See Amendments to the Code of Sports-Related Arbitration (in Force as from 1 January 2017)*, TAS/CAS Court of Arbitration for Sport (2017), https://www.tas-cas.org/fileadmin/user_upload/Amendments_Code_2017_tracked_changes.pdf [https://perma.cc/8R5Z-485P] (last visited May 30, 2022); *Amendments to the Code of Sports-Related Arbitration (in Force as from 1 January 2019)*, TAS/CAS Court of Arbitration for Sport (2019), https://www.tas-cas.org/fileadmin/user_upload/Amendments_Code_2019__en_.pdf [https://perma.cc/PU79-7PHH] (last visited May 30, 2022).

[8] *See* Lazutina & Danilova v. Int'l Olympic Comm. [2003], SFT, 1st Civil Division, 27 May 2003 (Swiss Federal Tribunal).

[9] *See* Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 Marq. Sports L. Rev. 305 (2010).

Prior to its present state, the CAS experienced several stages of reform in response to various challenges to its authority and independence.[10] In 1994, after the Swiss Federal Tribunal determined that there was sufficient connection between the CAS and IOC to question the CAS's independence under Swiss law,[11] the International Council of Arbitration for Sports (the "ICAS") was created. The ICAS was intended as both an administrative and financial oversight body of the CAS branch and a means of distancing the CAS operationally from the IOC.[12] In 2011, the ICAS amended the CAS's Code of Sports-related Arbitration ("CAS Code"), abandoning the old regime of sports organizations designating the appointment of arbitrators and instead designing a procedure by which CAS arbitrators are appointed into the CAS list of arbitrators.[13] In 2019, major reforms were made to the CAS Code, including the creation of the Anti-Doping Division and the Ordinary Division and Appeals Division, as well as the availability of public disciplinary hearings by request.[14] The present procedural rules pertaining to arbitration at the CAS are set out in the 2021 edition of the CAS Code.[15]

Apart from challenges to its financial and institutional independence from the IOC and other International Federations ("IFs"), the CAS has also been vigorously criticized. First, critics claim that the CAS lacks authority due to the insufficiency of party consent, including athletes with little bargaining power over the operation of mandatory arbitration clauses in the regulations of sport bodies. Second, critics argue that the CAS has limited contractual legitimacy to develop a body of jurisprudence for international sports law.[16]

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[10] *See* Gundel v. Fédération Équestre Internationale (FEI) and & Court of Arbitration for Sport [1993], SFT, 1st Civil Division, 15 March 1993 (Swiss Federal Tribunal); *Raguz v. Sullivan* [2000] N.S.W. Ct. App. 240; Lazutina v. IOC (SFT); Mutu and Pechstein v. Switzerland (European Court of Human Rights, Section III, Application No. 40575/10 and 67474/10, 2 October 2018); Platini v. Switzerland (European Court of Human Rights, Application No. 526/18, 5 March 2020).

[11] *See* Gundel v. FEI & CAS.

[12] *See* McLaren, *supra* note 9, at 307.

[13] *See* Tudor Chiuariu, *Amendments to the Code of Sports-Related Arbitration Setting the Procedure Before the Court of Arbitration for Sport (in Force as of January 1st, 2012)*, 24 Revista Romana de Arbitraj 12–18 (2012), 15-16.

[14] *See* Court of Arbitration for Sport, *supra* note 2.

[15] *See id.*

[16] For references on *lex sportiva, see* Antoine Duval, Lex Sportiva*: A Playground for Transnational Law*, 19 Euro. L.J. 822–42 (2013). *See also* the same author's most recent criticisms of the CAS at Antoine Duval, *Court of Arbitration for Sport Decides Who Gets to Play and Under What Conditions*, Mail Online (June 18, 2021), https://www.dailymail.co.uk/sport/sportsnews/article-9693349/Court-Arbitration-Sport-not-fit-purpose-claims-expert-sports-law.html [https://perma.cc/Q63U-9P77].

This paper outlines the elements of both of these criticisms of the CAS. Part II focuses on CAS's apparent lack of independence and impartiality, principally from the IOC. Part III evaluates the criticisms of deficient consent by parties in the CAS. Part IV analyzes CAS's contractual legitimacy. This paper concludes by explaining how these criticisms may be addressed and the benefits to the industry that outweigh the burdens.

This paper acknowledges that there may be other criticisms of the CAS not expressly reflected here. These criticisms include the lack of transparency in the accounts and reports of the ICAS. This paper further acknowledges that comparing the CAS to entities that hear private, international commercial disputes is limited by the fact that to a large extent, the CAS hears cases which are non-commercial in nature, arising out of various sport-specific disputes, such as transfer disputes, eligibility and disciplinary decisions, and governance disputes. Unlike commercial arbitration where there is generally equal bargaining power among the parties and a genuine consent to resolve the matter privately, at the CAS there is often marked inequality in the frequency of appearance and resourcing of the parties. The inequality is aggravated by the fact that it is often made compulsory for disputes to be submitted to the CAS.

II. Criticism One: Lack of Independence and Impartiality

One of the most common criticisms of the CAS is that it lacks independence and impartiality as the "world's supreme court for sport."[17] Historically, the bulk of the CAS's funding and the majority of its ICAS members and CAS arbitrators are provided by the IOC. It is therefore questionable whether the CAS was, as originally conceived, operationally or institutionally independent of the IOC to the extent required of a tribunal by Article 6(1) of the European Convention on Human Rights.[18] This criticism of the CAS has persisted, despite various institutional reforms beginning in 1994.

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[17] *See* Foreword by H.E. Judge Kéba Mbaye at Reeb, *supra* note 1.

[18] Other criteria would include the term of office of arbitrators, existence of guarantees against outside pressure, the body presenting an appearance of independence, assessment of impartiality based on subjective (individual arbitrators) and objective standards (institutional). *See Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

A. Challenges to the CAS's Financial and Institutional Independence

In 1993, the Swiss Federal Tribunal stated in *Gundel v. Fédération Équestre Internationale and Court of Arbitration for Sport* that, should the IOC become a party to a proceeding before the CAS, there existed substantial links between the CAS and the IOC strong enough to compromise the independence of the CAS.[19] The Swiss Federal Tribunal found that the CAS was wholly financed by the IOC and that the IOC had considerable power over the administration of the CAS, including the ability to modify the CAS statutes and appoint CAS members and arbitrators.[20]

Following *Gundel*, the CAS employed substantive reforms to reinforce its independence and impartiality, resulting in the IOC and other international sports governing bodies signing the Agreement related to the Constitution of the International Council of Arbitration for Sport (the "Paris Agreement")[21] to place the CAS under the administration of the International Council of Arbitration for Sport ("ICAS"). The parties to the Paris Agreement were the IOC, the Association of Summer Olympic International Federations ("ASOIF"), the Association of the International Olympic Winter Sports Federations ("AIOWF"), and the Association of National Olympic Committees ("ANOC").[22] The ICAS was established under Swiss law to act as a buffer layer of governance between the CAS and the IOC.[23]

In 2002, despite the creation of the ICAS as an institutional and financial buffer, Russian cross-country skiers Larisa Lazutina and Olga Danilova challenged the decision of the CAS (which had found in favor of the IOC against the skiers) at the Swiss Federal Tribunal, on the grounds that the policy of maintaining a closed list of arbitrators limited the fundamental freedom of parties to appoint the arbitrator of their choice in contravention of Article 190(2) of the Swiss Private International Law (the "PILA").[24] The Swiss Federal Tribunal determined that the then-current state of administration of the CAS meant that the CAS could be seen as sufficiently independent from the IOC. The Swiss Federal Tribunal further observed that

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[19] *See Gundel v. FEI & CAS*.

[20] *See id.*

[21] *See Paris Agreement*, DIGEST OF CAS AWARDS 561 (1994).

[22] *See id.*

[23] *See* McLaren, *supra* note 9, at 307.

[24] *See Lazutina v. IOC* (SFT)*; see also* Bundesgesetz über das Internationale Privatrecht [IPRG] ("Federal Act on Private International Law"), Dec. 18, 1987, SR 291 [herineafter "PILA"].

"[t]here appears to be no viable alternative to [the CAS], which can resolve international sports-related disputes quickly and inexpensively."[25]

Despite the finding in the Lazutina-Danilova matter by the Swiss courts, scholars continue to argue that the CAS lacks institutional independence. ICAS members remain drawn from or directly appointed by IFs, the IOC, and National Olympic Committees ("NOCs"), which potentially allows for the "refus[al] to re-appoint a recalcitrant member," should an ICAS member fail to adhere to the desires of the bodies that appointed them.[26]

While the ICAS is intended to act as a buffer layer of governance, the incestuous appointment process of ICAS members is questionable.[27] More broadly, ICAS members wield immense power not only to appoint arbitrators in CAS's list of arbitrators, but also to revise the CAS Statutes. Furthermore, the ICAS appointment of CAS arbitrators in the closed list of arbitrators is done in *consideration* of the names proposed by the IOC, IFs, and NOCs.[28] In the election of the President and Vice Presidents of the ICAS, ICAS members are also expected to consult the IOC, ASOIF, AIOWF, and ANOC, which comprise the majority of international sports administration.[29] The position of the President of the CAS is then automatically given to the elected President of the ICAS,[30] thereby perpetuating the fear and perception that ICAS members, or CAS arbitrators, would see the IOC, IFs, and NOCs as their constituency and feel the need, whether consciously or subconsciously, to please that constituency.[31]

The independence and impartiality of CAS's arbitrators have also attracted critical, scholarly concern, although the CAS reformed its mechanisms for the appointment of arbitrators into the CAS's arbitrators list in 2011[32] – whereas the previous prerequisite for arbitrators to be *proposed* by

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[25] Court of Arbitration for Sport, *supra* note 2.

[26] Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 Asper Rev. Int'l Bus. & Trade L. 289, 321 (2006).

[27] The last four members are appointed by the four members that have been appointed by the 12 members before. *See* Court of Arbitration for Sport, *supra* note 2, at S4.

[28] *See id.* at S14.

[29] *See id*. at S9.

[30] *See id.*

[31] *See* Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 Loy. U. Chi. L.J. 1203, 1229 (2004).

[32] Prior to 2011 CAS reforms, the ICAS was obligated to appoint arbitrators as proposed by IOC, IFs, and NOCs, in the proportions set out in the Code. *See*

the IOC, IFs, and NOCs no longer applies.[33] In addition, while there are more than 400 arbitrators on CAS's list of arbitrators, only a small group of arbitrators are used with any frequency.[34] Furthermore, for cases in the CAS Appeals Arbitration Division, the President of the said Division, not parties or parties' appointed arbitrators, usually appoints the panel president,[35] although parties are free to reject appointments. This, nevertheless, brings into question the independence of the ICAS and its influence from the IOC, IFs, or NOCs, especially when they are parties to the matter before the CAS.

These arguments were also brought to the Swiss Federal Tribunal and the European Court of Human Rights in several cases. In 2016, the CAS heard the case *RFC Seraing v. FIFA*, involving the breach of third party ownership regulations in soccer, as governed by FIFA.[36] The CAS published an award which held against Seraing, a football club in Belgium.[37] In 2017, Seraing challenged this CAS award at the Swiss Federal Tribunal on grounds that the CAS was not sufficiently operationally independent from FIFA.[38] Here, the CAS revealed that FIFA contributed less than 10% of CAS's overall annual budget as compared to the 65% contribution by the entire Olympic Movement. The Swiss Federal Tribunal compared the financial dependency of the CAS on leading sports bodies with that of the ordinary courts being underwritten by the state. Therein, the Swiss Federal Tribunal further concluded that the financial dependence does not directly result in the subjective impartiality of judges. In *Seraing*, the Swiss Federal Tribunal did not find sufficient grounds to revisit its decisions in *Gundel* and *Lazutina* and dismissed the challenge to the CAS award. The Swiss Federal Tribunal decision of *RFC Seraing v. FIFA* had relied heavily on a German *Bundesgerichtshof* (German Federal Court of Justice) decision in 2016 involving a German speed skater, *Claudia Pechstein v. Deutsche Eisschnelllauf-Gemeinschaft (German Speed Skating Union) and International Skating Union,*[39] which reaf-

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Rachelle Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT'L L. 1, 8 (2011).

[33] *See id.*

[34] *See* Straubel, *supra* note 31, at 1234.

[35] *See* Court of Arbitration for Sport, *supra* note 2, at R54.

[36] *See* FIFA, *Commentary on the Regulations on the Status and Transfer of Players Edition 2021*, https://digitalhub.fifa.com/m/346c4da8d810fbea/original/Commentary-on-the-FIFA-Regulations-on-the-Status-and-Transfer-of-Players-Edition-2021.pdf [https://perma.cc/HE39-2S32] (last visited June 29, 2022).

[37] *See RFC Seraing v. Fédération Internationale de Football Association* [2017] SFT 4A 260/2017 (Swiss Federal Tribunal).

[38] *See id.*

[39] *See* Bundesgerichtshof [German Federal Court of Justice], KZR 6/15, 7 June 2016 reported in (2016) BGHZ 66.

firmed that the CAS is an arbitration court pursuant to the German Code of Civil Procedure.

Claudia Pechstein was an Olympian and national speed skater for Germany who was banned for doping in 2009. She challenged the ban imposed by the national and international sports federations before the CAS[40] in 2009 and before the German *Bundesgerichtshof* and the European Court of Human Rights (the "ECtHR") in 2018 (the latter was determined with one other applicant, Romanian football player Adrian Mutu).[41] In *Mutu and Pechstein v. Switzerland*, the ECtHR determined that the CAS was a tribunal for the purposes of Article 6(1) of the European Convention of Human Rights (the "ECHR").[42] Although the ECtHR eventually dismissed Pechstein's challenge against the independence and impartiality of the CAS's list arbitrators on grounds that Pechstein did not provide sufficient evidence on the individual allegations,[43] it acknowledged that it was ready to recognize the susceptibility of athletes in the framework of the CAS disputes, within the institutional and procedural mechanism of the nomination of CAS arbitrators.[44] The ECtHR recognized the influence of IFs and the IOC (through the ICAS), which has authority over the nomination of CAS arbitrators and the appointment of persons who get to preside over the three Divisions in the CAS. The ECtHR also mentioned the advantages of a specialized body outside of the national court system to adjudicate swiftly and inexpensively.[45] There was, nevertheless, a joint dissenting judgment of Pechstein's challenge at the ECtHR, wherein two judges highlighted the "disproportionate and unjustified"[46] nature of the IOC's influence over the CAS.

B. Evaluating the Financial Independence of the CAS

The main point of contention for the challenges against the financial independence of the CAS is the source of funding of the CAS. In substance, the source of funding of the CAS is from sports federations such as the IOC, IFs, and NOCs, pursuant to Clause 3 of the Paris Agreement.[47] The Paris Agreement states that all parties agree to finance the activities of the CAS to

[40] *See* CAS 2009/A/1912, Claudia Pechstein v. Int'l Skating Union, Award of 25 November 2009; CAS 2009/A/1913, Deutsche Eisschnelllauf-Gemeinschaft v. Int'l Skating Union, Award of 25 November 2009.

[41] *See Mutu & Pechstein v. Switzerland*.

[42] *See* ECHR, 213 UNTS 221, *supra* note 18.

[43] *See Mutu & Pechstein v. Switzerland*, at 157.

[44] *See id.* at 158.

[45] *Id.* at 78, 97.

[46] *Id.* at 55.

[47] *See* Paris Agreement, *supra* note 21.

the extent determined by the ICAS. Parties include the IOC, ASOIF, AIOWF, and ANOC. IFs and NOCs form members to the ASOIF, AIOWF, and ANOC. The funds for the CAS are then attributed under the administration of the ICAS and involve the costs of arbitrators, arbitration fees of the CAS, and other fees incurred by the CAS for disciplinary matters pursuant to Rule 65 of the CAS Code.[48] Given that the CAS hears matters pertaining to the IOC, Ifs, and NOCs, there arise certain concerns that the CAS cannot adjudicate such matters independently without bias.

However, it is noteworthy that while CAS financing is, in substance, by the IFs and NOCs, under the Paris Agreement, the financing of the CAS is *through* the ASOIF, AIOWF, and ANOC. This is significant because this financial arrangement acts as a safeguard to ensure individual IFs and NOCs otherwise unhappy with a CAS award cannot stop contributing to the financing of the CAS, unless that IF or NOC was to leave the ASOIF, AIOWF or ANOC, which would lead to certain consequences for the individual IFs and NOCs, in relation to the Olympic Games. For example, if an individual IF decides to leave the ASOIF, it would lose not only its "good standing with the IOC,"[49] but also its right to receive any share of the revenue from the Summer Olympic Games, even if their sport is included in the program.[50] Similarly, if an NOC decides to leave the ANOC, it would risk losing its status recognition with the IOC and the entitlements attached to it,[51] such as the right to send competitors and officials to the Olympic Games.[52] Coupled with the institutional buffer of the ICAS, the Paris Agreement provides additional safeguards to ensure that the funding of the CAS remains sufficiently quarantined from the administration of the CAS and the findings of its arbitrators. The financial safeguards of the CAS are rather akin to how ordinary courts are funded by public tax revenues, which are collected and distributed to the judiciary.

Nevertheless, apart from disciplinary matters heard before the Appeals Division on decisions rendered by IFs or other sports bodies, parties to the CAS are expected to bear substantial costs of arbitration, which includes,

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[48] *See* Court of Arbitration for Sport, *supra* note 2.

[49] *See* Ass'n of Summer Olympic Int'l Federations, *ASOIF Statutes* (2018), https://www.asoif.com/sites/default/files/download/asoif_statutes_2018.pdf [https://perma.cc/XM8V-P5GZ] (last visited May 30, 2022).

[50] *See id.*

[51] *See* Ass'n of Nat'l Olympic Comms., *Constitution of the Association of National Olympic Committees* (2018), https://www.anocolympic.org/downloads/2018-11-28-anoc-document-anoc-constitution-en.pdf [https://perma.cc/MD72-K8GV] (last visited May 30, 2022).

[52] *See* Int'l Olympic Comm., *Olympic Charter* (2019).

inter alia, the CAS's administrative costs, costs of arbitrators, and ad hoc clerk, if any.[53] So while there might be certain indirect funding of the CAS through the Paris Agreement, in such non-disciplinary matters before the CAS, there is less reason to question the financial independence of the respective arbitration panels, given that the said panels are primarily funded by both parties to the arbitration. Parties' financing of such non-disciplinary matters before the CAS is akin to general international commercial arbitration.

The issue of financial independence also arises for non-commercial disciplinary matters heard at the Appeals Division. As mentioned above, unlike other matters heard before the CAS, arbitration costs incurred for disciplinary matters heard at the Appeals Division are borne by the CAS directly (save for the appeal filing fee of CHF 1,000).[54] As illustrated by the trend of attracting high-value litigation in international commercial arbitration,[55] arbitration is costly, and this provision in article R65 of the CAS Code was included to avoid denying parties' access to the CAS for the appeal of disciplinary decisions by sports tribunals. The nature of a fully funded disciplinary hearing in the CAS is akin to fully funded criminal proceedings and appeals in ordinary courts, wherein accused persons should not be expected to fund their court fees in their prosecution and the process of the administration of justice. Accordingly, it could be argued that, pursuant to Clause 3 of the Paris Agreement, the IFs and NOCs surrender significant portions of the revenue allocated to them as part of the IOC's revenue from the television rights for the Olympic Games, as part of the CAS financing to the ICAS, to ensure that aspects of the CAS, such as disciplinary hearings, can be accessed by aggrieved athletes.

While removing the dispensation of arbitration costs for disciplinary hearings in the CAS is a possible solution, the idea of the funding for appeals on disciplinary matters is to ensure such non-commercial matters are accessible to all parties involved. In non-commercial matters, the CAS takes on a distributive and supervisory role in assessing the merits of each decision and case. As such, it is crucial, if not absolutely necessary, for the CAS to be

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[53] *See* Court of Arbitration for Sport, *supra* note 2.

[54] *Id.* at R65.

[55] *See* Steven Seidenberg, *International Arbitration Loses its Grip*, 96 ABAJ 50 (2010); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137 (1994); Simon G. Zinger, *Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration Against Russian Parties*, 8 USF MAR. L.J. 141 (1995).

equally accessible to applicants for non-commercial matters, quite akin to the processes for criminal and disciplinary cases before domestic courts. There is, without a doubt, a role for fully funded hearings before the CAS, and it is impractical, if not irrelevant, to endeavor for the complete financial independence of the CAS for such non-commercial disputes. Sports arbitration in the CAS was established with the intention of uniformity and accessibility of justice, and this cannot be wholly achieved if parties, especially private persons, are expected to bear the exorbitant costs for their non-commercial matters heard before the CAS. This was raised by the Swiss Federal Tribunal in the case of *Seraing*, where it was argued that neither athletes nor states are the right persons or entities to finance a private sport arbitral tribunal.[56]

In fact, a more practical consideration is whether the CAS provides sufficient financial access for non-commercial cases, given that only costs for disciplinary matters are dispensed with, while other non-commercial cases such as transfer disputes, eligibility cases, and governance cases can only be heard if parties, especially the applicant, are willing to pay the associated costs in the CAS. As such, applicants for non-commercial, non-disciplinary matters before the CAS are subjected to high advance costs for proceedings, pursuant to article R64.2 of the CAS Code.[57] Another consideration is the adequacy of the scope of legal aid that is given to parties under the CAS Legal Aid Commission, which affects the accessibility of the CAS as a dispute resolution and adjudication forum in international sports.[58] Briefly, the CAS Legal Aid Scheme only provides for legal aid for decisions made by IFs, and it is only available to "natural persons".[59] This means that appeals on other decisions, such as those by NFs, are not entitled to CAS legal aid. Smaller and less affluent sports bodies, clubs and other legal entities, are also not entitled to get legal aid from CAS because they do not qualify as natural persons.

[56] *See RFC Seraing v. FIFA* (SFT).

[57] *See* Court of Arbitration for Sport, *supra* note 2.

[58] For discussions on the accessibility of legal aid before the CAS, *see* Antonio Rigozzi & Fabrice Robert-Tissot, *"Consent" in Sports Arbitration: Its Multiple Aspects*, *in* Sports Arbitration: A Coach for Other Players-ASA Special Series No. 41 (2015).

[59] *See* Court of Arbitration for Sport, *Guidelines on Legal Aid Before the Court of Arbitration for Sport* (2020).

C. Evaluating the Institutional Independence of the CAS

The challenges to the institutional independence of the CAS are centered on the IOC, IFs, and NOCs' influence over the appointment of ICAS members, and therefore the IOC, IFs, and NOCs' influence over the statutes of the ICAS and the appointment of arbitrators onto the CAS's arbitrators list. In *Mutu and Pechstein v. Switzerland*, the ECtHR examined the structure of the ICAS and held that the IOC, IFs and NOCs do exercise real influence over the ICAS, such as the appointment of 12 out of 20 ICAS members.

There are also real concerns pertaining to the independence and impartiality of the small group of arbitrators who are regularly appointed by the CAS.[60] As mentioned above, the practice in the CAS, and among disputing parties, is frequently to select and use a small group of experienced, active arbitrators in the CAS cases, albeit the long list of arbitrators available. While pragmatically, it is less risky for parties to nominate known and experienced CAS arbitrators, such practices do cast an appearance of doubt on the impartiality of the arbitrators, which is akin to appointing a former lawyer to judge a case in court.[61] For example, Prof. Dr. Ulrich Haas, one of the experts engaged by World Anti-Doping Agency in 2006 to revise the WADA Code, had his independence and impartiality as an arbitrator questioned before the Swiss Federal Tribunal in a matter pertaining to an anti-doping violation.[62]

The 2011 CAS reforms sought to significantly reduce the IOC, IFs, and NOCs' direct influence over the appointment of CAS arbitrators, wherein the ICAS is no longer obliged, let alone expected, to consider the proposed arbitrators of the IOC, IFs, and NOCs.[63]

It is admitted that there are still issues within the process of the appointment of CAS arbitrators by the ICAS which could potentially bring the institutional independence of the CAS into question. One issue is the consolidation of power into the President of the ICAS, who is thereafter also appointed as President of the CAS and who is empowered not only to administer the CAS but also to appoint presidents of arbitral panels (or sole arbitrators) for matters before the CAS. This may prove problematic as the panel president or sole arbitrator appointed is empowered to make decisions

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[60] Antonio Rigozzi et al., *Sports Arbitration*, 2013 EURO., MIDDLE EASTERN & AFRICAN ARB. REV. 15, 16 (2013).

[61] *See* Straubel, *supra* note 31, at 1234.

[62] *See Alejandro Valverde Belmonte v, Comitato Olimpico Nazionale Italiano, World Anti-Doping Agency, and International Cycling Union* [2010] 4A_234 / 2010 (Swiss Federal Tribunal).

[63] *See* Court of Arbitration for Sport, *supra* note 2.

about the matter before them, albeit they are expected to do so objectively. However, it is prudent to note that the ICAS appoints arbitrators in consideration of not only the names brought before it by IFs and NOCs, but also athletes' commissions of IFs and NOCs,[64] thereby providing broad-based consensus on the appointments rather than the commonly alleged predisposition towards sporting federations.

Moreover, the practices of the CAS on the appointment of a buffer layer of governance (i.e., the ICAS), procedures for the appointment of arbitrators into the arbitrators list, and rules on the appointment of arbitrators in active cases, are not different from the practices of other arbitration institutions. In most commercial arbitration institutions, such as the Singapore International Arbitration Centre ("SIAC"), International Chamber of Commerce ("ICC"), and London Court of International Arbitration ("LCIA"), there are also similar "buffer layers" on the appointment of arbitrators in cases. In ICC and LCIA, the respective arbitration institutions' "Court" has sole discretion to admit and appoint the arbitrators to sit on the arbitration tribunal, even if nominated by parties.[65] In SIAC, while there is a Panel of Arbitrators which consists of arbitrators appointed by SIAC-appointed Executive Committee, which parties can select from, the President of SIAC has final say in the appointment of the arbitrator(s).[66] Although parties to arbitration proceedings at these commercial arbitration institutions are able to nominate their arbitrators, parties' nominees are still subjected to the influences of bureaucratic processes within the respective arbitration institutions.

Furthermore, it is not uncommon within commercial arbitration to frequently use and engage a small pool of experienced arbitrators who often bring their specialized expertise and knowledge to the adjudication process.[67] Such repeat arbitrators are arbitrators who are repeatedly appointed by the same party, same *type* of party, and on the same issues.[68] This was aptly pointed out in the English case of *Halliburton v. Chubb*,[69] wherein a particular arbitrator was appointed for and by the Defendant before multiple tribunals and the Court of Appeal therein determined that there was no real possibility of bias. The Court of Appeal commented that the pool of suitably

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[64] *See id*. at S14.

[65] *See* LCIA Arbitration Rules (2014), Art 5; ICC Arbitration Rules (2017), Art 13.

[66] SIAC Arbitration Rules (6th ed., Aug. 1, 2016), Rule 9.

[67] *See* Drew J. Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 Arb. L. Rev. 325–40 (2013).

[68] Houchih Kuo, *The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond?*, 4 Contemp. Asia Arb. J. 247 (2011).

[69] [2018] EWCA Civ 817.

qualified and experienced arbitrators in certain fields may be small, and parties should not be deprived of the opportunity to nominate someone suitable to adjudicate their dispute on grounds of "overlapping" events or circumstances, which was the issue in that case. The issue of repeat arbitrators is, in fact, an inevitable outcome of the pursuit of flexibility in the private adjudication of arbitration, wherein parties are empowered to nominate their adjudicators, thereby creating a free market of expert adjudicators in the field.

Such criticisms of arbitration proceedings are not unique to sport arbitration, and it is not uncommon to find such subtle influences present in all types of arbitration and private adjudication, especially in specialized fields consisting of small pools of close-knit communities of specialized expertise.[70] In commercial arbitration, many institutions and arbitrators have adopted the practice of the International Bar Association ("IBA") Guidelines of Conflicts of Interest in International Arbitration (the "IBA Guidelines") in the assessment of the independence of the arbitrators and corresponding disclosure requirements.[71] The IBA Guidelines provide a definition of conflict of interest in international arbitration and the delineation of factual situations which would enable arbitrators to determine whether they are in conflict and whether they are obliged to disclose their interests, if any.[72]

It may be beneficial for the CAS to expressly adopt the practice of using the IBA Guidelines in assessing the independence of the arbitrators involved within the Arbitrator's Acceptance and Statement of Independence prior to the appointment before the CAS, just as in the practice of commercial arbitration, in order to alleviate challenges to the institutional independence of the CAS. The IBA Guidelines can provide not only definitive situations of conflict of interest and disclosure requirements, but also an internationally recognized standard to rely on with regard to the conflict-of-interest situations faced by arbitrators. There may not be a need for the CAS to codify the IBA Guidelines, just as how arbitration institutions do not codify the IBA Guidelines in their arbitration rules.[73] The IBA Guidelines are an accepted supranational source of law for international arbitration,[74]

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[70] *See Gundel v. FEI and CAS*, and *Lazutina v. IOC* (SFT).

[71] *See* Int'l Bar Ass'n, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014), https://www.ibanet.org/Document/Default.aspx?DocumentUid=E2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/8SB4-7CKQ] (last visited May 30, 2022).

[72] *See id.*

[73] Downie, *supra* note 32, at 25.

[74] Simon Greenberg et al., International Commercial Arbitration: An Asia-Pacific Perspective (2010), https://www.cambridge.org/core/books/interna-

and they are adopted directly by the CAS in practice, especially during the nomination and appointment processes of CAS arbitrators for active cases. For instance, the appointed arbitrator(s) can include in their official undertaking, pursuant to S18 of CAS Code, that he or she has conformed with the conflict-of-interest requirements in the IBA Guidelines.

Another way to alleviate conflict-of-interest issues could be for the ICAS to appoint renowned arbitrators to sit as a fixed panel on the Appeals Division. While this solution may be a double-edged sword, wherein aggrieved parties can seek to question the independence of the ICAS and the fixed appointment of the panel for the Appeals Division, this arrangement is more akin to the political practice of the executive branch's appointment of judges with tenure in ordinary courts. Furthermore, this solution of fixing a few renowned arbitrators can promote uniformity in decisions at the appellate level of the CAS,[75] supporting *jurisprudence constante*. Further, one could reconsider the criteria for CAS arbitrators to alleviate prevailing issues pertaining to the conflicts of interest or institutional independence of the CAS, such as disallowing CAS arbitrators to sit on any disciplinary tribunals of IFs or other sport associations. This could mitigate any potential actual or apparent bias. Another solution could be restricting the selection of arbitrators from CAS's panel of arbitrators to a narrower pool each time, based on a "taxi-rank" system of arbitrators.[76]

In any event, while it may be a stretch, it is worth considering the public-relations angle to wrangle free from allegations of apparent bias. In ordinary courts, there are contempt-of-court safeguards to ensure that malicious and opportunistic challenges to judges' independence and impartiality are contained. Affording arbitrators the equivalent standards of reverence and respect during the adjudication of cases as judges by instituting certain contempt of court offenses for arbitrators, especially with sufficient safeguards in place, such the IBA Guidelines-compliance, can go a long way toward alleviating public challenges to the independence and impartiality of the arbitrators involved and mitigate perceptions of apparent bias.

There is a specific concern on the lack of transparency arising from the opaque processes by which arbitrators are appointed, as well as the absence of public annual reports and accounts of the CAS or the ICAS. The ICAS is a Swiss foundation formed under article 80 of the Swiss Civil Code (the

tional-commercialarbitration/A512F7B067C3CDA639A80E956CD1E9C9 [https://perma.cc/K3PG-RKC3].

[75] Sarkar Ali Akkas, *Appointment of Judges: A Key Issue of Judicial Independence*, 16 Bond L. Rev. (2004).

[76] Int'l Cotton Ass'n, *ICA Bylaws & Rules* (2013).

"ZGB"),[77] pursuant to the Paris Agreement, which creates an "arbitration institution", i.e., the CAS, to facilitate the settlement of disputes in the field of sport.[78] In general, save for accounting and audit requirements, associations and foundations formed under Swiss law are provided relatively wide room to pursue their purposes; as such, there is no legal requirement for the ICAS or the CAS to publish their annual reports, audited accounts, or meeting minutes.[79] Nevertheless, for the purposes of reinforcing the credibility of the CAS or the ICAS as world's supreme court for sport, it might be prudent to further adopt certain transparency or accountability in the processes by which arbitrators are appointed and selected.

III. Criticism Two: Deficient Consent For Arbitration

The second-most common criticism of the CAS is that parties do not give adequate consent to submit to CAS's jurisdiction due to the mandatory nature of CAS arbitration referral clauses incorporated within matters pertaining to the Olympic Games and in the regulations of sport governing bodies. This argument of deficient consent is predicated on the contractual and consent-based nature of arbitration. Unlike basic accessibility to the domestic courts of a jurisdiction, parties are obliged to agree to CAS arbitration proceedings and, by extension, consent to the exclusion of the jurisdiction of their domestic courts in favor of CAS arbitration proceedings.[80] The consent to arbitration is especially crucial since arbitral awards are widely and almost universally recognized and enforced by domestic courts by virtue of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[81] (the "New York Convention"), providing the arbitration awards the weight of a binding court decision around the world. That is, arguably, one of the main reasons that the validity of arbitration clauses is frequently challenged.[82]

Apart from analyzing the interaction between CAS arbitration and Article 6(1) of the ECHR, this part will also evaluate three main aspects of

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[77] SR 210 Swiss Civil Code of 10 December 1907.

[78] *See* Paris Agreement, *supra* note 21.

[79] *See* articles 83a to 83c of the Swiss Civil Code, *supra* note 77.

[80] *See* Greenberg et al., *supra* note 74, at 2, 51.

[81] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3.

[82] *See* Protocol on Arbitration Clauses, opened for signature 28 July 1924, 27 LNTS 157 (entered into force 28 July 1924); *UNCITRAL Model Law on International Commercial Arbitration 1985*, GA Res 2205(XXI), UN Doc A/40/17 (21 June 1985) Annex I.

CAS arbitration that are often overlooked. First, conditions of participation and mandatory arbitration are commonplace practices in and outside of the sporting industry and ought not to be rendered invalid under the guises of "deficient consent", especially given the mandate afforded to democratically elected sporting organizations. Second, the issue of consent for cross-border disputes is often moot when foreign elements within adjudication exist, thereby incorporating the application of foreign laws and conflict of laws principles into the said dispute. Third, the jurisdiction of domestic courts is not entirely excluded, given that arbitrating parties still rely on domestic laws and the power of ordinary courts for the recognition and enforcement of foreign arbitral awards.

A. CAS Arbitration and Article 6(1) of European Convention of Human Rights

Sports arbitration in the CAS is currently mandated by the IOC for decisions of the IOC and all disputes "arising on the occasion of, or in connection with, the Olympic Games,"[83] as well as all matters pertaining to the World Anti-Doping Code involving international-level athletes.[84] As such, all NOCs and Ifs, and many national sports governing bodies, especially those with a presence at the Olympic Games, are also obliged to subscribe to mandatory arbitration at the CAS in their governing documents, thereby binding their members to an arbitration agreement by reference at the CAS.

The matter of *noles volens* arbitration was first raised before the Swiss Federal Tribunal in the 2007 case of *Guillermo Cañas v. ATP Tour*,[85] wherein it was acknowledged that Cañas was forced to choose between participating in a competition and not submitting to arbitral jurisdiction. At the ECtHR in 2018, Pechstein vehemently argued that the German Speed Skating Union and ISU monopolize the speed skating industry, and without Pechstein conforming to the compulsory requirement to submit disputes to the CAS, she would not be able to earn a living and practice her discipline at a professional level.[86] The ECtHR eventually found that Pechstein's situation amounted to a "compulsory arbitration" wherein Pechstein was not free and unequivocal in her decision to submit to the jurisdiction of the CAS, pursuant to Article 6(1) of the ECHR. While the ECtHR accepted the validity of

[83] Int'l Olympic Comm., *supra* note 52.

[84] *See* article 13.2.1 of World Anti-Doping Agency, *World Anti-Doping Code* (2015).

[85] *See* Guillermo Cañas v. ATP Tour [2006] SFT, 4P.172/2006, 22 March 2007 (Swiss Federal Tribunal).

[86] *See Pechstein v. Switzerland*, at 109-15.

such "compulsory arbitration" clauses due to the harmonization and uniformity of decisions taken in the field of sport, the Court held that safeguards under Article 6(1) of the ECHR must afforded to the party who did not give free consent to arbitration.[87]

Notwithstanding the position of the European Court of Human Rights, there is still much moral debate on the "forced" and "compulsory" nature of arbitration and the corresponding jurisdiction of the CAS to adjudicate disputes of parties who did not consent to CAS arbitration on a free and voluntary basis. Scholars like Lloyd Freeburn have characterized dispute resolution in the CAS as a "consent-based form for a non-consensual regulatory function," commiserating with the ECtHR's decision that athletes bound to dispute resolution in the CAS, based on arbitration agreements attached to regulations of sporting organizations and conditions of competition, were in fact forced.[88]

B. Evaluation of the Practice of Mandatory Arbitration

Notwithstanding the Swiss Federal Tribunal and ECtHR's determinations that athletes are often faced with the dilemma of signing up to the jurisdiction of the CAS as a condition of participation or losing the opportunity to earn a living (which findings are primarily limited to Switzerland and countries in the European Union respectively), the imposition of conditions to participation in sports is not uncommon. Apart from a mandatory CAS clause, most IFs and NOCs also include, as a condition of participation in the sport and/or competition, compliance with sports anti-doping rules under the World Anti-Doping Agency and World Anti-Doping Code.[89] Most IFs and national sports governing bodies also include conduct rules as a condition for participation in the sport as well, such as in-field and off-field conduct, on athletes and sport administrators.[90] Conditions of participation in sports imposed by sporting bodies have the effect of not only leveling playing fields and ensuring that sporting competition occurs under the

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[87] *See id.* at 96-115.

[88] *See* Lloyd Freeburn, Power, Legal Authority and Legitimacy in the Regulation of International Sport 192 (2018).

[89] *See* World Anti-Doping Agency, *World Anti-Doping Code* (2015), Art 23.5. *See also* World Anti-Doping Agency, *Code Compliance*, World Anti-Doping Agency (2015). *See also* Björn Hessert, *Cooperation and Reporting Obligations in Sports Investigations*, 20 Int'l Sports L.J. 145 (2020).

[90] Fédération Internationale de Natation, *FINA Doping Control Rules (DC Rules)* (2014), https://www.fina.org/sites/default/files/fina_dc_rules.pdf [https://perma.cc/CQ62-VCC8] (last visited May 30, 2022); World Athletics, *World Athletics Anti-Doping Rules* (2019).

same conditions but also ensuring that enforcement of the rules is of the same standards as well. By mandating that sporting disputes be sent to the CAS for adjudication, whether at first instance or appeal, a standard enforcement of sporting rules commences; the alternative is giving each domestic court, in every country, the opportunity to make contrasting decisions on sporting rules.

In fact, conditions are often imposed in certain established industries outside of sports, especially in licensing and employment of qualified persons. For example, to be admitted into the legal profession in most jurisdictions, applicants must submit to high ethical requirements and stipulated conduct in relation to the handling of trust bank accounts and the corresponding internal disciplinary proceedings.[91] In certain industries, such as the building and construction industry in the common law jurisdictions, standard form contracts are typically used by parties, which mandate standard domestic arbitration processes for dispute resolution.[92]

Compulsory arbitration practice is common in other jurisdictions and industries. For example, court-annexed arbitration is mandated by statute and rules of court in certain jurisdictions in America for parties that have commenced litigation in domestic courts.[93] Another example is the use of arbitration clauses in the constitutions of companies which bind members to mandatory arbitration for disputes pertaining to the operation of the constitution and shareholders' disputes.[94] While the deficiency of parties' consent in such arbitration practice is still commonly criticized, the mandatory arbi-

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[91] *See* Bruce A. Green, *Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000); Scott McLean, *Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers Paradigm*, 28 U. QUEENSLAND L.J. 225 (2009).

[92] *See* IAN H. BAILEY ET AL., CONSTRUCTION LAW IN AUSTRALIA (2011); Surajeet Chakravarty & W. Bentley MacLeod, *On the Efficiency of Standard Form Contracts: The Case of Construction* (USC CLEO Research Paper, 2004).

[93] Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); DEBORAH R. HENSLER, RAND CORP., COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURT SYSTEM (1984), https://www.rand.org/pubs/papers/P6963.html [https://perma.cc/LAG3-ATNS]; A. Leo Levin, *Court-Annexed Arbitration*, 16 U. MICH. J. L. REF. 537 (1982); EDGAR ALLAN LIND & JOHN SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983).

[94] *See* JOSEPH LEE, INTRA-CORPORATE DISPUTE ARBITRATION AND MINORITY SHAREHOLDER PROTECTION: A CORPORATE GOVERNANCE PERSPECTIVE (2015); Perry Herzfeld, *Prudent Anticipation? The Arbitration of Public Company Shareholder Disputes*, 24 ARB. INT. 297–330 (2008); Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT'L ARB. 371 (2007).

tration clauses in the law, regulations, and governing documents are still often regarded as valid and enforceable, and CAS arbitration clauses in sport regulatory documents should not be held to a different standard.

While it is arguable that the mandatory submission to the CAS treads upon one's right to a fair hearing, pursuant to article 6(1) of the ECHR, such a mandatory arbitration clause is typically inserted into the regulations and governing documents of IFs by their legislative actors, who are primarily persons elected by IF member federations. As such, in the examination of the source of law and legitimacy of such a mandatory arbitration clause, one must appreciate the legitimacy and democratic mandate in the inclusion of the CAS clause within the notably private nature of international sports. Nevertheless, one must also acknowledge present contentions and scholarship pertaining to the democratic deficits present within the organization of national and international sports.[95]

C. *Deficient Consent to Cross-Border Sport Litigation and Conflict of Laws*

In any event, high-performing athletes who dispute the exclusive jurisdiction of the CAS based on deficient consent are still bound to meet the same legal issues in ordinary courts where there are cross-border elements and foreign laws involved. This is especially the case for high-performing athletes who face disputes or disciplinary matters pertaining to an IF outside of their home country.

In such cross-border sport disputes and matters pertaining to the nationalities and laws of different countries, the issue of domicile is not entirely clear. For example, in the International Association of Athletics Federation (the "IAAF") Ethics Board's (now, World Athletics' Athletics Integrity Unit) determination that a Kenyan official extorted monies from Kenyan athletes in 2018, which involved both the application of the law of Monaco[96] and Kenyan citizens,[97] should the Monaco court have jurisdiction over the adjudication of this dispute or the Kenyan court? And in the determination of the applicable domicile and substantive law of the matter,

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[95] *See* Freeburn, *supra* note 88.

[96] World Athletics Constitution (2019), https://www.worldathletics.org/download/download?filename=E19e5c43-fc9e-4ff4-a71d-eeeec51a9037.pdf&urlslug=A1%20-%20The%20Constitution [https://perma.cc/SKH6-RY9E] (last visited May 30, 2022).

[97] *IAAF Ethics Board Decision Number: 10/2018 In the matter of David Siya Okeyo and Joseph I Kinyua and the IAAF Code of Ethics, (2018); IAAF Ethics Board Decision Number 11/2018 In the matter of David Siya Okeyo and Mr Isaac Mwangi Kamande and the IAAF Code of Ethics, (2018).*

should Kenyan common law principles apply or should Monégasque civil law? Furthermore, if there are foreign elements in the case, irregular rules on conflict of laws apply based on the domestic court in question. While there are trite international conventions on the issue of conflict of laws,[98] not all countries are signatories to the said conventions, and the rules applying conflict of laws would be rough, befuddling, and tedious.

In such situations, parties would not have consented to the application of cross-border elements and foreign laws but would have no say in its application in the adjudication of their matter. One may then argue that parties have no say in the application of cross-border elements and foreign laws because of their citizenship or domicile which pre-determined the application of the applicable laws and conflict of laws principles. A counterargument in support of the mandatory CAS clause is that it is a pre-determined application of arbitration rules in the CAS attached to the parties' membership with the respective sporting bodies with the mandatory CAS clause.

Notably, in CAS arbitration, parties are afforded more freedom to choose the applicable substantive laws. In the Appeals Division, R58 of the CAS Code determines the substantive law in the stipulated order, primarily taking into consideration the law chosen by parties or the law of the country in which the federation is domiciled.[99] In the latter circumstance, the substantive law applied by the CAS would be no different from the law that would be applied by a domestic court adjudicating the appeal. Furthermore, parties at the CAS are given more freedom to choose the applicable substantive law, especially in the Ordinary Division where parties are free to decide the substantive law to be applied to the merits of the dispute, authorize the Panel to decide, or have lacunas filled according to Swiss law.[100]

D. The Available Jurisdiction of Domestic Courts for CAS Arbitration

The jurisdiction of domestic courts is not excluded completely in the adjudication of cases in the various divisions in the CAS. The CAS, like many other arbitration institutions, must still adhere to minimum standards of procedural and substantive fairness, or the awards may be set aside by the domestic court in which the arbitration is located. For all CAS cases, the seat

[98] *See* The Hague Conference on Private International Law, at Hague Conference on Private International Law, *HCCH*: *Conventions, Protocols and Principles*, https://www.hcch.net/en/instruments/conventions [https://perma.cc/5M3J-NRPU] (last visited May 30, 2022).

[99] Court of Arbitration for Sport, *supra* note 2, at R58.

[100] *See id.* at R45.

of arbitration is Lausanne, Switzerland,[101] and the Swiss Federal Tribunal has jurisdiction to set aside CAS awards which are decided contrary to the requirements under Chapter 12 of the Swiss PIL.[102] For example, CAS awards can be set aside if the arbitral tribunal was not property constituted, the decision of the arbitral tribunal is *ultra vires*, or the award is incompatible with public policy.[103] While the grounds for arbitration awards to be set aside are limited and almost never given, setting aside an award is not unprecedented. The *Oberlandesgericht München* (Higher Regional Court of Munich) did make a finding,[104] albeit later overturned by the Bundesgerichtshof,[105] that the CAS award of Pechstein was unenforceable on the basis that the monopolistic nature of the International Skating Union was contrary to the German Act against the Restraints of Competition. Additionally, in December 2020, the Swiss Federal Tribunal reviewed the arbitral award of the CAS in *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation* upon the admission of evidence that the President of the panel made an inappropriate comment on social media concerning the Chinese race pursuant to article 190(a) of the Swiss PIL.[106] While there are limited instances of setting aside an arbitral award, the jurisdiction of domestic courts for arbitration is not completely excluded.[107]

Apart from the application to set aside arbitral awards at the domestic courts where the arbitration occurred, parties are empowered to make applications for the non-recognition of international arbitral awards at the domestic courts where the international arbitral awards are enforced. Given that many CAS arbitrations are based on cross-border disputes or parties from various jurisdictions, i.e., international arbitration,[108] there is also an opportunity for aggrieved parties to apply to a separate domestic court, apart from the Swiss Federal Tribunal, where the arbitral awards could be enforced on grounds that the award should not be recognized under domestic law. Under

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[101] *See id.* at R28.

[102] *See* PILA, *supra* note 24.

[103] *Id.* at Article 190(2)(b), (c) or (e).

[104] *Oberlandesgericht München* [Munich Court of Appeal], Az. U 1110/14 Kart, 15 January 2015.

[105] *See Mutu & Pechstein v. Switzerland*.

[106] CAS 2019/A/6148 *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation* (award of 28 February 2020).

[107] *See* Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. Int'l Dispute Settlement 217–65 (2010).

[108] Most CAS awards are rendered under chapter 12 of the Swiss PILA, *supra* note 24, as there is usually one party that had, at that time when the arbitration agreement was entered into, neither its domicile nor its habitual place of residence in Switzerland. See also article 176(1) of the PILA.

Chapter 5 of the New York Convention, parties may challenge the enforceability of CAS awards where the award is expected to be enforced, giving domestic courts authority and jurisdiction over CAS cases adjudicated in the CAS in Lausanne, Switzerland. Most prominently, the New York Convention provides that the recognition and enforcement of foreign arbitration awards can be refused if a domestic court finds that the subject matter of the award is not capable of settlement by arbitration under the laws of the country or if the recognition or enforcement of the award would be contrary to the public policy of the country.[109]

The ability to set aside or challenge the recognition and enforcement of an arbitration award essentially affords domestic courts certain power and authority over domestic and foreign arbitration proceedings involving their domiciled residents or organizations. At the outset, general grounds to set aside arbitration awards or challenges to the recognition or enforcement of arbitration awards are discretionary, whether it is based on the PILA,[110] the New York Convention,[111] or other uniform laws on arbitration such as the United Nations Commission on International Trade Law Model Law.[112] Furthermore, domestic courts are generally free to make the finding on whether the award is contrary to the public policy of the country or incapable of settlement by arbitration regardless of whether parties raise the argument in court, affording domestic courts oversight over arbitration awards that come before them.[113]

Circumstances in which domestic courts have the discretion and power to set aside an arbitral award or refuse the recognition and enforcement of an award on the basis that the award is contrary to the public policy of the country commonly involve fraud or corruption,[114] patent illegality,[115] a find-

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[109] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[110] *See* PILA, *supra* note 24.

[111] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[112] *See* UNCITRAL Model Law, *supra* note 82.

[113] *See* Article V(2) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81 ("Recognition and enforcement of an arbitral award may also be refused *if the competent authority in the country where recognition and enforcement is sought finds that . . . .*") (emphasis added); *see also* Article 36(1)(b) of UNICTRAL Model Law, *supra* note 82, ("Recognition and enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only *if the court finds that . . . .*") (emphasis added).

[114] *See International Arbitration Act* (Cap. 143A, 2002 Rev Ed Sing), at 24.

[115] *See* Oil & Natural Gas Corp. v. Saw Pipes Ltd. (2003) 5 SCC 705; *Venture Global Engineering v. Satyam Computer Services* (2008) 4 SCC 190 at 19, 21.

ing that the award is "wholly offensive to the ordinary reasonable and fully informed member of the public,"[116] or awards which are "so unfair and unreasonable as to shock the conscience of the court."[117] The use of the ground of public policy to set aside or refuse recognition and enforcement of arbitral awards "can never be exhaustively defined" and is unique to each country.[118] For example, the domestic courts in Indonesia interpret the justification of public policy violations very widely to refuse the recognition and enforcement of awards which "endanger the national interests of Indonesia which includes the local economy" or violate the sovereignty of Indonesia.[119] While it is not universal practice to interpret the ground of public policy as widely as Indonesia does, one can appreciate the potential of the power afforded to domestic courts, even if adjudications are submitted exclusively to an arbitral tribunal , like the CAS. It is nevertheless admitted that in Switzerland, there has been only one award which has been annulled for non-compliance with public policy since 1989, despite numerous attempts.[120] In 2012, the Swiss Federal Tribunal determined in *Matuzelum v. FIFA* that the threat of an unlimited occupation ban arising from the FIFA Disciplinary Code could be a "grave violation of privacy" and thereby contrary to public policy pursuant to Article 190(2)(e) of the Swiss PILA.[121]

Furthermore, domestic authorities have the power to determine the nature of disputes which are "incapable of settlement by arbitration" at the stage where domestic courts are used to challenge the recognition and enforcement of foreign arbitral awards, wherein the applicable law governing arbitrability of the award will not be determined by the substantive law of the arbitration agreement but the law where the award is intended to be enforced.[122] Such matters determined by domestic authorities to be "incapable of settlement by arbitration" will then render the arbitration clause invalid and deny the exclusion of the jurisdiction of domestic courts. Many countries deem certain fixed matters not arbitrable and keep their lists of subject matter arbitrability non-exhaustive to cater to public interest-related

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[116] *See* PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank [2007] 1 SLR 597.

[117] *See* McDermott Int'l Inc. v. Burn Standard Co Ltd. (2006) 11 SCC 181.

[118] *See Deutsche Schachtbau v. National Oil* [1987] 3 WLR 1023, p 1035D.

[119] *Astro Group v. Lippo Group* (2009) CJDC 05/Pdt.Arb.Int/2009, 28 October 2009 (Central Jakarta District Court), upheld in *Astro Group v. Lippo Group* (2010) 01/K/Pdt.Sus/2010, 24 February 2010 (Supreme Court of Indonesia).

[120] *See* Rigozzi, *supra* note 107; *see also* Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, 25 ASA BULL. 444 (2007).

[121] *See* SFT 138 III 322.

[122] Bernard Hanotiau, *The Law Applicable to Arbitrability*, 26 SAcLJ 874 (2014).

issues which may arise.[123] In any event, there are already certain trite aspects pertaining to sport which are already non-arbitrable, such as the non-arbitrability of criminal conduct, which excludes CAS jurisdiction over matters such as match-fixing conduct in sports.

In toto, the compulsive submission of sport disputes to CAS arbitration does not necessarily exclude the jurisdiction of domestic courts. For instance, domestic courts have the responsibility of adjudging challenges to CAS awards, such as attempts to set aside or challenge the recognition and enforcement of awards. It is admitted that this is a theoretic point, wherein in practice, domestic courts have infrequently overturned or failed to recognize a CAS award, or arbitral awards in general,[124] when sporting sanctions are involved rather than financial ones. This point, nevertheless, comes with the practical possibilities of invoking of the court's jurisdiction over the recognition of CAS awards, should it see fit to refuse enforcement or set aside the said arbitral awards.

IV. Criticism Three: The Limited Contractual Legitimacy of the Court of Arbitration for Sport

The third and final criticism evaluated in this paper is the reproach that the CAS has limited contractual legitimacy to adjudicate disputes as the supreme authority in sport, especially since CAS arbitration tends to create jurisprudence above and beyond the contractual mandate of parties. Scholars such as Lloyd Freeburn have argued that the CAS has also adopted practices extending beyond the contracting intentions of parties under the guises of "sport's consistency imperative," or *jurisprudence constante*, as the judicial authority in sports, in the development of international sports law, or *lex sportiva*, which treads upon the legality and contracting legitimacy of the arbitration tribunal hearing the matter. The CAS has not only behaved as the adjudicator of private, contractual disputes between parties, but also endeavored to develop a coherent jurisprudence within *lex sportiva* by adopting precedents and applying principles from past cases.[125]

It is undisputed that the CAS has developed its structure and jurisprudence to be the "world's supreme court in sport" and contributes massively to the development of *lex sportiva*.[126] The court-like nature of the CAS, especially the functioning of the Appeals Division, has brought into question the

[123] *Id.* at 879-80.

[124] *See* Dasser, *supra* note 120.

[125] *See* CAS 2002/O/373 *Canadian Olympic Committee v. International Olympic Committee*, Award of 18 December 2003, 14.

[126] *See* Duval, *Lex Sportiva*, *supra* note 16.

legitimacy of the quasi-judicial institution, given that the CAS is, essentially, an arbitral tribunal that involves mere private, contractual transactions between parties.[127] Furthermore, the processes instituted for the appointment of ICAS members are not wholly democratic, putting into question the legitimacy of the authority of the ICAS and of the appointment of CAS arbitrators and presidents of the CAS Divisions by the ICAS.

The question herein is whether the limited and private contractual legitimacy that the CAS beholds is sufficient for the CAS to act as a quasi-judicial global body for sport to produce *lex sportiva*. Two main points will be made in this part. First, there are precedents that private jurisprudence and law can contribute to the development of international law, thereby making this issue of the limited contractual legitimacy moot. Secondly, unlike the development of other private law, *lex sportiva* consists largely of public law principles, such as criminal and administrative law, and therefore, the development of *lex sportiva* in CAS arbitration need not be limited to the contractual nature of the issue submitted to the CAS panel.

A. Private Sources of Law Accepted as International Law

International law is traditionally made up of international conventions, international custom, "general principles of law recognized by civilized nations," judicial decisions, and "teachings of the most highly-qualified publicists of the various nations."[128] As such, the limited and private nature of the legitimacy afforded to the CAS, and the development of *lex sportiva* by private arbitration in the CAS, often invites criticisms of CAS authority to create *lex sportiva* and the emerging global body of law and jurisprudence in sports. However, international law has increasingly been recognized to be heavily influenced by the development in private law[129] and the development of international jurisprudence found in arbitration.[130] *Lex sportiva* is no exception.

Scholarly writing often analogizes the development of *lex mercatoria* with the growth of *lex sportiva*, as both areas of law and jurisprudence are

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[127] *See* Freeburn, *supra* note 88, at 189-95.

[128] *Statute of International Court of Justice,* art 38(1).

[129] *See* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007); Duval, *Lex Sportiva*, *supra* note 16.

[130] *See* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (2002).

established from private sources of law.[131] *Lex mercatoria* is the well-established body of international commercial law that has developed within the domain of private commercial activities based on customs and arbitral awards[132] and is universally accepted as international, as crystallized in present commercial conventions and national laws.[133] While *lex mercatoria* is made up of customs and principles established from centuries worth of commercial practice, the source of law of this universally recognized body of law is not public law, but private. Accordingly, it may be moot to argue that the limited and private nature of the contractual legitimacy of the CAS ought to restrict the adjudicative power of CAS arbitration as a source of jurisprudence for the development of *lex sportiva*.

B. The Public Law Elements of Lex Sportiva

Unlike *lex mercatoria*, *lex sportiva* is not made up of exclusively private law,[134] which may annul the purported need for private consent in the application and development of *lex sportiva*. Public law principles refer to the aspects of law within society that primarily govern the relationship between individuals and government, and the relationships between specific individuals within society, such as constitutional law, administrative law, and criminal law.

Lex sportiva also consists of sports regulation and disciplinary measures such as on-field and off-field conduct and sports anti-doping regulations and sanctions. These aspects of *lex sportiva* are disciplinary in nature, and the tribunals involved are empowered with seemingly quasi-criminal power to issue "penal" punishments[135] that affect the livelihoods of professionals in-

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[131] Leonardo V. P. de Oliveira, *Lex Sportiva as the Contractual Governing Law*, 17 INT. SPORTS L.J. 101–16 (2017).

[132] *See* CAS 98/200, *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, Award of 10 August 1999 ('AEK UEFA Award') [156], cited in Matthew J. Mitten & Hayden Opie, *"Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269 (2010).

[133] Most of the international commercial and arbitration conventions today are based on principles in *lex mercatoria.* Examples of such are *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 12 October 1929), and the *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301 (entered into force 26 September 1929). *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[134] *See* Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1327-28 (2011).

[135] *See* Straubel, *supra* note 31, at 1261.

volved and are vested with the authority to decide a case based on a standard higher than a civil case. Pursuant to Article 3.1 of the World Anti-Doping Code, the burden of proof to be established for cases not involving positive adverse analytical findings is "comfortable satisfaction", a standard higher than most civil law cases (balance of probabilities) but lower than criminal cases (beyond a reasonable doubt).[136] The standard for other non-doping disciplinary tribunals seems to also be "comfortable satisfaction", as seen in the disciplinary cases of extortion by the International Association of Athletics Federation's Ethics Board (now, the World Athletics Athletics Integrity Unit),[137] as well as the FIFA Regulations on the Status and Transfer of Players.[138]

Lex sportiva in the CAS has also been established with reverence to public law principles such as due process and procedural fairness. The CAS itself has highlighted the similarities of the roles of sport governing bodies and governmental bodies in their regulatory, administrative, and sanctioning roles, and it has upheld the regulatory power and authority of sport governing bodies.[139] The Swiss Federal Tribunal has not hesitated to annul decisions by the CAS with procedural defects.[140]

As such, the argument that the CAS has no contractual legitimacy based on defective consent has less merit given that private consent is usually not required by the individuals involved in the application of public law principles. Such public law principles apply by virtue of the parties' membership and involvement in the respective sport governing bodies and the respective application of public law principles in the jurisdiction where the said sport governing bodies are domiciled. The public nature and effect of CAS decisions is also one of the reasons why the CAS is moving towards more public arbitration hearings for hearings at the Appeals Division, pursuant to amendments to the CAS Code made in 2019.[141]

The consideration hereinafter is to what extent the CAS will hear arguments based on substantive public law principles, rather than just procedural ones, given the generally private nature of arbitration. Unlike commercial arbitration, the CAS does not necessarily exclude itself from certain adjudication, such as the hearing of administrative matters on bank-

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[136] World Anti-Doping Agency, *supra* note 84.

[137] *See* IAAF Ethics Board Decision Number: 10/2018, *supra* note 97; IAAF Ethics Board Decision Number 11/2018, *supra* note 97.

[138] *See* Article 19 of FIFA, *FIFA Disciplinary Code* (2019).

[139] *See* AEK UEFA Award, *supra* note 132, at 58.

[140] *See Cañas v.* ATP, which annulled the award in *Guillermo Canas v. ATP*; *see also RFC Seraing v. FIFA* (SFT).

[141] *See* Court of Arbitration for Sport, *supra* note 2, at R57.

ruptcy or family law disputes; the scope of disputes before the CAS widens to include adjudication on such matters involving more substantive public law principles. Inevitably, panels in the CAS inevitably must determine to what extent they will adjudicate under the auspices of such public law principles. The CAS Panel hearing the matter of the gender eligibility policies of World Athletics in a case in 2018 subtly alluded to this difficulty when matters of human rights are involved.[142] Eventually, the CAS Panel determined that it was limited in its findings due to the scope of the parties' claims, and it had no jurisdiction to address issues outside the said scope.[143] The understanding thereinafter is that the CAS is akin to an international arbitration body that adjudicates issues which are brought before it and ought to be able to decide on human rights issues brought before it,[144] and its jurisdiction to decide on any matter is highly dependent on the parties bringing the said claim before it.

The above example is illustrative of the interesting interaction between substantive public law principles and private arbitration within sports law, which deserves further and wider discussion beyond the scope of this paper. Nevertheless, on the issue of human rights in international sports law, the approach might be not only to rely on the adjudication process or the judiciary to adopt human rights standards, but also for sports legislators to embody or incorporate the relevant standards in the sporting regulations in order for human rights to be considered within any adjudication process. For example, even though World Athletics publicly stated that it is a private body and not bound by fundamental human rights instruments,[145] there are constitutional provisions on equal treatment and non-discrimination that parties are free to bring before the tribunal in the CAS.[146] The trend towards adopting human rights standards in sporting regulation is a good way to ensure substantive public law principles could be adjudicated before and determined by the CAS.[147]

Nevertheless, regardless of how much of a mandate that the CAS has to adjudicate disputes and disciplinary matters, little can be done to develop substantive jurisprudence in the CAS unless cases (including past cases) are

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[142] CAS 2018/O/5794,5798 *Mokgadi Caster Semenya and Athletics South Africa v. International Association of Athletics Federations*, Award of 30 April 2019.

[143] *See id*. at 625.

[144] *See* Straubel, *supra* note 31.

[145] World Athletics, *IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations* (2019), https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg [https://perma.cc/U3NV-LN8A].

[146] *See* World Athletics Constitution, *supra* note 96.

[147] *See* FIFA, FIFA Human Rights Policy (2017).

made more accessible to parties. It is impossible to create uniform jurisprudence without access to prior cases and practices.[148] It was reported that only 43 awards were published among approximately 600 total awards rendered in 2019.[149] At present, awards at the CAS Ordinary Division are still not made public unless all parties or the Ordinary Division President decide otherwise.[150] Furthermore, although awards at the CAS Appeals Division are generally made public pursuant to 2019 CAS Code reform,[151] both parties may agree to keep the award from being made public.[152] Awards at the CAS Appeals Division, especially matters pertaining to disciplinary nature, which costs are completely borne by the CAS, ought to be made public. If there are considerations to protect athletes in certain circumstances, it may be more prudent to consider redacting information and details out from the award, instead of not publishing the award. The principles and interest to publish arbitral awards are aptly illustrated in the English Court of Appeal case of *Manchester City Football Club Ltd. V. The Football Association Premier League Ltd. & Ors,*[153] wherein the court upheld the lower court decision to publish sports arbitral decisions on the basis that there is a "public interest in ensuring appropriate standards of fairness in the conduct of arbitration," which will have to be weighed suitably with parties' interest in preserving the confidentiality of the original arbitration and subject-matter.

V. Conclusion

This paper has endeavored to unveil the major criticisms of the CAS by breaking down the arguments and comparing the prevailing practices of the CAS with other arbitration institutions and ordinary courts. It has addressed the commonplace arguments that the CAS lacks financial and institutional independence, the "consent" athletes have provided for arbitration in the CAS under sport regulations is deficient, and the CAS's contractual legitimacy is limited. The authors argued that the present institutional structure of the ICAS provides an adequate layer of governance to address arguments

[148] *See* Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 Pepp. Dispute Resolution L.J. 189 (2012).

[149] Inside the Games, *The Inner Workings of the CAS, Independence and Sun Yang*, Inside the Games (1591298100), https://www.insidethegames.biz/articles/1094950/what-going-to-cas-really-means [https://perma.cc/6EBN-686P] (last visited May 30, 2022).

[150] *See* Court of Arbitration for Sport, *supra* note 2.

[151] *See id.*

[152] *See id.*

[153] *See* EWCA Civ 1110.

against the financial and institutional independence of the CAS. Furthermore, mandatory arbitration and other conditions of participation are common practices in other industries and should not be struck down by virtue of the "deficient consent" encompassed therein. It is prudent to conclude that sport arbitration in the CAS provides parties in cross-border and transnational disputes considerably more decision-making power compared to parties being subjected to the jurisdiction and conflict of laws principles of foreign courts. Moreover, the *de facto* power of the CAS is not only based on private contractual law, but also significantly based on public law principles, which considerably negates the argument that the CAS has limited contractual legitimacy to create jurisprudence and general principles of law within *lex sportiva*.

This paper demonstrated that the structure and practices of the CAS are not fundamentally defective *per se*, which is the position often propagated by aggrieved parties seeking to overturn a disappointing award by the CAS. It is admitted that the system of cross-border dispute resolution via CAS arbitration is imperfect, and there will always be room made to refine its processes and buttress the authority of CAS as the "world's supreme court for sport." It is also pertinent to keep in mind that sport arbitration at a central institution such as the CAS is the best alternative available to sport litigation in domestic courts, which will only garner inconsistent and unpredictable jurisprudence and the application of general principles. The Swiss Federal Tribunal[154] and ECtHR[155] have mentioned that there is no other viable alternative to the CAS to resolve international sports-related disputes quickly and effectively.

While there are creative recommendations on the creation of an international convention and global sport law body to legitimate the establishment of *lex sportiva* and the use of a uniform forum for sport dispute resolution, there is still little consensus among national governments about how to regulate a principally private industry such as sport. As such, it may be prudent to work within the bounds of private arbitration at the CAS for sport dispute resolution and refine the processes over time in the pursuit to perfect an imperfect system.

This paper has also stipulated various areas within which the structure and processes of the CAS can be improved, whether to buttress its credibility among its stakeholders in sports or reinforce its position as the world's supreme court for sports. For example, the CAS could expressly adopt the IBA Guidelines from existing commercial arbitration practices for concerns

[154] *See Lazutina v. IOC* (SFT).
[155] *See Pechstein v. Switzerland*.

arising from conflicts of interests of arbitrators, or it could even consider fixing a strict panel of arbitrators for the Appeals Division, akin to the practice of the U.S. Supreme Court, to allow for more uniform decisions and alleviate issues of conflict of interests. Further, the credibility of the CAS could also be buttressed by being more transparent about its arbitrator appointment processes, whether at the stage of appointment onto the panel of arbitrators or the appointment of the President or Sole Arbitrator at the Appeal Division. Finally, there are also contemporaneous concerns about the lack of diversity of the appointment of arbitrators in terms of both gender and geographical representation,[156] which could be addressed better by the CAS in order to maintain its legitimacy as the supreme court for international sports.[157]

[156] In a report by the International Council for Commercial Arbitration, it was reported that, as of 15 June 2021, 90% of the last 80 arbitration appointments were male. *See* International Council for Commercial Arbitration, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf [https://perma.cc/MUM8-NW3Y] (last visited May 30, 2022). *See also* other reports at *Arbitrator Diversity at the Court of Arbitration for Sport Part One*, MORGAN SPORTS L. (2021), https://www.morgansl.com/en/latest/arbitrator-diversity-court-arbitration-sport [https://perma.cc/M6FW-4JV6] (last visited May 30, 2022); *Arbitrator Diversity at the Court of Arbitration for Sport - Part Two*, MORGAN SPORTS L. (2021), https://www.morgansl.com/en/latest/arbitrator-diversity-court-arbitration-sport [https://perma.cc/T3KE-DRGC]; Grit Hartmann, *Tipping the Scales of Justice: The Sport and its "Supreme Court"* (2021), https://www.playthegame.org/media/10851569/Tipping-the-scales-of-justice-%E2%80%93-the-sport-and-its-supreme-court.pdf [https://perma.cc/BQ3X-WDKH] (last visited May 30, 2022).

[157] For the existing debates on gender diversity in international commercial arbitration, see International Council for Commercial Arbitration, *supra* note 156.