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Right Balance”

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James Merryweather

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List of Abbreviations

ADR – Alternative Dispute Resolution

AIOWF – Association of the Winter Olympic International Federations

ANOC – Association of the National Olympic Committees

ASOIF – Association of Summer Olympic International Federations

CAS – Court of Arbitration for Sport

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ICAS – International Council of Arbitration for Sport

ICC – International Chamber of Commerce International Court of Arbitration

IF – International Federation

IOC – International Olympic Committee

ISU – International Skating Union

NOC – National Olympic Committee

SGB – Sports Governing Body

Abstract – English

In 2018, the speed-skater, Ms Claudia Pechstein, challenged the operations of the CAS all the way to the European Court of Human Rights. The case, even before arriving in Strasbourg, was widely considered to have the makings of a ‘landmark case,’ the most significant examination of the Court of Arbitration for Sport since the early-2000s. What *Pechstein* revealed, was the appearance of a lack of independence, a lack of impartiality, and a system of dispute resolution which seemed to stack the deck against athletes. In the years following the case, the CAS was reformed five times, yet in none of those reforms, were any of the deficiencies identified in the complaint of Ms Pechstein rectified. This Thesis therefore sets out to analyse the compelling reasons for rectifying such issues, before ultimately concluding with suggestions for how this should be done.

The suggestions for reform to the ICAS Statutes include: amending the structure of ICAS to have independent members in the majority; appointing the President of the Appeals Division from within the independent and revised structure of ICAS; as well as adopting an open list of arbitrators, but as a bare minimum, increasing the transparency of the current one. Furthermore, it is also suggested that the CAS should publish all decisions, unless it can be proven that a party will suffer undue hardship or harm. The final suggestion for reform is that a system of precedent should be adopted as well.

Abstract – Deutsch

Die Eisschnellläuferin Claudia Pechstein hat die Tätigkeit des Internationalen Sportgerichtshofs angefochten und ging dabei im Jahr 2018 bis zum Europäischen Gerichtshof für Menschenrechte. Noch bevor der Fall Straßburg erreichte, galt er bereits weithin als "richtungsweisender Fall" und als die bedeutendste Untersuchung des Sportschiedsgerichts seit den frühen 2000er Jahren. Was Pechstein aufdeckte, war der Anschein mangelnder Unabhängigkeit, mangelnder Unparteilichkeit und ein Streitbeilegungssystem, das Sportlerinnen und Sportler zu benachteiligen schien. Der Internationale Sportgerichtshof wurde aus Anlass der Causa Pechstein zwar fünfmal reformiert, doch bei keiner dieser Reformen wurde einer der in der Beschwerde von Frau Pechstein festgestellten Mängel behoben. In dieser Arbeit werden daher die Gründe für die Notwendigkeit der Behebung der aufgezeigten Mängel analysiert, bevor abschließend Vorschläge gemacht werden, wie diese umgesetzt werden könnten.

Zu den Vorschlägen für eine Reform der ICAS-Statuten zählen: die Änderung der Struktur des ICAS hinsichtlich der mehrheitlichen Ernennung von unabhängigen Mitgliedern, die Ernennung der Präsidentin bzw. des Präsidenten der Berufungskammer aus den Reihen der geänderten, unabhängigen Mitgliederstruktur des ICAS; sowie die Einführung einer offenen Liste von Schiedsrichterinnen und Schiedsrichtern, zumindest jedoch die Erhöhung der Transparenz der derzeit vorhandenen Liste. Darüber hinaus wird vorgeschlagen, dass alle Entscheidungen des Internationalen Schiedsgerichtshofes veröffentlicht werden, sofern im Einzelfall nicht nachgewiesen werden kann, dass eine Partei durch die Veröffentlichung eine unangemessene Härte oder einen Schaden erleiden würde. Der letzte Reformvorschlag stellt die Einführung eines Präzedenzfallsystems dar.

Introduction

In 2018, Ms Claudia Pechstein challenged the operations of the CAS all the way to the European Court of Human Rights.¹ The case, even before arriving in Strasbourg, was widely considered to have the makings of a ‘landmark case’, the most significant examination of the Court of Arbitration for Sport since the early-2000s. What *Pechstein* revealed, was the appearance of a lack of independence, a lack of impartiality, and a system of dispute resolution which seemed to stack the deck against athletes. In spite of this, the majority of the ECtHR, only found a violation of substantive human rights, on the ground that Ms Pechstein was denied a public hearing.

This result was deeply unsatisfactory to many, and the aftermath generated significant commentary surrounding the organisational structure of the CAS, as well as its inner workings. The vast majority of this commentary was focussed on the issues raised by Ms Pechstein, as well as the reforms which would be necessary to either mitigate or eradicate such concerns going forward. In the time since *Pechstein*, the CAS has revised its Code of Sports-related Arbitration five times: in 2019, 2020, 2021, 2022, and most recently, in 2023. Thus, the average user of CAS might rightfully assume that all concerns raised by Ms Pechstein have been resolved, that the institution decided to reform its structure to make sure that the system is “bulletproof for when the next shot is fired.”² This Thesis sets out to examine that assumption.

To do so, the history of the CAS will be explained, detailing the initial concerns that surrounded its inception, and the resolution to them. Following on from this, the principle of consent will be examined, both in the context of international commercial arbitration, and international sports arbitration. The purpose behind doing so is to establish the necessary safeguards which the CAS must possess in order to be compatible with the European Convention on Human Rights. This Thesis then details the dominant interests in the current iteration of sports arbitration, as well as the interests which ought to be represented more. Finally, the current problems in the Code of Sports-related Arbitration are examined, and the Thesis concludes by advancing suggestions for reform to address such concerns.

¹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018).

² Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 96.

Chapter 1: The History of the Court of Arbitration for Sport and its Role in Resolving Sports Disputes

1.1 Introduction

The Court of Arbitration Sport, founded in 1984, is considered to be “one of the principal mainstays of organised sports.”³ Whilst this may be the position of the CAS now, the mainstream acceptance and legitimacy which it enjoys has only been achieved via a process of constant reform and evolution. To explain how the CAS established itself as the “supreme court of world sports,”⁴ whilst simultaneously contextualising the analysis detailed later in this Thesis, this Chapter will outline the key historical developments which have given it, its status.

1.2 The Historical Development of the CAS

1.2.1 The Formation of the CAS

The 1980’s marked a significant growth in the world of professional sports, and with the growth of sports, also comes the growth of sports related disputes. As a consequence, just two years into H.E. Juan Antonio Samaranch’s Presidency of the IOC (President from 1980 – 2001), he set out to determine “the possibility of creating an arbitration court, a kind of Hague Court in the sports world.”⁵ Following this, H.E. Judge Kéba Mbaye chaired the IOC Juridical Commission in charge of preparing the statutes for what would later become the CAS.⁶ The Commission’s proposal for the first statutes of the CAS were officially ratified in 1983 by the IOC, and they subsequently entered into force on 30 June 1984.⁷

1.2.2 The CAS until 1994

When the CAS was initially founded, it was comprised of sixty members appointed by the International Olympic Committee, the International Federations, the National Olympic Committees, and the IOC President.⁸ Each body was responsible for appointing fifteen

³ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

⁴ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

⁵ Juan Antonio Samaranch, ‘Speech delivered by Mr. Juan Antonio Samaranch IOC President. (85th IOC Session)’ (1982) 176 Olympic Review 314-318, p. 317.

⁶ Court of Arbitration for Sport, ‘History of the CAS’ <<https://www.tas-cas.org/en/general-information/history-of-the-cas.html>> accessed 06 May 2023.

⁷ Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015), para. 1.01.

⁸ Court of Arbitration for Sport, ‘History of the CAS’ <<https://www.tas-cas.org/en/general-information/history-of-the-cas.html>> accessed 06 May 2023.

members each, but the President of the IOC had to appoint its fifteen members from outside of the aforementioned groups.⁹ The CAS continued to develop and in 1991, it published its first Guide to Arbitration.¹⁰ This guide contained several model arbitration clauses with one such clause designed to be included in the statutes or regulations of sports federations or clubs. These clauses are now widely incorporated.¹¹

The first sports federation to adopt this clause was the International Equestrian Federation, and the federation's adoption of this clause, also led to one of the first proceedings before the CAS. Whilst the facts of the proceedings are not relevant, what is noteworthy is that the applicant, Elmar Gundel, challenged the resulting CAS award on appeal at the Swiss Federal Tribunal.¹² This case is particularly important as it provided the first external, critical evaluation of the CAS and its operations. The Swiss Federal Tribunal held two distinctive points regarding the formative CAS. Firstly, the Tribunal determined that the CAS was to be considered as a true court of arbitration,¹³ but whilst it acknowledged this fact, arguably the more crucial point it observed was that the CAS appeared to be dependent on the International Olympic Committee. The Tribunal held that, "certain objections to the independence of the CAS cannot be dismissed without further ado, in particular those based on the organic and economic links existing between the CAS and the IOC. In fact, the latter is competent to modify the Statute of the CAS; it also bears the operating costs of this tribunal and plays a considerable role in the appointment of its members."¹⁴ The links that the Tribunal enunciated led it to conclude that, whilst such concerns did not deny the CAS the status of a true arbitral tribunal, it would nevertheless "be desirable to ensure greater independence of the CAS with regard to the IOC."¹⁵ The CAS therefore was handed its first reform recommendation, and duly acted upon it.

⁹ Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015), para. 1.02.

¹⁰ Court of Arbitration for Sport, 'History of the CAS' <<https://www.tas-cas.org/en/general-information/history-of-the-cas.html>> accessed 06 May 2023.

¹¹ Michael Geistlinger & Cornelia Hofmeister, 'International Sports Arbitration as Entrustment of State Authority to a Body of an International Non-Governmental Organization Using the Example of the Court of Arbitration for Sport' (2012) 2 YB on Int'l Arb 309 – 316, p. 311.

¹² *Elmar Gundel v. Fédération Equestre Internationale, Tribunal Arbitral du Sport* BGE 119 II 271.

¹³ *Elmar Gundel v. Fédération Equestre Internationale, Tribunal Arbitral du Sport* BGE 119 II 271, S. 279.

¹⁴ *Elmar Gundel v. Fédération Equestre Internationale, Tribunal Arbitral du Sport* BGE 119 II 271, S. 280.

¹⁵ *Elmar Gundel v. Fédération Equestre Internationale, Tribunal Arbitral du Sport* BGE 119 II 271, S. 280.

1.2.2 The CAS Reform post-Gundel

Following the critical observations of the Swiss Federal Tribunal in *Gundel*, the CAS set about becoming more independent from the IOC. The primary way of achieving this was via the implementation of the Agreement concerning the constitution of the International Council of Arbitration for Sport,¹⁶ also known as the Paris Agreement. This agreement created the International Council of Arbitration for Sport, or ICAS, in 1994 and ICAS then took over the IOC's role of overseeing the operations of the CAS.¹⁷ Formally, ICAS is the governing body of the CAS, but its primary responsibility is to “safeguard the independence of the CAS and the rights of the parties.”¹⁸ It accomplishes this by looking after the administration and financing of the CAS.¹⁹

The 2023 Code of Sports-related Arbitration provides that ICAS is composed of twenty-two members.²⁰ These members are appointed as follows: six members are appointed by the International Sports Federations (five by the Association of Summer Olympic International Federations and one by the Association of Winter Olympic International Federations); four members are appointed by the Association of the National Olympic Committees; four members are appointed by the IOC; four members are appointed by the fourteen members of ICAS detailed previously, after appropriate consultation with a view to safeguarding the interests of the athletes; and finally, four members are appointed by the eighteen other members of ICAS, chosen from among personalities independent of the bodies designating the other members of the ICAS.²¹ A point which will be revisited later, is that only four members (out of twenty-two) are appointed to safeguard the interests of athletes. As such, whilst sixty three percent of ICAS have been appointed by an International Sports Federation or Governing Body, only eighteen percent are appointed to be specifically concerned with athlete's rights. It is true, however, that each individual appointed to ICAS must “sign a declaration undertaking to exercise their

¹⁶ Agreement concerning the constitution of the International Council of Arbitration for Sport 1994.

¹⁷ Court of Arbitration for Sport, ‘History of the CAS’ <<https://www.tas-cas.org/en/general-information/history-of-the-cas.html>> accessed 06 May 2023.

¹⁸ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section A S2.

¹⁹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section A S2.

²⁰ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

²¹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

function personally, with total objectivity and independence,”²² but, as will be explained later, an organisation structured in this way, does not present such an appearance.

The composition of ICAS is of particular importance considering the range of competences which it possesses. As detailed in S6 of the Code of Sports-related Arbitration, ICAS is competent to: adopt and amend the Code of Sports-related Arbitration;²³ appoint (and remove) arbitrators on the CAS list;²⁴ resolve challenges to arbitrations and subsequently remove them;²⁵ finance the CAS;²⁶ and to determine the legal aid budget and criteria.²⁷ ICAS can delegate certain functions to the ICAS President, three Vice-Presidents, or the Presidents of the two appeal divisions (positions which ICAS all appoints),²⁸ however, it cannot delegate the amendment of the Code of Sports-related Arbitration, the appointment of the aforementioned Presidents, nor the approval of the budget and the preparation of financial statements (which are required under Swiss law). As a consequence, ICAS ultimately yields substantial influence over the conduct of sports related arbitration.

1.3 Conclusion

The CAS, since its inception, has undoubtedly undergone major reforms. This is no more clearly illustrated than the founding of ICAS, a reform which represents a departure from the model of the CAS where the IOC ultimately possessed clearly decisive influence. Nevertheless, based on the membership of ICAS, and the competences which it exercises, certain questions remain about whether ICAS marks a legitimate improvement in the independence of the CAS from its users. This core tension will be evaluated and critiqued by reference to the safeguards which must be provided to any users of alternative dispute resolution, as well as the interests of both sides to a sports dispute (i.e., the interests of sport governing bodies and athletes).

²² CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S5.

²³ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (1).

²⁴ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (4).

²⁵ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (5).

²⁶ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (6).

²⁷ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (9).

²⁸ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2. S6 (2).

Chapter 2: Consent in International Sports Arbitration

2.1 Introduction

Every major human rights convention, or statutory provision, provides for the right of access to an independent and impartial tribunal.²⁹ In most instances, this provides that any individual has the right of access to a court, but increasingly, alternative methods of dispute resolution are replacing the work of such courts. Consequently, given the rise of such alternatives, the courts have been left with the responsibility to provide the conditions for when the right of access to them can be validly waived. Primarily, this is only when individuals have freely consented to an alternative method,³⁰ but even with consent, ADR must also still possess appropriate safeguards.³¹ This Chapter will therefore outline the safeguards which exist under Article 6 of the European Convention on Human Rights, before then explaining the principle of consent in international commercial arbitration. Finally, the criteria for a valid waiver of Article 6, as well as the safeguards needed if this is not the case, will be analysed.

2.2 The Protections of Article 6 ECHR

The safeguards, afforded by Article 6, are the starting point of analysing the tension between athletes and sport governing bodies at the CAS. This is because it sets the minimum standards which the CAS must comply with. Article 6 specifically provides that, “in the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”³² The rights and obligations contained within Article 6 are, however, only a general starting point for the protections which should be afforded in civil cases. This section will therefore seek to analyse the various safeguards which must be contained within the mechanisms of civil dispute

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950, Article 6(1); Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, Article 47; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Article 10.

³⁰ *Suda v. the Czech Republic*, App. no. 1643/06 (ECtHR, 28 October 2010), para. 49.

³¹ *Pfeifer and Plankl v. Austria*, App. no. 10802/84 (ECtHR, 25 February 1992), para. 37.

³² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950, Article 6(1).

resolution. It should be noted prior to such analysis that, despite being initially controversial,³³ the case law of the ECtHR does have binding effect on the considerations of the CAS.³⁴

The ECtHR has repeatedly held, in its case law, that Article 6 of the Convention guarantees everyone the right of access to a court.³⁵ Nevertheless, this right constitutes only one aspect of the protection which Article 6 affords applicants.³⁶ This is because the wording of Article 6 is such that it guarantees access to a “tribunal”, which “may be a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees.”³⁷ Consequently, the court’s case law enables arbitral tribunals, such as the CAS, to exist under this definition. Further to this point, the court has also held that where arbitration has “undeniable advantages for the individual concerned as well as for the administration of justice,”³⁸ then it will not violate the Convention.

The starting point of establishing whether a ‘tribunal’ offers the appropriate guarantees is broad, yet the court has established a series of more precisely defined criteria to ensure compliance with Article 6. Firstly, “a “tribunal” is characterised ... by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner.”³⁹ Secondly, a tribunal must be authoritative in any judgments, or the equivalent thereof, that it renders. The ECtHR has held in this regard that, “the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a “tribunal”.”⁴⁰ The reason for this is that this power is a component of the independence of the tribunal,⁴¹ one of the other key requirements of establishing its validity.⁴² Thirdly, impartiality,⁴³ alongside independence, are undoubtedly two of the most important criteria of a valid tribunal and as such, where a

³³ Ulrich Haas, ‘Role and application of article 6 of the European Convention on Human Rights in CAS procedures’ (2012) 3 I.S.L.R. 43 – 60, p. 43; Michael Geistlinger & Stephen Gappmaier, ‘Some Thoughts on the Role of the European Convention on Human Rights in the Jurisprudence of the Court of Arbitration for Sport’ (2013) 3 YB on Int’l Arb 307 – 314, p. 312.

³⁴ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 59.

³⁵ *Golder v. the United Kingdom*, App. no. 4451/70 (ECtHR, 21 February 1975), para. 36.

³⁶ *Lupeni Greek Catholic Parish and Others v. Romania [GC]*, App. no. 76943/11 (ECtHR, 29 November 2016), para. 84.

³⁷ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 94.

³⁸ *Tabbane v. Switzerland (dec.)*, App. no. 41069/12 (ECtHR, 1 March 2016), para. 25.

³⁹ *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18 (ECtHR, 1 December 2020), para. 219.

⁴⁰ *Van De Hurk v. The Netherlands*, App. no. 16034/90 (ECtHR, 19 April 1994), para. 45.

⁴¹ *Van De Hurk v. The Netherlands*, App. no. 16034/90 (ECtHR, 19 April 1994), para. 45.

⁴² *Le Compte, Van Leuven and De Meyere v. Belgium*, App. nos. 6878/75 and 7238/75 (ECtHR, 23 June 1981), para. 55.

⁴³ *Cyprus v. Turkey*, App. no. 25781/94 (ECtHR, 10 May 2001), para. 233.

tribunal is unable to meet such requirements, then it cannot be considered as valid.⁴⁴ The final criterion is that any judges which serve on a tribunal, have to be selected on the basis of merit. To be appointed on merit, individuals must “fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law.”⁴⁵

As with all human rights, Article 6 does not grant absolute protection, however. The court has determined that limitations to Article 6 are permitted by implication as “the right of access by its very nature calls for regulation by the State.”⁴⁶ Furthermore, Contracting States to the ECHR also enjoy a margin of appreciation when carrying out such regulation.⁴⁷ Despite this, State’s must still observe certain protections when determining the right of access. Any limitation has to pursue a legitimate aim,⁴⁸ whilst also possessing a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”⁴⁹ Even if such steps are carried out, with all the relevant principles borne in mind, the court ultimately remains the final arbiter on the compliance of any regulation with Article 6.⁵⁰

Article 6 therefore provides a series of minimum safeguards to any procedure which concerns civil rights and obligations. One of the most important principles, which impacts the safeguards in alternative resolution of disputes especially, is the principle of consent. Whilst access to the national courts of a country is compulsory,⁵¹ alternative dispute resolution is typically freely consented to due to its comparative advantages. What consent looks like in practice, as well as its impact on the above-mentioned safeguards, will be subsequently detailed.

2.3 Consent in International Commercial Arbitration

Consent is the principled bedrock on which the entire structure of international commercial arbitration rests. So much so, some authors view consent as “indispensable to any process of

⁴⁴ *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18 (ECtHR, 1 December 2020), para. 231.

⁴⁵ *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18 (ECtHR, 1 December 2020), para. 220.

⁴⁶ *Osman v. the United Kingdom*, App. no. 23452/94 (ECtHR, 28 October 1998), para. 147.

⁴⁷ *Zubac v. Croatia*, App. no. 40160/12 (ECtHR, 5 April 2018), para. 107 – 109.

⁴⁸ *Lupeni Greek Catholic Parish and Others v. Romania [GC]*, App. no. 76943/11 (ECtHR, 29 November 2016), para. 89.

⁴⁹ *Cordova v. Italy (No. 1)*, App. no. 40877/98 (ECtHR, 30 January 2003), para. 54.

⁵⁰ *Lupeni Greek Catholic Parish and Others v. Romania [GC]*, App. no. 76943/11 (ECtHR, 29 November 2016), para. 89.

⁵¹ Bernhard Berger & Franz L. Ellerhals, *International and Domestic Arbitration in Switzerland* (2nd Ed. Sweet & Maxwell 2010), p. 3.

dispute resolution outside national courts.”⁵² This is because the principle of party autonomy is the salient feature of international arbitration, and it also most prominently distinguishes the process from that of state court litigation. As such, “the jurisdiction of the arbitral tribunal rests solely upon the parties' wills, whereas any State court, even if the forum was selected by the parties, derives its territorial and subject-matter jurisdiction from national and international legal norms.”⁵³ Consequently, the existence of arbitration, as well as its legitimacy, is contingent upon the consent of the parties to engage in an alternative dispute resolution process.

Whilst the principle of consent is fundamental to the arbitral process, the demonstration of that consent is valued no less highly. There is a growing liberalisation of the way in which parties express their consent to arbitration, nevertheless, the predominant means still remains the inclusion of an arbitration clause in the contract. The form of consent may be inconsequential to the intent of the parties to arbitrate, however, in many jurisdictions, it will fundamentally impact the validity of that consent.⁵⁴ As such, the contract, in which the arbitration clause is contained, remains to be an important document. This is because the validity of the arbitration agreement is often only recognised as a result of the recognition that the parties are free to contract as they intend. Importantly, this freedom to contract encapsulates two key themes:⁵⁵ namely that contracts are based on mutual agreement, but also that the creation of a contract is the result of a free choice.⁵⁶ Consequently, in the context of international commercial arbitration, the validity of arbitration requires both consent, and freely given consent. The case law of the European Court of Human Rights also concurs with this scholarship and prescribes the criteria for ascertaining the validity of recourse to arbitration.

2.4 Impact of Consent on Article 6

2.4.1 Voluntary Consent

As the court has detailed the various safeguards which are afforded to individuals under Article 6, and as consent has been established as a fundamental component of international arbitration, the question exists as to what extent consent impacts, or even removes, some or all of the

⁵² Andrea M. Steingruber, *Consent in International Arbitration* (OUP 2012), para. 1.05.

⁵³ Bernhard Berger & Franz L. Ellerhals, *International and Domestic Arbitration in Switzerland* (2nd Ed. Sweet & Maxwell 2010), p. 3.

⁵⁴ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd Ed. CUP 2017), p. 21.

⁵⁵ Andrea M. Steingruber, *Consent in International Arbitration* (OUP 2012), para. 2.05.

⁵⁶ Andrea M. Steingruber, *Consent in International Arbitration* (OUP 2012), para. 2.05.

aforementioned protections. In the first instance though, it is necessary to delineate between consent when given freely, and when it is compelled.

The starting point for considering the impact of Article 6 on methods of ADR, is that when consent has been voluntarily given, then no real issues arise.⁵⁷ The ECtHR has repeatedly held that parties are free to take any dispute emanating from a contract to any other body, besides an ordinary court of law.⁵⁸ Nevertheless, in order to waive the rights conferred by Article 6, recourse to ADR needs to be established in a “free, lawful, and unequivocal manner.”⁵⁹ In the vast majority of cases concerning commercial contracts, such criteria are frequently satisfied.

For example, in the case of *Tabbane*,⁶⁰ a Tunisian businessman conducted business with the company Colgate. In this case, the ECtHR concluded that the businessman entered into an arbitration agreement, and as such, had “expressly and freely waived the possibility of submitting any disputes which could potentially arise in the future to an ordinary court which would have offered him all the guarantees of Article 6 of the Convention.”⁶¹ Moreover, the ECtHR also held that there was no indication of duress, and consequently, upheld the validity of the arbitration clause. As a second example, the case of *Eiffage S.A. and Others* concerned a group of civil engineering companies.⁶² This group launched a legal challenge to the arbitration clause contained within a contract that they had concluded with the European Council for Nuclear Research (CERN), after responding to a call for tender. The ECtHR held, however, that as the group freely entered into such a contract with CERN, then there was no issue from an Article 6 perspective.

The key reason for the ECtHR’s case law on this issue was that the individuals, and companies concerned, were “free to establish commercial relations with the partners of their choosing without affecting their freedom and capacity to engage, with other partners, in projects within their respective fields of activity.”⁶³ The court further elaborated in the case of *Eiffage S.A* that, “it is difficult to believe that the company Eiffage, which is very active in the sector of civil engineering but also in that of private housing, would be obliged to accept arbitration clauses

⁵⁷ *Suda v. the Czech Republic*, App. no. 1643/06 (ECtHR, 28 October 2010), para. 49.

⁵⁸ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 96.

⁵⁹ *Suda v. the Czech Republic*, App. no. 1643/06 (ECtHR, 28 October 2010), para. 49.

⁶⁰ *Tabbane v. Switzerland (dec.)*, App. no. 41069/12 (ECtHR, 1 March 2016).

⁶¹ *Tabbane v. Switzerland (dec.)*, App. no. 41069/12 (ECtHR, 1 March 2016), para. 29.

⁶² *Eiffage S.A and Others v. Switzerland*, App. no. 1742/05 (ECtHR, 15 September 2009).

⁶³ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 107.

in order to exist as a construction company.”⁶⁴ Consequently, it has been repeatedly held that where individual’s possess the liberty to choose contracts, and where they exercise that liberty to conclude contracts with an arbitration clause (or other means of ADR), then there is no encroachment of Article 6.

The court has provided one final criterion for waiving the safeguards of Article 6 via consent. This is namely that, “a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.”⁶⁵ As such, a waiver cannot merely eradicate any and all safeguards that would otherwise exist. Instead, any alternative procedure adopted must nevertheless contain mechanisms designed to ensure procedural fairness and equality between the parties.

2.4.2 Compulsory Consent

Contrary to the legal situation presented under voluntary arbitration, compulsory arbitration invokes entirely different considerations. This is because, firstly, it must be established whether arbitration is compulsory in each specific situation, and secondly, what protections are warranted under the circumstances if it is. Whilst the applicable legal provisions governing freely given consent predominantly applies to commercial arbitration, compulsory arbitration has become a key concern in sports arbitration, following the landmark *Pechstein* case. The ECtHR’s analysis in this case will therefore be used to determine the relevant principles governing compulsory arbitration.

The *Pechstein* case involved a professional speed skater, Ms Claudia Pechstein, who received a two-year ban, with retroactive effect, from the International Skating Union for a doping violation.⁶⁶ This ban was appealed to the CAS, who subsequently upheld it,⁶⁷ and Ms Pechstein then challenged the CAS before the Swiss Federal Tribunal.⁶⁸ The Federal Tribunal rejected Ms Pechstein’s appeal,⁶⁹ however, and as a consequence, she brought proceedings before the ECtHR.

The ECtHR began its analysis by identifying that the ISU’s Regulations mandated the compulsory and exclusive jurisdiction of the CAS for the following examples of disputes:

⁶⁴ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 107.

⁶⁵ *Pfeifer and Plankl v. Austria*, App. no. 10802/84 (ECtHR, 25 February 1992), para. 37.

⁶⁶ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 19.

⁶⁷ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 20 – 21.

⁶⁸ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 22.

⁶⁹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 23.

disputes arising out of the participation of ISU Competitions, Championships, or other activities, as well as disciplinary decisions, suspensions or penalties, and any eligibility issues.⁷⁰ The Swiss Government also did not dispute that Ms Pechstein had to accept the arbitration clauses in order to take part in ISU Competitions.⁷¹ This situation, as described, is not an uncommon one in the realm of sports disputes though. The Swiss Federal Tribunal has previously held that, “experience shows that, most of the time, a sportsperson will not have free rein in his or her dealings with the federation and will be required to submit ... to its desires. Thus an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause ... He or she will be confronted with the following dilemma: to agree to arbitration or practise his or sport in a non-professional context.”⁷²

Following the ECtHR’s analysis in *Pechstein*, as well as the general observations that the Swiss Federal Tribunal made, the question exists as to whether, in cases of sports arbitration, there has been a valid waiver of the safeguards of Article 6. As detailed above, a waiver can only be considered legitimate when it is given in a “free, lawful, and unequivocal manner.”⁷³ Against these criteria, the ECtHR proceeded to observe that in *Pechstein*, there was a complete lack of choice. This is the key point of difference between *Pechstein*, and other cases surrounding the validity of arbitration clauses (for example, in commercial contracts). Whilst the court remarked that in commercial situations, such as those found in *Tabbane* and *Eiffage S.A. and Others*, the businessmen and companies concerned could merely elect to contract with a company who did not choose arbitration, the same is not true for athletes. The only choice available to athletes is “between accepting the arbitration clause and thus earning [their] living by practising [their] sport professionally, or not accepting it and being obliged to refrain completely from earning a living from [their] sport at that level.”⁷⁴

In light of the previously detailed criteria on consent, and the application of that criteria to *Pechstein* and other athletes alike, the ECtHR concluded that, given the detriment an athlete would suffer by not accepting the arbitration clause, arbitration was not consented to freely and

⁷⁰ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 50.

⁷¹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 85.

⁷² *X v. ATP Tour et Tribunal Arbitral du Sport* BGE 133 III 235, p. 243.

⁷³ *Suda v. the Czech Republic*, App. no. 1643/06 (ECtHR, 28 October 2010), para. 49.

⁷⁴ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 113.

unequivocally.⁷⁵ Consequently, it was determined that such situations should be viewed as compulsory arbitration, and given this classification, it has been determined that the protections enshrined under Article 6 are applicable. What this means for athletes participating in such proceedings is that the CAS has to afford everyone a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁷⁶ The extent to which it successfully achieves this will be analysed later.

2.5 Conclusion

The principle of consent in international arbitration is a fundamental part of the arbitral process. This is particularly true when considering that it is the most demonstrative example of a valid waiver of the protections which Article 6 affords. As Article 6 provides that everyone has the right to a fair hearing, conducted by an independent and impartial tribunal, the waiver of such a right cannot be taken lightly. As a result, the court will only recognise a waiver where it is a free, lawful, and unequivocal decision. The imposition of this high threshold creates a unique tension in the area of sports arbitration as, in most cases, the criteria for a waiver is not met, yet arbitration is still nevertheless permissible. Whilst this situation is compatible with the Convention when adequate safeguards exist, it is advanced that the safeguards provided by the CAS are not uncontroversial, and hence there are also other prevailing reasons which dictate the current system of dispute resolution in sport.

⁷⁵ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 114 – 115.

⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950, Article 6(1).

Chapter 3: The Balance of Competing Interests in International Sports Arbitration

3.1 Introduction

“[R]easons of sporting necessity require a[n] ... international system of alternative dispute resolution,”⁷⁷ is the reality observed by Nick De Marco KC when evaluating why the system of sports dispute resolution is as it is. Nevertheless, what is very much clear within the legal scholarship on dispute resolution in international sport, is that the current status quo is not an uncontroversial one. As has been previously detailed, compulsory sports arbitration is a very real reality, and so there is undoubtedly a tension between “the benefits related to single international Arbitration such as harmonized standards and rapid decisions,”⁷⁸ on the one hand, and human rights on the other.⁷⁹ In other words, the tension at the crux of international sports dispute resolution is how key interests (such as efficiency, quality, and enforceability), can successfully co-exist with other interests (such as independence, impartiality, and transparency). Consequently, this Chapter will outline, firstly, what the prevailing interests are in international sports dispute resolution currently, before demonstrating what other, alternative interests, exist in this sphere.

3.2 What are the Prevailing Interests in International Sports Dispute Resolution?

3.2.1 Efficiency

The core justification for compulsory arbitration, particularly in its current iteration, is the efficiency with which it is able to resolve disputes.⁸⁰ Whilst there is no empirical, nor objective quantification of the efficiency which justifies CAS arbitration, the speed of its dispute resolution can be evaluated by comparison to the next best alternative.⁸¹ In this case, the realistic alternative options are commercial arbitration institutions, or state court litigation. Both options, however, can be comfortably considered to be less efficient than the CAS. This

⁷⁷ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 6.

⁷⁸ Bundesgerichtshof, ‘Schadensersatzklage von Claudia Pechstein vor den deutschen Gerichten unzulässig’ Nr. 097/2016.

⁷⁹ John G. Ruggie, “‘FOR THE GAME. FOR THE WORLD’ Fifa and Human Rights,’ Corporate Responsibility Initiative Report No 68. (Harvard Kennedy School 2016), p. 26.

⁸⁰ Antonio Rigozzi and Fabrice Robert-Tissot, “‘Consent’ in Sports Arbitration: Its Multiple Aspects’ (2015) Sports Arbitration: A Coach for Other Players? - ASA Special Series No. 41, Ch. 4 55 – 94, p. 68.

⁸¹ Antonio Rigozzi and Fabrice Robert-Tissot, “‘Consent’ in Sports Arbitration: Its Multiple Aspects’ (2015) Sports Arbitration: A Coach for Other Players? - ASA Special Series No. 41, Ch. 4 55 – 94, p. 68.

is because the ICC takes twenty six months on average to render a final arbitral award,⁸² whilst the ordinary Swiss Court system can take between two to three years to issue a judgment.⁸³ By contrast, the CAS, in ordinary arbitral proceedings, will decide upon cases in six to twelve months,⁸⁴ in appeal proceedings, will decide within three months,⁸⁵ however in cases before the ad hoc division (i.e., at the Olympic Games, or other major sports tournaments), a decision is rendered within twenty four hours.⁸⁶

A timely decision is essential during major sports tournaments as it ensures proper participation in the biggest sporting events. If athletes are waiting several years for a decision on a potential doping violation, the current sporting event will have finished, and no doubt several others will have also already come and gone. As athlete's careers are finite, they cannot afford such a lengthy delay, even outside of a major event, whilst awaiting a judgment in the dispute resolution process. As such, the speed of the CAS is unmatched in this regard, and it can therefore be validly argued that "arbitration in sports matters is more *efficient* than court litigation."⁸⁷ Given this efficiency, and given the importance of such efficiency in sports arbitral proceedings, some authors put forward that "the exclusion of the state court jurisdiction does not constitute (an invalid) waiver of a right, but rather a (valid) trade-off."⁸⁸

3.2.2 Quality Assurance

The principle of quality assurance in arbitral proceedings before the CAS is yet a further justification for certain, unique, elements of international sports arbitration. Whilst this principle has various manifestations in the Code of Sports-related Arbitration,⁸⁹ the core tenet of this principle is that "[i]n the specific case of sports arbitration, ... it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an

⁸² International Chamber of Commerce, 'Dispute Resolution 2020 Statistics' 2020, p. 19.

⁸³ Karin Graf and Mladen Stojiljkovic, 'In review: court procedure in Switzerland' (Lexology, 17 February 2022) < <https://www.lexology.com/library/detail.aspx?g=4284339a-f0b9-4eab-b5fd-eae91fda709e#:~:text=In%20many%20cases%2C%20however%2C%20parties,within%20six%20to%20nine%20months.>> accessed 20 May 2023.

⁸⁴ Court of Arbitration for Sport, 'General Information: Frequently Asked Question' < <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>> accessed 20 May 2023.

⁸⁵ Court of Arbitration for Sport, 'General Information: Frequently Asked Question' < <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>> accessed 20 May 2023.

⁸⁶ CAS Arbitration Rules for the Olympic Games (July 2021), Article 18.

⁸⁷ Antonio Rigozzi and Fabrice Robert-Tissot, "Consent" in Sports Arbitration: Its Multiple Aspects' (2015) Sports Arbitration: A Coach for Other Players? - ASA Special Series No. 41, Ch. 4 55 – 94, p. 68.

⁸⁸ Antonio Rigozzi and Fabrice Robert-Tissot, "Consent" in Sports Arbitration: Its Multiple Aspects' (2015) Sports Arbitration: A Coach for Other Players? - ASA Special Series No. 41, Ch. 4 55 – 94, p. 68.

⁸⁹ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023).

international dimension, to refer them to a specialised body.”⁹⁰ This is designed to ensure that proceedings are efficient,⁹¹ and that the decision rendered is sensible in the context of international sport. A further benefit was also detailed by the European Court of Human Rights in the *Pechstein* case. It held that, “[r]ecourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty.”⁹²

In order to establish the benefit of quality assurance, it is again helpful to compare it to the next best alternative. This is likely to be state court litigation, as a commercial arbitration institution would be comparable on this point. Given this, it is clear that state court litigation would not be able to offer the same quality assurance as the CAS for a number of reasons. This is because, firstly, non-specialised judges would not be able to act with sufficient speed to render judgments in a timely manner.⁹³ Secondly, without such specialisation, judges may not be able to produce judgments which take into account the nuances of professional sport.⁹⁴ Finally, if each individual athlete went to a national court for recourse, then there would be no consistent application of international sports law.⁹⁵ The situation could well arise that each national court would render judgments specific to its national law, and the result would be a series of vastly different judgments on the same issues, and no consistency of application either. Consequently, what the CAS offers is a quasi-judicial mechanism which ensures that all awards are of a certain quality, even if there is disagreement over its nuances.

3.2.3 Enforceability

The final key advantage which the CAS possesses is the ability to render enforceable arbitral awards. Enforceability is a key concern for both international commercial arbitration and sports arbitration alike, as without enforceable judgments, the entire utility of the process is dramatically mitigated. The next best alternative is, once again, the national courts. The key problem with this alternative though, as even put forward by Claudia Pechstein in the *Pechstein* case, is that “even assuming that a national court would rule on the matter within a time-limit that was compatible with participation in the sports event concerned, its decision could only be

⁹⁰ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 98.

⁹¹ *X v. ATP Tour et Tribunal Arbitral du Sport* BGE 133 III 235, S. 245.

⁹² *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 98.

⁹³ Antonio Rigozzi and Fabrice Robert-Tissot, “Consent” in *Sports Arbitration: Its Multiple Aspects*’ (2015) *Sports Arbitration: A Coach for Other Players?* - ASA Special Series No. 41, Ch. 4 55 – 94, p. 68.

⁹⁴ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 98.

⁹⁵ Antonio Rigozzi and Fabrice Robert-Tissot, “Consent” in *Sports Arbitration: Its Multiple Aspects*’ (2015) *Sports Arbitration: A Coach for Other Players?* - ASA Special Series No. 41, Ch. 4 55 – 94, p. 72.

enforced in the State in question, whereas international competitions tended to take place in a whole range of States.”⁹⁶ Consequently, the advantage which the CAS bestows upon its users is the fact that its awards can be enforced pursuant to the New York Convention.⁹⁷

This means that irrespective of the location of a sports competition, and irrespective of the location of a particular user of the CAS, the awards rendered by the CAS can be enforced in the majority of countries. This is a particular benefit when considering the internationality of most major sports tournaments today (e.g., UEFA Champions League, ATP Tennis Tour, Formula One). Were a sports federation or athlete to receive a binding court decision in one location, that judgment would most likely be powerless in a matter of weeks once the competition advanced. Therefore, the enforceability of the CAS awards is a significant advantage which influences its current iteration.

3.3 Why are These Interests Permissible Under Article 6 of the European Convention on Human Rights?

On the face of it, Article 6 of the ECHR seems to impose a series of stringent minimum safeguards concerning the right of access to a court. Nevertheless, as with most human rights, this right is qualified, and this qualification is the reason why methods of alternative dispute resolution can exist to begin with. In the context of the CAS specifically, whilst it has been previously detailed that it must maintain minimum safeguards due to the non-consensual nature of certain proceedings before it, this is not the only requirement.

To validly limit the right of access to a court, the method of alternative dispute resolution must also fall into one of a finite list of permissible reasons. The most relevant one for the CAS is to achieve the proper administration of justice.⁹⁸ This ground is only applicable though in so far as it does not restrict or reduce the right such that the very essence of the right is impaired,⁹⁹ if a legitimate aim is pursued,¹⁰⁰ and if it is also proportionate.¹⁰¹

In this regard, the Code of Sports-related Arbitration is to be considered necessary for the proper administration of justice, because it currently provides the most effective resolution

⁹⁶ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 89.

⁹⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

⁹⁸ *Ali Riza v. Switzerland*, App. no. 74989/11 (ECtHR, 22 November 2021), para. 97.

⁹⁹ *Markovic and Others v. Italy*, App. no. 1398/03 (ECtHR, 14 December 2006), para. 99.

¹⁰⁰ *Oorzhak v. Russia*, App. no. 4830/18 (ECtHR, 30 June 2021), para. 20.

¹⁰¹ *Markovic and Others v. Italy*, App. no. 1398/03 (ECtHR, 14 December 2006), para. 99.

mechanism for sports disputes. By conducting arbitrations with the speed that it does, the CAS is able to provide justice in a timeframe which is compatible with participation in sporting events. Moreover, such speed would not be possible without sufficient expertise, nor desirable if the awards could not be enforced. As such, it is advanced that whilst arbitration before the CAS may not always be consensual, it is a valid mechanism of achieving the proper administration of justice. This is not to say that the CAS offers a perfect method of dispute resolution, nor that it adequately balances all interests in all situations, but it does still manage to provide value to those who use it. As will be explained below, there are further interests which the CAS could promote better to truly facilitate the proper administration of justice, and the reforms to its Code which will realise this.

3.4 What are the Countervailing Interests in International Sports Dispute Resolution?

3.4.1 Independence

The independence of those serving as judges (quasi or otherwise), is arguably one of the most essential interests which is applicable to the resolution of any dispute. In the context of the resolution of sports related disputes, however, independence is no less important, and it is a vital interest held by athletes. The independence of those involved in proceedings before the CAS, has been one of the most contentious points around the operations of the CAS ever since its inception.¹⁰² It is advanced that the reason for this is that there is a distinction which must be drawn between the formal fulfilment of such criteria, and the subjective demonstration of it. In other words, “justice must not only be done: it must also be seen to be done.”¹⁰³ Therefore, whilst the CAS may well fulfil the formal criteria of objective independence, concerns have been raised, both by its users and in the literature, surrounding the fulfilment of its subjective independence.

The criteria for the fulfilment of the independence of a judicial body, has been detailed repeatedly by the ECtHR. It has provided that regard must be had to the manner of appointment of its members, the length of their term of office, the existence of guarantees against outside pressure, and whether the body presents an appearance of independence.¹⁰⁴ These criteria have

¹⁰² Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 88.

¹⁰³ *De Cubber v. Belgium*, App. no. 9186/80 (ECtHR, 26 October 1984), para. 26.

¹⁰⁴ *Findlay v. United Kingdom*, App. no. 22107/93 (ECtHR, 25 February 1997), para. 73.

been critiqued though for failing to consider subjective independence, with not enough weight given to the presentation of an appearance of independence.¹⁰⁵ The ECtHR has correctly identified that, in regard to subjective independence, “[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public.”¹⁰⁶ Consequently, the countervailing interest which athletes have in proceedings before the CAS, is to have confidence that it is indeed an independent arbitral institution. Being confident in the independence of a tribunal is most definitely a subjective criterion, but the threshold which the court has imposed, to demonstrate a lack of confidence on an individual basis,¹⁰⁷ has been described as a “*probatio diabolica*,”¹⁰⁸ (i.e., an impossible proof). The importance of the independence of the CAS arbitrators, as well as the CAS organisation, from the parties, comes from a need to have fair proceedings. With a lack of independence, or the personnel inside the CAS favouring one party over the other, comes a lack of fairness. This then also results in a failure to have a just resolution to the proceedings. Whilst this is a general interest, it is one most commonly held by athletes due to the current structure of ICAS, and the competences it exercises, as will be explored further later.

3.4.2 Impartiality

Aside from the preservation of independence, arbitrators who are impartial is just as important a consideration. Unlike independence, however, impartiality does not just consider objective criteria. This is because the ECtHR has held “that the existence of impartiality must be determined according to a subjective test, that is on the basis of the personal conviction and conduct of a particular judge, by ascertaining whether he showed any personal prejudice or partiality in a given case.”¹⁰⁹ Whilst the court does provide a subjective test of impartiality, it also details that impartiality must be demonstrated, “according to an objective test, that is, whether the court offered, in particular through its composition, guarantees sufficient to exclude any legitimate doubt about his impartiality.”¹¹⁰ The line between the fulfilment of the

¹⁰⁵ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 98.

¹⁰⁶ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 143.

¹⁰⁷ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 157.

¹⁰⁸ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 96.

¹⁰⁹ *Fey v. Austria*, App. no. 14396/88 (ECtHR, 24 February 1993), para. 28.

¹¹⁰ *Fey v. Austria*, App. no. 14396/88 (ECtHR, 24 February 1993), para. 28.

subjective and objective tests of impartiality is not always clear though, as it has been further detailed that “the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).”¹¹¹

Similar to the interest in having an independent judge (or quasi-judge as in arbitration), having an impartial judge is no less important. It is advanced that this is, firstly, to further preserve the fairness of proceedings, but secondly, also to ensure that the process possesses integrity.¹¹² As detailed above, the fairness of proceedings is undoubtedly important to ensure that the process produces just outcomes, however, the integrity of the CAS is more important still. As the initial intention of the CAS was to become the “supreme court of world sports,”¹¹³ it could not successfully do this (or maintain it) if its process lacks integrity. Therefore, the impartiality of all arbitrators who preside over CAS cases, both objective and subjective, is of paramount importance to ensure that the right decisions are reached, whilst also ensuring the viability of the CAS as the premier dispute resolution organisation in world sports.

3.4.3 Transparency

“Publicity is the very soul of justice ... It keeps the judge himself, while trying, under trial.”¹¹⁴ Transparency, whether in the form of public hearings, the publication of arbitral awards, or another means, is a critical interest in sports arbitration. On this point, it is necessary to separate the interests of commercial arbitration and sports arbitration. As one commentator has put it, “[i]n most instances, international commercial arbitration involves two relatively big private companies doing business on a transnational scale. Accordingly, it can be difficult to argue that there is a compelling public interest for the case to be resolved publicly and the final award to be made accessible beyond the parties to a particular dispute.”¹¹⁵ By contrast, there is a definite public interest in sports arbitration. This, firstly, comes from the popularity of sports worldwide, but secondly, also the contentious nature of certain proceedings before the CAS.

¹¹¹ *Kyprianou v. Cyprus*, App. no. 73797/01 (ECtHR, 15 December 2005).

¹¹² Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 17.

¹¹³ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

¹¹⁴ Judith Resnik, ‘Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)’ 4 *Law & Ethics of Human Rights*, p. 16.

¹¹⁵ Antoine Duval, ‘Time to go Public? The Need for Transparency at the Court of Arbitration For Sport’, in Duval /Rigozzi, *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press, Springer, 2019), p. 3.

As was the case in *Pechstein*, as well as many other cases, doping violations generate significant interest in the athlete.¹¹⁶ Similarly, any gross violations of disciplinary standards, or other comparable violations, also cause significant controversy to all those involved. The popularity of sports, coupled with the media attention generated by certain contentious offences, therefore creates a large public interest in certain proceedings before the CAS.

The importance of this interest to athletes can, again, be illustrated via the *Pechstein* case. Ms Pechstein requested a public hearing before the CAS (which, at that time, was not something contemplated by the Procedural Rules),¹¹⁷ but she had her request denied. She put forward that when she attempted to introduce arguments from experts, such arguments were rejected in a non-objective manner and further, she was also treated mockingly.¹¹⁸ The importance to Ms Pechstein of transparency, therefore, was that she hoped that she would have been treated objectively, and more respectfully, had her hearing been public.¹¹⁹ Whilst the above may have been true to Ms Pechstein individually, the court identified one further general interest. This is namely that in cases where the facts are disputed, and where the sanction imposed is stigmatising to the recipient (inter alia, and as detailed above, doping violations and disciplinary offences), then there is a risk of an adverse effect to the individual's "professional honour and reputation."¹²⁰ Consequently, transparency in proceedings before the CAS, in whatever form, enables public scrutiny to be applied to the decision,¹²¹ and the minimisation of damage when it is undeserving.

3.5 Conclusion

The conclusion of this Chapter is not that the CAS pursues efficiency, quality, and enforceability, at the expense of other, equally important interests. Instead, the reality is that there are some interests which are clearly dominant in the field of international sports dispute resolution, but that is not to say that these interests are unimportant, nor that they unjustly favour one party over the other. All the above-mentioned interests favour both parties to disputes before the CAS, yet questions exist as to what extent these interests are suitably well-

¹¹⁶ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 182.

¹¹⁷ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 169.

¹¹⁸ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 173.

¹¹⁹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 173.

¹²⁰ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 182.

¹²¹ Antoine Duval, 'Time to go Public? The Need for Transparency at the Court of Arbitration For Sport', in Duval /Rigozzi, *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press, Springer, 2019), p. 9.

balanced. This Chapter began by quoting Nick De Marco KC, who observed that “reasons of sporting necessity require a[n] ... international system of alternative dispute resolution,”¹²² and it is certainly true that there is a sporting necessity for the current iteration of the CAS. What this Thesis will go on to highlight is the areas in the Statutes of the ICAS, as well as in the Code of Sports-related Arbitration, where the balance between competing interests is favouring one group of interests, more so than the other.

¹²² Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 6.

Chapter 4: Problems within the Code of Sports-related Arbitration

4.1 Introduction

Whilst the current model of international sports “depends on a compulsory, specialised, centralised system of international dispute resolution,”¹²³ this does not mean that the current system is perfect. If anything, the *Pechstein* decision, and the subsequent literature it inspired, exposed a series of flaws within the current system regarding the protection of athlete’s rights, as well as the overall fairness of CAS proceedings. The decision in *Pechstein* was handed down in 2018, and the literature followed shortly afterwards, so the question arises as to what extent that decision, and its commentary, have meaningfully improved today’s Code of Sports-related Arbitration. This Thesis postulates that whilst improvements have been made, such improvements do not represent a substantial rebalancing of interests and there still exist issues in the current system which can and should be addressed. These will be examined below.

4.2 ICAS Statutes

Whilst not strictly related to the Code of Sports-related Arbitration and proceedings before the CAS, the ICAS Statutes nevertheless exert considerable influence. This is because ICAS, as the organisation which oversees the CAS, is empowered to make a number of decisions which directly impact how participants engage with it. Against this background, there are several issues which need to be addressed within the ICAS Statutes.

4.2.1 Membership of ICAS

As detailed previously, the 2023 Code of Sports-related Arbitration of the CAS provides that ICAS is composed of twenty-two members.¹²⁴ These members are appointed as follows: six members are appointed by the International Sports Federations (five by the Association of Summer Olympic International Federations and one by the Association of Winter Olympic International Federations); four members are appointed by the Association of the National Olympic Committees; four members are appointed by the IOC; four members are appointed by the fourteen members of ICAS detailed previously, after appropriate consultation with a view to safeguarding the interests of the athletes; and finally, four members are appointed by

¹²³ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 2.

¹²⁴ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

the eighteen other members of ICAS, chosen from among personalities independent of the bodies designating the other members of the ICAS.¹²⁵

The number of people which make up ICAS has changed since the *Pechstein* decision was issued, however, the concerns expressed in that decision still remain relevant. Moreover, the structure of ICAS is also a vital consideration given the extensive competences which it possesses. The concern surrounding ICAS is that only four of its twenty-two members are appointed with a view to safeguarding the interests of athletes,¹²⁶ and only a further four are completely independent.¹²⁷ This led the dissenting minority in the *Pechstein* to note that, “[i]t follows from this that the organisations [sporting federations] have a not insignificant influence on the composition of the ICAS.”¹²⁸ This conclusion is based on the fact that sixty three percent of ICAS is comprised of members of the sporting federations and the impact of this is that, whilst each individual appointed to ICAS must “sign a declaration undertaking to exercise their function personally, with total objectivity and independence,”¹²⁹ “this organisational structure does not give th[e] appearance [of independence].”¹³⁰ This concern is only exacerbated further when one considers that the sixty three percent of ICAS (which comprises the sporting federations), makes up one side of the disputes before the CAS. Meanwhile, the eighteen percent, which is there to safeguard the interests of athletes, comprises the other party in such proceedings. Consequently, there exists a clear imbalance in the representation of interests within the structure of ICAS. Such an imbalance is only problematic, however, when ICAS is empowered to act in a way which could negatively affect the interests of athletes, and this is in fact the case.

4.2.2 Appointment and Removal of Arbitrators

The reason why the composition of ICAS is of such significance, is due to the power which it exercises. As provided for by S6 of the Code of Sports-related Arbitration, ICAS “appoints the

¹²⁵ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

¹²⁶ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

¹²⁷ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

¹²⁸ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides, para. 9.

¹²⁹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S5.

¹³⁰ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, pp. 8 – 9.

arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators on the proposal of the CAS Membership Commission. It can also remove them from those lists.”¹³¹ When appointing individuals to that list, the “ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.”¹³² Individuals will only be appointed to the list of arbitrators, however, when their “names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs [International Federations], the NOCs [National Olympic Committees] and by the athletes' commissions of the IOC, IFs and NOCs.”¹³³ What these rules provide therefore is that ICAS, a body which is already largely comprised of representatives of sporting federations, will only appoint arbitrators to the list, upon nomination by bodies which are also largely the sporting federations. Given the considerable influence of sporting federations, the nomination procedure does not appear as if it will take into account, and balance, the interests of all participants before the CAS.

This appearance becomes particularly problematic when one considers how the parties then interact with the nominated arbitrators. In the Code of Sports-related Arbitration, R40.2 specifies that “[t]he parties may agree on the method of appointment of the arbitrators from the CAS list.”¹³⁴ In other words, when the parties are invited to nominate their arbitrator, as occurs in all commercial arbitrations, they are only permitted to appoint those from the CAS list. The reality which the rules, as they are, presents, is not one which is satisfactory to all as “[t]he mandatory list of arbitrators has raised some issues regarding the excessive limitation of the parties to appoint the arbitration of their choice as well as the equality of the parties.”¹³⁵ The defence to this criticism has frequently been that it preserves the interest detailed above: namely, quality assurance. The argument being that by having a closed list of arbitrators, it ensures that the arbitrators are suitably well qualified to preside over international sports

¹³¹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2, S6 (4).

¹³² CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section C, 2, S14.

¹³³ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, (1 February 2023), Section C, 2, S14.

¹³⁴ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R40.2.

¹³⁵ 'Commentary on the CAS Procedural Rules, Article R40 [Formation of the Panel]', in Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015), p. 265.

disputes, and thus can also ensure the efficient resolution of disputes which is so crucial.¹³⁶ That argument is not, however, convincing. This is because “[i]n much more technical areas – such as in the pharmaceutical or aeronautical industry – the parties may choose their arbitrator freely without there being any problem.”¹³⁷ Given this, and whilst a discernible and mutually exclusive advantage does not appear to exist for a closed list of arbitrators, athletes nevertheless have to appoint an arbitrator who has largely been nominated by the sports federations. The crux of this problem was detailed by the dissenting minority in *Pechstein* who observed that that “the organisations which appoint the arbitrators (International Federations (FI), the International Olympic Committee (IOC) and the National Olympic Committees (NOCs)) all represent one party in the arbitration – the sports bodies and not the athletes.”¹³⁸ Such an imbalance does not adequately reflect the interests of all participants before the CAS, and as a consequence, the rules which enable it should be reformed.

4.2.3 The Presidents of ICAS

An additional competence which ICAS possesses is to elect, for a period of four years, a President, three Vice-Presidents, Presidents of the Ordinary Arbitration Division, the Anti-Doping Division, and the Appeals Arbitration Division, as well as their deputies.¹³⁹ Significantly though, “[t]he election of the President and of the Vice-Presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.”¹⁴⁰ The heavy involvement of sporting federations, who typically appear on one side of proceedings before the CAS, should not materially affect the independence and impartiality of the Presidents and Vice Presidents appointed in this manner. Nevertheless, the appearance of independence and impartiality, is just as important as having it materially exist too.¹⁴¹ As such, the question has to be asked as to whether this procedure casts doubts over that appearance.

¹³⁶ 'Commentary on the CAS Procedural Rules, Article R40 [Formation of the Panel]', in Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer Law International 2015), p. 265; *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, para. 3.3.3.2.

¹³⁷ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides, para. 14.

¹³⁸ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides, para. 8.

¹³⁹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2, S6 (2).

¹⁴⁰ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 2, S6 (2).

¹⁴¹ *Findlay v. United Kingdom*, App. no. 22107/93 (ECtHR, 25 February 1997), para. 73.

The biggest concern surrounding the appearance of independence and impartiality comes to the fore when reviewing the procedural rules for appeals before the CAS. This is because R54 details that the President of the Division shall appoint the sole arbitrator,¹⁴² and in cases where three arbitrators are to be appointed, “the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators.”¹⁴³ Such a procedure may, on the face of, be uncontroversial as being able to appoint individuals suitably well qualified to efficiently render a well-reasoned decision is entirely legitimate. Problems, however, do arise due to the fact that in the absence of a majority decision, the President alone can render an award.¹⁴⁴ This is to be considered an extensive power, because in appeal proceedings, “[t]he Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.”¹⁴⁵

The Oberlandesgericht München, when it heard one of Ms Pechstein’s appeals (prior to it making its way to the ECtHR), took issue with this situation. It observed that by nominating Presidents from within its organisation, ICAS is “contaminating” its independence.¹⁴⁶ This is because through this mechanism, “the [Sports Governing Bodies] can also exercise an indirect influence on the third member of the arbitral panel competent to deal with a specific dispute.”¹⁴⁷ There is a grave risk of this negative influence when one considers the fact that the current President of the Appeals Arbitration Division, Ms Corinne Schmidhauser Oly, formerly worked on the legal committee of a sports governing body. Whilst such a mechanism does not lead to the conclusion that every President of every appeal tribunal, nominated by Ms Schmidhauser Oly, lacks personal integrity, it nevertheless leads to a perception of a structural bias by the parties to the disputes.¹⁴⁸

¹⁴² CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R54.

¹⁴³ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R54.

¹⁴⁴ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R59.

¹⁴⁵ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R57.

¹⁴⁶ Antoine Duval, Ben Van Rompuy, ‘The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded’ 23 June 2015. Available at SRN: <https://ssrn.com/abstract=2621983> or <http://dx.doi.org/10.2139/ssrn.2621983>, p. 27.

¹⁴⁷ Antoine Duval, Ben Van Rompuy, ‘The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded’ 23 June 2015. Available at SRN: <https://ssrn.com/abstract=2621983> or <http://dx.doi.org/10.2139/ssrn.2621983>, p. 27.

¹⁴⁸ Antoine Duval, Ben Van Rompuy, ‘The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded’ 23 June 2015. Available at SRN: <https://ssrn.com/abstract=2621983> or <http://dx.doi.org/10.2139/ssrn.2621983>, p. 27.

4.3 ICAS Statutes: Conclusion

As has been detailed above, ICAS has two significant flaws: namely that it, itself, is heavily weighted towards the sports federations, and when it exercises some of its competences, it can be argued that it subsequently contaminates its independence.¹⁴⁹ The problem with this is that it raises legitimate, and in the opinion of the dissenting minority in *Pechstein*, well-founded concerns surrounding the independence and impartiality of the CAS as a whole.¹⁵⁰ Moreover, following the publication of the *Pechstein* judgment, commentators acknowledged that “the CAS may have dodged this first bullet,”¹⁵¹ but that “in order to avoid a fatal blow,”¹⁵² the CAS should make sure that the system is “bulletproof for when the next shot is fired.”¹⁵³ As the most current version of the ICAS Statutes, an integral part of the Code of Sports-related Arbitration, possesses the same clauses, the concerns expressed remain as prevalent as ever.

4.4 The CAS Code of Sports-related Arbitration

Whilst the particular composition of ICAS means that, when it exercises certain competences, concerns are raised over its independence and impartiality, that is not to say that the Code of Sports-related Arbitration does not raise other concerns. As previously detailed, the appointment of Presidents of the arbitral tribunal in appeal proceedings, as well as the power that is given to that position, is already one prominent example of concern. Nevertheless, the provisions on confidentiality,¹⁵⁴ and the holding of public hearings,¹⁵⁵ also facilitate certain inequalities between the parties, which also then further supports the position of sports federations. These two key provisions will be explained further.

¹⁴⁹ Antoine Duval, Ben Van Rompuy, ‘The Compatibility of Forced CAS Arbitration with EU Competition Law: *Pechstein Reloaded*’ 23 June 2015. Available at SRN: <https://ssrn.com/abstract=2621983> or <http://dx.doi.org/10.2139/ssrn.2621983>, p. 27.

¹⁵⁰ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides, para. 16.

¹⁵¹ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 95.

¹⁵² Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 95.

¹⁵³ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 96.

¹⁵⁴ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R43.

¹⁵⁵ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R44.2.

4.4.1 Confidentiality

Under the current version of the CAS Rules, all proceedings are to be considered confidential.¹⁵⁶ The direct consequence of this is that “[a]wards shall not be made public unless all parties agree, or the Division President so decides.”¹⁵⁷ The CAS does not restrict the publication of awards in appeal cases, except where both parties agree as such.¹⁵⁸ This presents a clear benefit, in most situations, to athletes, however, not publishing all awards, creates a degree of inequality between the parties. This is because, even with the publication of the awards from appeals, only a small number of CAS decisions are actually made available on the database.¹⁵⁹ Meanwhile, sports governing bodies, who always remain a constant counterparty in proceedings, “have access to previous decisions which they were party to, irrespective of whether the CAS has chosen to publish those decisions.”¹⁶⁰ Athletes have no such access as whilst they may only be involved in one case in their career, sports governing bodies could well be involved in several per year. Moreover, these governing bodies will also be repeatedly involved in the same categories of disputes, for example anti-doping. Athletes, again, do not have the same exposure. The result is a vast difference in access to information, and with this, comes a definite degree of inequality between the parties. Whilst this is, on the face of it, potentially not overly problematic, it materially impacts the ability of athletes to prepare their case, assess their chances of success, but also to make their own conduct compatible with the CAS’ *lex sportiva*. Thus, there exists a very real disadvantage, and one which should be rectified.

4.4.2 Public Hearings

If *Pechstein* was said to have one clear impact on the operations of the CAS, then the provisions surrounding a public hearing is most definitely it. Despite the majority in *Pechstein* not finding a violation of Article 6 on the grounds that the CAS lacks sufficient independence and impartiality, it did find a violation because of the lack of a public hearing.¹⁶¹ Consequently, the CAS set about rectifying this flaw in its rules. The result was that in ordinary arbitral

¹⁵⁶ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R43.

¹⁵⁷ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R43.

¹⁵⁸ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R59.

¹⁵⁹ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 13.

¹⁶⁰ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 13.

¹⁶¹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 183.

proceedings, the hearing is not public (unless the parties agree otherwise),¹⁶² however in appeal proceedings, the same is true, except that “[a]t the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature.”¹⁶³ The CAS then mimicked the exceptions to Article 6, by further providing that, “[s]uch request may ... be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public.”¹⁶⁴ On the face of it, and like most provisions in the CAS’ Procedural Rules, this does not appear to be problematic. Nevertheless, the concern around R57 is how the CAS will interpret the exceptions to it, as whilst the rule possesses the same wording of the ECHR, the CAS does not have the case law of the ECtHR to rely on which more precisely details these exceptions.

The first concern which emanates from the rule is that the right to a public hearing under the ECtHR’s case law is not limited to disciplinary cases.¹⁶⁵ In theory, it could be, but only when arbitration has been freely consented to, and thus the right to a public hearing has been waived.¹⁶⁶ Where this has not occurred, as is more typical in sports arbitration, then litigants must be given the opportunity to request a public hearing.¹⁶⁷ At current, this is not reflected in the current Code of Sports-related Arbitration.

In situations though where it might be necessary to hold proceedings in camera, then these must be “strictly required by the circumstances.”¹⁶⁸ This is because the ECtHR has held, for example, that “the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public.”¹⁶⁹ The reason behind such a decision is that the “courts must consider whether such exclusion is necessary in the specific circumstances in order to protect a public interest, and must confine the measure to what is

¹⁶² CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section B, R44.2.

¹⁶³ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R57.

¹⁶⁴ CAS Code of Sports-related Arbitration, Procedural Rules (1 February 2023), Section C, R57.

¹⁶⁵ Antoine Duval, ‘Time to go Public? The Need for Transparency at the Court of Arbitration For Sport’, in Duval/Rigozzi, *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press Springer 2019), p. 10.

¹⁶⁶ *Håkansson and Sturesson v. Sweden*, App. no. 11855/85 (ECtHR, 21 February 1990), para. 66.

¹⁶⁷ William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), p. 290.

¹⁶⁸ William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), p. 290.

¹⁶⁹ *Belashev v. Russia*, App. no. 28617/03, (ECtHR, 4 December 2008), para. 83.

strictly necessary in order to attain the objective pursued.”¹⁷⁰ Against this background, the CAS “should adopt a wide understanding of the right to a public hearing ... and a strict reading of any exceptions to it.”¹⁷¹ The Code of Sports-related Arbitration does not contain any wording to this effect though, and so the problem is that without a system of binding precedent, nor the wide publication of awards, it is not possible to know whether Article 6 is upheld in the application of R57. This is of significant concern as not only would a failure to do so expose the CAS to various legal challenges,¹⁷² it also would materially violate the rights of athletes. This is, in addition to all of the above highlighted critiques, something which needs to be addressed.

4.5 Conclusion

As illustrated above, it appears that despite the ECtHR’s in-depth examination of the inner workings of the CAS, that not all concerns have been adequately addressed. It is clear that the rules have been improved in light of certain findings by the court, but the key question looming over the CAS is whether it is enough? As was acknowledged in the aftermath of *Pechstein* “the CAS may have dodged this first bullet,”¹⁷³ but that “in order to avoid a fatal blow,”¹⁷⁴ the CAS should make sure that the system is “bulletproof for when the next shot is fired.”¹⁷⁵ It is submitted that, despite the revisions contained within the 2023 Code of Sports-related Arbitration, it is still not enough. The current structure of ICAS appears to lack independence and impartiality, meanwhile certain provisions of the Code create a clear disadvantage for the athlete compared to the sports governing bodies. The overall concern is then worsened still when one considers that, for many, proceedings before the CAS are not freely consented to by those who are subject to them. As such, the question, which has to be asked, is whether the

¹⁷⁰ *Nikolova and Vandova v. Bulgaria*, App. no. 20688/04, (ECtHR, 17 December 2013), para. 74.

¹⁷¹ Antoine Duval, ‘Time to go Public? The Need for Transparency at the Court of Arbitration For Sport’, in Duval/Rigozzi, *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press, Springer, 2019), p. 11.

¹⁷² Antoine Duval, ‘Time to go Public? The Need for Transparency at the Court of Arbitration For Sport’, in Duval/Rigozzi, *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press, Springer, 2019), p. 11.

¹⁷³ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 95.

¹⁷⁴ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 95.

¹⁷⁵ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 96.

Code of Sports-related Arbitration, including the ICAS Statutes, can be improved, such that criticisms surrounding a lack of consent become weaker.

Chapter 5: Reforms to the Court of Arbitration for Sport

5.1 Introduction

The CAS, ever since its inception, always intended to become the “supreme court of world sports.”¹⁷⁶ In the close to forty years since its creation, it has only grown in popularity and in mainstream acceptance. Whilst this is the position of the CAS now, this was only possible because it was “always conscious of the possibility of improvement and reform,”¹⁷⁷ as evidenced by the various revisions which have been made to the CAS as an organisation, and its Code of Sports-related Arbitration. Yet, as has also been evidenced in the preceding Chapter, there are still concerns surrounding the operations of the CAS, and such concerns are only exacerbated further by the fact that proceedings operate on the basis of a system of compelled consent.¹⁷⁸ Despite the current reality, it is advanced that if “the CAS ... could be relied upon to give open, fair, transparent judgments then the criticisms of coerced consent lose their potency.”¹⁷⁹ This Chapter will therefore set out the potential reforms to the CAS which will help achieve this aim.

5.2 Reform to the ICAS Statutes

5.2.1 Composition of ICAS

Arguably one of the biggest concerns surrounding the independence and impartiality of the CAS, is the lack of even an appearance of it in ICAS. As an athlete, or in other words, the likely counterparty against the sports governing bodies in proceedings before the CAS, it is difficult to have confidence in a body in which their interests are only represented by a small minority. Moreover, this perception is only worsened still since the representatives, who are appointed to safeguard the interests of athletes, are done so by the sports governing bodies themselves.¹⁸⁰ This reality is deeply unsatisfactory.

¹⁷⁶ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

¹⁷⁷ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 201.

¹⁷⁸ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 The International Sports Law Journal 1–5, p. 3.

¹⁷⁹ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 6.

¹⁸⁰ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (1 February 2023), Section B, 1, S4.

Previous scholarship has suggested reforming ICAS' membership, and the biggest commonality between all current suggestions, is that the bodies representing athletes should be able to appoint members to ICAS directly.¹⁸¹ Despite agreement on this point, there are differing views regarding the number of representatives of different interests. On the one hand, authors like De Marco and Hannah suggest that eight members should be appointed by the sports governing bodies, eight members should be appointed by bodies representing athletes' interests, and finally, four should be appointed (or eight in the case of Hannah), by the previous sixteen.¹⁸² On the other hand, however, Duval suggests a different composition for ICAS. He advances that only four members of ICAS should be appointed by the sports governing bodies, whilst four are "selected by representatives of the athletes (at a specific conference or assembly including, for example, FIFPro, UNI World Athletes, EU Athletes, and the IOC Athletes' Commission)."¹⁸³ Where he crucially differs from De Marco and Hannah is by advancing that the final twelve members should be picked by the first eight.¹⁸⁴ The reason for this is that he intends the twelve, neutral members, of ICAS to have the "upper hand on the two partisan fractions inside ICAS."¹⁸⁵

It is advanced that Duval's suggestion for reform is to be considered the best for ensuring the legitimate independence and impartiality of ICAS. Where he stops in his suggestion for reform, however, is analysing the reason why it is the best. This Thesis will fill that gap. One of the key advantages, for both sports governing bodies and athletes alike, is the quality which a specialised arbitral institution in sports brings.¹⁸⁶ This is because it ensures that proceedings

¹⁸¹ Nick De Marco KC, 'Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration' (2016) Blackstone Chambers, p. 9; Bronte Le-Fevre Hannah, 'Ready, set, reform? The future of sports arbitration' (2020) 23(3) Int. A.L.R. 199-211, p. 206; Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>> accessed 15 July 2023.

¹⁸² Nick De Marco KC, 'Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration' (2016) Blackstone Chambers, p. 9; Bronte Le-Fevre Hannah, 'Ready, set, reform? The future of sports arbitration' (2020) 23(3) Int. A.L.R. 199-211, p. 206.

¹⁸³ Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>> accessed 15 July 2023, p. 3.

¹⁸⁴ Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>> accessed 15 July 2023, p. 3.

¹⁸⁵ Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>> accessed 15 July 2023, p. 3.

¹⁸⁶ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), para. 98.

are conducted in an efficient manner, whilst also enabling them to consider the emerging *lex sportiva* (i.e., also ensuring that sports arbitration accounts for the nuances of international sports).¹⁸⁷ As such, whilst appointing twenty (or twenty two) independent members of ICAS would make the organisation completely independent and impartial from all parties which appear before the CAS, this would not be advantageous. Representatives of sports governing bodies, as well as of athletes, are necessary to ensure that the CAS continues to offer quality in its dispute resolution mechanism. The specialist, intricate, knowledge which comes from being a representative of either party, would not be attainable in an independent individual, no matter how well qualified. As such, it is absolutely necessary to continue to have representatives of the sports governing bodies, and of athletes, in ICAS.

Turning to the question of whether the independent members should have the “upper hand on the two partisan fractions inside ICAS.”¹⁸⁸ On this point, it seems that such a situation would enable a much better balance to be struck between the interests of the parties. Whilst there is a clear advantage to having specialist knowledge within ICAS, it is not necessary for such specialism to be in the majority. This is especially true when the most potent criticism levelled at ICAS currently is the appearance of a lack of independence and impartiality.¹⁸⁹ As such, having individuals who are independent in the majority, will remove such criticism, and it will also reduce the appearance of bias when ICAS exercises some of its most important functions (i.e., inter alia, appointing arbitrators and appointing the Presidents of the CAS divisions). More than this however, being independent means that such individuals will not deliberately favour one side or the other, and as such, they can then account for the interests of both sides, and choose the ‘best’ middle ground. The result, therefore, is a membership structure which enables ICAS to ‘strike the right balance.’

5.2.2 Appointment of Presidents

One of the key functions of ICAS, is that it also appoints the Presidents of the various divisions. As detailed in the preceding Chapter, this is problematic when ICAS appoints the Presidents

¹⁸⁷ Gregory Ioannidis, ‘Defending the rights of athletes before the Court of Arbitration for Sport (CAS): revising procedural and substantive aspects of sports law litigation and practice’ (2021) 4 I.S.L.R., 57 – 64, p. 64.

¹⁸⁸ Antoine Duval, ‘The Court of Arbitration for Sport after Pechstein: Reform or Revolution?’ (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution> > accessed 15 July 2023, p. 3.

¹⁸⁹ *Mutu and Pechstein v. Switzerland*, App nos. 40575/10 and 67474/10 (ECtHR, 2 October 2018), Joint Partly Dissenting, Partly Concurring Opinion of Judges Keller and Serghides, para. 9.

from within its membership, and this is especially the case when the President of the Appeals Division, exercises a large amount of control over the proceedings. The independence of the person in this position is therefore vital, as it can remove any potential bias towards one party, and considering the cases which appear before the CAS Appeals Division (e.g., “it deals with all the disputes related to doping and transfer cases, but also those arising from disciplinary sanctions imposed by the SGBs and their political decisions,”¹⁹⁰ this is more important still. The first suggestion for reform therefore is that the Presidents should be appointed from the suggested membership structure of ICAS detailed previously. The ‘partisan’ groups within ICAS (i.e., the representatives of the sports governing bodies, and the athletes), however, would not be able to serve as President of the Appeals Division. This would ensure the neutrality of the President and means that they will not be incentivised to favour one party over the other.

The further reform which has been suggested though, is a threshold of independence which has to be reached, prior to someone being able to assume a Presidential position. De Marco suggests that the Presidents “should be independent both of all regulators and Olympic committees and of those bodies representing the interests of players,”¹⁹¹ however Duval goes further than this. He writes that ICAS should “[i]mpose a regime of incompatibilities to the President of the Appeals Division. He or she must accept to forego all his or her mandates within the SGBs and sever all contractual ties susceptible of giving rise to a conflict of interest.”¹⁹² The reasoning behind Duval’s suggestion is that “[o]nly by ensuring that he or she has no direct and personal, contractual or financial links with the SGBs can the CAS preserve its independence and legitimacy.”¹⁹³ Where Duval needs to go further though is by applying the same criteria to organisations which represent the interests of athletes. Whilst the suggestion for reform, as formulated currently, is no doubt a direct response to today’s system of ICAS, it is still not satisfactory as it then tips the scales the other way (i.e., it could then potentially favour athletes too heavily). As such, the reforms should be to appoint the Presidents from ICAS, as detailed

¹⁹⁰ Antoine Duval, ‘The Court of Arbitration for Sport after Pechstein: Reform or Revolution?’ (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution> > accessed 15 July 2023, p. 3.

¹⁹¹ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 9.

¹⁹² Antoine Duval, ‘The Court of Arbitration for Sport after Pechstein: Reform or Revolution?’ (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution> > accessed 15 July 2023, p. 4.

¹⁹³ Antoine Duval, ‘The Court of Arbitration for Sport after Pechstein: Reform or Revolution?’ (*Asser International Sports Law Blog*, 17 November 2015) < <https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution> > accessed 15 July 2023, p. 4.

previously, and have the relevant individuals sever any and all ties to sports governing bodies and athlete organisations alike. Such a reform would ensure that the Presidents are truly independent and can exercise their functions without any ulterior motives.

5.2.3 Appointment of Arbitrators

Alongside the composition of ICAS, the method of the appointment of arbitrators appears to be the most hotly debated element of any potential CAS reform.¹⁹⁴ In the scholarship to date on this issue, four key suggestions for reform have emerged: firstly, expand the current closed list of arbitrators;¹⁹⁵ secondly, introduce a system of rotating arbitrators, akin to the court system;¹⁹⁶ thirdly, increase transparency surrounding the reasons for the appointment of arbitrators;¹⁹⁷ fourthly, provide an open list of arbitrators which can be appointed.¹⁹⁸ Each suggestion will be examined in turn.

Expansion of the Closed List

The first of the suggestions for reform of the appointment of arbitrators is simply to expand the list of CAS arbitrators. There are currently four hundred and twenty-four arbitrators on the CAS general list, and this number is certainly higher than what existed at the time of *Pechstein*. Nevertheless, the CAS could still seek to include “arbitrators offering a wide range of expertise in different sports and from different international regions—to offer parties a genuine choice.”¹⁹⁹ By further diversifying the closed list of arbitrators, the CAS can still maintain the qualifications of those on the list, yet it can also ensure that the “appointment of arbitrators to

¹⁹⁴ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, pp. 9 – 10; Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 The International Sports Law Journal 1–5, p. 4; Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, pp. 203 – 205; Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), pp. 100 – 104.

¹⁹⁵ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 9.

¹⁹⁶ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 The International Sports Law Journal 1–5, p. 4.

¹⁹⁷ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), pp. 100 – 104.

¹⁹⁸ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, pp. 203 – 205.

¹⁹⁹ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 10.

the CAS would be less likely to favour sports governing bodies and regulators.”²⁰⁰ This suggestion is, however, does not have majority support as it still deprives the parties of having full autonomy over the process, one of the key advantages which arbitration offers relative to state court litigation.²⁰¹ Thus, there exists better suggests for reform of this element of the CAS.

Rotating Arbitrators

One of the more unique suggestions for reform has been put forward Lindholm,²⁰² who modelled his suggestion on the processes of the Investor Court System. Lindholm’s suggestion is that the CAS should do “away with direct party involvement in the formation of arbitration panels,”²⁰³ and instead employ “standing arbitrator–judges who are appointed to serve with the institution itself for fixed periods of time. These individuals are assigned to serve on panels to resolve individual disputes in a rotating and unpredictable manner, much like in state-based courts.”²⁰⁴ Lindholm argues that this would be advantageous because, firstly, it would increase the neutrality of CAS, secondly, as it is similar to the state court system, the procedures governing appointment and removal could be modelled the same, and thirdly, it would “foster greater jurisprudential consistency.”²⁰⁵

Whilst such a system has the potential to be advantageous on the face of it, the significant risk is that “it would remove the possibility of selecting an arbitrator with a specific expertise, which can be of vital importance in sports arbitration.”²⁰⁶ There is no doubt that this ability is of significant importance, as it is currently one of the justifications underpinning the current closed list, namely quality assurance. Moreover, as the autonomy of the parties is still so crucial to the arbitral process, “the body would have to be undoubt[edly] neutral and independent in

²⁰⁰ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 10.

²⁰¹ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd Ed. CUP 2017), p. 1.

²⁰² Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 *The International Sports Law Journal* 1–5.

²⁰³ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 *The International Sports Law Journal* 1–5, p. 4.

²⁰⁴ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 *The International Sports Law Journal* 1–5, p. 4.

²⁰⁵ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 *The International Sports Law Journal* 1–5, p. 4.

²⁰⁶ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) *Int. A.L.R.* 199–211, p. 205.

order to justify taking this right from the parties.”²⁰⁷ The model, as suggested by Lindholm, however, does not currently contain the necessary safeguards to ensure that this is the case. Consequently, due to the fact that it does not facilitate the ability to appoint an arbitrator with specific expertise, whilst also not providing the means by which the appointing body guarantees its independence and neutrality, then Lindholm’s suggestion also cannot offer a meaningful improvement.

Greater Transparency

The nomination process to the closed list of CAS arbitrators has been reformed over the years. Whilst it began as a quota system (i.e., that twenty percent had to be appointed from the sports governing bodies, and another twenty percent had to be appointed with a view to safeguarding athletes),²⁰⁸ the process of appointment is now much more meritocratic. Nevertheless, authors such as Rigozzi, for instance, have argued that “the real problem of perception lies in the opacity of the nomination process.”²⁰⁹ This is because he argues that “[u]ntil it is possible to determine who proposed the arbitrators for appointment by the ICAS – or indeed which arbitrator(s) applied spontaneously, without being proposed by anyone – and the way in which the newly created CAS Membership Commission evaluates the various candidatures,”²¹⁰ then the supposed meritocratic appointment process does not offer a meaningful improvement.

Against this background, Hannah further argues that “[i]f the choice of arbitrator is to remain limited to the closed list system, it is essential that the CAS provides more information as to the nomination and jurisdictional history of the arbitrators to ensure that parties can at least make fully informed choices.”²¹¹ She suggests that “[i]nformation as to the arbitrator’s

²⁰⁷ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 205.

²⁰⁸ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes (2004), Section C, 2, R14.

²⁰⁹ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 100.

²¹⁰ Antonio Rigozzi, ‘Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond’ in Ch. Müller, S. Besson, A. Rigozzi *New Developments in International Commercial Arbitration 2020* (Stämpfli Editions 2020), p. 100.

²¹¹ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 204.

jurisprudential record, relevant contractual relationships and links to their publications would be highly relevant.”²¹²

It is advanced that great transparency surrounding the current list of CAS arbitrators should be considered as the bare minimum when one considers any potential reforms. The reason for this is simple: party autonomy is at the forefront of arbitration as a means of dispute resolution.²¹³ It is one of the fundamental tenets which sets it apart from state court litigation and distinguishes it from other methods of dispute resolution as well. Consequently, the question must be asked as to how party autonomy can be exercised in the dark? Despite the fact that the current closed list contains over four hundred names, there is no record of who was appointed by whom. Moreover, there is no indication as to how certain arbitrators perceive certain issues based on publications, or other information. Things that are very much a standard part of any selection of an arbitrator in international commercial arbitration, are curiously absent in sports arbitration. This has to change in order to best give effect to the principle of party autonomy, and it is something which should be implemented whether the CAS chooses to pursue more substantial reforms or not.

Open List

The most popular suggest when it comes to reforming the CAS, is the abolition of the closed list of arbitrators. Whilst the dominant reason in favour of keeping the list closed, is the maintenance of a select list of arbitrators who are suitably well-qualified to serve as arbitrators at the CAS, it is advanced that this aim is not mutually exclusive with a closed list of arbitrators.

The key reason why an open list is to be preferred is because of the way in which arbitrators have been appointed up until now. In an earlier iteration of the CAS rules, arbitrators were appointed by the sports governing bodies, and although they still had had to appoint twenty percent of arbitrators with a view to safeguarding the interests of athletes,²¹⁴ sixty percent of the arbitrators were nevertheless directly appointed by the sports federations.²¹⁵ Today’s rules

²¹² Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 204.

²¹³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd Ed. CUP 2017), p. 1.

²¹⁴ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes (2004), Section C, 2, R14.

²¹⁵ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes (2004), Section C, 2, R14.

have abandoned the quota, but as detailed above, it is still unclear how an arbitrator has been appointed, and by whom. This reality therefore does not enable the parties, but athletes in particular, to adequately assess who they wish to nominate as their arbitrator. Even if they could accurately assess who they want, the reality they will likely face is that there are only a select few arbitrators who are truly independent, and even then, they may not have the expertise necessary to serve. Thus, whilst the closed list is there to ensure that those who preside over disputes at the CAS, have the relevant expertise, the choice of an arbitrator appears to really be Hobson's choice (that is to say they have no real choice at all).²¹⁶ The solution to such a problem therefore is that the CAS should "use an open list to provide reliable and current information as to available arbitrators and assist parties in finding an arbitrator suitable to hear their dispute."²¹⁷ Not only does this truly realise party autonomy in the arbitral process, but it can also ensure that parties accurately choose the best arbitrator for their dispute.

As mentioned though, the biggest criticism of an open list is that there is a risk of "jeopardis[ing] the efficiency and integrity of CAS proceedings. This is especially true for specific types of disputes such as anti-doping disputes which require a high level of expertise."²¹⁸ Nevertheless, the current Code of Sports-related Arbitration already provides a minimum criteria regarding qualification, namely that "ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language."²¹⁹ Thus, it should be the case that any fear surrounding a lack of experience can be managed by providing a list of arbitrator requirements to maintain a minimum level of expertise, whilst also safeguarding the independence of the arbitrator from either party.²²⁰ Such a system would mean that the parties are no longer restricted to those arbitrators on a closed list, but the quality and experience of a good arbitrator can still be preserved.

²¹⁶ Antonio Rigozzi and Fabrice Robert-Tissot, "Consent" in *Sports Arbitration: Its Multiple Aspects* (2015) *Sports Arbitration: A Coach for Other Players?* - ASA Special Series No. 41, Ch. 4 55 – 94, p. 55.

²¹⁷ Bronte Le-Fevre Hannah, 'Ready, set, reform? The future of sports arbitration' (2020) 23(3) *Int. A.L.R.* 199-211, p. 203.

²¹⁸ Bronte Le-Fevre Hannah, 'Ready, set, reform? The future of sports arbitration' (2020) 23(3) *Int. A.L.R.* 199-211, p. 204.

²¹⁹ CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, (1 February 2023), Section C, 2, S14.

²²⁰ Bronte Le-Fevre Hannah, 'Ready, set, reform? The future of sports arbitration' (2020) 23(3) *Int. A.L.R.* 199-211, p. 204.

5.3 Reform to the Code of Sports-related Arbitration

5.3.1 Publication of Awards

The publication of awards, whilst nothing new to the CAS, is nevertheless still something which is underutilised. As such, it is advanced that both R43 and R59 should be reformed to create a presumption of publishing awards, except where undue hardship or harm can be proved.²²¹ Thus, the new rule will read, “the original award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless either party can prove undue hardship or harm. In any event, the other elements of the case record shall remain confidential.”

The first clear advantage of this, is that it enables a greater consistency of decisions. As highlighted by De Marco, in the case of anti-doping violations, “each sport, the world over, is regulated by the same [World Anti-Doping Agency] Code and ... it would therefore be extremely unfair on one player to be more severely sanctioned for the same act under the same rules than another.”²²² By publishing more decisions, it would clearly enable a greater consistency within decisions as like cases could be treated alike, similar to the common law system of precedent. Whilst a strict system of precedent will be discussed below, even a small improvement in consistently interpreting doping violations, would greatly improve the current workings of the CAS. Perhaps more importantly though, by ensuring the consistency of decisions, any allegations of bias against the CAS also loses their potency as the award is there for everyone to review.

The second biggest advantage of publishing all decisions is that it remedies the disadvantage of not doing so detailed earlier, namely the inequality between the parties. Under the status quo, athletes, and by extension, their counsel, are only privy to the decisions which CAS publish on their database.²²³ Conversely, sports governing bodies have access to all of the CAS awards which have they have been a party to, which even estimating conservatively, will be far more than the typical athlete will ever participate in. Thus, one party is in possession of a wealth

²²¹ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 12; Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 207.

²²² Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 12.

²²³ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 13.

of information which they can use to put forward their case, and also evaluate their chances of success,²²⁴ but the other party is, in effect, going in blind. Thus, by creating a more level playing field for all parties to compete on, any allegations of bias, or a lack of independence, are without merit. The imbalance between sports governing bodies and athletes, can therefore become much more balanced as a consequence.

5.3.2 A System of Precedent

The emergence of *lex sportiva* is, at least at its most basic level, a well-documented phenomenon that has gained common acceptance.²²⁵ This largely details that there are specific legal considerations which must be applied to the nuances of sport. Yet, there still exists certain controversies surrounding its exact application, and also to what extent the CAS contributes to it. As detailed above, there is a clear imbalance between sports governing bodies, and athletes, however, it is advanced that a system of precedent, or *stare decisis*, could help promote equality between the parties and resolve such an imbalance.

The starting point of this reform is that “the Court of Arbitration for Sport has established the normative conclusion that the CAS *ought* to follow its own precedents based on the systemic interests of foreseeability, consistency, and coherency.”²²⁶ The three aforementioned interests are clearly advantageous, and certainly aid in the rebalancing of interests in proceedings before the CAS, as has been extensively detailed previously. Consequently, the question is therefore why a system of precedent, as only exists in the common law world, is a necessary reform when the publication of decisions achieves the same objectives. The answer is that it facilitates the better resolution of disputes in global sports worldwide.²²⁷

Recently, it has become an emerging theme that the CAS is credited with the development of its own *lex sportiva*,²²⁸ or common principles in global sports, due to its role as the “supreme

²²⁴ Saverio Spera, ‘Time for Transparency at the Court of Arbitration for Sport’ (*Asser International Sports Law Blog*, 31 January 2017) <https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera#_ftnref6> accessed 15 July 2023.

²²⁵ Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463.

²²⁶ Johan Lindholm, ‘A legit supreme court of world sports? The CAS(e) for reform’ (2021) 21 *The International Sports Law Journal* 1–5, p. 2.

²²⁷ Zachary Gotlib, ‘Athletes Have Rights, Too: Investigating the Extreme Unfairness in Sports’ Purported Supreme Authority—Why the International Court of Arbitration for Sport Fails to Reign Supreme’ (2016) 24(2) *Cardozo J. Int’l & Comp. L* 389 – 422, pp. 413 – 415.

²²⁸ Jennifer R. Bondulich, ‘Rescuing the Supreme Court of Sports: Reforming the Court of Arbitration for Sport Arbitration Member Selection Procedures’ (2016) 42(1) *Brooklyn Journal of International Law* 275 – 328, p. 279.

court of world sports.”²²⁹ The benefit to world sports being clear: that by developing a clear *lex sportiva*, the CAS can create an “integrated, consistent, global regulatory dispute resolution procedure.”²³⁰ The development of a *lex sportiva*, as created via a system of precedent, is uniquely the way to do this. As most sports governing bodies resort to the CAS, either as the exclusive dispute resolution mechanism in the first instance, or, following the internal procedure within the sports governing body, the influence of the CAS on world sports is clear. As such, creating a binding system of precedent, sets the standard that sports governing bodies and athletes alike have to abide by. This not only guarantees the equality of the parties (i.e., that both parties are treated the same), but it also ensures the “coherent [and] consistent ... resolution of sports disputes.”²³¹ It is therefore advanced that “[l]egal coherence is necessary to achieve fairness,”²³² and precedent is the means which facilitates this aim.

5.4 Conclusion

As has been extensively detailed above, there exists a number of reforms which can substantially improve the workings of the CAS, whilst simultaneously rebalancing competing interests in international sports arbitration. The reforms detailed above, however, do not even cover all possibilities for reform. Further suggestions regarding public hearings, the method of appointment for the President of the arbitral tribunal, as well as the involvement of the CAS in reviewing the award prior to it being issued, are all still areas which can be improved. Despite this, the focus of this Thesis is on the balance of competing interests in international sports arbitration, and with good reason given the unfairness which athletes endure when appearing before the CAS. Thus, the impetus for reform must be focussed on addressing this issue, prior to any further considerations on the optimisation of the CAS process. Implementing the suggested reforms will, not only address this unfairness, but also meaningfully improve the workings of the CAS, whilst ensuring genuine compatibility with the European Convention on

²²⁹ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

²³⁰ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 13.

²³¹ Bronte Le-Fevre Hannah, ‘Ready, set, reform? The future of sports arbitration’ (2020) 23(3) Int. A.L.R. 199-211, p. 209.

²³² Zachary Gotlib, ‘Athletes Have Rights, Too: Investigating the Extreme Unfairness in Sports’ Purported Supreme Authority—Why the International Court of Arbitration for Sport Fails to Reign Supreme’ (2016) 24(2) Cardozo J. Int’l & Comp. L 389 – 422, p. 413.

Human Rights. It is therefore submitted that there are clear advantages for pursuing such reforms, and the CAS should act upon them.

Conclusion

What this Thesis has set out to do is to renew the calls for reform, both in the organisational structure of the CAS, as well as to its Procedural Rules. The reality of international sports arbitration is that some element of compulsory consent will always be required, both to ensure the crucial efficient resolution of disputes, but also to have a consistent mechanism of dispute resolution. Nevertheless, that is not to say that the current operations of the CAS are perfect: rather the conclusions above illustrate that it is far from it. What identifies sports arbitration from commercial arbitration, is that fact that, “[c]ommerce is not usually about the creation of a level and fair playing field (often the opposite), yet those principles are integral to sport and to the resolution of disputes in sport.”²³³ As such, the most important reforms to the CAS, if any at all, have to be centred around ‘levelling the playing field’, or to use the words of the title, ‘striking the right balance’.

It is advanced that such reforms are necessary, firstly, to ensure the compatibility with Article 6 of the ECHR, secondly, to ensure that vital interests (such as independence, impartiality, and transparency) are better represented in the dispute resolution process, and thirdly, to balance out the interests of participants before the CAS. All three interests are important, yet when reform has the possibility to achieve all three, then they should be strongly considered.

Pechstein will undoubtedly not be the last challenge ever mounted against the CAS, nor should it, as in order to adequately protect the interests of everyone who appears before it, the CAS should be open to reform. Thus, to preserve its status as the “supreme court of world sports,”²³⁴ the CAS should seek to immediately rectify some of the clear deficiencies which exist in its operations. It is strongly hoped that this will be the case, both for the interests of the athletes who are currently disadvantaged in proceedings, as well as for the interests of international sports dispute resolution as a whole.

²³³ Nick De Marco KC, ‘Compelled Consent—Pechstein & The Dichotomy and Future of Sports Arbitration’ (2016) Blackstone Chambers, p. 17.

²³⁴ *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport* BGE 129 III 445, p. 462.

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