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Jennifer R. Bondulich

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RESCUING THE “SUPREME COURT” OF SPORTS: REFORMING THE COURT OF ARBITRATION FOR SPORT ARBITRATION MEMBER SELECTION PROCEDURES

“The practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”¹

INTRODUCTION

In 776 BCE, the first recorded Olympic Games took place in Athens,² where a cook named Coroebus won the first and only Olympic event—a 192 meter footrace.³ Since then, modern sports has transformed into an international multibillion dollar commercial industry.⁴ A major catalyst for the commercialization of international sports was the decision of the Olympics to allow professional athletes to compete in the Olympic Games.⁵ Prior to 1984, only amateur athletes were permitted to represent their country at the Winter and Summer Olympic Games.⁶ The change resulted in a massive increase in growth and commercial appeal of sporting events. To illustrate, the 1960 Winter Olympic Games produced \$50,000 in U.S. television revenues.⁷ In 2014, however, NBC paid \$7.65 billion simply to have the right to broadcast the Olympic until 2032.⁸

1. Olympic Charter ¶ 4, *entered into force* Aug. 2, 2016, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

2. See PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 1 (5th ed. 2015).

3. See *The Olympic Games*, HISTORY, <http://www.history.com/topics/olympic-games> (last visited Jan. 3, 2017).

4. See WEILER ET AL., *supra* note 2, at 1.

5. See Viktoriya Pashorina-Nichols, *Is The Court of Arbitration for Sport Really Arbitration?* 1, 9 (Victoria Univ. of Wellington, LLM Research Paper, 2015), <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5007/paper.pdf?sequence=1>.

6. See *id.* at 9; Bob Green, *What Changed the Olympics Forever*, CNN (July 23, 2012), <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/>.

7. WEILER ET AL., *supra* note 2, at 1115.

8. *Id.*

International and Olympic sports are organized through a complex hierarchical system of sports organization responsible for ensuring that the athletes who participate in sports win fairly and through proper means.⁹ At the most fundamental level, depending on the sport, individual athletes join clubs, which form national federations.¹⁰ National federations may be made up of member athletes competing in individual sports, leagues competing in team sports, and regional associations.¹¹ The national federation of each sport in each country organizes the qualifying events to determine which athletes will represent the country in international competition and, if eligible, the Olympic Games.¹² Each national athletic federation feeds into the sport's international athletic federation, which is responsible for the integrity, development, and promotion of individual sports at the international level.¹³ Each federation manages the administration of their sports and the development of athletes at every level of competition.¹⁴ Therefore, each sports' international federation is responsible for establishing and enforcing the criteria for participation at every level of sports competition.¹⁵

Although international athletic federations operate autonomously and independently, in order to compete in the games, all federations must seek recognition by the International Olympic Committee (IOC), which owns and controls the Olympic Games, and must act in accordance with the Olympic Charter.¹⁶ The

9. MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 1683 (3d ed. 2014); Pashorina-Nichols, *supra* note 5, at 7.

10. RUBINO-SAMMARTANO, *supra* note 9, at 1684.

11. *Id.*

12. WEILER ET AL., *supra* note 2, at 1116.

13. *International Sports Federations*, OLYMPIC, <https://www.olympic.org/ioc-governance-international-sports-federations> (last visited Dec. 27, 2016). Currently, there are ninety-two international federations recognized by SportAccord, the general association of international federations. See WEILER ET AL., *supra* note 2, at 1116. See generally SPORTACCORD, <http://www.sportaccord.com> (last visited Jan. 3, 2017).

14. WEILER ET AL., *supra* note 2, at 1116.

15. *Id.*

16. *Id.* The Olympic Charter serves three main purposes: (1) it serves as the constitution to the Olympic Games, setting forth the fundamental principles and mission of the Olympics; (2) it serves as the governing statutes of the IOC; and (3) it "defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement . . . all of which are required to comply with the Olympic Charter." Olympic Charter, *supra* note 1, at 11.

Olympic Charter codifies the governing rules and bylaws of the Olympic Games as well as the obligations and rights of the IOC, International Federations, and the National Olympic Committees.¹⁷

Due to the complex organization and commercialization of Olympic and international sports, which involves a multitude of interested parties that enter into contractual relationships with each other, a uniform, efficient, and quick method to resolve inevitable disputes becomes necessary.¹⁸ As participation in the Olympic Games and international competition grew, disputes between individual athletes and their sports governing bodies increased over commercial contracts, competition results, and eligibility.¹⁹ Dispute resolution in domestic courts is inherently difficult due to the involvement of various parties, such as international sports governing bodies, national sports governing bodies and individual athletes whom all are subject to different national laws.²⁰ Adjudicating international sports disputes in national courts raises complex choice-of-law issues and varying legal systems, such as common law and civil law systems.²¹ Additionally, international sports bodies, such as the IOC and individual athletic federations, seek to enforce uniform policies and governing rules consistently.²² Furthermore, the unique nature of sports and the requisite expertise make it difficult for individual judges in domestic courts to make consistent rulings.²³ As a

17. See Olympic Charter, *supra* note 1, at 11. Currently, there are 206 National Olympic Committees spanning over five continents. The National Olympic Committees promote the fundamental principles of the Olympics at a national level for all Olympic sports. Additionally, National Olympic Committees select and send athletes for participation at the Winter and Summer Olympic Games. *National Olympic Committees (NOCs)*, OLYMPIC, <https://www.olympic.org/ioc-governance-national-olympic-committees> (last visited Mar. 22, 2017).

18. See Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 65 (2010).

19. Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 63 (2012).

20. Matthew Mitten & Hayden Opie, "Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution, 85 TUL. L. REV. 269, 283 (2010).

21. *Id.*

22. *Id.*

23. *Id.*

result, the international athletic community relies on arbitration because it eliminates uncertainty otherwise found in national courts, which may have a vested interest in the outcome.²⁴ Arbitration provides a neutral forum to quickly resolve disputes with finality and procedural flexibility for private parties involved.²⁵ The international athletic community's preference for arbitration over domestic courts led to the development of an independent authority specializing in sports dispute resolution—the Court of Arbitration for Sport (CAS).²⁶

In 1984, the IOC created CAS as a division of the IOC dedicated to hearing Olympic disputes.²⁷ But, due to CAS' designation as the exclusive arbitral body for Olympic disputes (and later for the World Anti-Doping Agency's (WADA) doping-related offenses in international competition), CAS has evolved into the premiere forum for international athletic disputes.²⁸ CAS offers quick and efficient dispute resolution.²⁹ The exclusive arbitral body hears various types of disputes, including commercial contract disputes and appeals contesting positive drug tests.³⁰ At conception, the three main goals of CAS were: (1) "to resolve disputes referred to it through ordinary arbitration,"³¹ (2) "to resolve through the appeals arbitration procedure disputes concerning the decisions of the [individual] federations, associations, or other sports-related bodies,"³² and (3) to provide

24. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 2 (1995).

25. See *infra* Part.I. Many sports-related disputes must also be resolved in an expedient manner. For example, *ad hoc* Court of Arbitration for Sport panels are available during the Olympic Games to resolve emergency disputes and render decisions within twenty-four hours of filing. WEILER ET AL., *supra* note 2, at 1151.

26. Court of Arbitration for Sport [CAS], *History of the CAS*, CT. ARB. SPORT, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Jan. 6, 2016).

27. WEILER ET AL., *supra* note 2, at 1143.

28. See Eric T. Gilson, *Exploring the Court of Arbitration for Sport*, 98 LAW LIBR. J. 503, 504 (2006).

29. Reilly, *supra* note 19, at 76.

30. Gilson, *supra* note 28, at 504.

31. Adam Beach, *The Court of Arbitration for Sport' – A Supreme Court for the Sports World?*, STUDENT J. INT'L L., no. 4, 2012, <https://sites.google.com/site/349924e64e68f035/issue-4/-the-court-of-arbitration-for-sport-a-supreme-court-for-the-sports-world> (citing article S20 of the 1994 Code of Sports-related Arbitration).

32. *Id.*

advisory opinions.³³ Currently, clauses granting CAS exclusive jurisdiction are found in essentially all contracts between individual athletic federations and athletes participating in competition.³⁴

Many legal scholars today credit the award decisions of CAS for developing *lex sportiva*, which is a set of principles and rules making up international sports law.³⁵ In the formation of international sports law, CAS is credited with three different functions.³⁶ First, CAS develops specific principles of sport and applies general principles of law to sports institutions.³⁷ Over the years, CAS has developed specific principles of sport, including the concept of "fair play" and the strict liability standard that is applied to doping violations.³⁸ Unlike a common law court, CAS does not have binding precedent, and instead, arbitrators rely on these legal principles to assist arbitrators in making decisions.³⁹ Second, CAS' interpretation of sports law greatly influences rule-making decisions within international federations and the IOC.⁴⁰ Lastly, CAS is the primary contributor to the synchronization of global sports law, connecting and harmonizing both international and national sports law. As a result, CAS essentially functions as the "Supreme Court" of sports.⁴¹

33. *Id.*

34. WEILER ET AL., *supra* note 2, at 1145.

35. Gilson, *supra* note 28, at 504. Prior to *lex sportiva*, many legal principles and rules varied from jurisdiction to jurisdiction. *Lex sportiva* resulted from the need to harmonize sport regulations globally. Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1326 (2011). The development of *lex sportiva* has been compared to *lex mercatoria*, the law of international commercial arbitration. *Lex mercatoria* is described by the English Commercial Court as "the general law of merchants law to which some international tribunals have regarded . . . which governs the substantive rights and duties of parties to certain types of international transactions to the exclusion of substantive law." Michael Beloff, *Is There a Lex Sportiva?*, INT'L SPORTS L. REV., no. 3, 2005, at *49, *53. Regulations, such as the World Anti-doping Code, thus can be viewed as a direct result of this need to homogenize international sports law. Casini, *supra* note 35, at 1326.

36. *See* Casini, *supra* note 35, at 1326.

37. *See id.*

38. *See* Richard Parrish, *Lex Sportiva and EU Sports Law*, 37 EUR. L. REV. 716, 718 (2012).

39. *See* Mitten & Opie, *supra* note 20, at 286.

40. *See* Casini, *supra* note 35, at 1326.

41. Mitten & Opie, *supra* note 20, at 285; Casini, *supra* note 35, at 1334 ("This function is thus closely connected to the development of common legal

CAS has been criticized in the international community for its close ties to the IOC.⁴² In the past, athletes appealed arbitral awards and argued that CAS was not a legitimate arbitral body because it was a division of the IOC.⁴³ Although CAS was upheld as an independent and impartial arbitral body, CAS took proactive steps to appear more independent from the IOC, which included establishing the International Council of Arbitration for Sport (ICAS) to run and finance CAS in the place of the IOC.⁴⁴ CAS has taken additional steps to break ties from the IOC, but there are still many in the international community who question its independence. For example, in 2009, Romanian soccer player Adrian Mutu challenged a breach of contract dispute with the English Premier League Club, Chelsea, stemming from a drug suspension.⁴⁵ Mutu appealed CAS' determination, arguing that the CAS arbitrator lacked independence.⁴⁶ Further, in a case captivating the attention of the international sports community, German speed skater, Claudia Pechstein, challenged CAS' independence and impartiality in her domestic courts.⁴⁷ Structural rules standardizing procedures must be in place to resolve disputes between athletes and their respective athletic federations in a neutral and consistent manner, away from national courts.⁴⁸ If a German national court or any other domestic court were to overturn CAS' authority and declare the tribunal is not independent and impartial, it would encourage athletes to appear before their own domestic courts to resolve sports-related disputes.⁴⁹ In order to remain the supreme forum for international sports disputes, it is essential that CAS is viewed as an independent and impartial forum. If athletes are permitted to flee to national courts when a CAS award is unfavorable, it will result in the destruction of *lex sportiva*.

principles, such as legality, fairness and good faith as well as 'general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measure[s].'"

42. CAS, *supra* note 26.

43. WEILER ET AL., *supra* note 2, at 1147.

44. CAS, *supra* note 26.

45. WEILER ET AL., *supra* note 2, at 1149.

46. *Id.*

47. *Id.*

48. *Id.* at 1142.

49. *Id.* at 1150.

This Note explores whether CAS is the most objective forum to settle international sports disputes. More specifically, it focuses on CAS' Appeals Arbitration Division, which hears disputes between athletes and athletic federations involving the Olympic Games and international competition. If reforms and changes are not implemented, both individual athletes and international athletic organizations will turn to national courts—rendering CAS effectively obsolete. In order for CAS to continue to perform its vital function as international sports' supreme court and further develop specific legal principles for sport, institutional reform is required. CAS must redress the perceived structural imbalance in the favor of the IOC and international athletic federations. CAS has implemented some reforms since its inception in 1984, but the sports court must further reform arbitrator selection procedures and utilize a tripanel of arbitrators to hear disputes.

Part I of this Note will provide background on international dispute resolution, examining why arbitration has become a popular dispute resolution method, and will describe CAS' history and evolution into the primary forum for settling international sports disputes. Part II will analyze a recent case brought before the CAS, *Claudia Pechstein v. International Skating Union*, which threatened to upend CAS' supreme authority, shedding light on inherent deficiencies of impartiality and independence in CAS. Pechstein, a world-class German speed skater challenged the two-year suspension imposed by the International Skating Federation (ISU) for doping violations.⁵⁰ After CAS upheld her suspension, Pechstein subsequently challenged CAS' fairness in German national courts, questioning whether CAS is the most independent and objective forum to settle international athletic disputes.⁵¹ Part III will then compare the CAS arbitration process to arbitration processes utilized by professional sports leagues in Europe and the United States, specifically examining how the National Football League (NFL) in the United States and Sports Resolutions in the United Kingdom adjudicate athletic disputes. This Part will then analyze criticism the NFL has received regarding the commissioner's broad scope of powers

50. Mathias Wittinghofer & Sylvia Schenk, *A Never Ending Story: Claudia Pechstein's Challenge to the CAS*, KLUWER ARB. BLOG (June 14, 2016), <http://kluwarbitrationblog.com/2016/06/14/a-never-ending-story-claudia-pechsteins-challenge-to-the-cas/>.

51. *Id.*

in resolving disputes between individual athletes and the league and will highlight the specialized arbitrator selection methods found in Sports Resolutions to serve as a model for improvements to CAS' method of selecting arbitrators. Specialized arbitrator selection methods form arbitration panels comprised of arbitrators with a balance of legal knowledge and expertise on the topic in dispute in a fair and independent manner. Finally, Part IV of this Note will propose that the arbitration and member selection clauses in the 1994 Code of Sports-related Arbitration ("1994 CAS Code") be revised to model Sports Resolutions. Specifically, the arbitration member selection clauses shall be redesigned to utilize tripanel arbitrations, which, in turn, will result in a more balanced and independent arbitral decision. This Note will argue further that CAS awards should be given precedential value in published arbitration decisions, which will thereby compel arbitrators to make more consistent and fairer rulings.

I. INTERNATIONAL ARBITRATION AND CAS

The popularity of arbitration in resolving international disputes influenced CAS' development and success as the sole international forum for sports arbitration proceedings. Throughout this time, CAS has developed into an independent and exclusive forum for dispute resolution in international athletic competition. Yet, CAS has undergone major reform to establish itself as an independent forum separate from the IOC, such as the creation of the ICAS to independently run CAS and revisions to CAS procedures and arbitrator selection methods. This Part will then discuss the development of arbitration, specifically international dispute resolution, as a neutral, enforceable, and flexible dispute resolution mechanism. Finally, this Part will introduce arbitration methods utilized in international athletic competition and the creation and rise in popularity of CAS as the exclusive forum to settle international athletic disputes.

A. International Arbitration

The roots of commercial arbitration can be traced back to Medieval Europe.⁵² English merchants first resorted to adjudication in special tribunals outside the Royal Courts because the courts were not suited to serve the needs of these traders.⁵³ Early courts in England were primarily interested in resolving disputes over land and "conduct detrimental to the King's peace."⁵⁴ Additionally, the majority of disputes either occurred abroad or were between foreign merchants, therefore resulting in unenforceable judgments in national courts.⁵⁵ Lastly, the courts lacked the expediency merchants needed due to the nomadic nature of trade in Europe.⁵⁶ The courts of fairs and boroughs developed to alleviate the aforementioned problems with traditional courts.⁵⁷ Although these courts were eventually integrated into English courts, the needs the courts of fairs and boroughs sought to respond to influenced modern arbitration.⁵⁸ Various other special tribunals were developed in Europe to address the same needs.⁵⁹

Modern arbitration developed in response to the Industrial Revolution, which took place in the eighteenth and nineteenth centuries.⁶⁰ The Industrial Revolution marked a transformation from agrarian, rural societies in Europe and the United States to the development of industrial manufacturing and urbanization.⁶¹ Technological changes and manufacturization of goods resulted in specialization of labor and the creation of labor organizations, whose rules encouraged the use of arbitration by its members.⁶² Arbitration institutions "provid[ed] for the resolution of disputes by respected members of the same profession who would have extensive person[al] experience in the subject

52. See KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 11 (2010).

53. See *id.*

54. *Id.*

55. See *id.*

56. See *id.*

57. See Craig, *supra* note 24, at 6.

58. See *id.*

59. See *id.*

60. See *id.*

61. See *Industrial Revolution*, HISTORY (2009), <http://www.history.com/topics/industrial-revolution>.

62. See *id.*; see also Craig, *supra* note 24, at 6.

matter of the dispute.”⁶³ Arbitration between members of trade and professional groups provided an independent process from the court systems that resulted in a final, binding resolution.⁶⁴

Over the last fifty years, the international community has embraced and viewed arbitration as the primary means of resolving disputes.⁶⁵ The following factors have contributed to the popularity of international arbitration: (1) enforceability, (2) neutral forums, and (3) procedural flexibility and party autonomy.⁶⁶ The essential driving force for parties who seek arbitration is the desire to avoid national courts and uncertainty of a foreign judiciary.⁶⁷ Parties also fear foreign courts due to a perceived bias in favor of domestic parties and the additional risk of delayed appellate review.⁶⁸

One benefit of arbitration is that it allows for the enforceability of decisions worldwide. In the post-World War II era, a major concern for parties was the uncertainty of whether arbitration decisions could be enforced in another country. In many instances, prevailing parties who enlisted the losing party’s national courts to compel the enforcement of the award risked the chance that the national courts would scrutinize the procedures that led to the resulting award decision or simply ignore it.⁶⁹ As a result, the enforcement of international arbitration decisions could only be accomplished by treaty.⁷⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)—which entered into effect in 1958—attempted to alleviate this problem by establishing a multilateral

63. Craig, *supra* note 24, at 6.

64. *See id.*

65. *See* LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION (2015), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2014>.

66. *See id.* Another attractive benefit to international arbitration is the ability to use arbitrators with appropriate experience. For example, “[a]rbitrators can be selected for their familiarity with relevant commercial practices, trade usages, and legal structures, and their ability to apply different national laws and deal with comparative law issues.” *Id.* The ability to pick arbitrators with particular expertise is also applicable when sports disputes are resolved through arbitration. *See id.*

67. *See* Craig, *supra* note 24, at 2.

68. *See id.*

69. *See id.* at 9.

70. *See id.*

instrument that ensured the enforcement of arbitral awards internationally.⁷¹ Article III of the New York Convention expressly states that "[e]ach contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the [New York Convention]."⁷² In other words, Article III articulates that any award rendered in a country party to the New York Convention will be enforced in any other New York Convention country.⁷³ Today, the New York Convention has gained international acceptance and is regarded as the most successful treaty on arbitration laws.⁷⁴

Arbitration is also advantageous because it provides a neutral forum to settle disputes between parties from different countries.⁷⁵ Conducting arbitration in a neutral forum avoids the danger of a partisan judge siding with the contracting party from the host jurisdiction.⁷⁶ The ratification of the New York Convention increased the use of arbitration as an efficient and desirable

71. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]; Craig, *supra* note 24, at 3. The Geneva Protocol on Arbitration Clauses, adopted by the League of Nations in 1923, helped to ensure that arbitration agreements and awards would be recognized as valid by Member States. Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158. But, this protocol did not ensure that arbitration awards would be enforced internationally. *Id.*

72. New York Convention, *supra* note 71, art. III.

73. See Craig, *supra* note 24, at 11.

74. See *In Brief*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/in+brief> (last visited Dec. 27, 2016).

75. See Craig, *supra* note 24, at 12. Pierre Lalive discussed the three essential characteristics of a neutral arbitration site: (1) concrete neutrality, which is the equal treatment of both parties; (2) political neutrality or the nonallegiance to a relevant political movement; and (3) judicial neutrality. See Pierre Lalive, *On the Neutrality of the Arbitrator and the Place of Arbitration*, in SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23 (1984). Lalive also stressed the importance of state enterprise and organizational neutrality. See *id.* at 30. Placing arbitration in one party's country is likely to give the state-enterprise party substantial physical, practical, and psychological advantages. See *id.* at 30. Therefore, there is a strong proclivity to not place arbitration in one party's country or, if the nature of the dispute is related, to a party. See *id.* at 30. Although the IOC is not a state organization, nonetheless, it is as influential as a state-run organization.

76. Craig, *supra* note 24, at 15 ("Placing the seat of arbitration in a country other than those of the contracting parties avoids the danger of partisan, even xenophobic, judge taking the side of one party.").

remedy for international commercial disputes but highlighted the problem of determining where arbitration should be held.⁷⁷ In many ordinary commercial cases, arbitration may be conducted in the domicile of either party or other location previously agreed upon by the parties to the dispute.⁷⁸ In other cases, however, selecting a neutral forum is much more problematic. For example, in many international commercial disputes, one party may feel uncomfortable agreeing to arbitration in a developing country or in a climate of political controversy.⁷⁹ As a result of these fears, Switzerland, which has guaranteed neutrality, has become the most popular and logical host forum for international arbitration proceedings, including CAS.⁸⁰ In the 1960s and 1970s, when international arbitration became popular, Europe was generally regarded as the most acceptable international arbitration site because a majority of the parties involved came from Europe or European colonies.⁸¹ Further, many legal systems in Africa and the Middle East were derived from European civil codes, making Switzerland, and Europe in general, a cohesive location to resolve disputes.⁸²

Lastly, arbitration allows for procedural flexibility and party autonomy. Switzerland became an attractive forum for international arbitration because Swiss cantons⁸³ were parties to the

77. *See id.* at 11.

78. *See id.* at 12.

79. *See id.*

80. *See id.* at 13. In 1815, the Congress of Vienna committed to guarantee the neutrality of Switzerland. *See* SWISS CHAMBERS' ARBITRATION INST., SWITZERLAND: NEUTRALITY, ARBITRATION AND MEDIATION, A LONG AND UNIQUE HISTORY (2016), https://www.swissarbitration.org/files/560/History/Arbitration%20and%20Mediation%20in%20Switzerland_History%2020161010%20final%20published.pdf. Switzerland has long been the host of various non-governmental dispute resolution organizations such as the United Nations, the World Trade Organization, and the World Intellectual Property Organization. *Id.*

81. *See* Craig, *supra* note 24. The United States was not considered an effective arbitration site because it did not ratify the New York Convention until 1970. *Id.* Many foreign parties entering into contracts with U.S. parties feared the complex litigation and intervention from the courts, thus, parties frequently did not agree to arbitration in the United States. *Id.*

82. *See id.*

83. *Id.* "Cantons" are Member States of the Swiss Confederation. *Switzerland's 26 Cantons (Federal States)*, ALL ABOUT SWITZ., <http://swiss-government-politics.all-about-switzerland.info/swiss-federal-states-cantons.html> (last visited Dec. 28, 2016).

Intercantonal Arbitration Concordat of March 27, 1969 ("Concordat").⁸⁴ The Concordat provides procedural flexibility by deferring the procedural rules to the party's specific arbitration agreement.⁸⁵ Today, international arbitration in Switzerland is governed by Chapter 12 of the Federal Act on Private International Law enacted on December 18, 1987 ("PIL Act"), which stresses neutrality as well as procedural and party autonomy.⁸⁶ In arbitration, parties negotiate arbitration procedures in underlying contracts prospectively in anticipation of a future dispute.⁸⁷ Contracting parties can design the process to accommodate their specific needs based on the underlying contractual relationship.⁸⁸ Prenegotiated arbitration procedures, such as time limitations for completing the arbitral process, further enhance efficiency and speed in reaching a decision.⁸⁹ Procedural flexibility allows parties to select an arbitrator and a set of procedures with specific knowledge about the substantive international nature of the dispute.⁹⁰ Additionally, the rules of evidence and civil procedure are more lenient, and the arbitrators' final decisions are usually not subject to judicial review.⁹¹ Binding arbitration precludes judicial review in a traditional court proceeding, unless the arbitrator abused his or her discretion by misconduct.⁹²

84. Craig, *supra* note 24, at 13.

85. *See id.*

86. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987, AS 1776 (1988) (Switz.). The Federal Act on Private International Law ("PIL Act") leaves essentially all the rules of the arbitration procedure up to the parties' contractual arbitration agreement, including the right to challenge arbitrators. Article 180 states that an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to his or her independence." *Id.* art. 180. The PIL Act also provides for setting aside final awards in Article 190—including "where the sole arbitrator has been improperly appointed" as well as "where the principle of equal treatment of the parties of their right to be heard in an adversary procedure has not been observed." *Id.* art. 190.

87. Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A. (Mar. 5, 2012), http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

88. *Id.*

89. *Id.*

90. Mitten & Opie, *supra* note 20, at 283.

91. Adam Epstein, *Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum*, 12 J. LEGAL ASPECTS SPORT 153, 158 (2002).

92. *Id.*

Overall, these rules create an enforceable and neutral dispute resolution system, which provides flexibility and efficiency in resolving international disputes. The advantages of international commercial arbitration ultimately led to the adoption of arbitration in another expanding industry: international sports.

B. International Arbitration in Sports and the Development of CAS

Due to their popularity, professional sports and international competitions account for more than 3 percent of international trade.⁹³ From 2006 to 2014, revenue in the global sports market increased from \$107.52 billion to \$146.47 billion.⁹⁴ A majority of the revenue is generated from contractual agreements between players and international federations, players and individual clubs, broadcast agreements, sponsorship agreements, and endorsement deals.⁹⁵ International viewership has also grown with the development of new broadcasting platforms, including the digitalization of modern sporting events.⁹⁶ For example, the 2014 Winter Olympic Games in Sochi were broadcast to 2.1 billion people globally, an increase of three hundred million viewers in just four years from the 2010 Vancouver Olympics, which drew 1.8 billion viewers.⁹⁷ For the first time in Olympic Games history, digital coverage exceeded traditional television broadcasts at the Winter Games in Sochi.⁹⁸

93. Ian Blackshaw, *Settling Sports Disputes by ADR: Some Major Sports Dispute Resolution Bodies Modeled on the Court of Arbitration for Sport*, 3 DISP. RESOL. INT'L, no. 2, 2009, at 169, 169.

94. *Global Sports Market Revenue 2006-2015*, STATISTA, <http://www.statista.com/statistics/194122/sporting-event-gate-revenue-worldwide-by-region-since-2004/> (last visited Jan. 19, 2016).

95. WEILER ET AL., *supra* note 2, at 1143.

96. See INT'L OLYMPIC COMM., *MARKETING REPORT SOCHI 2014*, at 26 (2014), https://stillmed.olympic.org/Documents/IOC_Marketing/Sochi_2014/LR_MktReport2014_all_Spreads.pdf

(“For the first time at any Olympic Games, the amount of digital coverage available, [through online streaming and the Olympic Video Player application, at the 2014 Olympics] exceeded that of traditional television broadcasts. . .”).

97. *Id.* (“Ratings across the world consistently show that this is by far the most-viewed Olympic Winter Games ever, and the reach of these Winter Games is unprecedented.”).

98. *Id.* (“Of the total output, approximately 48,000 hours were shown on television, . . . while 230 dedicated digital channels – including 155 websites and 75 apps – carried a total of 60,000 hours of digital broadcast coverage.”).

In conjunction with the global reach of international athletic competition and the increase in contractual agreements, the number of disputes has also increased. This has resulted in the need for a timely, cost-efficient, and neutral process to resolve disputes. Unlike national courts, which may result in costly and time-consuming battles about conflict of laws and jurisdictional issues,⁹⁹ arbitration, and specifically CAS, is preferable because CAS provides dispute resolution services to handle disputes between athletes and their respective athletic federations and international conflicts involving international competition, particularly the Olympic Games.¹⁰⁰

In 1984, the IOC formed CAS as a means of offering agreeing parties the opportunity to settle disputes more efficiently and inexpensively than proceeding with litigation in national courts.¹⁰¹ The original procedural regulations provided for sixty arbitrator members.¹⁰² The IOC, the individual international federations, the National Olympic Committees, and the IOC President each appointed fifteen arbitrators.¹⁰³

Initially, international athletic federations viewed the independence of CAS as a threat.¹⁰⁴ Outside the Olympic Games, most parties did not utilize the new forum and, instead, submitted most disputes to arbitrators selected by the individual international athletic federation, "who virtually always rendered decisions in favor of the federation."¹⁰⁵ In 1991, however, the International Equestrian Federation ("FEI") became the first athletic federation to require all disputes to be submitted to CAS.¹⁰⁶ The FEI adopted CAS' arbitration clause giving CAS final authority to hear disputes arising in the sport.¹⁰⁷ Following FEI's adoption

99. See John Griffiths, *Procedural Fairness and Regulation of Sport: Lessons from the Common Law*, INT'L SPORTS L. REV., no. 4, 2009, at *69, *71.

100. See *id.* at *69.

101. See WEILER ET AL., *supra* note 2, at 1143.

102. CAS, *supra* note 26.

103. *Id.*

104. WEILER ET AL., *supra* note 2, at 1144.

105. *Id.*

106. See *id.*

107. See CAS, *supra* note 26. The model arbitration clause read as follows:

Any dispute arising from the present Statutes and Regulations of the . . . Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance

of CAS arbitration procedures, a number of federations began submitting disputes to CAS.¹⁰⁸

Despite the growing acceptance of the CAS procedures by various federations, many athletes and certain other federations still doubted CAS' independence from the IOC. Parties feared they could not obtain a fair hearing in front of CAS, particularly if the IOC was the adverse party.¹⁰⁹ At this time, CAS essentially operated as a division of the IOC.¹¹⁰ For example, the IOC absorbed all operating costs,¹¹¹ had the unilateral authority to modify the CAS statute "at the proposal of the IOC Executive Board,"¹¹² and, through appointments designated by the IOC President, held the power and influence to appoint thirty out of sixty member seats of CAS.¹¹³ Additionally, because of the great influence the IOC has over the federations, bias existed in choosing specific arbitrator member seats.¹¹⁴

In February 1992, the authority of CAS was challenged by an athlete claiming that CAS lacked independence and impartiality. This appeal became the catalyst for major reforms to CAS governance.¹¹⁵ In *Gundel v. Federation Equestre Internationale*, the FEI disqualified and suspended equestrian Elmar Gundel after his horse tested positive for doping.¹¹⁶ Gundel challenged

with the Statute and Regulations of the [CAS] to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way hinder its execution.

Id.

108. See *id.* Disputes brought before CAS include: "nationality of athletes and contracts concerning employment, television rights, sponsorship and licensing, and doping cases." *Id.*

109. See Beach, *supra* note 31.

110. See WEILER ET AL., *supra* note 2, at 1143.

111. See CAS, *supra* note 26.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *id.* Challenges to CAS awards are made before the Swiss Federal Tribunal under the PIL Act. *Id.* The Swiss Supreme Court has exclusive jurisdiction to hear appeals of CAS awards. See generally Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISP. SETTLEMENT 217, 217 (2010).

116. Rachele Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming The Governance of The Court of Arbitration For Sport*, 12 MELBOURNE J. INT'L L. 1, 7 (2011).

the FEI decision with CAS, and his suspension was reduced from three months to one month.¹¹⁷ CAS concluded that Grundel was negligent for not ensuring that his horse did not ingest banned substances but reduced his suspension because the violation was unintentional.¹¹⁸ Still unsatisfied, Gundel took his case to the Swiss Supreme Court, which has exclusive jurisdiction to hear appeals of CAS awards,¹¹⁹ arguing that the CAS award was not decided by impartial arbitrators and was unenforceable because of the close relationship between the IOC and FEI.¹²⁰ Grundel claimed that "when the CAS dismissed his appeal against suspension, it lacked the independence required of arbitral tribunals under Swiss law because the body that suspended him, [FEI] was a member federation of the IOC, and the IOC established the CAS."¹²¹ Although the Swiss Supreme Court held that CAS acted as an impartial and independent tribunal, the court criticized the institutional proximity between CAS and the IOC.¹²² The court expressed concern over the significant economic ties that existed between CAS and the IOC, including that the IOC funded the operating costs of CAS and played a substantial role in appointing arbiters.¹²³ The Swiss Supreme Court stated that the "links would have been sufficient to call into question the independence of the CAS in the event of the IOC being a party to the proceedings before it."¹²⁴ But, in this case,

117. CAS, *supra* note 26.

118. See Beach, *supra* note 31.

119. See CAS, *supra* note 26; WEILER ET AL., *supra* note 2, at 1143, 1148. CAS awards are appealable to the Swiss Federal Tribunal, and this right cannot be waived. Under Swiss law, appeals are granted when:

- (1) the appealing party was effectively denied the right to be heard before the arbitral tribunal;
- (2) the arbitral panel was constituted irregularly;
- (3) *the panel lacked impartiality*;
- (4) the panel erred in finding that it had jurisdiction over the matter decided;
- (5) the panel's award exceeded its authority as submitted to it; and
- (6) the panel's award contravened public policy as defined under Swiss law. (emphasis added).

WEILER ET AL., *supra* note 2, at 1148.

120. See Downie, *supra* note 116, at 7.

121. SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 115–16 (2009).

122. See CAS, *supra* note 26; LUTTRELL, *supra* note 121, at 116.

123. LUTTRELL, *supra* note 121, at 116.

124. CAS, *supra* note 26.

because "CAS was not an organ of the FEI [and] did not receive instructions from this federation" there was insufficient evidence that CAS lacked impartiality.¹²⁵ The message after *Gundel*, however, was perfectly clear—major reforms were necessary to establish CAS' organizational and financial independence from the IOC.¹²⁶

Influenced by the Swiss Supreme Court's warning, the IOC and the international athletic community were concerned that the validity of CAS would continue to be called into question. They also feared that increased challenges brought to national courts¹²⁷ would make international sports disputes "chaotic and ungovernable."¹²⁸ The IOC specifically recognized the need to standardize "the venue and the procedures by which disputes within the world of sports would be resolved without leaving individual disputes to the inconsistencies and biases of national courts in countries that had a vested interest in the outcome of the cases."¹²⁹

As a result, the Agreement Concerning the Constitution of the International Council of Arbitration for Sport ("Paris Agreement") was promulgated on June 22, 1994, which ushered in the

125. *Id.*

126. *Id.*

127. See WEILER ET AL., *supra* note 2, at 1144; *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994). In 1990, the International Amateur Athletic Federation (IAAF) found that, Butch Reynolds, a world-class amateur track athlete, tested positive for an anabolic steroid. WEILER ET AL., *supra* note 2, at 1144. Rather than requesting a hearing from the Athletic Congress of the United States, Inc. ("TAC"), the governing body of national track and field, Reynolds instead filed an action against the IAAF in the U.S. District Court for the Southern District of Ohio, arguing that the test results were erroneous because the drug test was administered incorrectly. *Reynolds*, 23 F.3d at 1110, 1112. The court found that Reynolds did not exhaust his administrative remedies provided by TAC. *Id.* Subsequently, Reynolds appealed his suspension to TAC and the IAAF. *Id.* at 1113. The IAAF arbitration panel upheld Reynolds' suspension, finding that the drug test administration was valid. *Id.* Reynolds appealed in the U.S. District Court for the Southern District of Ohio again and sought money damages and a restraining order to allow him to compete at the Olympic trials. *Id.* The court granted Reynolds a temporary restraining order to allow him to participate in the Olympic Trials, where TAC threatened other athletes with suspension if they competed with Reynolds. *Id.* The court awarded Reynolds's money damages and found that the international federation "acted with ill will and a spirit of revenge towards Mr. Reynolds." *Id.* at 1114.

128. WEILER ET AL., *supra* note 2, at 1144.

129. *Id.* at 1142.

modern independent CAS we see today.¹³⁰ Changes included removing CAS' headquarters from IOC offices¹³¹ and creating two separate divisions: the Ordinary Appeals Division and the Appeals Arbitration Division.¹³² The Ordinary Appeals Division hears private disputes arising from the practice and development of sports that the parties initially agreed to submit to CAS.¹³³ Meanwhile, the Appeals Arbitration Division hears appeals against individual athletic federations following the initial decision or suspension imposed by a sports-related body.¹³⁴ The Appeals Arbitration Division hears about 90 percent of the filed challenges.¹³⁵ Further, 30 percent of these cases relate to doping violations filed under the World Anti-Doping Code ("WADA Code").¹³⁶ The Paris Agreement also completely revised and outlined new procedural guidelines of the CAS Code, which governs arbitrator selection procedures of the CAS.¹³⁷ The most important reform was the implementation of ICAS.¹³⁸ According to the 1994 CAS Code, "[t]he purpose of ICAS is to . . . safeguard the independence of CAS and the rights of the parties."¹³⁹ Ultimately, ICAS is responsible for the administration and financing of CAS, which helped to sever its ties from the IOC.¹⁴⁰ The 1994 CAS Code was greatly influenced by arbitration guidelines laid out in the United Nations Commission on International Trade

130. *Id.* at 1144.

131. *Id.* Additional changes include the addition of mediation services and the creation of an *ad hoc* division specifically for disputes arising during Olympic competition. *Id.*

132. Beach, *supra* note 31. In 1996, CAS created an *ad hoc* division to resolve disputes at the Olympic Games. Gilson, *supra* note 28, at 505.

133. See Beach, *supra* note 31; CODE OF SPORTS RELATED ARBITRATION art. S20 (COURT OF ARBITRATION FOR SPORT 1994) [hereinafter 1994 CAS CODE]; Gilson, *supra* note 28, at 506.

134. Beach, *supra* note 31. A majority of the disputes brought before the Ordinary Appeals Division include contractual and tort matters. Costs in the Ordinary Appeals Division are estimated before the proceeding, and each party is required to split the costs. In contrast, CAS bears the cost of all matters heard by the Appeals Arbitration Division. Gilson, *supra* note 28, at 506.

135. Reilly, *supra* note 19, at 65.

136. *Id.* at 70.

137. See generally 1994 CAS CODE, *supra* note 133.

138. See Gilson, *supra* note 28, at 505.

139. 1994 CAS CODE, *supra* note 133, art. S2.

140. *Id.*

Law (UNCITRAL)¹⁴¹ and the International Court of Arbitration rules.¹⁴²

Under Article S4 of the 1994 CAS Code, ICAS is composed of twenty members bound to be objective and independent in upholding the code.¹⁴³ In selecting the members of ICAS, the IOC, the international athletic federations, and the Association of the National Olympic Committees collectively appoint twelve members.¹⁴⁴ Those twelve members in turn appoint the remaining eight members of the ICAS.¹⁴⁵ Members of ICAS must be experts in both arbitration and sports law.¹⁴⁶ The council also elects a president, who also acts as CAS President.¹⁴⁷ Additionally, ICAS members elect two vice-presidents and presidents for the Ordinary Arbitration Division and the Appeals Arbitration Division of CAS.¹⁴⁸ Procedurally, the division presidents handle all arbitration proceedings before the panel of arbitrators are selected.¹⁴⁹ The duties of each division president include setting up an arbitration schedule, creating the framework for arbitrator selection, and issuing orders regarding requests for interim relief.¹⁵⁰

To ensure fairness and independence, the ICAS members appoint a minimum of 150 arbitrators for renewable four-year terms.¹⁵¹ Members must “[have] appropriate legal training, recognize competence with regard to sport law and/or international

141. Craig, *supra* note 24, at 26. Similar to the aim of the New York Convention, which is to reduce the court's role in the enforcement of arbitration awards, the purpose of UNCITRAL Model Law is to reduce the role of local courts in international arbitrations. *Id.* The UNCITRAL Secretariat justified this goal on the basis that “parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted legal battles in court.” *Id.*

142. Downie, *supra* note 116, at 8.

143. *Id.* In addition to the appointment of CAS arbitrators, ICAS is responsible for all amendments to the 1994 CAS Code, the election of officers, including the president, two vice-presidents, and the division presidents. 1994 CAS CODE, *supra* note 133, art. S6.

144. 1994 CAS CODE, *supra* note 133, art. S4.

145. *Id.*

146. *See* CAS, *supra* note 26.

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.* Currently, there are 369 arbitrators on the general list. *Id.*

arbitration and [have] a good command of at least one CAS working language. . . ."¹⁵² According to Article S14 of the 1994 CAS Code, the arbitration pool is distributed as follows: one-fifth is chosen by the IOC, one-fifth is nominated by international athletic federations, one-fifth is nominated by National Olympic Committees, one-fifth is chosen with a view to safeguard the interests of athletes, and one-fifth is chosen from "persons independent of the bodies responsible for proposing arbitrators in conformity with the [requirements of the 1994 CAS Code]"¹⁵³ Arbitrators may hear matters in both the Ordinary Appeals Division and the Appellate Appeals Division.¹⁵⁴

Today, CAS, which is located in Lausanne, Switzerland, has essentially become the exclusive forum for international sports-related disputes.¹⁵⁵ The forum hears challenges involving eligibility of athletes to compete in the Olympic Games and various international competitions, positive drug test results, technical decisions made by officials during competition,¹⁵⁶ and disputes concerning international commercial contracts.¹⁵⁷ The CAS offers speedy and efficient resolution to disputes involving the Olympics and international athletic competition.¹⁵⁸

The new provisions of the 1994 CAS Code create the appearance of institutional independence and good governance for CAS.¹⁵⁹ While these steps give the appearance of impartiality, there is still debate as to whether CAS masks the IOC's influence.¹⁶⁰ Three-fifths of the arbitrators appointed to the list con-

152. 1994 CAS CODE, *supra* note 133, art. S14. Disputes heard in CAS can be conducted in either English or French. *Id.* art. R29.

153. *Id.* art. S14; *see also* Downie, *supra* note 116, at 8.

154. CAS, *supra* note 26.

155. *See* WEILER ET AL., *supra* note 2, at 1144; Alexandra Veuthey, *Re-questioning the Independence of the Court of Arbitration for Sport in Light of the Scope of Review*, INT'L SPORTS L. REV., no. 4, 2013, at *105, *105 ("In 2012, no fewer than 374 requests were filed at its clerks office."); *see also* Statistics, CT. ARB. SPORT, http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf (last visited Jan. 15, 2016).

156. *See* Gilson, *supra* note 28, at 504.

157. *See* Reilly, *supra* note 19, at 63.

158. *See id.* at 78.

159. Downie, *supra* note 116, at 7, 14.

160. *Id.* at 14.

sist of candidates are nominated by individual athletic federations and the IOC.¹⁶¹ Therefore, the scales are still tipped significantly in favor of the controlling governing bodies and against the individual athletes.¹⁶²

Ultimately, the trust of the international athletic community is imperative to preserving the integrity of CAS. If athletes do not believe the IOC and their respective athletic federations are ensuring fairness and integrity in the sport, it will trickle down to render the basic principles of athletic competition untrustworthy. Although the 1994 CAS Code developed under the Paris Agreement establishes independence from the IOC, athletes have increasingly begun to challenge the impartiality of CAS—specifically the appointment of arbitrators.¹⁶³ There has been a surge in the number of CAS award challenges filed with the Swiss Supreme Court.¹⁶⁴ For example, over half of the international arbitrations appeals filed with the Swiss Supreme Court are CAS challenges.¹⁶⁵ Most importantly, some individual athletes are bringing challenges directly to national courts rather than to the governing bodies of their individual sports as intended, thereby limiting the number of cases brought before CAS.¹⁶⁶ If CAS awards are overturned in the national courts, it could have catastrophic consequences for the “Supreme Court” of sports.¹⁶⁷

II. PROCEDURAL IMPLICATIONS OF CAS APPEALS IN NATIONAL COURTS AND A CRITIQUE OF CAS CODE REVISIONS

In order for CAS to be an effective tool in international sports arbitration, it is critical for national courts to recognize the enforcement clauses granting exclusive jurisdiction to CAS.¹⁶⁸ Uncertainty about CAS' independence, however, has led to chal-

161. See Andrew Smith, *The Pechstein Judgment: CAS's Reaction and Potential Ramifications*, LAW SPORT (Apr. 17, 2015), <http://www.lawinsport.com/articles/item/the-pechstein-judgment-cas-s-reaction-potential-ramifications>.

162. See *id.*

163. See WEILER ET AL., *supra* note 2, at 1149.

164. See Reilly, *supra* note 19, at 75.

165. *Id.*

166. See WEILER ET AL., *supra* note 2, at 1149.

167. Mitten & Opie, *supra* note 20, at 285 (“In 1981, Juan Samaranch, who was the then-current IOC president, envisioned a ‘supreme court for world sports.’”).

168. See WEILER ET AL., *supra* note 2, at 1144–45.

lenges in national courts, threatening CAS' place as the final arbiter of international sports disputes.¹⁶⁹ Significantly, the case of German speed skater, Claudia Pechstein, marks the first time a challenge to CAS has made it all the way to an athletes' highest national court. Professional athletes disputing CAS award decisions in both national courts and the European Court of Human Rights (ECtHR) has severe implications for CAS and *lex sportiva*. Furthermore, subsequent actions taken by CAS to revise arbitration procedures have not been sufficient in remedying the perception of institutional bias of CAS. This Part will describe the significance of Claudia Pechstein's challenge to the validity of CAS arbitration awards in national courts and discuss the consequences of this litigation. Furthermore, this Part will critique the revisions made to the CAS Code following the *Pechstein* litigation. Lastly, this Part will explore the effects of the European Convention of Human Rights (ECHR) on CAS arbitration.

A. *Claudia Pechstein v. International Skating Union*

The case of *Pechstein* marked a significant challenge to CAS' role as the primary and final arbiter in resolving sports disputes between individual athletes and their respective athletic federations. In 2009, the ISU suspended German world-class speed skater Claudia Pechstein for two years for blood doping.¹⁷⁰ During the 2009 Speed Skating World Championships, Pechstein's voluntary drug test showed irregular blood parameters, which

169. *See id.* at 1144, 1149.

170. *See* Kevin Draper, *A Lawsuit Threatens the Future of The Court of Arbitration for Sport*, DEADSPIN (Feb. 18, 2015, 11:14 PM), <http://deadspin.com/a-lawsuit-threatens-the-future-of-the-court-of-arbitrat-1686685232> (“[B]lood samples collected from Ms. Pechstein at the World Championships in Hamar in February of 2009 were deemed to be inconsistent with her biological passport, showing elevated levels of reticulocytes in her blood.”); Danielle Sharkey & Huw Roberts, *Skating on Thin Ice: The Independence of CAS is Challenged*, 26 ENT. L. REV. 117, 117 (2015). Pechstein's normal levels were between 0.4% and 2.4% of reticulocyte, but the blood screening at Hamar showed counts “well above 2.4% and which then sharply decreased.” *Pechstein v. Int'l Skating Union*, Swiss Federal Tribunal Decision, Feb. 10, 2010, 4A_612/2009 (Switz.) [hereinafter Swiss Federal Tribunal Decision 4A_612/2009], <http://www.swiss-arbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf>.

was deemed inconsistent with her biological passport.¹⁷¹ Pechstein appealed the decision to CAS, where she argued that a genetic abnormality rather than blood doping caused the positive drug test results.¹⁷² Due to the contractual clauses imposed on her by the German national skating federation and ISU, Pechstein's only choice was to appeal the ISU decision to CAS.¹⁷³ On November 25, 2009, Pechstein's appeal was dismissed on its merits.¹⁷⁴ The CAS did not reverse her suspension because the medical evidence Pechstein presented to explain the abnormality in her blood did not constitute new evidence.¹⁷⁵

Subsequently, Pechstein filed an appeal with the Swiss Federal Tribunal (SFT) disputing the CAS decision (upholding the

171. Despina Mavromati, *The Legality of the Arbitration Agreement in Favour of CAS Under German Civil and Competition Law*, in COURT OF ARBITRATION BULLETIN 27 (2016), http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_1.pdf (last visited Jan. 10, 2017); Draper, *supra* note 170.

172. See Draper, *supra* note 170. Pechstein never actually failed a drug test. The ISU concluded that she was blood doping because the biological passport showed deviations from the baseline before some races. Sharkey & Roberts, *supra* note 170, at 179. Her "biological passport" was created by collecting over ninety blood samples in order to monitor changes to her biological character. *Id.* The development of the biological passport, "make[s] it easier to detect the effects of any use of prohibited substances." *Id.* ("Athlete Biological Passport (ABP) is a very important development in the ongoing fight against doping, which has been praised by some as a 'breakthrough in the fight against doping' and criticized by others as being 'an aggressive new approach' raising 'serious concerns.'"). The ABP records the athlete's body levels over time using biological markers to assess "whether there has been an odd deviation from that athlete's baseline values, in order to indirectly detect a doping practice." Massimo Coccia, *The Athlete Biological Passport: Legal and Scientific Aspects*, INT'L SPORTS L. REV., no. 1, 2013, at *9, *10. See generally WORLD ANTI-DOPING AGENCY [WADA], ATHLETE BIOLOGICAL PASSPORT (ABP) OPERATING GUIDELINES (2017), <https://www.wada-ama.org/en/resources/athlete-biological-passport/athlete-biological-passport-abp-operating-guidelines>.

173. See Sharkey & Roberts, *supra* note 170, at 117.

174. See Smith, *supra* note 161.

175. See Swiss Federal Tribunal Decision 4A_612/2009.

ban) and sought a rehearing of the case in CAS.¹⁷⁶ Pechstein argued that her case was the "litmus test"¹⁷⁷ for the success of the WADA blood passport, which detected prohibited substances. She claimed that CAS' primary interests "[were] those of the [IOC] and the international sporting associations in general, which consider economic value of the Olympic Games and their sporting events to be at risk as the result of doping issues."¹⁷⁸ After a hearing on February 10, 2012, the SFT rejected Pechstein's appeal.¹⁷⁹ The SFT based the decision on the principle of good faith.¹⁸⁰ During initial appeals to CAS, one must immediately raise objections to the arbitration proceedings in order for the applicant to maintain a claim thereafter. Since Pechstein never raised any issues about the independence of CAS during her initial appeal, the SFT stated that she waived the right to invoke that ground for appeal.¹⁸¹ Furthermore, the court held that Pechstein incorrectly invoked Article 6(1) of the ECHR, which protects the right to a fair trial, because the provision was not applicable to voluntary arbitration proceedings.¹⁸² As a result, the SFT upheld the two-year suspension imposed by the ISU.¹⁸³

Although Pechstein's appeal to the SFT was the final appeal allowed under the arbitration clause establishing CAS' authority, she sued the ISU for €4 million in damages in a local civil

176. See Sharkey & Roberts, *supra* note 170, at 117. The applicable Swiss law states that "[w]ithin the framework of an appeal before the SFT against a CAS award, the lack of independence of impartiality must be raised under Art.190(2)(a) of the PILA." Veuthey, *supra* note 155, at *109. Article 190 of PILA states that the award may only be annulled under (2)(a) "if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted." *Id.*

177. Swiss Federal Tribunal Decision 4A_612/2009. Pechstein claimed that, before her appeal to CAS, IOC president Jacques Rogge declared that her case was a "litmus test to see if the long-term profile of the international scientific community [wa]s confirmed." *Id.*

178. *Id.*

179. Sharkey & Roberts, *supra* note 170, at 117.

180. Swiss Federal Tribunal Decision 4A_612/2009.

181. *Id.* According to the Swiss Federal Tribunal, "[t]he Appellant herself appealed to the CAS and signed the Procedural Order of September 29, 2009 without raising objections with respect to independence or impartiality." *Id.*

182. *Id.*; see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S 222 [hereinafter ECHR].

183. Sharkey & Roberts, *supra* note 170, at 117.

court in Munich for lost income during her suspension.¹⁸⁴ Pechstein also filed a complaint with the ECtHR claiming that the SFT did not provide a fair trial, and thus violated her human rights, because they did not adequately review the CAS decision.¹⁸⁵ The Local Court of Munich held that the arbitration clause in Pechstein's contract was void because, in order to compete, she had no other option but to sign the arbitration agreement with the ISU.¹⁸⁶ The court held that the forced arbitration clause violated the right to a fair trial under Article 6 of the ECHR¹⁸⁷ and concluded that "CAS arbitration did not satisfy all the requirements of Article 6 . . . owing to the way in which arbitrators are appointed and the institutional bias in favor of sports federations."¹⁸⁸ Despite this finding, the court did not vacate the CAS arbitration award because *res judicata* precluded the German court from reconsidering the award.¹⁸⁹ Similar to the SFT's reasoning for dismissing Pechstein's appeal, the German court upheld the CAS award because Pechstein did not initially raise objections to the arbitral process and the impartiality of the arbitration panel.¹⁹⁰

On January, 15, 2015, however, the appellate court, the Munich Higher Regional Court (MHRC), overturned the Local Court of Munich's dismissal and refused to recognize the CAS award as "contrary to public policy under Article V(2)(b) of the New York Convention,"¹⁹¹ which provides an exception to universal recognition and enforcement under the New York Convention and vacates arbitral awards if they are found to be contrary to the public policy of the country where enforcement is

184. *Id.*; Wittinghofer & Schenk, *supra* note 50.

185. Smith, *supra* note 161.

186. *Id.*

187. Sharkey & Roberts, *supra* note 170, at 117.

188. Smith, *supra* note 161.

189. *See id.* Despite this determination, "[t]he court still rejected Ms. Pechstein's claim since she had not contested the competence of CAS when she had first appealed the ISU's decision. The court therefore felt bound to recognize the CAS's *res judicata* effect and the CAS decision was duly upheld under the New York Convention." Sharkey & Roberts, *supra* note 170, at 117.

190. Smith, *supra* note 161.

191. Sharkey & Roberts, *supra* note 170, at 117. Article V(2)(b) states that "[r]ecognition and enforcement of the arbitration award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to public policy of that country." New York Convention, *supra* note 71, art. V(2)(b).

sought.¹⁹² The MHRC held that the arbitration clause naming CAS the exclusive arbitral forum violated German antitrust law, which "prohibits undertakings in a dominant position from imposing contractual conditions that are more restrictive than the norm."¹⁹³ Therefore, the court concluded that Pechstein's CAS award was incompatible with German public policy because the ISU required Pechstein to exclusively defer to CAS if she wanted to compete, with no opportunity to go to her national court.¹⁹⁴

Ultimately, the MHRC did not find actual bias of the arbitration panel appointed to hear Pechstein's appeal.¹⁹⁵ The MHRC did note, however, that the structure of ICAS weighs heavily in favor of the individual athletic federations.¹⁹⁶ The court implied

192. See New York Convention, *supra* note 71, art. V(2)(b).

193. Sharkey & Roberts, *supra* note 170, at 117.

194. *Id.* German antitrust laws prohibit companies from abusing a market-dominant position. The Higher Regional Court in Munich concluded that ISU compelled Pechstein to sign the arbitration agreement, giving CAS the ultimate authority, and thus violated German antitrust law. Ulrich Haas, *The Court of Arbitration for Sport in the Case Law of German Courts*, INT'L SPORTS L. REV., no. 4, 2015, at *71, *75 (2015). Additionally, according to the German lower courts, "an arbitration agreement with the hierarchically subordinate sportsman can 'only be valid if he has a genuine right to choose whether an ordinary court or a sports arbitral tribunal should rule on disputes involving him.'" *Id.* at *73.

195. Smith, *supra* note 161.

196. See *id.* Unidentified leaks disclosed the athletes under investigation. Michael A. Hiltzik, *Athletes See Doping Case Appeals as Futile Exercise*, L.A. TIMES (Dec. 11, 2006), <http://articles.latimes.com/2006/dec/11/local/la-me-doping11dec11/2>. Additionally, public statements were made that declared the guilt of athletes before CAS heard the appeal. Charles Pelkey, *Dick Pound Talks Floyd Landis, Lance Armstrong and the System*, VELO NEWS, http://velonews.competitor.com/2010/06/news/dick_pound_interview_2010_119685 (last updated Jan. 25, 2017). For example, WADA Chairman Richard W. Pound publically made comments asserting Tour de France champion cyclist Lance Armstrong's guilt. *Id.* Pound's comments were based on confidential data from WADA's lab and stemmed from a 2005 article published in the French newspaper *L'Equipe*. *Id.* The report matched urine sample identification numbers to Armstrong, which indicated the use of banned substances. *Id.* With respect to the article, Pound said there was "now an onus on Lance Armstrong and others to explain how it [banned substances] got in their systems." *Id.*; see also Charles Pelkey, *L'Equipe Alleges Armstrong Samples Show EPO Use in 99 Tour*, VELO NEWS, http://velonews.competitor.com/2005/08/tour-de-france/lequipe-alleges-armstrong-samples-show-epo-use-in-99-tour_8740 (last visited Mar. 4, 2017).

that the IOC and the athletic federations disproportionately influenced the selection of arbitrators¹⁹⁷ because the selection list of arbitrators gave substantial structural predominance to the sports institutions in dispute with individual athletes.¹⁹⁸ Furthermore, the court found legitimate concerns regarding the independence and impartiality of CAS panels in general, stating that there is “a lack of transparency” in the method of appointing the President of CAS panels because, under CAS Code 40.2, the president of each CAS panel is appointed directly by the Appeals Arbitration Division President.¹⁹⁹

Undeterred, Pechstein appealed to Germany’s highest civil court, the German Federal Court of Justice.²⁰⁰ On July 14, 2015, the International Federation of Professional Footballers (“FIFPro”), the representative organization for all professional soccer players, announced it would financially back Pechstein’s legal proceedings in the German Federal Court of Justice.²⁰¹ The players’ union, which represents over sixty-five thousand professional athletes, emphatically expressed support for Pechstein, stating:

Every athlete as a citizen and worker has the right to a fair process and to be judged in an independent and impartial court. The decisions of the regional courts in Germany . . . confirmed that this right was not duly granted by CAS at the time of her anti-doping case.²⁰²

On June 7, 2016, however, the court rejected Pechstein’s appeal and held that she received a fair hearing by CAS, thus confirming CAS’ role as the supreme arbiter of international sports disputes.²⁰³ While the court confirmed the monopolistic structure of athletic federations in its decision, it found that the binding arbitration clauses Pechstein was forced to sign to compete

197. Smith, *supra* note 161.

198. Haas, *supra* note 194, at *75. The court criticized the arbitrator list because “this pre-defined list was appointed by the [ICAS], a body which is comprised of 20 members, 12 of whom are nominated by the IOC, and [where] 3/5 of the arbitrators . . . [are] appointed upon proposals made by sports governing bodies.” Sharkey & Roberts, *supra* note 170, at 118.

199. Smith, *supra* note 161.

200. See Mavromati, *supra* note 171, at 27.

201. *FIFPro Backs Claudia Pechstein’s Legal Battle*, FIFPRO (July 14, 2015), <https://www.fifpro.org/news/fifpro-backs-claudia-pechstein-s-legal-battle/en/>.

202. *Id.*

203. See Wittinghofer & Schenk, *supra* note 50.

internationally did not violate her right to a fair trial.²⁰⁴ The court reasoned that Pechstein freely entered into the arbitration agreement with the ISU, which waived her right to bring cases in her home country.²⁰⁵ Contrary to the MHRC, the German Federal Court of Justice held that “[t]he procedure of drawing up the list of arbitrators of CAS indicates no structural imbalance impairing the independence and neutrality of the CAS to such an extent that its position as a ‘true’ court of arbitration could be called into question.”²⁰⁶ The court noted that there was no indication of structural imbalance in individual cases because arbitrators are chosen out of a list of more than three hundred people, and athletes can reject an arbitrator for bias.²⁰⁷ The CAS applauded the decision for setting a significant precedent validating CAS’ supreme authority.²⁰⁸ Despite the fact that most athletes do not have the resources to challenge CAS’ authority in a lengthy court battle, the case highlights major problems of the court and doubts of the athletic community regarding the independence and impartiality of CAS.

B. Implications of Pechstein’s Appeals for CAS

Although the German Federal Court of Justice did not rule in Pechstein’s favor, and Pechstein’s complaint to the ECtHR has not yet been decided, the implications of Pechstein’s legal fight in her national courts still threaten the autonomy of CAS.²⁰⁹ Generally, national courts are reluctant to overturn CAS arbitration decisions under public policy standards of the New York Convention.²¹⁰ In its decision, however, the MHRC directly undermined the authority of CAS, which threatens to open up a

204. See Rebecca Ruiz, *Court Upholds Authority of Arbitration Tribunal*, N.Y. TIMES, June 8, 2016, at B13.

205. *Id.*

206. Mavromati, *supra* note 171, at 49.

207. See Wittinghofer & Schenk, *supra* note 50.

208. See Ruiz, *supra* note 204.

209. See *id.*; Sharkey & Roberts, *supra* note 170, at 118.

210. See Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal*, 6 ASPER REV. INT’L BUS. & TRADE L. 289, 327 (2006). The New York Convention’s public policy defense is very narrow. See *Slaney v. Int’l Athletic Amateur Fed’n*, 244 F.3d 580 (7th Cir. 2001), *cert. denied*, 534 U.S. 828 (2001). In *Slaney*, the U.S. Court of Appeals for the Seventh Circuit upheld an arbitration award determining that Slaney committed a doping violation. *Id.* The court stated that the public policy defense under the New York Convention requires a showing that “the challenged

flood of litigation into national courts, making CAS obsolete.²¹¹ If athletes seek redress through their national courts, chaos will ensue due to the different legal systems, which have different procedural rules and lengthy litigation.²¹²

Regardless of the outcome in the German Federal Court of Justice and the ECtHR, support of Pechstein from the international athletic community indicates dissatisfaction with CAS. In addition to FIFPro's financial and public support, individual athletes have spoken in support of Pechstein's legal battle.²¹³ Robert Harting, a German Olympic discus thrower, expressed his support, stating that many athletes "believe mandatory arbitration is unfair" but sign anyway in order to compete, and "clean athletes who believe they have been wrongfully barred by [CAS] have no other options to clear their name."²¹⁴ Furthermore, Union Network International World Athletes, the world players' association, applauded Pechstein for her courage to stand up to CAS and committed to continue to fight for reform for international sport dispute resolution, stating that "[t]he court's decision exacerbates the crisis of confidence with sport's justice system that prevails among player associations, and certainly does not bring this to an end. . . . The CAS must have the confidence of those most affected by its decisions – the players."²¹⁵

award 'violated the most basic notions of morality and justice.'" Mitten, *supra* note 18, at 63.

211. Smith, *supra* note 161. The concern is that,

if other national courts were to follow the Munich Higher Court's lead by refusing to recognize CAS awards, re-litigating the merits of the cases and then handing out punitive damage awards against sports organizations, it would surely sound the death knell for CAS as an institution and for the international sports arbitration system as we know it.

Id.

212. Amanda Coletta, *Speedskater is Poised to Upend Rule of Sports' Highest Court*, N.Y. TIMES, Feb. 11, 2016, at B8. Before the appeal in the German Federal Court of Justice, Pechstein's attorney, Thomas Summerer, stated that "[i]f we are successful, all athletes might think about circumventing the CAS." *Id.*

213. *Id.*

214. *Id.*

215. Brendan Schwab, *Players Will Continue Claudia Pechstein's Heroic Fight to Reform Sport's Justice System*, UNI GLOBAL UNION (June 7, 2016), <http://www.uniglobalunion.org/news/players-will-continue-claudia-pechsteins-heroic-fight-reform-sports-justice-system>. Union Network International

Although the German Federal Court of Justice's decision preserved CAS' dominance as the premiere final arbiter of sports disputes, CAS, the IOC, and the international athletic community as a whole should take notice. The lower court's criticisms of CAS creates a stronger incentive for individual athletes and federations to bring CAS award challenges to national courts rather than the SFT.²¹⁶ If athletes and sports organizations do not fully trust CAS' independence and impartiality, the number of appeals to national courts will surely rise, which is likely to result in contradictory rulings and time-consuming and costly litigation. This would destroy the role of CAS as the exclusive, impartial forum for international sports related disputes.

The MHRC was expressly critical of the institutional impartiality created by Article S4 and S14, which governs ICAS and arbitration panel appointments, respectively, under the CAS Code.²¹⁷ Simultaneous to Pechstein's litigation in Germany in 2012, ICAS took proactive steps to remedy these allegations by removing the "one-fifth" appointment system.²¹⁸ The removal of the quota system appeared to eliminate the structural imbalance favoring the individual federations.²¹⁹ Removing the quota requirement exhibits CAS' new focus on the capabilities and

World Athletes is an association of eighty-five thousand athletes through major player associations, including FIFPro, EU Athletes, the U.S. National Basketball Players Association, the U.S. National Football League Players Association, and the National Hockey League Players Association. *Id.*

216. WEILER ET AL., *supra* note 2, at 1143, 1149. It would also have serious implications for the World Anti-doping Agency by undermining their fight against doping if substantive rules and procedures would have to be changed.

217. Smith, *supra* note 161.

218. CODE OF SPORTS RELATED ARBITRATION (COURT OF ARBITRATION FOR SPORT 2012) [hereinafter 2012 CAS CODE]. Article S14 now expressly states:

In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, *whose names and qualifications are brought to the attention of the ICAS, including by IOC, the I[n]ternational] F[ederation]s and the N[ational] O[lympic] C[ommittee]s.*" (emphasis added).

Id. art. S14.

219. Smith, *supra* note 161.

skills of the individual arbitrators selected rather than maintaining equal representation of the institutions.²²⁰ This change, however, still does not guarantee an arbitrary pool of candidates in practice.²²¹ The closed arbitration pool may still consist of an imbalanced number of institutional members, which would thereby continue to tip the scales in favor of the leagues and federations.

After *Pechstein*, subsequent revisions were made to the 1994 CAS Code, which included the addition of a “special list of arbitrators” who provide specific expertise for certain types of disputes.²²² For example, this new list may lead to more consistent results in anti-doping-related proceedings.²²³ Currently, it is common for nearly identical factual scenarios to have vastly different results in doping arbitration proceedings.²²⁴ The special list may be beneficial to anti-doping proceedings because arbitrators will have more specialized knowledge of the complexities in the WADA Code, therefore leading to greater consistency. Furthermore, the specialized list may contribute to the desired expediency of arbitration proceedings because parties unfamiliar with CAS proceedings would be able to quickly identify experienced arbitrators for the dispute in question.²²⁵

Nonetheless, athletes still can challenge the independence of CAS, even under the new changes made to the 1994 CAS Code. Further narrowing the arbitrators available on the closed list has the potential to tip the balance even more in favor of the institutions²²⁶ because there is a greater probability that a specialized arbitrator will have either worked for or was closely associated with the IOC, WADA, or another sports federation.²²⁷ It

220. Antonio Rigozzi, Erika Hasler, & Brianna Quinn, *The 2011, 2012, 2013 Revisions to the Code of Sports-related Arbitration*, SOC. SCI. RES. NETWORK (June 3, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411985.

221. Smith, *supra* note 161.

222. Rigozzi, Hasler, & Quinn, *supra* note 220. Previously, CAS maintained a separate arbitrator list for the various disputes related to the Fédération Internationale de Football Association (FIFA).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. See Hiltzik, *supra* note 196. Many arbitrators appointed by CAS have either current or prior professional relationships with WADA or other international or national sports organizations. For example, “[o]f the 45 member[s] of the North American branch, at least 24 ha[d] such affiliations” in 2006. *Id.*

is important that parties have a wide choice of arbitrators to choose from and for arbitrators to contribute to all types of disputes brought to CAS.²²⁸ Concentration of specialized arbitrators creates the potential for this narrow list of arbitrators to form institutional bias.²²⁹

Lastly, the influence of the MHRC decision could compromise the integrity of CAS and would have extensive negative implications on the development and role of global sports law.²³⁰ *Lex sportiva*, which harmonizes both the specific principles of sport and common legal principles, can only further develop if there is an effective centralized mechanism of review.²³¹ Additionally, doubts about the legitimacy and loss of trust in CAS would trickle down and affect the global public's perception of individual sports institutions.²³² Because of the development and vast growth of CAS, the role of national courts has diminished, but the reemergence of national courts could hamper further development of a cohesive, global sports law system of adjudicating disputes.²³³

C. Effects of the ECHR and the Fundamental Right to a Fair Trial on the Grounds of Lack of Independence and Impartiality in International Sports Arbitration

Another major concern for CAS' reputation as an independent and impartial dispute resolution tribunal is the pending determination by the ECtHR²³⁴ addressing whether the SFT violated Pechstein's right to a fair trial.²³⁵ If Pechstein prevails in the ECtHR, it will provide other athletes with an additional, substitute forum to bring their claims, consequently weakening CAS' public perception as well as the goodwill of the IOC, which is closely intertwined with CAS. Pechstein is not the first athlete to claim that CAS violated his or her fundamental human

228. Rigozzi, Hasler, & Quinn, *supra* note 220.

229. *Id.*

230. *See generally* Casini, *supra* note 35, at 1317.

231. *See id.* at 1331.

232. *See id.* at 1334.

233. *See id.* at 1326.

234. Smith, *supra* note 161.

235. Article 6, Section 1 of the ECHR states: "In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." ECHR, *supra* note 182, art. 6(1).

rights.²³⁶ For example, in 2007, the SFT vacated and remanded an arbitration award involving Argentinian professional tennis player Guillermo Canas and the Association of Tennis Professionals (“ATP”) Tour on the grounds that CAS did not provide Canas the right to a fair hearing.²³⁷ The SFT ruled that CAS arbitrators did not provide a “reasoned decision for rejecting arguments that Canas’ doping sanction violated U.S. and European Union laws.”²³⁸ Canas was drug tested during the ATP Abierto Mexicano de Tenis tournament in Acapulco, Mexico.²³⁹ The test indicated the presence of hydrochlorothiazide (“HCT”), which is a prohibited substance under ATP Rules.²⁴⁰ Canas exercised his right to a hearing by ATP’s Anti-Doping Tribunal.²⁴¹ The tribunal imposed a two-year ban and repayment of various earnings.²⁴² Subsequently, Canas appealed to CAS, where he claimed he had inadvertently ingested medication prescribed for the coach of another tournament player.²⁴³ Therefore, he argued that the sanctions should be eliminated or reduced based on the “No Fault or Negligence” provisions permitting reduction of ineligibility.²⁴⁴ The CAS panel partially upheld his ban.²⁴⁵ The panel agreed with Canas regarding his inadvertent ingestion of the prohibited substance.²⁴⁶ The panel determined, however,

236. Mitten, *supra* note 18, at 58; Thomas Schultz, *Human Rights: A Speed Bump for Arbitral procedures? An Exploration of Safeguards in the Acceleration of Justice*, 9 INT’L ARB. L. REV. 8, 14 (2006).

237. See Mitten, *supra* note 18, at 58; Canas & ATP Tour, CAS 2005/A/951, Award (Ct. Arb. for Sports 2006) [hereinafter CAS 2005/A/951], <http://law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-rev.pdf>.

238. Mitten, *supra* note 18, at 58 (“The SFT ruled that CAS arbitrators are required to discuss all of the parties’ arguments in their legal analysis of relevant issues in dispute, including claims that applicable national or transnational laws have been violated.”).

239. See CAS 2005/A/951.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Under the 2005 ATP Official Rulebook, “[i]f the Player establishes in an individual case involving a Doping Offense under Article C.1 [Presence of Prohibited Substance] or Article C.2 [Use of a Prohibited Substance] that he bears No Fault or Negligence for the offense, the otherwise applicable period of ineligibility shall be eliminated.” *Id.* The player has the burden of establishing how the prohibited substance entered the player’s system. *Id.*

245. *Id.*

246. Swiss Federal Tribunal Decision, Mar. 22, 2007, 4P.172/2006 (Switz.) [hereinafter Swiss Federal Tribunal Decision 4P.172/2006].

that he was not entirely blameless because he did not receive the medication from a doctor and, as an experienced professional tennis player, he should have examined the medicine before ingesting it.²⁴⁷ On March 22, 2007, the SFT annulled the panel's award and remanded the case to CAS to revise the award.²⁴⁸ The SFT determined that Canas' right to a fair hearing was violated because CAS disregarded alternative arguments submitted in his defense.²⁴⁹ On remand, the panel revised the CAS award and reduced Canas' period of ineligibility,²⁵⁰ finding that the "player's [Canas] ingestion of [HCT] was a mistake not caused by his actions or those of any people within his control or sphere of influence."²⁵¹

The *Canas* decision demonstrates an example of a strict view of an athlete's right to a fair hearing, however, there is currently debate over whether human rights provisions, like Article 6 of the ECHR, are applicable in private arbitration actions.²⁵² Traditionally, human rights provisions do not directly apply to private arbitration proceedings²⁵³ because covenants, such as the ECHR, bestow responsibility on the states to enforce violations of parties' human rights.²⁵⁴ Since arbitration tribunals are not state actors, the tribunals have no duty to uphold human rights of others.²⁵⁵ As a result, specifically, the WADA Code, which all international athletic federations and Olympics adhere to, allow for an athlete's right to a fair hearing.²⁵⁶

Further, various national governments have expressly stated that national human rights provisions do not have a "direct horizontal effect" on private bodies.²⁵⁷ This traditional view of human rights provisions means the right to a fair trial could only

247. *Id.*

248. *See* CAS 2005/A/951.

249. *See* Swiss Federal Tribunal Decision 4P.172/2006.

250. *See* CAS 2005/A/951.

251. *Id.*

252. Schultz, *supra* note 236, at 14.

253. *Id.* at 15.

254. *Id.* at 14.

255. *Id.*

256. Antonio Rigozzi, Gabrielle Kaufmann-Kohler, & Giorgio Malinverni, *Doping and Fundamental Rights*, INT'L SPORTS L. REV., no. 3, 2004, at *39, *45. In order to compete, Pechstein was subject to the restriction in the WADA Code. CAS, *supra* note 26.

257. Rigozzi, Kaufmann-Kohler, & Malinverni, *supra* note 256, at *47 ("[A]s a matter of principle, the fundamental rights granted by international (and

be carried out if the federation enforcing the doping provision was acting on the behalf of the state.²⁵⁸ In 2001, the SFT expressly held that athletes challenging an arbitral award could not invoke the ECHR because the claims do not involve abuses by states.²⁵⁹ This view, however, has been challenged by SFT decisions in the past. For example, there have been various inconsistencies in the SFT's perspective on the traditional view,²⁶⁰ and, in older cases, the SFT specifically has held that the guarantees of Article 6 ECHR "do not only concern state courts but also tribunals of private nature."²⁶¹

While the ECHR does not have a "direct horizontal effect" in the traditional sense,²⁶² denying Pechstein's fundamental rights to a fair trial because she was forced to bring her claims in a specific private forum is contrary to public policy. The Universal Declaration of Human Rights states that "every individual and every organ of society should contribute to securing the universal observance of human rights."²⁶³ This sentiment is directly applicable to both Pechstein's claims against the ISU and CAS in general. The PIL Act enables CAS to enforce arbitration agreements under Swiss law.²⁶⁴ As an ECHR Member State, Switzerland must ensure that CAS agreements and procedures meet fundamental standards of human rights, such as the right to a fair trial.²⁶⁵ Further support for Pechstein's fair trial claims

national) instruments of protection of human rights are not applicable in sports matters decided by private bodies.").

258. *Id.* at *46.

259. Schultz, *supra* note 236, at 14; *see also* Abel Xavier v. UEFA, Swiss Federal Tribunal Decision, June 11, 2001, 4P.64/2001 (Switz.).

260. Schultz, *supra* note 236, at 14.

261. *Id.*

262. *Id.* at 15.

263. *Id.* at 16. The Universal Declaration of Human Rights was proclaimed by the U.N. General Assembly on December 10, 1948, and set out universal and fundamental human rights for all. *Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Jan. 8, 2017).

264. *See* Downie, *supra* note 116, at 9.

265. *See* Schultz, *supra* note 236, at 15 ("As the ECHR guarantees the right to a fair trial and the right of access to the courts, if a state decides to grant validity to an agreement that removes a dispute from the judicial system, then it must see to it that the substitute dispute resolution procedure globally meets the standards that would otherwise have applied to the procedure in court."). Germany is also an ECHR Member State. 47 *Member States*, EUR. CT. HUM.

are found in the due process guarantees adopted by the New York Convention.²⁶⁶ If Pechstein were to succeed in the ECtHR, it may inspire other athletes to bring CAS appeals to alternative tribunals, which will undermine the goal of CAS to provide an independent, efficient, and speedy forum for dispute settlement. Therefore, it is paramount for CAS to address due process concerns to ensure its reputation as a fair tribunal.

III. COMPARISON OF CAS TO THE NFL ARBITRATOR SELECTION PROCEDURES IN THE UNITED STATES AND SPORT RESOLUTIONS IN THE UNITED KINGDOM

Although CAS is regarded as the supreme forum for international sports-related disputes, professional sports leagues in the United States do not submit disputes between individual athletes and the professional sport's governing body to CAS. Specifically, the National Football League (NFL) utilizes different arbitrator selection procedures set out in labor agreements between athletes and owners. Similar to CAS, the arbitration procedures utilized by the NFL do not always appear impartial and independent. For example, recently, NFL players have challenged arbitration decisions in national courts, criticizing the NFL commissioner and the scope of his broad powers.²⁶⁷ In contrast to issues related to the commissioner's broad discretionary powers to handle arbitration proceedings in the NFL, the United Kingdom has successfully implemented its own private tribunal, "Sport Resolutions," to hear professional sports-related disputes that are influenced by, but varied from, CAS arbitration procedures. Sport Resolutions was originally modeled after CAS in its formation but has since developed its own specialized arbitration selection procedures, specifically implementing three-person arbitration panels to suit the needs of sports disputes in the United Kingdom. This Part will compare CAS to the arbitrator selection procedures utilized by the NFL and discuss the growing concern over the independence and impartiality of the NFL's arbitration procedures. This Part will then highlight Sport Resolutions, the arbitration tribunal established in the United Kingdom to handle sports disputes.

RTS., http://www.echr.coe.int/Documents/2010_Expo_50years_02_ENG.pdf (last visited Jan. 19, 2016).

266. See generally New York Convention, *supra* note 71.

267. See *infra* Part III.A.

A. Professional Sports Arbitration in the United States

Although CAS is known as the “Supreme Court” of sports disputes, it is not the only dispute resolution system utilized in sports.²⁶⁸ Many arbitration systems have been influenced by the formation and success of CAS, particularly in the area of doping.²⁶⁹ Professional sports leagues in the United States do not submit arbitration proceedings to CAS.²⁷⁰ Instead, the American Arbitration Association (AAA) handles many sports-related disputes between individual athletes and leagues²⁷¹ and administers dispute resolution services with respect to disputes over partnership proceeds, termination of sports executives, sales of franchises, and various other contractual disputes in professional sports.²⁷²

The NFL sets out its arbitration clause in the collective bargaining agreement (CBA) between the NFL Player’s Association (NFLPA), the labor union representing professional football players, and the owners of football teams.²⁷³ The CBA outlines the arbitration procedures for both noninjury- and injury-based

268. See Blackshaw, *supra* note 93, at 169. Other sports dispute resolution bodies include the Sport Dispute Resolution Centre of Canada, the International Basketball Federation Arbitral Tribunal in Geneva, Switzerland, the FIFA Dispute Resolution Chamber based in Zurich, the Japanese Sports Arbitration Agency in Tokyo, and Sport Resolutions in the United Kingdom. Sport Resolutions will be further discussed below. See *infra* Part III.B.

269. See Blackshaw, *supra* note 93; Ryan Reszel, *Guilty Until Proven Innocent, and then Still Guilty: What the World Anti-Doping Agency Can Learn From the National Football League About First-Time Anti-doping Violation*, 29 WIS. INT’L L.J. 807, 812 (2012).

270. Am. Arbitration Ass’n, *Sports Arbitration Including Olympic Athlete Disputes*, ADR.ORG, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004199 (last visited Jan. 19, 2016) (describing the role that the American Arbitration Association plays in settling professional sports disputes in the United States).

271. *Id.* at 4. Additionally, under the Ted Stevens Olympic and Amateur Sports Act, AAA administers several types of disputes for the U.S. Olympic Committee, including: (1) athlete eligibility for both the Olympic Games and Pan-American games, (2) “determination[s] of the appropriate National Governing Body for a particular amateur sport,” and (3) positive drug tests outside of competition. *Id.*

272. *Id.*

273. See NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT (2011) [hereinafter NFL CBA], <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

grievances.²⁷⁴ Additionally, Article XI of the CBA provides for discretionary discipline by the commissioner of the NFL, Roger Goodell, through arbitration.²⁷⁵ The commissioner has discretionary and disciplinary power over conduct considered "detrimental to the integrity of, or public confidence in, the game of professional football."²⁷⁶ Essentially a catch-all, the CBA gives the commissioner the express authority to define the scope of detrimental conduct and to impose discipline he deems fit for the conduct committed.²⁷⁷ Similar to the binding arbitration clauses found in contracts between athletes and their respective athletic federations, under the CBA, players are bound to the arbitration procedures set forth and agreed to by the NFLPA and the owners of the teams.

Under the appeals process set forth in the CBA, "the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. . . . [N]otwithstanding the foregoing, the Commissioner may serve as [a] hearing officer in any appeal under his discretion."²⁷⁸ The NFL commissioner thus has exclusive authority to choose the arbitrators in the appeals process, and may even select himself.²⁷⁹ Although this power was collectively bargained for by the NFL and the NFLPA, it is drastically different than

274. See *id.* at 189, 195 (describing non-injury- and injury-based grievances). Under Article IX, Section 1 of the NFL-NFLPA collective bargaining agreement, a noninjury grievance is described as "[a]ny dispute arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players." *Id.*

275. The Commissioner of the NFL "represents the thirty-two NFL owners' business interests and has the authority to suspend players for 'conduct detrimental' to the team or league, and then act as mutual arbiter in disputes involving NFL Players Association and league." Zachary Palva, *Why the NFL Should Re-Consider Goodell's Role as Judge, Jury and Executor*, FORDHAM SPORTS L. FORUM (Apr. 17, 2016), <http://fordhamsportslawforum.com/nfl/why-the-nfl-should-re-consider-goodells-role-as-judge-jury-and-executioner/>.

276. NFL CBA, *supra* note 273, at 204.

277. Mike Florio, "Conduct Detrimental" vs. "Equipment Violations" in Brady v. NFL, NBC SPORTS (Aug. 8, 2015), <http://profootballtalk.nbcsports.com/2015/08/08/conduct-detrimental-vs-equipment-violations-in-brady-vs-nfl/>.

278. NFL CBA, *supra* note 273, at 204–05.

279. See *id.*

typical arbitration clauses, in which “a neutral third-party arbitrator is appointed by both parties to make a binding decision without preferential treatment to one side.”²⁸⁰ Goodell’s authority to review his own decisions without any neutral third-party oversight, essentially gives him the power to be both judge and jury.²⁸¹

Additionally, any decision under appeal “will constitute a full, final and complete disposition of the appeals, which will be binding on all parties.”²⁸² This is comparable to CAS’ authority to act as the final arbiter of appeals in the context of international sports disputes. Under the Federal Arbitration Act (FAA), however, NFL players have the right to challenge the commissioner’s ruling in federal court.²⁸³ But generally, courts in the United States give deferential treatment to privately agreed upon arbitration decisions and will only overturn an award where “evident partiality or corruption” was committed by the arbitrator.²⁸⁴

Recently, the independence of arbitration proceedings and the commissioner’s heavy-handed role in such proceedings has been scrutinized. As a result, rather than accepting the selected hearing officer’s determination as final and binding, athletes have begun turning to national courts to overturn the arbitration decisions.²⁸⁵ For example, in 2014, Baltimore Ravens running back, Ray Rice, assaulted his then-fiancé in the elevator of an Atlantic City Casino.²⁸⁶ After the incident, Goodell met with Rice, who admitted wrongdoing, and suspended him for two games in the upcoming season.²⁸⁷ Subsequent to the decision, rumors of a second surveillance video created a media firestorm

280. *Id.*

281. Palva, *supra* note 275.

282. Reszel, *supra* note 269, at 816.

283. See 9 U.S.C. § 10 (2016). The Federal Arbitration Act states that arbitration awards may be vacated “where there was evident partiality or corruption in the arbitrators.” *Id.*

284. Palva, *supra* note 275.

285. See Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015).

286. See *In the Matter of Ray Rice*, ESPN (Nov. 18, 2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

287. *Id.*

criticizing the lenient suspension.²⁸⁸ Thereafter, Goodell suspended Rice indefinitely.²⁸⁹ The NFLPA appealed the suspension, arguing that Goodell did not have the ability to go back and change the suspension.²⁹⁰ In this instance, rather than appoint himself to review the appeal, Goodell selected an independent neutral arbitrator.²⁹¹ The arbitrator found that Goodell's adjustment of Rice's penalty from a two-game suspension to an indefinite suspension was an abuse of discretion because "Rice did not mislead the Commissioner and because there were no new facts on which the Commissioner could base his increased suspension."²⁹²

In 2015, the NFL suspended Minnesota Vikings running back, Adrian Peterson, and similar to Rice, the decision was subsequently criticized for Commissioner Goodell's heavy involvement and conflict of interest. Peterson was suspended due to off-the-field conduct after he was arrested for whipping his son with a twig.²⁹³ At a disciplinary hearing conducted by Goodell, the NFL determined that Peterson's conduct was detrimental to the NFL in accordance with the new Domestic Violence Policy enacted as a result of the Rice incident.²⁹⁴ Peterson appealed the suspension in Minnesota District Court, which overturned the suspension because the new Domestic Violence Policy enacted by NFL was not in effect at the time the discipline was imposed.²⁹⁵ After an appeal by the NFL, however, the U.S. Court of Appeals for the Eighth Circuit held that the commissioner acted within the powers given to him in the CBA and reinstated the suspension.²⁹⁶ Although the court affirmed Commissioner Goodell's right to hear appeals of suspensions that he imposed

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. See Cole Renicker, *A Comparative Analysis of the NFL's Disciplinary Structure: The Commissioner's Power and Players' Rights*, 26 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 1051, 1056–57 (2016).

294. See Peter King, *Peterson's Punishment*, *SPORTS ILLUSTRATED* (Nov. 18, 2014), <http://mmqb.si.com/2014/11/18/adrian-peterson-suspension-appeal-roger-goodell>.

295. Ken Belson, *Appeals Court Upholds N.F.L.'s Suspension of Peterson*, *N.Y. TIMES*, Aug. 5, 2016, at D2.

296. *Id.*

previously, the tripanel of judges noted that “[a]llowing the commissioner . . . to hear challenges to the commissioner’s decision may present an actual or apparent conflict of interest for the arbitrator.”²⁹⁷

In addition to players’ off-the-field conduct, Goodell’s role as the sole arbitrator concerning on-the-field conduct in “Deflatgate” has resulted in further criticism.²⁹⁸ In 2015, the NFL suspended New England Patriots quarterback, Tom Brady, under Article 46 of the CBA, which specifically allows the commissioner, in his sole discretion, to sit as arbitrator for all disputes involving conduct detrimental to the sport, for four games for his alleged involvement in underinflating footballs to gain a competitive advantage during the 2015 American Football Conference Championship Game.²⁹⁹ Because there was no league precedent for suspensions relating to underinflating footballs, Brady was seemingly suspended arbitrarily under the NFL’s drug policy.³⁰⁰ The NFLPA immediately appealed the decision seeking a neutral arbitrator, citing “the NFL’s history of inconsistency and arbitrary decisions in disciplinary matters, it is only fair that a neutral arbitrator hear this appeal.”³⁰¹ Subsequently, Judge Berman of the U.S. District Court for the Southern District of New York vacated Brady’s four game suspension.³⁰² Judge Berman found that the suspension was arbitrary because Brady did

297. *Id.*

298. Renicker, *supra* note 293.

299. *Tom Brady Suspension Case Timeline*, NFL (July 15, 2016), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>; NFL CBA, *supra* note 273.

300. See *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015). Commissioner Goodell stated that Brady’s conduct improperly affected the competitive advantage and threatened the integrity of the game, and “the ‘closest parallel’ for Brady is the discipline approved for a first violation of the policy governing performance enhancing drugs.” Steve Silva, *Roger Goodell Says NFL’s Drug Penalties are ‘Closest Parallel’ to Tom Brady’s Punishment*, BOSTON (July 28, 2015), <https://www.boston.com/sports/new-england-patriots/2015/07/28/roger-goodell-says-nfls-drug-penalties-are-closest-parallel-to-tom-bradys-punishment>.

301. Howard Ulman & Jimmy Golen, *NFL Commissioner to Hear Brady Suspension Appeal*, ASSOCIATED PRESS (May 15, 2015), <http://bigstory.ap.org/article/352d3e3f2fa3495698f4e5392db49c84/deadline-looms-bradys-appeal-4-game-suspension>.

302. See *Nat’l Football League Mgmt. Council*, 125 F. Supp. 3d.

not receive proper notice of a four-game suspension for underinflating footballs.³⁰³ Additionally, Judge Berman determined that Brady was deprived due process because Jeff Pasch, the General Counsel of the NFL, was able to review the initial independent investigatory report conducted by NFL-appointed independent investigator Ted Wells, but Brady was not given the opportunity to review the documents.³⁰⁴ Berman cited the NFL's lack of proof that footballs were actually deflated, calling it "a quantum leap."³⁰⁵ Furthermore, Judge Berman criticized Goodell for "his irrational twisting of highly equivocal evidence into the assertion that Brady masterminded an illegal 'scheme' that was on par with steroids."³⁰⁶ After the NFL filed an appeal, however, the U.S. Court of Appeals for the Second Circuit reinstated Brady's suspension, holding that Goodell did not abuse his discretion and acted within the powers given to him under the CBA.³⁰⁷

Ultimately, the CBA grants the commissioner discretion to uphold the integrity of the game.³⁰⁸ Accusations of biased investigative and adjudicative processes, however, have undermined both the players' and public's confidence in the NFL,³⁰⁹ primarily

303. Renicker, *supra* note 293.

304. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d; see Michael David Smith, *Judge Didn't Buy NFL's Claims that Ted Wells was "Independent,"* NBC SPORTS (Sept. 3, 2015), <http://profootballtalk.nbcsports.com/2015/09/03/judge-didnt-buy-nfls-claims-that-ted-wells-was-independent/>.

305. Sally Jenkins, *Roger Goodell's Insistence on Acting as Emperor Makes the NFL Vulnerable to a Legal Smackdown*, WASH. POST (Aug. 21, 2015), https://www.washingtonpost.com/sports/redskins/deflategate-judge-doesnt-seem-likely-to-rubber-stamp-roger-goodells-decisions/2015/08/21/034f8a26-4747-11e5-846d-02792f854297_story.html?utm_term=.a4587e95118d.

306. *Id.*

307. *Tom Brady Suspension Case Timeline*, *supra* note 299. The majority opinion stated: "We hold that the commissioner properly exercised his broad discretion under the [CBA] and that his procedural rulings were properly grounded in that agreement and did not deprive Brady of fundamental fairness." *Id.*

308. NFL CBA, *supra* note 273.

309. Michael Hurley, *Roger Goodell, NFL Blasted for Bias, Dishonesty, Fraud in N.Y. Law Professor's DeflateGate Court Filing*, CBS BOSTON (Dec. 18, 2015), <http://boston.cbslocal.com/2015/12/18/roger-goodell-nfl-blasted-for-bias-dishonesty-fraud-in-n-y-law-professors-deflategate-court-filing/>. New York law professor, Robert Blecker, filed an amicus curiae brief with the U.S. Court of Appeals for the Second Circuit in support of Brady and the NFLPA. *Id.* Blecker criticized the NFL's initial investigation, stating, "from the start, the NFL's

because the commissioner has the power to appoint himself as both the disciplinarian and appeals arbitrator.³¹⁰ The commissioner's discretion to choose himself as the "hearing officer" is blatantly biased toward the league and decreases the credibility of both the league and the commissioner.³¹¹ In the NFL, the commissioner's power was collectively bargained for by the NFLPA and the league. Although the court determined Goodell acted properly in his role as arbitrator, the results from Deflategate will no doubt have a lasting effect on labor negotiations when the current CBA is set to expire in 2021.³¹² Without player's confidence that disputes will be handled in an independent and impartial manner, more players will be motivated to bring appeals to national courts. This will further undermine the NFL's ability to enforce the privately agreed-upon provisions in the CBA, which govern the NFL and the professional football players.

The negative perception of the NFL and the inconsistent actions of the commissioner following the aforementioned cases has undermined the public trust of both the league and the commissioner, and this serves as a cautionary tale for CAS. Similar to the NFL CBA, Rule 40.2 of the 1994 CAS Code allows the President of the Appeals Arbitration Division to appoint an arbitrator in the absence of an agreement between the parties.³¹³ Allowing the president of the division to select an arbitrator of his choosing appears contradictory to the independence requirement stressed within the 1994 CAS Code.³¹⁴ It is unlikely that the president of the division, who is selected by ICAS through

investigation, adjudication, and punishment of Tom Brady for actively participating in a scheme to illegally tamper with ball pressure has been infected with bias, unfairness, evident partiality, and occasional fraud." *Id.*

310. NFL CBA, *supra* note 273.

311. See Nate Davis, *NFLPA Demand Roger Goodell Step Aside as Arbitrator in Tom Brady's Appeal*, USA TODAY (May 15, 2015), <http://www.usatoday.com/story/sports/nfl/patriots/2015/05/15/nflpa-appeal-letter-tom-brady-roger-goodell-troy-vincent-deflategate-ted-wells/27371977/>.

312. Sally Jenkins, *Why Roger Goodell, not Tom Brady, is Deflategate's Real Loser*, WASH. POST (July 19, 2016), https://www.washingtonpost.com/sports/redskins/why-roger-goodell-not-tom-brady-is-deflategates-real-loser/2016/07/19/946c09b2-4dcc-11e6-a422-83ab49ed5e6a_story.html?utm_term=.ab2d7eeabfe9.

313. 1994 CAS CODE, *supra* note 133, art. R40.2.

314. See generally *id.* art. R33. CAS Code R33 expressly states that "[e]very arbitrator shall be and remain impartial and independent of the parties." *Id.*

individual institutions and the IOC, will be able to select an unbiased arbitrator.³¹⁵ This in turn will lead to structural imbalance and bias in the formation of CAS arbitration panels and will undermine the legitimacy of the organization.

B. Sport Resolutions in the United Kingdom

Unlike the NFL and CAS, Sport Resolutions in the United Kingdom is viewed as an independent, affordable, speedy, and confidential forum.³¹⁶ Established in 2000 and governed by English law, Sport Resolutions was modeled after CAS³¹⁷ and offers arbitration and mediation services for over fifty different sports in the United Kingdom.³¹⁸ Additionally, it is the independent provider of the United Kingdom's anti-doping panel—the National Anti-doping Panel.³¹⁹ The National Anti-Doping Panel is an independent organization responsible for ensuring that all sports bodies in the United Kingdom comply with WADA.³²⁰ Arbitration clauses establishing Sport Resolutions as the independent dispute resolution service have been incorporated into many British athletic institutions' agreements.³²¹

It can be argued that Sport Resolutions adopted many of the basic concepts initiated by CAS but utilizes them in a more independent and impartial manner. For example, unlike CAS, which is controlled primarily by the IOC and the individual federations, Sport Resolutions is not controlled by many different athletic interest groups.³²² The Sport Resolutions board is con-

315. See *id.* art. S4(1) ("The International Council of Arbitration for Sport Composition.").

316. See Edward Procter, *Dispute Resolution in Sport: The Role of Sport Resolutions*, INT'L SPORTS L. REV., no. 1, 2010, at *3, *3.

317. Blackshaw, *supra* note 93, at 181.

318. *Id.* at 182. The most common areas where Sport Resolutions exercises jurisdiction are athlete selection, child protection for underage athletes, player eligibility, and anti-doping. Procter, *supra* note 316, at *3.

319. See Blackshaw, *supra* note 93, at 181.

320. See generally *What We Do*, U.K. ANTI-DOPING, <http://www.ukad.org.uk/our-organisation/what-we-do/> (last visited Dec. 29, 2016).

321. See Blackshaw, *supra* note 93, at 182. The British Olympic Committee also incorporated Sport Resolutions into its commercial contracts. The provision forces parties to go through the mediation procedures set forth by Sport Resolutions before the dispute can be settled by arbitration proceedings. *Id.*

322. See Procter, *supra* note 316, at *3.

trolled by nine different groups, including Olympic and Paralympic associations from England, Scotland, Wales, and Northern Ireland as well as professional players associations, sponsors, and governing bodies.³²³ In the formation of the Sport Resolutions board, individual professional athletes varying interests were represented, unlike CAS, where athlete's interests were, and still are, only represented by their individual sporting institutions.³²⁴ The general aim of Sports Resolutions is to provide athletes in the United Kingdom with equality and diversity in resolving athletic disputes.³²⁵ Additionally, Sport Resolutions stresses the importance of applying Article 6 of the ECHR,³²⁶ believing that every athlete has "an entitlement to a fair and reasonable hearing within a reasonable time by an independent and impartial tribunal established by law."³²⁷

The panel of arbitrators available in Sport Resolutions is also more specialized than the arbitrators available under CAS. The panel of arbitrators in Sport Resolutions tribunals is made up of one or three arbitrators.³²⁸ The arbitrators are selected from four specialized groups: (1) a chairpersons' list—which requires the

323. See Blackshaw, *supra* note 93, at 182; Procter, *supra* note 316, at *4.

324. See generally 1994 CAS CODE, *supra* note 133.

325. See Procter, *supra* note 316, at *3.

326. *Disciplinary Procedures*, SPORT RESOLUTIONS, <https://www.sportresolutions.co.uk/resources/dispute-guidance/disciplinary-procedures> (last visited Mar. 3, 2017).

327. *Id.*

328. SPORT RESOLUTIONS, ARBITRATION RULES OF SPORT RESOLUTIONS (2015), https://www.sportresolutions.co.uk/uploads/related-documents/D_3_-_Arbitration_Rules.pdf.

individual selected to be a solicitor or barrister³²⁹ with a professional interest in sports;³³⁰ (2) a commercial arbitrators' list;³³¹ (3) a professionals' list;³³² and (4) a lay members' list.³³³ Every arbitration tribunal includes an arbitrator from the chairperson's list.³³⁴ Panel members appointed to the chairpersons' list must have at least seven years of legal and arbitration experience to ensure they are able to lead a tribunal quickly and efficiently.³³⁵ When parties elect to use the tripanel, in addition to the chairperson, the two additional panel members of the arbitration panel, known as wing members, are selected from the commercial arbitrators' list, the professionals' list, and the lay members' list.³³⁶

Inclusion of professional and lay members lists ultimately help to accomplish Sport Resolutions goals of equality and diversity.³³⁷ While the chairperson's list of arbitrators must have expert legal training, the wing members have a broader range of professional backgrounds.³³⁸ The commercial arbitrators must be professionally qualified to arbitrate commercial disputes

329. In the United Kingdom, lawyers are referred to as solicitors and barristers. *What is the Difference Between Attorney, Barrister, Lawyer, and Solicitor?*, DICTIONARY.COM, <http://blog.dictionary.com/lawyer-vs-attorney/> (last visited Jan. 6, 2017). According to Black's Law Dictionary, a solicitor refers to "a [British] lawyer who consults with clients and prepares legal documents but is not generally heard in High Court . . . unless specially licensed." *Solicitor*, BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, a barrister is "a lawyer who is admitted to plead at the bar and who may argue cases in superior courts." *Barrister*, BLACK'S LAW DICTIONARY (10th ed. 2014).

330. The chairperson's list appoints individuals with expert experience in the various types of disputes that Sport Resolutions has jurisdiction over. Procter, *supra* note 316, at *4.

331. *See id.* Arbitrators must have professional qualifications, a professional interest in sport, and completed at least ten arbitrations as a sole arbitrator. *Id.*

332. *See id.*

333. *See id.*

334. *See* SPORT RESOLUTIONS, APPLYING FOR MEMBERSHIP OF SPORT RESOLUTIONS (UK) PANELS OF ARBITRATORS AND MEDIATORS: SELECTION CRITERIA 2015, at 4–5 (2015) [hereinafter PANEL SELECTION CRITERIA], https://www.sportresolutions.co.uk/uploads/related-documents/B1_-_Panel_Selection_Criteria_2015.pdf.

335. *See id.* at 5.

336. *See id.* at 4–5.

337. *See id.* at 2.

338. *See Arbitration FAQs*, SPORT RESOLUTIONS, <https://www.sportresolutions.co.uk/faqs/arbitration> (last visited Mar. 3, 2017).

through a national accreditation body, such as the Chartered Institute of Arbitrators.³³⁹ Additionally, all commercial members must have a professional interest in sports.³⁴⁰ The professional list consists of arbitrators with professional experience sitting on arbitration panels as wing members in cases where technical expertise is necessary.³⁴¹ Finally, lay group members are required to have experience in sports, either as a competitor, coach, official, sponsor, or in other similar capacities.³⁴²

Sport Resolutions also offers flexibility in curating custom arbitration panels.³⁴³ Parties to arbitration can either select arbitrators from a list provided by Sport Resolutions or may ask to appoint arbitrators with specific skills and experience.³⁴⁴ Parties involved in these arbitration proceedings have more confidence that the panel before them has an adequate understanding of the dispute and that each parties' interests will be equally represented. Therefore, parties feel that they will be heard by a panel of procedural and substantive experts who do not have a vested interest in the outcome,³⁴⁵ which creates confidence in the system and legitimizes the organization. CAS arbitrators must have appropriate legal training and experience with sports law to conduct the arbitration, but the closed list of arbitrators are primarily appointed by the IOC and other governing bodies who are commonly connected to disputes being handled.³⁴⁶ As a result, arbitration selection in CAS is inadequate to ensure athletes bringing forth appeals will not be met with a panel with inherent biases and ties to the IOC.

IV. SOLUTION

In order to remain the supreme forum to settle international sports disputes, CAS must implement further revisions to ensure that the selection list of arbitrators who are available to hear disputes is free from institutional bias and does not deprive athletes of the fundamental human right to a fair trial. Regardless of the outcome in the German Federal Supreme Court and

339. Procter, *supra* note 316, at *5.

340. *Id.*

341. *Id.*

342. *Id.*

343. See generally *Arbitration FAQs*, *supra* note 338.

344. *Id.*

345. See *Disciplinary Procedures*, *supra* note 326.

346. See 1994 CAS CODE, *supra* note 133, art. S14.

the ECtHR, if athletes do not trust CAS as a neutral forum to hear grievances, CAS will be rendered obsolete. Thus, CAS must revise Article S14 of the 1994 CAS Code, which governs arbitrator selection procedures, to create specialized lists of arbitrators with different experience in both dispute resolution and sports. Additionally, in order to enhance the integrity of the arbitration process, CAS must enforce binding precedent with regard to past arbitration decisions. This Part will propose that CAS arbitrator selection procedures in the 1994 CAS Code be amended to utilize a tripanel of arbitrators composed from three specialized groups to ensure a more impartial and independent arbitration. Additionally, this Part will propose that CAS adopt the doctrine of *stare decisis*, giving precedential value to past CAS arbitral awards, which will compel the CAS tripanels of arbitrators to make more consistent and balanced award decisions.

A. Adopt Sport Resolutions Arbitrator Selection Procedures

Article S14 of the 1994 CAS Code must be revised in order to eliminate concerns of institutional bias.³⁴⁷ CAS should assemble specialized groups of available arbitrators into arbitration panels, similar to the arbitrator selection method utilized by Sport Resolutions.³⁴⁸ Implementing three categories of arbitrators, modeled after Sport Resolutions, will help ensure that the panel of arbitrators is not hand selected by the IOC or other governing bodies. Three member panels would allow for "the opportunity to give and take during the deliberation process [and provide] an excellent way to ensure a fair result."³⁴⁹ Replacing the current appointment system will create a greater level of expertise about the dispute at hand, which would instill confidence in the international sports community.³⁵⁰ Unlike current CAS arbitration procedures, which state that arbitration panels may be comprised of either one or three arbitrators, the proposed tripanels³⁵¹ should consist of: (1) one experienced lead chairperson, (2)

347. See Haas, *supra* note 194, at *76.

348. See PANEL SELECTION CRITERIA, *supra* note 334 (describing the criteria for appointment to each member list).

349. John P. DiBlasi, *The Commercial Arbitration – The Single Arbitrator Versus the Tri-Panel*, NAT'L ARB. & MEDIATION (June 2014), <http://www.namadr.com/DIBLASI.JOHN.MAKING.THE.COMMERCIAL.ARBITRATION.THE.SINGLE.ARBITRATOR.VERSUS.THE.TRI-PANEL.CFM>.

350. See Procter, *supra* note 316, at *3.

351. See 1994 CAS CODE, *supra* note 133, art. S3.

one experienced sports professional from a specialized list, and (3) one layperson with experience in sports.³⁵² Consistent use of tripanels, made up of members of each list, will be more beneficial than a single arbitrator because multiperson panels help to ensure that decision-making will be more balanced.³⁵³ It is impossible to eliminate all arbitrators with an affiliation to the IOC or an international athletic federation. In fact, it would be a detriment to the accuracy and efficiency of arbitration because members of the IOC and the international federations have vast knowledge in sports and the disputes that arise. But, in order to eliminate perceived bias and establish CAS independence, the IOC and international federations shall be able to appoint no more than one-third of the arbitration pools.

First, a chairpersons or legal member list consisting of lawyers, judges, or accredited arbitrators will be pooled, allowing the disputing parties to select a chairperson for the arbitration panel.³⁵⁴ It is essential that the individuals appointed to this list not only have experience conducting arbitration proceedings but also have a professional interest in sports as well.³⁵⁵ Each member's knowledge of both law and sports should be broad enough to ensure they are able to hear a wide variety of disputes in a timely and efficient manner.³⁵⁶ Unlike current CAS procedures, in which the president of the Appeals Arbitration Division selects the lead arbitrator, the parties shall jointly select the arbitrator to lead the panel hearing their dispute.³⁵⁷ The lead arbitrator seated on the tripanel would ultimately safeguard the need for speedy and efficient dispute resolution in international sports.³⁵⁸ Allowing both parties to jointly select the lead arbitrator reassures all parties involved that fundamental bias against one of the parties is eliminated.

Additionally, the wing members of the arbitration panel should be selected from lists of specialized individuals who have

352. Procter, *supra* note 316, at *5.

353. See DiBlasi, *supra* note 349 (comparing the advantages and disadvantages of single arbitrator versus tripanels).

354. PANEL SELECTION CRITERIA, *supra* note 334, at 4–5.

355. See Procter, *supra* note 316, at *3.

356. *Id.* at *4. In Sport Resolutions, arbitrators appointed to the chairperson's list lead tribunals concerning "anti-doping, child protection, disciplinary and regulatory, eligibility, and selection hearings." *Id.* at *5.

357. 1994 CAS CODE, *supra* note 133, art. R40.2.

358. Reilly, *supra* note 19, at 63.

expert knowledge on the disputed subject.³⁵⁹ Members seated in the two wing positions of the arbitration panel will be selected from a specialist list and a layperson's list.³⁶⁰ The specialist list will be comprised of experienced, accredited arbitrators who have professional experience in sports or professional qualifications in areas such as anti-doping and accounting.³⁶¹ Having an arbitrator with superior knowledge on such technical subjects will facilitate a speedy and efficient resolution of the dispute at hand.

The most important member list implemented, however, will be the layperson's list. Members will be comprised of arbitrators experienced in sports on both the national and international level.³⁶² Like Sport Resolutions, members appointed to the layperson panel will have experience either as a coach, official, administration, or an actual competitor.³⁶³ Arbitrators with firsthand experience either competing or coaching will provide an in-depth perspective on the specific issue, which will instill confidence in all the parties involved.³⁶⁴ This will provide a greater and much-needed balance between the athletic federations' interests and those of the athletes.

To implement the specialized tripanels, ICAS must revise the 1994 CAS Code.³⁶⁵ Any changes to the 1994 CAS Code must be decided by a full meeting of ICAS with two-third of its members present.³⁶⁶ It would be drastic for ICAS to attempt to put the new specialized arbitrator groups into effect immediately. Therefore, new appointment procedures should be effective within two years of the revision. ICAS should also create advisory committees to select applications of new potential arbitrators. The advisory appointment committees shall be made from current ICAS members, current arbitrators, and various members of the international athletic community and would include athletes,

359. PANEL SELECTION CRITERIA, *supra* note 334, at 5–6.

360. *See Procter, supra* note 316, at *4.

361. *See id.* at *2. Expertise in areas such as chemistry, medicine, and psychology are helpful in hearing anti-doping appeals. *See id.* at *5.

362. *See id.* at *5.

363. *See id.* at *3.

364. *See id.* at *5 (“[B]ecause decisions are made by expert, not generalist, judges who can be expected to understand the sporting context in which disputes occur.”).

365. *See id.*

366. *See id.*

coaches, officials, and representatives of athletic governing bodies. Currently, CAS arbitrators are appointed to renewable four-year terms.³⁶⁷ A two-year grace period would thus enable ICAS to evaluate the criteria for creating the specialized arbitrator groups and assess all current arbitrators to determine whether or not they fit the criteria. Additionally, ICAS shall amend the 1994 CAS Code to limit CAS arbitrator terms to two renewable four-year periods. Limiting terms will help to alleviate perceived bias and avoid attempts by arbitrators to act as the mouthpiece of the IOC or other international governing bodies.

Due to the close scrutiny surrounding CAS and its relationship with the IOC and other governing bodies, participating adverse parties must trust that there are adequate, independent dispute resolution procedures in place.³⁶⁸ Creation of a tripanel,³⁶⁹ led by a neutral chairperson and two wing panelists with specialized experience in the subject matter in dispute, will quell concerns of dependence and institutional bias. If parties trust CAS is a neutral forum that is independent from the IOC, athletes will not turn to national courts. Furthermore, if national courts believe CAS is a fair tribunal, cases challenging CAS arbitration awards will not be litigated.

B. Adopt the Doctrine of Stare Decisis in CAS Arbitration Awards

Contrary to general arbitration practices, CAS should adopt a doctrine of *stare decisis*.³⁷⁰ Horizontal consistency in arbitration awards is important in order for future cases filed in CAS³⁷¹ to

367. 1994 CAS CODE, *supra* note 133, art. S13.

368. Procter, *supra* note 316, at *5. One way in which Sport Resolutions ensures that adequate and fair arbitration procedures are being utilized is by providing information and training to arbitrators about the consequences of giving an unfair or incorrect award. *Id.* Additionally, to dispel concerns regarding Sport Resolutions' funding in anti-doping cases, a third-party, the Department of Culture Media and Sports, directly funds proceedings to "ensure that a financial relationship does not exist between the anti-doping prosecution body and the anti-doping tribunal." *Id.*

369. See PANEL SELECTION CRITERIA, *supra* note 334, at 4.

370. Rosmarijn van Kleef, *Reviewing Disciplinary Sanctions in Sports*, 4 CAMBRIDGE J. INT'L COMP. L. 3, 21 (2015); *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[*Stare Decisis* is a] doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.").

371. Kleef, *supra* note 370, at 21–22.

“remain identical and universal across time and subject matter.”³⁷² Consistency in final arbitration awards will provide uniformity and will establish CAS as an impartial forum.³⁷³ Although arbitrators consider past CAS awards in making their decision, past decisions are ultimately not binding.³⁷⁴ CAS arbitration decisions must follow precedent of past decisions of similar nature, as they do in a court of law in common law systems.³⁷⁵ Additionally, implementing *stare decisis* will contribute to the advanced development and harmonization of global sports law—*lex sportiva*. Through its awards, CAS has made important contributions to developing and interpreting sports law.³⁷⁶ Acceleration of the harmonization of specific sports principles and general principles of law will contribute to a streamlined body of global sports law, which will benefit the international sports community as a whole.³⁷⁷ Harmonization of these principles will help protect all athletes’ fundamental rights without involving domestic courts.³⁷⁸ If adverse parties trust that the arbitrator’s determinations are based on past decisions involving similar facts, CAS will appear more transparent and independent from the influence of the IOC and other governing bodies. Implementing a policy of binding precedent will thus enhance the integrity of the arbitration process.

CONCLUSION

To maintain CAS’ position as the “Supreme Court” of sports, it is crucial that the international athletic community trusts that the tribunal is impartial and independent from the IOC and other governing bodies. Although CAS has attempted to distance itself from the IOC,³⁷⁹ its efforts have been insufficient in maintaining the independence and integrity of the court thus far. Ul-

372. Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT’L L. 43, 47 (2008).

373. *See id.*

374. *See Mitten & Opie, supra note 20, at 286; Mitten, supra note 18, at 58–59.* In an effort to achieve greater transparency, CAS provides a public database of all past arbitration awards. *See* CT. ARB. SPORT, <http://www.tas-cas.org/en/index.html> (last visited Jan. 10, 2017).

375. *See Stare Decisis, supra note 370.*

376. *See Casini, supra note 35, at 1326.*

377. *See id.*

378. *See id.*

379. *See supra* Part II.B.

timately, CAS cannot maintain its position as the exclusive forum for international sports disputes if athletes continually ignore its rulings and challenge them in national courts, where vastly inconsistent rulings may result across different jurisdictions. Significant revisions to the arbitration member selection procedures must be implemented to ensure that CAS is free from institutional bias. The CAS must adopt an arbitration panel with broad legal knowledge and specialized expertise in sports to ensure that numerous types of disputes will be decided fairly. A tripanel system influenced by Sport Resolutions will guarantee balance between governing bodies and individual athletes.³⁸⁰ Furthermore, adoption of the doctrine of *stare decisis* will force arbitrators to make consistent rulings.³⁸¹ As a result, if adverse parties perceive CAS as the neutral and supreme forum for dispute resolution, national courts will as well.³⁸² By implementing these changes, CAS will become a fair and balanced arbitration panel, securing CAS as the world's "Supreme Court" of sports and the further development of *lex sportiva*.

Jennifer R. Bondulich*

380. See *supra* Part IV.A.

381. Gal-Or, *supra* note 372, at 61.

382. See *supra* Part IV.A.

* B.S., Marist College; J.D., Brooklyn Law School (Expected 2017); Executive Notes & Comments Editor, *Brooklyn Journal of International Law* (2016–2017). I would like to thank the staff of the *Brooklyn Journal of International Law* for their efforts in the publication of my Note. Thank you to Travis Marmara and Kelsey Binder, without whom this Note would not be possible. I would also like to thank my friends and family for their encouragement and support throughout this process. Most importantly, I would like to give a special thank you to my parents, Anne and John Bondulich, for their infinite love and support and for encouraging me to believe I could achieve anything I set my mind to. All errors or omissions are my own.