



# Arbitration

in 57 jurisdictions worldwide

Contributing editors: Gerhard Wegen and Stephan Wilske

# 2012



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### Arbitration 2012

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd 2012  
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ISSN 1750-9947

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Tel: 0844 2480 112

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# CAS

## Bernd Ehle and Guillaume Tattévin

Lalive

### What is the Court of Arbitration for Sport (CAS)?

The Court of Arbitration for Sport is an arbitral institution established to resolve sport-related disputes. It is based in Lausanne, Switzerland. The CAS has been described by the Swiss Federal Supreme Court as 'the Supreme Court of world sports'.

The CAS was established in 1984 at the initiative of the then chairman of the International Olympic Committee (IOC), Juan Antonio Samaranch and the International Court of Justice judge, Keba Mbaye. The IOC was concerned about the combination of increased sports-related litigation and the lack of an international dispute settlement body. The IOC created the CAS to establish an efficient and specialised dispute resolution mechanism that would avoid the unpredictability of such disputes being decided by the domestic courts of numerous jurisdictions. Following significant reforms to its structure in 1994, the CAS is now independent from the IOC and is supervised by the International Council of Arbitration for Sport (ICAS).

Since 1984, the CAS has registered more than 2,700 requests for arbitration or advisory opinions. It has rendered more than 1,500 awards and 20 advisory opinions. The caseload increased significantly after FIFA (Fédération Internationale de Football Association) had granted jurisdiction to the CAS in 2002.

Disputes submitted to the CAS include all types of cases relating to sports, whether commercial or disciplinary in nature, such as contractual disputes and disputes relating to doping, transfer or nationality of athletes. However, the CAS has above all thrived as an appellate body for disciplinary proceedings against athletes. These proceedings now account for approximately 80 per cent of CAS cases.

The CAS operates as an arbitral institution with a number of specificities relating to the specialised nature of its cases and, given the short time frame of athletes' careers, the urgency in which many of them must be decided, particularly disciplinary proceedings.

### What is the International Council of Arbitration for Sports (ICAS)?

The International Council of Arbitration for Sport is the CAS's supreme body. It is tasked with administering the CAS and safeguarding its independence.

The ICAS was created in 1994, 10 years after the CAS. Prior to this, the CAS was dominated by the IOC, which assumed the entire costs of the CAS and appointed half the CAS members. The need to restructure the CAS and reduce the IOC's dominant involvement became apparent following the decision rendered in the *Gundel* case. In *Gundel*, a jockey challenged a CAS decision for upholding his disqualification for horse doping. The challenge was heard by the Swiss Federal Supreme Court, which dismissed the challenge. However, the court emphasised that the structural dependency of the CAS on the IOC would have been problematic if the IOC had been a party to the case. Such is the case, for instance, in disputes related to athletes' participation in the Olympic Games. The link between the IOC and the CAS therefore had to be broken.

The ICAS is composed of 20 members, all of whom must be lawyers. Twelve members are appointed in equal numbers by international sports federations, by the national Olympic committees and by the IOC. Pursuant to article S4 of the CAS Code, these 12 members co-appoint the next four members, who must be appointed 'with a view to safeguarding the interest of the athletes'. Finally, these 16 members designate the final four ICAS members 'from among personalities independent of the bodies designating the other members of the ICAS' (article S4, CAS Code).

In 2003, the new structure of the ICAS and CAS was successfully tested in the *Lazutina and Danilova v International Olympic Committee* case, where two skiers challenged a CAS award confirming their disqualification from the Olympic Winter Games. In rejecting the challenge, the Swiss Federal Supreme Court recognised that the CAS was now structurally independent from the IOC. As a result, the CAS is entitled to decide disputes involving the Olympic body.

### How is the CAS organised?

#### The CAS Code

The statute of the CAS and its procedural rules are set out in the CAS Code. The latest revision to the Code came into force on 1 January 2012. In addition to the CAS Code, the CAS has also enacted Mediation Rules.

#### The CAS president

Pursuant to its statutes, the CAS is headed by a president, who is ex officio the president of the ICAS. The president is responsible for administrative tasks within ICAS and chairs the ICAS Board. He or she is also tasked with the allocation of cases to the CAS divisions.

#### The CAS divisions

The CAS is organised into two permanent divisions and temporary ad hoc divisions. The two permanent divisions are the Ordinary Arbitration Division and the Appeals Arbitration Division.

The Ordinary Arbitration Division deals with disputes submitted to arbitration pursuant to an agreement between the parties. These are the original CAS disputes. The disputes are essentially contractual, often commercial and may relate, for instance, to sponsorship and licensing issues, transfers or television rights.

The role of the Appeals Arbitration Division is to constitute the arbitration panels that will rule on appeals against decisions rendered by sports federations. These are disciplinary disputes involving athletes. The Appeals Division was created in 1994 following the success of a model arbitration clause published by the CAS in 1991 and then incorporated in the statutes of several sports federations. Disciplinary cases, particularly those involving doping, began to reach the CAS in growing numbers. A full appeals procedure was therefore created to take into account this developing trend. It now represents the majority of the cases registered with the CAS. For instance, in 2009, 244 cases were submitted to the Appeals Division and only 25 to the Ordinary Division.

The CAS can hear appeals against disciplinary decisions taken by both national and international federations. When the rules so provide, the Appeals Division will also hear appeals against decisions of the Ordinary Division of the CAS or decisions of non-CAS arbitral tribunals.

In addition to the two permanent divisions, the CAS has created ad hoc divisions for specific events. The first such ad hoc division was established for the 1996 Olympic Games in Atlanta. It was then extended to all Summer and Winter Olympic Games as well as major sporting events such as the FIFA World Cup, the UEFA European Championship and the Commonwealth Games. Ad hoc divisions are located at the seat of the event and their panels must rule within a short deadline of 24 hours.

What is the purpose of the divisions?

The divisions are part of the administrative organisation of the CAS. They administer the panels established under their scope of authority. As a result of their administrative nature, the decision to allocate a case to a division cannot be appealed. A case can also be switched from one division to another after filing without any procedural consequence.

Despite the administrative nature of the divisions, their presidents are granted the power to act at the request of a party when the arbitral panel is not yet appointed. This is the case in particular for requests for joinder and for provisional measures. As a result of being granted these significant powers, the presidents of the divisions must be independent from the parties in the same way as arbitrators, and can also be challenged if doubts arise as to their independence.

Furthermore, the presidents' decisions may be challenged in the same way as awards when they have similar consequences on the proceedings. The Swiss Federal Supreme Court recently allowed a challenge against a decision of the president of the Appeals Division rejecting an appeal as inadmissible for non-payment of administrative fees, thereby terminating the case.

The panels

Arbitration panels are established under the divisions to rule on the disputes themselves. Panels can include one or three arbitrators, although as a rule, appeal proceedings are decided by three arbitrators, unless otherwise specified. The final decision as to the number of arbitrators belongs to the president of the relevant division.

Panels may be assisted by a secretary to the tribunal, an established practice that was formally adopted in the 2010 revision of the CAS Code.

### Which disputes are arbitrated by the CAS?

Scope of CAS arbitration

Article S1 of the CAS Code provides that the CAS will settle 'sports-related disputes'. The Procedural Rules interpret this in a broad manner, providing at article R27 that such disputes include 'matters of principle relating to sport', matters 'brought into play in the practice or the development of sport', and 'generally speaking, any activity related or connected to sport'.

Under this broad definition, the CAS essentially hears sports-related commercial disputes and disputes between sports federations and their members or between members of a federation.

Basis for CAS jurisdiction

As for arbitration in general, the jurisdiction of the CAS is conditioned on the parties' mutual agreement, which may be expressed contractually. The CAS provides a model clause for such purpose, which reads: 'Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of sports-related arbitration.' The outreach of CAS jurisdiction was demonstrated in 2011 when the Swiss Federal Supreme Court upheld the decision of a CAS tribunal to accept

its jurisdiction despite the lack of any reference to the CAS in the dispute resolution clause, on the basis of a finding that the parties' intention was to avoid domestic courts and to settle their dispute before a sports-related institution, thereby making the CAS close to the default arbitral jurisdiction in sports cases.

However, the jurisdiction of the CAS is more often established through the rules of sports federations that have elected to grant jurisdiction to the CAS by including a CAS arbitration clause in their own rules. The Swiss Federal Supreme Court has accepted that CAS jurisdiction could be based on the acceptance of the rules of a national federation that included a reference to the FIFA rules, which themselves included a CAS clause. However, the Federal Supreme Court has also ruled that an athlete who agreed to comply with a federation's rules in the context of a specific event was bound by the CAS clause contained in those rules for that specific event only – and not for other, unrelated disputes.

The extent to which sports federations have given jurisdiction to the CAS varies. Some international federations have granted general jurisdiction to the CAS. These include large federations such as the Equestrian, Swimming, Basketball, Triathlon and Athletics Federations. Other federations, such as FIFA and UEFA, grant general jurisdiction to the CAS but include limited exceptions with regard to rules-of-the-game and minor doping issues in the case of FIFA.

Other federations have granted jurisdiction to the CAS to specific disputes only. For instance, the International Cycling Union grants jurisdiction to CAS only for licensing issues. Others such as the Ski, Bobsleigh and Wrestling Federations limit the jurisdiction of the CAS to disciplinary disputes, while the Volleyball Federation further restricts the jurisdiction to doping disputes only. On doping matters, the World Anti-doping Code has established the CAS as the only appeal authority for all doping cases in competitions at the international level.

Finally, some international federations have no established link with the CAS. This is the case of the FIA (Fédération Internationale de l'Automobile), which has its own dispute resolution mechanism, or the Judo Federation, which has granted jurisdiction to the CAS only until its own tribunal is established.

At the national level, sports federations may also grant jurisdiction to the CAS. This is for instance the case for the Swiss Football and Ice-Hockey Federations, which grant full jurisdiction to the CAS. Other national bodies, such as the US Anti-Doping Agency, grant limited jurisdiction to the CAS.

As of 2012, article R39 of the CAS Code confirms that CAS panels are entitled to rule on their own jurisdiction, pursuant to the widely accepted principle of *compétence-compétence*.

### Arbitrator appointment and challenge

How are arbitrators appointed?

Like many arbitral institutions, the CAS maintains a list of arbitrators. Unlike most other institutions, however, the parties may only choose arbitrators from within that list. The reason for this restriction to the parties' choice is the need to ensure the swift appointment of arbitrators who are specialised in sports matters. The restriction on party autonomy has indeed been validated by the Swiss Federal Supreme Court in the interest of a speedy resolution of disputes.

The restricted choice makes the constitution of the arbitrators list very important. The list is established by the ICAS every five years and must include at least 150 arbitrators and 50 mediators. In practice, there are now 265 arbitrators on the list, originating from 70 countries, and the list is likely to grow further. Some arbitrators also appear on a special list for football-related disputes.

Arbitrators are appointed on the CAS list by the ICAS. As of 2012, CAS arbitrators are no longer appointed through the same complex rule as ICAS members. Instead, they are chosen by the ICAS from persons proposed by the IOC and by national and international federations.

Arbitrators who appear on the CAS list are free to serve on any CAS permanent or ad hoc division panel.

What about ad hoc divisions?

Parties appearing before the ad hoc divisions cannot choose their arbitrators. In the interest of swift dispute settlement, ad hoc divisions are composed of six to 12 arbitrators. Three-member panels are then constituted by the president of the division.

Can an arbitrator act as counsel before the CAS?

Since the 2010 revision of the CAS Code, CAS adjudicators (arbitrators and mediators) may not act as counsel before the CAS, even in unrelated cases. This runs contrary to usual practice in international arbitration, where it is the norm for practitioners to act as both counsel and arbitrators in separate cases. Such simultaneous dual functions are prohibited in the case of the CAS and since the 2006 non-binding recommendation had not produced sufficient results in this respect, the rule was formally adopted as part of the 2010 revision.

As justification for this decision, the ICAS has cited a significant increase in parties expressing their discomfort in having a CAS member representing a party. This claim had even been made in a challenge submitted to the Federal Supreme Court in the *Al Nabyan* case in 2006. An additional reason cited has been that CAS arbitrators were being forced to refuse appointments due to conflicts of interest, a problematic issue given the limited number of potential arbitrators in this field.

How can a party challenge an arbitrator?

Arbitrators can be challenged in case of doubts over their independence. The deadline to bring a claim is seven days after the ground for the challenge has become known.

Challenges are the responsibility of the ICAS. From 2010, challenges are submitted directly to the ICAS board. The board may then choose to refer the dispute to the full ICAS at its own discretion. The Swiss Federal Supreme Court ruled in 2010 that no appeal was admissible against ICAS decisions on challenges. Instead, the Federal Supreme Court exercises control over the independence of arbitrators when an award is challenged, pursuant to article 190 of the Swiss Private International Law Act (the PIL Act).

The challenge procedure is standard. All parties and arbitrators, as well as the secretary-general of the CAS (as confirmed by the Swiss Federal Supreme Court in 2011) are allowed to submit comments. Unlike other institutions that view challenges as purely administrative rulings, the ICAS must provide reasoning for its decisions. It may also publish its decisions, a practice that is gaining acceptance in the arbitration community.

#### How are CAS proceedings conducted?

The CAS is recognised by the Swiss Federal Supreme Court as an arbitral institution and its procedure generally follows accepted international arbitration practice. However, CAS procedure is different depending on whether the case is an ordinary, appeals or ad hoc dispute. Each follows a similar but not identical pattern.

#### Procedure

Ordinary CAS proceedings are traditional arbitral proceedings. The arbitration is initiated by a statement of claim, in reply to which the respondent files an answer. The CAS is soon to introduce an electronic filing system to facilitate the submission of written submissions. The proceedings then follow with a written phase that can include one or two exchanges of briefs, followed by a hearing of witnesses and experts. Hearings normally last for one day and are increasingly conducted by means of telephone or video-conferencing.

Appeals proceedings are different because the deadlines are shorter and submissions are limited. The appeal itself must in general be submitted to the CAS within 21 days from the notification of the decision appealed. The appellant then has only 10 days to file its full

brief and the respondent must file its defence within 20 additional days. No additional submissions or exhibits are allowed.

In ad hoc proceedings, due to time constraints, the procedure is essentially oral. The panel holds a hearing immediately after receiving the summary request filed on a standard form. The parties raise their arguments and evidence directly at the hearing.

#### Awards

In keeping with the nature of each division, ordinary proceedings do not prescribe a time limit to render the award. However, appeals must be rendered within three months of the panel receiving the file. Panels are entitled to first render only the operative part of their awards, which are enforceable. Finally, ad hoc decisions must be rendered within 24 hours of the dispute being submitted to the CAS.

Draft awards are subject to review by the secretary-general of the CAS.

While the CAS Code was originally silent on the issue, the 2010 CAS Code revision has prohibited separate or dissenting opinions. However, the CAS Code provides for publicity of awards, unless both parties have agreed to keep the award confidential. As a result, many CAS awards have become public and easily accessible on the CAS website. This has led to the development of consistent case law and enhanced the predictability of the outcome of issues in dispute.

#### Specific features of CAS proceedings

Challenge of CAS awards before the Swiss Federal Supreme Court Pursuant to the CAS Code, all CAS awards are rendered in Switzerland. This is the case even when hearings take place outside Switzerland, as for instance in the case of disputes administered by the ad hoc divisions. As a result, the Swiss Federal Supreme Court has jurisdiction on challenges against all CAS awards pursuant to chapter 12 of the PIL Act.

The first challenge against a CAS award was filed in 1992. The Federal Supreme Court then ruled on no more than three challenges a year until 2007 when nine challenges were filed against CAS awards. In 2010, there were at least 14 decisions of the Federal Supreme Court on challenges against CAS awards. This trend is consistent with the increasing number of CAS cases.

In CAS cases as in other arbitration matters, the Federal Supreme Court rules swiftly and as a court of last resort. Most challenges are decided within four to six months and the vast majority of challenges are rejected. However, as recent successful challenges have shown, the Federal Supreme Court somehow appears more willing to scrutinise arbitral awards and intervene in CAS cases than in others. In 2010, a CAS award had the dubious honour of being the first award ever annulled by the Swiss Federal Supreme Court for breach of public policy. Despite this, CAS awards remain unlikely to be annulled, as shown by the only six annulments out of some 90 cases reviewed by the Federal Supreme Court.

In addition, the Supreme Court is less inclined to apply the article 192 PIL Act exception to CAS arbitrations involving athletes' rights. Pursuant to article 192, parties not domiciled in Switzerland may agree to exclude all challenges against an arbitral award. Such agreements need to be made expressly. In a 2007 decision, the Supreme Court refused to uphold such a clause as included in the standard rules of the Association of Tennis Professionals, considering that professional athletes were usually not in a position to negotiate arbitration clauses on an equal footing with their federations.

#### Choice of law

Unlike most arbitration rules, the CAS Code regulates the law applicable to the merits of the dispute. For ordinary disputes, Swiss law applies to the merits unless the parties have expressly selected some other law. For appeals disputes, panels must apply the law of the country where the federation that issued the decision being challenged is domiciled, unless the parties have indicated otherwise or unless the panel finds that another law is more appropriate.

In ad hoc disputes, panels must apply the Olympic Charter as well as 'the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate'.

#### Provisional measures

Like many arbitration rules, the CAS Code allows parties to seek provisional measures once the arbitration has been filed. Of particular interest is the rule that, pending designation of the panel, the president of the division has the power to order such measures. Provisional measures can even be ordered ex parte, subject to later review.

#### Joinder and intervention

The CAS allows third parties to participate in ongoing ordinary arbitrations. The third party must be bound by the arbitration agreement or the original parties must agree to its intervention. The party seeking intervention must make its request before the hearing. The decision as to whether to allow the intervention is taken by the president of the panel or by the president of the division if the panel has not yet been appointed.

Similarly, a party can cause a third party to participate in the arbitration, under the same conditions.

#### Does the CAS administer proceedings other than arbitration?

##### Advisory opinions

As of 1 January 2012, the ICAS removed the possibility for the CAS to issue non-binding opinions to IOC, the World Anti-Doping Agency and international federations or related organisations.

Between its creation and the end of 2011, the CAS has rendered approximately 20 such advisory opinions. A well-publicised opinion concerned the admissibility of special full-body swimsuits, which significantly enhance a swimmer's performance. Prior to the 2000 Summer Olympics in Sydney, the Australian Olympic Committee had sought an advisory opinion from the CAS to clarify the position regarding this new equipment under the Swimming Federation rules.

#### Mediation

The consensual approach of mediation no doubt corresponds to the spirit of fair play that should prevail in sports. As a result, the ICAS introduced the CAS Mediation Rules in 1999.

Mediation before the CAS is limited to disputes that fall under the Ordinary Division of the CAS, and excludes disciplinary proceedings. The CAS must maintain a list of at least 50 mediators, which currently includes 52 names. Unlike CAS arbitrators, mediators need not be lawyers.

CAS mediations must normally be completed within 90 days, subject to an extension by order of the CAS president. However, the parties may always choose to terminate the mediation at any time. A successful mediation would lead to a settlement between the parties.

Mediation at the CAS is still in its elementary stages of development. As of January 2012, there have been approximately 25 CAS mediations. The reason for the comparative lack of success of CAS mediation may lie in the qualifications required for appointment on the CAS list of mediators, where the emphasis is placed on knowledge of the sporting movement rather than on technical mediation skills. If CAS mediation is to gain more widespread acceptance, it may be time for the ICAS to appoint trained and experienced mediators.

#### What is the cost of CAS proceedings?

The registration fees of the CAS are modest, currently 1,000 Swiss francs. However, the registry then requires payment of administrative fees, which are determined according to the amount at stake. These can reach a maximum of 25,000 Swiss francs. In addition, arbitrators' fees are billed on an hourly basis. The hourly rate depends on the amount at stake and can range from 250 to 400 Swiss francs where the amount in dispute is over 10 million Swiss francs.

Following a trend initiated in 2004, appeal proceedings are no longer free for the parties as of 1 January 2012, and the fees are no longer borne by the CAS. Until 2004, all appeal proceedings were free. From 2004 to 2010, only appeal proceedings related to international cases remained free, and the 2010 revision of the CAS Code has re-extended the benefit of free proceedings to appeals against national federations when they are acting as delegates of international federations. However, from 2012 onwards, the only proceedings that remain free concern appeal proceedings initiated in relation to disciplinary sanctions.

The main source of costs for any party to CAS proceedings is counsel fees. In this respect, the CAS offers a legal aid fund, which is rather limited. Its existence was made official in the 2010 revision of the CAS Code. In addition, starting with the Sydney Summer Olympics in 2000, the CAS has organised pro bono representation from local counsel in ad hoc cases.

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Further information on the CAS can be found on its website, [www.tas-cas.org](http://www.tas-cas.org), or by contacting its Secretariat.

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