

# On track for the year 2000: Sydney and the Court of Arbitration for Sport

by DAMIAN STURZAKER\*

## Introduction

In the countdown to the Sydney Olympics in the year 2000 preparations for the Games are running at fever pitch. But one important aspect of the preparation is well in hand. Unlike other sites for Olympic Games, Sydney already has a body established for resolving disputes privately between parties through arbitration.

Since 1996 the Court of Arbitration for Sport ('CAS') has had an Oceania registry to handle disputes that arise in this area of the world. This permanent registry is to be contrasted with the special *ad hoc* divisions established by the CAS for the 1996 Summer Olympics in Atlanta and the 1998 Winter Olympics in Nagano.<sup>1</sup>

At the Commonwealth Games in Kuala Lumpur the CAS established a special *ad hoc* division consisting of a president, Raghunanadan S. Pathak, former Chief Justice of India and former Judge of the International Court of Justice in The Hague and six arbitrators. One of the arbitrators was Mr Robert Ellicott, a former Judge of the Federal Court of Australia. This was the first time CAS had operated at the Commonwealth Games.

## The CAS: Function and Structure

The CAS was created in 1983 at the instigation of the President of the International Olympic Committee ('IOC'), Juan Antonio Samaranch, apparently as a response to being named personally as a defendant in proceedings brought by athletes. It was created to resolve "disputes of a private nature, arising out of the practice or development of sport and, in a general way, all activities pertaining to sport".<sup>2</sup>

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<sup>1</sup> It was a requirement of participation that every athlete who signed an entry form for the Commonwealth Games agreed to submit any dispute to the arbitration panel. Prior to the institution of the arbitration panel all appeals of the Commonwealth Games had to be made to the Commonwealth Games Federation Court of Appeals, consisting of Commonwealth Games Federation office-bearers. Selection of the tribunal members was left to the discretion of the CAS. Report published in the *Times of India* available from Internet URL: <http://www.timesofindia.com/070898/07spor22.htm>.

<sup>2</sup> Court of Arbitration for Sport, CAS Compilation 1993 (the CAS Code) available from Internet URL: <http://www.olympic.org/eftas.html>.

To facilitate the operation of the CAS a body called the International Council for Arbitration for Sport ('ICAS') was created by the IOC, the International Federations ('IFs') and the National Olympic Committees ('NOCs'). The ICAS performs three major functions:

- (a) it gives greater independence to the CAS;
- (b) it performs all the administrative duties on behalf of the CAS including selection appointment of the CAS arbitrators; and
- (c) it undertakes all financial tasks essential to the operation of the CAS.

The ICAS is a 20-member council, composed of high level jurists appointed for a renewable period of four years. ICAS members must sign a declaration undertaking to exercise their functions in a personal capacity with total objectivity and independence.<sup>3</sup>

The CAS, which is overseen by the ICAS, is split into two divisions:

- (a) an ordinary arbitration division, which has the task of resolving disputes submitted to the ordinary procedure;
- (b) an appeals arbitration division, responsible for resolving disputes concerning the decisions of disciplinary tribunals or similar bodies of federations, associations or other sports bodies.

One hundred and fifty persons with legal training and an acknowledged competence in sports issues are appointed by the ICAS as follows:

- (a) 30 arbitrators from among those proposed by the IOC;
- (b) 30 arbitrators from among those proposed by the IFs;
- (c) 30 arbitrators from among those proposed by the NOCs;
- (d) 30 arbitrators chosen with a view to safeguarding the interests of the athletes; and
- (e) 30 arbitrators chosen from among people independent of the above organisations.<sup>4</sup>

These persons appear on the list of arbitrators for a renewable period of 4 years.<sup>5</sup> The arbitrators must be independent and not have any link with the parties. They must also have the availability needed to accomplish their task.

### **Advantages of the CAS**

The CAS satisfies the essential conditions of independence and objectivity required of an arbitral body and can pronounce awards equivalent to the judgments of state courts. The CAS has a number of advantages to proceeding before state courts.

<sup>3</sup> See CAS Code Art s5.

<sup>4</sup> See CAS Code Art s14.

<sup>5</sup> See CAS Code Art s13.

- (a) It is suitable for international disputes as the parties are free to choose the applicable law and yet have the benefit of flexible and simple procedural rules.
- (b) There is confidentiality between the parties and the arbitrator and the award is not published unless the parties agree.
- (c) It has specialist legally trained arbitrators with relevant experience and understanding of sports issues and of matters of concern to sports people.
- (d) It is efficient and quick. A decision generally must be given within six months of the hearing and that decision is final and binding. Generally the ordinary procedure is completed between eight and twelve months of filing a request. If there is an appeal the matter may take a further four months to conclude.
- (e) It is inexpensive and cost-efficient. When using the ordinary procedure parties pay the arbitrator's fees and expenses, a share of the CAS arbitration costs and the costs of any experts, witnesses or interpreters. The appeal procedure is free except for an initial fee of \$500 payable by the party lodging the appeal. The CAS will generally fund the appeal costs including the venue and the arbitrator's fees and expenses.

### **Jurisdiction of the CAS**

The CAS establishes panels, composed of one or three arbitrators, which have the task of providing for the resolution by arbitration of disputes arising within the field of sport, in the conformity with the procedural rules.<sup>6</sup>

The responsibility of the panels is to resolve all types of disputes of a private nature in relation to sport. This includes disputes arising from –

- (a) All types of legal relations between parties and for which it has been decided to call upon CAS arbitration. This includes sponsorship contracts, contracts for the granting of television rights to a sports event, contracts regarding the undertaking by an athlete, and contracts between an athlete and his or her manager. These disputes are submitted to the ordinary arbitration procedure.
- (b) Last instance decisions taken by the tribunals of the organisation concerned or similar tribunals within sports federations providing the statutes and regulations of these bodies provide for the jurisdiction of the CAS. This includes disciplinary decisions, in particular regarding doping; decisions regarding the disqualification of athletes and decisions concerning the official recognition of events. These disputes are submitted to the appeals arbitration procedure.

The panels may also give non-binding advisory opinions at the request of the IOC, the IFs, the NOCs and the associations recognised by the IOC and the Olympic Games Organising Committees.

<sup>6</sup> See CAS Code Art R40.

## Procedure

The rules that apply to arbitration before the CAS contain in the procedural rules which form an integral part of the code of sports-related arbitration. Regulations have been drawn up so that they integrate with the framework established by Chapter 12 of the Swiss Federal Code on International Private Law which governs international arbitration.

Arbitration proceedings before the CAS allow the parties a free choice of their arbitrator(s) from the CAS panel. The arbitrators must be independent and cannot be linked to the parties in any way.

The seat of every arbitration is in Lausanne (Switzerland) where the CAS places its infrastructure at the disposal of the parties.<sup>7</sup> In addition, two decentralised Courts have been established in Sydney and Denver. The actual place of arbitration may be elsewhere, for example when an *ad hoc* arbitration division of the CAS is set up for the duration of the Olympic Games. Such divisions were established at Atlanta in 1996 and in Nagano and Kuala Lumpur in 1998.

The arbitration is carried out in French or English. If the parties cannot decide between these two languages, the president of the panel decides. The parties may also choose another language by agreement. This choice will also require the agreement of the panel.<sup>8</sup>

The panel decides the dispute according to the rules of law chosen by the parties at the outset of the procedure or in the contract which includes the arbitration clause. In the absence of such a choice Swiss law is applied. The parties may authorise the panel to decide *ex aequo et bono*.<sup>9</sup>

## Ordinary arbitration proceedings

To initiate proceedings before the CAS a party must forward an application to the CAS head office in Switzerland.<sup>10</sup> The application does not constitute a detailed statement of the case and simply describes the facts and legal issues.

Unless it is apparent that there is no arbitration agreement referring to the CAS, the court office forwards the arbitration application to the other parties and requests that party to reply to the choice of arbitrators and submit an answer.

The answer should include a brief description of the case for the defence. If the respondent contests the competence of the CAS, it must express this at the outset within the framework of its reply. The answer may also include any counterclaim.

The panel is made up of one or three arbitrators. If the parties cannot agree on their number, the CAS takes this decision.

<sup>7</sup> See CAS Code Art R28.

<sup>8</sup> See CAS Code Art R29.

<sup>9</sup> See CAS Code Art R45.

<sup>10</sup> See CAS Code Art R38.

The parties are free to choose the way in which the approved arbitrators are designated. If no agreement can be reached then:

- (a) if three arbitrators are provided for, both parties choose an arbitrator and these arbitrators then choose the president of the panel;
- (b) if one of the parties does not choose an arbitrator or if the arbitrators cannot agree on a president, the president of the CAS will choose the arbitrator;
- (c) if the single arbitrator is provided for, the parties can agree on the arbitrator or if no agreement can be reached the arbitrator will be chosen by the president of the CAS.<sup>11</sup>

There are two phases in the ordinary arbitration procedure. The first written phase includes one or two exchanges of documents (a statement of case, counter-statement, reply, rejoinder) in which the parties have an opportunity to complete their application or answer respectively. These documents must be accompanied by all evidence on which the parties intend to rely, as well as the list of witnesses and experts they wish to be heard.<sup>12</sup>

The oral phase includes an oral hearing during which the panel hears the parties, witnesses and the experts. It is concluded by oral pleadings from the parties' representatives. The hearing will be confidential, unless the parties otherwise agree.<sup>13</sup>

The panel does have the power to require additional evidence to be produced, to order witnesses to be heard or appoint an expert.

The award is made by a majority decision, or in absence of a majority decision, by the president of the panel alone.<sup>14</sup> The decision must be in writing and must include the reasons. The award is final and binding on the parties and may not be challenged or appealed against with the exception of appeals on the following grounds:

- (a) incompetence or irregular formation of the arbitration panel;
- (b) arbitration award going beyond the application of which the CAS is seized;
- (c) the lack of a decision on one of the major points of the application; or
- (d) violation of the rights of the parties to be heard or lack of equal treatment or incompatibility of the award with public order.

An award must be challenged within 30 days from the date of the handing down of the award. The only Court of Appeal is the Swiss Federal Tribunal.

<sup>11</sup> See CAS Code Art R40.2.

<sup>12</sup> See CAS Code Art R44.1.

<sup>13</sup> See CAS Code Art R44.2.

<sup>14</sup> See CAS Code Art R46.

### Appeal arbitration proceedings

The appeal arbitration procedure is used where a dispute arises from a decision taken by internal tribunals or similar bodies of sport federations, associations or other sports bodies, when the statutes and regulations of those bodies provide for the competence of the CAS. A recent example is the Irish swimmer Michelle de Bruin who filed an appeal with the CAS following a four-year ban handed down on 6 August 1998 by FINA, the governing body of swimming. Originally a hearing date was expected for sometime in October 1998, however the appeal was not heard until 3 May 1999.

To initiate an appeal the applicant must send an application to the CAS containing the claims of the applicant and his choice of arbitrator together with a copy of the contested decision and the provisions of the statutes or regulations confirming that an appeal might exist. Unless the clause of the statutes or regulations of the sports body states otherwise the time limit for submission of the Statement of Appeal is 21 days from the appealed decision.<sup>15</sup> Ten days after the time limit for appeal expires, the applicant must submit a Statement of Appeal to the CAS containing a description of the facts and the legal arguments giving rise to the appeal, together with all the evidence on which it intends to rely.<sup>16</sup>

Unless it is apparent to the CAS that there is no arbitration agreement it will forward the Statement of Appeal to the respondent and the President of the Appeals Division proceeds to constitute the panel. The panel is usually three arbitrators with each party appointing their arbitrator and the Appeals Division President appointing the president of the panel.<sup>17</sup>

A respondent is required to submit an answer within 20 days following receipt of the grounds of appeal. The answer should include a complete statement of the case of the defence and should be accompanied by exhibits and evidence on which the respondent intends to rely. If the respondent intends contesting the competence of the CAS, he must do so from the outset in the framework of his answer.<sup>18</sup>

In the Appeal the panel has full powers to review the facts and the law. It is not compelled to accept the facts established by the inferior tribunal. The panel will also decide according to the applicable regulations of the sports body involved. If necessary, the panel will have recourse to the law of the country in which the sports body has its domicile to resolve legal questions which the applicable regulations of the body did not permit it to answer.<sup>19</sup>

The time limit to render an award in the appeal procedure is four months from the filing of the Statement of Appeal although this time limit may be extended.

<sup>15</sup> See CAS Code Art R49.

<sup>16</sup> See CAS Code Art R51.

<sup>17</sup> See CAS Code Art R50.

<sup>18</sup> See CAS Code Art R55.

<sup>19</sup> See CAS Code Art R58.

The award is by majority decision, or in the absence of a majority, by the president of the panel alone. It must be in writing and will include reasons for the decision. The award is final and binding and appeal or recourse is allowed with the exception of annulment proceedings against the arbitration awards on extremely limited grounds. The time limit for challenging the award is 30 days and the only Court of Appeal is the Swiss Federal Tribunal.<sup>20</sup>

Recently, the power of the panel to review the facts and the law has been challenged in a case between a Czech tennis player, Petr Korda and the International Tennis Federation.<sup>21</sup> In this case Korda tested positive for a class 1 prohibited substance during the Wimbledon Tennis Championships. The ITF's independent anti-doping review board concluded there had been a violation of the anti-doping programme. Korda appealed to the Anti-Doping Appeals Committee who accepted that he did not take the prohibited substance knowingly and that no sanction should be imposed beyond the mandatory sanction that Korda should forfeit all computer ranking points and return to the ITF all prize money earned at the tournament. The ITF filed an appeal with the CAS against the leniency of the penalty. Korda sought a declaration from the High Court of England and Wales that the ITF was not entitled to appeal to the CAS.

The claim by the ITF to the existence of a right of appeal relied on a clause in the anti-doping programme which stated:

"Any dispute arising out of any decision made by the... Appeals Committee shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport..."

The ITF contended that this clause conferred on both parties an absolute and general right of appeal on its merits to the CAS. Korda submitted that the clause conferred no such general right of appeal but only a limited right to resolve questions raised by the decision of the Appeals Committee. He stated that the clause extended only to the validity, enforceability or construction of the decision.

Justice Lightman agreed with Korda's submissions. He concluded that the section in the programme assumed that a final decision had been made and that the right of appeal was concerned only with resolving questions as to the impact of that decision on the parties.

This decision is being appealed to the Court of Appeal by the ITF. As the wording used in the programme was practically identical to the wording suggested by the CAS for inclusion in the statutes of any sports federation, the decision, if not overturned on appeal, has the potential to dramatically affect the operation of the appeal panel, at least insofar as those matters concerning Great Britain are

<sup>20</sup> See CAS Code Art R59.

<sup>21</sup> *Korda v ITF Limited*, trading as International Tennis Federation, High Court of England and Wales, Justice Lightman 29/1/99 reported in *The Times* 4/2/99.

concerned. Prudence would suggest that international federations should ensure that the wording used in respect of appeals to the appeal panel should expressly state that such an appeal should be a “full appeal” including reconsideration of findings of fact and conclusions in relation to penalties.

### **The CAS in operation**

In recent years the CAS has been increasingly used to resolve international disputes. Since its creation a total of 215 cases have been referred to the CAS. Some 35 of these cases have been referred to CAS since 1 January 1998.<sup>22</sup> The increased workload is partly due to the efforts of the CAS to ensure that the system is responsive to the need for an effective, affordable method of dispute resolution.

Prior to the Summer Olympic Games in Atlanta in 1996, the ICAS, as the parent body of CAS, set up a special *ad hoc* division with special rules for the settlement of disputes which would arise on the occasion of the Atlanta Games. The *ad hoc* division was described by CAS as a service to sports and athletes, providing them with an independent, fair, quick and inexpensive form of settling disputes arising during the Games. For example, as opposed to being expelled from the Olympics by decision of the IOC executive board following a positive drug test, an athlete has an immediate appeal to CAS which had the discretion to allow the athlete to continue competing.<sup>23</sup>

The *ad hoc* court consisted of a president and co-president, a court officer and 12 international arbitrators, all judges or lawyers of high calibre from all parts of the world all with expertise in sports law. All arbitrators were independent and none had any link with the IOC or any IF. All had been selected from the CAS list of 150 arbitrators.

Typically what occurred was that following a decision by the executive board of the IOC the aggrieved party would file an application before the CAS. Once the application was received, the president would put together a panel of three arbitrators to deal with the case. The panel would then call a hearing at which the parties (with or without the assistance of lawyers or other persons) would present their case and evidence. After the hearing, the panel made its decision, all within 24 hours of the filing of the application. Depending on the particular case, the decision would either be a final decision or a decision to refer the case to a regular CAS arbitration to continue after the Games.

Following on from this experiment another *ad hoc* division was established for the recent Winter Olympic Games in Nagano. This *ad hoc* division, comprising of two co-presidents and six arbitrators, was to resolve all disputes arising out of the Olympic Games.

<sup>22</sup> Letter from M. Reeb, counsel to CAS 3/11/98. Letter with author.

<sup>23</sup> CAS press release available from Internet URL <http://www.IJF.org/whatnew/latenews/wn-bb-010.html>



The *ad hoc* division of the CAS in Nagano received five requests for arbitrations. As two of the requests concerned the same dispute it was possible to hear both at the same time. Two of the cases received an enormous amount of international publicity: the Rebagaliati and the Samuelsson cases.<sup>24</sup>

The Canadian athlete Ross Rebagaliati won the gold medal in the snowboarding giant slalom competition. The athlete tested positive for marijuana and was disqualified by the IOC executive board and stripped of his medal. The athlete's appeal to CAS was upheld on the basis that there was no agreement between the International Ski Federation and the IOC that a positive testing for signs of marijuana could lead to sanctions.

The Samuelsson case arose after the International Ice Hockey Federation ('IIHF') disqualified Ulf Samuelsson, a player on the Swedish team, on the basis that he had lost his Swedish nationality upon becoming a US citizen. Nonetheless the IIHF allowed Sweden to keep the results it had obtained previously with Samuelsson playing. Two applications for arbitration were submitted to CAS: the Swedish National Olympic Committee and Samuelsson asked that he be allowed to continue competing in the Olympic tournament; and the Czech National Olympic Committee asked that the matches in which Samuelsson had taken part be forfeited. Both arbitration requests were dealt with at the same hearing.

At the hearing the CAS confirmed that the player had been granted US citizenship in November 1995. In accordance with Swedish law, he therefore automatically lost his Swedish nationality. The CAS therefore established that he was not eligible to compete for Sweden in the Winter Olympic Games in Nagano.

The request for arbitration from the Czech Olympic Committee was on the basis that according to the IIHF regulations, if a player was proven to be ineligible during the course of a championship, the games played with ineligible players were forfeited. Despite this the CAS observed that the rule was intended for competition such as world championships and not for the Olympic Games. The Tribunal held that as the Czech Republic had not played against the Swedish team it had not been disadvantaged. The CAS also concluded that the Czech Olympic Committee was inappropriately placed to ask for reversal of the IIHF's decision and that furthermore its attitude was offensive to the Olympic ideal of fair play. The decision taken by the IIHF was therefore upheld by the CAS.<sup>25</sup>

In the lead up to the Commonwealth Games the CAS dealt with a number of disputes including:

<sup>24</sup> CAS *Olympic Review* Vol. 20, April/May 1998. Available from Internet URL: <http://www.olympic.org/flat/news/review/1998>

<sup>25</sup> CAS *Olympic Review* available from Internet URL: <http://www.olympic.org/flat/news/review/1998>

- (a) an appeal by Australian sprinter Nova Peris-Kneebone concerning the decision by Athletics Australia to overlook her for one of the three sprinting births available in the 100m;<sup>26</sup>
- (b) an appeal by squash player Anthony Heel against his exclusion from the Games team;<sup>27</sup>
- (c) the appeal by Richard Upton concerning his three month suspension for taking a banned substance;<sup>28</sup> and
- (d) appeal of rower Nick McDonald Crowley following his banning for taking steroids.<sup>29</sup>

### **Conclusion**

In an increasingly leisure orientated world sport plays a greater role as a means of entertainment. The internationalisation of the media and the commercialisation of sport have combined to bring about an increase in a number of disputes connected with sports activities. The CAS has proved increasingly popular as means of resolving these disputes.

The CAS has demonstrated a capacity to respond to the needs of the international sports community for an effective, affordable and accessible means of resolving disputes. This has been evidenced in the establishment of registries in Sydney and in Denver as well as the use of special tribunals during the course of international competitions such as the Nagano Winter Olympics and the recent Commonwealth Games in Kuala Lumpur.

To engender even greater confidence in the CAS some recommend that:

- (a) the CAS should publish decisions to permit adequate evaluation of its fairness, consistency and efficiency;
- (b) publish the cost of each CAS arbitration;
- (c) provide for the cross-examination of witnesses before the CAS panels;
- (d) ensure the list of CAS arbitrators includes persons with diverse backgrounds including non-legal backgrounds;
- (e) impose reasonable time limits to complete a CAS arbitration and penalties for undue delays;
- (f) allow more liberal discovery;

<sup>26</sup> On 4 September 1998 Malcolm Holmes, as the CAS representative, upheld the decision of Athletics Australia. Available from Internet at URL <http://www.bday.co.za/98/0904/sport/s11.htm>

<sup>27</sup> The CAS Tribunal found that there was no evidence that the selection committee had not acted in the best interest of the Australian Commonwealth Games Association or Squash Australia. *ABC News* 11 August 1998 available from Internet URL: <http://www.abc.net.au/news/98/08/10/980810>

<sup>28</sup> The Court of Arbitration for Sport upheld the three month ban.

<sup>29</sup> The Court of Arbitration for Sport found that as the rower had received the steroids whilst in hospital battling blood poisoning he had been given the drugs involuntarily and would be cleared. *ABC News* 20 June 1998 available from Internet URL <http://www.abc.net.au/news/sport/moresport/1998/06>

- (g) disseminate information to athletes regarding the legal implications of signing agreements to arbitrate; and
- (h) encourage the formation of athlete unions with the authority to negotiate agreements with sports governing bodies.<sup>30</sup>

The CAS was established in recognition of the fact that in today's world sport is business. The success of the CAS will be judged according to whether participants in sport continue to embrace the CAS as the preferred method of resolving international sporting disputes.

<sup>30</sup> Nancy K. Raber, 'Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport', 8 *Seton Hall Journal of Sport Law* 1998 76 at page 96.