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MORE THAN JUST A GAME: RESOLVING DISPUTES IN MODERN SPORT

Graeme Mew and Mary Jane Richards*

**Introduction**

Sport affects us all. It can lift (or depress) the spirit of whole nations. It evokes passion, dedication and excellence in individuals. Sport touches the lives of spectators, athletes, officials and sport organizations at all levels. But there is a darker side to this universality. Sport has become a significant part of the global economy, and as a result, the stakes for all parties involved have increased. Disputes have become inevitable. At the end of the spectrum there are parties, such as international sports federations, which have developed into powerful players, with a monopoly over their respective sports. At the other end of the spectrum, there are the athletes, who as individuals, may be greatly disadvantaged by the disparities in resources and power between themselves and their respective sports organizations. Yet it is the athletes who invest huge amounts of time and effort into excelling at their respective sports, often with only a brief window of time during which they can truly perform at the top. The chance to compete, and perhaps prevail, at the highest level can mean the difference between poverty and a comfortable income.1 From this perspective, disputes over issues such as team selection and eligibility have important and perhaps life-long consequences.

Although the parties involved all have a similar goal in the development of sport, they nevertheless have other less compatible interests. Athletes contend for limited space on teams and for recognition of their rights; sports organizations vie for the right to control their own administrative processes and members.

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1 For example, in Gilmer v. Laird (1989) 13 A.C.W.S. (3d) 302 (B.C.S.C.) the chance to compete at the Olympics was judicially valued at $20,000 CAD ($30,460 CAD or £14,050 at 2005 values). The case concerned a cyclist who was injured in a motor vehicle accident. One suspects that contemporary valuation could be much higher.
Historically, the resolution of sports disputes has been inconsistent and often ineffective. Until the late 1990’s it could be argued that a degree of disorder reigned, as an overlapping yet unrelated array of international, national, governmental and non-governmental institutions attempted to resolve disputes in sport with little regard for the consistency of outcome from one case to another, however similar the circumstances. Athletes’ rights, as well as the principles of natural justice and due process, were often ignored. Parties to proceedings, especially unrepresented athletes, found themselves facing their federation or organization in the dual role of adversary and adjudicator. In the last ten years, sporting federations and games organizers alike have recognized that this abundance of processes for dealing with disputes has done more to harm the sporting community than help it, due to the amounts of time, money and energy expended, as well as the loss of focus on sport itself. The Court of Arbitration for Sport (CAS), an international authority for the resolution of sports disputes established by the International Olympic Committee, has emerged as a leader in developing fair and consistent procedures for dealing with sport disputes. Many countries in the Commonwealth have followed suit and set up domestic sports dispute resolution systems, for the purpose of providing dispute resolution and education for the sporting community at a national level.

Although there is some debate as to whether a discernible set of principles for governing sports law-a lex sportiva- has evolved, a review of the literature does reveal a trend towards a more accessible, consistent and equitable system for the resolution of sports disputes, both at a domestic and international level. Emerging from a disjointed miscellany of unrelated avenues of legal intervention, there is a movement within many Commonwealth countries towards a unified mechanism for dispute resolution at a domestic level, overarched and harmonized by a “true supreme court of world sport” embodied by CAS at the international level.

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The Hierarchy of Decision Makers in Sporting Disputes

Albeit sometimes in irregular form, a pyramid of sports dispute decision makers has emerged.

The First Point of Resolution for Sports Disputes: National Governing Bodies and Their Subsidiaries

The primary responsibility for avoiding and resolving sporting disputes lies with national governing bodies (NGBs) or sports organizations (NSOs) and their subsidiary organizations (clubs, leagues, regional and provincial organizations). The vast majority of these organizations are “private tribunals”; private, autonomous and self-governing organizations that have the power to write rules and make decisions that affect their members. They derive their power from their governing documents—rules, regulations, by-laws and constitutions—which form a contract between the organization and its members. The contract thus both establishes the legal basis for the organization to exercise its authority, as well as the rights and obligations of membership. These organizations assume the responsibility to apply sanctions (for example, for play infractions) against members, and have responsibility for the selection of athletes to teams by establishing selection criteria, and for the application of those criteria to during selection competition. In many, if not most, cases the contract is in standard form, and the athlete has no negotiating position.

Because the authority to act and make decisions depends on the governing documents, it is in the best interest of every organization to have sound policies relating to the areas of governance that are often most contentious, such as eligibility and team selection, discipline, and especially hearings and appeals. This is of particular concern from a dispute resolution perspective, because although such governing documents are often not prepared by experts in drafting, in a dispute about their interpretation, a decision-maker at a higher level, such as an

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5 Ibid., at 2.
arbitrator or judge, may assume that they have been.  

Use of alternative dispute resolution to resolve sports disputes may be a prerequisite for government support. In Canada, for instance, government funding for NSOs is now contingent on the existence of organizational policies regarding resolution of disputes and appeal policies that provide for independent arbitration of disputes that have exhausted internal appeal mechanisms.  

In the United States, the Amateur Sports Act mandates arbitration to resolve disputes and requires all NGBs from each sport to agree to submit all disputes within the scope of the Act to binding arbitration with the American Arbitration Association. The Act also entitles Olympic athletes to review grievances with the United States Olympic Committee via the North American Court of Arbitration for Sport (NACAS), which is comprised of North American CAS members and supported by the American Arbitration Association.  

In the U.S., courts deny standing to athletes who have failed to exhaust their internal remedies within the sporting body.  

The Conflicting Roles of the Sporting Body as Rule Maker, Prosecutor and Judge  

Initially, disagreements between the organization and its members should be resolved by internal administrative review within the body, independent arbitration or a combination of the two. The organization should also establish appeal policies from its own decisions. Critics point out that this may lead to the perception, on the part of athletes, that they are fighting their organization as an adversary, according to rules established by that adversary, before adversary-appointed decision makers. This perception can be reduced by using outside arbitrators, which has led several Commonwealth countries to adopt sport specific independent arbitral boards for such purposes.  

The Relationship between International and National Federations and Domestic Law  

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7Findlay, Supra note 4 at 7.
9Nafziger, Supra, note 3, at 64; Carter, Supra note 2, at 5.
11Nafziger, Supra, note 3, at 38.
12Findlay, Supra, note 4, at 1, and footnote 2.
At the top of the power hierarchy are the international and national sporting federations (IFs and NFs, respectively). International federations perform a governing function over sport for the development and regulation of sport at an international level, and NSOs do the same on a national level. Rule 30 of the Olympic Charter gives international federations the power to establish eligibility criteria and to establish and enforce the rules to govern their respective sports. As agents for the international federations in their respective countries, national governing bodies are accountable to their IFs and must comply with their rules. However, the NSO is also bound by applicable national legislation. In fact, the relationship between the NSO and its IF is sometimes determined by national law. In turn, regional or Provincial Sporting Organizations (PSOs) are accountable to both NSOs and IFs. Disagreements between international federations and their constituent national organizations are often resolved by arbitration. For example, the International Association of Athletic Federations (IAAF) constitution Rule 21.1 provides that all disputes between members and the IAAF council must be submitted to the IAAF arbitral Panel for determination.

Although it is difficult to identify a clear order of supremacy due to the sheer number of countries and sports involved, Professor James Nafziger, who has written extensively in the area of international sports law, has identified several normative trends in resolving sport-related disputes. One such trend is that International Federations have the authority to review certain decisions of the national governing bodies, for instance, those involving issues of status or competition. International Federations have existed for decades, free of outside influence, and have developed their own “complex and entirely inbred procedure for resolving disputes.” Thus they have not historically welcomed the possibility of outsider decision-makers, particularly civil courts. Arbitration fares better. Professor Nafziger notes

13 Nafziger, supra, note 3, at 40.
16 Nafziger, supra, note 3, at 38.
18 Nafziger, supra, note 3 at 39.
20 Ibid., at 133.
21 Carter, supra note 2 at 2. (quoting James Nafziger).
that where there are disagreements between the two bodies that do not involve national legislation, they are usually resolved by arbitration.\(^{22}\)

International Federations have a lot of control over the resolution of a dispute. An example is the case of \textit{Nagra v. Canadian Amateur Boxing Association} (2000).\(^{23}\) In that case an athlete, through taking civil proceedings, successfully compelled an NSO to allow him to compete under circumstances found to have been in breach of an international federation’s regulations. Article 30 of The International Amateur Boxing Association (IABA) regulations required all competitors to be clean shaven as part of the pre-competition medical examination. As a Sikh, the athlete wore a beard. A Canadian court had found those regulations to be in violation of his human right to freedom of religion. However, the national sporting organization was bound by the rules of the IF and could have incurred sanctions for obeying the court order to allow that athlete to compete.\(^{24}\) Further, the IF had the power to prevent the athlete from competing internationally, since competitions and national sporting organizations outside of Canada are outside the jurisdiction of Canadian courts.\(^{25}\) The practical result of this was that the athlete could not compete outside of the jurisdiction of his NSO, thus eliminating the possibility of meaningful competition in an international forum.

An Additional Layer of Complexity: NSOs and Multi-sport Organizations

National governing bodies are also constrained by the decisions of multi-sport organizations such as National Olympic Committees (NOCs) and National Commonwealth Games Associations. National governing bodies have the power to select teams for single sport competitions, but for multi-sport competitions, the national governing body only has the power to nominate team members. The body responsible for naming the team is the multi-sport organization (for example, the Commonwealth Games Association of Canada).\(^{26}\) In selection disputes, depending on the timing of a complaint, this not only affects who has the authority to make decisions regarding such disputes, but also the jurisdiction or authority of

\(^{22}\)Nafziger, \textit{Supra}, note 19 at 133.


\(^{24}\) Haslip, \textit{Supra}, note 17, at 260, footnote 62.

\(^{25}\) \textit{Ibid.}, at 260.

\(^{26}\) Findlay, \textit{Supra} note 6, at 6.
an independent arbitrator to bind the organization.27

When an international federation decision conflicts with a national or international Olympic committee, the rules of the Olympic Charter reign supreme. At this point, however, it is still unclear under what circumstances the International Olympic Committee will trump an IF decision.28 Disagreements between IFs and National Olympic Committees are resolved by the IOC or the Court of Arbitration for Sport. For example, in CAS advisory opinion 94/128 (1995), CAS designated the primary jurisdiction for deciding doping infractions to the international federations, and not to the National Olympic Committees.29 National Olympic Committees have authority to intervene in disputes regarding eligibility in Olympic competition and sometimes national legislation gives them the power to sanction international competition and determine eligibility status.30 The IOC has the authority to review a broad range of NOC decisions at the request of an athlete, an IF or on its own initiative, and is the ultimate internal decision maker within the Olympic movement.31 Notwithstanding this, the Court of Arbitration for Sport is the final arbiter for all disputes related to Olympic sport, with the power to overturn decisions by all sporting bodies within its jurisdiction, including the IOC.

The hierarchy of the Olympic Movement has a similar organization to that of the international and national Sporting Federations. The Olympic Movement consists of the IOC, national Olympic committees, international federations, organizing committees of the Olympic Games, and national sport associations, as well as the athletes who belong to them. The International Olympic Committee is paramount, and controls its membership via the Olympic Charter. All of the members of the Olympic movement are bound by the Olympic Charter and must abide by the decisions of the IOC.32

International federations must agree to comply with Olympic criteria and receive approval from the IOC board before they are recognized as an IF. This recognition is subject to

27 Id.
28 Nafziger, Supra note 3 at 39.
29 Ibid., at 39.
30 Id.
31 Ibid., at 40.
revocation if the federation fails to comply with the IOC rules. The Olympic responsibilities of the international federations include the selection of Olympic officials, determination of athlete eligibility, definition of the rules for competition, imposition of sanctions, drug testing and resolution of disputes. Most IFs submit disputes to the Court of Arbitration for Sport, although a few employ their own arbitral panel. However, arbitral panels administered by sporting federations can lead to many difficulties, chief among them the perception of partiality and bias, as the decision-maker is not entirely independent from the federation. This type of dispute resolution policy can be especially troubling if the federation has the discretion to overturn awards, as was the policy with the International Association of Athletic Federations (IAAF), before they amended their constitution to delegate all disputes to CAS for arbitration. The practical result of such veto policies is that the arbitration is not necessarily final and binding, and the potential for political manipulation, or the perception of such, is significant.

National Olympic Committees must also agree to abide by IOC rules. The NOCs can then in turn delegate the development and governance of Olympic sport to the national governing bodies. National Olympic Committees have the authority to recognize an NGB for any amateur sport, for the purpose of selecting and training athletes to represent their respective countries in international competitions. NOCs may intervene in disputes involving particular athletes in sanctioned competition. National legislation sometimes allows national Olympic committees to regulate international competition and eligibility. The IOC may review decisions by an NOC at the request of an athlete, or on its own initiative.

Similarly, the Commonwealth Games Federation is the supreme authority in all matters concerning the Commonwealth Games. The national Commonwealth Games associations, national governing bodies and international federations are bound by both the constitution

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34 Raber, *Id.*
38 Raber, *Supra*, note 14 at 81.
40 Nafziger, *Supra* note 19 at 133.
41 *Id.*
The complex sharing of power and interrelated yet individualized dispute resolution processes amongst the various sporting organizations and bodies has often led to confusion regarding who has jurisdiction or authority to make decisions concerning athletes, especially regarding eligibility and doping. During the 1990’s both domestically and internationally, momentum began to form for a movement towards a more unified and transparent system of solving such disputes. Internationally, this movement took the form of the Court of Arbitration for Sport. Domestically, several Commonwealth countries began to initiate their own national programmes for sport dispute resolution, with the aim of not only resolving sporting disputes with finality and without redress to the courts; but also the prevention of such disputes to begin with.

The Creation of National Programmes for Sport Dispute Resolution in the Commonwealth

Understanding the Need for a National Standardized Programme

Professor Richard McLaren, in his article “A New Order: Athletes' Rights and the Court of Arbitration at the Olympic Games” argues that the needs of the sporting community in disputes tend to differ from ordinary disputes in several ways. Firstly, sporting disputes tend to rest on highly technical fact rather than issues of law. Specific knowledge is required in deciding them, which may be lacking in judges. Secondly, disputes tend to require fast resolution. Thirdly, the international nature of sport tends to give rise to cultural barriers, conflict of laws, and disagreements about jurisdiction. Fourthly, due to the nature of disputes such as doping, confidentiality is very important. Finally, there has been an inherent resistance to litigation in the closely knit sporting community due in most part to the longstanding internal processes for dispute resolution, as well as ongoing relationships that will

43 Locklear, Supra, note 32 at 204.
not be served by the adversarial nature of litigation.45

In recognition of these unique needs, several Commonwealth countries have established national programmes for the prevention, arbitration and mediation of sporting disputes. A national, standardized system of dispute resolution has the benefits of ensuring consistency of outcomes, accessibility and affordability for interested parties as well as long term gains of satisfaction and compliance with outcomes and arbitral awards. In his article “Current Problems in the Resolution of Sporting Disputes in Australia”46, Paul Hayes argues that the need for such a system is illustrated by the challenges currently being experienced in Australia, where there is presently no standardized system of sport dispute resolution, and no less than six different means of pursuing resolution. These methods include the traditional court system, CAS (Oceania division), the National Sporting Dispute Resolution Centre (made somewhat redundant by the Sydney office of CAS)47, ad hoc tribunals set up by local and national sporting organizations, statutory tribunals and private mediation. Since none of these tribunals are related, Hayes argues the outcomes can be inefficient and inconsistent, due to the range of tribunals addressing similar regulations and issues in an unrelated manner.48 There has also been a perception of procedural unfairness and bias on the part of complainants, especially at the level of the ad hoc tribunals because often the sporting organization appoints the members of these tribunals.49 The U.S. faces similar difficulties. Professor Nafziger has stated that in comparison to the overly complicated array of decisions rendered by U.S. courts and independent arbitral bodies, the systems in the U.K., New Zealand, and Canada are much more efficient and effective.50

The Advantages Offered by National Sports Dispute Resolution Programmes

There are many advantages offered by an national programme of sport specific arbitration, set up independently of sporting organizations and designed to accommodate the unique needs of sports disputes. The hearings are generally expeditious, which is often important as many

47 Ibid., at 27. Since the establishment of CAS Oceania District Registry, the use of the NSDC for arbitration and mediation has become minimal.
48 Ibid., at 29.
49 Ibid., at 30.
50 Nafziger, Supra, note 10 at 11.
selection disputes arise on the eve of competition and traditional litigation does not allow for timely hearings and decisions. There have been criticisms that in complex disputes, last minute hearings may not allow for a fair and proper hearing in accord with the principles of natural justice. Imperfect as they may be, such hearings are probably the most adequate method of resolution available. Unlike litigation, last minute arbitration can accommodate parties who have may have already departed for competition and are geographically separated from the hearing. The cost of arbitration is a fraction of that of litigation; however, this can increase with the complexity of the matter, the number of parties, the format of the hearing and the involvement of legal counsel. In sport specific arbitration, adjudicators tend to be selected for both their legal expertise as well as their sport specific knowledge. This is especially important as sports disputes tend to be highly technical questions of fact.

Independent expert adjudicators are advantageous because the perception of bias that persists when a sports organization uses an internal appeal procedure is reduced. Internal administrative panels can often allow or be perceived to allow politics to override legal logic, impartiality and neutrality, leading to controversy and lack of compliance with arbitral awards. However, the policy of many national sport dispute resolutions programmes, such as the Sport Dispute Resolution Centre of Canada, is that the complainant must first exhaust internal administrative remedies before seeking independent arbitration. This seems logical at a lower level of sport; the use of independent arbitration to resolve disputes is neither practical nor economically feasible. But as one approaches the top of the sports pyramid, where the stakes are much higher and involve issues of livelihood and significant economic consequences, the case for independent adjudication becomes more compelling.

For a start, an important role for any domestic sport dispute resolution programme is that of an educational resource provider. This is critical to ensure fairness and consistency in decisions made at the level of sports organizations. The structure of the decision-making system must be transparent and accountable or parties will not accept the decisions made by

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51 Findlay, *Supra*, note 4 at 1.
52 *Id.*
54 Findlay, *Supra*, note 5 at 7.
57 Haslip, *Supra*, note 17 at 266.
it as binding. An athlete who knows in advance whether his or her particular dispute has arisen in the past, and how it has historically been dealt with, is more likely to accept the outcome.\textsuperscript{58}

Furthermore, domestic sport dispute resolution programmes can also serve to moderate the imbalance of power between athletes, coaches and sports bodies by providing for the systematic recognition and protection of the rights of athletes.\textsuperscript{59}

Harmonization with International Norms in Sport Dispute Resolution

The Canadian programme is an example of how domestic systems of sport dispute resolution operate with a goal of harmonization with the Court of Arbitration for Sport. The Sport Dispute Resolution Centre of Canada (SDRCC) modeled its ADRsportRED code\textsuperscript{60} after the CAS Code of Sport Related Arbitration\textsuperscript{61}, and the programme was developed in consultation with CAS representatives.\textsuperscript{62} Active members of CAS also serve as SDRCC arbitrators.\textsuperscript{63} The goal of harmonization was thought to be important because consistency of decision making both domestically and globally is the most desirable outcome. Such harmonization has already been achieved to some extent with the uniform doping regulations organized by the World Anti-Doping Agency (WADA).\textsuperscript{64} This is not to say that the international and domestic systems need be identical; the needs of the athletic community at a domestic level differ from those of the international athletic community.\textsuperscript{65} The function of the system at the domestic level is thus slightly different; it is appropriate that the services offered should be tailored to the needs of the community that is being served.

A Brief Comparative Analysis of the SDR Systems in the Commonwealth

A brief comparison of the services offered by the national sport dispute resolution programmes in the UK, New Zealand, South Africa and Canada, illustrates the importance of a tailored, domestic, sport specific Sport Dispute Resolution system. All of the programmes

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Online: http://www.adrsportred.ca/tribunal/code_e.cfm.
\textsuperscript{61} Online: http://www.tas-cas.org/en/code/frmco.htm
\textsuperscript{62} Findlay, \textit{Supra}, note 4 at 15.
\textsuperscript{63} Jodouin, \textit{Supra}, note 45 at 21.
\textsuperscript{65} Findlay, \textit{Supra}, note 4 at 15.
are relatively recent developments. In the UK, the Sport Dispute Resolution Panel (SDRP) was formed in 1997, and began its work in 1999. The Sports Disputes Tribunal of New Zealand was established in 2003. South Africa’s Sports Commission Dispute Resolution Centre (SCDRC), which operates under the aegis of the South African Sports Commission, was created in 1998. In Canada, an interim programme, called ADRsportRED was launched in 2002, and the permanent phase of the project, entitled the Sport Dispute Resolution Centre of Canada (SDRCC), was launched in 2004.

Types of Disputes

For the most part, the national sport dispute resolution systems of the Commonwealth deal with the same types of disputes, but there are also differences. For example the South African Sports Commission Dispute Resolution Centre does not deal with doping violations, but the programmes in Canada, New Zealand and the UK do. The most common issues that the South African SCDRC deals with are team selection and criteria; non compliance with the policies or constitution of an National Sporting Organization; poor communication between executives and members and the unification of federations. The majority of cases deal with the latter issue. There has reportedly been much splintering of sporting federations due to dissatisfaction of members. The Centre works to reunite these fractions.66

The UK SDRP deals with issues such as discipline, doping, suspension, eligibility, selection, child welfare, funding, commercial contracts or any other sports related matters.67

The Sport Dispute Tribunal of New Zealand is competent to hear any sports related dispute, particularly anti-doping issues, appeals against decisions made by an NSO, selection decisions, and assistance with matters of “national significance” or “interpretation” or other special cases.68

In Canada, the SDRCC is authorized to deal with any dispute with “national impact.” Disputes at the international, provincial, municipal and local levels fall outside the jurisdiction of the Centre. The SDRCC Dispute Resolution Secretariat will deal with disputes

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66 Email Correspondence with Mandy Van Der Laan (13 July 2005) On file with author.
67 Online: http://www.sportsdisputes.co.uk/.
regarding national team selection, government grants for training and competition expenses (“carding”), harassment, discipline, eligibility, contractual interpretation, doping and appeals from any decision handed down by a national sport organization or multi-sport organization. Before a party can apply for SDRCC arbitration, the internal appeal process must first be exhausted. It has, however, been suggested that claims should be allowed at any time, as internal appeal mechanisms needlessly complicate the system and slow the process down.

Mode of Resolution

Mediation and arbitration are offered by all of the programmes. South Africa offers conciliation services for minor disputes through “Certified Sport Leaders” (CSLs) who are individuals accredited by the Commission as proficient in mediation. The SDRCC is about to initiate a similar programme using “resolution facilitators.” In South Africa, arbitration is offered through an external service, the Arbitration Foundation of South Africa. In Canada, New Zealand and the UK, the arbitration is offered through an panel internal to the programme.

Confidentiality and Publication of Decisions

There is a tension between the need for confidentiality in sport disputes and the reality that without publication, the goal of consistency and transparency in decision making cases will be difficult to achieve. The SDR programmes across the Commonwealth have achieved a balance of confidentiality and consistency that fits the needs and functions of their particular sports community. On the continuum of confidentiality and consistency, Canada and the UK are the median, while South Africa maintains the most confidentiality, and New Zealand is the most public.

In South Africa, all decisions are confidential and unpublished. In contrast, in New Zealand, hearings are open to the public, although a determination of confidentiality can be

69 ADRsportRed website, online: http://www.adrsportred.ca/faqs/index_e.cfm#120.
70 Jodouin, Supra, note 45 at 17.
72 ADRsportRED website, online: http://www.adrsportred.ca/newsletter/index_e.cfm#2.
73 Haslip, Supra, note 17 at 271.
74 Email correspondence with Mandy Van Der Laan (13 July 2005) On file with Author.
made at the pre-hearing. In New Zealand, all decisions, unless deemed confidential, are published and the media notified.\textsuperscript{75} In the UK programme, the hearings are confidential, but the SDRP may publish the decision unless both parties agree that it should remain confidential. In the case of any arbitration, the SDRP retains the right to publish generic, non-identifying information relating to the case.\textsuperscript{76} In Canada, under article RA-5 of the ADRsportRED code, all arbitral proceedings are confidential and not open to the public. However all arbitral awards are published unless all parties involved, including the Panel and Chief arbitrators, agree.

**Types of Services Offered**

With the exception of the SDTNZ, all of the programmes offer educational materials on the prevention of disputes and dispute resolution training, in addition to dispute resolution services.\textsuperscript{77} The South African and UK programmes offer independent investigations and advisory opinions. The UK Sport Dispute Resolution Panel offers assistance with dispute resolution within sporting bodies themselves, for example, appointing independent tribunals and appeal boards to sporting bodies. The SDRCC Resource and Documentation Centre maintains a website with free access to services such as arbitral decision databases, templates of contracts and administrative policies, and summaries of cases and emerging jurisprudence. The SDRCC also includes an ombudsperson service.\textsuperscript{78}

**Finality of Arbitral Decisions**

The right to appeal an arbitral decision rendered at the national level to an international level (i.e. CAS) is another area of dissimilarity between the SDR programmes in the Commonwealth. In New Zealand, there is a limited right of appeal to CAS. Grounds include a situation in which the international federation’s rules provide for such an appeal, an allegation that the Tribunal’s decision was affected by corruption, or an assertion of a breach of the principles of natural justice.\textsuperscript{79} This is similar in result to the UK SDRP rules of arbitration, which hold that a tribunal decision is final and binding, with no right to appeal.

\begin{footnotes}
\textsuperscript{76} UK Sports Dispute Resolution Panel Arbitration Rules, Rule 14.2.
\textsuperscript{77} Jodouin, Supra note 45 at 11; Email correspondence from Mandy Van Der Laan (13 July 2005) On file with author.
\textsuperscript{78} Jodouin, Ibid., at 19.
\textsuperscript{79} The Rules of The Sports Dispute Tribunal of New Zealand, Rule 24.2.
\end{footnotes}
subject to any applicable statutory or other rights. Those “other rights” include the “recognition that CAS would have jurisdiction where it is required to do so under IF rules or the WADA Code.” In Canada, the ADRsportRED code holds that for non-doping related arbitrations, parties expressly waive their right to appeal to any “judicial body to which an appeal may be properly made.” This would seem to include CAS. However, for doping related matters, the decisions of the Doping Appeal Tribunal are final, subject to the right of IFs and WADA to appeal to CAS. In South Africa, all sporting federations have the right to appeal a decision of the AFSA. The appeal is made to an appeal board, composed of independent mediators not involved in the dispute. If the party is unhappy with the decision of the appeal board, they retain the right to appeal to the national courts.

Lessons Learned From A National System of Sport Dispute Resolution

In her article “Principles underlying the Adjudication of Selection Disputes Preceding the Salt Lake City Winter Olympic Games,” Dr. Hilary Findlay highlights a number of themes that have emerged from an analysis of disputes resolved under the Canadian programme. These themes seem likely to apply across domestic programmes. Findlay notes that a large number of disputes arise from the interpretation of the contract between the sports organization and the athlete. This difficulty is often caused by shortcomings in drafting which lead to vague, incomplete and even contradictory policies. This leads to problems in arbitration, because an arbitrator does not have the authority to rewrite the contract by fixing drafting limitations in governing documents.

Another theme highlighted by Findlay is that many disputes arise from allegations of bias. This stems not only from the fact that when sports associations resolve disputes internally they are perceived as adversary and adjudicator, but also from the fact that the sports community is often small and members commonly perform different roles at different times. Sometimes these roles conflict. The decisions emanating from the arbitral panels suggest that some conflict of interest must be accepted, and some degree of bias is inevitable; it does not

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80 Email correspondence from Jon Siddall (22 July 2005). On file with author.
81 ADRsportRED code RA-1.
82 ADRsportRED code RA-9.10.
83 Email correspondence with Mandy Van Der Laan (5 August 2005). On file with author.
84 Findlay, Supra, note 6.
85 Ibid, at 6.
86 Haslip, Supra, note 17 at 265.
necessarily obligate an external hearing.87

A third theme is that the sport system is a hierarchical system, and the issue of jurisdiction and authority of decision makers is not always clear. For example, depending on the timing of a protest, the authority to decide a matter might lie with a national Olympic committee, or an National Governing Body. The competence and jurisdiction of an arbitrator to render an award will vary depending on the identity of the sporting body responsible for the decision.88

A fourth theme is that the factual basis for disputes tends to be highly technical in nature, especially for disputes regarding objective selection criteria. Disputes regarding subjective selection criteria tend to involve issues of bias.89

The final theme proposed by Findlay is that sports disputes often involve multiple parties. This is especially true for eligibility and selection disputes, since there are finite spaces on a team, and a successful application for the complainant means another member will be removed from a team. This raises issues of who should be included in the resolution process of a dispute. Variables for inclusion involve the subject matter of the dispute and the effect a decision might have on the interested party.90 It is interesting to note that under the U.S. Olympic Committee rules, when an athlete submits a claim for arbitration, he or she must submit a list of people who the athlete believes may be adversely affected by an arbitral award. The Sports Organization against which the application for arbitration has been filed shares the same responsibility. It is then determined by the arbitrator which of these individuals must receive notice of the arbitration. Once notified, the alerted parties have the option to participate in the hearing, but they are deemed to be bound by the results of the arbitration, regardless of their participation.91

The Role of Domestic Courts of Justice

In countries with a unified domestic system of SDR in place, and further at the international level, the question of whether a court has jurisdiction to intervene and review a decision made

87 Findlay, Supra, note 6 at 6.
88 Id.
89 Ibid, at 7.
90 Id.
by a sporting or arbitral body at any level remains relatively undecided. The appropriateness of such review is also hotly contested. From an international perspective, critics argue that the use of national law to resolve disputes arising out of international sports activities is inappropriate, and should only occur if fundamental rights or natural justice are violated.\footnote{Nafziger, Supra, note 19 at 130.} From a domestic perspective, the focus is on the authority of a private tribunal to govern itself and its members, and the authority of an arbitral board to make binding decisions.

On the issue of private tribunals, Findlay argues that in giving such bodies the authority to make decisions that affect their members, legislators have determined that private tribunals serve core values. Those values are clearly undermined if the decisions of such tribunals are regularly and easily challenged by courts.\footnote{Findlay, Supra, note 4 at 13.} On the issue of the finality of arbitral awards, there is judicial recognition that an arbitral award should not be overturned unless the decision is a result of abuse of power, fraud or corruption.\footnote{Locklear, Supra, note 32 at 216.} Courts typically deny standing or relief because of deference to the authority of sports organizations to apply their own principles and rules (or those of national and international federations) and will usually recognize and enforce the rules and decisions of appropriate national governing bodies and international federations.\footnote{Nafziger, Supra, note 3 at 45.} However, Professor Nafziger argues that if issues involve fundamental human rights, natural justice, public order, or mandatory law, then decisions made by an arbitral board should be reviewable by the courts.\footnote{Ibid., at 67.} Even in such cases, Nafziger cautions that judicial relief from decisions of sports bodies should be reserved for cases where due process violations are patent.\footnote{Ibid., at 105.}

If Professor Nafziger’s views are taken to their logical conclusion, an interesting issue emerges with the strict liability rule for doping infractions. Since such violations entail heavy sanctions, one might presume that they may raise issues of procedural and substantive fairness, and therefore such decisions should be vulnerable to review.\footnote{Ibid., at 45.} However, as will be more fully explored later in this discussion, several unique characteristics surrounding the issue of doping seem to immunize these decisions from judicial review. One is that it appears
that the recognition of the importance of anti-doping regulations trumps the principle of due process to the extent that strict liability is the only way to effectively fight doping in sport.99 The other is that the Court of Arbitration for Sport, in applying the World Anti-Doping Code, has set a precedent of considering the guilt or intent of the accused athlete at the sanctioning stage in the context of “exceptional circumstances”, mitigating somewhat the harshness of the strict liability rule.100

A Growing Judicial Recognition of the Appropriateness of Specialized SDR Processes

Throughout domestic judicial systems there is a growing trend towards the recognition of the jurisdiction and competence of specialized processes for resolving issues in national and international sports law.101 Domestic courts and other authorities normally enforce CAS awards and refuse to conduct hearings de novo in matters that have already been arbitrated. Exceptions can occur when the court feels that an arbitral award contravenes public interest, or raises issues about CAS’s jurisdiction, its competence to decide a given matter, or fundamental irregularities in administrative or arbitral procedures.102

Recent judicial decisions indicate a more formal recognition of the jurisdiction and competence of CAS to hear sporting disputes. It is noteworthy that in 2004 Olympic Games, CAS was advised that the exclusivity of the Ad Hoc Division would be respected by the Greek judiciary for reasons of pragmatism as well as of principle. As a consequence of CAS practice of publishing decisions, CAS is recognized as a “true arbitral forum” and thus the decisions rendered by CAS are entitled to the benefits of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.103 This has the added effect of excluding the intervention of domestic courts other than the Swiss National Courts to challenge or set aside awards (the involvement of the Swiss courts arises from the fact that, in all cases, no matter where the hearing actually occurs, CAS legally sits in Lausanne, Switzerland.)104 This was clarified in Raguz v. Sullivan (2003).105 In that case, the issue was

99 Oschütz, Supra note 15 at 687.
100 Ibid., at 689.
101 Nafziger, Supra, note 19 at 149.
102 Nafziger, Supra note 3 at 68.
104 Carter, Supra, note 2 at 6.
whether a national court can review a decision of CAS. An Australian court denied an appeal of a judoka, holding that it had no jurisdiction to address the merits of the decision because every competitor had signed a waiver agreeing to designate the authority to resolve any Olympic related disputes to CAS. Further, the court characterized this agreement as foreign (since the seat of CAS is based in Switzerland) rather than domestic, even though CAS arbitration took place in Australia. This decision is said to have strengthened the integrity and authority of CAS, and shows that courts are reluctant to interfere with CAS.106

In A & B v. IOC (2003), the Swiss Federal Tribunal ruled that CAS is sufficiently independent of the IOC and the international federations for its decisions to be considered “true awards”, and that CAS is “more akin to a judicial authority independent of the parties.”107 The perception since Gundel v. FEI/CAS (1993),108 is that recourse to Swiss courts is only available in narrowest of circumstances, for example where CAS has fundamentally misdirected itself in law.109

In the UK, the courts have a narrow parameter of judicial review. The rules within the governing documents of a sports organization are seen to represent “more than a contract, they are a legislative code, laid down to be obeyed by the members.”110 Courts only tend to intervene if the complainant was denied an appropriate hearing or was confronted with bias; if the sporting organization has exercised a monopolistic position over its members; if the sporting organization’s administrative tribunal exercised a public law function; or if its decision would violate statutory law or would have other public law consequences.111 For example, in Cowley v. Heatley,112 an English court reviewed a decision of the Commonwealth Games Federation to deny a swimmer of South African origin eligibility to represent England at the Commonwealth Games. The court denied the athlete’s appeal, but noted that the Commonwealth Games Federation’s constitution encompasses a large number of nations with different systems of law. The court held the view that the constitution could

106Nafziger, Supra, note 3 at 45.
109 Nafziger, Supra note 3 at 104-105.
110 Ibid., at 68.
111 Ibid., at 68.
not be governed by the national law of only one of the federation’s constituent members.\textsuperscript{113}

In the US, courts will not find the existence of an express or implied right to challenge the decisions of sports associations. US courts generally defer to private processes, as long as the decision is not a result of abuse of power, fraud or corruption. However, courts will review claims regarding property rights, trademarks and other commercial interests.\textsuperscript{114} In \textit{Harding v. US Figure Skating Association} (1994),\textsuperscript{115} the court stated that it should only intervene in the disciplinary hearings of a private association in the most extreme circumstances, such as when the association has breached its own rules and done serious harm to an individual. Even then, all internal remedies should first be exhausted. In such a case, the injunctive remedy should only be to correct the breach; the court should not intervene in the merits of the underlying dispute.\textsuperscript{116} In \textit{Michels v. USOC} (1984),\textsuperscript{117} the court stated that there “can be few less suitable bodies than a federal court for determining the eligibility or procedure for determining the eligibility of athletes.”\textsuperscript{118}

In Canada, SDRCC arbitration is final and binding, but it is recognized that the courts cannot be completely ousted, and in fact, have an appropriate role to play.\textsuperscript{119} If a decision was not made in good faith, was overbroad or addressed issues not pursuant to the dispute, then courts have jurisdiction to intervene.\textsuperscript{120} Courts are also appropriately utilized to enforce a decision of the SDRCC, on the basis that arbitral bodies are limited in their powers to sanction a party who is not complying with an arbitral award.\textsuperscript{121} Thus in Canada, the correct progression of a dispute is internal administrative procedures and appeals, then an appeal to the national SDR programme, sometimes with a possible appeal to CAS, with recourse to the courts if the award is not being honoured by a party.

\textbf{The Importance of the Principles of Natural Justice}

\textbf{Grounds for Appeal to the Courts}

\begin{itemize}
\item \textsuperscript{113} Nafziger, \textit{Supra}, note 3 at 70.
\item \textsuperscript{114} Nafziger, \textit{Ibid.}, at 72; Locklear, \textit{Supra}, note 32 at 216.
\item \textsuperscript{115} \textit{Harding v. United States Figure Skating Ass’n} 851 Supp 1476 (D. Or. 1994).
\item \textsuperscript{117} \textit{Michels v. U.S. Olympic Committee}, 741 F. 2d 155, 159 (7th Cir. 1984).
\item \textsuperscript{119} Findlay, \textit{Supra}, note 4 at 9.
\item \textsuperscript{120} Haslip, \textit{Supra}, note 17 at 269.
\item \textsuperscript{121} Jodouin, \textit{Supra}, note 45 at 20.
\end{itemize}
A breach of the rules of natural or moral justice is one of the grounds for which courts justify intervening in or reviewing a sporting organization or arbitral board’s decision. This is so because even though the governing documents of an organization are characterized as forming a contract between the association and its members, the monopolistic nature of the sporting organizations means that there is no real freedom of contract, at least on the part of the athlete. Therefore even though the private tribunal is responsible for making the rules that affect its members, the courts are the final judge as to whether such rules are applied in accordance with the principles of natural justice. The rationale for this can be found in Denning L.J.’s reasons in Lee v. Showmen’s Guild of Great Britain (1952). Denning L.J. stated:

“Although the jurisdiction of a domestic tribunal is founded on contract, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must for instance, observe the principles of natural justice.”

Denning L.J. added:

“Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts of their jurisdiction…. they cannot prevent (the tribunal’s) decisions being examined by the courts.”

In Breen v. A.E.U. (1972), Lord Denning, M.R. stated that even though sports federations derive their powers from contract, their rules are more like a legislative code laid down to be obeyed by their members, and so should be subject to control by courts like any code laid down by Parliament.

A violation of natural justice is also one of the grounds for appeal from the decisions of

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122 Nafziger, Supra, note 3 at 45.  
123 Findlay, Supra, note 6 at 2.  
125 Ibid., at 5.  
126 Id.  
128 Ibid at 1159.
sports organizations to domestic sport dispute resolution programmes, for example in Canada and New Zealand. At the level of the national SDR programmes, natural justice is the guiding principle of the process.\textsuperscript{129} Natural justice applies whenever “rights, property or legitimate expectations are affected.”\textsuperscript{130} Thus even though sports organizations are autonomous and have the authority to govern themselves and their members, they must do so in a manner that accords with the principles of natural justice.\textsuperscript{131}

While one cannot enumerate all of the circumstances in which a court will find that the interests of natural justice require judicial intervention, the requirements of natural justice generally depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal acted and the subject matter being dealt with. Generally, if the board or Tribunal is found to have acted in an unfair manner, review is likely to occur.\textsuperscript{132} However, the intention of the courts is not to regulate sporting bodies. The two general principles at stake are the right to a hearing and the right for the hearing to be free from bias.\textsuperscript{133} The right to a fair hearing requires that all parties who may be affected by an arbitral decision have a right to be present and participate in the hearing. A stranger to an arbitral award cannot be bound by it.\textsuperscript{134} This is especially important in selection disputes, as success for a complainant is likely to adversely affect a selected team member. The 2002 Canadian Commonwealth Games Swim Team selection controversy is a good illustration of this concept. Three swimmers successfully appealed the selection of the team to Swimming/Natation Canada’s (SNC) Appeal Panel. The deselected team members then filed an appeal with ADRsportRED, the predecessor to the Canadian Sport Dispute Resolution Centre of Canada. The arbitrator reversed the SNC decision. During this process, hundreds of team members, coaches and support persons spent a number of months in limbo, unsure who might be selected to or deselected from the team.\textsuperscript{135}

The Limits of Natural Justice

\textsuperscript{129} See for example, p. 7 of the SDTNZ information guide, online: http://www.sportstribunal.org.nz/downloads/guide.pdf.
\textsuperscript{130} Sharad Rao, “Rules of Natural Justice as applied in sporting disputes” [unpublished], p. 1.
\textsuperscript{131} Findlay, Supra, note 4 at 7.
\textsuperscript{132} Rao, Supra, note 130 at 3.
\textsuperscript{133} Id.
\textsuperscript{134} Grenig, Supra note 91 at 267.
There may nevertheless be circumstances in which respect for the principles of natural justice must defer to other important goals. An example is the strict liability rule for doping offences. Although strict liability does not permit the accused athlete to establish moral innocence, this has not been found to violate the principles of natural justice.\(^{136}\) This is justified by the interests of other competitors, who have presumably not ingested a performance enhancing or banned substance, and the importance of the goal of eliminating drug use from sport. If a federation had to prove intent in every doping case, the fight against doping would be impossible.\(^{137}\) The harshness of this result is often moderated by arbitral panels when deciding sanctions.\(^{138}\)

Another example of the principles of natural justice bowing to other important goals is the urgency of the need for a decision, for example on the eve of a major competition. Urgency may justify the exclusion of the principles of natural justice from consideration, but the interested party should be entitled to a proper hearing in which the principles of natural justice are applied.\(^{139}\) Of course, there are situations in which the adequacy of a later remedy may be compromised, and the decision-maker should bear this in mind in coming to the conclusion that urgency demands an exclusion of the principles of natural justice.\(^{140}\)

An example of a situation where urgency prevailed over natural justice occurred at the 2002 Salt Lake City Olympics. The Canadian Olympic Association filed an application for preliminary relief with CAS, requesting that the referees and judges involved in the pairs figure skating competition be compelled to appear before CAS to give evidence regarding the controversial first and second place finish of the Russian and Canadian competitors. The preliminary relief was requested in order to prevent any more judges from leaving Salt Lake City and to preserve evidence for a hearing that was scheduled for several days later.\(^{141}\) Article 14 of the CAS Ad Hoc Division Rules states that the Panel can provide interim relief to an applicant without first hearing from the respondent if such relief is necessary to protect the applicant from irreparable harm. The Panel should also consider the likelihood of success

\(^{136}\) Oschütz, *Supra*, note 15 at 681, 687.

\(^{137}\) Ibid., at 687.

\(^{138}\) Ibid., at 689.

\(^{139}\) Rao, *Supra*, note 130 at 2.

\(^{140}\) Ibid., at 3.

of the merits of the claim and whether the interests of the applicant outweigh those of the respondent or other members of the Olympic community. The Panel was satisfied that the irreparable harm might come to the applicants if the judges were allowed to leave Salt Lake City. The Panel also held that the interests of the applicant outweighed those of the respondent and other members of the Olympic Community. The preliminary relief was thus granted, even though the International Skating Union or the judges were not given the opportunity to respond.

In *Ferdandez v. Sport North Federation* (1996), the court noted that the principles of natural justice are flexible and dependant on the circumstances. The standard is whether a reasonable person would consider the procedures adopted by a sports organization as fair, considering all the circumstances. In fact, arguments have been made that the correct standard of review for a decision emanating from a private tribunal is not one of correctness, but one of “substantial compliance with natural justice.” This means that the determination of whether the principles of natural justice have been respected will vary along a continuum of factors, such as the level of performance, whether or not a decision affects a party’s livelihood, and whether or not the association has a monopoly over the sport. The greater the impact of the decision, the more stringent the requirements for procedural fairness. It is the role of the arbitrator to determine the appropriate measure of fairness in a given dispute.

Respect for the Principles Natural Justice as a Preventative Tool

At the domestic level, the goal for national sport dispute resolution programmes is to educate sports organizations of the importance of natural justice, and that the violation of these principles may lead to serious disputes and drawn out proceedings. In Canada, the impetus for the creation of the SDRCC was in part a study for the Secretary of State for Amateur Sport which found that all too often the rights of coaches and athletes and the principles of

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143 *Id.*
natural justice were being violated or ignored. The reasons for these violations were manifold. They included poorly drafted or inconsistent rules or regulations, the procedures used to enforce rules, and poor or unfair decision making.\textsuperscript{149} The research group that generated the study determined that the role of arbitration should be not to change the substantive policies of a sports organization, but to ensure that decisions made under such policies were made in compliance with procedural fairness.\textsuperscript{150} The ADRsportRED rules were crafted to overcome such shortcomings.\textsuperscript{151} In Canada, government funding for sport organizations is contingent on organizational dispute resolution and appeal policies that conform to the principles of natural justice, and acceptance of the SDRCC programme.\textsuperscript{152}

An informal survey of Canadian sport association websites reveals that the goal of the SDRCC to raise awareness of the importance of natural justice in the resolution of sporting disputes seems to have been effectively met. For example, the British Columbia Alpine Ski Association, a provincial sporting organization, posts their guidelines for minimum standards of Procedural Protection on their website. These guidelines outline the “rules of natural justice” as three basic principles which must be followed by all independent sport organizations. These principles include the authority or jurisdiction of decision makers, the right of the person affected to know the substance of a complaint made against them and to be provided with a reasonable chance to respond.\textsuperscript{153}

\textbf{Natural Justice at the International Level}

The Olympic Games rules are the rules which govern CAS Ad Hoc Division. These rules apply principles of natural justice and due process. In Athens, CAS emphasized several times the importance of natural justice or due process, but never found that it had not been complied with. CAS looked at factors such as the opportunity to attend the hearing and state a defence, and whether the exclusion of observers constituted a breach of due process. The panel was conscious of the need to allow potentially interested parties to participate, and would give such parties notice.

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\textsuperscript{149} Findlay, Supra, note 4 at 5.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Ibid.}, at 15.
\textsuperscript{152} \textit{Ibid.}, at 9.
\textsuperscript{153} Online: http://www.bcalpine.com/dyndata/forms/files/64Procedural%20Protection.pdf.
\end{flushright}
CAS has issued advisory opinions confirming that every decision made by a federation must respect the principles of natural justice, human rights and national and international law.\(^{154}\) For example, CAS will not uphold a disciplinary action imposed by an IF unless the IF has a legal basis for such action.\(^{155}\)

**Scope of Appeal and Hearing de Novo**

Should courts or appeal tribunals rehear the original case or apply thresholds of review typically used in civil appeals of judicial review? Practices seem to vary widely in sports cases.

**The Typical Judicial Scope of Appeal: Narrow**

The appropriate scope of appeal in the resolution of sports disputes is the subject of much debate. In civil courts, the scope of judicial review is narrow and based on procedural error. Such a review constitutes a summary review of a decision by a lower court, and not a rehearing of the merits of the case.\(^{156}\) The rationale for such narrow grounds is that the proper role for an appeal is not to re-decide a matter but to correct errors in decision making. Thus grounds for appeals with a narrow scope of review include a lack of authority to make the decision, failing to follow policy procedures, or biased or grossly unfair decision making. Disagreement with a decision is not considered an appropriate ground.\(^{157}\) Thus where a policy was properly applied, there would be no grounds for appeal.\(^{158}\)

**The Scope of Appeal in National SDR Programmes and CAS: Broad**

However in appeals from the decisions of sporting bodies, the scope of appeal is often wide enough to constitute a hearing de novo. A hearing de novo is a complete rehearing of the case, based on substantive error, or errors in fact, law or discretion.\(^{159}\) At the highest level of international sport dispute resolution, CAS has explicitly stated its authority to hear a case de novo. Article 57 of CAS code of Sports Related Arbitration states that CAS has the power to

\(^{154}\) Oschütz, *Supra*, note 15 at 680.


\(^{156}\) Findlay, *Supra*, note 4 at 4.


\(^{158}\) *Id.*

\(^{159}\) *Ibid.*, at 10.
order a hearing de novo and reduce sanctions that the Panel finds severe.160 Under Article 57, CAS enjoys the same powers as the IF whose decision they are reviewing. In the event that a sanction seems disproportionately severe, the panel has the discretion to reduce it.161 This is especially relevant in doping cases, because as discussed earlier, CAS uses this discretion to moderate the effects of the strict liability rule where an athlete can prove a lack of intention to ingest a prohibited substance. However, even with such broad discretionary powers, CAS will stay entirely within the legal realm and will only make logical interpretations flowing from the appropriate legal framework. If this provides an unjust result, CAS can only recommend to the IF of IOC that the relevant constitution or charter be amended.162

CAS further clarified its powers to hold a hearing de novo in B. v. FINA (1999).163 In that case the panel stated that it may consider “all evidence, oral and written, produced before it… in short, the hearing before the Panel constituted a hearing de novo, a rehearing of the merits of the case.”164 As a general rule, CAS applies the sporting organization’s rules at the time the dispute arose, but if the rules in place at the time of the determination are more favourable to the appellant, the Panel is obliged to apply the more favourable rules.165 CAS allows for a hearing complete with witness examination.166 While some commentators have observed that CAS does not allow for the cross examination of witnesses, the reality is quite different in that examination is routinely allowed and conducted, even by civil lawyers 168

At the domestic level, whether an appeal constitutes a hearing de novo is a point of dissimilarity amongst the national dispute resolution systems in the Commonwealth. In Canada, the SDRCC programme is based on the concept of a hearing de novo (ADRsportRED code RA-15). The arbitral panel will hear an appeal of a decision emanating from a sporting organization, or if the parties agree, they will hear a dispute that has bypassed the internal appeal mechanisms.169 The arbitral panel has full power to review facts and law, may substitute its decision for the earlier decision; and may substitute measures and grant

160 Oschütz, Supra, note 15 at 679, 699.
161 Ibid., at 699.
162 McLaren, Supra, note 35 at 404.
164 Oschütz, Supra, note 15 at 679.
165 Id.
166 Id.
167 Carter, Supra, note 2 at 5; Raber, Supra, note 14 at 94.
168 Carter, Supra, note 2 at 5; Raber, Supra, note 14 at 94.
169 Findlay, Supra, note 4 at 9.
such remedies and relief that it deems just and equitable in the circumstances.\textsuperscript{170} The scope of review is not limited to the traditional grounds of appeal, such as error in procedure or of jurisdiction, but instead allows a full review and examination of the substance and merits of the dispute by the panel. The justification given for this broadening of the scope of review is the lack of sophistication of the parties involved.\textsuperscript{171} However, in her article “Rules of a Sport Specific Arbitration Process as an Instrument of Policy Making”,\textsuperscript{172} Dr. Findlay has argued that a scope of review this broad can conflict with the policies of associations whose governing documents provide for a much narrow scope of review. The concern is that the effect of such a broad scope of review would be that an arbitral decision effectively rewrites the policies of a sporting organization, for example when such policies are poorly crafted. However Dr. Findlay notes that thus far, no Canadian arbitrators have taken their inherent authority that far.\textsuperscript{173} Indeed, they have limited their review to examining whether the organizations have followed their own policies or exercised discretion properly. It seems that arbitrators are particularly deferential to decisions made by sporting organizations that involve the use of discretion.\textsuperscript{174} For example, in \textit{Blais v. Tae Kwon Do Association of Canada} (2003),\textsuperscript{175} the panel held that “it is not within the scope of powers of the arbitrator to rewrite the selection process that has been developed by experts within the sport, and approved and validated by the Canadian Olympic Committee.”\textsuperscript{176} As the jurisprudence develops, it appears that in effect, SDRCC arbitral panels are operating under a self imposed narrow scope of review.\textsuperscript{177} An analysis of decisions by the SDRCC reveals that the standard of correctness, proposed by Denning L.J. in \textit{Lee v. Showmen’s Guild} (1952),\textsuperscript{178} is the standard that is applied by arbitrators when reviewing decisions of sporting organizations.\textsuperscript{179}

In New Zealand, once an appellant has exhausted all of the appeal channels provided by their organization, the Tribunal will allow a rehearing of the evidence and submissions made

\begin{footnotesize}
\textsuperscript{170} Id.
\textsuperscript{171} Ibid., at 15.
\textsuperscript{172} Ibid., at 12.
\textsuperscript{173} Ibid., at 15.
\textsuperscript{174} Ibid., at 12.
\textsuperscript{176} Findlay, Supra, note 4 at 12.
\textsuperscript{177} Ibid., at 13.
\textsuperscript{178} Lee, Supra, note 124.
\textsuperscript{179} Findlay, Supra, note 6 at 3.
\end{footnotesize}
during earlier appeals, as well as any new points that the parties wish to make.\textsuperscript{180} The Tribunal is not bound by the dispute resolution procedures of the sporting body concerned, but will always apply that body’s rules and policies. This effectively constitutes a hearing de novo. Critics point out that if a Tribunal is going to rehear the case on its merits, the provision that complainants must first exhaust all internal appeal channels (some of which may provide for much narrower scope of review than does the Tribunal) is inefficient, as it only extends the time required to resolve the dispute because internal appeal decisions are not binding and offer no finality.\textsuperscript{181}

In the UK, although not explicitly stated in the SDRP rules, the tribunal is intended to have the discretion, subject to any other applicable rules, to hear a case on its merits. However in practice, the Panel has restricted its role to a review of the “relevant issues.”\textsuperscript{182}

In South Africa, the Sports Commission Dispute Resolution Centre rules of arbitration do not indicate the scope of review given to the arbitral or appeal panels. However, in practice, the SDRC empowers the AFSA arbitration panel to determine the scope of review. For an appeal of a AFSA panel decision, the entire case is reheard with the scope of a hearing de novo.\textsuperscript{183}

**The Scope of Appeal Among Sporting Federations and Governing Bodies: Typically Narrow**

At the level of individual sport organizations, the scope of appeal seems to be narrower. In her article “Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making,” Dr. Hilary Findlay analyzed the internal appeal policies of many sports organizations in Canada and found that most allow only narrow grounds for review and the scope of review is narrow as well.\textsuperscript{184} An informal poll of national and international sports association constitutions would suggest that this is the case outside of Canada as well. However, there are some exceptions. For instance, The International Rugby Board Regulation 17.17.7 grants the Appeal Committee the discretionary authority to conduct a hearing de novo based on the record of the decision of a Judicial Officer or Disciplinary Committee.

**The Role of The Court of Arbitration for Sport**

\textsuperscript{180} Rules of the Sports Disputes Tribunal of New Zealand Rule 12.9.2
\textsuperscript{181} Jodoin, Supra, note 45 at 19.
\textsuperscript{182} Email correspondence from Jon Siddall (22 July 2005). On file with author.
\textsuperscript{183} Email correspondence from Mandy Van Der Laan, (10 August 2005). On file with author.
\textsuperscript{184} Findlay, Supra, note 4 at 8.
The role of CAS in the resolution of sports disputes is growing at an ever increasing rate. In addition to the great deference paid by the judiciary to the jurisdiction of CAS due to its expertise and perceived equity in decision making, sporting bodies are deferring to it as the ultimate body of appeal.\(^{185}\) Hence, from the top down, there is a harmonizing of the process of resolving sport disputes.

The expanding role of CAS has been called one of the most important developments in sports law in recent years.\(^{186}\) CAS is a non-governmental organization to which private and quasi-public (those that are dependant on government funding) sports federations and athletes have voluntarily deferred.\(^{187}\) It was formed in 1984 by the International Olympic Committee (IOC), due to a perceived need for a formal and authoritative tribunal that was removed from the supervision of federations, was impartial and neutral, and served the special needs of the sporting community.\(^{188}\)

The Organization of the Court of Arbitration for Sport

The seat of CAS is in Lausanne, Switzerland, and judicial review of any decisions originating from its arbitral panel fall under the jurisdiction of the Swiss Courts. CAS also maintains two regional offices in Sydney, Australia, and New York, USA. CAS has two distinct jurisdictions: the division for ordinary submissions to arbitration, such as contract disputes; and the appellate division, which provides for appeals from decisions of federations or clubs. Appeals are available only on points of law, not on the application of sporting organization rules.\(^{189}\) CAS also provides advisory opinions upon the request of international Federations, the national Olympic committees or the IOC.\(^{190}\) The Court of Arbitration for Sport also provides mediation services, but the scope of this service is limited to situations in which the issues are pecuniary in nature and related to sport. Doping and discipline are excluded from the scope of mediation.\(^{191}\)

\(^{185}\) Oschütz, \textit{Supra}, note 15 at 675.
\(^{186}\) Findlay, \textit{Supra}, note 4 at 1 (quoting James Nafziger).
\(^{188}\) McLaren, \textit{Supra}, note 44 at 3.
\(^{189}\) Carter, \textit{Supra}, note 2 at 3.
\(^{190}\) Carter, \textit{Ibid.}, at 5; Raber, \textit{Supra}, note 14 at 87.
The decisions of CAS are final and binding unless otherwise provided for by the parties or
the award. All decisions of CAS are published, which, as proponents of the concept of lex
sportiva argue, contributes to a consistent jurisprudence. Although CAS panels are not
bound to follow earlier panel decisions, CAS has declared that the panels are “disposed to
follow earlier CAS decisions for reasons of comity and in order to strengthen legal
predictability in international sports law.”193 The issues dealt with by CAS include
allegations of doping, eligibility, suspensions, breaches of contract, nationality for the
purposes of competition and team selection.194

The Evolving Jurisdiction of CAS

CAS is primarily responsible for the harmonization of sport dispute resolution. As recently
as the mid-1990s, these disputes were resolved using internal policies, private arbitrators and
courts of law, with very little common criteria or jurisprudence and almost no transparency of
decision-making. In the early 1990s, a network of agreements began to form between CAS
and national and international federations, accepting CAS as the final arbiter and dispute
resolution mechanism. The question remained, however, how national courts would regard
the jurisdiction of CAS. This question was partially answered in Gundel v. FEI/CAS
(1993).195 In that case, an international federation suspension was upheld by CAS. The
athlete appealed to the Swiss Federal Tribunal, Switzerland’s highest court. The Tribunal
upheld CAS award and recognized CAS as an arbitral court, but criticized the close
relationship between CAS and the IOC and warned of the possibility of a perception of
bias.196

The decision in Gundel led to a reorganization of CAS. The International Council for
Arbitration for Sport (ICAS) was created to replace the IOC as the governing body of CAS.
The ICAS consists of 20 members, all high level jurists, none of whom may participate as
arbitrators or counsel in CAS arbitrations. The ICAS elects its own president, and each
member is appointed for renewable four year periods.197 The IOC no longer has direct

192 Carter, Supra, note 2 at 5; Raber, Supra, note 14 at 87.
193 Oschütz, Supra, note 15 at 680.
194 Nafziger, Supra, note 19 at 143.
195 Elmar Gundel v. FEI/CAS, I Civil Court, Swiss Federal Tribunal (March 15, 1993). (Hereinafter “Gundel”).
196 Carter, Supra, note 2 at 4, Oschütz, Supra, note 15 at 677
197 Carter, Ibid., at 5; Raber, Supra, note 14 at 84.
operating control over CAS. The duties of ICAS include amending CAS code; electing CAS president and deputies of the ordinary and appeal divisions; appointing and removing arbitrators; and approving CAS budget.

The composition of CAS was also reorganized following Gundel, to emphasize its independence. CAS now consists of 300 arbitrators of diverse backgrounds and nationalities. The IOC no longer has sole responsibility for nominating members and funding CAS. International Federations and National Olympic Committees also share in these responsibilities. Members vary in their backgrounds and expertise, from former athletes and sporting officials to lawyers and independent arbitrators. It is thought that a diverse panel will reach more accurate decisions because such individuals bring a number of different perspectives, education and expertise to the hearing.

As substantial as these changes have been, critics say they have not gone far enough. Many point to the relative absence of female arbitrators, and the narrow scope of socio-economic backgrounds among the panel members, as problematic. There have also been criticisms directed at the fact that those who sit as arbitrators for CAS are not prevented from appearing as counsel in front of the it. Although ICAS members cannot sit as arbitrators or act as counsel there are no such provisions for CAS members.

In 2003, another decision by the Swiss Federal Tribunal cemented the role of CAS in the resolution of sporting disputes. In A & B v. IOC, the Tribunal held that CAS is a fully independent and impartial arbitral tribunal, separate and distinct from the IOC. The Tribunal considered CAS to be “a judicial authority independent of the parties,” and its decisions to be “true awards.” Also in 2003, WADA designated CAS as the court of final review for international doping disputes. Doping disputes are among the most inflammatory and serious in the world of sports. The message of confidence in CAS expressed by WADA

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198 Carter, Id.; Raber, Id.
200 Carter, Ibid., at 4.
201 Carter, Ibid., at 5; Raber, Supra, note 14 at 94.
203 Ibid., at 280.
205 Nafziger, Supra, note 3 at 53.
206 Carter, Supra, note 2 at 5.
further solidifies the role of CAS as an instrument of synchronization for sport dispute resolution at an international level.

Probably the most convincing proof that CAS is independent from the IOC is found within the decisions emanating from the arbitral Panel. CAS has overturned decisions by the IOC and has criticized the IOC on a number of occasions.\textsuperscript{207} For example, CAS has criticized IFs for “high handedness” and national Olympic committees for abusing the rules of fair play.\textsuperscript{208} In Athens, CAS was critical of an IF’s attempts to limit the scope of substantive review of a ruling of its own review board’s decision in the face of a broad submission to CAS arbitration.\textsuperscript{209}

The Basis for CAS Jurisdiction

The jurisdiction of CAS is based on contract. CAS exercises jurisdiction either by virtue of the rules forming part of a sporting body’s governing documents or by virtue of ad hoc arbitration agreements at major competitions.\textsuperscript{210} Article S1 of the Olympic Code provides for CAS arbitration “only in so far as the statues or regulations of the said sports bodies or a specific agreement exist” establishing CAS jurisdiction.\textsuperscript{211} Currently, almost all members of the Olympic Movement include clauses in their governing documents assigning jurisdiction to CAS in the case of a dispute.\textsuperscript{212} These agreements are the basis for the enforceability of the arbitral awards.\textsuperscript{213} Two long-time holdouts have recently agreed to recognize the jurisdiction of CAS. In 2002, the Fédération Internationale de Football Association (FIFA) and CAS came to an agreement whereby CAS agreed to create a specific list of arbitrators for football related matters, in accordance with FIFA statutes; and FIFA agreed to recognize the jurisdiction of CAS.\textsuperscript{214} In 2003, the International Association of Athletic Federations (IAAF)

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\textsuperscript{207} McLaren, \textit{Supra}, note 35 at 383.  \\
\textsuperscript{208} Nafziger, \textit{Supra}, note 116 at 233.  \\
\textsuperscript{209} Carter, \textit{Supra}, note 2 at 7; \textit{Torry Edwards v. IAAF & USA Track & Field}, CAS Ad hoc Div. (O.G. Athens 2004) OG 04/003.  \\
\textsuperscript{210} Nafziger, \textit{Supra}, note 3 at 41.  \\
\textsuperscript{211} Nafziger, \textit{Supra}, note 3 at 41.  \\
\textsuperscript{212} McLaren, \textit{Supra}, note 198 at 517.  \\
\textsuperscript{213} Oschütz, \textit{Supra}, note 15 at 677.  \\
\textsuperscript{214} Nafziger, \textit{Supra}, note 19 at 143.  \\
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\textsuperscript{214} Online: www.fifa.com/documents/static/ regulations/TAS\%20827\%20EN.pdf
amended its constitution to provide that “all disputes arising under (the IAAF constitution) shall be subject to an appeal to CAS.”

Another means of establishing the jurisdiction of CAS is through the mandatory arbitration agreement contained in the entry agreement for the Olympics and other major international competitions. All athletes must sign these agreements in order to compete. Such mandatory arbitration clauses have been criticized by some as a violation of athlete rights. One definition of arbitration is “the contractual proceedings by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of the matters involved, voluntarily select an arbitrator of their own choice and by consent submit the controversy for determination in substitution for the determination by the ordinary process of law.” It has been argued that mandatory arbitration clauses, by forcing an athlete to choose between waiving their right to other forms of resolution and not competing at all, are not a meaningful exercise of freedom of contract or consent. Under the New York Convention, a national court may refuse to enforce an arbitral award if it would be contrary to the notions of morality and justice, for example if the arbitral agreement was exacted under duress or unconscionability.

Most, if not all, Olympic Sports now have a CAS arbitration clause in their code/rules/regulations/statutes. However, not all disputes arising under the jurisdiction of an IF will necessarily be subject to a final appeal to CAS (practices vary from sport to sport). At the Olympics, CAS has jurisdiction over international federations by virtue of the fact that the IF is participating in the Olympics and therefore is deemed to have subscribed to the arbitration clause in the Olympic Charter. However, in the absence of a violation of the Olympic Charter, it has been suggested that CAS does not have jurisdiction over these federations.

The Supervisory Role of CAS

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217 Ibid., at 546.
218 Ibid., at 547.
219 McLaren, Supra, note 198 at 524.
CAS plays a supervisory role in international sporting disputes. This was exemplified by several decisions in Athens. CAS reiterated the recognized boundaries of what is and is not justiciable before a sports tribunal. CAS has the jurisdiction to overrule the decision or rules of any international federation if the federation decision-making body conducts itself with a lack of good faith or such a decision constitutes a violation of the principles of natural justice. In many cases CAS does uphold the IF’s interpretation of its own rules, but if the IF misinterpreted its own rules, CAS has the jurisdiction to quash the decision. CAS has held that the interpretation of any rule of a sporting body is a question of law. A purposive and contextual approach is necessary to discern their true intent and effect. After rules have come into force, a sporting body cannot impose a meaning which the rules do not otherwise bear.

The Extension of the Role of CAS through the Ad Hoc Division

The role of CAS as a neutral, independent and final arbiter of sporting disputes at the international level has expanded through the work of the Ad Hoc Division (AHD). The AHD was created to resolve disputes at the Olympic games in Atlanta in 1996, pursuant to article S6.8, which allows for the establishment of regional and ad hoc offices of CAS. It was hoped that a free, on-site dispute resolution service would prevent the potential onslaught of lawsuits prior to and after major competitions. All athletes who were eligible to compete were required to sign an entry form that included an arbitration agreement and a waiver of the right to sue in national courts.

The Unique Characteristics of the Ad Hoc Division

There are some differences in the operation of CAS and the AHD. Where, for example, CAS requires that a sporting organization explicitly give it jurisdiction to arbitrate disputes in the organisation’s governing document, the jurisdiction of the AHD arises from several specific conditions: the entry form arbitration clause for athletes, a pre-existing CAS arbitration clause in the governing documents of the federation, the deemed acceptance by a federation

\[221\] Ibid., at 10.  
\[222\] Id.  
\[223\] McLaren, supra, note 198 at 519.  
\[224\] Raber, supra, note 14 at 77.
of the AHD’s jurisdiction by participation in major games, and a contractual agreement between the host city and the IOC creating the jurisdiction of the AHD. It is important to note that according to article 74 of the Olympic Charter, international federations are deemed by their presence at the Olympic Games to have subscribed to the arbitration clause in the Olympic Charter. For example, at the Sydney Olympics, prior to the International Association of Athletic Federations’ endorsement of CAS within its constitution, the AHD nevertheless acted as an appeal court over IAAF decisions.

Similar to CAS panels, the AHD panels consist of three arbitrators, specially selected for the Olympic games. However, unlike CAS, which allows the parties to agree to the choice of laws, the AHD panel will deem what regulations, rules and general principles of law that will be applicable to the dispute. The AHD is bound to decide all disputes in accord with the Olympic Charter, applicable regimes, general principles and rules of law. The Olympic Games rules provide that the Panel must apply the principles of natural justice and due process. The AHD has the authority to establish the facts on which the application is based, and uses a mix of common law and civil law procedures to come to a decision. The decision must be rendered within 24 hours of the application having been made. The panel is also required to give brief written reasons; however the decisions usually contain a comprehensive analysis. Every AHD decision is final and binding and there is no right of appeal from a decision. If there is an appeal, it is limited to the Swiss Federal Tribunal. In special cases, such as where irreparable harm may occur, the panel can provide interim relief to an applicant without first hearing from the respondent. The panel will weigh factors such as the likelihood of the applicants case succeeding on its merits, and a balancing of the interests of the applicant, respondent and Olympic community. Such interim awards cease to

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225 McLaren, Supra, note 44 at 5.
226 McLaren, Supra, note 198 at 524.
227 McLaren, Supra, note 35 at 395.
228 McLaren, Supra, note 198 at 521.
229 Nafziger, Supra note 3 at 43.
230 McLaren, Supra, note 35 at 391.
231 McLaren, Supra, note 198 at 521.
232 McLaren, Supra, note 35 at 391; McLaren, Ibid., at 522.
233 McLaren, Supra, note 198 at 523.
234 McLaren, Supra, note 44 at 12; McLaren, Ibid., at 521.
235 McLaren, Supra, note 198 at 523.
be effective once the arbitral decision is rendered. The only instance of such a decision by an AHD was at the Salt Lake City Olympics in the Canadian ice-skating case (see below).

For the first decade of its existence, the AHD rendered most of its decisions in relation to doping offences. Save for a few well publicized exceptions, such as the Ross Rebagliati marijuana scandal at the 1998 Nagano Olympics, many of the decisions were confidential and unpublished, and it was difficult to glean what impact the AHD would have on the jurisprudence of CAS. Now, in addition to doping related decisions, the AHD renders decisions in the areas of eligibility, challenges to official’s decisions, and the validity of athlete suspensions. It is critical in many disputes, especially during the time of competition, that disputes are efficiently and quickly resolved so that competitions can continue without delay. This is obviously much more easily accomplished with on-site arbitration than it could be with recourse through the court system. However, the AHD will decline jurisdiction over commercial disputes which do not impact directly on athletes or require immediate resolution, since those are the types of disputes better fitted to national civil courts.

**The Impact of the Ad hoc Division**

The impact of the AHD on both athletes and sporting federations has been mostly advantageous and is starting to be recognized as such, since with every Olympic Games, the number of disputes submitted to the AHD increases. For all parties, the AHD decisions provide almost immediate finality, since AHD decisions are final and binding with no possibility of appeal. The services provided by the AHD are free, which is important for sporting organizations and athletes alike. All decisions are rendered within twenty four hours due to the recognition of urgent time limits during competition.

**Advantages to Athletes**

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236 Ibid., at 522.
238 McLaren, *Supra*, note 44 at 5.
240 Locklear, *Supra*, note 32 at 207.
242 Raber, *Supra*, note 14 at 89.
From the perspective of athletes, the AHD is designed to enhance, and not to attenuate, athletes’ rights.243 Athletes’ rights are protected by the Olympics Games rules which govern the AHD and provide for the application of the principles of natural justice and due process. The jurisdiction of the AHD is carefully restricted so that athletes do not give up their rights with national and international federations and courts, but have an immediate adjudicative body to which to turn during major competitions.244 The jurisdiction of the AHD only lasts during the Games, and only in relation to disputes arising out of the Games.245

The AHD has reversed decisions emanating from both the IOC and International federations, hence it is probable that the AHD system is perceived by athletes as fair and autonomous from the influence these bodies. For example, the AHD will not allow an international federation to exercise powers that are not found within its constitution; a legal basis must exist for disciplinary action or suspension.246 For example, at the 2000 Sydney Olympics, after three Bulgarian weightlifters tested positive for banned substances, the International Weightlifting Federation (IWF) suspended the Bulgarian federation, the result of which was the suspension of the entire team, including an athlete who had not tested positive.247 In overturning the suspension of the clean athlete, the AHD noted that following three positive drug tests in one year, the IWF had the power to impose a fine on a national federation; failure to pay the fine constituted the legal basis of any suspension of the federation. There was no legal basis to suspend a national federation without first imposing the fine.248

AHD panels have shown “practicality in accommodating athletes wherever possible”, by working toward constructive solutions, such as adding competitor slots.249 The AHD has been quick to deny any application of Olympic or federation rules that are made to gain unfair advantage or against the spirit of fair play. For example, following the first three qualifying games of ice hockey at 1998 Olympic Games in Nagano, the International Ice Hockey Federation (IIHF) discovered that one of the players on the Swedish team had lost his Swedish citizenship, and was thus ineligible to compete in the rest of the tournament. The

243 McLaren, Supra, note 35 at 390; McLaren, Supra, note 44 at 4; McLaren, Supra, note 198 at 521.
244 McLaren, Supra, note 44 at 4.
245 Ibid., at 12.
246 McLaren, Supra, note 198 at 532.
248 McLaren, Supra, note 198 at 532.
249 Carter, Supra, note 2 at 7.
Czech Olympic Committee applied to the AHD, requesting an invalidation of the games in which the ineligible Swedish player had competed. This would have re-ordered the play-off round to the advantage of the Czech team. Because the Czech team had not played against the Swedish team during any of the three impugned games, the AHD dismissed the Czech application.\textsuperscript{250}

In a similar attempt to manipulate the rules for strategic advantage, during the Olympic Games in Atlanta, the U.S. Swimming Federation, supported by the German and Netherlands teams, brought an application requesting that an Irish swimmer be prohibited from competing in the 400-metre freestyle because her entry application had been brought past the deadline. Although a strict interpretation of the rules would have sustained this objection, the AHD determined that switching competitors between events was a common and accepted practice amongst the federations and therefore the Irish swimmer was not prohibited from competing in the 400 freestyle.\textsuperscript{251}

\textbf{Advantages to Sporting Bodies}

The AHD offers advantages to sporting bodies and federations as well. By avoiding costly disputes in court, federation and national governing body resources can be better put to developing sport and supporting their members through training programmes and financial assistance.\textsuperscript{252} Although the AHD will not allow a federation to exercise a power not contained in its governing documents, if a federation or the IOC comply with relevant rules, the AHD is constrained by law and will never step outside of it. The perceived credibility and neutrality of the decision maker benefits the sporting bodies, because athletes are not constantly trying to appeal decisions they feel were made under the shadow of the federation or sports organization.

\textbf{The Boundaries of Arbitral Jurisdiction: Field of Play Decisions}

Field of Play decisions “reflect a compromise between a correct and just decision on the one hand, and a swift decision in order to have no interruption on the other. The fairness

\textsuperscript{250} McLaren, \textit{Supra}, note 44 at 11; McLaren, \textit{Supra}, note 198 at 538-539.
\textsuperscript{252} Raber, \textit{Supra}, note 14 at 88.
principle underlies this compromise.”[^253] This compromise is best reconciled when sports organizations ensure through that their regulations provide for the highest degree of certainty to be established during the most appropriate time frame.[^254] For example in *Yang v. Fédération Internationale de Gymnastique (FIG) (2004)*[^255], CAS upheld a decision by FIG, which held that a judging error was irreversible because the protest had been made after the close of competition. FIG had a policy requiring that technical errors must be identified and appealed before the end of competition. The rationale for this is to ensure that the persons in the best position to judge the error are available to resolve it; it also allows for certainty of ranking and results.

The importance of the finality of the sporting officials field of play decisions is illustrated by the Lindland/Sieracki matters,[^256] in which multiple and conflicting arbitral awards were rendered regarding a mat official’s decision that Lindland had used an illegal hold against Sieracki, which ultimately cost Lindland a place on the 2000 US Olympic wrestling team. In response to the ensuing calamity, the U.S. Olympic Committee created a new bylaw holding that the final field of play decision of a referee during competition is not reviewable by arbitration unless the decision was made outside the authority of the referee or was the product of fraud, corruption, partiality or other referee misconduct.[^257]

**CAS Policy Regarding Field of Play Decisions**

Although all disputes arising in Olympic and Commonwealth sport, no matter what the subject matter, fall within its jurisdiction, CAS and the AHD have a policy of non-interference in Field of Play decisions made by officials, since the referees and official are in the best position to determine their application.[^258] The CAS Code does not have a formal rule about this; it has simply been established as a precedent through the jurisprudence that while the Panel may review an official’s field of play decision, it will not be overturned.

[^254]: Ibid., at 10.
[^256]: Lindland v. United States Wrestling Ass’n Inc. (USWA), 230 F. 3d 1036, 1038 (7th Cir. 2000); Lindland v. USWA Inc. 228 F. 3d. 782, 783 (7th Cir. 2000); Lindland v. USWA Inc., 227 F 3d. 1000 (7th Cir. 2000); Lindland v. USWA Inc., Am. Arb. Ass’n No. 30-190-00443-00 (2000); Sieracki v. USWA Inc., Am. Arb. Ass’n No. 30-190-00483-00 (2000).
unless one of the few exceptions applies. Such exceptions include corruption, decisions made in bad faith or with malice, and arbitrary or illegal decisions. As long as a complainant has had the opportunity of a full and fair review by their National Governing Body, referee decisions should not be vulnerable to arbitral review, since the merits of the rules of the game and the subtleties of judgment calls are likely to be beyond the expertise of the arbitrator. The rationale offered for this is based on the law of contracts. Competitors bargain for the capability and expertise of an official. Although the sport specific knowledge of a CAS arbitrator often exceeds that of a civil court judge, it is still considerably less than that of an official.

CAS will decide on a rule of law, but will never replace the referee on the field of play for purely sporting decisions. However, the distinction between a purely sporting decision of rules, and a rule of law is “is not always easy to draw on the facts”. Officiating in many sports is by its very nature subjective and judgemental.

Similarly, technical decisions, standards or rules used during competition are shielded from scrutiny by CAS unless the rule or its application by an official is arbitrary, illegal or the product of a wrong or malicious intent against an athlete; or if the sanctions appear to be excessive or unfair. Even then, such review would only be procedural and not substantive in nature. The rationale underlying this policy is that the game cannot be constantly interrupted by dissatisfied athletes appealing to outsider decision makers. Only decisions that damage personality or property will be reviewed.

In *KOC v. ISU*, a case in which a disqualified speed skater alleged bad faith against a referee, the AHD panel explained why technical decisions of referees and judges would not be reviewed:

261 *Supra,* note 118 at 372.
262 Locklear, *Supra*, note 32 at 229.
266 *Id*.
“Sometimes mistakes are made by referees, as they are by players. That is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about a “field of play decision simply because he or she disagrees with that decision.”269

Examples of Field of Play Decisions

In Mendy v. Ass’n. Internationale de Boxe Amateur (AIBA) (1996)270, a referee ruled that a boxer had hit below the belt, and the AHD upheld that ruling. In that case, the referee’s decision was a purely technical one, based solely on federation rules. Thus the only issue was whether Mendy’s punch really was below the belt. The AHD did not decide that issue, but deferred to the original referee’s decision. The AHD stated that it is not the place of the Panel to review the application of rules of play because the Panel is much less well placed than referee or ring judges. This policy is limited to technical decisions or standards, and doesn’t apply to decisions taken in violation of law or social standards.271

In 2000, the Australian Olympic Committee requested a CAS advisory opinion regarding the “shark suits” approved by FINA.272 CAS found no reviewable issue, since permissible costumes for competition are included in the “rules of the game” and thus beyond the reach of CAS unless the rules were “contrary to general principles of law, if their application is arbitrary, or if the sanction provided by the rules can be deemed excessive or unfair on its face.”273 Since FINA had reached the conclusion that the bodysuits were allowed in compliance with its own governing regulations, there was no procedural issues or conflict with general principles of law.274

In another case during the Olympics in Athens, the jury failed to reset the timer during an

269 Ibid., at 614.
271 Carter, Supra, note 2 at 6.
273 Carter, Supra, note 2 at 7.
274 Nafziger, Supra, note 118 at 373.
equestrian event, which led to a German equestrienne incurring an excessive time penalty.\textsuperscript{275} In refusing to reverse this decision, the AHD stated that rulings “on the playing field” would not be reviewed, except where malice or bad faith were demonstrated.\textsuperscript{276}

At the 2000 Olympics in Sydney, a race walker was disqualified for exceeding the maximum number of form infractions during the race, but was only notified after the race had finished.\textsuperscript{277} CAS upheld the disqualification, stating “CAS arbitrators do not review the determinations made on the playing field by judges, referees or other officials who are charged with applying what is sometimes called the ‘rules of the game’ (one exception among others would be if such rules have been applied in bad faith, for example as a consequence of corruption.).”\textsuperscript{278}

An example of a circumstance where an official’s decision was determined to have fallen into the category of exceptions to the field of play policy, and was therefore presumably reviewable by CAS, was the controversy over the judging of the pairs figure skating competition at the 2002 Salt Lake City Olympics. In that case, the French judge, who claimed that she was pressured by her National Federation, admitted that she discounted the score she gave to the Canadian competitors in order to give the gold to the Russian competitors. Although the result was appealed to CAS by the Canadian Olympic Committee, before the hearing was held, the IOC, on the recommendation of the International Skating Union (ISU), made the decision to award a second gold medal to the Canadians. Jacques Rogge, the president of the IOC, stated that the decision was based on a principle of “justice and fairness for the athletes.”\textsuperscript{279} The ISU also suspended the French judge.

\textit{Yang: The Leading Case in Field of Play Decisions}

\textsuperscript{275} Comité National Olympique et Sportif Français (CNOSF) et al v. Fédération Equestre Internationale (FEI), CAS AHD OG 04/007 (Athens).
\textsuperscript{276} Carter, Supra, note 2 at 7.
\textsuperscript{278} Locklear, Supra, note 32 at 221.
The recent decision in *Yang v. International Gymnastics Federation (FIG) (2004)*\(^{280}\) is now considered the leading case in the area of field of play decisions. In *Yang*, the field of play jurisprudence was not directly relevant, because the issue was the consequences of an admitted error on the part of an official. In this case, an error was made in calculating the starting value for Yang’s parallel bar routine. Yang argued that as a result of the scoring error, he was deprived of the gold medal in the “all around” event. The international federation admitted the error after the fact and suspended the judges, but refused to alter the official scorings or the medal placings.\(^{281}\) CAS held that it would abstain from correcting the results on reliance of the error, because it was discovered and challenged in hindsight, and after the end of the competition.\(^{282}\) CAS stated “the solution lies within the framework of the sport’s own rules; it does not licence arbitral interference thereafter. If this represents an extension of the field of play doctrine, we tolerate it with equanimity.”\(^{283}\)

In *Yang*, CAS reaffirmed its competence to review Field of Play decisions, but only if the “decision is tainted by fraud or arbitrariness or corruption; otherwise although a court may have jurisdiction, it will abstain as a matter of policy from exercising it.”\(^{284}\) The Panel held that what is meant by “arbitrariness, fraud or corruption,” is more than just a wrong decision or one that a sensible person would not have reached, because that could open every field of play decision up to review. There must instead by direct evidence of bad faith, for example evidence or prejudice against (or preference for) a particular team or competitor. It’s a high threshold for an applicant to overcome, but CAS argued that a lower threshold would open the floodgates for reviews of field of play decisions.\(^{285}\)

In *Yang*, an error was identified and admitted in hindsight, but CAS still abstained from correcting the results:

“An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition….. No one can be certain how the competition in question would have turned

\(^{280}\) *Yang*, Supra note 254.

\(^{281}\) Ibid., at para. 2.16.4.

\(^{282}\) Beloff, Supra, note 219 at 9.

\(^{283}\) *Yang*, Supra, note 254 at para. 4.7.

\(^{284}\) Ibid., at para. 3.17.

\(^{285}\) Ibid., at para. 4.6. (quoting KOC, Supra, note 255 at 615)
out had the official’s decision been different, (and) for a court to change
the result on this basis would still involve interfering with a field of play
decision.”286 The panel stated that athletes have to accept that referees
make decisions on the basis of what they see and it is not open to an
athlete to challenge this on the basis of disagreement.287

The CAS enumerated the mistakes made by the FIG, all in good faith. FIG mistakenly
publicly accepted that there was an error of judging by their officials, but under FIG’s
regulations, an error must be identified during competition to have any affect on the result.
The error in this case was identified after competition, so could not successfully be
appealed.288 The second error that the FIG made was publicly stating that but for the error,
Yang would have been the winner of the competition. There was no way of knowing how
Yang or anyone else would have reacted had the fact that he was leading in points been made
known, thus the error did not necessarily cost him the gold medal.289 The third mistake that
FIG made was sending a letter to the actual winner, Paul Hamm telling him that Yang was
the “true” winner and asking him to surrender his gold medal. CAS thought there was no
reason for Hamm to do so. Hamm was not responsible for the judge’s error.290

Conclusion

It is clear that the field of sports dispute resolution is an evolving one. Sports disputes are
inevitable, and inevitably, the needs of the sporting community are better met with the speedy
and inexpensive forms of resolution provided by arbitration and mediation than they are with
litigation. Out of an overlapping disarray of dispute resolution methods, characterized by a
fragmented and inconsistent approach, has emerged a harmonized method for resolving
sports disputes. The goals are certainty, consistency, neutrality, fairness and respect for the
principles of natural justice at a local, national and international level. The promising
outcome is a process of cooperation between decision-makers, marked by a clear hierarchy of
authority and jurisdiction. Most importantly, it is a process that serves the needs and supports
the interests of all the parties involved. As Nafziger points out, sports law is unusual in that

286 Ibid., para. 4.7, 4.8.
287 Ibid., at para. 4.7.
288 Ibid., at para. 4.9.
289 Ibid., at para. 4.8.
290 Ibid., at para. 4.9.
international law is shaping domestic law, instead of the other way around. But perhaps this is appropriate, given the fact that sports is such a common passion across the globe, and that what it inspires in spectators and competitors alike is a certainty that we should all be playing by the same rules if a fair result is to be obtained.

291 Nafziger, Supra, note 10 at 9.