

THE DOPING CASES AND THE NEED FOR THE INTERNATIONAL COURT OF ARBITRATION FOR SPORT (CAS)

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I. INTRODUCTION

There is a long recorded history of the use by athletes of substances for performance enhancement.¹ The use of substances in the form of drugs was officially recognised after the 1928 Winter Olympics when the International Federation of Sports Mediation (FIMS) was established as a forum to discuss doping in sport. Slowly an awareness grew in the international community that athletes were competing assisted by drugs to enhance performance. This awareness became sharper after the Second World War when amateur sporting events became much more competitive. France enacted anti-doping legislation in 1963, Belgium in 1965. Other countries followed suit. There were attempts to detect drug use at the 1964 Tokyo Olympics but such attempts were not successful.²

When prominent athlete *Tommy Simpson* died in the Tour de France and his death was exposed as drug induced, it led to the International Olympic Committee (IOC) establishing a Medical Commission (the IOCMC). Historically this became one of the most significant developments, as through the Medical Commission was published the International Charter Against Doping in Sport³ (now known as the IOC Medical Code) was published. The Charter

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1 K Donald, *The Doping Game*, Boolarong (1983) pp 26-27; T Donohoe and N Johnson, *Foul Play, Drug Abuse in Sports*, Oxford (1988) pp 2-3; GM Kelly *Sport Law, An Australian Perspective*, The Law Book Co (1987) p 398; and H Opie, "Legal Regimes for the Control of Performance-Enhancing Drugs in Sport" (1990) 12 *Adelaide Law Review* 332; EH De Rose, "Doping in Ancient and Modern Olympic Games", *Sport, Medicine and Health - The Asian Perspective Proceedings of the FIMS-1992*, Hong Kong International Sports Medicine Conference 17-24 March 1992.

2 A De Schaepdryver and M Hebbleinck (Eds) *Doping* (1965); referred to by Opie, note 1 *supra* at 336.

3 The IOC, (1989), republished in 1991, 1994.

included a 'list' of banned substances, which was used as the foundation for all drug testing programs in sport around the world. It is now annually reviewed by the IOCMC. Its contents are often challenged. The Charter provides: guidelines as to functions and penalties; a model national anti-doping program; the list of doping classes and methods of doping; the requirements for accreditation of laboratories and laboratory practice; the standard operating procedures for doping control; the rights, responsibilities and status of athletes and their entourages; and, principles and guidelines for in and out of competition testing.

Up until the International Charter Against Doping in Sport, anti-doping efforts had been somewhat ad hoc. However, when the pre-eminent sports organisation, the IOC, set a standard and imposed it upon its sporting federations an imprimatur was given to policies committed to drug free sport. Over the last ten years, international co-operation and initiatives improved⁴ as drug testing programs were put in place by National Olympic Committees (NOCs) (for example the Australian Olympic Committee (AOC)), international and national federations (ISFs and NSOs) through their rules and by-laws, and by governments through legislative reform or administrative process (for example the Australian Sports Drug Agency (ASDA)).

However, three impediments to successful anti-doping programs were quickly exposed. There was a lack of harmonisation and consistency of procedures and accountability for the integrity of the urine testing. Secondly, there was a lack of agreement between sports federations internally between national and international organisations and externally between the various sports as to the appropriate sanctions for breaches. Thirdly, when doping disputes went to the sporting tribunals and from the tribunals to domestic courts on appeal, there developed an awareness and appreciation of the need for sound jurisprudential and equitable principles in the hearing of doping disputes. In response to these impediments, the sports organisations have attempted to harmonise sanctions and testing procedures. However, the sports tribunals have met some difficulties as they have travelled through the legal labyrinth revealed by sports appeals, particularly appeals from positive findings of drug use.

In examining the legal complexities and legal principles revealed in the doping cases, this paper traces the steps taken by parties involved in sports law to bring consistency and integrity to international sports law through the establishment by revised rules and procedures of an International Court of Arbitration for Sport (CAS).

4 JA Nafziger, *International Sports Law* Transnational Publishers Inc, (1988). In particular, see "History of Organised International Sports Competition", pp 11-23 and "The Institutional and Legal Framework Today", pp 25-37.

II. THE SPORTING TRIBUNAL

Nafziger maintained that:

International sports law provides a dynamic...process to avoid, manage and resolve disputes among athletes, national sports bodies, international sports organisations and governments. This process is distinctive although it incorporates rules and procedures drawn from more general regimes of private and public law and operates within a structure of established institutions, including arbitral bodies and national courts.⁵

However, the process was incomplete. Sporting organisations had developed arbitral procedures through tribunals on an ad hoc basis, and when domestic courts became involved on appeal, they applied principles unique to their jurisdictions. As a result, there were inconsistencies in process and decision making, especially in doping disputes. Despite the fact that Nafziger has argued that “gradually, a distinctive *lex specialis* is emerging from a line of arbitral decisions”,⁶ analysis of the case law revealed there was no *lex specialis* emerging in doping disputes at international level. Sporting bodies recognised the need for an international arbitral body of sufficient stature to develop such a *lex specialis*.

While disputes in sports law as to selection, disqualification and sponsorship have been before domestic courts, it is the doping disputes that have often exposed the legal complexities in sports law.

Doping disputes in sport also involve competing ideologies. The utilitarian motivation is to make international sport's governance uniform, and to protect the integrity of the event. While admirable, such an aim often conflicts with athlete's rights, as individuals, and their access to fundamental principles of natural justice. It is clear that a balance between the ideologies of utilitarianism and individualism has to be found.

This will be the true test of a just and independent CAS, which has been adopted by sporting organisations as the final appellate court for sports disputes (but especially in doping disputes). In 1994, a pre-existing CAS, which was first established by the IOC in 1984, had its once limited jurisdiction revised. The re-constitution of this Court in 1994 and the refinement of its appeal procedures arose out of influential sporting organisations' frustrations (such as the IAAF) with the interference of domestic courts in the resolution of disputes, especially doping disputes, and the implications of court orders for their organisations.

A profile of a doping dispute best illustrates the legal complexities faced by both athletes and sports organisations. The American athlete, *Butch Reynolds*, sued the IAAF through the Ohio Federal District Court to the Sixth Circuit Federal Court of Appeal and was awarded \$US27 million in damages. His case is a good example of the type of issues doping tribunals must address and how

5 *Ibid*, p 27.

6 JA Nafziger, “International Sports Law as a Process for Resolving Disputes”, in *Sport & Law*, supplement to the Official Proceedings of the IAF symposium on Sport & Law, Monte Carlo, 31 Jan - 2 Feb 1995, p 20.

domestic courts have intervened in such disputes to consider whether the athlete has been given fair consideration. Reynolds was tested in Monte Carlo and the sample analysed in a laboratory in France. He was sanctioned under an IAAF arbitration in England, and then sued the IAAF in the American Courts.⁷ Reynolds' urine sample was provided in August 1990 and he was sanctioned by way of a ban from competition. In March 1991 litigation commenced. While litigation was being pursued, the IAAF threatened to invoke their Rule 53(ii), which was known as the 'contamination rule'. This rule allowed the IAAF to suspend any athlete who competed against an ineligible athlete. So the dispute between Reynolds and the IAAF affected other athletes and caused havoc to an athletic event. The dispute then travelled through the IAAF Disciplinary Tribunals, the American Arbitration Panels, the Ohio State Federal Courts and the Federal Courts sitting in appellate jurisdiction⁸ by way of four tribunal hearings and five court hearings over three and a half years.

The Court at first instance and on appeal refused to hear Reynold's appeal holding it could not exercise jurisdiction until after his administrative appeal rights were extinguished. Then the American Arbitration Association (AAA) on appeal lifted his ban as it endorsed his challenge to the quality of the sample testing procedures by the laboratory in France. The American Athletics Committee (TAC) was then ordered by the IAAF to enforce its ban. The TAC had a dilemma as to whether to enforce its own rules, recognising the AAA ruling, or to accept its International Federation's instruction. Injunctions and restraining orders were issued once the contamination rule was invoked. Events were postponed. In December 1992, the Federal District Court of Ohio awarded *Reynolds* \$US27 million damages. The finding suggested the IAAF had "purposely avoided the truth".⁹

The matter then went to the Federal Court of Appeal which concluded that there was no personal jurisdiction of the American Courts over the IAAF as the IAAF activities had not arisen out of activities in Ohio. Effectively, this squashed a verdict for damages. The Federal Court examined the status of an arbitral award and whether it should be recognised by the Court. The analysis of the status of an arbitral decision and its recognition acknowledging the USA participation in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), was important reasoning giving heart and credibility to those urging the IOC to re-structure the CAS.

7 For a full commentary on all the steps taken in this litigation and a comprehensive analysis of the issues each tribunal examined and the views expressed see HJ Hatch "On Your Mark, Get Set, Stop! Drug Testing Appeals in the International Athletic Federation" (1994) 16 *Loyola and Los Angeles International and Comparative Law Journal* 537 at 542.

8 *Reynolds v IAAF* 23 F 3d 110 (6th Cir 1994). See also prior proceedings in No C-2-91-003, 1991 WL 179760 (SD Ohio 19 March 1991), vacated and remanded, 935 F 2d 270 (6th Cir 1991) (*per curiam*); on remand, 1992 US Dist LEXIS 8625, at *1, stay of preliminary injunction granted, 968 F 2d 1216 (6th Cir 1992) (table), application for emergency stay granted, 112 S Ct 2512 (1992).

9 *Ibid*, C-2-91-003 8D Ohio 19 March 1991, p 7

Other cases exposed further legal complexities. *Alex Watson*,¹⁰ an Australian pent-athlete challenged the prohibited level of caffeine declared in 'the List'. A Senate Inquiry concluded that the level of scientific knowledge about caffeine blood and urine levels reached by drinking coffee and the effects of caffeine ingestion on the individual was inadequate. The Inquiry considered information on the variations as to the effect and reliability of urine analysis to determine the level of caffeine ingestion was also inadequate.

The more serious cases related to a challenge to the use of steroids and testosterone levels. Early challenges exposed serious questions as to the unscientific way in which, in its original form, the List was compiled. Two British weightlifters, *Andrew Saxton* and *Andrew Davies*,¹¹ provided urine samples ten days before the 1992 Barcelona Olympic Games. They were at the Games in July 1992 when it was announced they had tested positive for a substance called Clenbuterol. They were sent home at once and it was said, erroneously, that they had received a life ban from the governing body of British Weightlifting. However, a copy of 'the List' revised by the IOCMC in May 1992, two months prior to the published positive finding did not make any mention of Clenbuterol. A further copy on 4 August 1992 issued a warning about its chemical structure. The decision to ban Clenbuterol appears to have been taken at a late night meeting of the IOCMC on 31 July 1992 in Barcelona, although various spokespersons claimed it was already a banned substance. The latter view is extremely difficult to support. The List said at that stage of anabolic androgenic steroids:

The anabolic androgenic steroid class includes testosterone and substances that are related by structure and activity to it.

Clenbuterol's structure is quite unlike that of testosterone. The expression "and related substances" now appears below the five B2-agonists substance now listed.

Such a case even raises the question of the application of natural justice principles. Were the weightlifters given same? They never appealed their ban.

*Martin Vinnicombe*¹² challenged the procedures for testing under the Australian government legislation,¹³ when his test was performed under Australian law by a Canadian Testing Team in Pennsylvania, USA.

Vinnicombe's case exposed a further complexity in the development of the law in relation to the use of drugs in sport. That is, there can be further complications when a government becomes involved and introduces domestic legislation. In Australia the anti-doping code for sports has been committed to legislation by way of a Federal Act known as *Australian Sports Drug Agency Act* (the *ASDA*

10 Australian Senate Standing Committee on Environment, Recreation and the Arts, *The Circumstances Surrounding the Positive Drug Test on Mr Alex Watson*, AGPS 1992.

11 *Saxton and Davies*, Reported *Canberra Times*, 3 November 1992, p 20.

12 *Vinnicombe v The Australian Sports Drug Agency and Steven Haynes*, FCA, G0065 of 1992; *Vinnicombe v The Australian Professional Cycling Council (APCC) and The Australian Cycling Federation and The Australian Sports Commission*, (Unreported Arbitration, FCA NSW Registry, Ellicott QC Refereeing, 24 April 1992).

13 *The ASDA Act*.

Act). The Act commits, by way of its objects, Australia to a philosophical code of ethics in sport that is anti the use of drugs, values fair play, recognises the health of a competitor and also acknowledges the rights of all those who take part in sport.

The *Vinnicombe* case went to the Australian Federal Court and the court recommended arbitration. A number of legal issues were canvassed in the pleadings. The existence of a Register recording an athlete's name who had tested positive to a banned substance was challenged and the Government Authority administering the Act (the ASDA Agency) claimed confidentiality and privilege protected the Register. The question whether procedures for testing required under the Act required "strict compliance" or "substantial compliance" was an issue. Australia's powers to test an Australian athlete under a Memorandum of Understanding between Canada, the United Kingdom and Australia was also examined. During the two year ban imposed on *Vinnicombe* the International Professional Cycling Federation granted him a licence as to ride professionally as their rules did not reflect the two year ban under the rules of the Australian Cycling Federation. Further, because the Agency refused to take part in the Arbitration, *Vinnicombe's* name stayed on the Register. The matter was resolved after the two year ban imposed on *Vinnicombe* expired.

An interesting anomaly exists in Australia. Under the procedures as outlined by the 1990 *ASDA Act*, although it appeared that there was a general right of appeal to the Administrative Appeals Tribunal (AAT), a closer analysis of the Act and its various provisions revealed that it was mandatory under s 15(1) for a competitor's name to be entered on the Register if the sample was taken, identified, transported and tested in accordance with the Regulations, and the testing was carried out by an accredited laboratory. The 1992 amendments determined that ASDA could only determine an invalid test under s 16(2) if it was not satisfied that the applicable procedural requirements relating to the sealing of any container containing the sample had not been complied with, or the sample was not tested by an accredited laboratory, or the sample was tampered with. This restricted ASDA's powers to determine that a test was not positive. Further, it in effect restricted the grounds on which an appeal could be brought.

The 1996 amendments to the *ASDA Act* inserted section 17V which stated that "[a]pplication may be made to the Administrative Appeals Tribunal for a review of a reviewable decision".

Yet section 17M(4) empowers ASDA to decide that a positive test result is invalid only if it is satisfied that:

- (a) the applicable procedures relating to the sealing of any container holding the sample have not been complied with; or
- (b) the sample was not tested by an accredited laboratory; or
- (c) the sample was tampered with by someone other than the competitor or a person chosen by the competitor to oversee any part of the collection or testing of the sample.

These are the only grounds on which ASDA may decide that a positive test result is invalid. This appears to limit the content of any submission invited

concerning “relevant information or evidence” (section 17L(2)(b)) to the three points, which are set out above. Therefore a review of a reviewable decision may be very limited. This has not been defined. As the doping disputes between the sports organisations and the athlete exposed these complex legal issues many of which confounded the Sports Tribunals there grew an awareness of a need for comity in sports law at an international level.

III. LEGAL ISSUES ARISING OUT OF THE DOPING CASES

Legal issues such as defining the offence of doping in terms of strict liability or requiring an element of intent, natural justice principles, the right to privacy, the question of restraint of trade, and the jurisdiction of domestic Courts were frequently examined in doping cases. When appropriate legal standards were applied to existing dispute resolution mechanisms that had been propagated by the sports organisations it was clear they were not ideal models. From the doping cases, even in an environment where the appropriate standards were applied to the operation of the tribunals, there grew an awareness by all parties of the need for a truly just and fair body of international standing to be the final arbiter of all sports related disputes. A short analysis of some of these legal issues exposed through the doping cases is necessary to understand the motivation of the parties to establish an International Sports Court.

A. Defining the Doping Offence

It is a fundamental legal issue as to whether the rules of the IOC, the NOCs, and the ISFs in a doping case create a ‘strict liability’ offence or whether they require ‘an intention’ on the part of the athlete.

Analysis of the standard to be applied to a doping offence was reasoned by Scott J in *Gasser’s Case*.¹⁴ Scott J examined Rule 144 of the IAAF rules and determined it created an “absolute offence, independent of any guilty state of mind on the part of the athlete”.¹⁵

This strict liability onus makes no allowance for the consideration of the state of mind of the athlete. As Opie¹⁶ points out, there could be circumstances that require an identification of two classes of doping - one, ‘innocent doping’ and secondly, ‘inadvertent doping’. *Samantha Riley’s*¹⁷ offence was found to be one of ‘inadvertent use’ attracting no sanction when she allegedly was given a cold tablet by her coach. However, the Australian Swimming Federation had no rule acknowledging ‘inadvertent use’. At the Seoul Olympics in 1988, the British sprinter, *Linford Christie* consumed a Chinese herbal medicine ‘ginseng’, to which pseudoephedrine (a banned substance) had been added. He was not

14 *Sandra Gasser v Henry Robert Hunter Stinson and John Bryan Holt* (Unreported, High Court of Justice Chancery Division, Scott J, 15 June 1988).

15 *Ibid* at 38.

16 H Opie, note 1 *supra* at 336.

17 *Riley v FINA Executive*, (Unreported, Single Member, FINA Executive, 9 January 1996).

disqualified from a medal because the authorities determined it was not at an important level.¹⁸ His performance has recently again been called into question.

Inconsistencies continued to be obvious to all involved in sports and the law. Fortunately, the issue as to 'inadvertent use' once litigated before the courts is now addressed in most sports organisations rules. They have usually been amended to acknowledge 'inadvertent use' can be raised as a defence to a doping charge with consideration as to penalty. Usually however if the doping charge is found proven it is still recorded as an offence against the athlete.

B. Restraint of Trade

Given that the imposition of a sanction (such as suspension from competition), is the most common penalty for a doping offence, the argument that suspension constitutes an unlawful restraint of trade has been raised in several cases. With the substantial financial rewards that are now available to elite athletes, it is not surprising that the serious penalties that have been applied by sporting organisations are challenged in the courts.

Forbes states: "It is a matter of striking a fair balance between relevant and legitimate interests of the parties, with a passing glance at the interests of the public."¹⁹

The restraint of trade argument was used in *Pate and Hall's Case*²⁰ and *Robertson's Case*.²¹ In the former case, the athletes claimed that it was unreasonable for an NSO to impose a greater penalty than its international counterpart. However, in *Robertson's Case*, the Cycling Federation mounted no defence and notified the court they could not afford to appear or be represented as they were a voluntary organisation. The athlete was successful, the Court finding that the penalty could not be justified on grounds of public policy. The Court however commented it had to decide the case on the evidence before it. The issue of restraint of trade was also raised in *Gasser's Case*,²² where Scott J said that while "people should be free to exploit for their financial gain the talents and abilities that they may have", it was not unreasonable to impose sanctions, and indeed, that it would be unfair to other athletes not to do so.²³

The issue was also recently canvassed in the appeal by the infamous athlete, *Ben Johnson*²⁴ to lift his life sanction imposed following two positive findings of steroid use. Athletics Canada argued that it was not directly preventing him from entering sponsorship contracts, rather, it had banned him from competing. The Panel rejected his appeal, finding that whilst sanctions are a restraint of trade, they are reasonable in circumstances where there has been doping.²⁵

18 As reported in *The Sydney Observer* 18 October 1988, p 12.

19 JRS Forbes, *Disciplinary Tribunals*, The Law Book Company (1990) p 31.

20 *Pate and Hall v Australian Professional Cycling Council Incorporated*, (Unreported, Supreme Court of Victoria, No 9215216, settled out of court, March 1992).

21 *Robertson v Australian Professional Cycling Council*, (Unreported, Supreme Court of NSW Equity Division, Waddell CJ, 10 September 1992)

22 Note 14 *supra*.

23 *Ibid* at 37.

24 At the Athletics Canada Appeal Tribunal, reported in *Sydney Morning Herald*, 25 July 1997, p 10.

25 *Ibid*, p 6.

*Diane Modahl*²⁶ probably presents the best case for damages arising out of a restraint of trade argument. She has proven her sample was tainted or degraded after being left in sunlight, out of refrigeration, for two days. The IAAF Appeal Panel found the testosterone/epitestosterone (T/E) ratio of her urine sample arising from her test was unreliable. She pursues her rights now in the civil courts.

C. Principles of Natural Justice

The efficacy of any anti-doping policy will be undermined if principles of natural justice are not adhered to. As Buti and Fridman²⁷ point out, natural justice has two major components, namely *audi alteram partem*, a rule which provides that a person is entitled to know the nature of any accusation made and a fair opportunity to state his or her case, and *memo judex in cause sua*, a rule that no one should judge his or her own cause.

The right to be heard was an issue in the case of *Saxton and Davies*.²⁸ The athletes were not notified of the offence, nor provided with the opportunity to explain. Likewise, in *Reynold's Case*, the District Court found that the IAAF hearing was not conducted in accordance with principles of natural justice:

It is this court's conclusion that the IAAF hearing was not conducted in good faith, was not conducted by an unbiased decision-maker, was not in accordance with the IAAF's own rules and regulations, did not accord Reynolds a full and fair opportunity to participate and resulted in a decision that was not fair and impartial but rather was arbitrary and capricious.²⁹

In *Kioa v West*, Mason J held that:

there is a common law duty to act fairly in the sense of according procedural fairness in the making of administrative decisions which affects rights, interests, and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.³⁰

While Megarry VC suggested there was some doubt about the applicability of natural justice to private bodies,³¹ there is a significant body of law to support the proposition that sporting tribunals' decisions which affect the liberty and financial status of an athlete, attract the rules of natural justice.³² A tribunal has only a "reasonable satisfaction" test to meet. Dixon J held:

26 *Modahl v British Athletic Federation*, Independent Appeal Panel of BAF, 26 July 1995 and IAAF Appeals Panel 1998.

27 A Buti and S Fridman, "The Intersection of Law and Policy: Drug Testing in Sport" (1994) 53(4) *Australian Journal of Public Administration* 489 at 500.

28 Note 11 *supra*.

29 *Reynolds v IAAF C-2-92-452* United States District Court, SD Ohio 3 Dec 1992 at 8.

30 (1985) 159 CLR 550 at 552.

31 *MacInnes v Onslow Fane* (1978) 1 WLR 1520 at 1535 per Megarry VC, cited in *Sandra Gasser v Henry Robert Hunter Stinson and John Byron Hold* (Unreported, High Court of Justice Chancery Division, Scott J, 15 June 1988 at 40).

32 *Paul Quirke v Bord Lutchleas na h'Eireann (BLE)* (Unreported, High Court of Ireland (Judicial Review), Barr J, 25 March 1988 at 4).

it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

The notion that the decision of a tribunal must be based on the evidence is an important principle of natural justice. In *Briginshaw v Briginshaw*,³³ it was determined that the rules of evidence applicable in courts are not required in tribunals.

In *Carlton Football Club and Gregory Williams v Australian Football League v Ors*,³⁴ although not a doping case, the Victorian Supreme Court, examined the effect of a ban on both plaintiffs, that is, the player and the football club to which he was contracted. The Court considered whether it had jurisdiction, given that the AFL Rules stated that the Tribunal's decision would be final and binding. The Court commented that the proceedings and playing laws had "an air of the past" and noted that there was no avenue of appeal between the Tribunal and Court for the more serious cases. It examined whether the principles of natural justice applied and found that the Tribunal was bound to apply such rules and principles. It examined the burden of proof and declared that the burden was on the party alleging the reportable offence. In relation to the standard of proof, the Court reasoned whether it should be based on reasonable satisfaction in accordance with the *Briginshaw* 'gloss' or by application of the civil standard of beyond reasonable doubt. In a final comment, the Court noted that the AFL Rules "bar lawyers, but it may be that a rule which permitted legal representation, by leave of the Tribunal, both to assist and for the players, in the more serious cases, would add something to the management of everybody's rights".³⁵ The Court of Appeal addressed similar issues but reversed the primary judge's decision and upheld the Tribunal's sanction.

Courts will interfere if the conclusion reached by the tribunal is plainly absurd or unreasonable or such that no reasonable person could come to that conclusion. Therefore, the legal obligation of a body to act honestly and in good faith goes hand in hand with an obligation to accord procedural fairness. A court may go further, as it has jurisdiction to ensure, encourage and secure the tribunal's due performance of its task.

Most sporting tribunals have a rule declaring that its decision shall be final or only open to an internal appeal. It is usually argued that all parties intended to exclude lawyers and courts from impacting on the tribunal's deliberations and decisions. However, parties to a contract can be sued for breaches of specific

33 (1938) 60 CLR 336 at 362.

34 (1997) 71 ALJR 1546.

35 *Briginshaw v Briginshaw* (1938) 60 CLR 33.

terms and even implied terms. In *McInnes v Onslow-Fane & Anor*³⁶ it was held that courts should be in effect "slow to buy into" internal disputes of a sporting nature.

It is really a pointless argument. If the Court considers there has been an injustice, it will interfere. As O'Sullivan points out:

Courts have stood as a bulwark to prevent the infringement and denial of individual rights by more powerful parties and have been quickest to act where they perceive that there are inadequate procedural safeguards to protect individual rights and freedoms.³⁷

However, there was concern expressed by some sporting authorities that with the propensity to protect the rights of the individual athlete by means of litigious activity, the process at times appeared to be more important than the substance. The search for an appropriate appellate court with international recognition arose out of the growing awareness of the legal complexities being addressed by sports tribunals and their regular referral of these issues to domestic courts.

IV. THE STATUS OF AN ARBITRAL AWARD

In the debate as to the recognition of a Sports' Court, the principles and general law of international arbitration were examined. The philosophical and procedural background to international arbitration provided a framework for understanding the context in which the decision to establish an international *lex specialis* developed. It was imperative that such a Court, recognised by the parties on a contractual basis be legitimate and, in its evolution, legitimised. So the law related to the status of an arbitral agreement and its consequent award became relevant.

Most states that have affected the development of case law in sporting and doping disputes are bound generally by the principles enunciated in the United Nations 'New York' Convention³⁸ and various domestic legislative provisions reflect these principles. An arbitral dispute is now defined in broad terms and generally a state or a state agency that is party to an arbitration agreement cannot invoke its own municipal law in order to contest the capacity to arbitrate within the limits of the arbitration agreement. The status of arbitral awards in America and Australia are two examples that were examined in the decision making process.

A. The United States

The statutory foundation for arbitration in the United States is the *Federal Arbitration Act*³⁹ (the *FAA*). The *FAA* placed arbitration agreements on the same

36 (1978) 1 WLR 1520 at 153.

37 TJ O'Sullivan "Athletes' Rights - Must the Courts be Involved?", paper presented at the International Bar Association 25th Biennial Conference, 1994, p 18.

38 Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration 1958.

39 9 USC Ch 392 Sec 1 1947.

basis as other contracts.⁴⁰ The Act creates a body of federal substantive law applicable to any arbitration agreement falling within the parameters of the Act. This is despite any contrary state procedural or substantive arbitral law. In effect, the *FAA* establishes a federal court jurisdiction for the review and enforcement of arbitration awards. The Act permits a party to an arbitration agreement to obtain a stay of proceedings in a federal district court when an issue is referable to arbitration⁴¹ and permits a party to obtain an order compelling arbitration when one party has failed, neglected or refused to comply with an arbitration agreement.⁴² A party to an award can apply to a Court for an order confirming the award.⁴³ The *FAA* will only allow an arbitral award to be vacated where there is corruption, partiality, misconduct, refusal to hear evidence, or the arbitrator exceeded his or her powers.

In *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Incorporated*,⁴⁴ the US Supreme Court held that in an international arbitration, the fact that an arbitrator had been asked to award relief which was conferred on a court by statute only did not disqualify the arbitrator from doing so. The presumption in favour of free negotiation of contractual choice of forum provisions was held to be reinforced by a policy in favour of arbitral dispute resolution. The court effectively interpreted the *FAA* as creating a presumption of its ability to arbitrate.

B. Australia

In Australia, model uniform legislation based to a large extent on the *Arbitration Act 1979* (UK) had been developed. This legislation has been enacted in all Australian states and territories.⁴⁵ The legislation acknowledges that arbitration seeks to achieve, as quickly and cheaply as possible, finality in dispute resolution from a tribunal of the parties' choice. Although the titles of the uniform arbitration acts refer to 'Commercial Arbitration', their scope is not limited to the recognition of disputes in commercial areas. The avowed purpose of these Acts is to allow disputes of all kinds to be subject to arbitration.

In *Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Limited*⁴⁶ the NSW Court of Appeal gave a resounding endorsement of arbitration as a dispute resolution mechanism. Gleeson CJ said:

40 *Gilmer v Interstate/Johnson Lane Corporation* 111 S Ct 1647 at 1654 (1991).

41 The *FAA*, s 3.

42 *Ibid*, s 4.

43 *Ibid*, s 9.

44 473 US 614 (1985).

45 ACT: *Commercial Arbitration Act 1986* (commenced 2 March 1987).

NT: *Commercial Arbitration Act 1985* (commenced 1 November 1985).

NSW: *Commercial Arbitration Act 1984* (commenced 1 May 1985).

QLD: *Commercial Arbitration Act 1985* (commenced 1 December 1990).

SA: *Commercial Arbitration Act 1986* (commenced 9 July 1987).

TAS: *Commercial Arbitration Act 1986* (commenced 1 January 1987).

VIC: *Commercial Arbitration Act 1984* (commenced 1 April 1985).

WA: *Commercial Arbitration Act 1985* (commenced 1 April 1986).

46 (1996) 39 NSWLR 160.

it is consistent with the modern policy of encouragement of various forms of alternative dispute resolution including arbitration, mediation and conciliation, that Courts should facilitate rather than impede agreements for the private resolution of all forms of disputes, including disputes involving claims under statutes.⁴⁷

Further, in *PMT Partners Pty Limited (in Liquidation) v Australian National Parks and Wildlife Service*⁴⁸ the High Court held that a standard arbitration clause governed the procedures to be followed by the parties in the event of a dispute and precluded one of the parties from electing to take court proceedings instead. So an NSO's agreement with an athlete to go to its tribunal and then on appeal to the CAS under Australian law would preclude either party from going to the Federal or State courts. However, as has been noted that the *ASDA Act* allows for appeals to the Federal Court on limited issues arising from urine sample testing. Thus, there is room for a potential conflict of laws in this situation.

The High Court held in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture*⁴⁹ that the parties to an arbitration are free to confer such powers as they deem appropriate on the arbitrator, provided they are lawful. In particular, they may confer power on an arbitrator to award a remedy that is only provided by statute to a court. Kirby P of the NSW Court of Appeal in *IBM Australia Limited v National Distribution Services Limited*⁵⁰ adopted this view holding an arbitration clause might be sufficiently wide to include claims to award relief.

The general statutory framework in relation to arbitration in the United States, the United Kingdom, Australia and the codified law countries of France and Switzerland, have some similarities and some important differences. The key difference is the relationship between arbitration proceedings and civil litigation arising out of the same dispute. Whilst in the United States, s 3 of the FAA provides for a mandatory stay of civil proceedings, in Australia and the United Kingdom, courts have a discretion whether to grant a stay of proceedings. In France, domestic arbitration is still appealable, unless stipulated otherwise in the agreement, and international arbitration agreements are not rigorously interfered with by courts.

The differences between arbitral principles in these jurisdictions are more apparent than real in nature, and courts in Australia and the United Kingdom have relied on US precedents in their consideration. Hence, there is a remarkable degree of commonality in the approach taken by the courts in each country regarding the important role played by arbitration. In each jurisdiction, the parties are free to confer on the arbitrator such powers as they deem appropriate, particularly in relation to remedy normally provided by statute. Thus, arbitration is clearly seen as being contractual in nature and the parties to an arbitration can determine the scope of the arbitrator's powers and functions.

47 *Ibid.* Whilst this is a NSW decision, it is likely that it would apply at the federal level and in all states and territories because of their use of "mirror" arbitration legislation.

48 (1995) 184 CLR 301.

49 (1981) 146 CLR 206.

50 (1991) 22 NSWLR 466 at 479.

From this analysis it was established that all legal institutions operating under both the common law and codified law recognise arbitral decisions. As such, the courts, if arbitral decisions are contractual and properly conducted, will be reluctant to interfere with any agreements reached. But was there scope or a place for a Court of Arbitration for Sport? Is it trite to suggest the name itself is argumentative?

V. THE COURT OF ARBITRATION FOR SPORT (CAS)

A. The CAS: 1983-1993

In 1983 the President of the IOC, Mr Juan Antonio Samaranch, proposed the establishment of a system of arbitration for sport. As a result, the CAS was established in Lausanne, Switzerland in 1984. While not always highly praised, Samaranch was far-sighted in recognising the need for an International Sports Tribunal.

The Court and its Statute and Rules officially came into force on 30 June 1984. They were established under Swiss domestic law and its jurisdiction has been tested in the Swiss Federal Court. It specialised in resolving “disputes of a private nature, arising out of the practice or development of sport, and in a general way, all activities pertaining to sport”.⁵¹

When it commenced its role, the CAS was not operative as an appellate court. Work for the appellate jurisdiction developed in the second half of 1991. It followed the insertion of an arbitration clause in favour of CAS in the regulations of the International Equestrian Federation (FEI), which was the first ISF to have its rules provide for judicial control outside that of its own executive bodies.⁵²

In a judgment of 15 March 1993, the CAS received judicial imprimatur when the Swiss Federal Supreme Court, the highest Swiss judicial authority, acknowledged the specific role of the CAS:

The CAS is a true arbitral tribunal independent of the parties, which really exercises complete judicial control over the decisions of the associations which are brought before it, in particular over the penalties prescribed by the regulations which have been imposed on the appellants.

This statement was made in *Gundel's Case*.⁵³ This was an appeal by a rider, Gundel, who contested the very existence and independence of the CAS, challenged its jurisdiction, in particular calling into question the CAS's independence with respect to the FEI.

The Court's determination established that in a case between an athlete and the athlete's ISF, the Court had to be regarded as an independent arbitral tribunal, recourse to which validly waived general jurisdiction. The decision was subject only to a public law appeal. The Swiss Federal Court however made one criticism of the CAS as not being sufficiently independent from the IOC. It held:

51 Almost identical wording of Articles 1 and 4 of the CAS statute referred to in D Hahn “Presentation of CAS Judicial Decisions” *Court of Arbitration for Sport*, CAS Compilation 1993.

52 Adopted by the General Assembly of the FEI in March 1991.

53 *Gundel v FEI*, (ATF Swiss Federal Supreme Court, First Civil Division, 15 March 1993).

certain objections with regard to the independence of the CAS could not be set aside without another form of process, in particular those based on the organic and economic ties existing between the CAS and the IOC. In fact, the latter is competent to modify the CAS Statute; it also bears the operating costs of this court and plays a considerable role in the appointment of its members. The fact remains, however, that given, on the one hand, the possibility which exists of ensuring, by the remedy of challenge, the independence of the Panel called upon to hear a specific case and, on the other hand, the solemn declaration of independence signed by each CAS member before he [or she] takes office, such objections alone do not allow the CAS to be denied the quality of a true arbitral tribunal...even though it would be desirable for greater independence of the CAS from the IOC to be assured.⁵⁴

The case was timely. The ISFs were concerned with the role domestic courts had been playing in sports litigation. There was also a growing awareness of the need for swift and independent settlement of sports disputes. The recognition and status given to the CAS in *Gundel's Case* by the Swiss Federal Court gave impetus to the sporting bodies urging the reconstitution of the CAS as a forum of international stature for the resolution of sports disputes including doping disputes.

B. The International Council of Arbitration for Sport (ICAS): 1994

On 22 November 1994, the ICAS was constituted as a Foundation under the Swiss Civil Code. Its purpose was to be an Independent Council:

to facilitate the settlement of sports-related disputes through arbitration and to safeguard the Independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.⁵⁵

The separation of the Council from the Court and from the direct control of the IOC was an imperative. The ICAS is composed of 20 members, with four representatives for each of the following stakeholders: the international Olympic Winter and Summer Federations, the NOCs, the IOC, the athletes, and independent personalities elected by other members of the Council. The representatives must "exercise their function in a personal capacity, with total objectivity and independence in conformity with their code".⁵⁶

In order to guarantee the impartiality and independence of the CAS, the members of the Council cannot act as arbitrators of the CAS, nor as counsel for a party in proceedings before it. This rule is a recognition of the legal maxim, *nemo debet esse iudex in propria causa*, one cannot be a judge in one's own cause.

C. The CAS: 1994 - present

The ICAS made significant alterations to the CAS procedures. Hahn points out its role most succinctly:

⁵⁴ *Ibid* at 6.

⁵⁵ Article S2, *Code of Sports-Related Arbitration*, 22 November 1994 (replacing the former Statute of the CAS) published Lausanne 1995. Also "Amendments Proposed Concerning the Code of Sports-related Arbitration", 5 April 1995; also Mediation Rules adopted by ICAS, 18 May 1999.

⁵⁶ CAS Code Art S5.

In the field of sports litigation in the strict sense, the functions of an ordinary arbitration Court are distinct from those of a Court of Appeal. In its first role, the CAS is seized of disputes immediately and directly as an Arbitration Court of first and sole instance, either through a compromise signed after the dispute has arisen or by virtue of an arbitration clause contained in a contract or in the rules of a national or international sports federation.

In its second role, the CAS intervenes with full powers of cognisance as a Court of Appeal and of last instance, in response to an appeal made by any party against a decision of the internal body of a national or international sport federation.

In its third role, the CAS gives Advisory Opinions, which may be sought outside the context of any sports litigation and which have a bearing on questions of principle relating to sport.⁵⁷

The independence of the sporting bodies' by-laws was acknowledged by the ICAS through the CAS code:

The disputes to which a federation, association or other sports body is party are a matter for arbitration in the sense of this Code, only insofar as the statutes or regulations of the said sports bodies or a specific agreement so provide.⁵⁸

So the individual by-laws of the sports associations guide the court's jurisdiction to hear a matter.

One of ICAS's functions allows it to establish a legal aid fund so access to an appropriate forum for both athletes and poorer sporting organisations has been established. Such a need was exposed in *Robertson's Case* where the sporting federation (cycling) could not afford to be represented in litigation before the Supreme Court of NSW when the athlete filed a restraint of trade application against a sanction imposed for a doping breach. It is not only athletes, but also the poorer, voluntary, amateur sports organisations that have limited funds for litigation so such a fund is necessary to ensure equity before the Court.

On analysis of its Code, the restructure of the CAS is encouraging. The Code allows for the President of the ICAS to be President of the CAS.⁵⁹ The President of the Court when it was without international status was Judge Mbaye, former Vice President of the International Court of Justice. Judge Mbaye is now President of both the ICAS and the CAS. Under his current leadership one hopes that both the newly constituted Court and the Council will be more interventionist in their role to serve the international sporting community than was the old CAS.

The formula for funding both the Council and the Court is as follows:

- one third - the IOC;
- one quarter - the Olympic Summer Sports Federation;
- one twelfth - the Olympic Winter Sports Federation; and
- one third - the Association of National Olympic Committees (ANOC).⁶⁰

57 *Ibid*, Art 60, 61.

58 *Ibid*, Art S1.

59 *Ibid*, Art S9.

60 From Motion at the Paris Conference of the IOC.

Funding was effected through deductions in advance from shares allocated to the organisations from the IOC's revenue (for example, income from television rights to the Olympic Games). The first deduction was made with the establishment of the ICAS. The CAS financial base is therefore secure and all organisations associated with the Olympic movement are committed to its development.

By insertion of a clause into the international and national by-laws of sporting organisations the CAS becomes the appeal forum for athletes who are members of ISFs.⁶¹ Athletes who are members of these bodies have appellate rights to the CAS once they have exhausted all the remedies under the Constitution of their ISF. The CAS by contract has consequently become the court of last instance for the Olympic sports' national federations, the national bodies of those organisations and the National Olympic Committees. The CAS now assumes a central position in avoiding, managing and resolving disputes relating to all Olympic international sports activity, including commercial activity and especially drug related disputes. Its agreement with the ISFs to resolve appeals from tribunals' decisions greatly strengthens the CAS's authority in international sports law. The CAS has become the exclusive forum for resolving doping disputes, be they between athletes and Olympic sporting bodies, or the NSOs and ISFs. As the *Reynold's Case* held until these forums are fully exhausted by agreement no Court should consider any issues between the parties. After the CAS forums are fully exhausted no court should consider any issues between the parties. After the CAS forums are exhausted there should only be a question as to procedural fairness and perhaps damage before State Courts. This of course remains to be tested.

There are now 150 named arbitrators from regions around the world for the CAS.⁶² The need to broaden the geographical representation of the arbitrators from outside Europe has been met. The view of countries where courts are structured under the common law to countries where courts are structured under the civil law system is that the codified process is much less sensitive to issues of procedural propriety and fairness. So arbitrators trained in the principles enunciated through the development of the common law, with its precedent base, have been appointed.

There was also a need for arbitrators with expertise in physiology and pharmacology. Many disputes require not only a knowledge of legal precedent but a comprehensive skill in understanding and assessing expert technical evidence. This was particularly so in *Modahl's Case*. The list of Arbitrators now reflects the selection of Arbitrators with a wide range of qualifications not only legal qualifications and from all regions recognised by the Olympics. Ellicot QC,⁶³ writing on the ICAS before its establishment, said that, "the success of the body will depend largely upon the quality of mind and degree of practical

61 The *Agreement Concerning the Constitution of the ICAS* lists all International Summer Sports Federations and International Winter Sports Federations who are signatories to this arbitration clause. It is important to note that the IAAF is a signatory.

62 CAS Code, Art S13.

63 RJ Ellicot QC is now a member of the ICAS.

legal and administrative experience of those appointed to it".⁶⁴ The same can be said of the CAS.

To initiate a dispute the party forwards an application with a statement of facts and legal issues. In reply the other party is notified, raises a defence and must immediately contest if competence is an issue as well as detail any counter claim. The Panel can consist of between one and three arbitrators. The parties are free to choose the way in which the approved arbitrators are designated. If no agreement can be reached then:

- if three arbitrators are provided for, both parties choose an arbitrator and these arbitrators then choose the president of the panel;
- if one of the parties does not choose an arbitrator or if the arbitrators cannot agree on a president, the president of the CAS will choose the arbitrator;
- the single arbitrator is provided for, the parties can agree on the arbitrator or if no agreement can be reached the arbitrator will be chosen by the president of the CAS.⁶⁵

It is the Appeals Arbitration Division which will be most involved in dealing with and defining drug-related disputes. The CAS will entertain appeals from a doping dispute only after the parties have entered an agreement to submit to arbitration and as long as the appellant has exhausted the legal remedies available to him or her through their sports body.⁶⁶

The arbitration agreement acknowledges that the award shall be final and binding upon the parties and the award subject to arbitration may not be set aside.

The appeals procedure outlined is really in the form of a hearing *de novo* because the Panel has the power to entertain an application for a hearing, full power to review facts and law, and hear witnesses, experts and oral argument.⁶⁷ The CAS therefore has power to intervene on questions of fact and penalty as well as considering legal issues such as whether natural justice principles were applied in the hearing of first instance.

The CAS has much to recommend it in relation to its costs rules. As to the costs parties incur in proceedings:

The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.⁶⁸

Fair costs procedures are the hallmark of true procedural justice. This must be balanced with the use of costs to deter unmeritorious claims. At present a claimant must pay a minimum fee of 500 Swiss Francs for filing a claim.⁶⁹ At

64 RJ Ellicot QC "The Reports of Athletes and the Rule of Law" presented at the IAF Symposium on Sport and Law, Monte Carlo 31 Jan - 2 Feb 1991, IAF Foundation Publication, p 49.

65 CAS Code, Art R40.2.

66 *Ibid*, Art R57.

67 *Ibid*, Art R65.2.

68 *Ibid*, Art 65.3.

69 *Ibid*, Art R65.2.

the conclusion of proceedings the arbitral award must state the costs of the hearing and "grant the prevailing party a contribution towards its legal expenses and other expenses".⁷⁰ This seems a fair cost provision for litigation that could involve expenses related to scientific testing, expert medical opinion, requiring interpreting services and the calling of witnesses from afar. The IAAF, at its Congress in August 1995 revealed that in the prior two years, it had paid legal bills of US\$4.5 million because of doping disputes with athletes. It said the American, French, German and Italian Athletic Federations combined had paid out a total of US\$39 million in legal fees in the prior four years, and almost all costs were expended in doping disputes.

D. The CAS and Advisory Opinions

The third role of the CAS, which allows for the provision of legally based advisory opinions, will guide sporting tribunals as they exercise their jurisdiction in doping dispute hearings at the first instance. This advisory opinion role of the Court can be expected to have a particular influence in doping dispute resolution and in fact, its first opinion related to a doping dispute.⁷¹ The advisory opinion role could provide a further legal aid to sporting bodies. It can provide a preliminary view from the Court on any legal aspect of a case. It is an ideal vehicle, if used by the sporting bodies to access legal advice and to provide a vehicle to assist tribunals avoid making legal errors. This should assist in the speedy resolution of a doping dispute at first instance.

The CAS published its first advisory opinion under the new order on 5 January 1995, following a reference from *The International Cycling Union (uci) and the Italian National Olympic Committee (Coni)*.⁷² The significance of this decision was that it addressed a dispute between an international and national sporting body. The Court advised which body of rules should be applied in a sanction for a positive drug test. This was a very interesting development in sports law and the beginning of an authoritative international precedent applicable to doping cases.

E. The Oceania Division of the CAS

Australia has been at the forefront in addressing problems related to the *lex fori* of the restructured CAS. The Oceania region is represented as one of the circles in the Olympic symbol and comprises Australia, New Zealand and the Pacific Isles.⁷³ There had been concern expressed by sporting organisations and athletes that the CAS, even after restructuring, would not completely meet the

70 *Ibid.*, Art R64.5.

71 *The International Cycling Union and the Italian National Olympic Committee* (Advisory Opinion, Keba Mbaye J, 5 January 1995, Ref TAS 94/128 UCI/CONI).

72 *Ibid.*

73 The Olympic symbol represents the union of the five continents and the meeting of athletes from all over the world at the Olympic Games. The colours represent the colour symbols of all the nations. The National Olympic Committees form five continental associations: the Committees of Africa, of Asia, of Pan-America, of Europe and Oceania. Australia belongs in the Oceania Division of the Olympic movement.

needs of athletes from around the world. The first concern was the *lex fori*, that is, under what law the dispute would be resolved. To allay the concerns, "The Law Applicable to the Merits" was inserted into the restructured Code. This Rule states:

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss Law. The parties may authorise the Panel to decide *ex aequo et bono*.⁷⁴

The fact that the rule uses *ex aequo et bono* opens a legal dilemma, for this term can have a different meaning for different people. What is fair and equitable to someone in civilization A may be unfair and inequitable in civilization B. Whose standard of *ex aequo et bono* should apply? Further, is there an international standard of *ex aequo et bono*? The classic is the *Abu Dhabi Arbitration*,⁷⁵ where Lord Asquith determined the 'proper law' to be applied was that of Britain, rather than the local law, even though the contract had been made in Abu Dhabi. He blatantly applied his value judgment about the inadequacies of the local law, and the superiority of English law. Whilst he acknowledged that there was no basis upon which English domestic law could apply, he maintained that the terms of the contract invited the application of good sense and common practice, "a sort of modern law of nature".⁷⁶ He added that the rules of English law "are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence - this modern law of nature".⁷⁷ Such comments clearly illustrate how diverse judicial concepts of what constitutes a fair and just law can be.

Nevertheless, the presence of the *ex aequo et bono* rule allays the fears of the NSOs so far as the law to be applied is concerned. The CAS rules determine unless each party agrees to the *lex fori* the Swiss law applies.

Since 1996, the Oceania Registry has operated out of Sydney. There is now also another registry of the CAS in Denver, USA. The CAS Oceania Division has dealt with a number of disputes especially in the lead up to the Commonwealth Games.⁷⁸

74 CAS Code, Art R45

75 1 ICLQ 247 (1952).

76 *Ibid* at 251.

77 *Ibid* at 252.

78 D Sturzaker, "Towards 2000: Is Sydney on the Right Track?" presented at Mission Possible: Sports, Business, and the Olympics, University of Western Sydney-Macarthur, 24 March 1999, for full analysis of CAS Code and CAS cases in the Oceania Division. For example:

- (a) an appeal by Australian sprinter *Nova Peris-Kneebone* concerning the decision by Athletics Australia to overlook her for one of the three sprinting births available in the 100m. The CAS upheld the decision of Athletics Australia, 4 September 1998.
- (b) an appeal by squash player *Anthony Heel* against his exclusion from the Games team; the CAS found there was no evidence the Selection Committee had not acted in the best interest of both the Commonwealth Games Association and Squash Australia;
- (c) the appeal by *Richard Upton* concerning his three months' suspension for taking a banned substance; The CAS upheld the sanction 16 April 1998
- (d) appeal of rower *Nick McDonald Crowley* following his 2 year suspension for steroids; the CAS found that the rower had received the substance involuntarily whilst receiving medical treatment. The ban was lifted 24 April 1998.

The CAS had not been without procedural problems. In *Foschi's Case*⁷⁹ the parties were unable to agree on the place for the hearing and the CAS Panel made a decision on the issue.⁸⁰

Since the CAS has operated in Australia one case was heard in 1997 related to selection for the Atlanta Olympic games, nine cases have been heard in 1998 and six in 1999. In 1998 two of the matters related to Selection disputes for the Commonwealth Games, the balance (seven) were appeals against sanctions for positive drug tests. In 1999 one case related to selection and five cases related to doping appeals. None of the matters dealt with by the CAS went by way of appeal to any State Court or the Federal Court. Of the twelve doping appeals heard in the two years of the full operation of the Oceania Division of the CAS the 'inadvertent use' of drugs (for example, salbutamol in asthma spray) was a defence successful in only five cases and as to penalty a "no sanction" decision was the result in all five cases. It was also used in the other seven doping cases but was unsuccessful.

The CAS from Lausanne now publishes a digest of its most significant CAS awards. The six cases it has published on doping appeals between 1995 and 1998 endorse the application of principles such as the 'strict liability' onus the athlete has to meet and outlines the application of appropriate sanctions to particular doping offences. It is noted all reported cases respect the confidentiality of the athlete by reference to them as athlete "X". However, in matters such as appeals from selection decisions the issues are usually aired in the local media and therefore reported.⁸¹

An example of a successful doping appeal heard by the Oceania Division of the CAS related to an elite athlete in the sport of rowing. He was found positive to the drug Probenecid, which was used to boost the effects of antibiotic medication given to him to attack a most serious golden staph infection from which he suffered and was hospitalised. After the positive finding, in accordance with the Australian Rowing Rules, he was suspended for two years for the use of a steroid.

While the strict liability test was found to apply the CAS held the athlete was so ill at the time he had not committed a 'voluntary' act. Further, the rules of the International Rowing Federation allowed for the rebuttable presumption defence, and this was applied. The penalty on appeal was no sanction. However, the athlete is still recorded on the register in Australia with a positive drug test. One may well ask, 'is that fair'?

In its international operation, CAS had not been without procedural problems. In *Foschi's Case*⁸² which was an American swimmer's dispute with the Swimming Federation the parties were unable to agree on the place for the hearing and the CAS Panel made a decision on the issue.⁸³

79 CAS Code, Art R47.

80 HE Judge Keba Mbaye, President ICAS/CAS: *The Origin of Sports Justice in the Olympic Family* ICAS Meeting, Damascus, June 1997, p 7.

81 Note 78 *supra*.

82 CAS Code, Art R47.

83 Note 80 *supra*.

F. The Ad Hoc Division of the CAS

The Olympics in the year 2000 will be held in Sydney. The Oceania Division will be expected to deal with all internal Australian disputes arising out of selection, but the Ad Hoc Division will hear any disputes during the actual Games, as it did in Atlanta in 1996.

In an attempt to prevent Court intervention, the Atlanta Olympic Committee, the body organising the September 1996 Olympics, established an expedited system of arbitration under the jurisdiction of the CAS. The intention was that "late breaking disputes could be resolved on-site through fair and neutral procedures that would protect due process rights and eliminate the need to resort to litigation in disparate national courts".⁸⁴ The CAS Code, authorised expedited arbitration proceedings.⁸⁵ The ordinary Arbitration Division of CAS agreed to expedite the proceedings.⁸⁶ United States law thus permitted expedited proceedings, so long as they were fair and effective.⁸⁷

To establish the jurisdiction only required two key documents, as the powers already existed under the CAS rules. The documents were a Participant Agreement,⁸⁸ and the ICAS Rules establishing the Ad Hoc Division of CAS with specialised rules for its operation.⁸⁹

The Ad Hoc Division rules indicated that the procedural protections of the CAS remained in place, thereby guaranteeing procedural fairness. Participants in the Atlanta Games were required to sign an agreement which stated that they would accept the jurisdiction of the CAS, and that its decisions would be final, non-appealable and enforceable, with the exception of appeal to full CAS arbitration. The agreement also stated that the athlete would not institute any claim, arbitration or litigation, or seek any form of relief in any other court or tribunal.

The Ad Hoc Division of the CAS heard four cases in Atlanta that related to sports issues other than doping. The only drug related dispute the CAS dealt with at Atlanta was *Korneev and Gouliev's Case*.⁹⁰ However, the parties did not challenge the jurisdiction of the CAS or the validity of the Participant Agreement.

An ad hoc division of the CAS also successfully operated at the 1998 Winter Olympics in Nagano. The Commonwealth Games operates independently of the IOC yet after monitoring the Atlanta experience, the organisers of the Commonwealth Games requested an ad hoc division of the CAS be established.

84 Law Offices Wunder, Diefenderfer, Cannon & Thelen, *Draft Forms and Suggested Rules Summary Arbitral Jurisdiction at the XXVI Olympiad Atlanta*, Georgia Memorandum to the IOC Washington 23 February 1995.

85 CAS Code, Art S6-8.

86 *Ibid*, Art R44.4.

87 *Merrill Lynch Pierce Fenner & Smith Inc v Cunningham* 736 F Supp 887, 889 (ND Ill 1990).

88 1996 Summer Olympic Games Participant Arbitration Agreement.

89 "Specialised Rules for Summary Arbitral Jurisdiction for the 1996 Summer Olympic Games Atlanta, Georgia". See also ICAS Amendment to the Code of Sports Related Arbitration - Ad-Hoc Division.

90 The Russian athletes were banned because the substance Bromantan was detected. The ban was overturned by the CAS Ad Hoc Division, *Korneev & Gouliev v International Olympic Committee*, (Unreported, CAS Appeal Panel, 4 August 1996).

The CAS is now perceived by the international sporting establishment as independent and its considerations objective.

The ad hoc agreement also allowed the CAS the status of *amicus curiae*, if the agreement was challenged in a civil court. This agreement would not have bound a civil court to grant leave to appear, but would allow the CAS opportunity to protect its interests and to defend its status as the Court of final appeal in Sports Disputes.

The specialised Rules allowed at Atlanta for the constitution of a Panel from a daily list of available ICAS listed arbitrators. The Panel could order injunctive relief or decide the dispute on its merits and issue an award.

In practice, the Ad Hoc Division in Atlanta demonstrated a real commitment and ability to deal with disputes expeditiously. Its decisions were respected. The independence of its determinations were not challenged.

After the events of the XXVI Olympiad in Atlanta, the Ad Hoc Division of the CAS has been assessed by all parties as an independent, fair, speedy and effective dispute mechanism. An ad hoc division of the CAS will be established for the Sydney Olympics.

The Sydney Olympics Games through the Host City Contract is governed by Swiss Law. It says:

Any dispute concerning its validity, interpretation or performance shall be determined conclusively by arbitration, to the exclusion of the ordinary courts of Switzerland or the Host Country, and be decided by the Court of Arbitration for Sport in accordance with the statutes and regulations of the said Court.⁹¹ The arbitration shall take place in Lausanne, in the Canton of Vaud, Switzerland.

G. Third Party Status at CAS Hearings

In the Ad Hoc Division of CAS in Atlanta in the matter of *United States Swimming v FINA*⁹² and through the Oceania Division of CAS in the *Kathy Watt v Australian Cycling Federation*⁹³ it became clear that a third party affected by a decision of CAS should be able to be a party to the hearing. The first case involved an Irish swimmer, Michelle Smith, where an objection was raised by the United States against her selection to represent Ireland. The second case involved selection of cyclist, *Lucy Tyler-Sharman*. Tyler-Sharman was not a party to the hearing and it was said her interests were protected by the Sporting Authority who selected her. Their decision, affecting her, was overturned. The CAS Code is to be amended to recognise third parties affected by CAS proceedings. This will broaden its jurisdiction considerably.

91 The parties to this contract were the IOC, the City of Sydney and the AOC. It was signed on 23 September 1993. On 4 February 1994, the Sydney Organising Committee for the Olympic Games (SOCOG) intervened as an additional party.

92 CAS Ad-Hoc Division Atlanta, 22 July 1996.

93 Oceania Division of CAS, Melbourne June 1997.

H. CAS and a Mediation System

The code of the CAS has been amended to acknowledge and support a mediation procedure.⁹⁴ This move mirrors in the CAS an initiative through the National Sports Dispute Centre (the NSDC) which already supports a mediation system in Australia. The NSDC is a separately funded organisation and has provided great support, especially to athletes and small sports organisations who do not operate their own Tribunals. The NSDC has assisted both parties in disputes as to rules, selection, and so on.

For most sporting disputes a 'mediation' procedure may assist resolution but in doping disputes, by the time the matter comes before CAS, it is of an appellate nature. Such an amendment to the code was necessary especially for commercial disputes but a mediation system will add little to assist the resolution of doping disputes. The list of mediators is limited to 30 members from around the world.

The CAS should address whether it is also an appropriate forum to assess damage and compensation. This issue has not been debated by the sports organisations. It is arguable the code rules could allow such an order.

VI. CONCLUSION

The role of the CAS was praised by Ms Watt's Counsel, David Grace QC, as a "terrific way" of settling disputes. He stated:

This is a perfect system for settling these disputes in an atmosphere that's much more relaxed, where the procedures are easy to comply with and the dispute can be heard quickly, efficiently and inexpensively.

The Court is an independent forum which allows each side to put its case any way it likes. The procedures are often moulded to suit the subject matter of the hearing and the ordinary rules of evidence don't necessarily apply.⁹⁵

The fundamental question now is the extent to which national courts will follow the Swiss lead in recognising and enforcing CAS awards in the face of due process or public order claims. The result will be what Nafziger calls "a blending of national and international institutions into a single process of justice that avoids judicial complexity".⁹⁶ This is the voice of the hopeful, who have been perplexed by the anomalies that have developed in the jurisprudential principles so far enunciated in doping disputes.

Normative trends confirm the growing commitment of national legal systems to the process of international sports law.⁹⁷ Adjudication is a last resort. If there should be adjudication it is hoped the CAS provides the final orders.

Nevertheless, as jurisprudential principles flow from the CAS, effective monitoring must be built into the process to protect the interests of all parties. It is imperative that the court promptly publish reasons for any decisions it makes.

94 Rules approved by ICAS motion, 18 May 1999.

95 Mr David Grace QC, in C Laird, "A Sporting Chance: Defending Cathy Watt's Right to Ride" (1996), 8 *Law Institute Journal* 8 at 9.

96 JA Nafziger, note 6 *supra*, p 31.

97 *Ibid*, p 22.

Gradually through arbitral decisions a distinctive *lex specialis* should emerge. The motivation behind the establishment and recognition of the CAS has been to protect the interests of international sporting competition while giving due recognition to the legal rights of the athletes. The process of refining its procedural rules must be a continuous one. There is no room for complacency.