

TIPPING THE SCALES OF JUSTICE – THE SPORT AND ITS “SUPREME COURT”

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CHAPTER ONE

A point in time: The CAS through the case of a sprinter from Belarus

The spectacular escape of Olympic sprinter Kristina Tsimanouskaya at the Olympic Games in Tokyo has thrown a spotlight on the situation in Belarus, 'Europe's last dictatorship'. However, the case has also revealed a great deal about the state of affairs at the CAS, albeit unnoticed. And it has once again highlighted the need to take a closer look at the sports 'court'.

Rarely does anything get too little attention during the fortnight of the Olympic Games. Especially when it is part of a high-profile political case – like that of sprinter Krystsina Tsimanouskaya, who narrowly escaped deportation from Tokyo to her home country Belarus and now has to build a new life in Poland.

The event that changed the Olympic routine did not come without warning: Belarus had been in turmoil for over a year since Aleksander Lukashenko claimed a sixth presidential term after a rigged election. Even the International Olympic Committee (IOC) had put their former comrade Lukashenko, who had also been President of the National Olympic Committee for 23 years, and his son Viktor, who replaced him as sports boss, on the sanctions list. But the Olympic rulers had shown nothing but indifference towards the pressure on Belarusian athletes. Among the thousands who were imprisoned or sidelined by the relentless regime for their critical views were many athletes including Olympians.



Belarusian athlete Krystsina Tsimanouskaya leaves the Olympic Games in Tokyo to apply for political asylum in Poland after being denied further participation in the Games by the Court of Arbitration for Sport. Photo: Yuichi Yamazaki/Getty Images.

This was the precarious future to which Tsimanouskaya was to return by force, after she had publicly criticised team officials. They had scheduled her for the 4 x 400 relay, a distance she had never run, after some members of the team were found to be ineligible to compete at the Olympics because they did not have the required doping tests.

In a video on Instagram Tsimanouskaya complained about “negligent” coaches. “The next day, Belarusian TV started saying I had mental health issues,” she explained later to media. “Then the head coach came over to me and said there had been an order from above to remove me.” Officials took the athlete to the airport and struck her off the start list for the 200m, for which she had trained for years.

Tsimanouskaya took refuge first with the Japanese police at Haneda airport and then in the Polish Embassy in Tokyo, refusing to be returned to Minsk.

While the fate of the athlete from the dictatorial stronghold caused worldwide concerns and set off another debate on the IOC’s approach to human rights, a centrepiece of the tumultuous incident received hardly any public scrutiny: the role of the sports judiciary, the third pillar in the global governance of sport.

A CAS order playing dumb

In the end, it was the Court of Arbitration for Sport (CAS), which denied Tsimanouskaya further participation in the Tokyo Games. Two hours before her 200m race, the runner had filed an application for “provisional relief” against her NOC’s decision not to let her compete. 90 minutes later it was rejected by the Ad-hoc Division of the sports “court”.¹

The CAS order deserves attention for several reasons.² First, because the ruling so easily picked one side – that of the sports system and the Belarusian officials whom Tsimanouskaya had dared to contradict on social media. The arbitrator simply claimed not to have “enough information and evidence” to even assume a “likelihood of success” for the athlete before the CAS. This would have been a precondition for granting the athlete’s request to provisionally overturn her NOC’s decision and allow her to run the 200m.

To deny Tsimanouskaya any possibility of juridical success was somewhat startling, since her criticism had already triggered intimidating threats against her on Belarusian state TV. They were even quoted in her application to the CAS, which also described the attempted abduction to Minsk. And given the practice of oppression in her home country, her ban looked very much like the kind of discrimination that violates Olympic values – at least according to the messages of the Charter. The CAS wasted no thought on this. Also, the question of whether Tsimanouskaya suffered “irreparable damage” by missing an Olympic race

¹ While the CAS may have the appearance of a court of law, it is an arbitral tribunal that is – unlike any other arbitral tribunal – not grounded in free consent of the disputing parties. Other specifics that set the CAS apart from a court of law are discussed in this report. They are the reason the term “court” is used here in quotation.

² CAS OG 20/13 Krystsina Tsimanouskaya v. National Olympic Committee of Belarus. Published here: https://www.tas-cas.org/fileadmin/user_upload/OG_20-13_Order_for_publication.pdf

- which, according to ample CAS case law, would have been another possible reason for a provisional order against her NOC - was not discussed. Instead, the arbitrator used the alarming circumstances of the case against Tsimanouskaya: She had sought protection "at an undisclosed location" and therefore, as it is noted, was not able to answer his questions.



The Ad-hoc Division of the Court of Arbitration for Sport easily dismissed Tsimanouskaya's appeal to stay and compete in the Olympic Games in Tokyo.

This quick disposal of Tsimanouskaya's Olympic dream reflected a troubling state of sports arbitration before the CAS. Named the "supreme court for world sport" by its founder, the late IOC president Juan Antonio Samaranch, the CAS was initially about protecting the much valued "autonomy" of the sports system against costly lawsuits before state-based courts.

In theory, the CAS should work as a neutral and independent dispute resolution forum where neither party has a home-court advantage. For athletes, however, this "court" has become a controversial institution. This is not necessarily related to the fact that they have no other option but to accept the jurisdiction of the CAS in order to exercise their sport - a

practice commonly referred to as forced arbitration. Rather, the often opaque procedures and dubiously reasoned awards have led to the CAS being seen increasingly as part of the machine, the network of sports governing bodies, which is likely to crush an athlete in case of a conflict.

The Tsimanouskaya case has even more to offer as an example: a backstory linked to the institutional structure of the CAS, a tell-tale mark for the (real or perceived) lack of neutrality at the sports “court”.

When the Vice President intervenes

The order in her case was issued by Michael B. Lenard, a man who arguably should not be involved in CAS’ jurisprudence at all. The former handballer, who handles investment funds in his main job, has been connected to sports arbitration since 1994, when he was Vice President of the US National Olympic Committee. The problem is that since that time he has also served as Vice President of an institution hardly known by anyone beyond the legal community – the International Council of Arbitration for Sport (ICAS).

The Council, a private law foundation, allegedly works as a kind of Supervisory Board and oversees CAS’ administration and financing. Its main objective, however, is to safeguard the independence of the CAS and the rights of the parties, which means – as CAS’ own website unequivocally declares – “that in no circumstances” can a member of ICAS “play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party”.³

The statement is dictated by legal necessity: In the mid-1990s, the formation of the ICAS followed a ruling by the Swiss Federal Tribunal, which expressed concerns about the then still somewhat too obvious ties between the sports judiciary and the Olympic masters.⁴ Until then, for example, CAS arbitrators were appointed directly by the IOC.

Today, the sports bosses select the majority of the 20 ICAS members which then appoint the arbitrators to a closed list. To become Vice President of the Council, Lenard even needed to be personally approved by the whole conglomerate: IOC, International Sports Federations and Association of National Olympic Committees (ANOC). Surely letting an ICAS top man by grace of the sporting lords decide on a case should go against the idea of embracing a little more independence, especially during the Olympic Games when the IOC’s interests are most likely to be affected?

Yet, it turns out, it was legitimate that Lenard acted as a CAS arbitrator during the Games in Tokyo: An exception to the hands-off rule applies to the so-called Ad-hoc Divisions

³ History of the CAS. Retrieved in August 2021, under <https://www.tas-cas.org/en/general-information/history-of-the-cas.html>. Supported by the Code of Sports-related Arbitration: “Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.”

⁴ SFT’s decision in 4P.217/1992, ATF 119 II 271 (Gundel v. FEI), 15.3.1993, was followed by the so-called Paris Agreement of 22.6.1994 that constituted the ICAS and was signed by the presidents of IOC, ASOIF, AIOWF, and ANOC.

during major sports events. Noteworthy, it is a self-granted exception: the Council enjoys the benefits of self-regulation, with no external agency to hold it accountable on a regular basis.

With that, the case of the Belarusian sprinter, although almost unnoticed, reflected a crucial question that affects the legitimacy of the CAS: Does the institution, which decides on vital interests of the global sports system and on the fates of thousands of athletes out of a small castle in Lausanne, structurally ensure fair, equal, and consistent enforcement of sports rules as it claims?

Briefly about this investigation

This is the core issue that this report aims to explore and the reason why Play the Game has investigated the CAS. *Justitia*, it is said, is blind to power, and her balanced scales of justice represent the impartial weighing of the merits of one side against the other, which is what she should stand for. In recent years, many awards have raised doubts among those who are worried about fairness and integrity in sport. Questions that often cannot be answered easily, because of the secrecy the institution cultivates.

In its first part, this report takes a behind-the-scenes look at the CAS: at its composition, at the balance of powers and at mechanisms within the institution – and at patterns that, although largely hidden from public awareness, could influence sports jurisprudence. The second part deals with the situation of athletes before the CAS and their concerns.

Play the Game has spoken to many sources over the last months. Among them arbitrators, on the condition they remain anonymous – they are “bound by the duty of confidentiality”, as the CAS Code puts it. Besides, the regular actors before the CAS, arbitrators, and counsels, are a tight-knit circle. Speaking out publicly not in the context of a scientific but a journalistic approach might have repercussions, we were told.

This is primarily a critical stocktaking of the practices at the CAS. However, it should not be ignored that the sports judiciary has also made valuable contributions in providing a framework for professional sport. Many CAS arbitrators do their job to the best of their ability and with high legal expertise. Quite a few share concerns that are being discussed here.

The CAS media department answered some questions (including those related to previously unpublished facts), but not all.

CHAPTER TWO

Miguel Maduro: “The opposite of the rule of law“

Can an arbitration court whose composition is decided by one of its most frequent parties, the sports governing bodies, independently resolve disputes? This is questionable – and the CAS itself fuels the greatest doubts because it advocates less transparency than any other pillar of sports governance. And that already applies to basic information.



The Court of Arbitration for Sport resides in the Château de Béthusy in Lausanne. Photo: Miguel Villagran/Getty Images.

One of the few who does not mince his words at all when it comes to the sports „court“, is Miguel Maduro, a former Advocate General at the European Court of Justice. His view on the CAS is harsh: In sports arbitration, he says, “they have the jurisdiction and the authority over a global order like a court has, but they do not meet the criteria you would expect. First of all, the way the CAS works does not comply with the right to a fair trial.”

The Portuguese has profound experience not only with the inner workings of a court – but also with good governance which is one of his teaching areas as a professor. At FIFA, he personally experienced the shortcomings of the sports system when he was briefly enlisted as Chair of the Governance Committee to help clean up football. He eventually resigned, disappointed about the “window dressing“ FIFA had in mind.

Sport does not get on very well with independent people and that also applies to its judiciary, Maduro says: “How is the CAS supposed to decide independently in disputes with

sports organisations as a party, when representatives of these organisations decide on its composition?”

Maduro specifically targets the aforementioned “supreme” institution, the ICAS, and its core vulnerability: a voting majority for the sports system.

Twelve ICAS members are selected directly by the sports bosses in the IOC, the International Federations, and the National Olympic Committees. These twelve then pick four more people, with a view towards, as the CAS Code puts it, “safeguarding the interests of the athletes.”⁵ The 16 choose the last four members, who “shall be independent of any preceding body”.

It is a process that ensures possible subordination of the Council to the appointing sports governing bodies. “The ICAS represents the sports system, safeguarding the sports system,” Maduro believes.

Above all, the Council appoints the arbitrators for a (renewable) term of four years. Which is tantamount to a barely concealed influence of the sports rulers on CAS’ jurisprudence.

The public concerned with sports policy, even if they have never heard of ICAS, is probably familiar with one member of the Council: John Coates, at the helm of ICAS since 2011 and an IOC Vice President. For many he is the incarnation of what is wrong with the sports judiciary.



John Coates, President of ICAS (right), is also an IOC Vice President. Here he is pictured with IOC President Thomas Bach who led the Appeals Division at CAS between 1994 and 2013. Photo: Matt King/Getty Images

⁵ ‘CAS Code’ refers to the Code of Sports-related Arbitration, latest version, in force as of July 2020, available on the website of the CAS.

The Australian, who just secured Brisbane the 2032 Olympics in a highly opaque procedure, became a member of ICAS with its creation in 1994. That was just one year after he was involved in a scandal related to Sydney's bid for the 2000 Summer Olympics. Coates had visited IOC members of African countries and delivered money for "athlete training" - in the event of Sydney's success, the amount was to be increased tenfold.

But these stories do not even matter, says Maduro: "You cannot be a legislator and a judge at the same time." To him, Coates is just one example of how far sports arbitration is from the rule of law. "It is the opposite of the rule of law."

The answer is ... "Not published"

The crushing distrust expressed by Maduro and others is only reinforced by the lack of transparency the ICAS stands for. Transparency is not really an appraised feature on the global sports stage - but at its judicial branch the deficits are prominent to an unrivalled degree.

Decision-making processes within the Council are a mystery even to CAS arbitrators (more on that later). Annual reports, including financial statements, are not published. When Play the Game asked for the latest annual report, the answer from the media department only clarified what was not really a secret to us: since it is a private foundation, ICAS "is not required to publish its financial statements."

Only the very basics are a matter of public record: ICAS/CAS is funded by the sports organisations, through deductions made by the IOC from the sums allocated to them as part of the IOC's revenue from the TV rights for the Olympic Games. Upon request, a previously reported amount is confirmed by the CAS: CHF 9 million is contributed by the IOC, the National Olympic Committees (ANOC), by the Olympic summer and winter sports federations (ASOIF and AIOWF), and FIFA.

However, this contribution, which has remained constant for years, contrasts with a steadily increasing budget for the CAS - according to CAS' own figures from CHF 15.5 million in 2016 to 17.1 million in 2020. How is the missing amount of CHF 8 million covered? When asked about the income from arbitration fees paid by the litigants and about assets that ICAS may have, the response again becomes tight: "Not published".

Until recently, not even information on how many cases the CAS had decided in the last four years was available. The statistics on the website had not been updated beyond 2016. They were modified in April 2021, after Play the Game sent a first inquiry including a question about the number of cases.⁶

The number of 948 arbitration cases in 2020 came as quite a surprise - an explosion of the caseload compared to the last known figure from 2016 with just 599 cases. It is also a figure

⁶ Statistics on the number of CAS cases: https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020.pdf

that magnifies one of the major transparency issues at the CAS. Only a very limited number of awards are published on the CAS website – and no one has come anywhere close to explaining why so many are not.

According to CAS' own media department 20 per cent of the awards are not available due to confidentiality agreements. That does not clarify at all why the database on CAS' website contains just a few dozen awards for the last years. For 2020, the online search yields not even 40 published decisions out of 948.

Miguel Maduro has no explanation either, but says, “such a publication policy undermines the rule of law. Law should be made public.” In the first place, the secrecy hinders actors in sport and litigants before the CAS to determine what the law is. This casts massive doubts upon the CAS' self-adulation that it helps develop a global sports law, the so-called “lex sportiva”.

Law evolves by setting precedents, then adhering to them (although it is not mandatory for arbitration) – or derivating from previous awards with persuasive arguments. Who would unscrupulously attribute such a formative power to a “court” which reserves much of its jurisprudence to an exclusive circle of insiders?

Missing landmark decisions

To make things even more aggravating: Even so-called landmark decisions are inaccessible, as legal scholars, such as Swedish professor Johan Lindholm, have noted.

To name just one: the 1996 award that established the standard of proof arbitrators use to decide doping and disciplinary cases – “comfortable satisfaction”, which is higher than a mere balance of probability (the standard for civil cases), but less than proof beyond a reasonable doubt (as required in criminal law). The basis and exact meaning of that? That would perhaps be more comprehensible if the initial ruling could be read.

In 2019, Lindholm published a 348-page book on the CAS and its jurisprudence, the only empirical study to date. He based it on 830 awards he managed to collect up until 2014. He comments: “... decisions that in practice establish rules of direct and substantial importance in disputes, that directly affect clubs and individuals, and that may lead to severe consequences, including both extensive disciplinary sanctions and monetary damages, cannot in practice be read, reviewed, considered, evaluated, or criticised.”⁷

So far, the CAS has not shown any inclination to alleviate the problems caused by its widely criticised discretionary publication practice.⁸ Why not is a key question. For the

⁷ The Court of Arbitration for Sport and its Jurisprudence. An Empirical Inquiry into Lex Sportiva. TMC Asser Press, Den Haag, 2019, p. 113

⁸ See, for example, Antoine Duval: Time to go public? The need for transparency at the Court of Arbitration for Sport. Research paper. Asser Institute, September 2020

time being, let us briefly point out that the CAS removes not just its jurisprudence from public scrutiny, but also the underlying process of arbitrators' appointments as well as the process of selecting the panel presidents.

CHAPTER THREE

Mastermind in the Court Office?

On paper, ICAS is in charge of fundamental matters at the CAS. However, there are signs that a power couple is pulling the strings instead – to the chagrin of arbitrators we spoke to. This also calls into question a ruling by the European Court of Human Rights, which declared the CAS to be sufficiently independent of sports organisations.

Here is another puzzling question: Who really calls the shots at the sports “court”? Is it the ICAS, who arguably should have responsibility for matters of principle like for example the publication policy? Maybe, but there are indications that the Council is far less involved than it is suggested in the CAS Code. The members meet only once a year (as they did last year, the media department confirmed upon request). None of the arbitrators we spoke to could provide clues of a decisive role for ICAS – or even believed in it.

One ICAS member, for example, the president of the Appeals Division, should play an important and quite time-consuming role at the CAS. After all, she appoints a sole arbitrator or, as it is custom for appeal matters, the president of a panel of three arbitrators for every single case (811 last year) and thus should be exerting a strong influence on CAS’ jurisprudence.⁹ As one arbitrator says: “Once the panel president is determined, you often know what the outcome of a decision will be.”

However, who will chair a panel is usually communicated by the Court Office to the arbitrators appointed by the parties. This does not necessarily mean decisions are made there but it is surprising that many arbitrators do not even know the name of the Division president: the Swiss Corinne Schmidhauser, a former alpine skier and Olympian.

Schmidhauser’s outdated CAS CV still lists her as president of Antidoping Switzerland, but actually, since the beginning of 2021, her main job is at a private school. (One of her predecessors is a lot better known: Thomas Bach, the IOC president, led the Appeals Division between 1994 and 2013.)

John Coates, as ICAS president, signs the appointment letters to the arbitrators and also the farewell letters when their services at CAS are terminated (no reasons are given). But do the ICAS members really decide who becomes a CAS arbitrator and whose mandate is cancelled such as they are supposed to? Arbitrators whose CAS mandates were not renewed, say Council members they contacted were as surprised by the dismissal as they were themselves.

⁹ For the Ordinary Division the arbitrators appointed by the parties chose a president, who then has to be confirmed by the Division president. For the Anti-Doping Division (first-instance cases) ICAS has drawn up a closed list of panel presidents, from which the arbitrators appointed by the parties chose one – if not a sole arbitrator decides, who is appointed by the Division President who is an ICAS member.

The Director General and the power of “redacting”

Considered as important as the IOC bigshot Coates is Matthieu Reeb, at least at the operating level. The Swiss is considered the grey eminence of the CAS. After all, he spent his entire professional life there, starting in 1995, fresh from university, when he was not even 30 years old. Initially given a short-term contract as a counsel, he worked his way up to become Secretary General (now Director General) in 2000. People who have worked with him say: “CAS is his life.”



Matthieu Reeb is Director General at the Court of Arbitration for Sport. Here he is pictured during the PyeongChang 2018 Winter Olympics. Photo: Ker Robertson/Getty Images

The landlord of the Court Office directs much more than his 41 staff members, 14 lawyers included. He has the power to control/influence decisions by “redacting” awards before they are issued. Or, as the CAS Code puts it: “Before the award is signed, it shall be transmitted to the CAS Director General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle.”

Reeb is said to make extensive use of this provision.

“When you draw up the award, it has to be reviewed by the Court Office. Every award passes over Reeb’s desk,” confirms one former arbitrator, who considers this rule unacceptable. “Why don’t they trust the arbitrators they have appointed themselves?”

Reeb’s advice is not binding to the arbitrators, but it puts pressure on them. And as if that was not questionable enough, the “tutelage” starts even before, another arbitrator tells us: At the beginning of the procedure arbitrators would be provided by the Court Office with

rulings “that would give direction”, including unpublished awards. The panel president would write the award anyway, as our source says, “and then consult with Reeb.” The other two arbitrators are allowed to comment.

A third arbitrator even claims colleagues would “write emails to Reeb to thank him for the good cooperation” after issuing an award as a means “to get new cases assigned”. Episodic, perhaps. But it adds to the impression it might not be the ICAS that has the exclusive competence to appoint the panel chairs. Does the Council just rubber-stamp preferred choices that are presented by Reeb?

In Germany, “rumours” to this effect were even cited in a doctoral thesis on the CAS: The selection of panel chairs was said to be decided with the help of a “file” kept by Reeb. A record that allegedly also contains information on which party the potential panel president previously decided in favour of, whether pro-sports federation or pro-athlete.¹⁰

It cannot be concluded that the Director General can influence CAS’ jurisprudence at will – but his actions remain widely without oversight. At least that seems to be the idea, given the current CAS Code: A previous explicit provision that ICAS “supervises the activities of the CAS Court Office ...” was deleted in the 2020 version for unknown reasons.

~~8. It supervises the activities of the CAS Court Office and the CAS Anti-Doping Division Office;~~

The provision that ICAS supervises the activities of the CAS Court Office has been deleted from the CAS Code from 2020.

Just a mascot from the IOC-top?

So, who supervises Reeb’s activities: John Coates and thus the IOC? That would be a powerhouse of two for the pinnacle of sports judiciary.

According to Reeb, the role of the Olympic ruler at the CAS is rather negligible. In an interview last year, Reeb presented Coates as a mascot of sorts: He would simply “give confidence to the contributors that there is someone who knows the Olympic Movement in the role.” Certainly, the Australian would „not play any role in the procedures themselves.“¹¹

This can be believed or not, but outside the world of sports arbitration the IOC Vice President is not exactly famous for letting things slip out of his control but for knowing how to get things done, discreetly if need be.

“If there were a gold medal for Machiavellianism, he’d have won it years ago,” read a portrait in his hometown paper, The Sydney Morning Herald, in 2017. Coates comes across as “inclined to micro-managing”, even deciding what would be served for lunch at board

¹⁰ Johannes Wissmann: Schiedssprüche des Court of Arbitration for Sport vor schweizerischen und deutschen ordentlichen Gerichten. Herbert Utz Verlag München 2015, p. 33

¹¹ Liam Morgan: The inner workings of the CAS, Independence and Sun Yang. Blog insidethegames.biz, 4.7.2020

meetings. His overall modus operandi: “He is essentially a backroom operator, doing his best work behind closed doors.”¹²

How far-fetched is it to think of the ICAS as a façade for proper appearance, designed merely to maintain the impression of distance between arbitration practice and sports bosses in order to dispel legal concerns (the same ones that once forced the creation of the ICAS)?

The very fact that the question of the actual balance of power at the CAS is an issue, further weakens confidence in the sports judiciary. And it would be another argument for reform, as Miguel Maduro and others have long advocated: “Why not appoint independent full-time ICAS members for limited tenures?” he asks.

This would cut the close family ties to the sports bosses, reduce possible subordination of Council members, and prevent the impression that the ICAS is more of a show than an actual supervisory body.

A sound decision by the European Court of Human Rights?

In 2018, however, it was confirmed by supreme authority that the top-down construct from the ICAS to the arbitrators on the CAS list was appropriate.

Romanian footballer Adrian Mutu and German speedskater Claudia Pechstein challenged the neutrality of the CAS before the European Court of Human Rights (ECtHR). Athletes’ representatives and many experts celebrated the ruling as a victory – after all, the judges established that CAS awards and their impact on athletes’ rights are subject to requirements of the European Convention on Human Rights such as the right to a fair trial. In Pechstein’s doping case the CAS and Switzerland had infringed those rights by denying her a public hearing.

But sports officials declared the majority ruling a success for themselves, too. In scrutinising the make-up of the CAS, the Court decided that “the system of the list of arbitrators meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals, and that the CAS, when operating as an appellate body external to international federations, is similar to a judicial authority independent of the parties.”¹³

Whether the vote of confidence in CAS’ independence was a sound decision, can be questioned not only because of the ambiguous decision-making channels within the sports “court”. An analysis of the current list of arbitrators – who they are, where they come from, and above all: how they are connected to sport – should also provide clues.

¹² Jane Cadzow: 'Horrendous enemy, terrific friend': What drives AOC head John Coates? In: Sydney Morning Herald, 6.10.2017

¹³ ECtHR, Appl. Nr. 40575/10 and 67474/10, Mutu & Pechstein vs. Switzerland, 2.10.2018

CHAPTER FOUR

Introducing the CAS arbitrators – some basic data

A record number of arbitrators are currently on the CAS list. Who are they and how did they make it to the sports “court”? Their biographies on the CAS website provide only scant information. Why? A family portrait that fills some obvious information gaps.

According to its Code, the CAS works with „not less than“ 150 arbitrators, who are suitable for the job because of their legal training and knowledge of sports. Their names have to be “brought to the attention“ of ICAS, “including by the IOC, the IFs, the NOCs“ and their athletes commissions.

In 2021, a record number of arbitrators has made it onto the CAS list: 418. One would assume that the increase in personnel is due to the rising caseload. But this is by no means certain, as we will see later.

The CAS publishes biographical information on the arbitrators online where you can find anything from 30-page CVs to two-liners.¹⁴ However, the data often maintain the appearance of transparency rather than being truly informative.

A key question for example is who recommended an arbitrator? Usually, no information is given. When it comes to sports officials in the role of arbitrators, the referral is no mystery, but with many others, there is a risk that for example an athlete could choose an arbitrator who was nominated by the same body against that he is up against at CAS.

Only very few arbitrators - you can count them on one hand - indicate in their CVs which awards they have participated in, or which party appointed them for a case. In the CAS database, such party - arbitrator relations can be researched to some extent, but the data is as fragmentary as the number of published awards.

Most arbitrators do not mention how long they have been at the CAS, but some have been there for nearly 30 years since the 1990s.

That is not all that is missing: Dozens of biographies are outdated, incomplete or even dodgy - and have left out important offices and positions in sports (in international and national federations, IOC, NADOs and NOCs). Not even a position as NOC president (Donald Rukare, Uganda) or as CAF’s 1st Vice President (Augustin E. Senghor, Senegal) seem worth mentioning. The same applies to (elected) presidents of national federations, NOC board members and even more to many of the arbitrators’ commitments in committees and commissions of national and international sports federations.

¹⁴ The analysis of the CAS database with information on arbitrators for this text was finalised in August 2021. If any updates have been made since then (a system is not apparent anyway), these are not included.

The question as to why there is no obligation to fully disclose these positions leaves room for speculation. Surely, this is a far cry from a decent presentation of an open register of interests as one might expect from a “court”. The lack of basic information about the arbitrators puts newcomers to the CAS, mostly athletes and their lawyers, at a disadvantage compared to regular litigants such as the sports governing bodies and their counsels.

Presumably most would agree that it matters who the CAS arbitrators are and who they are connected to. After all, they wield considerable power not just over the outcome of individual disputes but also over the development of the so-called sports law.

Predominantly Western, white and male

To fill obvious information gaps, an online search of the 418 arbitrators was conducted for this report. While not guaranteeing complete accuracy, it represents a more substantive approach than CAS itself is willing to provide.¹⁵

What do the arbitrators reveal about the composition of the CAS and ultimately about its independence or lack thereof?

At first glance, the CAS looks geographically diverse, at least as far as the origin of the arbitrators is concerned: they come from 90 countries, after all. At second glance, the diversity shrinks. More than half of the judges (220 - 50.5 %) are from Europe, and more than one in ten are from the US.

In general, a few countries dominate the CAS. With the USA (44), UK (29), Switzerland (28), Australia (22) and France (21), five countries have more than 20 arbitrators; Canada, Spain, Germany, Italy more than ten. These countries provide 210 arbitrators - one out of every second arbitrator. It is certainly not wrong to note: The CAS is European/North American dominated, it is Western, and it is mainly white.

Another even more striking diversity problem is that the CAS is male. Only 56 arbitrators are women. That is just 13 per cent. In international courts (not arbitral tribunals) nowadays usually a quarter of judges are female.

Certainly, a more inclusive “court” - which, after all, serves sport and its unparalleled diversity of actors - would be more likely to be perceived as credible? Diversity “on the bench” matters, as it increases trust and the appearance of fairness in any type of jurisdiction.

In terms of age, a few arbitrators can be called senior citizens as ten have already celebrated their 80th birthday. The role of most senior is shared between two men from Canada and the Netherlands both born in 1935. The three youngest (born in 1986) come from Saudi

¹⁵ Lindholm in his book on CAS’ jurisprudence (see footnote 6) included a chapter on „the characteristics of CAS arbitrators“ such as „gender, age, experience working in CAS, professional background, geographical origin“. In that respect, an update seven years later is attempted here. Other features such as detailing the links to sports governing bodies are exclusive.

Arabia (an NOC employee), Belgium (employed at FC Barcelona), and South Africa (a former Olympic triathlete, affiliated to the NOC).

Table 1: Age of CAS arbitrators

Age	Number of arbitrators	Percentage
+30	12	2,87
+40	88	21,05
+50	115	27,51
+60	108	25,83
+70	85	20,33
+80	10	2,39

The CAS appointed 26 new arbitrators in 2021 (the appointments were not publicly announced but appeared suddenly in the online list of all arbitrators sometime in May/June) and lowered the average age of arbitrators somewhat. Half of the newbies are younger than 50.

However, it is apparently possible to be appointed to the CAS at any age. There is also a newcomer, born in the late 1940s, about whom little flattering can be found online, only claims of missed court dates or that the man seemingly considers rudimentary tasks before courts “boring and unnecessary”.

Of course, all 418 arbitrators have a legal background as it is one of the few criteria the CAS formulates for appointment. Except perhaps for one arbitrator who in 2020 was forced to resign from her post as Director General of the National Football League in connection with media reports that she had faked her law degree - and who then announced that she now “wants to concentrate on work for the CAS”.

The typical CAS arbitrator works as a lawyer in a private law firm – or at least 282 say they do. For some, you cannot be sure what their main occupation is. Who can tell with high-profile sports officials? The table below shows arbitrators by their occupation. Double counting is included so that sports officials or academics who sometimes work as lawyers in private practice are counted under both occupations.

Table 2: Occupations of CAS arbitrators

Occupation	Number of arbitrators	Percentage
Sports official *	44	10,53
Sports employee**	42	10,04
Lawyer in private practice	282	67,46
Lawyer in company	16	3,82
Judge	23	5,5
Academic	60	14,35
Public office	25	5,98
Others	3	0,7

* Sports official means elected /executive position in sports governing body including boards of national anti-doping organisations

**Sports employee means employed by sports governing body, including football clubs etc.

More details worth noting: In addition to the 60 full-time legal academics, 93 arbitrators (and thus more than a third overall) have an academic background and they teach part-time at universities and colleges. 114 are active at other international arbitration institutions besides the CAS, so they have experience with arbitration.

VIPs and careers

Retirees are a trusted constant at the CAS. They are often former judges (32). Some of them belong to another category that is well represented among the arbitrators - VIPs of all sorts. They work or have worked at the United Nations or High Courts, others at the International Bar Association (incidentally, CAS has special interests there; more on that later).

To name some: John Charles Thomas from the US was the first black judge at the Supreme Court of Virginia and the youngest ever. Raymond Ranjeva from Madagascar is a former Vice President of The International Court of Justice at the Hague. And with Jean-Paul Costa from France, a former President of the European Court of Human Rights has turned CAS arbitrator.

In general, the CAS is not lacking in legal, political, or other prominence: With George Abela even a former President of State (Malta) now is on the CAS list. Among the arbitrators are former Attorney Generals, ambassadors and current honorary consuls, a former Minister of Justice (he resigned after just two days – but the short-term government position is included in his three-line CAS CV), a former Minister of Interior, resigned after corruption allegations a few years ago, and now is new at CAS in 2021.

Didier Linotte is still President of Monaco’s Highest Court. Philippe Sands sits on the Board of the English PEN and has written the widely acclaimed book ‘East West Street: On the Origins of Genocide and Crimes Against Humanity’. Sands is one of a handful internationally acknowledged human rights lawyers in sports arbitration, even though the CAS Court Office recently tried to offer 16 arbitrators as specialists in this field.¹⁶ For the

¹⁶ See: Sport and Human Rights. Overview from a CAS perspective. 31.3.2021

CAS administration, sometimes participation in a FIFA working group or in a Human Rights Commission in Qatar is considered sufficient human rights expertise.

An arbitrator's reputation does not always go back to legal expertise, at least the latter sometimes appears to be less memorable than other features in arbitrator CVs: One arbitrator boasts about having "delivered ground-breaking commercial tour programs with artists like Rolling Stones and David Bowie", another about being the first Hungarian to have climbed Mount Everest from the North side.

There is also the brother of the host of the 'Late Show', Stephen Colbert, as well as a former Chairman of the Australian Broadcasting Corporation ABC. A fact, his CAS biography also omits is the following event, noted on his law firm's website: The man became the first foreign judge to resign from the Hong Kong Court of Final Appeal "citing concerns regarding the national security legislation imposed by the Chinese government."

Very likely, this arbitrator will not be assigned by CAS in disputes involving Chinese parties even if he was defending democratic convictions rather than showing bias.

An unusual case of "bias"

In December 2020, the CAS encountered problems with such openly displayed convictions, when the Swiss Federal Tribunal (SFT) set aside an award in the doping case against the Chinese swimmer Sun Yang.

Arbitral awards by the CAS can be challenged at the Swiss Supreme Court¹⁷, but appeals are a rare occurrence and success is even rarer - in almost 40 years of CAS history only a dozen appeals went through. That is by design: The SFT's review is mostly limited to certain procedural issues. Merits of a case will not be re-examined on appeal, only when a CAS award is grossly incompatible with Swiss "public principle of law".

Sun Yang's appeal was successful on the basis of apparent "bias" of the panel chair. That could have been a field day for the many critics doubting the independence of CAS. For good reasons it was not: The case did not challenge the institutional structure of the CAS but just covered an Italian arbitrator who went overboard with his passionate love for animals.

The culprit, panel chair Franco Frattini, had condemned the Chinese practice of dog slaughter on social media. Because he also used derogatory expressions against dog meat eaters, the Federal Court considered him to be biased against the whole of China.¹⁸

¹⁷ Setting aside proceedings against CAS arbitral awards have to be filed with the SFT due to the seating of CAS tribunals in Lausanne. If appeals are unsuccessful, there is still the route via European courts, depending on the case.

¹⁸ Swiss Federal Tribunal: 4A_318/2020 of 22.12.2020



Franco Frattini, a former MP and Foreign Minister in Italy, had a very brief stint as a CAS arbitrator. He was appointed to CAS in 2018 but later disappeared from the current list of arbitrators after his award in Sun Yang's doping case was set aside on appeal due to apparent bias of Frattini against China. Photo: Valeri Sharifulin/Getty Images.

It was an embarrassment for the CAS, but the matter will probably soon be forgotten. This is not only because a new award has been issued against Sun Yang in the meantime, which halved his doping sanction. It is also due to the fact that Frattini, who was appointed to the CAS in 2018, has now mysteriously vanished from the current list of arbitrators before the end of his four-year term. But there are questions hitting much closer to the mark, when it comes to bias than a dispute over traditional eating habits. Take Frattini.

What had qualified him for sports arbitration at the CAS? The Italian, a former judge and a former EU Commissioner, was also foreign minister in cabinets of Silvio Berlusconi. As a politician, Frattini had lobbied for the IOC, and achieved, as he put it, "a great victory for the good of all." He headed the efforts to have the IOC awarded Observer status at the United Nations which was significant for the Olympic rulers, who like to be seen on an equal footing with the world's powerful.

Was Frattini - a prominent figure - eventually rewarded for loyal services to the Olympic family with a position as a CAS arbitrator? Such a career would not be uncommon. And it is one of the reasons why, with many controversial CAS awards, it is not a far-fetched suspicion that the arbitrators may be biased in favour of those by whom they are recommended - the sports governing bodies.

CHAPTER FIVE

Too close to sport to be independent?

In addition to 44 sports officials on the CAS list of arbitrators, 203 arbitrators hold other positions with sports governing bodies, many even more than one. Well over half of all arbitrators have side jobs in sports - does this influence the jurisdiction? And why are repeat arbitrators, super arbitrators, and super presidents a problem at the CAS?

What clues regarding the independence of the sports “court” does the current arbitrators’ list provide? Although lawyers and judges value objectivity and the appearance of not being influenced by their personal experiences, they are not robots.

Just ten per cent of the arbitrators are elected sports officials, and another ten percent are employed by the sports business. That does not sound too bad, or does it?

First, a look at the three IOC members on the list: Richard Pound (Canada), Anita DeFrantz (USA) and Denis Oswald (Switzerland). According to available sources (which are tenuous for the aforementioned reasons), Pound and DeFrantz are rarely appointed to panels which begs the question of why they are even on the list. A last resort for eventualities perhaps?

Oswald, who was re-elected to the IOC Executive Board in Tokyo in 2021, is an entirely different story: the rudimentary CAS database lists more than 60 cases that the Swiss lawyer has decided on since the 1990s, nearly all involving international federations. FINA (swimming), FEI (equestrian), IJF (judo), FIH (hockey), FIG (gymnastics), ITU (triathlon), IWF (weightlifting) or FIFA (football) all secured the services of the IOC grandee. Certainly, the man knows his way around, himself having been the President of world rowing until 2014.

It is hard to claim that these three IOC members and other elected sports officials in the ranks of arbitrators represent society’s norm of separation between legislative and judiciary powers.

The CAS Code is not of much help with its focus on keeping up appearances: “Every arbitrator shall be and remain impartial and independent of the parties,” it reads, “and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties.”

Unfortunately, those “circumstances” are not specified. And they appear to be open to generous interpretation, when a president of one sports federation taking up cases of another federation is not an issue. Indeed, there are no binding rules on what might constitute a conflict of interest. Also, control mechanisms do not seem to exist, as we will see later.



Denis Oswald has had long career in the Olympic system and has also decided on at least 60 cases at CAS since the 1990s.
Photo: Harold Cunningham/Getty Images

Masters of multitasking

The IOC members are just the tip of the iceberg. Another figure widens the perspective: In total, we found only 84 of 418 arbitrators without any relation to sport, neither past nor present.

With the majority of CAS arbitrators, there is no certainty that conflicts of interest are kept out of the jurisdiction. After all, among those shaping the jurisprudence are not only elected officials and sports employees, but also the many arbitrators currently holding positions in sport they were appointed to by sports governing bodies. 203 arbitrators (nearly half on the CAS list) are sitting on legal, governance, ethics, and other commissions of international and/or national federations / organisations. In other words, they are on the payroll of the sporting conglomerate.

CAS arbitrators do side-jobs for ANOC, the Olympic Council of Asia, the European Olympic Committee. Almost all Olympic federations (and a few non-Olympic) have people sitting on their committees who at the same time decide on the fate of athletes at the CAS.

At the top: more than dozen arbitrators have roles within football at FIFA, UEFA, CAF, AFC, and CONCACAF. One would like to assume that these people are not allowed to decide on cases close to the interests of those federations, but the opposite is true (we will later come to examples) – and deliberately so. The CAS maintains a special list for football-related cases with arbitrators often connected to the business.

However, to rely on the services of CAS arbitrators is a common occurrence in sports governing bodies: ANOC, boxing (AIBA), cycling (UCI), fencing (FIE) and floorball let their Ethics Commissions be chaired by CAS arbitrators, who also chair the Anti-Doping-Panel in archery and the Judicial Board in World Sailing. World Athletics appointed as many as 13 CAS arbitrators to their disciplinary panels.

112 arbitrators even hold multiple positions. One of them is the Canadian lawyer Richard McLaren who has been at the CAS since 1993. He has earned worldwide respect when commissioned by WADA to investigate Russian state-organised doping and by the International Weightlifting Federation to clear up its corruption mess. Recently he was hired by AIBA for a report on alleged corruption in boxing at the Rio 2016 Olympics. Less well known are his positions as basketball's (FIBA) integrity officer, his seat in ITF's (Tennis) Integrity Unit or his work for the International Cricket Council as Chair of the Anti-Doping Tribunal, and FIA, the governing body of motor sport, as judge to their International Court of Appeal. As an arbitrator he also works for the Canadian Sport Dispute Resolution Centre.

Regardless of his professional merits, it is debatable whether he can be perceived by observers as being independent from the sporting conglomerate, as one might expect of a CAS arbitrator.

Add to that mix the arbitrators who do not hold positions with sports governing bodies but in their biographies proudly list the IOC and others as clients of their private law practices. In stark contrast, we could detect just ten arbitrators connected to athletes' representative bodies.

Success rates and in-group favouritism

According to Swiss law, an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his independence. Given the above figures, it is amazing that parties before the CAS only rarely issue challenges. However, most of them are declined by the ICAS (the Challenge Commission), as the CAS informs upon request from Play the Game: In the years between 2016 and 2020, parties tried to reject an arbitrator 42 times - only twice successfully.

There may be several reasons why challenges are scarce. The kindest explanation would be that the ICAS/CAS Court Office has a good hand in selecting, for example, panel presidents. Another option: The parties know their objections would not be accepted anyway.

The Swedish professor Lindholm provided a remarkable finding in his book: Not only are sports governing bodies by far the most common class of litigants before the CAS (involved in 85 per cent of cases) - they also win their cases more often than others. They are "the only class of appellants to win more cases than they lose", and they are also overall more successful than the average when they act as respondents.

Does this have anything to do with the multiple obligations of so many arbitrators? Is it not both possible and likely that an arbitrator's relationships influence how he or she decides CAS cases, at least to some extent?

Miguel Maduro believes so: "The effects of CAS rulings are not limited to the individual parties, they have impact on others in the sports world," he says. "When an arbitrator decides a case with an international federation involved, that award can influence another federation he is connected to."

Maduro says that during his brief time at FIFA, his team planned to establish a rule that no CAS arbitrator would be allowed to sit on FIFA's committees. "We were surprised that the idea of drawing a line there had to come from us and was not mandated by the CAS." In his opinion, arbitrators should not hold any other positions in sports organisations.

In-group favouritism, to use a term from psychology, might also be fostered by the nomination process for the CAS list (by recommendation of sports governing bodies) and an interest in reappointment. These are conditions that are arguably at odds with fair adjudication or at least with the trust in it.

Besides: Could financial interests reinforce a tendency towards prioritising the interests of those who select the CAS arbitrators (and appoint them to panels)? Arbitrators receive between CHF 300 and CHF 500 per hour – depending on the disputed sum, if it is a monetary dispute. For the typical dispute over disqualification or suspension from the sport or eligibility issues, Matthieu Reeb, the Director General, decides. The remuneration corresponds to the average of lawyers' fees in Switzerland.

Super arbitrators and super presidents

A special feature of the CAS illustrates how some arbitrators can make their living from sports arbitration: the "super arbitrators", as Lindholm calls them.

From the awards the professor was able to gather in the period until 2014, Lindholm found a "drastically inequitable distribution of appointments among CAS arbitrators": Just seven per cent of the arbitrators on the CAS list received more than 45 per cent of all appointments.

The 17 "super arbitrators" he detected were long-standing CAS members, all of them men and mostly from Europe. By contrast, the majority of arbitrators had participated in only one or two decisions.

Recently, the London law company Morgan Sports Law reached similar results based on an analysis of 2,081 published CAS awards issued between 2000 and 2020. Although the analysis is somewhat affected by the fact that the CAS keeps the majority of awards secret (a total of 7,393 cases were decided in the period from 2000 to 2020), the findings are

sobering. They point to “serious diversity issues as regards both gender and ethnicity” at the CAS and a group of just 14 (male) arbitrators receiving more than 100 appointments.¹⁹

And the imbalances seem to persist: Play the Game asked about the frequency of appointments to panels in 2020. The result for those more than 900 cases: 35 per cent of the arbitrators (137 out of the then 390+) were not appointed to a panel at all, 30 per cent sat on a panel less than ten times, 35 per cent more than ten times.

In addition, Lindholm points to the problem of “repeat arbitrators” (repeatedly appointed by the same party). We can only guess whether such arbitrators are sufficiently impartial and independent of the parties who frequently rely on them.

In this respect, too, the CAS prevents scrutiny by keeping most awards under lock and key. Is that in fact the very purpose of the capricious publication policy - to conceal too close ties between arbitrators and parties? In any case, this keeps potential conflicts of interest out of the public eye.

The CAS practice of not making the panel's votes (or dissenting minority opinions) public adds to the secrecy: It's impossible to know, whether a repeatedly appointed and potentially biased arbitrator voted for “his/her” party.

Similar to the “super arbitrators”, there are “super presidents”. It is not known what makes them attractive as panel chairs (for the majority of cases they are selected by the ICAS/Court Office), but some of them were involved in earlier high-profile CAS cases. Their influence - by casting the final vote if the other two arbitrators are divided - cannot be ignored.

Upon request, CAS informed that 102 arbitrators have been appointed to chair a panel in 2019, in 2020 it was 120. But a few stand out, they are appointed again and again. Some decisions in favour of sports governing bodies directed by these “super presidents” certainly give room for questions, all the more so when it comes to unpublished awards or to awards for which the CAS only communicates the results.

An insight into CAS psychology

By some of their colleagues, the presidents are even revered as this story shows. Deon van Zyl, a retired High Court judge from Pretoria and a former president of South African Athletics, provided a rare glimpse into what might be part of the inner CAS psychology.

For his Rotary Club, he shared some “most exhilarating experiences” as an arbitrator in Ad-hoc Divisions during sports events (a CAS responsibility since the Atlanta Olympics in

¹⁹ Morgan Sports Law: Arbitrator Diversity at the Court of Arbitration for Sport. Published in two parts on 23 September and 13 October 2021 on www.morgansl.com. The articles focus on the lack of diversity: Only 4.5 % appointments were to female arbitrators; only 17.3% were to non-white arbitrators, and only 3.6 % were to black arbitrators.

1996). Zyl finds warm words for 5-star-hotels, sightseeing trips, and a number of sports stars he cheered for together with his wife and even his daughters. Family travel seems to be common: "A number of the panel members were accompanied by their families, who soon became great friends."

Those benefits came with some arbitration duties, which were obviously not too burdensome for the man from South Africa as he fully relied on the panel chair: "In the panels on which I served Michael Beloff QC from the UK played a prominent role and gave us all guidance on what was expected of us as panel members."²⁰

Beloff is one of those super arbitrators/super presidents who has decided for 25 years at the CAS in addition to his interim involvements with cricket, athletics, and other sports organisations. What does the former president of the Trinity College reveal about himself in his CV? Above all, how others describe him as a "senior statesman" or even "the godfather of sports law". When it comes to self-promotion as a guiding light of the legal business, modesty is not his forte (nor, for that matter, is it with some of the other "supers" at the CAS).

Which brings us back to our recipient of the guidance from South Africa: Van Zyl managed to get on the good side with the higher-ups at the CAS. He ended up himself being appointed panel chair. Did that happen by willingly accepting "what was expected of us as panel members"?

Van Zyl need not be a typical story, although we have heard of former arbitrators, whose terms at the CAS were not renewed after they were less amenable to suggestions.

Without question, an inner circle of presidents exercising significant power multiplies the impression of a judiciary that can be steered into certain directions. "CAS should adopt a different system," suggests Miguel Maduro. "A closed list of panel presidents with just one single term of appointment, not renewable."

²⁰ Rotarian Deon van Zyl's service on the Court of Arbitration for Sport. In: „District Governor's Monthly Magazine. Rotary District 9350", July 2020

Jamaica with his gold medals in the 100 and 200 metres in world record times. What a wonderful privilege it was for us to attend the opening and closing ceremonies and to witness such athletes participating under the motto "One World, One Dream". Elsa and I were extremely happy to meet with Bill and Melinda Gates, who were sitting right behind us at the swimming events in the National Aquatic Centre. Once again my CAS programme made it possible for us to attend all the major swimming, track-and-field and gymnastics events and we could join the sports leaders and media of the world in describing the Games as unprecedented, spectacular and spellbinding.

Once again we were enabled to visit historical sites such as the Forbidden City and Great Wall of China. On my birthday (22 August) Elsa and I were also the guests of our CAS panel chair, Chief Justice Raghunandan Pathak, and his wife Asha,

for an unforgettable dinner at a famous Indian restaurant in Beijing.

I truly enjoyed my experiences as a CAS panel member at the various Games I attended. In the process I wrote a number of judgments on sports disputes, some of which were later to be published in CAS publications. And all this happened while I was a Rotary member committed to service above self!

Deon van Zyl



JULY EDITION

Deon van Zyl, a retired High Court judge from Pretoria, has shared his experiences as an arbitrator in the Ad-hoc Divisions with readers of the magazine for his Rotary district. He enjoyed meeting Bill and Melinda Gates and visiting the Chinese Wall in between writing judgements on sports disputes. Excerpt from the 2020 July edition of District Governor's Monthly Magazine. Rotary District 9350, South Africa.

Serving football, not footballers

A reform like that would eliminate the problem of a long-standing CAS elite, about whom nobody knows exactly how and why they are selected as panel chairs. But would such an antidote be in the interest of the sports bosses at all? Sometimes, appointments of panel presidents prompt exactly this question.

Take Michele Bernasconi, a partner in a Zurich law firm. He's in the top ranks of the most frequently appointed arbitrators and often chairs panels. UEFA brochures list him as "legal advisor" and a Co-director of their Football Law Programme for aspiring sports lawyers. Michel Platini, former UEFA president, once complained how the CAS arbitrator played an important role to exclude him from the race for the FIFA top job in 2015 thereby opening the door for then UEFA Secretary General Gianni Infantino. It happened "all with the help of Zurich lawyer Michele Bernasconi".²¹

Exaggeration or not – you wonder why an arbitrator with close ties to the football establishment is even allowed to handle football-related cases with federations as litigants. Bernasconi handles such cases regularly involving for example FIFA or CAF and CONCACAF, UEFA's sister organisations in Africa and the Americas.

In 2009, he chaired the panel in one of CAS' so-called landmark-decisions: Brazilian footballer Franceline da Silva Matuzalém had unilaterally terminated his contract with the club Shakhtar Donetsk and moved on to Real Zaragoza. The CAS award raised the compensation the athlete and Zaragoza had to pay to Shakhtar from 6,8 million to a whopping 12 million euros. The decision took not only the salary of the player into account, but also his value to his former club, i.e. missed transfer fees, among other things.

With this, the panel deviated drastically from previous CAS jurisprudence that had strengthened the freedom of employment for players by deciding that a club was not entitled to claim a player's alleged market value as compensation. The award was widely seen as shifting the pendulum back in favour of the football establishment and the clubs. And according to Play the Game's information it was an intensely debated majority decision with the deciding vote cast by panel president Bernasconi.

And it had a sequel: Based on the Bernasconi-panel award, FIFA later ruled that Shakhtar could request a ban for the athlete if he failed to pay the astronomic "debt" on time. A decision that was again upheld by the CAS, this time by another panel.

Matuzalém went to the Swiss Federal Tribunal against the sanction he considered amounted to a lifetime ban and ended up with a real landmark decision. For the first time, the federal judges annulled a sports arbitral award on the merits of the case and for a breach of public policy. They overruled the CAS because of an "obvious and grave

²¹ Andrew Warshaw: Platini calls for 'great manipulator' Infantino to resign and for truth to be told. Blog Inside World Football, 13. 5. 2020

violation“ of the athlete’s rights. A press release labelled the award as being “fundamentally unlawful”.²²

Once again - according to Play the Game’s information - two super arbitrators had participated: Luigi Fumagalli (Italy) and José Pintó Sala (Spain). The latter currently serves in several UEFA commissions and as chief of ANOC’s Ethics Commission (not mentioned on his CAS CV). On what grounds exactly did the panel stick to FIFA’s Disciplinary Code that would have kicked the player out of the game for good? We will never know: The overturned decision remained unpublished.

A short-lived epiphany

Once, in fact not too long ago, even the grey suits in Lausanne’s Olympic headquarters seemed to realise the problem with conflicts of interest at their “court”. The astonishing episode occurred in 2018, when the CAS acquitted some Russian athletes who had been banned from the Pyeongchang Winter Olympics by the IOC for involvement in cheating at the Olympic Games in Sochi.

IOC boss Bach voiced strong criticism and even called for changes at the CAS. Reform was needed to guarantee a “jurisdiction with quality and continuity”. That was an interesting wording: Were quality and continuity at the CAS not a given in Bach’s view? Even more astonishing: His ally Coates kind of agreed, and a statement read: “CAS has noted the comments and concerns raised by IOC President Thomas Bach and will consider them thoroughly.”

Actually, at least by CAS standards, nothing too special had happened before the 2018 Games in Pyeongchang: Among the arbitrators who had ruled in favour of the Russian athletes were at least two allied to an interested (sports governing) party.

Christoph Vedder (Germany) chaired the Anti-doping hearing panel of the International Biathlon Union (IBU) - a federation with several athletes involved in the Russian doping scheme and, to put it mildly, with strong ties to Russia. And Michael Geistlinger (Austria) had served as legal adviser and Secretary General for the IBU at a time for which a fact-finding commission would later disclose systematic corruption within the federation paid for by Russian officials.

Just another instance where CAS arbitrators were not vetted - or were they? Obviously, the IOC as the respondent in the case had not challenged their appointments to Russia-related panels.

And what about the reforms? Would one consider Geistlinger’s departure from the CAS a reform (albeit not publicly communicated, only visible when searching the list of

²² See: Swiss Federal Tribunal, First Civil Law Court, Judgement of March 27, 2012 / 4A_558/2011

arbitrators)? The Austrian had also published an article defending the Russian annexation of Crimea in 2014. Perhaps this was too embarrassing even for the CAS.

Profound reforms never materialised. Which is why Bach's moment of truth in hindsight looks very much like a political stunt. Particularly as the sports justice system is a blank space when it comes to the big messages championing Olympic progress such as, to name just the latest, the 'Olympic Agenda 20 +5'.

CHAPTER SIX

Conflicts of interest: Double hatting and CAS as a tool

There are in fact guidelines for dealing with conflicts of interest in arbitration. But they do not count for much at the CAS. Here is a look at exemplary cases that illustrate the ignorance of good practice. A deliberate ignorance that sometimes makes the CAS a suitable instrument for ambiguous politics of the sports system. Which is why pressure to reform the CAS will most likely have to come from outside.

Sometimes, a different kind of conflict of interest is hitting even closer to the Olympic family.

By 2010, the revised CAS Code prohibited the practice of so-called double hatting: Arbitrators were no longer allowed to act as counsel for a party before the CAS. But the criticism, some CAS arbitrators and counsels might have access to *insider knowledge* and benefit from a strategic advantage, was not eliminated by that as the ban for double hatting did not extend to law firms.

Many arbitrators work in large law firms, which IOC, WADA, or international federations like to commission with highly paid expert opinions or mandates for their disputes at the CAS. One of the most obvious examples (albeit not a stand-alone): Kellerhals Carrard that is one of the biggest Swiss law firms with about 200 lawyers.

The senior François Carrard is part of the legal nobility in French-speaking Switzerland. He served as IOC Director General for 14 years. To this day, the octogenarian sits on numerous boards of directors including five-star hotels popular with sports officials and IOC-owned companies such as Olympic Broadcasting Services SA and IOC Television & Marketing Services SA – and he maintains the family bonds as a legal advisor to the Olympic rulers.

Carrard has also worked harmoniously with some of the biggest sports crooks in his various roles with international federations. In 2020, those mandates once again came into question with the downfall of Tamás Aján, the long-term president of the International Weightlifting Federation (IWF).

As IWF's lawyer, the Swiss "monitored" elections that had been manipulated, and he acted for Aján privately. Weightlifting officials, who years ago drew attention to missing millions now on record, were threatened with legal action by Carrard. He reminded the critics of their "obligation of loyalty and faithfulness", including a "duty to provide in all circumstances for the interests of the principal", i.e. Aján.²³ Which perfectly describes Carrard's approach – always loyal in the service of the Olympic rulers.

²³ Letter by François Carrard, 4.3.2011, private archive

Those incidents do not diminish his popularity, and he is still working for the IWF and others in the Olympic family. Recently, Carrard was appointed a member of the FIG “Gymnastics Ethics Foundation” and chief of FINA’s “reform” commission. At CAS, he was an arbitrator until 2009, when the new clause against double hatting came into force and he focused his activities on legal representation before the sports “court”.



François Carrard who has held many posts within international sports federations cannot work as an arbitrator at CAS, where he acts as a lawyer. But his colleagues from his company Kellerhals Carrard - one of the biggest Swiss law firms with about 200 lawyers – can. Photo: Alexander Hassenstein – FIFA/Getty Images

Now, other lawyers from Kellerhals Carrard do the honours as arbitrators. The most prominent is Jean-Philippe Rochat, partner at the firm since 1988 and between 1994 and 1999 also part-time General Secretary of CAS. It was Rochat who hired and groomed Matthieu Reeb as his successor, a fact that probably explains recurring rumours about the firm’s influence at the CAS.

Rochat’s name and that of Carrard & Associés also popped up during the Panama papers investigation. It became public that the firm's specialties did not just include sports law, but also the management of shell companies in offshore tax havens for a number of unnamed high-profile figures. “Tax optimisation is legal, and it is not the core business of the firm,” Rochat explained in Swiss media.²⁴

As president of the Sion 2026 Olympic Bid committee, he first tried to defend himself with his faithfulness to Olympic values. But the Swiss public was not convinced. So Rochat

²⁴ L'étude d'avocats du président de Sion 2026 citée dans les Panama Papers. 22.11.2017, Radio Télévision Suisse (RTS)

resigned after being linked to the shady practices revealed by the Panama papers. As a CAS arbitrator he stayed on board. As does his Kellerhals Carrard colleague Marco Balmelli. In 2015 he sat in a panel for a case involving FIFA at the same time as his boss François Carrard headed the federation's "reform" commission.

For Kellerhals Carrard, such conflicts of interest seem to be merely a marketing tool. On their website, the firm proudly refers to CAS arbitrators within their ranks as well as to the numerous positions their lawyers have held and continue to hold in sports federations. In their own words, Kellerhals Carrard simply offers potential clients "a unique and unparalleled insight into the administration and business of sport."²⁵

Guidelines to be ignored

In fact, standards are in place to prevent dubious multitasking of lawyers and arbitrators: the "Guidelines on Conflicts of Interest in International Arbitration", created by the International Bar Association (IBA). Albeit not binding, violations are considered taboo.

The so-called "Non-waivable Red list" describes the most serious breaches. And not particularly surprising it includes circumstances that would be worth checking for some proceedings at the CAS, which does not seem too interested in the arbitration etiquette. An arbitrator, for example, should reject a case, when "his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."

Dozens of exclusion criteria of varying importance are laid down in the "Guidelines". The "Orange list" (marking potential conflicts of interest of a less serious nature depending on the facts of a case) explains when disclosure to the parties is warranted.

That should happen for example when "the arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties," even without "creating a significant commercial relationship for the law firm and without the involvement of the arbitrator." The same goes for an arbitrator employed by a law firm, which has "previously rendered services" for one of the parties.

It is not a given at CAS to respect those rules to promote a level playing field among parties. On the contrary. As recently as 2015, when the IBA published the revised "Guidelines", experts rubbed their eyes as an exception materialised for the CAS:

"It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator

²⁵ See: Kellerhals Carrard: Tätigkeitsbereiche, Sportrecht. Retrieved in July 2021: <https://www.kellerhals-carrard.ch/de/taetigkeitsbereiche/sportrecht/index.php>

in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.”²⁶

Until then, the situation where a party or one of their affiliates had nominated the same arbitrator within the past three years for two or more cases, was a subject matter of the „Orange list“ and came with the duty to disclose. The disqualification of a repeat arbitrator was not necessarily warranted. But doubts on her/his objectivity were a probable reason for challenge, especially if a party favoured the same arbitrator for similar disputes, for example in doping cases.

One would assume that the closed list of arbitrators and the forced nature of sports arbitration call for stricter adherence to etiquette on potential conflicts of interest. So why opt for more lenient standards at the CAS where repeat arbitrators are a troublesome issue?

It stands to reason that lobbying was involved in the deliberate 2015 move against disclosure in sports and was promoted by close personal links between the Bar Association and the CAS. A member of the IBA working group that drafted the exception for sports was elected to the ICAS Board in the same year (Carole Malinvaud, France). A former IBA president had been CAS arbitrator for years (David W. Rivkin, USA, now an ICAS member as well). Among the several arbitrators with deep roots in the IBA: Bernard Hanotiau (Belgium), recently tasked with chairing the second panel deciding on the Chinese star Sun Yang after the Federal Tribunal set aside the first one. He was Co-Chair of the committee reviewing the “Guidelines”.

When the CAS looks like a tool

Even against the background of the revised “Guidelines”, a recent case suggested a considerable lack of control mechanisms within the ICAS/CAS administration when it comes to conflicts of interest. It is the 2020 award that allowed Manchester City to enter the Champions League - the competition from which the club had previously been excluded by UEFA for a breach of the Financial Fair Play regulations. More precisely, in UEFA's words, ManCity was guilty of “the most serious and complex attempt to circumvent the rules of fair financial play.”

²⁶ IBA Guidelines on Conflicts of interest in International Arbitration, October 2014, p 22



Photo: TF-Images/Getty Images

However, the CAS arbitrators decided that documents on well disguised payments, cover-ups and collusion were worth nothing: because the evidence was either not established or time barred.

Was the panel for the case of the football club, since 2008 owned by Sheikh Mansour Bin Zayed Al Nahyan of the Abu Dhabi ruling family, tailored to this outcome? The CAS administration did not intervene, when ManCity appointed an arbitrator from France who immediately should have triggered a “Red list”-warning.

As “The Guardian” soon reported, French lawyer Andrew de Lotbinière McDougall had until recently been overseeing the activities of the office in Abu Dhabi for his law firm. That office listed the telecom giant Etisalat and the airline Etihad as clients – the very same Abu Dhabi companies that allegedly supported ManCity with illegal funds.²⁷ He voted to dismiss the main charges against ManCity.

At his side stood the panel chair Rui Botica Santos. The Portugese was proposed by ManCity too, and not, as required, by the ICAS Appeals Division’s President. Botica Santos had long pursued an interesting (and by his own account: unpaid) sideline activity as chairman of the General Meeting of General Electric Portugal, which ended in 2012. A partner in his law firm Coelho Ribeiro & Associados served as chairman on the Board of the company until 2019. General Electric Portugal is a healthcare subsidiary of the U.S. giant. And it is a long-standing client of the CAS arbitrator's law firm. What makes this

²⁷ David Conn: Cas releases its reasons for overturning Manchester City’s EU ban. The Guardian, 28.7.2020

connection delicate: The president of ManCity, Khaldoun Kalifa al Mubarak, is also the CEO of the UAE's sovereign wealth fund, which enjoys a „strategic partnership“ with General Electric. The fund holds considerable shares in the U.S. corporation.²⁸

UEFA did not oppose ManCity's choice for the panel president. Botica Santos is one of the „super-arbitrators“ – specialised in football-related cases. At CAS since 2004, he is familiar with UEFA as they had previously appointed him to several cases.

The CAS panel were not overly concerned, when UEFA, as the award notes, „ultimately chose not to seek further disclosure“ from ManCity about the sponsorship deals in question as the federation could have done to support their case. Therefore, some experts speaking to Play the Game have questioned the seriousness of UEFA in pursuing a financial level playing field in club competitions.

As for the CAS, the award drew criticism as „flawed and contradictory“, mainly for having ignored ManCity's duty to produce certain documents.²⁹ With this, the CAS looked very much like an accomplice to UEFA's odd omissions.

UEFA vs. ManCity was not the first case where observers wondered whether the CAS occasionally serves as the establishment's tool to delegate responsibility and/or justify ambiguous politics.

The clumsiest example so far was provided by the IOC, which apparently wanted to pose as the strictest anti-doping fighter ever. In 2008, at a meeting in Osaka, the IOC Executive adopted a new rule against doping offenders, the so-called „Osaka Rule“. It banned any athlete with a doping sanction of more than six months from participating in the next Olympic Games, even if the sanction had already been completed. The IOC, with its legions of lawyers, declared the extended doping ban a mere „eligibility issue“ - not a doping sanction.

The CAS panel had to remind the IOC, firstly, that qualification or eligibility rules „do not sanction undesirable behaviour by athletes.“ Then the arbitrators did the duck test - if it looks like a duck, walks like a duck and quacks like a duck, it is a duck - and assessed the new IOC rule as a clear doping sanction. More than that, they had to lecture the IOC on a legal principle that every first-year law student knows: *ne bis in idem* - you cannot be punished twice for the same offense. In doing so, the IOC had nonchalantly tried to overturn the WADA Code with its sovereignty over sanctions. It was embarrassing for the IOC to have to be admonished to respect the Code.³⁰

²⁸ See also Ferry Batzouglu: „Der Prozess“. Frankfurter Allgemeine Zeitung, 28.5.2021

²⁹ Björn Hessert: The duty to cooperate - questions arising from the Man City v UEFA decision. Blog Law in Sport, 31.7.2020

³⁰ CAS 2011/O/2422 United States Olympic Committee (USOC) v. International Olympic Committee (IOC), 4.10. 2011

So, why did they risk it? The Olympic rulers were always going to lose. Incidentally, their defeat was secured by three of the most seasoned arbitrators: Richard McLaren (Canada), Michele Bernasconi (Switzerland) and David W. Rivkin (USA). Some say the main point for the IOC rulers was not to win the case, but to send a signal to the public the IOC was always on the right side in the fight against doping.

A bitter aftertaste

When it comes to decisions involving high-profile political and financial interests of the sports system, there is widespread unease about the CAS, as most famously demonstrated in the Russian doping saga. It left a bitter aftertaste when the arbitrators watered down the sanctions proposed by WADA to the point of a mere charade. Or lifted them for members of the “Olympic movement” from the Russian Olympic and Paralympic Committees.

That was not the only part of the award that seemed to have the IOC’s hands all over it, as observers noted.

Needless to say, the Russia panel was again composed of two “super arbitrators”. For disputes regarding WADA compliance issues there is a closed list of panel chairs, and formally the party-appointed arbitrators decide on the chair. The choice fell on the Australian judge Mark Lloyd Williams.

At home, Williams is described as “a keen sportsman”, who had „performed a large amount of pro bono work for athletes and sporting bodies, including the Australian Olympic Committee.”³¹ The latter has been presided over by John Coates for the last 30 years. Coates previously had appointed Williams to chair Appeals Tribunals at his NOC to handle disputes over selection by various national federations prior to 2012 Olympic Games. The compatriots also share a passion for the same sport: rowing. At Rowing Australia, both are highly respected: The annual report 2018 lists Coates as a “life member” and trustee of a foundation, Williams as an ombudsman. These are just facts, but at the CAS, already those can cause headaches.

Anyway, the award was widely considered poorly reasoned. Why the leniency towards RUSADA despite overwhelming evidence? In awards against individual athletes this remains a rarity, even when the evidence is far less compelling.

Pressure for reform from the outside?

Criticism about bias in favour of the sports organisations does not resonate much at the CAS. But could the legislative and/or legal environment from outside the sports system push the “court” to reform?

Recently, the CAS practice has been put under pressure by the Swiss parliament that is traditionally friendly towards the sporting conglomerate: It adopted amendments to the

³¹ Two silks appointed as District Court judges. Media Release NSW Government, Justice Department, 4.9. 2013

Private International Law Act, effective as of January 2021. The revised law demands that an arbitrator shall disclose all circumstances that may give rise to doubts about their independence and impartiality, not just when he or she is appointed, but also throughout the proceedings. It means that it may be easier for a party to go for an appeal, also after receiving an award when a reason for challenging a CAS arbitrator is discovered later.

Did the sports “court” adapt to the latest change in the legal framework? Perhaps. At the beginning of the year, ICAS sent out a three-page internal memo, obtained by Play the Game. The reprimand reads: “Arbitrators shall avoid any conflict of interest and generally should refrain from sitting in sports organisations, bodies, and tribunals (arbitral or not).”

But obviously the Council did not want to be overly strict and immediately put the announcement into more relative terms: Only arbitrators who are involved “in more than one international sports organisation and more than one national sports organisation” will not get their appointments as arbitrators renewed. Yet, if taken seriously, a few dozen arbitrators would have to leave the CAS.³²

The announcement was made under the heading “Independence”. Does that mean that by CAS’ own standards, the arbitrators concerned are not considered independent? Paper does not blush and the supervisors from ICAS do not appear too worried: Among the new appointees of 2021, nearly a dozen arbitrators hold positions in sports organisations, some hold several.

C. Independence

13. CAS arbitrators shall avoid any conflict of interest and generally should refrain from sitting in sports organizations, bodies, and tribunals (arbitral or not).
14. All CAS Members are required to update their CAS bio and to disclose in detail their involvement, if any, in any sports organizations, bodies, and tribunals every time there is a major change in their functions but at least once every other year.
15. Thereafter, the ICAS will not renew (see §23 below) arbitrators who are involved in a proscribed manner in more than one international sports organization, body or arbitral or adjudicatory tribunal (other than CAS) and more than one national sports organization, body or arbitral or adjudicatory tribunal. Proscribed involvement means (i) with respect to a sports arbitral or adjudicatory tribunal, serving as an administrator or arbitrator in such tribunal and (ii) with respect to a sports organization or body that is not such a tribunal, holding an “executive position” in such sports organization or body. An “executive position” means serving as an officer or on a governing or executive board or other commissions with authority to issue final decisions, regardless of whether such decisions may be appealed to CAS. Exceptions for justified grounds, especially at the national/regional level, may be granted by ICAS on a case by case basis. In any event, the CAS arbitrators must decline to sit in panels dealing with procedures related to “their” decisions issued at the level below.
16. The same principles apply to CAS ADD arbitrators with the difference that they should not be involved in any anti-doping authority or panel of any sports federation; if they are involved in a sports tribunal dealing with various types of disputes, they should decline sitting in anti-doping procedures.

According to the Guidelines for CAS membership, arbitrators should avoid any conflict of interest and generally refrain from sitting in sports organisations, bodies, and tribunals. Excerpt from Guidelines for CAS membership.

³² ICAS: Guidelines for CAS Membership, January 2021

Rather, hopes for pressure on CAS to reform can be pinned on the European courts. For one, the European Court of Human Rights' findings in the Pechstein case attesting proper "independence" to the CAS are not carved in stone.

Miguel Maduro has an interesting opinion on this ruling, pointing out "that the decision was not consistent with the case law of the Human Rights Court." He says, the verdict may have turned out that way because the majority of judges "were probably afraid they could implode the sports arbitration without having a replacement."

Already in 2018, two of the judges issued a remarkable minority opinion. They doubted the neutrality of the CAS. Instead, they found a "lack of impartiality and independence" constituting "a fundamental problem for this institution."³³

Could this become the majority opinion next time? This certainly is not out of the question, given the conflicts of interest that dominate the CAS.

³³ Joint partly dissenting, partly concurring opinion of Judges Keller and Serghides. European Court of Human Rights, Mutu & Pechstein v. Switzerland, Appl. Nr. 40575/10 & 67474/10

CHAPTER SEVEN

David, Goliath and the remedy gap

Athletes and other individual litigants are clearly the “weaker” party before the CAS. This is first of all because sports law consists of the laws that self-regulating sports organisations have drawn up. For them, athletes' rights are rarely a priority. A state of affairs that the CAS has done little to cure. Therefore, even high-profile experts doubt the suitability of the CAS for dealing with issues related to athletes' rights.

It is easy to see how the idea of CAS as the pinnacle of international sports arbitration is damaged by its own institutional defects.

But there is more indicating that a level playing field for athletes and other individuals before the CAS is not a given. In the first place: sports law is not always the „global transnational order“ that it likes to parade as. In big parts, it is the laws of self-regulating sports governing bodies, a patchwork of disciplinary, ethics and other rules.

International federations are, roughly speaking, free to adopt constitutions that lack measures against abuse of power, corruption, and so on. If their statutes do not violate Swiss law, they are sacrosanct and by merit not subject to the scrutiny of the CAS. Arbitrators have to respect the standards sports organisations set for themselves – regardless of how poor they are.³⁴

Too often, officials benefit from the absence of any rules. For example, when details of long-standing corruption in the International Weightlifting Federation emerged in 2020, including vote-buying for elections to the Executive Board, some actors just shrugged their shoulders. Vote-buying was not prohibited anywhere in the IWF's statutes.

After too many high-profile corruption and doping scandals, the sense of comfort and the impunity provided by the self-governing sporting conglomerate under the exclusive legal “control” of the CAS is of course dwindling. This is all the more true as they have prompted new legislations that encroach on the previously “sovereign rights” of sports bosses. First and foremost, the “Rodchenkov Act”, which allows US law enforcement agencies to globally take action against sports officials and protect victims of doping fraud.

Generally speaking, however: sports arbitration leaves athletes and other individuals before the CAS unprotected from poor governance or abuse of power. That applies to cases about anything from contract disputes, player transfers and other (football) labour cases, eligibility matters, or complaints related to (non-doping) disciplinary matters, for example discrimination. All of which can have serious economic consequences for athletes.

³⁴ CAS, however, in the landmark-decision CAS 94/129, USA Shooting & Quigley v. International Shooting Union, has established that sports governing bodies are at least subject to legal principles upholding or relating to the rule of law, e.g. rules must be adopted in proper ways and their consequences for athletes understandable.

Athletes' rights: Limited or sacrificed

What constitutes abuse of power is, of course, in the eye of the beholder/party. For elite athletes, the sports rulers have established (and continue to do so) exemptions and derogations from legal standards that elsewhere in society would be outruled as discriminatory or unfair. This applies to a wide range of general issues – from freedom of expression (the infamous IOC rule 50) to restrictions on athletes' commercial freedom.

The same applies when it comes to sport-specific issues like the fight against doping, legitimised by public interest in fair competition, with the presumption of guilt whenever a banned substance is found. Even before WADA was established as the key enforcer of anti-doping rules, the CAS supported the controversial principle of “strict liability” and developed a special “standard of proof” for doping offences and other disciplinary cases.

The lower evidentiary threshold can serve as a drastic means of sanctioning athletes, at least if the CAS wants to be strict. In 2016, for example, the public in Australia got to know the CAS from its merciless side when, for the first time, an entire team sat in the dock for alleged doping.

The CAS upheld an appeal by WADA against the Australian Football League's decision to acquit Essendon Football Club players of doping charges. A panel with the two „super arbitrators“ Michael Beloff (GB) and Luigi Fumagalli (Italy) and with the Australian James Spigelman imposed a maximum sanction of two years on 34 players. None of them had been tested positive, but the CAS was “comfortably satisfied” by merely circumstantial evidence that each of the players had received one or more injections of a banned substance. Although the supplement regime was ordered by the team management, the arbitrators decided the players were “significantly at fault”.

The catch of the case: The Essendon players had signed consent forms assuring them that the supplements were compliant with the WADA Code. “An injustice unparalleled in Australia’s sporting history,” Australian media rated the verdict, which was later upheld in the Swiss Federal Court. If the case had been appealed in Australia, some argued, a procedural error could be found as the 34 players were tried as a team and could not present their case individually – and thus were deprived of their basic rights.

WADA, on the other side, was pleased with its strengthened ability to sanction athletes even collectively without a positive test.

More than 40 percent of all cases before the Appeals Division are related to doping.³⁵ But doping sanctions are only one example of the fact that athletes usually take the brunt of the “transnational harmonisation”. Their rights are limited or sacrificed by many different

³⁵ According to Lindholm, see above. Roughly half of CAS awards are doping-related decisions. Another 40 per cent are fairly evenly split between cases concerning contract disputes, player transfers, other (non-doping) disciplinary matters and eligibility. Meaning: From the perspective of most sports, CAS jurisprudence primarily concerns doping.

rules, such as the admissibility of collective punishment, sporting nationality, or in contractual matters like player transfer issues.

It does not help to restrain the sports bosses in their legislative fervour that CAS awards are rarely set aside by the Swiss Federal Tribunal.

“One can fairly say that, in practice, arbitrators enjoy an almost absolute freedom as to how they decide a case on its merits,” Antonio Rigozzi, a leading expert on sports arbitration, put it already ten years ago.³⁶ He and others have argued for a different approach, based on the fact that athletes do not freely agree to have their disputes settled by CAS and submission is a compulsory condition for their professional activities.

However, there is nothing to suggest that the federal judges might soften their narrow interpretation of what amounts to a violation of public policy in Switzerland. As was recently demonstrated in the case of the South African Olympic Champion Caster Semenya: the SFT confirmed a 2019 CAS award banning her and other female athletes with higher-than-typical natural testosterone.



Caster Semenya did not succeed in having the Swiss Federal Tribunal overturn a CAS award that banned her and other female athletes with higher-than-typical natural testosterone. Photo: Francois Nel/Getty Images

The CAS took the side of World Athletics and their eligibility rules for certain distances, albeit acknowledging that the regulations against Semenya were discriminatory. But they were deemed a “necessary” and “proportionate” response to concerns regarding fair

³⁶ Antonio Rigozzi: Challenging Awards of the Court of Arbitration for Sport. *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 217–265

competition. Concerns regarding the alleged pivotal relation between high testosterone levels and actual athletic performance, on the other hand, had to take a backseat. In other words: Discrimination is allowed when the sports system considers it valuable for the self-defined integrity of competition.

Justice without remedy?

The athletes are not alone in their doubts whether even their essential rights are upheld by sports arbitration. “There are questions being asked within and outside the sports sector (including from the UN human rights system) about whether CAS in particular is fit for purpose to address human rights-related complaints,” two high-profile experts stated last year.

The experts are former UN Human Rights High Commissioner Zeid Ra’ad Al Hussein and Rachel Davis from the non-profit organisation Shift who were commissioned by the IOC to draw up recommendations for a human rights strategy.³⁷ They attested to vast deficiencies and urged the Olympic masters to embrace the global (minimum) standards that the United Nations Guiding Principles on Business and Human Rights (UNGPs) offer. This would, as they stressed, also open up “new pathways for remedy” which the sports system and its judiciary more often than not fail to provide.

³⁷ Recommendations for an IOC Human Rights Strategy. Independent Expert Report by Prince Zeid Ra’ad Al Hussein and Rachel Davis, March 2020

Currently, the IOC is sitting at the apex of a patchwork of remedy when it comes to human rights harms occurring across the Movement. There are various reasons for this, including that:

- Existing reporting mechanisms tend to be focused on threats to the integrity of sport and are not designed for receiving and responding to serious human rights complaints, hence they are not likely to be used or trusted for that purpose;
- Athletes are becoming frustrated by the limitations of the existing arbitration and dispute resolution systems in addressing human rights claims and are increasingly likely to seek access to state-based mechanisms that have human rights expertise such as National Human Rights Institutions or the European Court of Human Rights;
- There are questions being asked within and outside the sports sector (including from the UN human rights system) about whether CAS in particular is fit for purpose to address human rights-related complaints as more sports bodies recognize their human rights responsibilities.

Strengthening the remedy ecosystem in sports means using leverage to improve the quality of grievance mechanisms that are available at other levels of sports, closer to the ground where harms occur, which can include sports bodies' own mechanisms but also social dialogue with trade unions where they exist. The IOC has started to play this role in its work on PHAS, and we see this as a critical area for the organization to develop further.

Human rights experts, Zeid Raád Al Hussein and Rachel Davis, point out that questions are being asked both from inside and outside the sports sector whether CAS in particular is fit for purpose to address human rights-related complaints. Excerpt from 'Recommendations for an IOC Human Rights Strategy'.

The World Players Association (WPA), the umbrella for more than 100 player associations in over 60 countries, names „remedy gaps“ as the biggest issue, when it comes to sports law. There were no legal means to prevent the hijab ban in international basketball, for example. In the end, public pressure was successful. And there is no justice enforcable, when sports bosses are not willing to protect human rights in sportswashing dictatorships or refuse to use their leverage against officials from countries where state reprisal for athletes activism occurs.

The strange case of Mariyam Mohamed

Even if sports governing bodies have commitments (to human rights and otherwise) in place, it is by far a given that a cure for harm done will be available or granted. At the CAS, this is even typical. Not just in cases involving athletes.

Take the 2021 decisions in the case of Mariyam Mohamed against the Asian Football Confederation (AFC). In 2019, Mohamed, a former soccer player and official from the Maldives, tried to get elected to AFC's Executive Board and as Asia's female representative on FIFA's governing council. But the then still powerful Kuwaiti Sheikh Ahmad al-Sabah (recently found guilty of forgery by a Swiss court) favoured another candidate. He offered

Mohamed incentives to drop out of the election and later issued threats to end her career if she did not withdraw. She ran and lost the vote.

After the AFC Electoral Committee had dismissed her complaints, Mohamed filed two appeals at the CAS. The first against the improper third-party interference; the second claiming that the elections had been conducted in breach of FIFA's and AFC's rules against gender discrimination (for labelling only certain seats as "female-member-seats").

In unpublished decisions, the CAS panel ruled in her favour, but refused remedy, e.g. the annulment of the elections. According to a CAS Media Release,³⁸ the three arbitrators – among them the super arbitrators Michael Beloff and Luigi Fumagalli – came to a conclusion almost comically removed from the reality of how power works at the highest levels of football:

"The Panel noted that the attempts to influence the 2019 Elections through inducements were not effective, in that Mariyam Mohamed did not withdraw her candidature. In that respect, while the Panel found the third-party interference established, it underlined that it did not, in the end, have an effect on the elections."

Awards like this one reinforce the impression of the CAS as an instrument to avoid substantive justice rather than an institution to deliver it.

Is the CAS by any measure up to the task of protecting individual rights and justice for athletes – "at the heart of the Olympic movement", as the IOC seems to constantly remind the public – against the dominating sports organisations?

As the numbers indicate: athletes do not do well before the CAS. According to Swedish professor Johan Lindholm, individual applicants are rather unsuccessful before the Appeals Division. In disputes against sports governing bodies just one appeal out of three is upheld.

Faking athletes' representatives at ICAS

In light of the limitations of a "sports law" which is the law of sports organisations – does it really matter that athletes, unlike their counterparts before the „court“, have at most a negligible part in the set-up of the CAS? The assumption that it matters seems valid if only because the sports judiciary wants to give the opposite impression, in a rather bizarre way and already for its top tier. Four members of the supervisory Council, the ICAS, are allegedly selected with consideration towards "the interests of the athletes". Who are they?

There is the American Michael B. Lenard, the aforementioned Vice President, once an Olympic athlete, but an ICAS veteran for much longer. The same is true for another ICAS Vice President: Tjasa André-Proscenc from Slovenia and a Council member since 1994. Actually, she has been a member of her NOC's Board for nearly 30 years and sat on the ISU

³⁸ Published on the CAS website, 25 January 2021

board, but once upon a time, the 78-year-old was a figure and a roller skater. Moya Dodd from Australia, a former footballer, was a FIFA council member and serves in the IOC Entourage commission. The fourth alleged „lobbyist“ for athletes is the highest-ranking sports official with multiple posts: Tricia Smith, former rower from Canada, NOC president, Vice President of World Rowing, member of the ANOC council and, above all, an IOC member.

It can be left open whether the pretence of declaring sports officials to be athletes' representatives (this is how they are actually referred to in CAS' communication) reflects a certain awareness of the wider problem of possible arbitrary unfairness mirrored in the very make-up of the sports "court". On a less friendly note, it boils down to further disempowering athletes, who are already in a „David and Goliath“ situation at the CAS.

CHAPTER EIGHT

Survey among independent athletes' organisations

Not only do athletes hardly have a say in the composition of the CAS, but the sports rulers have also not been interested in their opinion when it comes to possible structural shortcomings of the CAS. We asked independent athletes' organisations for their assessments. They also offered some profound reform ideas for sports arbitration. Also, the duration of some CAS proceedings alone can ruin athletes.

It comes as no big surprise: The CAS is the “court” athletes do not trust.

Here are the results of a survey conducted among independent athletes representatives. Twelve organisations took part, among them unions active for many years as well as recently established associations who broke free from international federations or their National Olympic Committees to better safeguard their rights.

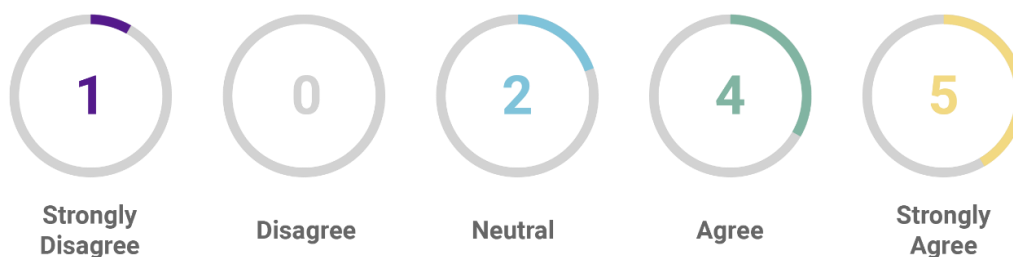
“We want to have a voice as negotiating partners on equal terms. Up to now that has not been the case,” as Athletes Germany put the need for separation in 2017. For the sports judiciary, their perspective (let alone involvement) is still missing.

The organisations represent several thousands of athletes, from individual sports, continents, and countries. One association asked to remain anonymous.

In alphabetical order they are Athletes Germany, Australian Athletes' Alliance, Cyclists Alliance, EU Athletes, Fédération Nationale des Associations et de Syndicats Sportifs (France), FIFPRO (World Football Players' Union), Global Athlete, Professional Players Federation (UK), Sindikat Sportnikov Slovenije (Slovenia), The Athletics Alliance, World Players Association, Anonymous.

Some shared their views in addition to replying to the options given in the questionnaire; these comments are included below.

1. As an athletes' representative, to what extent do you agree with the following statement: “In principle, we support the existence of a common dispute resolution body (CAS) that would ensure fair, equal, and consistent enforcement of sports rules across all nations and all sports.”



This outcome was certainly not a given: The majority of independent athletes' representatives support the enforcement of sports law through transnational arbitration rather than taking disputes to state courts. However, this does not at all translate into a vote in favour of the CAS as can be seen below.

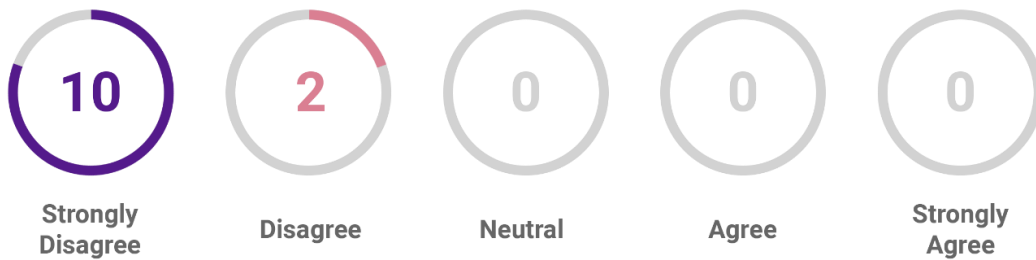
Some have sent the additional comments:

"We support, but it doesn't need to be CAS," writes FIFPRO.

Global Athlete comments: "But not CAS in its current form."

The World Players Association are in favour of arbitration, too, but only with preconditions that the CAS currently does not meet: "First, transnational sports law must be legitimate, which requires that respect for human rights, including player rights, is embedded. Second, arbitration must be genuinely independent, both procedurally and substantively. Third, in case of a conflict between sporting norms and human rights norms, human rights must prevail."

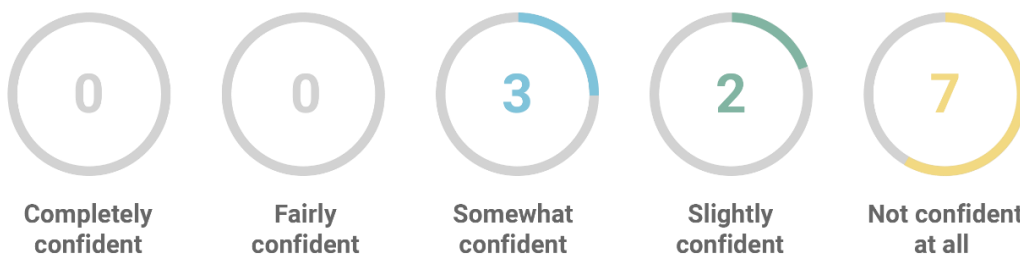
2. As an athletes' representative, do you think athletes' impact on ICAS/CAS setup (since 2016, the Code invites the athletes' commissions associated with the IOC, IFs, and NOCs to propose arbitrators to ICAS) is sufficient?



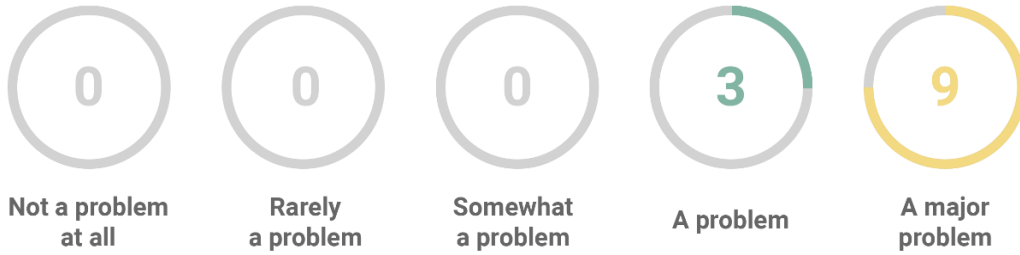
We asked a supplementary question, namely whether the independent athletes organisations had ever been asked to propose future CAS arbitrators for appointment.

FIFPRO regularly proposes arbitrators for the CAS list; the others have never been asked to do so.

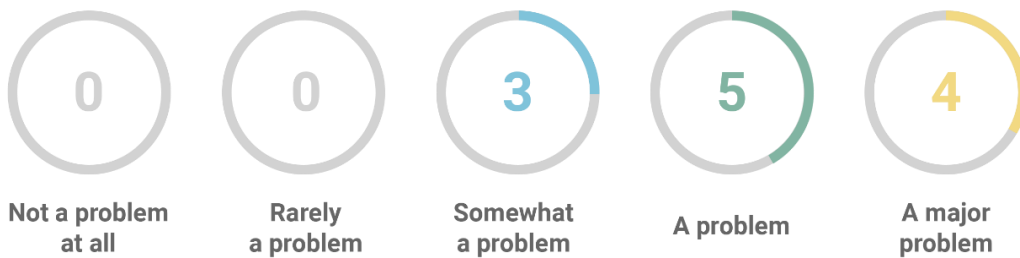
3. As an athletes' representative, do you trust in the current CAS arbitration in terms of impartiality and independence?



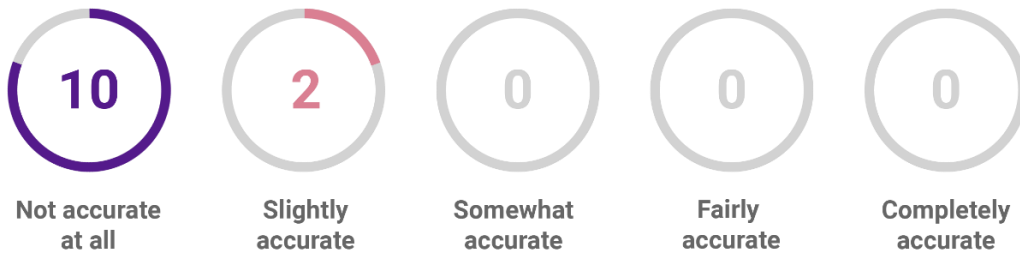
4. As an athletes' representative, do you think CAS arbitrators being at the same time elected sports officials (in sports governing bodies, NADOs) is a problem?



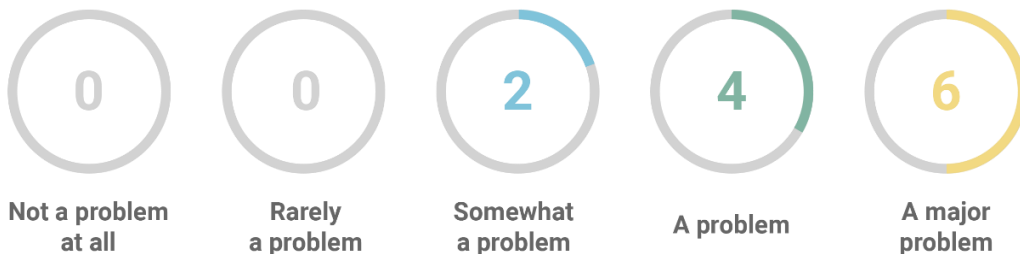
5. As an athletes' representative, do you think CAS arbitrators being at the same time members of Disciplinary panels in sports federations is a problem?



6. As an athletes' representative, do you think that the organisational culture, the setup of ICAS/CAS is characterised by being transparent?

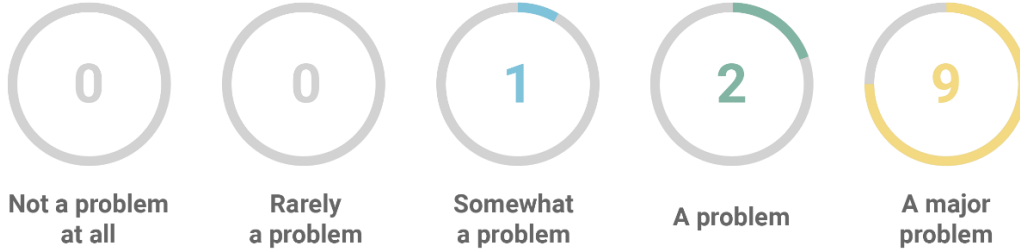


7. As an athletes' representative, do you think that CAS' practice not to publish a majority of awards is a problem?

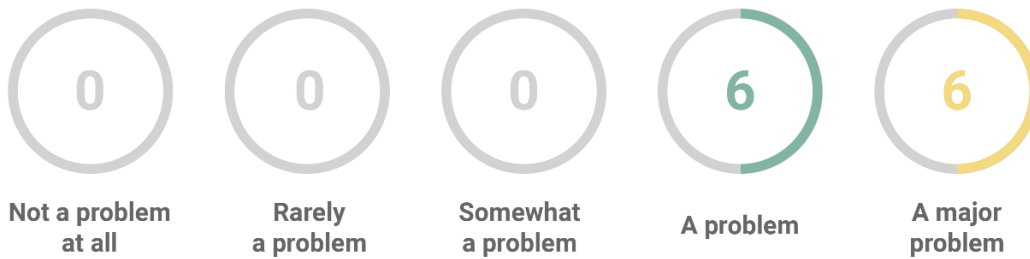


8. From your perspective and experience, how serious would you rate the following possible shortcomings at the CAS?

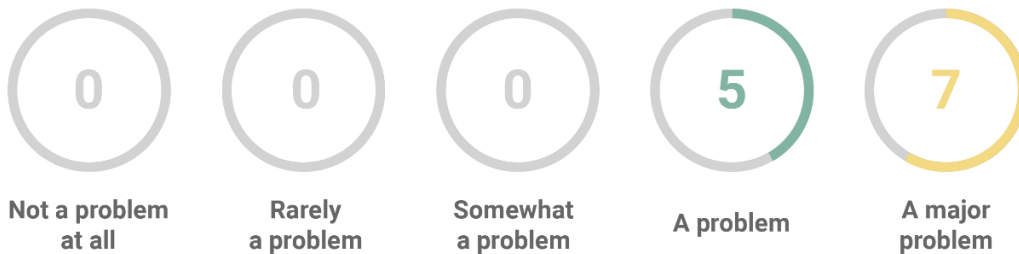
a. Costs are too high



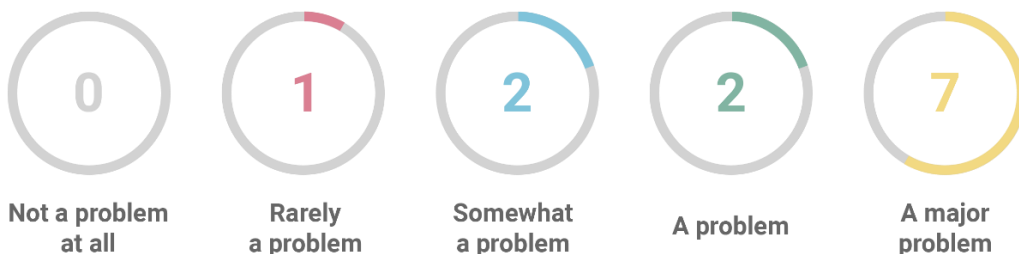
b. CAS proceedings taking too much time



c. Lack of independent arbitrators resulting in a lack of legitimation



d. The closed list system of arbitrators, from which athletes have to choose



9. If you had to name three governance reforms to be urgently introduced for the CAS, what would they be?

The president of the ICAS must not be a sports official, but a neutral without links to a sports governing body.

8

Provisions for the appointment of athletes' representatives to the ICAS should be established.

6

ICAS/CAS has to change the rules for legal aid.

6

The CAS should publish all awards in a timely manner (confidentiality agreements can be, if needed, held up by anonymising awards).

5

The CAS should operate with an open list of arbitrators. (If arbitrators can prove their suitability, ICAS has to acknowledge them.)

3

The CAS should change the mechanism to appoint arbitrators to decide cases, introduce a random selection process.

2

ICAS should provide an open register of interests for all the arbitrators.

2

ICAS/CAS should publish annual reports and financial statements in a timely manner.

2

One of the offered options: "Term limits for ICAS members and CAS arbitrators should be introduced" received no votes.

The fact that eight out of twelve organisations prioritise a change at the top of the ICAS (the highest score) highlights how much of the athletes' distrust in sports arbitration is indeed connected to the core structural flaw of the CAS: the lack of separation between legislative and judicial power.

"CAS or an alternative arbitration system needs to be removed from under the IOC umbrella," comments Global Athlete. "Otherwise, none of the above matters."

This is in line with other answers (4, 5, 8c): All athletes' representative bodies consider sports officials as arbitrators to be a problem, most of them "a major problem". The assessment is almost as unambiguous for arbitrators who sit on disciplinary commissions of sports federations. Therefore, the perception that a lack of independent arbitrators results in a lack of legitimacy of the CAS is shared and seen by all as "a problem" or "a major problem".

Athlete suggestions for reform

Several organisations responded to the invitation to add reform proposals they consider important.

FIFPRO stresses the opaque state of affairs within the CAS, as described in the first part of

this report, and emphasises that an open register of interests for the arbitrators “should include interests of their law firms and colleagues.” Furthermore, the CAS “should change the mechanism to appoint presidents of the panels and sole arbitrators.”

From Athletes Germany comes the overarching call to “make the CAS more accessible, trustworthy and affordable to athletes.” Followed by suggestions to “build up remedy mechanisms” as well as “human-rights capacity.”

The World Players Association favoured only one of the reforms suggested in the survey and instead offered the following ideas: “ICAS is in parity composed of representatives of sports bodies and athlete representatives, including Player Associations, with a truly independent president. Issues above would be resolved if this was the case.”

Furthermore, the players' union once again advocates for the CAS to “be equipped to handle human rights-related cases, including by ensuring the accessibility of CAS (e.g., financially, culturally, linguistically), the application of substantive human rights law to sport and human rights disputes, sufficient human rights expertise of arbitrators and the instalment of safeguards of human rights compliant outcome.”

Distrust that might accompany negative or disappointing outcomes of disputes can be alleviated if people believe that the underlying process is fair. Sports arbitration before the CAS has obviously come to the point where it is the other way round.

When CAS proceedings are dragging on

There are circumstances beyond the lack of independence that add to the doubts about a level playing field for athletes before the CAS. They are related to what should actually be the benefits of arbitration: “fast and free” (or at least affordable) procedures, as Matthieu Reeb, the Director General of the CAS, puts it.

The label does not correspond at all to the experience of athletes.

“CAS proceedings taking too much time” is identified by all athletes organisations as “a problem” or “a major problem”. This is not a small matter. Elite athletes slapped with a doping ban by their federation lose their livelihood, until they are possibly cleared by the CAS. We have spoken to some despairing athletes who were waiting almost a year for a CAS panel to issue an award. They felt they were being ruined by the duration of CAS' procedures alone.

One athlete, who was up against his federation and WADA at CAS, writes: “If an athlete delayed any notification ... they would be held severely liable and never excused. Yet the powers that be are seemingly able to do whatever they want and get away with whatever they want. This entire thing nearly bankrupted me. It put me into an awful depression ... Yet again I am merely a number. They do not in my opinion care about the mental health of anyone they interact with.”

No reason for why CAS continued to delay the decision was ever given to the athlete: "My attorney says this is typical. For this to be typical is inexcusable. These matters should be handled with the utmost of care and speed."

For his book, Johan Lindholm calculated: CAS takes on average 224 days to decide a case brought under its Appeals Arbitration. This is more than twice as long as the obligations on CAS under its own Code. In general, the operative part of an award should be communicated to the parties within three months.

Upon request the CAS media department comes up with an array of reasons for the common delays including "procedural incidents", a "challenge against an arbitrator" (rare at the CAS) or the "impossibility to arrange a hearing at short notice", "a second hearing", and the "duration of the panel's deliberations".

This differs considerably from what two arbitrators tell us: Sometimes, they claim, drawn up awards would sit on a table in the Court Office for months. As long as it takes Matthieu Reeb to exercise his power to "redact" them.

CHAPTER NINE

Legal Aid, André Cardoso and the “worst kind of injustice”

The high costs of CAS proceedings are often mentioned, mostly by affected athletes, but usually brushed off with reference to the legal aid system that the CAS offers to individual litigants. Not much is known about this legal aid. A recent case shows how the “aid” does not necessarily help but is rather designed to weaken athletes’ performances before the CAS.

CAS proceedings can be expensive - even for international sports federations, though they usually can afford it. For individuals, it can be an entirely different story. Nine out of twelve athletes organisations identify the “too high” costs at the CAS as “a major problem”. This affects the access to sports jurisdiction and just as important: the fairness of the proceedings before the CAS. Justice only for those who can afford it?

This question became evident in 2020 when William Wallace, newly elected president of the Trinidad and Tobago Football Association (TTFA), tried to oppose FIFA. The federation had ousted him from office, just months after he was elected. FIFA boss Infantino had backed the incumbent, a man who had almost bankrupted the federation from the island nation.

The outcome of the story is well-known: Wallace sued FIFA before the High Court of his country, where a judge found that the world governing body had acted illegally. FIFA suspended the federation and their football team arguing that the complaint at a civil court was a “grave violation” of its statutes, which expressly prohibits recourse to state courts. In the end, the Court of Appeal in Trinidad and Tobago overturned the decision and concluded the dispute should be resolved at the CAS. Wallace gave up.

Because, and this is the irony in the story: Originally, he had started at the sports “court”. But the costs quickly turned out to be beyond what he had imagined. A fight “we couldn’t afford”, Wallace told The Guardian’s football podcast.

For example, TTFA were asked to pay the entire costs of arbitration (USD 40.000) in advance. Wallace asked the CAS why that was: “FIFA wrote back that it was not customary for them to pay fees upfront. ... We felt it was wrong. How could CAS accept that? For us, it seemed as if we were going to go into a fight that was not a fair one.”³⁹

Sometimes, sports arbitration seems to be about enforcing obedience at any price, literally. It is not an isolated incident. Play the Game has obtained a document concerning a recent case where FIFA’s opponent is an athlete. The letter from the CAS Court Office states:

³⁹ The Guardian; „Football Weekly“-podcast, 24.2.2021, here: <https://www.theguardian.com/football/audio/2021/feb/24/has-fifa-really-changed-football-weekly-special-part-two>

“I must, however, inform you that, as a general rule, FIFA does not advance costs when it is a party to a CAS proceeding, which is acceptable to CAS pursuant to art. R 64.2 of the Code of Sports-related Arbitration.”

Je dois cependant vous informer que, en règle générale, la FIFA ne verse pas d'avance de frais lorsque qu'elle est partie intimée à une procédure devant le TAS, ce qui est acceptable pour le TAS conformément à l'art. R.64.2 du Code de l'arbitrage en matière de sport.

Ce qui veut dire que, selon la même règle, Mr [REDACTED] doit payer la totalité des avances de frais. Par conséquent, l'appelant est invité à payer, d'ici au [REDACTED], le montant de CHF [REDACTED] sur le compte du TAS :

Nom de la banque	Crédit Suisse AG
Adresse de la banque	Rue du Lion d'Or 5-7, Case postale 5722, CH-1002 Lausanne, Suisse
Numéro de compte	384033-71
Nom du bénéficiaire	Fondation Conseil International de l'Arbitrage en matière de Sport (CIAS)

Château de Béthusy Av. de Beaumont 2 CH-1012 Lausanne Tél: +41 21 613 50 00 Fax: +41 21 613 50 01 www.tas-cas.org

A fax from CAS obtained by Play the Game confirms that FIFA does not pay legal fees in advance when they are party to a CAS proceeding.

However, the rule does not fully explain why it is the athlete who has to pay the full advance on costs. At the very least, it is misleading what the CAS claims about the costs for athletes when asked by Play the Game: “The CAS appeals procedures are always free of charge for all parties (athletes and federations) in matters of a disciplinary nature when the decisions challenged are rendered by an international federation.”

Otherwise, the CAS is happy to refer to its legal aid system – a fund put in place in 2012 for athletes and other individuals, who cannot afford financially to proceed before CAS. Yet, according to our survey, athletes representatives rank a reform of the legal aid system as the second most urgent reform. Why is it that complaints by athletes about exorbitantly high costs at the CAS are mounting up? Why is it that athletes – recently U.S. swimmer Shayna Jack - are turning to the public asking for financial assistance in their legal battles?

A few facts about that legal aid: 90 per cent of those who apply for support are athletes according to the CAS. And as the table below demonstrates the number of applications is rising (the figures are provided by CAS upon request from Play the Game).

Table 3: The outcome of legal aid applications to CAS

Year	Granted	Partially granted	Denied	Total
2016	16	10	10	36
2017	11	13	12	36
2018	24	6	19	49
2019	31	11	13	55
2020	21	38	32	91
Total	103	78	86	267

Source: CAS media department

In 2020 roughly every tenth case at the CAS involved a legal aid application.

Requests are evaluated by the ICAS Legal Aid Commission chaired by John Coates. Why are 61 per cent of all applications denied or just “partially granted”? Coates has to give only “brief” reasons which is convenient for him. All the more so as the criteria for legal aid are not completely clear. The obvious questions: How “poor” litigants have to be to get it and what amounts are paid? There are of course “guidelines”⁴⁰ - but they certainly do not tell what is wrong with CAS’ legal aid system.

A casualty of legal aid: André Cardoso

One case tells the story and allows a revealing look into the legal aid system. The beneficiary or rather the casualty was the Portuguese professional cyclist André Cardoso.

In June 2017, the UCI tested Cardoso and allegedly found EPO in his urine. A year and a half later, in November 2018, he was given a four-year ban and a five-figure fine. It was the maximum sanction - although neither the B-urine sample nor a blood test confirmed the doping finding.

To start at the end: When taken to the CAS, the draconian verdict held. “The athlete is always guilty,” The Sports Integrity Initiative website aptly headlined their story.⁴¹

What makes Cardoso’s case particularly interesting or “special” as his lawyer Dr. Rafael Brägger says, is the fact that CAS’ own system of legal aid probably contributed to the athlete’s conviction rather than being “aid”.

⁴⁰ Guidelines for Legal Aid, published here: <https://www.tas-cas.org/en/add/legal-aid.html>

⁴¹ Andy Brown: The André Cardoso case: The athlete is always guilty. On: sportsintegrityinitiative.com 13.5.2021



For professional cyclist André Cardoso from Portugal, the meeting with CAS' legal aid system proved useless. Photo: Bryn Lennon/Getty Images.

Brägger's law firm, Pachmann (Zurich), had initially accompanied Cardoso through nine months of provisional suspension. When the UCI finally did initiate anti-doping proceedings, the cyclist was out of money. His team Trek-Segafredo had fired him after the “positive” test. The father of three could no longer pay his lawyers and therefore did not adequately defend himself before the UCI panel.

Anyway, there seemed to be a glimmer of hope. From the start, the UCI and its anti-doping tribunal had explained to Cardoso where he could appeal a ban with financial support: The CAS would “provide for the possibility of being granted legal aid.”

Cardoso went to the CAS and what happened in the two years leading up to the award in February 2021 was hair-raising enough to bring the Zurich law firm back to Cardoso's side.

Attorney Brägger knows his way around the CAS and frequently represents athletes there. In Cardoso's case, he now quotes Plato to characterise the system his clients are subjected to: “The worst kind of injustice is feigned justice.” After all, he says, the CAS only pretends to “offer (financial) support to penniless athletes in their cases against the overwhelmingly powerful sports federations.” In fact, however, its legal aid system “has devastating gaps” and does not guarantee a “fair trial characterised by the principle of equality of arms.”

That is the gist of a 119-page complaint against the UCI and CAS that Brägger filed with the Swiss Federal Tribunal (SFT). The appeal was lost in September on grounds that

Cardoso and his lawyers consider unconvincing. They intend to appeal to the European Court of Human Rights. There the case has the potential to put the CAS under severe pressure.⁴²

Cardoso's gauntlet at CAS begins with the rejection of essential parts of his request for legal aid. Neither the exemption from court costs is approved, nor are the fees for his lawyers (who had agreed to work for a reduced rate). Also denied: the payment of costs for hiring scientific experts.

The complaint to the SFT points out: "This automatically resulted in his case - and results in the case of every party with no means - in a lack of sufficient evidence: Only those who can afford experts' fees can prove their case before the CAS by means of experts." The contrast to the UCI could hardly be more striking: The federation submitted six scientific expert opinions and travelled to the hearing with no less than three lawyers.

The ICAS grants Cardoso limited travel and accommodation expenses. For his participation in the hearing, for those of his witnesses, experts, lawyers, and translators there is a total amount of just CHF 1,500. No surprise that CAS, when asked by Play the Game what amount it has spent on legal aid in the last five years responds with its favourite routine formula: "not published".

In the end, the hearing takes place without Cardoso's personal participation - because he can afford neither the flight to Lausanne nor a hotel there. The CAS also refuses to grant him an advance on his costs, therefore Cardoso has to join via video link.

Is this the equality of arms the legal aid system supposedly guarantees athletes?

When a pro bono counsel is not a bonus

The CAS panel didn't care too much. It ruled that Cardoso's right to a fair trial had not been violated because "he has had the benefit of an experienced pro bono counsel". The "benefit", however, turns out to be another facet of the "feigned justice" the CAS has in store for athletes.

Only after repeated requests does the ICAS allow Cardoso a pro bono counsel. He can choose from 17 lawyers.⁴³ Some did not respond at all to Cardoso's requests, others declined: lack of time or conflict of interest. Six remained. Some of them said they had never had a case before the CAS, or at least had never conducted doping litigation. Not a single one was familiar with Swiss law. "It seems," the complaint to the SFT notes, that CAS' pro bono counsels were to "gain first experience ... and practice, so to speak, on the living object."

⁴² The appeal to the Swiss Federal Tribunal, dated March 12, 2021, was provided to Play the Game by the law firm Pachmann Rechtsanwälte with the consent of André Cardoso. The SFT ruling dated September 22, 2021: 4A_166/2021 André Cardoso vs. Union Cycliste Internationale

⁴³ In response to a Play the Game request, the CAS states it has "around 50" pro bono lawyers on its list.

Cardoso's case certainly suggested so: The pro bono counsel missed no less than six deadlines. He failed to request neutral expert opinions to be obtained by the panel. Finally, he drafted a statement of grounds for appeal against the UCI verdict, which obviously was created with the help of text recognition software - the CAS was frequently mutated to "CA5" and the UCI to "U0". Those and other shortcomings irritated even the arbitrators, as the award later made clear.

However, Cardoso repeatedly and in writing drew the attention of the ICAS, the Court Office and the panel to his counsel's omissions without them intervening. In doing nothing, the complaint now alleges, the ICAS violated once more its "duty to ensure an effective legal aid system for athletes".

No information was ever provided in response to Cardoso's enquiries as to how the counsel's qualifications had been checked.

On the other hand, the CAS Court Office did forward Cardoso's complaints (marked as confidential) about the pro bono counsel to his opponents from the UCI. An action fitting seamlessly into CAS' general make-up and just one of the many reasons the Court Office was accused before the SFT to have breached its duty "to maintain independence and neutrality".

How could a pro bono counsel screw up so badly? Was he simply out of his depth or indifferent to what was happening to Cardoso? The legal practice at the CAS might shine a light on the underwhelming performance: CAS does not pay those counsels, not even compensation, as it confirms upon request.

This is in stark contrast to state courts, where compensation for lawyers who work for free is considered a pillar of modern judiciary. The CAS practice is even illegal in Switzerland, says the complaint in the Cardoso case. Certainly, it does little to motivate lawyers to devote sufficient time and care to their pro bono clients.

However, there could be another explanation for the almost bizarre display: Pro bono mandates are often seen as a steppingstone to the regular CAS arbitrators list. Could athlete representation therefore be secondary to the question of how rigorously a counsel takes on the powerful?

And the powerful they are still: the international federations and the CAS itself. Cardoso's pro bono counsel hesitated (and missed another deadline) when the athlete urged him to challenge the ICAS-appointed panel president. Her law firm was working with the UCI lawyer on another matter, which is grounds for suspicion of bias. According to the IBA Guidelines on Conflicts of Interest this could have led to her disqualification. However, the president remained. "There was a lack ... of independence and impartiality of the arbitral panel," summarises the complaint to the SFT.

Most significantly, the pro bono counsel did not address a fundamental legal argument in Cardoso's hearing. An objection that had been suggested by the athlete and his former law firm: The CAS no longer had jurisdiction over the case. Because Cardoso in his opinion had been deceived by the UCI "about the fairness of the legal proceedings".

As the athlete put it in a complaint to the CAS: "Obviously, if I am simply granted an insignificant contribution to my costs for travelling to Lausanne and back without any support for any lawyer and any experts, I am not able to defend myself properly. This is against any sound legal system. My basic human rights are heavily violated. The arbitration clause(s) which foresee the CAS as dispute resolution mechanism and which I was forced to conclude are, hence, completely depriving me of my legal rights. By pretending that the dispute resolution mechanism is fair I was defrauded by the UCI. At least I was in a fundamental error. For this reason, I am herewith annulling all the arbitration clause(s), which foresee the CAS as dispute resolution mechanism. The CAS is as of now incompetent to decide the matter."

Cardoso says that without the idea of adequate legal aid at the CAS he would have immediately taken action against UCI in state courts. After all, free legal representation is available there. "No athlete, knowing that he could not even afford the proceedings would agree to an arbitration agreement in favour of CAS," his lawyers write in the complaint to the SFT. An obligation to such proceedings would be "invalid anyway" under Swiss law.

Should the CAS panel have annulled its own jurisdiction due to an inadequate legal aid system and thus also UCI's doping verdict? The Swiss federal judges referred to an earlier SFT ruling according to which the granting of any kind of legal aid precludes a dissolution of the arbitration agreement. But they also held back on this point and ruled that, in the cyclist's case, "it was not necessary to assess whether the arbitration agreement in favour of the CAS could have been terminated due to a lack of financial means." However, this is a fundamental question – with the answer still pending.

In the case of André Cardoso, did the CAS (and Switzerland) infringe the European Convention on Human Rights, which mandates the right to a fair trial? Article 6 requires that there be a fair balance between the opportunities afforded the parties involved in litigation. Since the Court in Strasbourg already established that sports arbitration is forced arbitration, would the CAS not have to give special protection to athletes' rights and ensure equality of arms?

The Cardoso case – and with it the praised legal aid system at the CAS – arguably illustrates the opposite: It is rather a story of discrimination.