

Increased transparency as a tool to pursue institutional independence

Legal foundations of international sports federations and the Court of Arbitration for Sport

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Introduction

In 1983, the International Olympic Committee (IOC) ratified the Statutes of the Court of Arbitration for Sport (CAS) with came into force as from 30 June 1984. In its first year of operation, 1984, two procedures were initiated.² Since then, the CAS has developed into what is colloquially known as the “supreme court of sport” which is evident in the figures that 599 procedures across all sports were opened in 2016.³

As the CAS case load has grown, so too has the complexity of the legal landscape underpinning the open system of the international sport world pyramid. One of the more vital issues that the CAS has had to deal with, during this period of growth, is that of institutional independence from some of the larger international sports federations (IFs) that have supported the centrality of the CAS in the sports law world, such as the IOC and the Fédération Internationale de Football Association (FIFA). In this regard, scholars, academics and practitioners have criticised the CAS for its lack of independence from an institutional perspective. The issue of independence has again reared its head as the Pechstein series of cases have raised some of the same arguments that have been articulated over the course of the past 30 years or so.

As a result, the authors of this article will address the issue of transparency as a tool for the CAS to pursue increased perceived institutional independence. The authors put forth the thesis that the CAS legal foundation and its

place in the international sport world pyramid require absolute transparency in CAS appeal proceedings. The CAS hears appeals of decisions of IFs. According to Swiss civil and taxation law, IFs carry out public interest work that is akin to governmental pursuits which engage issues of public policy. As the CAS hears disputes within this legal framework, transparency of the CAS is necessary in order to instill public confidence in this quasi-judicial system similar to state courts. As an aside, it will be noted that the CAS system of arbitration is on a voluntary basis, where stakeholders must agree to submit to CAS jurisdiction and that reform may be a matter of self-preservation. It is for these reasons that increased CAS transparency is necessary, particularly when the CAS is reviewing the decisions of IFs. The CAS will only benefit from the perception that it is an independent institution fostering greater public confidence.⁴

It is from this perspective that the authors will propose certain amendments to the Code of Sports-related arbitration (the CAS Code) for the purpose of increasing transparency. These recommendations involve the composition of CAS arbitration panels and the disclosure of links to IFs; the publication of CAS awards; and the holding of certain types of hearings on a public basis.

Parenthetically, in order to demonstrate that transparency is necessary due to the legal nature of IFs, it is necessary to point out that the legitimacy of public institutions is contingent on the perception that such an institution is acting in accordance with sound fundamental legal principles. An increase in transparency will only increase the trust in a public institution for obvious

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² Court of Arbitration for Sport, *Statistics*, available at www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf (accessed 4 December 2017).

³ *Ibid.*

⁴ Much of the criticism relating to the independence of the CAS and its lack of transparency has focused on its potential institutional links with IFs, sources of funding and the composition of the International Council of Arbitration for Sport (the ICAS), the body charged with the administration of the CAS. Although some of those macro-institutional issues relate to the greater issue of independence as it manifests itself through transparency, the work of the ICAS is not the focus of this article but will be referred to tangentially. The focus of this article is to look at the legal foundations of IFs and how CAS arbitrations proceedings can increase transparency via changes to the details of the rules of the CAS Code.

reasons. The need for transparency in the CAS lies in its place as the gate-keeper of decisions of the IF. It is beyond the scope of this article to develop in detail the idea that public perception, trust and transparency are linked. This connection appears obvious; however it is necessary to point this out in this limited manner.

Ultimately, the key point to retain is that IFs pursue a public interest function; the CAS is the gatekeeper of the decisions of those organizations; and as the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code.

The place of CAS in the international sports pyramid

A larger proportion of the CAS work involves the review of decisions of IFs. In these types of cases, the IF is often a respondent in the CAS appeal proceeding. The involvement of an IF in a CAS proceeding necessarily raises public policy issues, as the overarching purpose and intent of IFs are to support and promote the development and administration of a particular sport.⁵

For a variety of tax and privacy law reasons, many IFs have chosen to establish their seat of operations in Switzerland as an “association.” There is an inherent public policy aspect to these types of “associations” due to their legal foundation and the objectives they pursue. Art. 60 of the Swiss Civil Code (SCC) identifies associations as entities with “*political, religious, scientific, cultural, charitable, social or other non-commercial purpose*.”⁶ This implies that associations are quasi-charitable in nature. Swiss associations are also limited, in that the Swiss Federal Tribunal (SFT) has determined that associations can pursue any purpose that is not contrary to law or morality.⁷ This is the fundamental legal form of most IFs established in Switzerland.

Relevant to this discussion is that IFs also receive special taxation status. The IOC received a Swiss federal tax exemption in 2000 by mutual agreement. This tax exemption now applies to all IFs as of 2008 via the Host State Act (HSA). The HSA requires that IFs ensure that “*its purposes are not for profit and are of international utility*”⁸ and that it “*carries out activities in the sphere of international relations*.”⁹ This is an inherent characteristic of an association performing a public purpose which is also recognized by the Swiss Federal Act on the Promotion of Sport and Exercise (SFAPSE), which was enacted “[i]n the interest of the physical fitness and health of the population,

holistic education and social cohesion”.¹⁰ These two Swiss pieces of Federal Law are examples of how associations, and more specifically IFs, carry out public interest work.

It must also be noted that many IFs established as associations under Swiss law receive “charitable organization” taxation status. Generally speaking, charitable organizations must have a real activity in the pursuit of public service and/or pursue public utility goals.¹¹ Goals of “public service” are identified as activities that are linked with works that are usually performed by the state. Goals of “public utility” should objectively be in the public interest or must be subjectively selfless. Associations operating as charitable organizations in Swiss law must pursue these public purposes, in order to receive preferential taxation status. This Federal Swiss tax exemption for IFs implies that the Swiss taxation system is subsidizing the purposes and works of IFs as the Swiss public purse is foregoing incoming revenue for the sake of IFs pursuing what is viewed to be positive public work.¹² It is these features of IFs established in Switzerland pursuant to Swiss law that demonstrate that such organizations carry out work in the public interest.

Finally, a distinction must be drawn between the CAS ordinary and appeal procedures. The CAS Code allows for disputes “*relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport*”. In this sense, ordinary arbitration procedures usually involve contractual disputes of a pecuniary nature between private parties, such as sporting clubs, athletes and agents where the contract includes a valid arbitration clause. The SFT has drawn the same distinction:¹³

“To that extent, the dispute submitted to the CAS with regard to the international contract involved had all the

10 SFAPSE art. 1(1).

11 See Luc Hafner and Adrien Tharin, *Law and Practice of Charitable Giving in Switzerland*, available at www.altenburger.ch/uploads/tx_altenburgerteam/AT_2012_Law_and_Practice_of_Charitable_Giving_in_Switzerland.pdf (accessed 4 December 2017).

12 The taxation of IFs as associations is a complex area. Generally speaking, associations are allowed to pursue for profit activities and do not receive tax exemptions on income earned from “for profit” activities where the exemption is applicable to the work of an association that is attributable to the charitable activity. What is defined as “for profit” is a disputed area of the law (i.e. income generated by FIFA from the World Cup and disbursements to national associations for the purposes of development). Funds must be allocated exclusively to the pursuit of the public service or public utility goals to be eligible for this exemption on that income. If other goals pursued in parallel, partial exemption may be granted. For the purposes of this piece it is important to note that this special status afforded to IFs demonstrates that they carry out work that is for the public interest. Again, for a comprehensive view see Luc Hafner and Adrien Tharin, *Law and Practice of Charitable Giving in Switzerland*, available at www.altenburger.ch/uploads/tx_altenburgerteam/AT_2012_Law_and_Practice_of_Charitable_Giving_in_Switzerland.pdf (accessed 4 December 2017).

13 ATF 4A_506/2007 at 3.2; see ATF 133 III 235 at 4.3.2.2.

5 For the sake of parsimony, we will consider IFs within the international context; however, these principles equally apply to national associations.

6 SCC art. 60(1).

7 ATF 97 II 333, JdT 1972 I 1648.

8 HSA art. 6(b).

9 HSA art. 6(c).

characteristics of an ordinary commercial arbitration, except for the sport framework involved. The dispute opposed two parties on equal footing, which sought to have it adjudicated in arbitration and were fully aware of the financial issues involved; from that point of view, their situation was quite different from that of the simple professional sportsman opposed to a powerful international federation.”

Although increased transparency in all types of CAS cases may be a desired result, these types of arbitrations do not raise the same public policy concerns as cases involving IFs that seek to regulate a sport, particularly those involving issues that relate to athlete's rights. For this reason, the authors distinguish the necessity of full transparency between the two different types of cases.

FIFA as a public institution

In addition to these features of Swiss law, particular IF rules must be looked at in identifying this public purpose. Specifically, the CAS has recognized that IFs retain *“the right of a Swiss association to regulate and determine its own affairs is considered essential for the association”*.¹⁴

FIFA is no different, as it is established under art. 60 of the SCC.¹⁵ Therefore, FIFA is subject to the same regime described above. Moreover, the FIFA Statutes particularly recognize, as its purpose, goals in the public interest that usually governmental organizations are devoted to pursuing, including:

- to promote football globally in *“light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes”*¹⁶;
- to promote integrity, ethics and fair play with a view to preventing corruption, doping or match manipulation that may jeopardize integrity¹⁷;
- the promotion of human rights¹⁸ and the elimination of discrimination and gender inequality¹⁹; and
- the promotion of friendly relations in society for humanitarian objectives.²⁰

Not only do these stated objectives pursue the public interest, but FIFA, in its Financial Report 2016, specifically recognizes that it is a *“non-profit organisation”*.²¹ There are particular accounting and

taxation rules that apply to different income streams as they are allocated to different purposes carried out by FIFA. For the purposes of this article, it is important to note FIFA's status as a charitable association.

This legal regime with respect to FIFA, and as applicable to similarly-established IFs, supports the view that such organizations are the *“world governing body”* of their respective sports. Such a perspective, in carrying out a public function, requires that CAS arbitrations involving the review of their decisions requires increased transparency as these are not private decisions involving private actors but quasi-governmental bodies.

CAS arbitration is voluntary

The incidence that CAS arbitration requires the acquiescence of stakeholders is not only an additional reason to increase its transparency, but also a challenge to this pursuit, which will be discussed in the conclusion. Simply put, the CAS is a private arbitration body established pursuant to the Swiss Federal Code on Private International Law (PILA). At the heart of the system is the principle of voluntariness, where disputes can only be heard where the parties have expressly agreed to submit to its jurisdiction via a valid arbitration agreement *“if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute”*.²² This principle is directly reflected in the CAS Code itself, as both ordinary and appeal procedures must be referred to the CAS through an arbitration clause in the subject contract or the relevant sports' association regulations, respectively.²³

A good example demonstrating the necessity of an overt acceptance of CAS jurisdiction is within the licensing system for club competition in European football. The UEFA Financial Fair Play regulations delegate the licensing function to national football associations, or, in certain situations, to the leagues. The decisions of national licensing organizations can only be appealed to the CAS if those national regulations explicitly confer appeal jurisdiction over such decisions to the CAS. The CAS has ruled that licensing regulations of the Real Federación Española de Fútbol (RFEF) and the Federazione Italiana Giuoco Calcio (FIGC) do not allow for the appeals of FFP licensing decisions of the Second Instance Licensing Committee of Spain²⁴ and of the Alta Corte di Giustizia Sportiva in Italy²⁵, respectively. Those decisions reject the notion that a general recognition of the CAS in FIGC and RFEF statutes is sufficient to confer jurisdiction, where the specific licensing regulations do not allow for this appeal route. Conversely, the CAS has consistently ruled that decisions of the Romanian

p. 50.

²² PILA, art. 178(2).

²³ The CAS Code, art. R27(1).

²⁴ CAS 2013/A/3199 *Rayo Vallecano de Madrid SAD v. RFEF*.

²⁵ CAS 2014/A/3629 *Parma FC v. FIGC & Torino FC*.

¹⁴ CAS 2014/A/3828 *Indian Hockey Federation (IHF) v. International Hockey Federation (FIH) & Hockey India*.

¹⁵ FIFA Statutes, art. 1(1).

¹⁶ FIFA Statutes, art. 2(a).

¹⁷ FIFA Statutes, art. 2(g).

¹⁸ FIFA Statutes, art. 3.

¹⁹ FIFA Statutes, art. 4.

²⁰ FIFA Statutes, art. 5.

²¹ FIFA Financial Report 2016, 67th FIFA Congress in Bahrain, 11 May 2017,

licensing authority can be appealed to the CAS, because the appeal clause in those regulations specifically allow and recognize the CAS as the appeal court of those decisions.²⁶

Although the issue of voluntariness is a complex one, particularly for athletes, as the Pechstein series of decisions examine issues of duress and pressure, in the end the entire sports arbitration system and its submission to the CAS relies on the acceptance of the system from all stakeholders. If large portions of the legal sporting community are calling for reforms to the CAS Code increasing transparency, perhaps it would be in the best interests of CAS, from a self-preservation perspective, for the ICAS to take concrete action on these issues.

Conclusion: recommended amendments to the CAS Code to increase transparency

The need for transparency in CAS proceedings, particularly in appeal proceedings involving the review of decisions of IFs, is clear. Transparency, however, exists on a continuum. Naturally state courts the world over publicize their judgments; open the court files and evidence to the public via the public registry system; and their hearings are open to the public. As the IFs pursue a public interest function, the CAS is the gatekeeper of the decisions of those organizations and the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code. Two amendments to the CAS Code would increase transparency immediately:

- disclosure of arbitrators' links to IFs; and
- the publicity of CAS court files and publication of CAS awards.

Pursuant to the CAS Code, where a panel of three arbitrators will hear the case, each party has the opportunity to appoint one arbitrator and the CAS will appoint the president. Where the case will be heard by one arbitrator, if the parties do not agree, the sole arbitrator will be appointed by the CAS. The members of the open list of CAS arbitrators are appointed by the ICAS.²⁷ No less than twelve members of the ICAS are composed of persons appointed by IFs²⁸ and of the twenty ICAS members only four positions are “with a view to safeguarding the interests of the athletes”.²⁹

The deck of cards is heavily stacked in favour of the open list of arbitrators to represent the IF perspective. Whether this affects the impartiality of an individual arbitrator on any particular case is irrelevant. The rules regarding the composition of the open list leave it open for members of the sporting legal community

to deduce that it is possible that the interests of the IFs are well represented on any particular panel.

Moreover, the CAS Code and how it is applied in practice on a day to day basis does not adequately address this issue. In all cases “[e]very arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties”.³⁰ Although “[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality”,³¹ it is difficult to carry out a challenge due to the lack of knowledge available to the legal community regarding the potential links of arbitrators to IFs. Many arbitrators have been supported in their appointment as an arbitrator by either their national associations or an IF. Some arbitrators are even retained by an IF or a national association, at the same time that they sit as an arbitrator. Understandably, these engagements are a matter of solicitor-client privilege; however, the possibility that an arbitrator has links to an IF again allows the public to question whether or not the arbitrator will have a pro-IF view.

The SFT has stated that the rights guaranteed to parties to an arbitration proceeding must be protected akin to a state court. More specifically, it has been expressed that “[l]ike a State court, an Arbitral Tribunal must present sufficient guarantees of independence and impartiality”³² and that “[t]o decide whether or not an Arbitral Tribunal presents such guaranties, one should refer to the constitutional principles developed with regard to State courts”.³³ The SFT has also mentioned that a closed list of arbitrators does “not justify as such to apply less demanding standards to sport arbitration than in commercial arbitration”.³⁴

What is of utmost importance in this line of jurisprudence is that the SFT has specifically noted that it is not the actual independence that is questionable but the appearance of impropriety. There is an objective element to this notion where “it is enough for the circumstances to give the appearance of prevention and that they may suggest partiality of the magistrate”;³⁵ however, the mere “individual impression” of one party to the proceeding is not conclusive.³⁶ Independence can be raised on a subjective basis as well where “[a] suspicion is legitimate even if it is based only on appearances, provided they arise from circumstances examined

³⁰ The CAS Code R33(1).

³¹ The CAS Code R34(1).

³² ATF 4A_506/2007 at 3.1.1; ATF 125 I 389 at 4a; 119 II 271 at 3b.

³³ ATF 4A_506/2007 at 3.1.1; ATF 125 I 389 at 4a; 118 II 359 at 3c, p. 361.

³⁴ ATF 4A_506/2007 at 3.1.1.

³⁵ ATF 4A_506/2007 at 3.1.1.

³⁶ ATF 128 V 82 at 2a, p. 84.

²⁶ CAS 2013/A/3194 S.C. F.C. Universitatea Cluj S.A. v. RFF & RPFL.

²⁷ The CAS Code S(3).

²⁸ The CAS Code S(4)(a) to (c).

²⁹ The CAS Code S(4)(d).

objectively”.³⁷ In practice, the IBA Guidelines on Conflicts of Interest in International Arbitration may be used.

The practical problem, however, is that if an arbitrator has substantial links to an IF, he or she is not required to disclose them. Working for a federation in and of itself in an athlete’s rights’ case may pose a perception problem, whether or not the case involves that particular IF as it is the perception that undermines public trust in quasi-judicial institutions. The current system and lack of knowledge of which arbitrators are retained by which IF does not adequately address this issue.

As a result, the authors of this article recommend that, to increase public trust in the CAS via increased transparency, one of the two following proposals ought to be adopted:

- all arbitrators are prohibited from acting within or for any IF or national association at any level during their tenure as an arbitrator; or
- all arbitrators must disclose all links and retainer agreements to all IFs or associations and this must be a matter of public record.

Both of these solutions pursue the necessity of transparency; however, with some challenges. The first solution in the legal sport community may be difficult to achieve given the interconnectedness of the community. The second may violate solicitor-client privilege. Moreover, to have arbitrators exclusively work for the CAS may increase the cost of arbitration due to the necessity of having full time arbitrators with only one engagement at a time. If the CAS open list of arbitrators is to resemble a state court then the ICAS has some difficult choices to make.

Secondly, for the CAS to pursue transparency, the ICAS ought to consider the publicity of CAS court files and the publication of all CAS awards. Currently, there is no system in place for a member of the public to access the content of court files, such as the briefs filed with the CAS and the evidence relied upon. With respect to the publication of CAS awards, appeal decisions shall be released to the public *“unless both parties agree that they should remain confidential”*.³⁸

The justification for these amendments relies on the same reasoning that is applied above in relation to transparency regarding the process of appointment and impartiality of arbitrators. As the IFs pursue a public interest function, the CAS is the gatekeeper of the decisions of those organizations and the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code.

The implementation of these publicity proposals presents two specific challenges within the context of the CAS. Firstly, the CAS is a system of private arbitration. Cases involving pecuniary claims without the involvement of IFs do not present the same public interest issues as appeal procedures reviewing the decisions of IFs. Perhaps it follows that ordinary arbitration procedures involving such claims are not required to be publicized on the basis of transparency. The publication of all ordinary procedure awards, however, could be justified on the basis that the full body of jurisprudence could be available to all practitioners. This could lead to the by-product of ameliorating the overall quality of the legal work before the CAS. In addition, this would reduce the advantage that some practitioners enjoy with increased access to unpublished decisions, particularly where a lawyer practising before the CAS works at the same law firm that retains a CAS arbitrator.

The second challenge is that the CAS system of arbitration is completely voluntary, as explained at the outset. The publication of awards and the disclosure of all court files would require the consent of all stakeholders and require major modifications to not only the CAS Code but perhaps to the procedural regulations of the IFs. For a true change, all IFs and national associations would have to agree to this concept.

Despite these challenges, the authors of this article contend that the pursuit of absolute transparency in CAS appeal proceedings is necessary. The public interest functions pursued by IFs, where the CAS is the gatekeeper of the decisions of those organizations, from a policy perspective ought to supersede any competing interests. It is possible that such changes would require a paradigm shift in mentality on behalf of IFs to accept such a system. Considering that IFs are the “world governing body” of their respective sports and pursue the public interest, the authors of this article are hopeful that they would be magnanimous in their approach and agree to complete transparency in CAS proceedings.

³⁷ ATF 129 III 445 at 3:3:3 p. 454; 128 V 82 at 2a, p. 83.

³⁸ The CAS Code R59(6).