

Chapter One

The Courts, the CAS and the 'Professional' Athlete

Abstract

This chapter introduces some key judgments concerning athletes' participation rights and sports arbitration, including the recent cases involving Oscar Pistorius, Matuzalemda Silva and Glasgow Rangers FC. It uses those cases to discuss the relationship between sports arbitration and the powers of the domestic courts, introduces the concepts of 'international' and 'global' sports law and discusses how awards of arbitral bodies can be enforced, and can be challenged, in 'ordinary' courts, with particular reference to the Swiss courts which have oversight of the Court of Arbitration for Sport. Some of the arguments in favour of CAS reform are introduced and the distinction between the courts' appellate and supervisory functions are discussed.

Introduction

The argument that sporting activities are 'special', that ordinary legal norms ought not to be applicable to them and that they should, instead, be largely self-regulating has been a recurrent theme within the history of international sports law. However, in the jurisdictions under consideration here – the European Union and the United States in particular, and the Court of Arbitration for Sport (hereafter CAS) one does not have to search too hard for examples of why sporting entities must not ever be left to their own devices, to the extent of being able to avoid scrutiny of how they adhere to fundamental legal principles in the way that some commentators advocated after the European Court of Justice's decision in *URBSFA v Bosman* [1996] 1 CMLR 645, for example.

While the implications of *Bosman* will be a recurrent theme throughout this book a no less pertinent, and far more recent, example of why legal systems should be wary of acceding to sports' demands for self-regulation is the CAS judgment in *Oscar Pistorius v The International Association of Athletics Federations* CAS 2008/A/1480. While many elite athletes will lack the resources to challenge an international federation's machinations in the way he did and those who do not qualify as elite competitors will necessarily fall outside the CAS' jurisdiction, the decision highlights the importance of the CAS and the courts having the power to engage in rigorous, independent oversight of sporting activities

After the 2006 Athletics World Championships (where he won gold medals in the 100, 200 and 400m class-43 events) Pistorius asked to be considered for selection in South Africa's 2008 Olympic squad in the 400m and in the 4 x 400m relay, using his prosthetic lower limbs but in all other respects running on equal terms against participants without disabilities (Pistorius, 2009). However, six months after his World Championship success, the International Association of Athletics Federations (IAAF) changed its rules on 'technical aids' specifically to prohibit the use of any device that incorporated springs, wheels "or any other element that provides the user with an advantage over another athlete not using such a device." (<http://www.iaaf.org/mm/document/imported/38361.pdf>). This appeared to be a clear attempt to retrospectively prevent Pistorius from competing with 'able-bodied' runners at the Olympics, and in the months after that rule change he participated in various tests at the IAAF's behest, namely the 'Rome Observations' (video recordings of his performance at a specially-organised race in July 2007) and the 'Cologne Tests' (laboratory analysis conducted by personnel at the German Sport University between July and December 2007) (Pistorius, para 45).

Having considered the results of those tests, the IAAF Council concluded that Pistorius' prostheses enabled him to exert less mechanical effort than able-bodied athletes, "with a mechanical advantage of the blade in relation to the healthy ankle joint of an able bodied athlete higher than 30%" (<http://www.iaaf.org/news/kind=101/newsid=42896.html>) and that his energy loss was "significantly lower" than the others' (Pistorius, para 51). Consequently, in January 2008 the IAAF ruled he was ineligible for Olympic selection because his prosthetic legs contravened the newly-drafted Rule 144.2(e) on technical aids. The IAAF said the studies had indicated his prosthetic legs constituted a 'technical device' which gave him such an 'advantage' over an able-bodied runner of similar ability (<http://news.bbc.co.uk/sport1/hi/olympics/athletics/7141302.stm>). Pistorius appealed against that decision to the CAS, asking it to vacate the IAAF decision and rule that he could participate in IAAF-sanctioned events.

In a robust criticism of the IAAF's procedures CAS identified several areas of concern. First, there was the technical point that the Rome Observations had confirmed that Pistorius ran at his quickest on the straight parts of the track in the 400m race, but under the IAAF's instructions the subsequent Cologne Tests concentrated solely on how he performed 'on the straight', and gave no consideration to how he performed at the start or during the first 50m of the race – the crucial 'acceleration phase' in that discipline. The CAS pointed out (at para 61):

(H)aving viewed the Rome Observations ... the IAAF's officials must have known that, by excluding the start (of the race) and the acceleration phase, the results would create a distorted view of (his) advantages/disadvantages by not considering the effect of the device on the performance of Mr Pistorius over the entire race. The panel considers that this factor calls into question the validity and relevance of the test results on which the Cologne report was based.

The CAS thus determined that "the Cologne Report does not answer the question that (CAS) is required to decide" (para 62) namely, whether the prostheses gave Pistorius an 'advantage' over the other competitors.

Second, CAS was concerned to note that the scientist who represented Pistorius "was effectively 'frozen out' to such an extent that he declined to attend the Cologne tests." He had previously been informed by the IAAF that he would be able to attend as a mere observer and would have no input on the testing protocol or the subsequent analysis, and the IAAF had ignored letters and emails from him in relation to the testing procedure (para 63). Moreover, the scientist who had conducted the tests was not presented with the IAAF's summary of his report (on the basis of which the Council had taken the decision to exclude Pistorius), and when it was presented to him at the hearing he confirmed that the summary contained material inaccuracies.

Third, there had been several egregious flaws in the IAAF Council's voting procedure on the matter, notably the IAAF's informing the media before the vote was even taken that Pistorius would be banned; the fact that Council Members were given a very short time frame in which to read the paperwork and vote; and the IAAF's indication to Council Members that any abstentions would actually be counted as positive votes to declare Pistorius ineligible – a decision which, as CAS indicated, meant the IAAF's subsequent press statement (<http://www.iaaf.org/news/kind=101/newsid=42896.html>) to the effect that the decision on Pistorius' eligibility had been taken unanimously was misleading.

Fourth, the CAS had already noted that the same prosthetic legs had "been used by many single and double amputees, almost unchanged, since 1997" (para 33) and was clearly troubled by the fact that only in March 1997 had the IAAF changed its rules on technical aids. There was a clear inference being that the IAAF had changed its rules simply to head-off Pistorius once his participation at the Olympics had become a clear possibility given his performance in class 43 events.

In summary, the Panel's impression is that ... by November (2007) some IAAF officials had determined that they did not want Mr Pistorius to be acknowledged as eligible to compete in international IAAF-sanctioned events, regardless of the results that properly conducted scientific studies might demonstrate. In the Panel's view, the manner in which the IAAF handled the situation of Mr Pistorius in the period from July 2007 to January 2008 fell short of the high standards that the international sporting community is entitled to expect from a federation such as the IAAF (paras 69, 70).

While those criticisms should definitively undermine any argument that sports should be left to their own devices and operate free of external oversight, the phrasing of the IAAF's rules on technical aids was also a factor in persuading the CAS to intervene in Pistorius' favour. The relevant rule, Rule 144.2(e) as amended, stated that:

For the purposes of this rule, the following shall be considered assistance and are therefore not allowed:

...

(e) Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device.

The Panel regarded this provision as a "masterpiece of ambiguity" (para 80) and was not at all convinced that Pistorius' prosthetic leg was a 'technical device'. Although CAS took the view that it was, if only for the sake of expediency, it said it was debatable whether it was a 'technical device' that 'contained' a spring because, just like the human leg, Pistorius' prosthesis was a 'spring' in its own right – "almost every non-brittle object is a 'spring' in the sense that it has elasticity" (para 81) and "based on current scientific knowledge, it appears to be impracticable to assess definitively whether the *Cheetah Flex-Foot* prosthesis acts as more than, or less than, the human ankle and lower leg, in terms of 'spring-like' quality" (para 96). Equally importantly, while the Cologne Tests had ostensibly identified some 'advantages' to Pistorius in his use of the prosthesis, they had failed to establish (having not been requested by the IAAF to consider) whether there was an *overall* advantage to him in using it because the Cologne Tests had not been at all concerned with whether the drawbacks to Pistorius

outweighed the benefits. While the IAAF had contended that a device which provided an athlete with *any* advantage should render him ineligible under Rule 144.2(e), CAS took the contrary view:

(T)o propose that a passive device...should be classified as contravening that Rule without convincing scientific proof that it provides him with an *overall net advantage* over other athletes flies in the face of both legal principle and common sense.... If the use of the device provides more disadvantages than advantages, then it cannot reasonably be said to provide an advantage over other athletes (para 83).

While there is much to commend the adage that justice is better dispensed by a good layman than a bad lawyer and that the courts should be wary of intervening with sports bodies' decisions, it is also the case that international sports organisations can afford able counsel who are capable of drafting the rules properly. Should they fail in that fundamental task it is desirable that legal systems should have the authority to call them to account and to require that changes be made. In that spirit, CAS declared that Pistorius was eligible to compete in IAAF-sanctioned events (which included Olympics trials and, in principle, the Olympics themselves) notwithstanding the provisions of Rule 144.2(e) and the findings of the Cologne tests.

However, the aftermath of the CAS ruling revealed that a hostile animus on the part of the IAAF remained, and what occurred at that time also gives weight to the argument that effective oversight of sports bodies is necessary. Pistorius was not selected for the Beijing Olympics – his fastest time was not fast enough for the individual 400m, and he was not one of the two discretionary reserve selections the relay squad - but just three days before the selection decision was made, IAAF officials expressed concern that his prostheses could cause a danger to other athletes in the relay changeover, and made it clear that they did not want Pistorius to be included in the relay squad for safety reasons: “We would prefer that (South Africa) don't select him for reasons of athletes' safety” said one IAAF spokesman, while another spoke of “‘a potential for massive disaster' at the relay change-over” (www.news.bbc.co.uk/sport1/hi/olympics/athletics/7508399.stm). No arguments concerning ‘athlete safety’ had ever been advanced by the IAAF before or during the CAS hearing; but it got its way in the end.

Looking Beyond Pistorius

It is the author's contention that there is no merit to the argument that sporting organisations should have immunity from ordinary legal standards, and this book explores the ways in which legal systems and sports-specific arbitral processes respond to the challenges posed by those who, like Pistorius, enjoy the status of 'professional' or 'elite' athlete and have encountered situations in which their relationships with other participants, employers or governing bodies have broken down. Exploring those athletes' engagement with 'the law' broadly defined requires us to see beyond the distinction between the realm of sports law and the field of sports arbitration – a barrier that is unhelpful because a proper understanding of one must necessarily be informed by an appreciation of the other because (as this book shows) many sports-related disputes can be aired either before the courts or the arbitrators in the alternative. Even the most sophisticated grasp of how 'the law' applies to athletes will necessarily provide only a partial understanding of sport and the law if there is no equivalent appreciation of arbitration's impact upon such disputes and of its ever-widening sphere of influence. The relationship between the courts and the arbitrators should be central to any discussions of what 'sports law' is, and to any discussions of whether there is now in existence an 'international sports law' where sports-specific arbitration is a fundamental component.

Sport, the law and the 'professional' athlete

At this point it is necessary to outline precisely what is connoted by the words 'professional' and 'elite' as used here. The superficial answer is that 'professional' encompasses those whose playing ability provides employment or commercial relationships – those for whom sport is an 'economic activity' as explored by the European Court of Justice in *Deliege v ABSL* [2000] ECR I-2549 rather than a mere recreation. But what it means to be a 'professional' cannot simply be explained in economic terms. Howe (2004) discusses how the "tools of professionalism"(33) have resulted in commercialism becoming the dominant force in the contemporary sporting landscape, the rise of professional sport heralding "a class of individuals who are in the same circumstances with regard to the work/training time ratio, teams and competitions of near-equality (which) will generate 'fair' matches that are exciting and entertaining. This principle is at the root of the establishment of leagues and divisions that...allows teams of near-equal resources and abilities to play together" (34). 'Elite' or

‘professional’ sport draws spectators to the spectacle and, in turn, commercial interests are also piqued because of the opportunity it provides to flout their wares to a potentially interested market. The athletes are not necessarily ‘professionals’ in the sense of being paid to play (and for that reason Division One college athletes are no less ‘professional’ than are major league baseball players or Test match cricketers); but they share similar pressures and opportunities which can result in ‘the law’ having a role in their lives.

“Professional (athletes), when they have important decisions to make, have too much at stake to make them well. The whole bundle of status, self-esteem and personal financial management which we call a career is a lot to have to put on the table” (Allison, 2001: 154), but much of the caselaw and the academic discourse that currently comprises ‘sports law’ seems dominated by the interests of employers, agents, broadcasters and other media, or the power brokers at WADA, the IOC and the other global actors whose success is, fundamentally, dependent upon what the athletes achieve. But if the interests of those athletes are not properly protected, and if the athletes themselves are not properly advised, then the passions of those other stakeholders – the spectators, advertisers, consumers, administrators, media outlets, lawyers, agents, the stay-at-home fans, the gamblers and the sundry other hangers-on - are as nothing. The interests, opportunities and pressures facing the ‘professional’ athlete has to remain at the centre of whatever ‘sports law’ is, and arbitration systems are no less central to that than are court structures.

Towards an ‘international’ sports law

Securing arbitral awards which are binding on the parties and cannot then be challenged through the courts can ordinarily be established in one of three ways: first, national laws can be drafted in a way that explicitly recognises arbitral awards as legitimate and either removes or restricts the scope for national courts to set them aside (see for example Chapter IV of the New French Arbitration Law, 13 January 2011); second, the contracting parties to an arbitration can contractually agree to exclude national laws; or third, the validity of an arbitral award “can apply independently of national legal roots and the wishes of the parties” (Foster 2003: 11). Systems of sports arbitration possess characteristics which distinguish it from sports law and other forms of arbitration, and there are also distinctions between international sports law and global sports law even though the two phrases are often used interchangeably. Most significantly, “international sports law can be applied by national courts (whereas)

global sports law by contrast implies a claim of immunity from national law” (2). The decisions of sports-specific systems of arbitration such as the CAS are examples of global sports law because while their decisions can in principle be subject to review by the courts, that rarely happens in practice. The occasions when intervention does occur remind us that these bodies are not ‘above the law’, but the reality is that successful challenges against those bodies’ determinations are exceptionally rare, and for that reason the work of sports arbitrators transcends the national laws of whatever legal system would otherwise exercise jurisdiction over the dispute. “(The phrase) ‘global sports law’ highlights that it is a cloak for continued self-regulation by international sports federations. It is a claim for non-intervention by both national legal systems and by international sports law; it thus opposes a rule of law in regulating international sport” (3).

Global sports law has its origins in a contractual relationship under which the parties agree to (or are compelled to) submit to the authority of international sporting federations, but which provide no possibility of appeal. Its regulatory structures would be those of ‘classic’ self-regulation – institutions internal to the sports organisation itself, unknown or (at best) opaque to the outside world and adhering to rules and procedures which those organisations have themselves devised – but in respect of which there would be no possibility of outside influence. In contrast, the salient features of international sports law would include those characteristics which one would expect to find in any legal system, such as the provision of “clear, unambiguous rules, fair hearings in disciplinary proceedings, no arbitrary or irrational decisions and (the existence of) impartial decision-making” which would necessarily carry a realistic potential for the parties to appeal against a decision (3).

Foster explores how these rules of international sports federations – the norms which they have created, which they impose through their own regulatory structures and which can be challenged only through recourse to sports arbitration – can be divided into four discrete categories. First, the ‘rules of the game’ are essentially arbitrary and not ordinarily subject to external oversight unless their provisions are somehow in violation of general legal principles or if they are imposed unlawfully or capriciously. Such cases account for many of those heard by the CAS Ad-Hoc Division for the Olympic Games, such as *Swedish National Olympic Committee and Swedish Triathlon Union v International Triathlon Union* CAS OG 12/10 (refusal to interfere with field-of-play decisions) or *Russian Olympic Committee v International Sailing Federation* CAS OG 12/11 (failure to exhaust internal remedies meant

the application to the CAS was invalid). At London 2012, a total of nine cases were heard by the ad-hoc division.

Second, the ethical principles of sport, which are concerned with inherent perceptions of fairness, integrity and respect for opponents are not easily open to legal challenge because only those with specific competence within the sport are able to articulate what these principles are, and what should be the appropriate sanctions for any violations of them, although criminal legal proceedings against cricketers who deliberately bowl ‘no-balls’ in exchange for money from gamblers shows that the distinction can be a fine one (<http://www.bbc.co.uk/news/uk-15573463>). Third, and citing the CAS judgment in *AEK Athens and Slavia Prague v UEFA* CAS 98/200, Foster identifies what he properly regards as ‘international sports law’ – the obligation upon sporting institutions (and especially the sporting federations) to abide by those general principles of law outlined above, and in particular to refrain from the adoption of arbitrary or unreasonable rules and measures. The effect of ‘international sports law’ is that sports’ autonomy is limited because they are obliged to abide by these principles, without exception, and it is a misnomer to assert that they are in any sense ‘above the law’ – although that is not to deny their considerable power or the wide-ranging authority that is vested in those institutions’ disciplinary tribunals and other decision-making bodies.

The final category, that of ‘global sports law’, is limited to those situations in which the international federations have successfully established norms in respect of the practice of sports and the rules and regulations which govern them – norms which are established by virtue of the contractual relationships between the parties, and which renders them entirely free from the threat of ‘mainstream’ legal oversight because their decisions are not subject to scrutiny by national courts: to the extent that they are scrutinised at all, scrutiny resides with the CAS and similar sports-specific organs. The courts should be wary of accepting that their jurisdiction has been ousted in this way. Foster rightly highlights the tendency among sports lawyers to use the phrases interchangeably so that the corpus of internationally-recognised legal principles, safeguarded by potential recourse to national courts which also properly respect the autonomy of sports organisations, routinely attracts both the words ‘global’ and ‘international’. But this is properly termed ‘international sports law’, and is the sense in which it is used here. While “the recognition of the Court of Arbitration for Sport as the prime institutional source is a key feature” of international sports law (9) it connotes a system which carries with it the possibility of even CAS rulings being appealed before the (Swiss)

domestic courts, and the courts should be wary of ever accepting that sporting organisations have successfully insulated themselves from both their appellate function and the inherent supervisory jurisdiction (see for example *Petition of Rangers Football Club* [2012] CSOJ 95).

Sports arbitration: enforcement and jurisdiction

Arbitration thus offers the potential for disputes to be resolved on the basis of universally-acknowledged principles, specifically accepted by the parties and not limited by the vagaries of national legal systems. They are binding, recognised by national legal systems and can be enforced under national laws should such an eventuality arise. As with other structures of arbitration, the work of CAS and other sports-specific systems would be rendered untenable if national legal systems did not recognise their validity and were unable to enforce them, so the willingness of national courts to do so is a pre-requisite for any form of arbitration. However, the position of the sporting authorities in this regard is rather stronger than is usually the case with commercial arbitration judgments. In the context of commercial arbitrations the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award “is built on the presumption that the award is governed by a national arbitration law since the setting aside of an award belongs to the exclusive jurisdiction of the court under whose arbitration law the award is made” (van der Berg 1981: 37), but rather than trouble themselves with the niceties of arbitral enforcement and the 1958 provision sporting authorities can take the benefit of what appears to be a unique power to impose sanctions on clubs, member federations and individuals who were not even involved in the dispute if the terms of an award against a third party are not complied with, and this sports-specific power operates in addition to the possibility of recourse to national enforcement provisions. At their most extreme, international sporting organisations can prohibit members of a national federation – be they clubs, individual athletes or the whole national governing body - from participating in events until compliance with an award against one individual club, or one individual athlete is forthcoming. The need for global action to secure enforcement of sports awards has thus been much less of a pressing issue in sports than it is in other arenas of arbitration because, if they are properly drafted, the various contracts and memoranda of association governing relations between athletes, clubs, national governing bodies and international federations will commit all parties to utilising sports’ specific dispute resolution systems rather than revert to the courts, and they also compel all those actors to

take steps to ensure awards are enforced or to risk the possibility that they in turn will be sanctioned for non-compliance. For example, Sion FC, a Swiss football club, were notoriously deducted 36 points by their domestic governing body after they fielded players who were signed during a period of transfer ineligibility imposed pursuant to an earlier CAS ruling (and which they had the temerity to challenge before the Swiss domestic courts). FIFA had “threatened to suspend the Swiss national side and the country’s club sides from all competitions if Sion were not punished”, and the domestic governing body rapidly turned tail when faced with this eventuality. The club commented that “it did not expect any courage on the part of the (governing body) in the face of FIFA”

(<http://www.bbc.co.uk/sport/0/football/16366160>), but because the relationship between the parties gave FIFA the powers to compel the domestic federation to do their bidding or face Draconian sanctions, the Swiss FA felt it had little choice. Sports arbitration does not face the challenge of enforcing arbitral awards in the way that commercial arbitration does (Yu, 2002), and this wide-ranging power – allied to the near impossibility of review by the courts – ought to be regarded as a central aspect of both international and global sports law.

Switzerland’s is usually – although not inevitably – the applicable law even if none of the parties to the dispute is actually domiciled there. There is a rather tendentious argument that the parties, being free to contract on whatever terms they wish, are free to decide which country’s should be the applicable law of an arbitration, but with regard to individual athletes especially, this contractual freedom is a mythical creature. For example, the contract signed by athletes at the Olympic Games provided that any CAS arbitration arising from the Games “shall be governed by Chapter 12 of the Swiss Act on Private International Law and its seat shall be in Lausanne, Switzerland”, and this applied regardless of the jurisdiction in which the Olympic Games were taking place, the nationality of the athlete or the jurisdiction in which the governing body is situated. In similar vein, the athletes’ personal injury waiver clause which was used at the 2010 Vancouver Winter Olympics was drafted so widely that it purportedly released the IOC and local Olympic Organising Committees from any liability save for that provided for by Swiss law, thereby ousting the jurisdiction of the Canadian courts in respect of the death of Georgian luger Nomar Kumaritashvili (although driver error was the primary contributing factor, the courts might have been rather more zealous than the IOC in investigating whether the track was safe, and whether the pole he hit should have been there: http://news.bbc.co.uk/sport1/hi/olympic_games/vancouver_2010/luge/8513595.stm). More broadly, the 2010 contract also meant that “any dispute, controversy or claim arising

out of, in connection with, or on the occasion of the Olympic Games” not resolved through “the legal remedies established by my National Olympic Committee, the International Federation governing my sport, VANOC and the IOC shall be submitted exclusively to the CAS” (VANOC 2010).

However, while it is the norm for Swiss law to be deemed the governing law in respect even of those CAS arbitrations which physically take place outwith Switzerland and/or where neither party is domiciled within Switzerland, disputes as to the choice of forum do arise (see most recently *Brazilian Olympic Committee v World Taekwondo Federation CAS* 2012/A/2713). But CAS Rule 45 states that “the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. Given there is a perception that CAS’ procedures and decision-makers, and the supervisory jurisdiction of the Swiss courts, are unduly favourable to the governing bodies, there is little reason why they would agree to (and still less to instigate) a situation in which Swiss law was no longer applicable to ‘their’ dispute. If the athlete alone wishes a different jurisdiction’s laws to apply, thanks to the provisions of Rule 45 they will be thwarted and Switzerland’s will be the applicable law.

The fact that so many sports bodies are located within Switzerland of itself provides a reason for them to prefer Swiss law as the applicable law in sports arbitrations. However an added incentive is that Swiss law on arbitrations betrays the strong influence of the delocalisation theory, which “minimalises the territorial link between arbitration and the place of arbitration....The application of the delocalisation theory can successfully avoid the uncertainty caused by the mandatory rules and public policy exceptions of the national rules” (Yu 2002: 198). Delocalisation theory suggests that the role of an international arbitrator is the one assigned to her by the terms of the contract which subsists between the parties and is thus one of a private nature – the arbitrator’s is a role very different to that of a judge whose power is conferred by the state and, consequently, only the supervisory powers of the courts in the jurisdiction where recognition or enforcement is sought should be applicable to the arbitration. In the case of Switzerland (which is one of only three European countries, alongside France and Belgium, to show strong influences of delocalisation theory in its arbitration laws) those supervisory powers have been shown to be very light-touch indeed, not just in respect of CAS awards, and under normal commercial arbitration principles the possibility of having the terms of an award being subjected to scrutiny only by the courts in a

jurisdiction where neither party has any assets is very attractive. However, because delocalisation theory only 'works' if neither party has assets there and the agreement to submit to the jurisdiction has been entered into freely, the principle cannot truly be applicable to most CAS arbitrations because at least one party is ordinarily domiciled, and has assets, in Switzerland.

Key cases and guiding principles

In the context of CAS rulings the Swiss courts have used its power to set awards aside on very rare occasions. In *Gundel v FEI* CAS 1992/A/63, the Swiss court stated that the relationship between CAS and the IOC was such that the former could not truly be regarded as independent of the latter. CAS thus had to be reconstituted as an independent entity in order to give validity to any decisions it reached in cases where the IOC was a party.

Much more recently and more significantly, *Matuzalem* (SFT 4A_558/2011 27 March 2012) became the first occasion when a CAS award was actually annulled by the Swiss Federal Tribunal on the ground that it violated the 'substantive public policy' provision of Article 190(2)(e) of the Private International Law Act ("PILA")). The decision was thus overruled on grounds of substantive law rather than procedural law as had been the case in *Gundel*, and while it will not lead to sports bodies contemplating whether Swiss law still best suits their interest it may at least herald a subtle change in approach by the Swiss courts. The initial CAS ruling is discussed in detail in a subsequent chapter, but in May 2009 Matuzalem and his present club were held jointly and severally liable in damages to Shakhtar, his previous club and ordered to pay nearly EUR 12,000,000 plus interest. The Swiss Federal Tribunal upheld this decision in June 2010 (SFT 4A_320/2009), but neither the player nor the club were able to pay the amount owing, and in July 2010 FIFA's Disciplinary Committee informed them that disciplinary proceedings would be initiated with a view to imposing further sanctions under Article 64 of the FIFA Disciplinary Code. In August 2010 the FIFA Disciplinary Committee gave Matuzalem a further 90 days' grace to settle their debts, and if payment were not made the club to whom the debt was owed could apply to have the player banned from any football-related activity until it was; given the sums involved, this amounted to a potential lifetime ban. The club paid a sum of EUR 500,000 shortly thereafter, but no other payments were made and both the club and the player appealed to the CAS (*Real Zaragoza v FIFA* CAS 2010/A/2261 and *Matuzalem Francelino da Silva* CAS 2010/A/2263). CAS dismissed both appeals and Matuzalem appealed against the CAS award to the Swiss

Federal Tribunal. On 27 March 2012, the Swiss Federal Tribunal annulled the CAS award, on the ground that it violates fundamental public policy as per PILA.

There had been several earlier cases where public policy had been argued in respect of CAS judgments, but those challenges had fallen on stony ground. For example, in decision 4P.240/2006/len of January 2007, concerning the CAS award in *Rayo Vallecano de Madrid v FIFA CAS 2006/A/1008* the Federal Tribunal affirmed FIFA's power to regulate the sport through appropriate rules and decision-making processes and held that sanctions issued by governing associations in conformity with their statutes and regulations were not in conflict with the state's monopoly to enforce monetary judgments. Therefore, the statutes were not inconsistent with public policy (Levy, 2012). The rationale was that the consent that an association's members supposedly give to the possessors of these wide-ranging powers is considered to be voluntarily even though the dominant position of an international sporting federation makes it impossible for a member federation, club or individual athlete to avoid those rules (if you don't play by the international federation's rules, you don't play at all). Notwithstanding this myth of voluntarism, the possibility of the Federal Tribunal annulling CAS awards would be limited to those very rare situations where one of the following reasons can be established (Article 190 (2) PILA):

- a. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b. if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
- e. if the award is incompatible with public policy.

The first four relate exclusively to procedural flaws of the kind explored in *Gundel* (and are explored at far greater length in Rigozzi, 2010), but potential grounds under head e) include unequal treatment, a denial of the right to be heard, or an 'ambush' judgment where the Panel relies on arguments which part could have reasonably expected it to apply (perhaps akin to the 'nutritional supplement' rabbit that CAS pulled out of the hat in *UCI v Contador CAS 2011/A/2384, 2386*). Only point e) allows the Federal Court to consider the legal merits of

the appealed decision, but it has been notoriously loathe to allow challenges on this or any other basis and this has inevitably worked against the athlete's interests. Prior to *Matuzalem*, only 6 appeals against CAS decisions had been successful and on other occasions "the Federal Tribunal has made it clear that even if an award is arbitrary or if it is evidently illicit or obviously based on wrong merits, it does not necessarily violate the principle of public policy unless fundamental legal principles are disrespected (Levy, 3). Further, Article 27 of the Swiss Civil Code (private law) stipulates that a person may not enter into a contract which is excessively binding or which otherwise limits the person's freedom in an excessive manner. "A contractual restriction of economic freedom is considered excessive within the meaning of Art. 27 (2) Swiss Civil Code when a person is subjected to another person's arbitrariness, gives up his economic freedom or limits it to such an extent that the foundations of his economic existence are jeopardized" (4).

Matuzalem must have been regarded as a particularly egregious abuse of public policy for the Federal Tribunal to overturn the CAS decision, and it should certainly not be regarded as a 'floodgates' case. On this occasion the potential for a decision to be overturned became a reality because the sanctions that had been imposed by the federation severely impacted on the athlete's right to economic development. The Tribunal stated that "measures taken by sport federations which gravely harm the development of individuals who practice the sport as a profession are only valid when the interests of the federation outweigh the infringement of privacy of the individual" (4). It went on to say that:

"The sanction ... contained in Article 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor, Matuzalem would be subject to a ban from all professional activities in connection with football until a claim in excess of € 11 million with interest is paid. This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee in breach and indirectly the interest of the sport federation to contractual compliance by football players. The infringement of Matuzalem's economic freedom would (in theory) be an appropriate threat to pay and to find the funds for the amount due. However, if Matuzalem rightly says that he cannot pay the whole amount anyway, it is questionable if the sanction is appropriate to achieve its direct purpose – namely the payment of the damages. Indeed the prohibition from continuing his previous economic and other activities will deprive Matuzalem

from the possibility of achieving an income which would enable him to pay his debt. Yet the sanction of the Federation is not even necessary to enforce the damages awarded: Shakhtar can enforce the award by means of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 ("New York Convention"), as most states are parties to that treaty and in particular Italy, which is Matuzalem's present domicile (4A_558/2011 at 4.3.4).

The Federal Tribunal summed up its reasoning thus:

'The threat of an unlimited occupational ban based on Article 64 (4) of the FIFA Disciplinary Code constitutes an obvious and severe restriction in the player's privacy rights and disregards the fundamental limits of legal commitments as contained in (Swiss law). Should payment fail to take place, the award under appeal would lead not only to the player being subjected to his previous employer's arbitrariness but also to a restriction in his economic freedom of such severity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of FIFA or its members. The CAS arbitral award...contains an obvious and grave violation of privacy and is contrary to public policy (4A_558/2011 at 4.3.5).

Clearly *Matuzalem* is a very significant decision for FIFA and other entities that purport to exercise such breathtakingly swingeing powers but, like *Pistorius*, the decision-makers had to get it massively wrong before their decision was overturned. The wider circumstances under which Swiss public policy provides a potential remedy remain unchanged and, therefore, the case's implications for others who would challenge a CAS final award under Articles 190(2) of the PILA are very limited. The Supreme Court has taken the view that only decisions that contradict fundamental principles that are widely-recognised and should underpin any legal system will be regarded as incompatible with public policy – so, for example, that encompasses the principles of good faith, the prohibition of discrimination, the protection of minors, the doctrine of *pacta sunt servanda* (parties' contractual rights must be respected) and the corollary prohibition of the abuse of contractual and legal rights. In doping cases the principle of ('modified') strict liability has been regarded as not contrary to public policy, and neither is the automatic annulment of results obtained during the period of ostensible doping; only a *Matuzalem*-type sanction, so manifestly at odds with public policy because it

disproportionately deprives an athlete of the opportunity to play professionally, is likely to galvanise the Swiss Courts into action. One wonders whether the penalties that the Swiss FA were compelled to impose on FC Sion in order to safeguard their own position would be regarded in a similar light, but it was the decision's impact upon an individual player which tipped the balance away from the governing body.

Matuzalem will not alter the Swiss courts' being supportive of the principle of sports arbitration and their respect for the judgments of the CAS. This is absolutely appropriate, but while there is always a challenge for supervisory courts in balancing the need for fairness in arbitration against certainty in, and respect for, arbitral processes there has to be meaningful oversight and at least the potential for awards to be successfully appealed if confidence in any system of arbitration is to be maintained. It has historically betrayed little desire to over-regulate CAS' activities save in the most egregious of situations (again, the very low possibility of successful appeals is not going to increase as a consequence of *Matuzalem*), and because it hears cases on the basis of the parties' documents and written submissions – ordinarily, it does not hear the parties and only exceptionally (by virtue of Article 99(1) SCA) will it entertain new evidence that was not adduced before the CAS - the differences between an appeal from the CAS and the *hearing de novo* that characterises CAS hearings (pursuant to CAS Rule 53) will remain. However, the principles of good faith do allow the parties to re-argue and further develop any arguments that had been previously advanced so long as those arguments are potentially in support of one or more of the Article 190(2) grounds, and if athletes and their advisors feel re-energised after *Matuzalem* this could be an area worth exploring: it is not inevitable that they will be condemned to simply re-produce their CAS arguments in written form.

Further, although the Supreme Court has taken the view that any dispute which involves a professional athlete is deemed to have a financial value and is therefore a suitable matter for arbitration (PILA Article 177(1)), under s 74 of the Supreme Court Act (SCA) it will not entertain appeals in respect of those arbitrations if the monetary value of a claim is less than either 15,000 Swiss Francs (for employment and tenant law issues) or 30,000 (for all other matters). It is perfectly understandable that the courts do not wish to be troubled by relatively inconsequential (at least in financial terms) arbitration decisions that would have the potential to absorb a disproportionate amount of judicial time, but the difficulty here is that challenges to CAS awards are often concerned with annulling or upholding the decisions that were

initially laid down by governing bodies. There are not many CAS determinations that have the air of an international commercial arbitration and certainly very few that concern anything like the vast sums that were at stake in *Matuzalem* – financially, there is little at stake in respect of the Olympic ad-hoc tribunal's awards, for instance - but it is not possible to know how many parties, if any, have been dissuaded from challenging an award as a consequence of this provision's existence. In similar vein, Articles 62 and 65 SCA make provision as to costs and the loser is likely to be liable in costs of several thousand Francs, and quite possibly tens of thousands. Further, if the petitioner is not domiciled in Switzerland or a state with which there is an agreement making contrary provision a petitioner can be requested to post a security for costs. This has "placed Latin American football clubs, particularly Brazilian clubs, in a precarious position when they wish to challenge CAS awards regarding the transfer of players...Article 62 may allow their adverse parties, usually European clubs, to force them to withdraw their appeals" and legal aid is available only rarely (Rigozzi, 2010: 229). Again, it is impossible to say how many potential petitioners have been dissuaded by this provision, but the potential for injustice is clearly extant.

CAS reforms: Some modest proposals

A particular difficulty attending the whole concept that the CAS is a 'court' in any meaningful sense of the word is that its composition is largely self-referential even in the wake of the *Gundel* reforms. Rather than having a truly independent appointments committee (assuming such a system would be feasible) twelve of the twenty members of the International Council of Arbitration for Sport, who appoint the panel members of the Court of Arbitration for Sport itself, are nominated by international sports federations, National Olympic committees and the IOC. Those twelve then appoint four others who are representative of the athletes and, in turn those sixteen appoint another four who are independent of any of those other groups. It is this Council that appoints the CAS members, most – probably all – of whom have been intimately involved in sport as administrators or participants in the broad sense as well as highly-regarded jurists. Of itself, and even allowing for the difficulty in challenging a CAS decision, that process does not call into question the integrity of the Council or CAS members and it certainly does not amount to a ground for challenging the entire process as contrary to Swiss public policy; but there are legitimate concerns that governing bodies who are repeatedly involved in CAS cases tend to repeatedly appoint the same arbitrator (each side appoints one and the CAS office appoints the third, unless the parties agree that the dispute can be heard by a sole arbitrator), and there is no

requirement that arbitrators disclose any previous related appointments. Rigozzi (2010) rightly asserts that this is a particular concern in respect of doping cases and contravenes Clause 3(1) of the International Bar Association guidelines on international arbitration agreements (www.ibanet.org), as well as having the effect of ‘closing’ what is already a closed list still further, so that there is a comparative handful of frequently over-used arbitrators while others spend their whole careers as CAS arbitrators without ever hearing a case. It is proposed that, in order to redress the ‘competitive imbalance’ in cases involving athletes, the athlete should nominate one arbitrator and the other two should be appointed by the CAS office, but that no arbitrator should be appointed to a second case unless and until no others are available. Further, while there should be a continuing expectation that both parties are bound by the existing seven-day right to challenge an appointed arbitrator (CAS Rule 34), perhaps there could be a provision for that level of diligence being waived in exceptional circumstances (see the Supreme Court’s decision 4P.105/2006; Rigozzi, 2010: 240), for it is not unreasonable to expect a different level of diligence from an athlete than can reasonably be expected of governing bodies, anti-doping actors or others that are, effectively, multi-million dollar commercial enterprises.

The primary justification for proposing a more lenient regime in favour of the athlete is that athletes have little direct influence over the sports governing bodies that acquiesce to the jurisdiction of the CAS, sign up to the WADA Code or agree to use their own internal disciplinary systems in order to do their masters’ bidding. Clearly they sign contracts acknowledging the authority of those entities and acceding to the dispute resolution systems for which they make provision, but the validity of the agreement is a validity by reference, and while there is a strong argument that an agreement by reference is no agreement at all (Mills, 2002) “the (Swiss) Supreme Court has held without hesitation that (for example) a player who was a member of a national football federation was bound by the arbitration agreement contained in the FIFA statutes” (Rigozzi, 2010: 243), which in turn acknowledged WADA’s right of appeal in respect of doping decisions handed down by a domestic governing body, and in other cases it has similarly stated that the compulsory imposition of CAS jurisdiction upon athletes does not vitiate their validity. While this rejection of even the pretence of a consent freely given has contributed to the development of the sports arbitration industry, rejecting the premise that arbitration agreements are freely entered into by the parties is an example of the ‘specificity of sport’ in the context of arbitration and its excesses could be ameliorated by the adoption of procedural rules which are more in the athletes’

favour (or which, at the very least, are not quite so contrary to them) and the development of practices that reflect the fact that this is not an area of arbitration in which the parties' consent can possibly be said to have been given freely and knowingly. However in the absence of coherent global entities that are truly representative of all athletes' interests one wonders if there can ever be a coherent pressure for change – unless the CAS itself took steps to address the problem.

While the legitimacy of sports' disputes resolution is rooted in the contracts that putatively exist between federations, event organisers, individual participants, commercial partners and so forth one can clearly have reservations about the legitimacy of these 'international sports laws' that have been created through such channels, particularly when one bears in mind that unlike commercial arbitrations the parties will find themselves bound by a contract which cannot in all good faith be classified as one freely entered-into, and which they cannot bilaterally agree to amend so that the applicable law is any other than Switzerland's in the event of a dispute arising which compels a CAS arbitration.

This inequality, verging on a complete absence, of bargaining power on the part of the athletes means that agreements compelling them to have their disputes resolved by sports' own dispute resolutions systems, and thereafter by recourse to the ostensibly exclusive jurisdiction of the CAS, are not contract freely entered into but, in Kahn-Freud's (1941) words, are "a command under the guise of an agreement". Rulebook provisions that purport to instigate 'final and binding' dispute-resolution structures similarly compel mandatory recourse to an arbitration which is conducted by legal professionals who are closely allied to particular sports and sporting federations. This is a particular problem in respect of 'blood doping', where confidentiality clauses prevent the world's foremost scientific authorities from offering independent advice on athlete biological passports

(<http://www.bbc.co.uk/news/science-environment-17586597>) and is bound to attract the attention of the Federal Tribunal some time soon. For the moment, those federations have successfully established "a hierarchy of interlocking norms that ensures that they have jurisdiction over everyone and everything connected with sport internationally" (Foster, 2003: 13). Save for the very limited potential for review afforded by Swiss law, athletes "can claim justice only from an arbitration panel created and appointed by the international sporting federation itself, or at best by the Court of Arbitration for Sport" (2003: 15).

Conclusion

The courts' willingness to recognise that sports disputes are best resolved by sporting organisations themselves rather than by the courts, and to be wary of interfering in those organisations' decisions, is no less important an aspect of 'international sports law' than are those sports' own creation of rules, regulations and internal dispute-resolution systems that ostensibly incorporate both the internationally-recognised internal safeguards outlined above and the concomitant adherence to the internationally-recognised legal principles of "clear unambiguous rules, fair hearings in disciplinary proceedings, no arbitrary or irrational decisions, and impartial decision-making" (Foster, 2003: 2). Sports that have been willing to develop impartial and transparent disciplinary mechanisms, where both parties are given the opportunity to present their case before ostensibly independent decision-makers in proceedings not obviously tainted by bias or impropriety, can ordinarily expect to carry out their functions without attracting judicial intervention. It does not, however, follow from this that there is no potential for judicial oversight in most jurisdictions. International sports law means that sports-specific dispute resolution systems such as the CAS – which contractually oblige the parties to seek resolution through a forum that may be cheaper, quicker and more responsive to the peculiarities of sport than are the 'ordinary courts' – still need to abide by legal principles and they are not 'above the law'; or at least not in principle.

However, a common factor among arbitral bodies is that, historically, there has been no expectation that their decisions will be explicitly and consistently informed by the rulings of earlier arbitral bodies in a manner akin to judicial precedent. Moreover, this has been the case even when a dispute shares marked factual similarities with the subject-matter of an earlier arbitral award. There is no system of binding authority in arbitration and "each award stands on its own; it may well happen that an arbitral tribunal ... will arrive at a different conclusion from another tribunal faced with the same problem. The award of the first tribunal ... may be of persuasive effect, but no more" (Blackaby *et al.* 2009: para 1.1113). While this 'traditional' approach to arbitration can certainly be discerned in many CAS decisions it is also the case that some CAS' determinations actually have been explicitly informed by both its earlier rulings and by recourse to wider legal principles and judicial precedent – a cynic might argue that CAS Panels use precedent when doing so reinforces the judgment they wish to reach and ignore it when the precedents are adverse, and this does appear to be the case in resp[ect of appeals from the FIFA Dispute Resolution Chamber in particular. That said, while one must be wary of unduly lauding what is, ultimately, a purely private dispute-resolution

system which has the potential to visit extraordinarily damaging decisions, particularly upon individual athletes who would usually lack the resources to challenge its rulings through the courts even if there were a realistic possibility of success, CAS' robust procedures (Mangan 2009), the ever-improving legal sophistication of its judgments, and its potential to be the one entity that can offer security to those same competitors against the procedural ineptitude, mendacity or sheer incompetence on the part of sports decision-makers that *Pistorius* epitomises have contributed to "the recognition and enforcement of CAS awards domestically and internationally. There is a growing body of private international sports law which some claim might soon be seen to override national law" (Anderson 2010: para 3.01). This potential for sports law to override national law is susceptible to exaggeration, but it is certainly the case that this increased juridical sophistication on the part of CAS is to be welcomed. The application of a coherent corpus of arbitration principles to sports dispute resolution would be particularly welcome if it were to be underpinned by a greater willingness on the part of the CAS to make explicit reference to its own earlier determinations, as well as to wider legal authority.

Finally, the Scottish case of *Petition of Rangers Football Club* [2012] CSOJ 95 highlights the need for sports organisations to ensure their provisions clearly elucidate the circumstances under which their own disciplinary procedures have jurisdiction and the extent of recourse to the CAS. Here, the club sought judicial review of the well-documented imposition of a transfer ban by the domestic governing body as a sanction for its failure to advise that governing body that Director Craig Whyte was banned from holding any Directorships at the time of his appointment. In opposing the club's application, the Scottish Football Association (SFA) asserted that its Articles of Association provided that any dispute (including challenges to the decisions of its disciplinary bodies) should be referred to the CAS, citing SFA Rule 5.1(c) which provided that all members shall "recognise and submit to the jurisdiction of the CAS as specified in the relevant provisions of the FIFA statutes and the UEFA statutes" (para 6). Giving the judgment of the court, Lord Carloway pointed out that this obliges FIFA to provide "the necessary institutional means to resolve disputes and to recognise the CAS, and also provide for appeals to CAS in certain circumstances". However, those rules did not require clubs to submit disputes with their *domestic* governing body to the CAS, and the SFA's Articles of Association, which form the contract between the SFA and its members, were also silent on that matter. Lord Carloway noted (para 7) that in two CAS judgments, *Ashley Cole v FAPL* CAS/2005/A/952 and *Al-Wehda v Saudi Arabian Football Federation*

CAS/2011/A/2472, CAS had said that there were no such mandatory provisions in the FIFA statutes; but even if there had been such provisions there would have been no right of appeal to the CAS unless the rules of a national governing body likewise provided for it, and as a matter of Scots law there was no appropriate provision for that in the SFA's Articles of Association. Lord Carloway also noted that Rule 15.8.3.6 the rules of the Judicial Panel (an organ of the SFA and from which the membership of a disciplinary tribunal in any given case is drawn) said that the tribunal's decisions were "final and binding on the parties and there shall be no further right of appeal." That served to exclude the possibility of an appeal to the CAS against the Judicial Panel's findings, but it did not oust the court's jurisdiction because "the present application to the court, by contrast, is not an appeal but an application to the court in its supervisory jurisdiction to correct what is alleged to be an excess of jurisdiction by the tribunal" (para 8).

Consequently, the Scottish court's supervisory powers do allow it to correct the disciplinary tribunal's error (namely, that its rules did not provide it with the authority to impose a transfer ban and its decision in that respect was thus *ultra vires*) and, on this occasion, to remit the matter back to that tribunal for reconsideration. Lord Carloway accepted that "the fact that I find the imposition of the additional sanctions to be *ultra vires* does not necessarily mean that (Rangers) will escape to a lighter and ineffective punishment" (para 23) - the SFA had wanted to impose a transfer ban because the only alternative available to it within the rules was termination of Rangers' membership of the SFA and/or a fine of up to £1 million which would never have been paid. While subsequent events rather deflected attention from the SFA's difficulty with this aspect of the Rangers debacle, the case does reinforce the need for governing bodies to ensure that, if they want to oust the jurisdiction of the courts, the relevant rules state so clearly and consistently, and accord with the law of each particular jurisdiction - this is not an area in which a 'one size fits all' approach is appropriate. Finally, it should be noted that the courts - properly wary of any attempts to marginalise them completely - should draw a distinction between an 'appeal' and the exercise of their supervisory jurisdiction. Closing the possibility of an appeal to the domestic courts in favour of exclusive recourse to the CAS is feasible if the Articles of Association, Statutes and other contractual documents are properly drafted; but whether the courts' supervisory role can be ousted and, if so, how that can be achieved is governed by domestic law rather than the whims of sporting entities. Ordinarily, supervisory jurisdiction cannot be ousted through the terms of a private parties' contract, no matter how tightly drafted those terms may be.

