

Chapter 2

Introductory Remarks

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The Court of Arbitration for Sport, based in Lausanne, Switzerland, was the ‘brain child’ of the late and long-time former President of the International Olympic Committee, Juan Antonio Samaranch. It was established in 1983 with the object of settling sports disputes “within the family of sport” and began to function in 1984.¹ Since then, the CAS has developed into, what Samaranch—always a visionary—had in mind, a ‘Supreme Court of World Sport’.

Over the years, sport has become a global business accounting for more than 3% of world trade; and, in the European Union, sport now represents more than 2% of the combined GNP of the twenty-seven Member States. It is not surprising, therefore, with such a rise in the value of the sports industry and related sports rights, not least sports broadcasting rights,² that there has been a phenomenal rise in

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¹ On the organisation and activities of the CAS, see Blackshaw 2006.

² See Blackshaw 2009a.

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the number of sports disputes. There is often more to play for off than on the field of play! In line with Samaranch's aims, many of these disputes have been submitted to the CAS for settlement—either by arbitration or by mediation³ under the corresponding express provisions in sports contracts of various kinds, including commercial ones, or regulations of international sports governing bodies or on an *ad hoc*—case by case—basis.⁴ The CAS also offers non-binding Advisory Opinions under its Consultation Procedure.⁵ A useful procedure in appropriate cases.

Also, it may be noted, *en passant*, that a party may apply to the CAS for the interpretation of an Award issued in an Ordinary or Appeals Arbitration:

whenever the operative part of the award is unclear, incomplete, ambiguous or whenever its components are self-contradictory or contrary to the reasons, or whenever the award contains clerical mistakes or a miscalculation of figures.⁶

The Panel must rule on the request for interpretation within one month.⁷ Again, this is a useful procedure in practice.

Furthermore, during the Summer and Winter Games, the CAS operates a so-called Ad Hoc Division (AHD) to deal expeditiously and without charging any fee with disputes arising during the Games. The CAS AHD has been continuously in operation since the Centennial Summer Games held in Atlanta in 1996 and has worked well, particularly as many sports disputes are time sensitive and subject to tight sporting deadlines.

The CAS is governed by the International Council of Arbitration for Sport (ICAS), whose main function is to safeguard the independence of the CAS and the rights of the parties appearing before it (see below). The ICAS is also responsible for the CAS finances. For a complete list of the functions of ICAS, see Article S56 of the CAS Code of Sports-related Arbitration 2010.

Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of *stare decisis* (binding legal precedent),⁸ in the interests of comity and legal certainty, they usually do so.⁹ As a result of this practice, a very useful body of sports law—a so-called *Lex Sportiva*—is steadily being built up.¹⁰

³ At the time of writing (August 2010), there are some 300 CAS Arbitrators and some 65 CAS Mediators.

⁴ On Alternative Dispute Resolution of Sports Disputes in general and, the settlement of them, in particular, through the CAS, see Blackshaw 2009b.

⁵ See, for example, Advisory Opinion CAS 2003/C/445, Canadian Olympic Committee, 24 April, 2003, rendered by Ian S. Blackshaw.

⁶ Article R63, para 1, CAS Code of Sports-related Arbitration, 2010.

⁷ *Ibid.*, para 2.

⁸ See *UCI v J. TNCB*, CAS 97/176 Award of 28 August 1998, 14.

⁹ As an exception, which proves the rule, see Dabscheck 2010.

¹⁰ See further on this, Nafziger 2001, 57; Nafziger 2004, 48–61, and Blackshaw 2006. See also Blackshaw 2002.

However, one of the difficulties faced by the CAS in its desire to develop a *Lex Sportiva* and provide some degree of legal certainty and consistency stems from the fact that, generally speaking, CAS proceedings and decisions are a matter of private law and confidential to the parties. CAS by its nature is a private arbitral body. And therein lies the paradox—the need, on the one hand, of the sporting community ‘not to wash its dirty sports linen in public’; and, on the other hand, the need of a wider public to know how cases are being decided, including details of the evidence adduced to the CAS, particularly for future guidance and reference. As regards the confidentiality of CAS Ordinary Proceedings, Article R43 of the CAS Code of Sports-related Arbitration 2010 provides as follows:

Proceedings under these procedural rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings.

However, the last sentence of this Article provides the following exceptions to the general rule of confidentiality:

Awards shall not be made public unless all parties agree or the Division President so decides.

However, as regards the confidentiality of CAS Appeal Proceedings, Article R59 of the CAS Code of Sports-related Arbitration 2010 provides in para 5 as follows:

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential.

Thus, in CAS Appeal cases, the emphasis is more on publication of the Awards and less on confidentiality, unless both parties agree otherwise, and, therefore, in this particular respect, this provision goes some way towards encouraging the development of a *Lex Sportiva* (see below).

In practice, more CAS Awards are being published,¹¹ especially on the CAS official web site.¹² In fact, the CAS itself is interested in developing a *Lex Sportiva* as the following extract at page xxx from Volume II of the CAS Digest of Awards makes clear:

The ‘Digest of CAS Awards 1986-1998’ recorded the emergence of a *lex sportiva* through the judicial decisions of the CAS. It is true that one of the interests of this court is to develop a jurisprudence that can be used as a reference by all the actors of world sport, thereby encouraging the harmonisation of the judicial rules and principles applied within the sports world.

Furthermore, as the work of the CAS continues to expand and becomes more widely known and discussed, especially in press reports and articles, the need for

¹¹ The Secretary General of CAS, Matthieu Reeb, has edited and published three Digests of several CAS cases covering the periods 1986–1998; 1998–2000; and 2001–2003. A further volume in the series is expected shortly.

¹² ‘www.tas-cas.org’. The CAS official web site under the title ‘Jurisprudence’ contains a new section, entitled, ‘Archive’, which, at the time of writing (August 2010) is still under development. Once this section is fully ‘live’, it will be interesting to see how comprehensive it is and what it covers.

such publicity also increases, especially in football cases where substantial sums of money are often in contention. In fact, a ‘public interest’ argument comes into play and needs to be satisfied in appropriate cases.¹³ But, in this context, it should be remembered that what interests the public is not necessarily the same as what is in the public interest!¹⁴

The CAS operates generally under Swiss Law having its ‘seat’ in Lausanne.¹⁵ Awards of CAS can be legally challenged before the Swiss Federal Supreme Court, which is also based in Lausanne. However, the grounds for appeal are limited under the provisions of Article 190(2) of the Swiss Federal Code on the Private International Law of 18 December, 1987.¹⁶ In practice, the right to a fair hearing (ground (d)) is perhaps the most important ground and the CAS bends over backwards in each case to ensure that the parties are given every opportunity of presenting their case and being heard and also receiving a fair hearing.¹⁷ In practice, there have been few legal challenges to CAS awards. In the latest fundamental challenge in 2003 concerning the independence of the CAS, in view of its association with and partial funding by the IOC, the Swiss Federal Supreme Court held that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC — as in that particular case — was a party in its proceedings.¹⁸ The Court further included the following ringing endorsement of the CAS in its Judgment:

The CAS is growing rapidly and continuing to develop. An important new step in its development was recently taken at the World Conference on Doping in Sport, held

¹³ See, for example, the Decision in the *Gaia Bassani* case (CAS 2003/O/468), where the author of these Introductory Remarks was the Sole Arbitrator and, because of the particular circumstances of the case and the need for a wider audience to know about the case and its outcome, directed that the Decision be published.

¹⁴ On this point, see the discussion in the English case of *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417.

¹⁵ See the Australian case of *Angela Raguz v. Rebecca Sullivan & Ors*, 2000 NSECA 240; CAS Digest II, p. 783—CAS Awards Sydney 2000, p. 185, in which case it was held that the CAS Award could only be challenged in a Swiss Court under Swiss Law.

¹⁶ The grounds are as follows:

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

¹⁷ See the Judgment of 22 March, 2007 in the *ATP Tour Appeal* case brought before the Swiss Federal Supreme Court against a CAS Award of 23 May, 2006 - Reference 4P 172/2006.

¹⁸ See Judgment of 27 May, 2003 of the First Civil Division of the Swiss Federal Tribunal in the case of *A. & B. v International Olympic Committee and International Ski Federation* (4P.267/2002; 4P.268/2002; 4P.269/2002; and 4P.270/2002).

in Copenhagen at the beginning of March 2003. This Conference adopted the World Anti-Doping Code as the basis for the worldwide fight against doping in sport. Many States, including China Russia and the United States of America, have adopted the Copenhagen Declaration on Anti-Doping in Sport. Under the terms of Art. 13.2.1 of the new Code, the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes. This is a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC. This new mark of recognition from the international community shows that the CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve sports-related disputes quickly and inexpensively. Having gradually built up the trust of the sporting world, this institution which is now widely recognised remains one of the principal mainstays of organised sport.¹⁹

Awards made by the CAS, like other international arbitral awards, are legally enforceable generally in accordance with the rules of Private International Law, and also specifically under the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958.²⁰ The CAS is also recognised under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.

Since FIFA, the world governing body of football, agreed to use the CAS as a final court of appeal for football disputes in 2002, the workload of the CAS has increased dramatically year after year and continues to do so, not least in relation to international transfer disputes coming up for review *de novo* (a complete review of the facts and the law) by the CAS from the FIFA Dispute Resolution Chamber (DRC).²¹ Such appeals must be filed with the CAS within 21 days of the date of notification of the DRC Decision. Indeed, the CAS has established a list of arbitrators who are specialised in football matters.²²

In this book—the first of its kind—the Editor, Alexander Wild, has assembled a number of high profile football CAS cases with commentaries on them—provided, in many of these cases, by the lawyers involved in them. As such, this not only lends insight into the actual cases themselves, but also adds to the authoritativeness of this work.

One final point, which is particularly important in relation to football disputes, the CAS has wide powers to order so-called ‘provisional or conservatory measures’ including suspension of sporting sanctions pending the outcome of an appeal to the CAS in which those measures are legally challenged by the party affected by them.²³ This happened on 6 November 2009 in the appeal by Chelsea Football Club to CAS over a transfer ban imposed on the Club by the FIFA DRC

¹⁹ Ibid. at para 3.3.3.3.

²⁰ The majority of countries around the world have ratified this Convention; in the case of enforcing CAS Awards in those countries that have not ratified the Convention, the legal process of ‘*exequatur*’ must be followed, which involves a full review of the case by the judicial authorities of the country concerned.

²¹ See De Weger (2009).

²² See www.tas-cas.org and follow the links to CAS Arbitrators.

²³ Article R.37, CAS Code of Sports-related Arbitration, 2010.

in the *Gael Kakuta* case, in which the CAS lifted the ban pending the outcome of the appeal. In fact, the dispute was subsequently settled amicably by an agreed payment of compensation by Chelsea to Kakuta's former football club Lens FC and the CAS 'ratified' the settlement agreement reached by the parties.²⁴

Football is not only the world's favourite sport but also its most lucrative one and, as this book demonstrates, football disputes provide a rich seam to be worked by sports lawyers, who, together with sports administrators and other interested parties, including sports marketers and corporate sponsors, need to be fully briefed on the subject of 'CAS and Football'.

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Since 1986, CAS jurisprudence has been published in the volumes of the *Digest of CAS Awards*, edited by the CAS Secretary General Matthieu Reeb (*Recueil des sentences du TAS/Digest of CAS Awards 1986-1998, II—1998-2000; III—2001-2003; Edité par/Edited by Matthieu Reeb, Staempfli Editions SA Berne (1998: I)/Kluwer Law International (1998-2000/2001-2003: II/III)*), which cover the period 1986–2003. For the full text of the recent CAS Awards—also including those commented upon in this book—see www.tas-cas.org and the CAS Newsletter (since June 2004).

²⁴ See www.soccernet.espn.go.com/news/story?id=694773&cc=5739