

Class 10:

Arbitration in Sports

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Overview

1. Introduction
2. The ecosystem of organized sport
3. Main features of CAS arbitration
4. Legal remedies against CAS awards
5. “Hot Topics” in sports arbitration
 - Consent
 - Legitimacy of CAS
 - Human rights
 - Competition law
6. Main differences between sports and commercial arbitration (summary)
7. Discussion (if time permits)

1. Introduction

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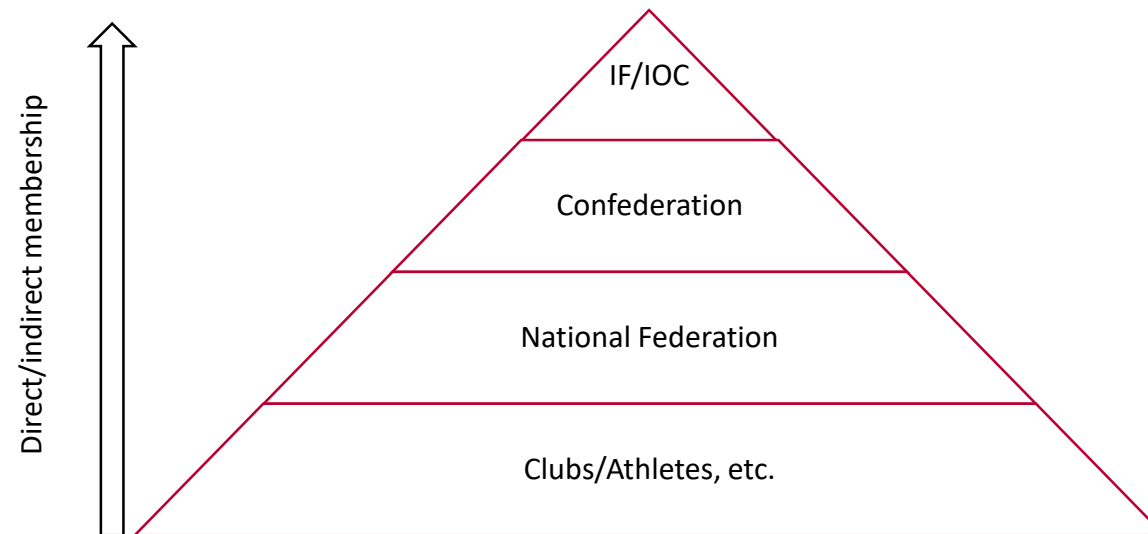
1. What do you think when you hear “sports arbitration” or “Court of Arbitration for Sport”?
2. What do you think when you hear “*lex sportiva*”?

1. Introduction (2)

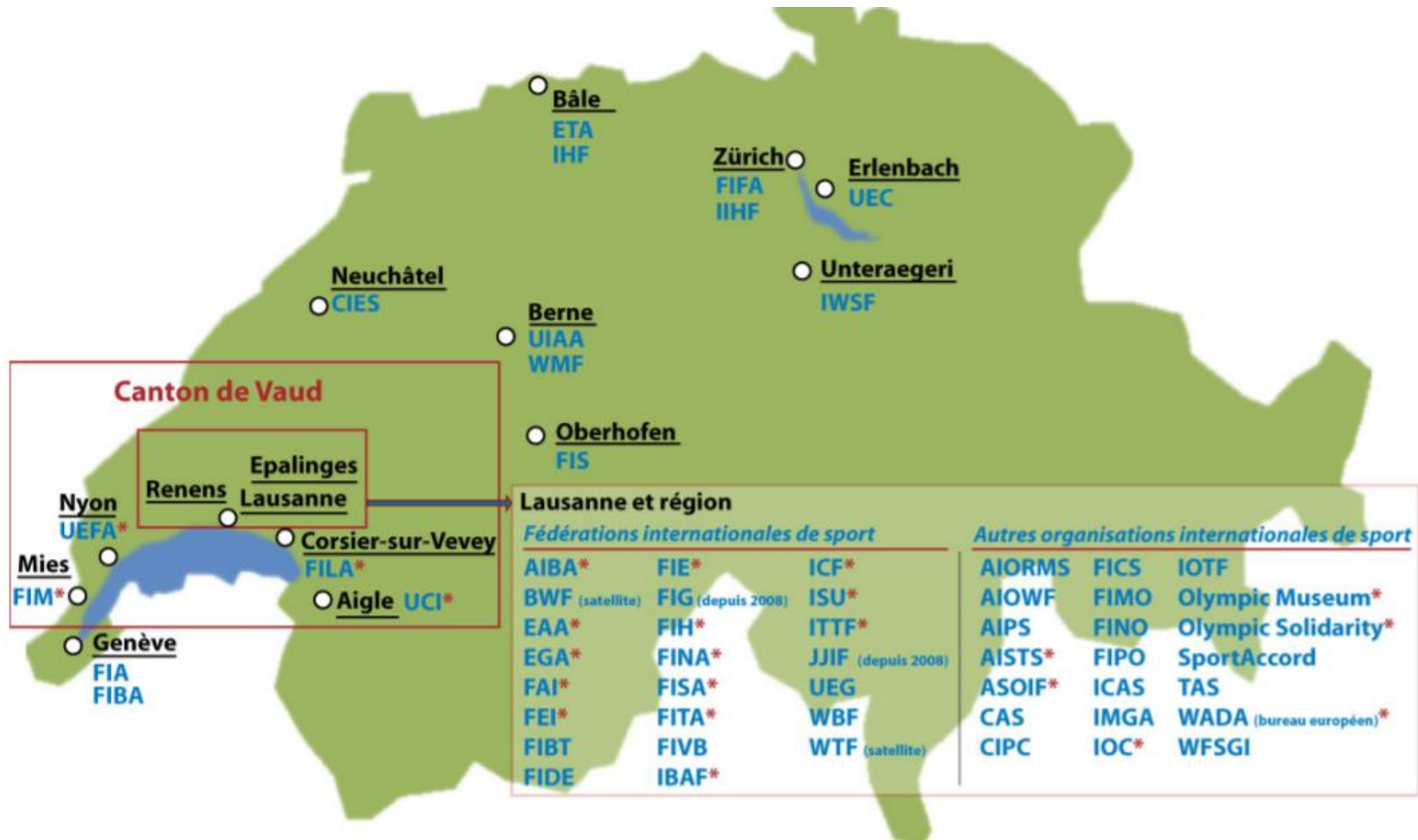
- What are the goals of today's class?
- What is "Sports Arbitration"?
- What is the Court of Arbitration for Sport (CAS)?
- Why is CAS in Switzerland?
- Do all sports-related disputes go to CAS?
- Role of state courts in sports-related disputes?

2. The Ecosystem of Organized Sport

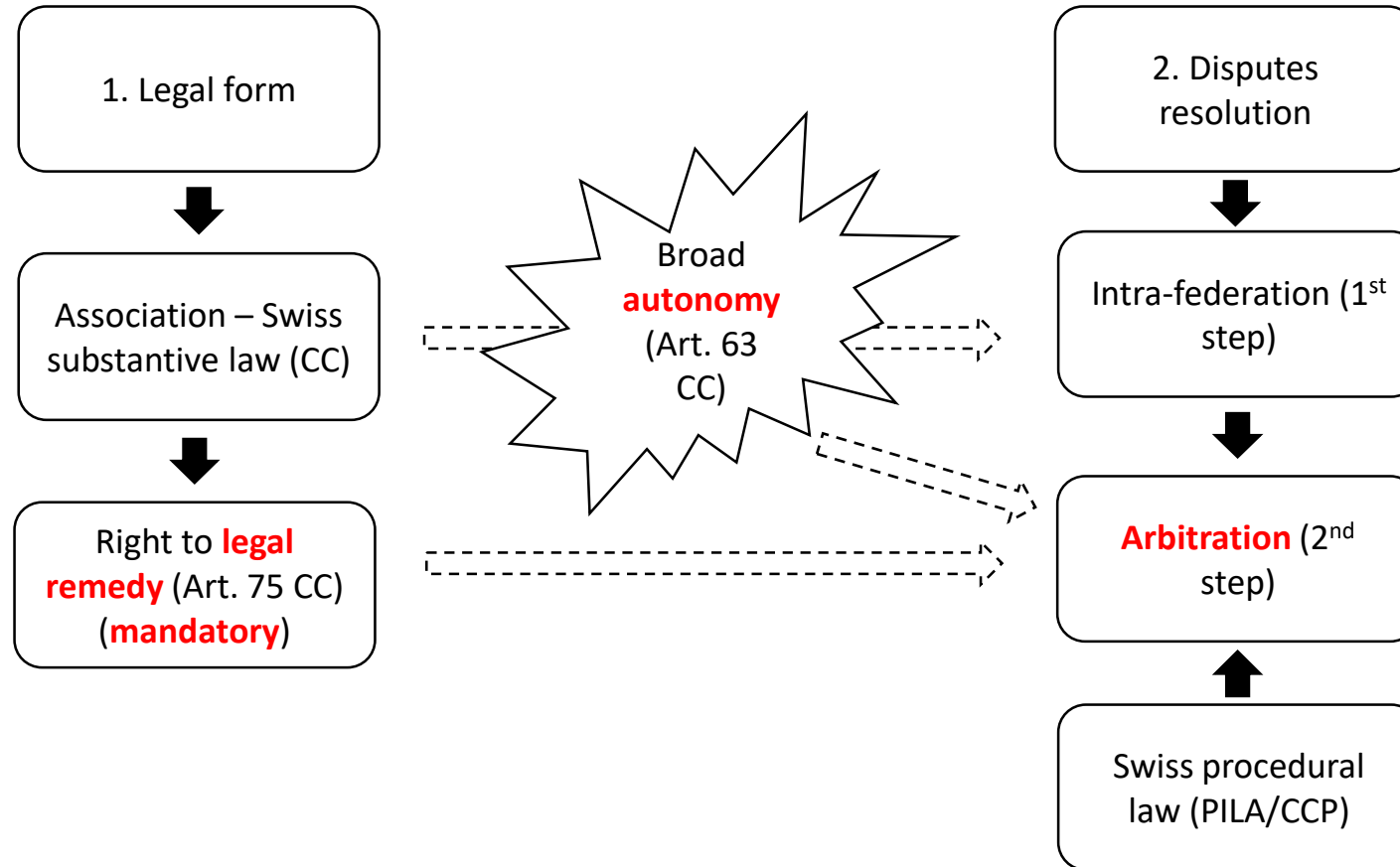
- Often very political
- Pyramidal
 - One-place principle
- Myriad of rules (normative density)
 - Predominance of Swiss procedural & substantive law
 - Specificity of sport (*lex sportiva*)



2. The Ecosystem of Organized Sport (2)



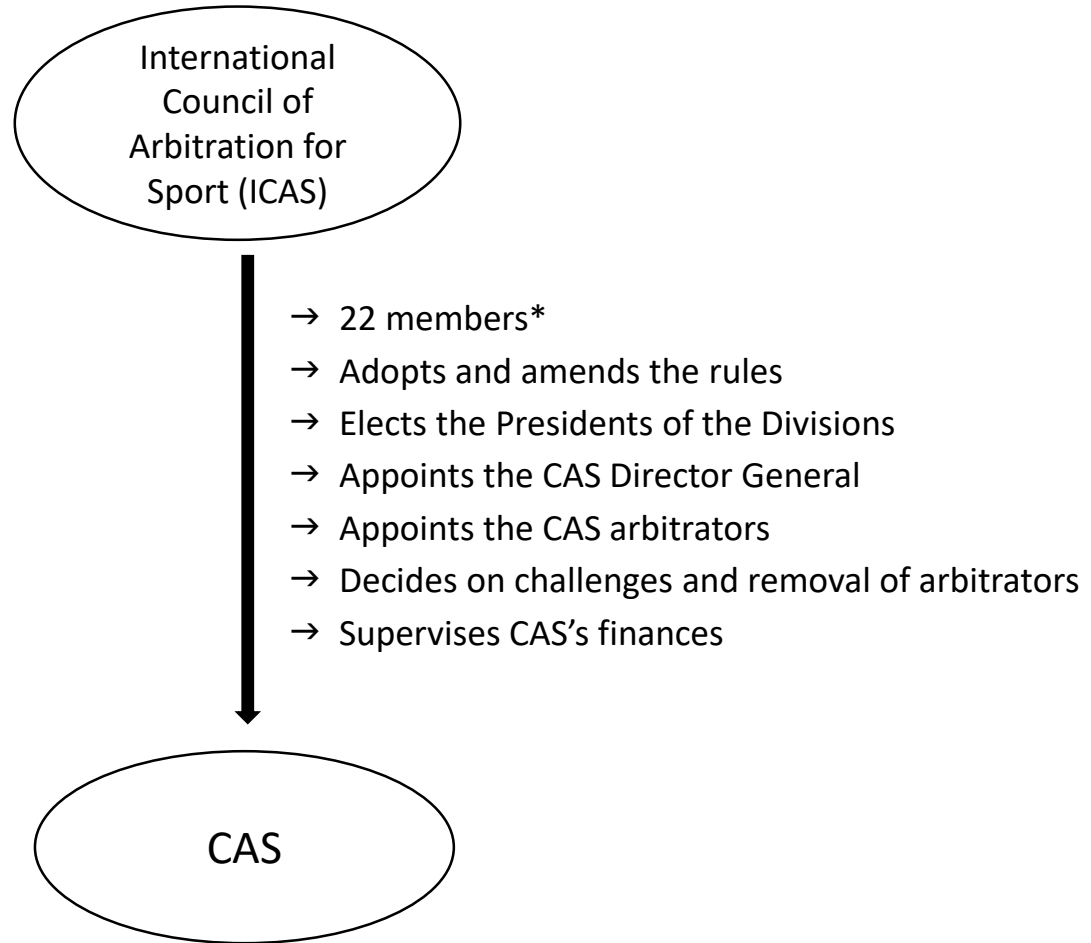
2. The Ecosystem of Organized Sport (3)



3. Main Features of CAS Arbitration

“The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of the CAS.” (Article S2 of the ICAS Statutes)

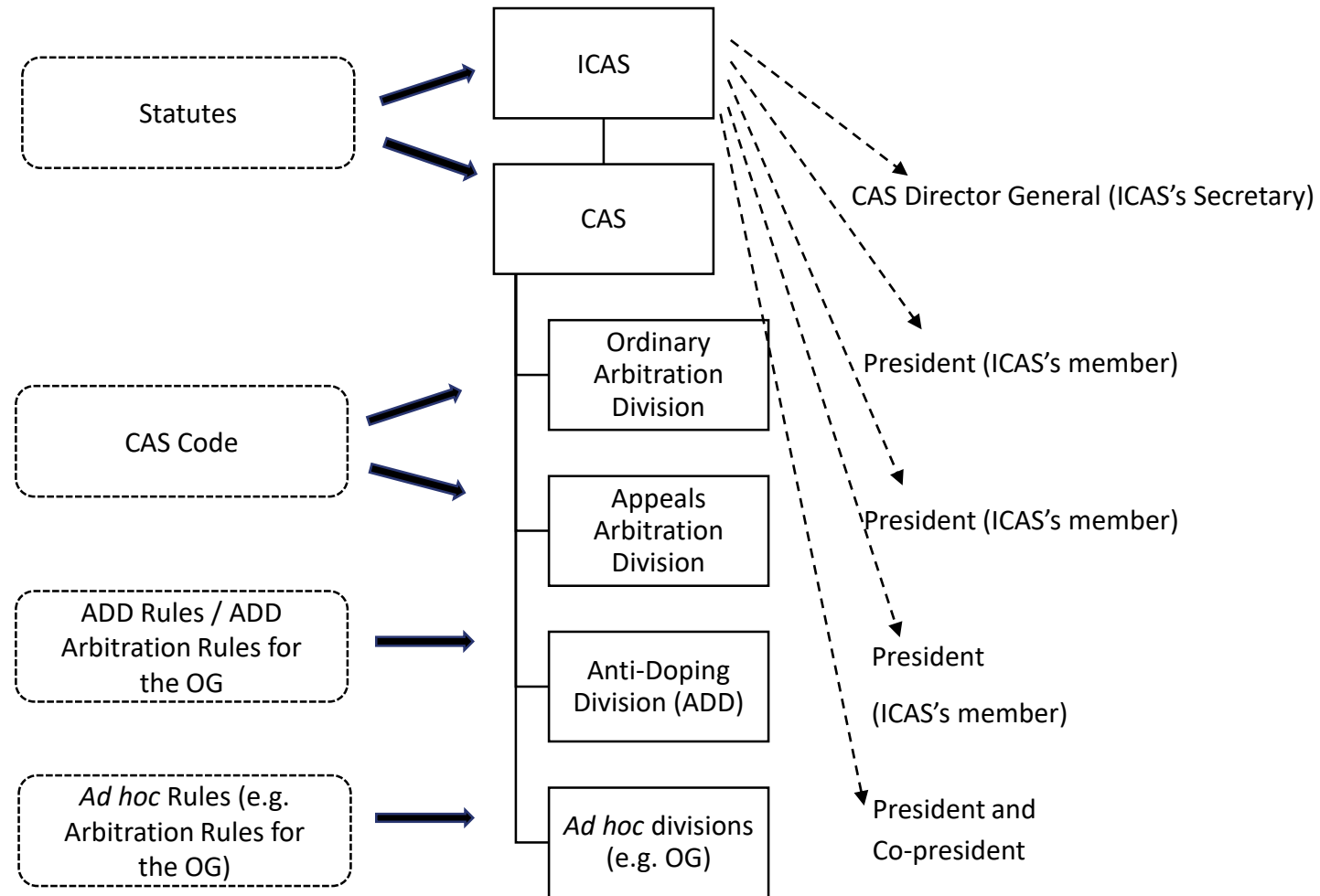
- *Appointment:**
- 6 from IFs
 - 4 from ANOC
 - 4 from IOC
 - 4 from previous 12
 - 4 from previous 16



3. Main Features of CAS Arbitration (2)

- **Ordinary Arbitration Division**
 - First instance procedures (contractual disputes)
 - Non-compliance procedure with the WADC (*WADA vs RUSADA*)
- **Appeals Arbitration Division**
 - Appeals against IF's/CAS ADD's decisions
 - Second instance procedures *ex novo* (mostly disciplinary disputes) (*WADA vs Sun Yang & FINA*)
- **Anti-Doping Division** (IMPORTANT: see decision 4A_232/2022)
 - First or sole instance for anti-doping procedures (permanent or *ad hoc – fast track* – during sporting events) (*Russian athletes cases*)
- **Ad-hoc Divisions** (fast-track – 24/48 hours)
 - Qatar World Cup
 - OG (*WADA & IOC & ISU vs Kamila Valieva*)

3. Main Features of CAS Arbitration (3)



3. Main Features of CAS Arbitration (4)

– R28 of the Code of sports-related arbitration (“**CAS Code**”):

*“The **seat** of CAS and of each Arbitration Panel (“Panel”) is **Lausanne**, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.”*

Also:

- Art. A3 CAS ADD Rules
- Art. 7 of CAS ADD Rules Beijing 2022
- Art. 7 Arbitration Rules for the Olympic Games
- Art. 7 Arbitration Rules 2022 FIFA World Cup Qatar

3. Main Features of CAS Arbitration (5)

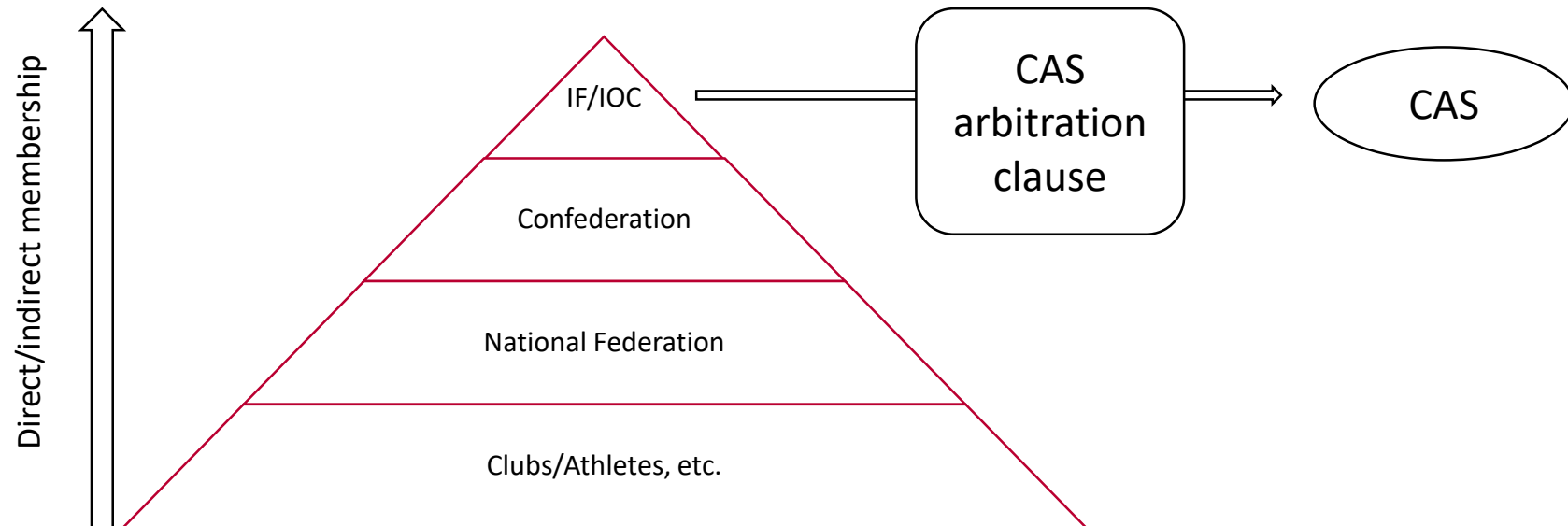
	International arbitration	Domestic arbitration
Relevant Provisions	Arts. 176 – 194 of the Swiss Private International Law Act (SR. 291, PILA)	Arts. 353 – 399 of the Code of Civil Procedure (SR. 272, CCP)
Subjective scope	<i>"The provisions of this Chapter shall apply to arbitrations with their seat in Switzerland if at least one of the parties to the arbitration agreement, at the time of its conclusion, did not have its domicile, habitual residence or seat in Switzerland."</i> (Art. 176(1) PILA)	<i>A contrario</i> (Art. 353(1) CCP)
Opting out	<i>"The parties may, either in the arbitration agreement or in a subsequent agreement, exclude the application of this Chapter and agree to the application of Part 3 of the CCP. The exclusion shall meet the conditions as to form set out in Article 178(1)"</i> (Art. 176 (2) PILA).	The parties can agree to opt out of the CCP by declaring this in the arbitration agreement or in a subsequent agreement, and instead they can agree that the Provisions of the Twelfth Chapter of the PILA shall apply (Art. 353(2) CCP).
Authority to appeal	Swiss Supreme Court (SSC), (Art. 191 PILA)	Swiss Supreme Court (SSC), (Art. 389(1) CCP) Through parties' agreement: cantonal court (Art. 390(1) CCP)

3. Main Features of CAS Arbitration (6)

	International arbitration	Domestic arbitration
Grounds to set-aside	<p>Art. 190(2)(a-e) PILA:</p> <ul style="list-style-type: none"> a) Improper appointment or constitution of the tribunal; b) Jurisdiction wrongly accepted or denied; c) <i>Ultra/infra petita</i>; d) Equal treatment and right to be heard; e) Procedural and substantive public policy. 	<p>Art. 393(a-f) CCP:</p> <ul style="list-style-type: none"> a) Improper appointment or constitution of the tribunal; b) Jurisdiction wrongly accepted or denied; c) <i>Ultra/infra petita</i>; d) Equal treatment and right to be heard; e) Arbitrariness; f) Manifestly excessive costs.
Waiver to set-aside and/or to revision	<p><i>"If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, either in the arbitration agreement or in a subsequent agreement, exclude in whole or in part recourse against arbitral awards; the right to revision under Article 190a(1)(b) cannot be waived. The agreement shall meet the conditions as to form set out in Article 178(1)."</i> (Art. 192 PILA).</p>	<p>Not possible.</p>

3. Main Features of CAS Arbitration (7)

- **Jurisdiction:** “*whenever the parties have agreed to refer a **sports-related** dispute to CAS*” (Art. R27 CAS Code):



3. Main Features of CAS Arbitration (8)

- **Arbitrability:** any dispute of “*financial interest*” (Art. 177(1) PILA) or “*claim of which the parties can freely dispose*” (Art. 354 CCP)
 - **Anti-doping** (*WADA vs Sun Yang & FINA, WADA & IOC & ISU vs Kamila Valieva, Russian athletes cases*)
 - **Other disciplinary matters** (unethical behavior, match-fixing, hooliganism, etc.) (*FIFA vs Michel Platini*)
 - **Eligibility** (*Caster Semenya vs WA, recently Lia Thomson vs World Aquatics*)
 - **Association law** (e.g. elections within sports bodies) (*Serik Konakbayev vs AIBA*)
 - **Contractual disputes** (employment, transfer of players, agency, sponsorships, media rights, etc.)
 - **Field of play decisions** (e.g. referee’s decisions, but limited review)

3. Main Features of CAS Arbitration (9)

- **“Peculiar” procedure:**
 - Official languages: French, English and Spanish
 - Forced seat
 - Sports regulations applied as “substantive law”
 - Swiss law very often applied subsidiarily
 - Importance of CAS’s case law as “precedent”
 - In general more expedited procedure
 - No procedural hearings/CMC (but see latest amendments in CAS Code)
 - Shorter submissions and hearings
 - Cross-examination vs “hot tub”
 - Awards rendered “in principle” quickly (fast-track if *ad hoc* Divisions)
 - No direct communication with the arbitrators
 - CAS more than a simple institution administering the case

3. Main Features of CAS Arbitration (10)

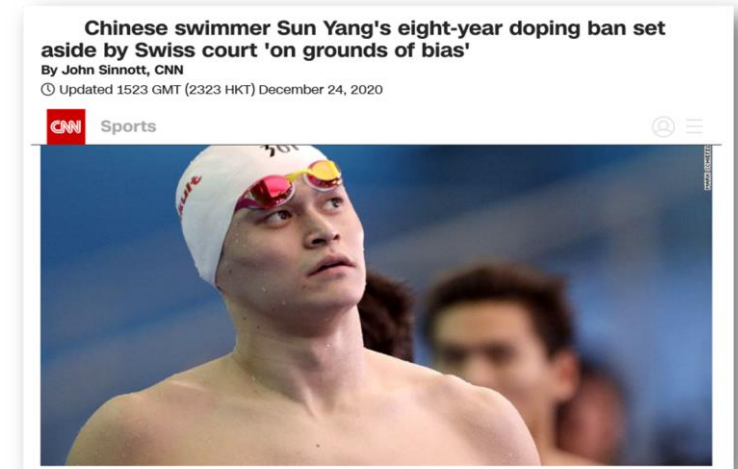
- Limited rights to appoint the arbitrators
 - Procedure varies depending on the applicable rules
 - Closed lists
 - General list
 - Football list
 - ADD list
 - Arbitrators eligible for party nomination
 - Arbitrators eligible as panel presidents or sole arbitrators
 - Special list for WADC non-compliance
 - *Ad hoc* lists
 - Challenge: to the ICAS
 - Exception: *ad hoc* Divisions (same authority...)

3. Main features of CAS Arbitration (11)

- **Applicable law on the merits:**
 - Sports regulations + *lex sportiva*
 - Mostly Swiss law
 - By “choice” (see for instance Art. 56(1) of FIFA Statutes)
 - By default (Arts. R45 and R58 CAS Code, A20 CAS ADD Rules)
 - In support (Arts. 17 CAS ADD Rules Beijing 2022, 18 Arbitration Rules 2002 FIFA World Cup Qatar)
 - General principles of law (Arts. 17 CAS ADD Rules Beijing 2022, 17 Arbitration Rules for the Olympic Games)

4. Legal Remedies against CAS Awards

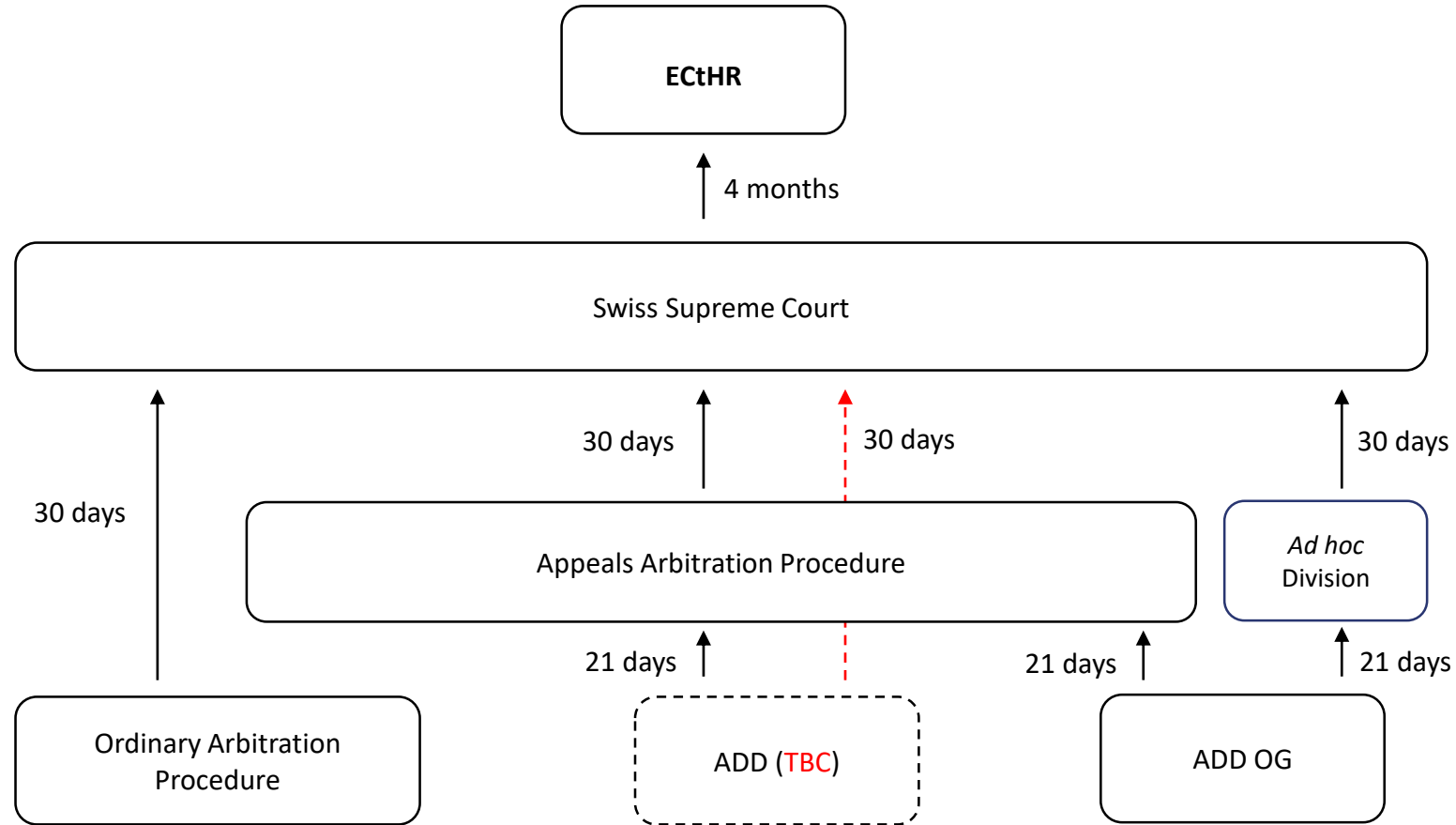
- Always the **Swiss Supreme Court**:
 - **Set-aside** (Art. 190 PILA): 30 days
 - Rule: only written submissions
 - Very limited power of review (≠ court of appeal)
 - Limited grounds (Art. 190(2) PILA)
 - **Revision** (Art. 190a PILA): 90 days (10 years absolute time limit):
 - Rule: only written submissions
 - “new” facts or evidence (Art. 190a(1)(a) PILA)
 - criminal proceedings (Art. 190a(1)(b) PILA)
 - “new” grounds regarding independence or impartiality (Art. 190a(1)(c) PILA): *WADA vs Sun Yang & FINA*



4. Legal Remedies against CAS Awards (2)

- Languages: official Swiss languages and (since 1 January 2021) English (Art. 77(2*bis*) Swiss Supreme Court Act (SCA))
 - NB.: English does not apply as language of correspondence/decision
- Award immediately enforceable
 - Exception: suspensive effect granted as a provisional measure (Art. 103 SCA)
 - Possibility of waiver (Art. 192 PILA)
 - Stricter requirements for waiver in sports arbitration (Art. 192 PILA) (*Cañas case*, DSC 133 III 235)

4. Legal Remedies against CAS Awards (3)



4. Legal Remedies against CAS Awards (4)

- **ECtHR:**

- “Human rights-focused” application – consequences unclear
- *Mutu and Pechstein vs Switzerland* and *Semenya vs Switzerland*



5. “Hot Topics” – Consent

“Consent”?

- CAS arbitration in disciplinary matters is “forced arbitration”
(*Mutu and Pechstein vs Switzerland*)
- Athletes have no choice but to accept CAS arbitration
(*Cañas case, DSC 133 III 235*)

5. “Hot Topics” – Legitimacy of CAS

CAS’s appearance of independence and impartiality?

- Confirmed in *Lazutina* (DSC 129 III 445) (also *decision of the Swiss Supreme Court 4A_644/2020 dated 23 August 2021*)
- Confirmed by ECtHR in *Mutu and Pechstein vs Switzerland*
- But *quid* appointment of the president of the panel in Appeals Arbitration Procedure?
- Opaque appointment of the arbitrators to the lists?
- Some lists very limited (e.g. ADD list, *ad hoc* lists)
- Recurring appointments of the “few” - opaque appointment of the president by the CAS

5. “Hot Topic” – Human Rights

Transgender swimmer Lia Thomas begins legal case against swimming’s world governing body

Plans to allow for transgender swimmers at World Cup meet scrapped due to no entries



Open category was to make debut on pilot basis with 50- and 100m races in Berlin



5. “Hot Topics” – Human Rights (2)

- Do CAS arbitrators have sufficient expertise in HR law?
- Very strict approach of the Swiss Supreme Court
 - Very low likelihood of success
 - Limited power of review
 - No “human rights analysis” (vertical effect approach)

Not possible to plea the
ECHR as a ground to set aside
(*decision Swiss Supreme
Court dated 4A_846/2019 17
August 2020*)

Increasing
involvement of the
ECHR

5. “Hot Topics” – Human Rights (3)

194. It can therefore be concluded from the above-cited case-law of the Court that domestic courts are under an obligation to ensure real and effective protection against discrimination committed by private individuals (see also, to this effect, the cases concerning violent attacks against individuals carried out by private groups and the issue of a State’s positive, including procedural, obligations, for example, *Identoba and Others v. Georgia*, no. [73235/12](#), § 63, 12 May 2015, and *Beizaras and Levickas v. Lithuania*, no. [41288/15](#), 14 January 2020). In the present case, however, the Federal Supreme Court did not consider that prohibition of discrimination committed by private-law entities fell within the concept of public policy within the meaning of section 190(2)(e) PILA. As such, it did not carry out a review, that the applicant had requested, of the compatibility of the DSD Regulations issued by World Athletics, a non-State instrument, with the Constitution or the Convention.

195. Having regard to the foregoing, the Court considers that the Federal Supreme Court did not fulfil the requirements set out in the above-cited case-law, which requires States Parties to the Convention to effectively prevent and provide redress for discriminatory acts, even those carried out by private individuals or entities.

Semenya vs Switzerland
(application 10934/21, judgment of 11 July 2023)

5. “Hot Topics” – Human Rights (4)

201. The Court considers, for the reasons set out above (letters β to στ), that the applicant was not afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since they concerned substantiated and credible claims of discrimination as a result of her increased testosterone level caused by DSD. It follows, particularly with regard to the high personal stakes involved for the applicant – namely, participating in athletics competitions at international level, and therefore practising her profession – that Switzerland overstepped the narrow margin of appreciation afforded to it in the present case, which concerned discrimination on grounds of sex and sex characteristics requiring “very weighty reasons” by way of justification (see paragraph 169 above). The high stakes of the case for the applicant and the narrow margin of appreciation afforded to the respondent State should have led to an in-depth institutional and procedural review, but such a review was not available to the applicant in the present case. As a result, the Court is unable to find that the application of the DSD Regulations to the applicant’s case could be considered a measure that was objective and proportionate to the aim pursued.

202. There has accordingly been a violation of Article 14 of the Convention in conjunction with Article 8.

Semenya vs Switzerland
(application 10934/21, judgment of 11 July 2023)

5. “Hot Topics” – Competition law

- CAS-124/21 P – International Skating Union (ISU)
 - Sport is an economic activity (para. 91)
 - Arbitration rules imposed by the ISU must comply with the requirement of effectiveness:

193 That is why, while noting that an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 35, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 34), the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU (see, to that effect, judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 37). Such a requirement is particularly necessary when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete.

194 In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies.

195 Compliance with that requirement for effective judicial review applies in particular to arbitration rules such as those imposed by the ISU.

5. “Hot Topics” – Competition law (2)

- CAS awards must be reviewed by courts within the EU when EU competition is at stake:

198 That requirement of effective judicial review means that, in the event that such rules contain provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the awards made by that body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, it entails that court’s satisfying all the requirements under Article 267 TFEU, so that it is entitled, or, as the case may be, required, to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it (see, to that effect, judgments of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107, paragraphs 14 and 15, and of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 40).

6. Sports Arbitration vs Commercial Arbitration

Commercial arbitration	CAS arbitration
Mainly first (only) instance	Mainly second instances (appeal arbitration)
Voluntary	Forced (in disciplinary matters)
Normally arbitration agreement in a contract	Different forms of arbitration agreements – often in the rules of the federations (agreement by reference)
Parties can choose the seat	Parties cannot choose the seat – always Lausanne
Mainly based on the contract + choice of applicable law	Mainly based on sports regulations & lex sportiva + (Swiss) law (by “choice”, default or in support)
Parties’ right to freely chose the arbitrators	Parties’ right to chose the arbitrators limited
Can be long and expensive (no legal aid)	Faster and cheaper (legal aid available)
(In principle) confidentiality	Limited confidentiality
No arbitral precedent	CAS case law as precedent
Waiver of SCC remedies possible	Waiver of SCC remedies possible – but stricter requirements
New York Convention applicable to enforcement of awards	New York Convention applicable but in practice “federative” enforcement

7. Discussion

1. Is arbitration (always) the right solution to solve sports disputes? What are the potential disadvantages (especially for athletes) compared to state court litigation?
2. Should there be “open” lists of CAS arbitrators / no lists at all?
3. Assuming that sport arbitration is different from commercial arbitration, should there be – in Swiss arbitration law – provisions specific to sports arbitration? For instance, a broader power of review by the Swiss Supreme Court?

Thank you

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