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INTRODUCTION

As the financial rewards in sport have become greater, questions of control and discipline have become increasingly important. All professional sports bodies have disciplinary codes governing the conduct of their member athletes. They seek to impose even more stringent controls over their members, but they run the risk of litigation if procedures for control and discipline do not adhere to the principles of procedural fairness.

In an international context it is interesting to examine how the Olympic Movement deals with discipline and control, particularly at Games time. Since the revival of the modern Games in 1896, the Olympics has expanded and developed into a multi-billion-dollar business responsible for the organisation of international competition every two years. Summer and Winter Games combined involve approximately 340 events and thirty-five International Sports Federations. From this, we can see that the International Olympic Committee (hereinafter "IOC") is a pre-eminent international sports body with immense political and economic power. One commentator, Anthony T. Polvino states:

> The Olympic Movement, which is governed by the International Olympic Committee, is the dominant institution in the framework of international sports law. The Olympic Movement performs two principal functions: it plans association and competition among

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[1] The authors wish to express thanks to Lise Narbel, Secretary to the Court of Arbitration for Sport.

> athletes and it 'serves as a nucleus or catalyst for the development of international sports law' by making many IOC rules and practices customary in the global system.[2]

The Olympic Movement uses contractual consensus to ensure that the Court of Arbitration for Sport (hereinafter "CAS") settles all disputes. How does this mandatory condition coincide, if at all, with the imposition of legal norms of fairness and human rights? This essay will attempt to answer this question with specific reference to the Ad Hoc Division of CAS. We will look briefly at U.S. law, U.K. law and European law. By way of example, we will consider a specific case heard before the Ad Hoc Division in Nagano in 1998. We conclude with some thoughts for the future, referring to the recent creation of the World Anti-Doping Agency and a CAS mediation process.

I. LEGAL BACKGROUND

A. How Do the CAS and the Ad Hoc Division Work?

The CAS was formed by the IOC in 1983 and became operational in November 1984.[3] It is a formal tribunal for the resolution of sporting disputes.[4] There are detailed codes to govern the composition and formation of the CAS, its competence, function, the applicable law, the composition of the arbitral panels and the hearing and appeal processes.[5] Its headquarters are in Lausanne,

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[2] *See* Anthony T. Polvino, Comment, *Arbitration as Preventive Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347 (1994).

[3] *See Italy Spikes United States*, TIMES-PICAYUNE, Nov. 23, 1994 (discussing the history of the Court of Arbitration for Sport created in 1984 for final ruling in disputes between athletes and sport federations).

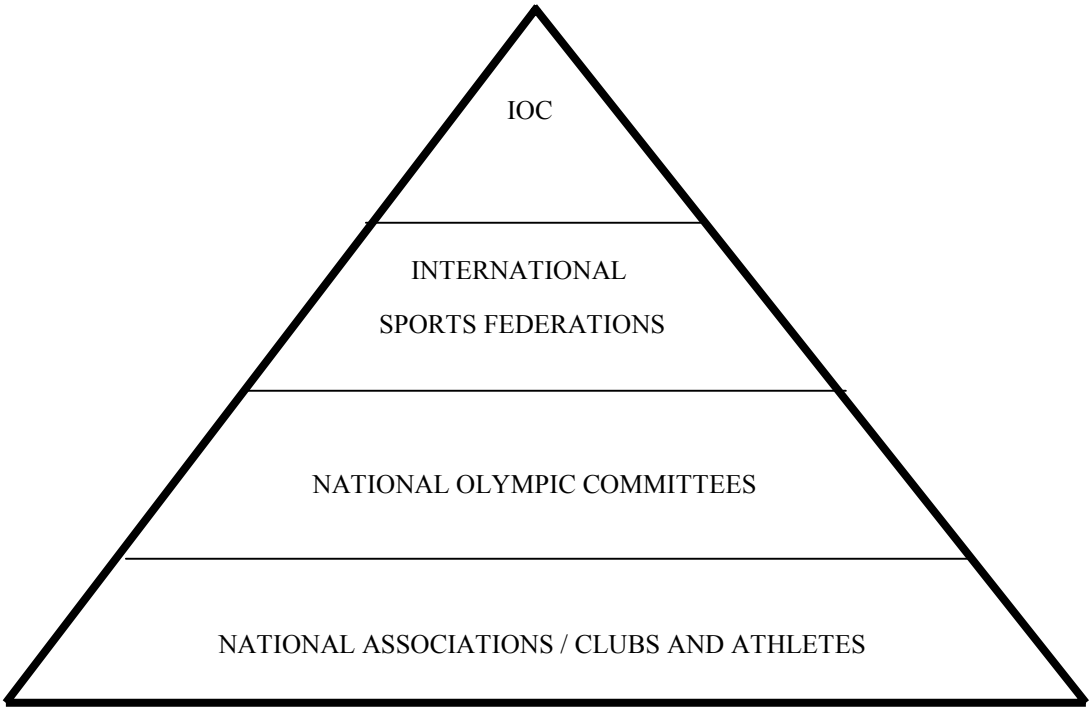
[4] *See id.*

[5] To view a copy of the CAS Code for Sports Related Arbitration, *see* the Court of Arbitration for Sport, *at* http://www.tas-cas.org (last visited Jan. 23, 2002).

Switzerland, and it now has two outposts in Denver, Colorado and Sydney, Australia.[6]

B. How Does CAS Get its Jurisdiction?

The Olympic Movement is based on a pyramid structure:



[6] Mary K. Fitzgerald, *The Court of Arbitration for Sport: Doping and Due Process During the Olympics*, 7 SPORTS LAW. J. 213, 220 (2000).

For organisations within this structure, the Olympic Charter is the supreme authority.[7] It sets out the guiding principles for all aspects of the Olympic Movement.[8] Rule 5 of the Fundamental Principles proclaims, "Under the supreme authority of the IOC the Olympic Movement encompasses [organisations], athletes and other persons who agree to be guided by the Olympic Charter. The criterion for belonging to the Olympic Movement is recognition by the IOC."[9]

The power of the IOC is final and they must officially recognize the International Federations (hereinafter "IFs") and the National Olympic Committees (hereinafter "NOCs") before an individual athlete can compete. In relation to IFs, Rule 29 confirms:

> In order to be recognised these [organisations] must apply the Olympic Movement Anti-Doping Code and conduct, effective out-of-competition tests in accordance with the established rules. . . . As far as the role of the IFs within the Olympic Movement is concerned, their statutes, practice and activities must be in conformity with the Olympic Charter.[10]

Rule 74 of the Olympic Charter states, "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS, in accordance with the Code of Sports Related Arbitration."[11]

From this pyramid structure, we can see that the CAS gains its jurisdiction primarily from Rule 74 of the Olympic Charter. In

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[7] *See* James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 491 n.6 (1992) ("The Olympic Charter is the codification of the Fundamental Principles, Rules and Bye-laws adopted by the IOC. It governs the organization and operation of the Olympic Movement and stipulates the conditions for the celebration of the Olympic Games.").

[8] *Id.*

[9] To view a full text of Rule 5 of Olympic Charter Fundamental Principles, *see* http://multimedia.Olympic.org/pdf/en_report_122.pdf (last visited Jan. 23, 2002).

[10] To view a full text of Rule 29 of Olympic Charter Fundamental Principles, *see* http://multimedia.Olympic.org/pdf/en_report_122.pdf (last visited Jan. 23, 2002).

[11] To view the Olympic Charter, *see* http://multimedia.Olympic.org/pdf/en_report_122.pdf (last visited Jan. 23, 2002).

addition, many of the IFs who are affiliated with the IOC will provide in their bylaws and regulations that the CAS will have jurisdiction in any arising disputes.[12] At Games time athletes are required to sign an entry form, which expressly gives the Ad Hoc Division jurisdiction to arbitrate disputes arising during that period.[13] There is thus a chain of contractual obligations, which binds the athletes to observe the rules of the IOC Olympic Charter. Even if there is no written contract, this contractual nexus may be implied or inferred so that the IOC maintains supremacy.

CAS arbitrations are deemed to take place in Lausanne, Switzerland, regardless of where they are actually held. They are therefore governed by the CAS internal statute and codes and ultimately by Chapter 12 of the Swiss Private International Law Act.[14] Under the Swiss Laws, a challenge of a CAS award before the Swiss Supreme Court would only succeed on limited grounds of procedural impropriety or public policy.

Outside Switzerland, challenges to a CAS decision will be bound by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention.[15] This has been ratified by 112 countries and provides for the

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[12] *See* Polvino, *supra* note 2, at 372:

> Presently, fifteen important international federations have manifested their confidence in the enforceability of CAS awards by introducing into their statutes clauses providing for the recognition of the CAS as the sole judicial authority competent to hear an appeal against the decisions of their internal bodies.

[13] Fitzgerald, *supra* note 6, at 238:

> Beginning with the Atlanta Summer Games, athletes wishing to participate in Olympic competitions were required to sign an arbitration agreement in their entry forms, stating that they agreed to settle any disputes via CAS administered arbitration. Specifically, the athletes agreed that 'the decisions of the CAS [would] be final, nonappealable, and enforceable.'

[14] *See* Nafziger, *supra* note 7, at 507:

> For choice-of-law purposes, party autonomy permits the selection of any appropriate body of municipal law, general principles of law, the *lex mercatoia*, other rules of arbitration, or international sports law. In the absence of specific provision Swiss Law applies because of the location of CAS headquarters in Lausanne.

[15] *See* Polvino, *supra* note 2, at 373 ("Municipal courts generally will recognize and enforce CAS awards, primarily under the New York Convention.").

international recognition of arbitration awards.[16]

Article V of this Convention sets out grounds for refusing to recognise an arbitration award: 1) incapacity or invalidity of the agreement; 2) improper notice; 3) the decision was beyond the scope of the proceedings; 4) the arbitrator or proceedings were not in accordance with the agreement; or 5) the award was set aside or suspended by a competent authority. The award may also be unenforceable under Article V if: 1) it is not valid according to the laws of the State where its recognition and enforcement is sought; or 2) it is contrary to public policy.[17]

C. What Law Does CAS / Ad Hoc Division Apply?

The CAS Code states that disputes will be resolved according to the law chosen by the parties or in the absence of agreement, according to Swiss Law.[18] However, for the Ad Hoc Division there is no opportunity for choice and the arbitration is governed ultimately by Chapter 12 of the Swiss Act on Private International Law but pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law deemed appropriate by the Ad Hoc Division.[19]

Prior to the establishment of the Ad Hoc Division, disputes arising at the Games were sent to the CAS for resolution, but no time scale was imposed for deciding the cases and the CAS was still based in Lausanne, Switzerland. Athletes may have been dissuaded from pursuing their claims as the arbitration seemed so far removed from the momentum of the Olympic Games.

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[16] Fitzgerald, *supra* note 6, at 225 ("As of February of 2000, 112 countries had ratified the Convention.").

[17] To view a full text of the New York Convention, *see* International Alternative Dispute Resolution, *at* http://www.internationaladr.com/tc121.htm (last visited Jan. 23, 2002).

[18] *See* Rule 45 CAS Code of Arbitration for Sports Disputes.

[19] *See* Rules 7 and 17 of the Ad Hoc Division rules for Sydney.

Following the long and protracted case involving Butch Reynolds,[20] the IOC, in an attempt to ward off future court cases, introduced a new procedure for the settlement of disputes arising during Games time. This was brought into operation for the Atlanta Games in 1996, was used again in Nagano in 1998 and in Sydney in 2000. In May 1996, the International Council for the Arbitration for Sport presented the new "Rules for the Resolution of Disputes arising during the Olympic Games," which set out the procedure for swiftly resolving disputes at Games time.[21]

It was anticipated that the panel of arbitrators would be available immediately and make its decision within twenty-four hours of an application being filed. The procedure would be free of charge. In most cases the panel's decision was to be final, in some complex or technical matters where a decision could not be made straight away the case would be referred to the CAS for regular arbitration.

The press release for the new process did not mention that athletes would have to sign, in their entry form, an agreement to settle all disputes by way of such arbitration. At the time of the Ad Hoc Division introduction, many athletes voiced concern at signing an agreement to binding arbitration. However, the IFs of all the Olympic Sports were persuaded to agree to the process thereby ensuring that if athletes did not sign the contract/entry form, then they would be excluded from the competition.

D. What Legal Norms Should Apply to the Resolution of Sports Disputes?

In the U.S., the Constitution guarantees rights of due process through the Fifth Amendment and applies these to the states through

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[20] Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994). For a more complete discussion of the case, *see* David Mack, *Reynolds v. IAAF: The Need for an Independent Tribunal in International Athletic Disputes*, CONN. J. INT'L L. (1995).

[21] *See* International Olympic Committee, *at* http://www.olympic.org (last visited Jan. 23, 2002). The Olympic Division is an international arbitration court. *Id.* It is independent and follows court-like procedures granting due process. *Id.* It will be present on site throughout the Games, available around the clock. *Id.*

the Fourteenth Amendment.[22] These rights arise where a state action infringes upon a life, liberty or property interest.[23] Organisations deemed to be performing a public function or authorised under the laws of the state (quasi-public institutions) are also viewed as state actors.[24]

Each case is taken on its own merits, but generally an athlete will have a property interest because there is a potential economic benefit in his continued participation in his sport.[25] If he has such a property interest, then he is entitled to due process rights. The current Olympic athlete has more financial support at stake than ever before. Athletes can receive financial support through their National Olympic Committee (hereinafter "NOC") and National Governing Board (hereinafter "NGB").[26] In addition to financial support, different governing bodies institute incentives and bonuses for obtaining medals during the Games, like "Program Gold" which was

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[22] U.S. CONST. AMENDS. V, XIV.

[23] *See* Stephen Schilde Williams, Comment, *Can a Louisiana Unit Order Be Effective Retroactively?*, 49 LA. L. REV. 1119, 1133 n.95 (1989) (explaining the Fifth and Fourteenth Amendments' prohibitions on any state action impeding on an individual's right to life, liberty, or property without due process of the law).

[24] *See* 15 AM. JUR. 2d, Civil Rights § 83 (2000) (describing the factors courts look at when determining whether a quasi-public institution is a state actor for Constitutional purposes).

[25] *See* Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1159 (1987) (explaining in the context of a collegiate athlete the athlete's economic interest in uninterrupted preparation in order to so enter the lucrative career as a profession athlete).

[26] *See To City and Sports Desks: Fundraising to Begin for Olympic Training*, PR NEWSWIRE (Sept. 18, 1985) ("U.S. Olympic athletes, unlike those from all other countries, do not receive any continuing financial support from their government. The USOC is the only one of the 161 national Olympic committees in the world that finances all training, medical supervision, and transportation for its athletes."); *see also* Eric Moses, *Q&A: Restoring the Shine: IOC's Highest-Ranking American Talks About How Scandal Has Changed the Olympics, and What People Should Really be Talking About*, DAILY NEWS (L.A.) (Mar. 7, 1999) (noting that the International Olympic Committee also provides financial support for athletes' training).

in effect in Atlanta.[27] It is the taking of this property interest that triggers the due process analysis.

Due process rights are split into two: procedural due process and substantive due process. Procedural due process evolved from the U.S. Supreme Court's decision in *Mathews v. Eldridge*,[28] which stated that procedural due process provides a party "the opportunity to be heard at a meaningful time and in a meaningful manner."[29] In terms of procedural due process, an athlete would be entitled to a hearing and notice of the hearing time, date and content. The level of these rights will depend upon the rights affected by the decision. For the gravest situations the maximum protection would involve the right to a hearing in front of a neutral decision-maker with an opportunity to make an oral presentation, to present favourable evidence and to confront and cross-examine adverse witnesses. There may also be a right to have an attorney present; to receive a copy of the transcript and to have a written decision based on the record.

Substantive due process focuses on whether the rule, regulation or legislation being violated is fair and reasonable and clearly relevant to the accomplishment of its purpose. Purely private rather than governmental decisions are not subject to constitutional due process requirements but over the years the U.S. has developed case law, which will ensure that a minimum standard of due process is applied in private situations. Berry and Wong set out five conditions where generally the courts will review the rules of sports bodies: 1) the rules violate public policy because they are fraudulent or unreasonable; 2) the rules exceed the scope of the association's authority; 3) the organization violates one of its own rules; 4) the

[27] *See* Melissa Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 665 (1998) ("Couple the grants with prize money, throw in commercial endorsements and appearance fees and top off the package by paying various coaching and training expenses, and an Olympic athlete may well have their entire livelihood dependent upon competing in their sport."). *Id.* at 666.
[28] 424 U.S. 319 (1976).
[29] *Id.* at 333.

rules are applied unreasonably or arbitrarily; or 5) the rules violate an individual's constitutional rights.[30]

Principles of natural justice and human justice demand that a sporting organisation observe these tenets of natural justice. In particular, there is an implied duty to act fairly, to allow the athlete to make representations against the charges and to ensure that the panel deciding the case is not biased.

The U.K., unlike the U.S., does not have a constitution affording specific rights of due process. Rights may be implied in contract or may be based on common law. The U.K. courts have been willing to intervene in the interests of natural justice in some cases, and in others they have not been willing to do so, as the national and international governing bodies of sport are private bodies and are therefore entitled to make their own rules, which are bound in contract rather than public law. The crucial recurring question in the case law is whether the legal relationship between athletes and governing bodies is governed by private law or public law. The question is crucial because it determines on what basis an athlete can challenge a governing body's decision and what the legal remedies may be.

The following brief examination of some U.K. cases illustrates that where there is an issue of public policy or procedural fairness, the courts may intervene, but in all other cases, they will defer discipline and control to the governing bodies of the sport. The courts have decided that governing bodies are regulated mainly by private law, and therefore will not be able to invoke public law remedies such as judicial review.

[30] *See* BERRY & WONG, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES 36 (1984).

II. CASE LAW

A. Wright v. The Jockey Club[31]

The plaintiff was a professional jockey. The defendant refused to grant him a license on medical grounds. The plaintiff sought damages for loss of earnings, arguing that the defendant had breached its duty of care in carrying out its licensing functions. The claim was dismissed. The court held that the defendant was a domestic tribunal, and the only term implied by law was a duty to act fairly. They confirmed that this aspect of fairness involved a number of aspects: "First that the Committee should act in good faith. . . . Secondly fairness involved informing the plaintiff of the nature of the material or grounds on which the application might be refused and thirdly giving him the opportunity to answer those matters."

On the facts of this particular case, the court found that the defendant had not acted unfairly.

B. Jones v. Welsh Rugby Union[32]

The plaintiff was a rugby union player sent off for fighting during a game. He was suspended for four weeks by Welsh Rugby Union's disciplinary committee pending appeal. He had not been given the opportunity to make representations at the disciplinary hearing. The committee had viewed a video in private. The plaintiff had not been able to comment on the video evidence, or to present his own evidence and questions. The court held that this was a procedural defect, which had rendered the proceedings unfair. They granted an injunction lifting the suspension and allowing the plaintiff to play pending the hearing of an appeal against the committee's decision.

[31] Jockey Club Licensing Comm. ex parte Wright (Q.B. 1991).
[32] Times Mar. 1997 (Q.B. 1997); Times Jan. 1998 (C.A. 1998).

C. Currie v. Barton[33]

An amateur tennis player sought to have a ban preventing him from playing for the county overturned because he had not been present at the hearing at which the ban had been imposed. The application was dismissed as the court held that the County Tennis Association was an unincorporated association and the plaintiff did not have a contractual relationship with it.

D. Gasser v. Stinson[34]

The plaintiff was an amateur athlete who was suspended for two years from competitions held under rules of the International Amateur Athletics Federation (hereinafter "IAAF") for testing positive for drugs. She claimed the test was not in accordance with IAAF rules, and that the rules relating to bans amounted to unreasonable restraint of trade. The court held that the rules were not unreasonable, and that the plaintiff was bound by the result of the drugs test and the IAAF rules.

E. Wilander v. Tobin[35]

The plaintiffs were international tennis players who faced disciplinary proceedings on the charge of having taken banned drugs. They brought proceedings alleging that the disciplinary proceedings were void as being an unreasonable restraint of trade as they had no right to be heard or adduce evidence in their defence until the appeal hearing. The court rejected the argument that the disciplinary proceedings were void in unreasonable restraint of trade.

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[33] Times Feb. 1988 (C.A. 1988).
[34] Unreported decision, 1998.
[35] 1 Lloyd's Rep. 195 (Ch. D. 1996); *aff'd*, 2 Lloyd's Rep. 293 (C.A. 1997).

F. Edwards v. British Athletic Federation[36]

The plaintiff was an athlete who had been banned for four years after testing positive for anabolic steroids. The IAAF later refused to remit the last two years of his ban. He claimed this was discriminatory under European Community Law, as remission had been granted to athletes from other European Economic Area (hereinafter "EEA") countries where their domestic laws limited bans to two years. The court held that rules relating to drug control rules in sport are not subject to Community Law, as they are exclusively sporting rules.

G. Modahl v. British Athletic Federation, Ltd. (hereinafter "BAF")[37]

Modahl is probably the most famous case in the U.K. relating to a positive drug test. Modahl was suspended after a positive drug test. At her first disciplinary hearing, the suspension was upheld, but later an appeal panel allowed her appeal. She then commenced proceedings for damages alleging that the disciplinary committee had not acted in a bona fide manner, and had been biased against her.

In lengthy and protracted litigation, the case was finally decided in the Queen's Bench Division in December 2000. The court found that because there was no contract between the claimant, Modahl, and the defendant, BAF, there was no basis upon which she could argue that there was an implied term that disciplinary proceedings against her would be conducted fairly. However, upon considering the facts of the case the court found that the allegations of bias were unfounded, and that the BAF had acted impartially.

[36] 2 C.M.L.R. 363 (Ch. D. 1997).
[37] 2000 WL 33201389 (Q.B. 2000), *aff'd*, 2001 WL 1135166 (C.A. 2001).

III. DOES THE CAS / AD HOC DIVISION MEET THESE LEGAL NORMS?

A. The Rule against Bias

From its inception, the CAS was seen as an IOC tool, and its impartiality was always under question. This was discussed in the case of *Gundel v. International Equestrian Federation (FEI)*[38] in 1993, which confirmed that the CAS was an arbitral court with the ability to pronounce final and enforceable awards, and that recourse to the Swiss courts would be on very narrow issues of procedural impropriety or misdirection in law. While finding in principle that CAS decisions could not be challenged, the Court expressed concerns that the CAS was a creation of the IOC, that the IOC had the power to choose CAS members, and that the CAS did not have separate legal and financial personality.[39]

Responding to these criticisms, the CAS underwent several reforms to attain independence from the IOC.[40] In June 1994, the International Council Of Arbitration for Sport (hereinafter "ICAS") was founded.[41] The ICAS's function is to safeguard the arbitration process and the financial independence of the CAS.[42] It therefore oversees all the administration and financing of the CAS and ensures its autonomy.[43]

An important change was that the power to select Arbitrators and the Panel was taken from the IOC and placed with the ICAS. CAS

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[38] Gundel v. FEI/CAS I Civil Court, ATF 15th March 1993.

[39] For a more detailed discussion of *Gundel*, *see* Jan Paulsson, *Arbitration of International Sports Disputes*, 9 ARB. INT'L 359 (1993).

[40] Stephen A. Kaufman, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527 (1995):

> In response to continuing criticisms regarding the CAS's lack of independence, the IOC and the thirty-two international federations it oversees, agreed to establish the ICAS on June 22, 1994 . . . the ICAS's primary duties include ensuring the absolute independence of the CAS from the IOC, and protecting the rights of the parties appearing before the CAS.

[41] *Id.*

[42] *See id.*

[43] *Id.* ("[T]he ICAS completely manages and administers the finances of the CAS, which includes approving the budget and annual accounts.").

Arbitrators are now chosen by the IOC, IFs, NOCs and by the ICAS from independent individuals.[44] Selections are made in accordance with Sections 13 to 19 of the Code.[45]

B. The Rule for Fairness

With these reforms the CAS has improved its credibility, but with regards to the Ad Hoc Division, the main issue is the fairness of the imposition of a mandatory arbitration clause for Olympic Athletes. As Bitting explains:

> For many Olympic caliber athletes, training and competing in their chosen sport is their job—their means of supporting themselves and their families. As a result, any contract agreement between the athlete/employee and governing officials/employer should be subject to standard contract analysis.[46]

In contract law, a contract may be void, voidable or unenforceable for various reasons. In relation to the Ad Hoc Division, let us consider some of the key issues:

> 1. Unequal Bargaining Power[47]—an athlete has no choice but to sign. For many athletes, competing in the Olympics is their highest goal. They train endlessly to be selected and to be afforded the opportunity to compete. The

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[44] *Id.*:

> The ICAS selects the arbitrators as follows: 20 arbitrators proposed by the IOC, 20 arbitrators proposed by the IFs, 20 arbitrators proposed by the NOCs, 20 arbitrators chosen after appropriate consultations with a view to safeguarding the interests of the athletes, [and] 20 arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.

[45] For a more detailed discussion about the composition of the CAS, *see* Jose Marxuach, *The Court of Arbitration for Sport*, WORLD ARB. & MEDIATION REPORT (March 1999).

[46] Bitting, *supra* note 27, at 664.

[47] *See* Daniel Gides, Comment, *Judicial Postponement of Death Recognition: The Tragic Case of Mary O'Connor*, 15 AM. J. L. & MED. 301, 318 n.112 (1989) (noting that courts have often been willing to void contracts under concepts such as unequal bargaining power and public policy).

tournament is only held every four years, and in some cases if an athlete misses the Games, they may pass their peak in the intervening four-year period. With all these pressures, an athlete signs the entry form. If they do not sign then they simply cannot become an Olympian.

2. Clause Violates Public Policy[48]—does it invoke notions of morality and justice? In English law, any contractual attempt to oust the jurisdiction of the courts would be unconstitutional and void for public policy grounds. A body may refer a case for arbitration, but they cannot prevent court access that can only be done through statute. The athlete entry form for the Sydney Games contains a clause waiving the right to litigate. Would a domestic court uphold this?

3. Unconscionability[49]—Does the clause unfairly favour the organisation imposing the agreement, and is there an absence of meaningful choice for the athlete?

4. Undue Influence/Adhesion[50]—Was the standard contract drafted and imposed by the party holding the superior bargaining power? In English law the principle "contra proferentum" will apply, whereby if there is any ambiguity in the contract, a court will hold that the contract benefits the athlete rather than the IOC.

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[48] *See id.*

[49] *See*, *e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (holding a contract should be unenforceable if any element is unconscionable when the contract is formed and defining unconscionability as including an absence of a meaningful choice on the part of one party where the contract terms are favourable to the other party); *see also* UCC § 2-302 (declaring that a court may refuse to enforce a contract which it finds to be unconscionable when made).

[50] *See generally* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 634 (4th ed.) ("In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object.").

> 5. Duress[51]—has there been an imposition of improper pressure or threat to the athlete, so that they have no choice but to sign the agreement?
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> 6. Capacity[52]—Many of the athletes competing are under eighteen. Are they able to enter into a valid contract signing away their litigation rights?
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> 7. Restraint of Trade[53]—Can the Ad Hoc Division rule to have binding mandatory arbitration be viewed as an unreasonable restraint of trade, and therefore contrary to public policy and voidable? The common law doctrine of restraint of trade in U.K. law has intervened in cases to protect an individual against an unreasonable restraint of trade upon their right to work even though they may have bargained that right away. Can that same doctrine work to protect an athlete's right to compete, if indeed such a right exists?

Each case will be considered on its own facts, but from this brief note we can see that sports bodies would also be bound by the legal norms of contract law and common law. Many of the issues above could be raised in a claim against the Ad Hoc Division. Perhaps the strongest claim would be one which argues the doctrine of restraint of trade. In the U.K., case law has established that individual

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[51] *Id.* at 632 ("Duress consists of unlawful confinement of another's person, or relatives, or property, which causes him to consent to transaction through fear."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

[52] There is a general rule that minors do not have the capacity to enter into contracts. *See generally* Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992) (describing the common law "infancy doctrine," which was enacted to protect minors from contracts entered into based on their lack of judgment).

[53] *See* Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703 (1985) (citing Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 802 (1949) ("While it is the general rule that a contract in general restraint of trade is void, a contract only in partial restraint may be upheld.")).

athletes may challenge the rules of a governing body even though there may be no contractual relationship.[54]

It has also been established that an athlete need not be a professional to bring a restraint of trade claim.[55] The most difficult aspect of such a restraint of trade claim would be to successfully establish that the rules were unreasonable. The IOC would counter argue that such rules are necessary for the expedient and efficient resolution of disputes, and that in the interests of their sports event, they are necessary and reasonable. They may also state that their rules are purely sporting and do not affect the trade or employment of athletes.

U.S. courts have recognised "arbitration is simply a matter of contract between the parties."[56] "When the parties agree to have disputes settled by an arbitrator, they also agree to accept the arbitrator's view of the facts and of the meaning of the contract."[57] However, an arbitrator is still bound by due process, and an arbitration award can be vacated where the losing party was "not given a meaningful opportunity to be heard."[58] To meet this due process standard, the arbitrator must hold a fundamentally fair hearing, which is described as "one that meets the minimal requirements of fairness—adequate notice, a hearing of the evidence and an impartial decision by the arbitrator."[59] It is important to note the "minimal requirement" is merely a floor below which the due process rights of the parties must not fall. The focus of American jurisprudence in analysing arbitration is that it is voluntary, and it is thus a choice made by the parties during arm's length negotiations. This runs counter to the experience of the Olympic athlete who, in order to participate, must sign an agreement to arbitrate any dispute and be bound by the result. This is not a choice without consequence, as Judge Cudahy of the Seventh Circuit recently wrote,

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[54] *See* Eastham v. Newcastle United Football Club Ltd., 3 W.L.R. 574 (Ch. D. 1963); Greig v. Insole, 1 W.L.R. 302 (Ch. D. 1978).
[55] *See supra* note 34 and accompanying text.
[56] *See, e.g.*, Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1129 (7th Cir. 1997) (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).
[57] *Generica*, 125 F.3d at 1129.
[58] *Id.* at 1130.
[59] *Id.*

> A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter. . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.[60]

Parties attempting to resolve their disputes through arbitration "should not expect the same procedures they would find in the judicial arena."[61] This includes the fact that arbitrators are not bound by the rules of evidence.[62]

The U.S. courts will likely defer to the choice to arbitrate any claims. The courts have been willing to defer to the Amateur Sports Act,[63] which grants exclusive jurisdiction to the USOC over all matters pertaining to the United States participation in the Olympic Games. Ultimately, decisions of eligibility fall within the exclusive jurisdiction of the USOC. As Judge Posner recently opined, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games."[64] Clearly the U.S. courts will defer to the USOC for eligibility decisions, and will only become involved where grave due process violations occur.

C. European Law

Article 7 of the European Anti-Doping Convention of 1989 provides that there should be a clear and enforceable provision to appeal any judgement made, and that appeal should be heard with

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[60] Dean v. Sullivan, 118 F.3d 1170, 1173 (7th Cir. 1997).
[61] Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 592 (7th Cir. 2001).
[62] *Generica*, 125 F.3d at 1130.
[63] 36 U.S.C. § 380 (2001).
[64] Michels v. United States Olympic Comm., 741 F.2d 155, 159 (Ill. 1984) (Posner, J., concurring).

regard to the principles of natural justice.[65]

Decisions of the Ad Hoc Division are final and binding. In the case of *Wilander v. Tobin*[66] the court considered the application of Article 7 in relation to appeals. Justice Lightman stated:

> This (as it seems to me) means that the suspected sportsman is entitled to two hearings, namely a hearing at first instance and a hearing on appeal from an adverse decision at first instance. . . . In the light of the terms of the 1989 Convention and the recognition of this fundamental right, I think that there is a serious question whether a disciplinary procedure such as r53, making no provision for an appeal, is materially deficient and unfair and whether r53 is accordingly, on this ground, in unreasonable restraint of trade.[67]

Although this was overturned by the court of appeals, in European law, an athlete could formulate similar arguments and bring a claim against the mandatory binding arbitration of the Ad Hoc Division, as it clearly imposes that its awards are final and cannot be challenged.

In the U.K., the Human Rights Act 1998 came into force on October 2, 2000.[68] This Act takes the principal rights contained in the European Convention on Human Rights and sets them up as a screen through which all domestic legislation and acts of public authorities must be viewed. It is a constitutional development, which affords to U.K. citizens the protections of the European Convention on Human Rights.[69] It means that if a dispute arises, the U.K. national may bring a claim in the domestic courts rather than having to take a claim to the European Court of Human Rights. In the

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[65] For full text of the European Anti-Doping Convention of 1989, *see* Anti-doping Convention, *at* http://culture.coe.fr/Infocentre/txt/eng/econ135.htm (last visited Jan. 23, 2002).

[66] 1 Lloyd's Rep. 195 (Ch. D. 1996); *aff'd*, 2 Lloyd's Rep. 293 (C.A. 1997).

[67] *Id.*

[68] Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1244 n.4 ("The Human Rights Act became effective in England on October 2, 2000, and adopted the European Code of Human Rights as domestic law.").

[69] *Id.*

context of this discussion, we are concerned with Article 6, which grants the right to a fair trial. Article 6 essentially provides that in determining a person's civil rights, everyone is entitled to a fair, public hearing within a reasonable time by an independent impartial tribunal.[70]

This was intended specifically for criminal trials, but it also extends to any dispute that concerns civil rights and obligations. The Convention Rights may apply to sports governing bodies if they are acting as public authorities, or if their decisions are such that they affect the rights of individuals to engage in commercial activity. In any event, as Lloyd states, "[t]he Courts are likely to consider the Convention rights set out in Article 6 as yardsticks of fair conduct by a disciplinary tribunal in the same way as they have taken into account the rules of natural justice."[71]

Under European Law, the Treaty of Rome affords fundamental rights,[72] which are relevant in international sports law. These include: Article 39 (previously 48), freedom of movement for workers; Articles 43 and 49 (previously 52 and 59), freedom of establishment and freedom to provide services for workers; and Articles 81 and 82 (previously 85 and 86), competition—prohibition of practices, which prevent, restrict or distort competition and prohibition of the abuse of a dominant position.[73]

These Treaty rights will apply to the practice of sport if it constitutes an economic activity within the EEA. The rules of governing bodies will not be subject to Treaty rights if they are not

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[70] To view the full text of the European Convention on Human Rights, *see* the European Court of Human Rights, *at* http://www.echr.coe.int/Eng/BasicTexts.htm (last visited Jan. 23, 2002).

[71] *See* Lloyd, *Sports Disciplinary Proceedings and the Human Rights Act*, 8 SPORT & THE L.J. 61 (2000).

[72] *See* Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and Ad Hoc Compromise*, 18 BERKELEY J. INT'L L. 1, 47 (2000) (noting that although the Treaty of Rome did not explicitly confer fundamental rights, the Court in Stauder v. City of Ulm, 1969 E.C.R. 419, 425, "stated unambiguously that such rights formed an integral part of the general principles of law whose observance it protect.").

[73] To view the full text of the Treaty of Rome, *see* http://www.cerebalaw.com/rome.htm (last visited Jan. 23, 2002).

economic, and are merely of sporting interest. The courts will intervene to put a stop to restrictive practices that have a significant economic impact and that cannot be justified as a rule inherent in the sport or a rule necessary for the organisation of sport or sporting competitions.[74]

A decision of the Ad Hoc Division may have an adverse economic impact on the professional career or livelihood of an athlete. The athlete may lose the ability to enter into lucrative sponsorship and endorsement contracts or worse, have existing contracts terminated for breach. Following previous European case law, this factor would mean that such a claim would be actionable.

European law may therefore be used in an action claiming that an athlete should not be bound by binding mandatory arbitration, as it breaches the athlete's Treaty rights. While the IOC is definitely in a dominant position, it may be difficult to show that the clause imposing the Ad Hoc Division arbitration infringes competition rules, and has the effect of distorting or restricting interstate trade competition. Arguments alleging breach of competition rights have been made in previous sports cases, but European courts have not made any conclusive pronouncements to confirm that the Treaty rights will apply in sporting situations to individual athletes.[75] It may therefore be more appropriate for an athlete to rely on arguments claiming restraint of trade and subsequent breach of Articles 43 and 49.

IV. AUSTRALIAN CASE

No Ad Hoc Division has been challenged in a domestic court, but a recent claim to the Australian domestic courts found that the arbitration agreement signed by the athlete had a valid exclusion clause (waiver of athletes right to litigate), and therefore the

[74] *See* Case 36/74, Walrave & Koch v. Union Cycliste Int'l, 1974 E.C.R. 1405; Case 13/76, Dona v. Montero, 1976 E.C.R. 1333; Case 415/93, Union Royale Belge des Societes de Football Ass'n v. Bosman, 1995 E.C.R. I-4921; Case C-51/96, Deliege v. Ligue Francophone de Judo et Disciplines Associees, 2000 E.C.R. I-2549.

[75] *See Bosman*, 1995 E.C.R. I-4921.

supreme court did not have jurisdiction to hear the case.

> The contract read in part that the seat of arbitration is Lausanne, Switzerland and that the hearing will take place in Sydney. The unqualified choice of Lausanne as the seat of all CAS arbitration within the scope of the arbitration agreement meant that the agreement did provide for arbitration in a country other than Australia. Accordingly this was not a domestic arbitration agreement and an appeal of the CAS award could not be made to an Australian court of law.[76]

This case merely reaffirms the principles of the New York Convention, and that the basis for a successful challenge of a CAS award has to be some procedural impropriety or some issue of public policy.

In the U.S., the recent case of Mary Decker Slaney also confirmed that in accordance with the New York Convention, a domestic court will not relitigate issues decided by arbitration unless there is a valid defence under the Convention that bars enforcement of the award. The case further held that if an athlete wishes to claim they did not agree to arbitration, or they were not a party to the arbitration, then such claim needs to be made before the arbitration hearing.[77]

This would be an important point to bear in mind if an athlete wished to bring a claim against a decision of the Ad Hoc Division. An athlete may be able to counter this by arguing that due to the urgency and time constraints involved in an Olympic dispute, it was

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[76] *See A Challenge to the Olympics Case Decided by CAS*, WORLD ARB. & MEDIATION REPORT (Nov. 2000).

[77] In *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 591 (7th Cir. 2001), the court noted:

> Our judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received. Slaney had the opportunity to show that she had never agreed to arbitrate the dispute when she was notified of the arbitration, but she let that opportunity pass. Slaney could not sit back and allow the arbitration to go forward, and only after it was done . . . say: oh by the way we never agreed to the arbitration clause.

virtually impossible to have pursued a court hearing before the Ad Hoc Division hearing. As we have remarked above, in Olympic disputes speed is of the essence.

The approach of the IOC has been to ensure that the CAS is the only body involved in resolving sports disputes at the Olympics. Juan Antonio Samaranch stated:

> I am certain that the aim is for sports bodies to keep control over the organization and holding of contests and therefore over the settlement of disputes concerning the practice of sport, primarily because the application of game rules and disciplinary regulations is by and large bound to be beyond an ordinary judge.[78]

Although it is not a governmental body, the IOC wields such international power that any allegations of injustice on public policy grounds would be difficult. However, a claim using contract law may succeed on the basis that the athlete has no choice and therefore has unequal bargaining power, and/or that the clause imposing binding mandatory arbitration is in restraint of trade.

In Atlanta, 197 nations competed in 271 events with a total of 10,744 athletes. Six cases were submitted to the Ad Hoc Division, two of which were consolidated. In Nagano, eighty nations competed in sixty-eight events with 2,302 athletes, but only five cases were submitted to the Ad Hoc Division, two were consolidated, so only four cases were heard. A closer study of one of these cases appears below. In Sydney, fifteen cases were brought, but one was withdrawn shortly before the hearing, so fourteen cases were heard. To date there have been no court cases against the awards of the Ad Hoc Division.

[78] *See* Kaufman, *supra* note 40, at 549; *see also* Juan Antonio Samaranch, Opening Speech by the President of the IOC at the International Conference on Law and Sport, Sept. 13-14, 1993, reprinted in INTERNATIONAL CONFERENCE ON LAW AND SPORT 141 (1993).

V. NAGANO CASE STUDY

Snowboarding was first introduced as an Olympic Sport in Nagano in 1998. On Sunday February 8, 1998, Canadian snowboarder Ross Rebagliati won the Gold Medal in the Men's Giant Slalom. On the morning of February 11, 1998, the IOC Executive Board upon recommendation of the IOC Medical Commission voted to disqualify Rebagliati after he tested positive for marijuana.[79]

The Canadian Olympic Association (hereinafter "COA") appealed on Rebagliati's behalf to the Ad Hoc Division.[80] Rebagliati argued that the last time he had used marijuana was in April of 1997, but that he spends a significant amount of time in an environment with marijuana users, and believed he had inhaled second-hand marijuana smoke.[81] In particular, he attended a going-away party in his hometown on January 20 and 31, shortly before travelling to Nagano for the Games.

The COA prepared a defence on this basis, gathering data on second-hand marijuana smoke and its effects, and the level of the drug that might feasibly show up in a urine specimen following such secondary inhalation. Medical Advisers confirmed that the smoking of a marijuana cigarette would result in a concentration of approximately 400 nanograms per millilitre in a urine sample. Rebagliati's sample only had a concentration of 17.8, but the International Ski Federation (hereinafter "FIS") regulations stated action should be taken against any athlete with a concentration above 15.[82]

All these arguments were unnecessary, as it turned out that on a technicality the IOC had no power to disqualify Rebagliati anyway! Under the IOC's Medical Code, a sanction can only be imposed on

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[79] *See* The Mountain Zone, Olympics '98, *Rebagliati Wins Back His Gold*, Feb. 12, 1998 (reporting the events surrounding the Rebagliati controversy), *at* http://classic.mountainzone.com/olympics/nagano/up2-12a.html (last visited Feb. 8, 2002).
[80] *Id.*
[81] *Id.*
[82] *Id.*

an athlete if there is an agreement between the respective sports federation and the IOC to test for marijuana.[83]

The sports federation in this instance was FIS, and they had no agreement with the IOC to ban marijuana use for competitors. FIS gave evidence to the Ad Hoc Division that it did not request doping control officers to test for marijuana and that it had not specifically, in its rules, forbidden the use of marijuana.

On the evening of February 11, 1998, the Ad Hoc Division issued its decision, which quashed the IOC disqualification ruling. They found that the IOC had no legal authority to strip the medal, as there was no agreement between them and FIS to ban marijuana. The decision was final and binding on all parties, and Rebagliati was told that he would face no further sanctions or penalties whatsoever for testing positive for marijuana. He was completely exonerated by the decision, and his medal and good name were restored.[84]

Following this decision, the IOC Medical Commission amended the Anti-Doping Code so that testing for marijuana will be conducted at the Olympic Games regardless of IF consent.

CONCLUSION

The quick resolution of disputes at Games time is crucial. The Ad Hoc Division of CAS is a perfect medium through which to achieve this. As we have seen in the case of Rebagliati, the process of appeal was dealt with rapidly, efficiently and it produced a favourable result for the athlete. Lawyers Kaufmann-Kohler[85] and Beloff[86] have both written of the speed, efficiency and impartiality of the Ad Hoc

[83] Ch. 11, Art. III, ¶ B of the IOC Medical Code, as in force February 1998 ("In agreement with the International Sports Federations and responsible authorities tests may be conducted for cannabinoids (marijuana hashish). The results may lead to sanctions.").
[84] CAS OG 98/002, reported in DIGEST OF CAS AWARDS 1986-1998 (M. Reeb ed.).
[85] *See* Gabrielle Kaufmann-Kohler, *Arbitration and the Games—Or The First Experience of the Olympic Division of the CAS*, MEALEY'S INT'L ARB. REPORTS (Feb. 1997).
[86] *See* Michael Beloff, *The Court of Arbitration for Sport at the Olympics*, SPORTS & L.J. OF THE BRITISH ASS'N FOR SPORT & THE LAW (1998).

Division, but they are both members of the CAS who have sat on Ad Hoc Division panels.

While to date there have been no challenges to an Ad Hoc Division decision, it would be interesting to see how a domestic court would react to an athlete's claims of public policy, unequal bargaining power and restraint of trade as we have discussed above. These appeals are always controversial, and there is always a huge stake involved for the athlete. Consequently, questions regarding the impartiality and independence of the CAS continue to arise. Despite this, the Ad Hoc Division does have several key factors in its favour: 1) it is more neutral than arbitration by the governing bodies of sport; 2) the composition of the panel makes it better qualified in the subject area than the state judiciary; 3) there is speedy resolution—litigation is lengthy; 4) there is no cost involved—litigation is expensive; 5) confidentiality; 6) there is some flexibility in proceedings, not bound by rigid court rules of procedure and evidence; 7) a court judgement, even though favourable, may be difficult to enforce; and 8) domestic courts may not have the jurisdiction to hear the case, particularly if the sports governing body is based in another country.

In any event, to ensure that the hearings at the Games are processed swiftly and in accordance with the tenets of natural justice, the authors would concur with Raber[87] on certain points, and would add several additional suggestions for the Ad Hoc Division, including: 1) publication of CAS decisions; 2) provide for cross examination of witnesses; 3) ensure a diversity of backgrounds in arbitrators; 4) allow more liberal discovery; 5) ensure that athletes are fully informed of their rights and the implications of an arbitration agreement before signing; and 6) to assist the appeal process they should ensure the following are ready and easily accessible for the athletes: a) standard forms; b) a list of scientific experts; c) a list of lawyers specialising in sports law; d) interpreters; e) stenotypists; f) legal research resources; and g) appropriate hearing and meeting rooms.

[87] *See* Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORTS L. 75 (1998).

Domestic courts may not be willing to challenge CAS decisions unless there is some issue of procedural fairness or public policy. If the decision does invoke some question on one of these two issues, then we can be sure that athletes are no longer afraid of pursuing court actions and they will do so. As Nafziger stated:

> The growth of relatively informal methods for resolving disputes in the sports arena has coincided with what might seem to be a contradictory trend, though still weak, toward adjudication of what formerly were nonjusticiable controversies. The proliferation of terminal arbitration clauses and improved methods of nonadjudicatory resolution of disputes have not inhibited litigation. Instead, athletes and their clubs have become somewhat more litigious—perhaps because courts have become more receptive to claims of due process and human rights.[88]

If the arbitration process at the Games is to succeed in warding off such actions, it must comply with legal norms from outside sport, in particular the norms of natural justice and human rights.

A further positive development in the Olympic Movement has been the creation of the World Anti-Doping Agency (hereinafter "WADA"). In its mission statement, WADA promotes the harmonisation of rules, disciplinary procedures, sanctions and other means of combating doping in sport.[89] The majority of cases heard before the Ad Hoc Division relate to doping offences, and therefore the work of WADA is crucial in helping to strengthen the athletes confidence in the doping process and any subsequent appeal to the Ad Hoc Division.

For the Sydney Games, WADA created an Office of the Independent Observer who has since produced a report of its

[88] James Nafziger, *supra* note 7.

[89] *See* WADA Mission Statement (stating in relevant part, "[t]he mission of the Agency shall be to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport and contribute to the unification thereof taking into account the rights of athletes."), *available at* http://www.wada-ama.org (last visited Jan. 23, 2002).

observations. In relation to the Ad Hoc Division it stated:

> The role of the CAS is to ensure that the appropriate regulations (in this case, those of the IOC and the IFs) notably those in the Olympic Movement Anti-Doping Code, have been observed and that the principles of due process and natural justice have been followed pursuant to the rules established for CAS. On the basis of the one hearing that we attended, we are content that the processes followed in and by the CAS are proper and satisfactory.[90]

While WADA is also subject to queries regarding its impartiality and independence, the authors believe that athletes can welcome the inclusion of this watchdog in the Ad Hoc Division process as a further indication that the CAS is working towards creating a fair appeals process that is transparent and entirely independent. It must continue working toward this aim if it is to successfully and consistently win the confidence of the athletes it seeks to serve.

Another interesting recent development has been the inclusion of a CAS mediation process. CAS published its mediation rules in May 1999, but to date has not carried out any sports mediation. Mediation has the benefit of being an informal, consensual negotiation to try and reach a settlement. It is usually a quick, cost-effective method for resolving disputes.[91]

In the Olympic Games mediation may not be suitable. One commentator, Christopher Newmark, explains that mediation is inappropriate in disputes relating to disciplinary or doping sanctions.[92] An athlete should not be free to negotiate a settlement to avoid sanctions. The CAS mediation rules thus specifically exclude

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[90] WADA Independent Observer Report, Olympic Games, Sydney, Australia, *at* http://www.wada-ama.org (last visited Jan. 23, 2002).

[91] *See* Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 309 n.50 (1999) (citing from Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., Nov.15, 1999, at A1 (noting a recent NLJ/AAA survey finding that "80% of litigators believe mediation saves time and money.")).

[92] *See* Christopher Newmark, *Is Mediation Effective for Resolving Sports Disputes?*, INT'L SPORTS L.J. (May 2001).

disciplinary and doping disputes from the mediation process.[93]

A further reason why mediation may not work in the Ad Hoc Division context is the sheer weight of the decisions and their consequences. Which athlete would willingly enter into negotiations and then agree to compromise and give up his medal? Or give up his "chance in a lifetime" to compete in the Olympics? In such situations, only the formal authority and pronunciation of a court would be effective.

Newmark goes on to discuss the case of *Lewis v. World Boxing Council* (hereinafter "WBC") *and Bruno*.[94] What is interesting is that the English courts upheld the WBC's rules for compulsory mediation in the U.S. The judge decided this even though the WBC was one of the parties to the action and, as Lewis pointed out, it would not be impartial. The Judge was influenced by the fact that the WBC rules did not deny Lewis access to a court if the mediation did not resolve the matter.[95]

The Ad Hoc Division rules and the entry form for athletes try to prevent court access, and it remains to be seen how the U.S. courts or the English courts will deal with this if a claim against the Ad Hoc Division comes before them.

In any event, it seems highly unlikely that a mediation process will be introduced for the Ad Hoc Division. For the time being, Olympians have to agree to the compulsory arbitration process of the Ad Hoc Division, but it may only be a matter of time before the compelling nature of this process is brought before the courts in a claim for breach of natural justice and/or breach of human rights. The next Winter Olympic Games will be held in Salt Lake City, Utah, U.S., in February 2002. This will be the largest Winter Games in history, with an estimated 3,500 athletes and officials from eighty countries expected to attend and participate. Will this be the stage for a future court action? The U.S. has the reputation of being the

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[93] For a complete copy of the CAS Mediation Rules, *see* http://www.tas-cas.org/english/mediation/fraMediation.asp (last visited Jan. 23, 2002).

[94] 914 F. Supp. 1121 (D.N.J. 1996)

[95] *See* Newmark, *supra* note 92.

most litigious country in the world,[96] so it is highly probable that if an athlete were to bring an action for breach of due process or natural justice, such claim would arise here! Watch this space as the Games and their aftermath unfold.

[96] David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 29 (1995) ("The rest of the world regards the United States as the most litigious society ever.").