

Arbitration in Sports

Christopher Boog
6 February 2025



Overview

- Introduction
- The ecosystem of organized sport
- Main features of CAS arbitration
- Legal remedies against CAS awards
- “Hot Topics” in sports arbitration
 - Consent
 - Legitimacy of CAS
 - Human rights
 - Competition law
- Main differences between sports and commercial arbitration (summary)
- Q & A

1 Introduction

The Rise of Modern Organized Sport

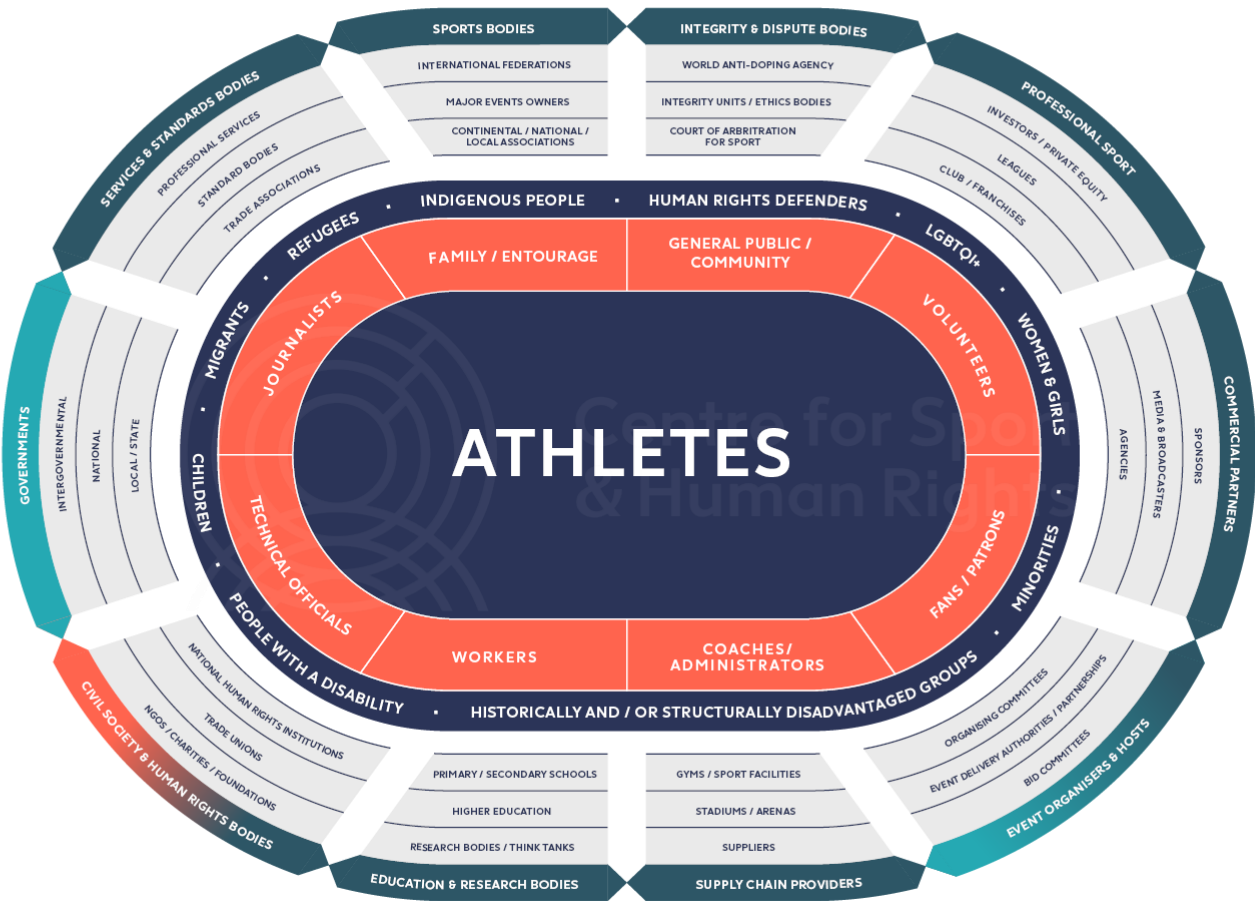
- Early to mid 20th century: transition from amateur competitions to professional leagues and competitions
- Increased commercialization of sports
- Rise of international competitions (Olympics, Football World Cup) led to need for consistent rules and dispute resolution
- Early regulatory bodies formed (IOC 1894; FIFA 1904) to govern competitions and resolve disputes internally
- They had their own rules and regulations – these resulted in disputes

2 The Ecosystem of Organized Sport

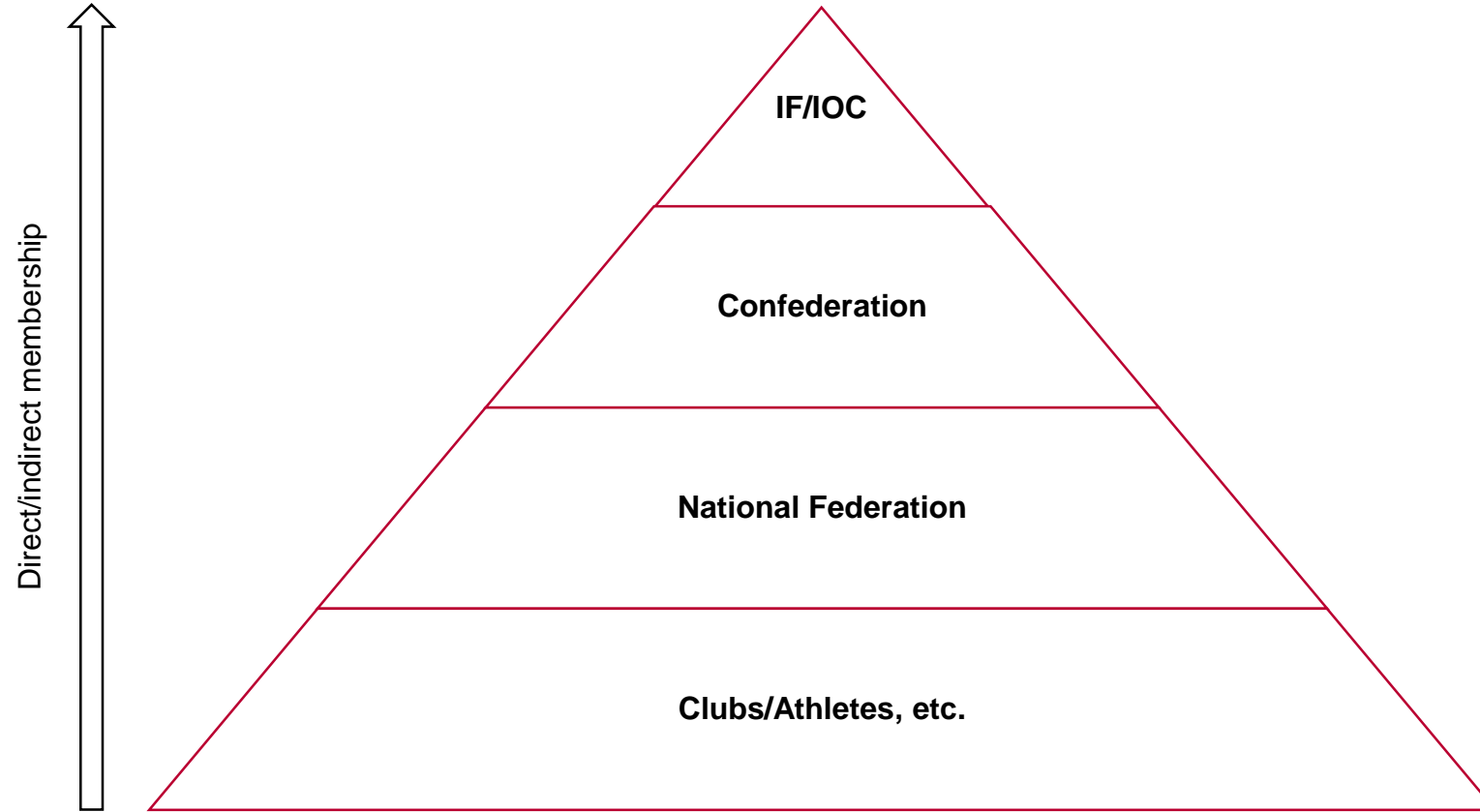
The Ecosystem of Organized Sport (1)

Sports Ecosystem

- People and communities whose human rights must be protected and respected.
- States and government bodies that have a duty to promote, protect, and fulfill human rights.
- Institutions and business actors who have a responsibility to respect human rights.



The Ecosystem of Organized Sport (2)



The Ecosystem of Organized Sport (3)

- Multi-layered system
- Involving wide range of stakeholders
- top-down structure
 - IFs responsible for creating regulatory framework and enforcing rules
 - Confederations / National Federations apply and enforce rules within their “territory”
 - Clubs/teams/athletes are subject to these rules through participation agreements, licenses, or employment contracts

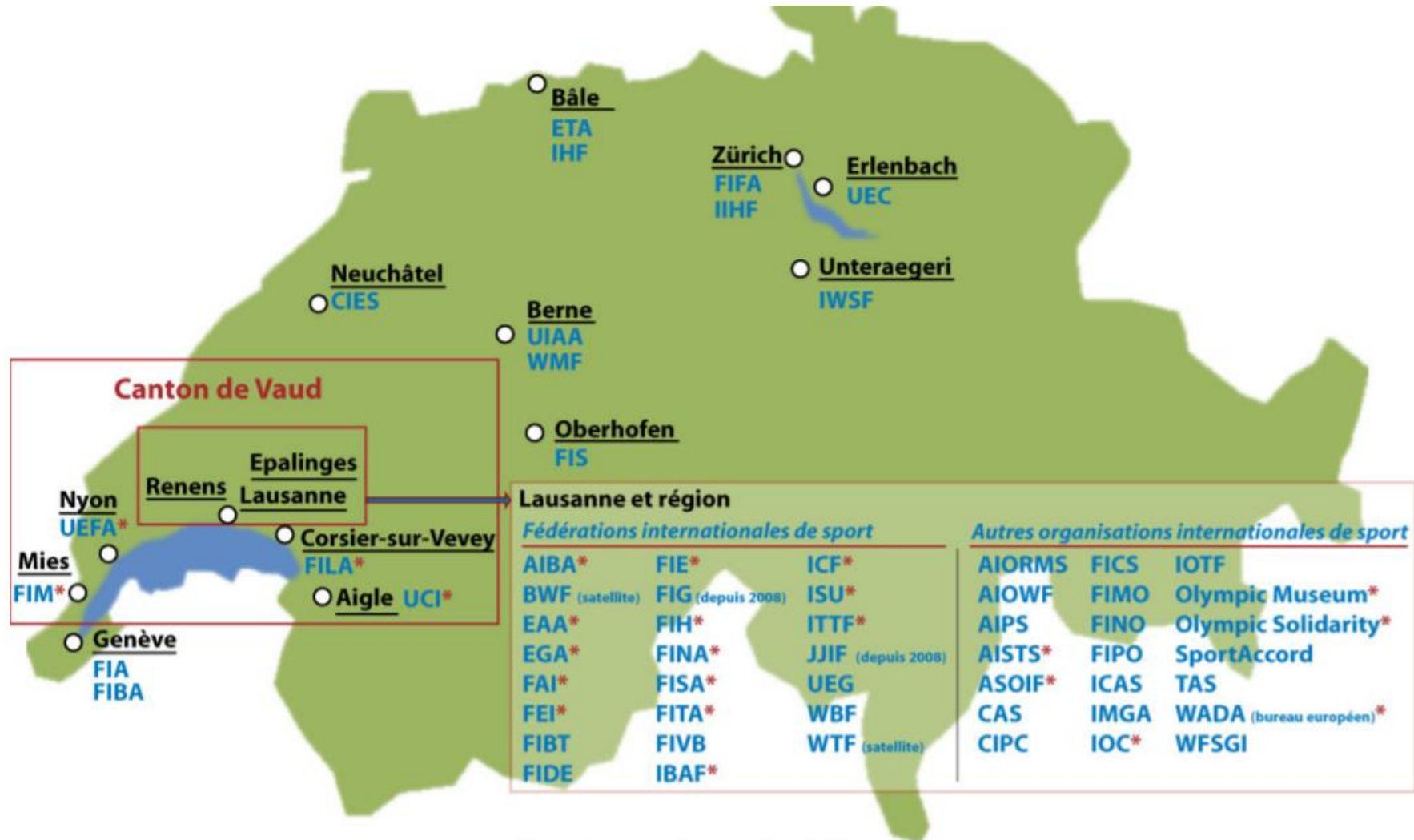
The Ecosystem of Organized Sport (4)

- “competitive side” vs “business side”: sponsors, media, event organizers with vested financial interests
- “new players”: players’ unions; athlete commissions; human rights groups
- complex web of relationships
- complex web of potential disputes:
 - doping violations
 - transfer disagreements
 - contractual breaches
 - disciplinary measures, etc.

Arbitration and Ecosystem of Organized Sport

- Most IFs embed arbitration clauses directly into their statutes and regulations
- Athletes and clubs must agree to these clauses as a condition for participation in competitions (e.g., Olympics, World Cups, World Championships, European Championships, etc.)
- Athletes register with NFs → implicitly agree to be bound by international regulations → including arbitration clauses
- Participation in major events requires adherence to arbitration framework as a condition for eligibility
- Athletes have little to no bargaining power to negotiate or opt-out of arbitration clauses → “mandatory” or “forced” arbitration

Switzerland at the Heart of Ecosystem



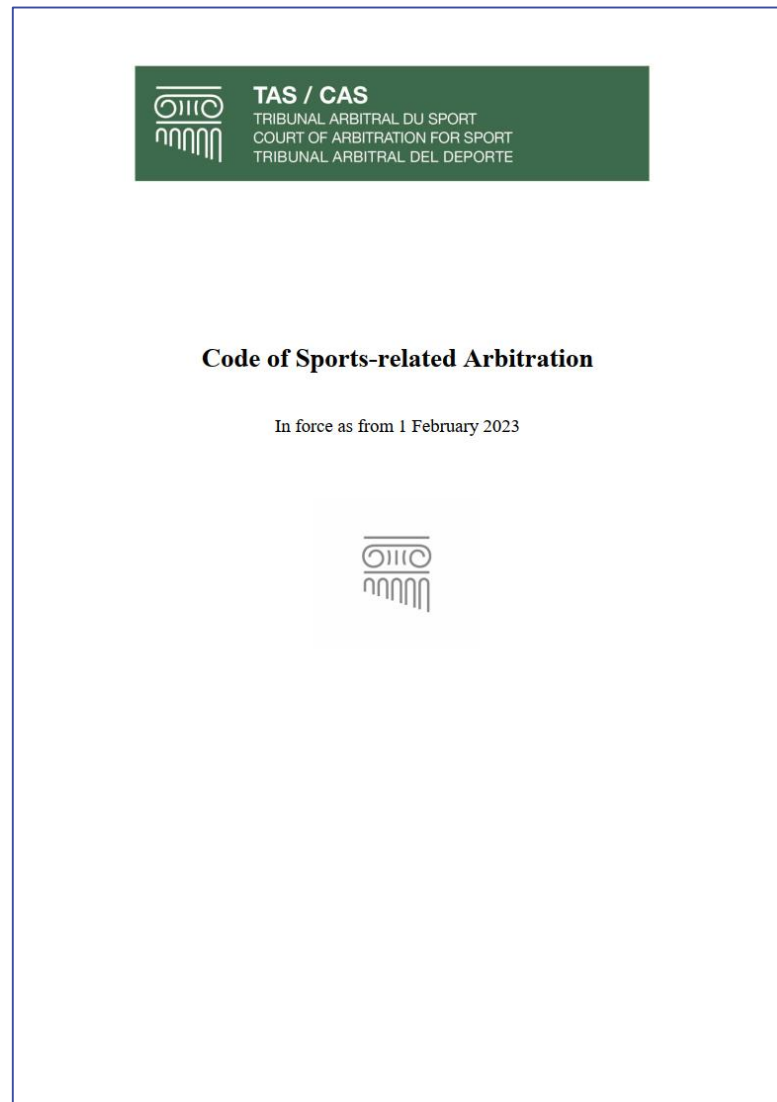
3 Main Features of CAS Arbitration



History of CAS

- 1970s-1980s: Surge in complex sports-related disputes; national courts inadequate to resolve sports disputes (inconsistent rulings; delays; etc.)
- 1981: then-IOC President Samaranch proposed creation of dedicated sports arbitration body to ensure consistency and speed
- 1984: CAS officially established under the IOC's oversight, headquartered in Lausanne, Switzerland
- 1984-1994: CAS operated with limited independence from the IOC
- 1994: **Gundel** case before the Swiss Supreme Court → successful challenge to CAS' independence → structural reforms establishing CAS as an independent body under the newly created International Council of Arbitration for Sports (ICAS)
- Sufficient independence and impartiality confirmed in **Lazutina** (2003) and by ECtHR in **Mutu/Pechstein**

Main Features of CAS Arbitration (1)



Statutes of the Bodies Working for the Settlement of Sports-Related Disputes



Procedural Rules

Main Features of CAS Arbitration (2)



Code of Sports-related Arbitration

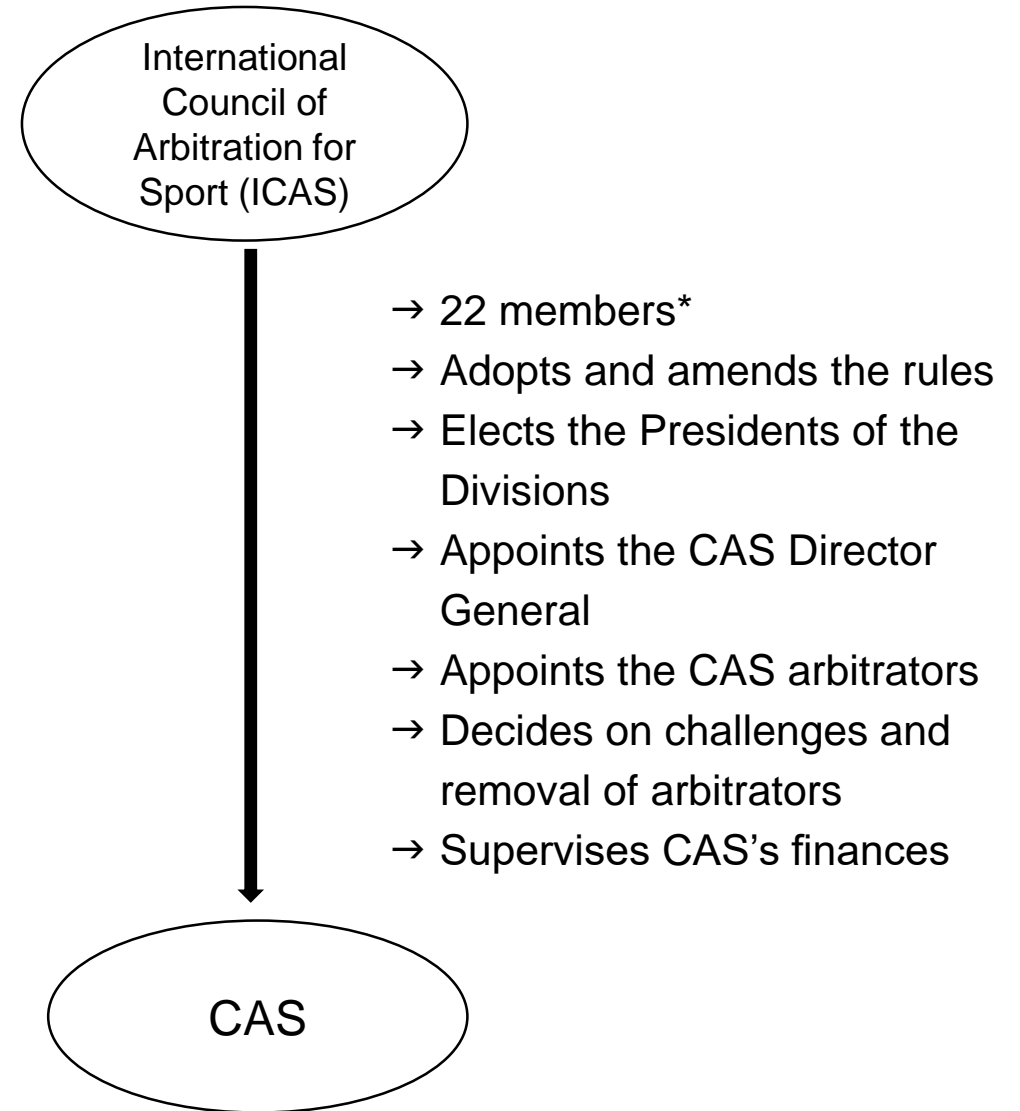
- S1** In order to resolve sports-related disputes through arbitration and mediation, two bodies are hereby created:
- **the International Council of Arbitration for Sport (ICAS)**
 - **the Court of Arbitration for Sport (CAS).**

Main Features of CAS Arbitration (3)

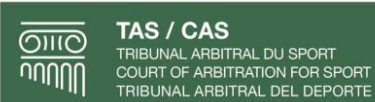
S2 The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.

S4 ICAS is composed of twenty-two members, experienced jurists appointed in the following manner:

- a. six members are appointed by the International Sports Federations (IFs), viz. five by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
- b. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;
- c. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
- d. four members are appointed by the fourteen members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
- e. four members are appointed by the eighteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.



CAS



S3 CAS maintains one or more list(s) of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels composed of one or three arbitrators.

CAS comprises of an Ordinary Arbitration Division, an Anti-doping Division and an Appeals Arbitration Division.

CAS maintains a list of mediators and provides for the resolution of sports-related disputes through mediation. The mediation procedure is governed by the CAS Mediation Rules.

CAS (2)

Ordinary Arbitration Division

- First instance procedures (contractual disputes)
- Non-compliance procedure with the WADC (*WADA vs RUSADA*)

Appeals Arbitration Division

- Appeals against IFs/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*)



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Main Features of CAS Arbitration (4)



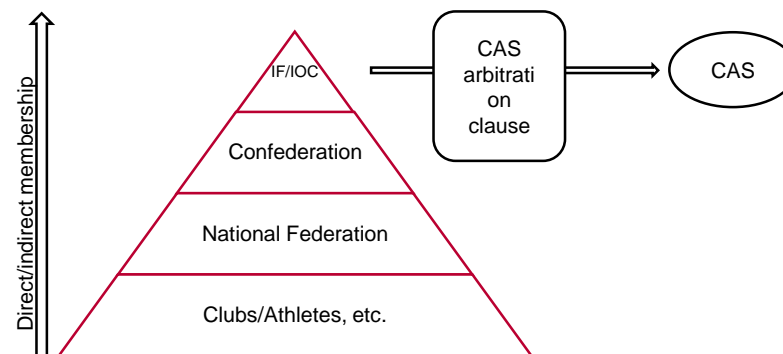
Code of Sport

In force as

R27 Application of the Rules

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle 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.



Main Features of CAS Arbitration (5a)



R28 Seat

Cod

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

Main Features of CAS Arbitration (5b)

- Switzerland is outside the EU → CAS has no power to refer questions of EU Law to the CJEU under Article 267 TFEU
- Two significant CJEU judgements in December 2023:
 - **European Super League**: UEFA's Authorisation Rules (which govern international club competitions) must be compliant with EU Competition Law
 - **International Skating Union (ISU)**: skaters submitted a complaint to the CJEU on the basis that the ISU were acting contrary to Articles 101 and 102 of the Treaty of the Functioning of the European Union; it was held that the ISU had breached European Competition Law
- In June 2024, UEFA altered their Authorisation Rules to offer an **alternative seat for CAS arbitration in Dublin**.

Main Features of CAS Arbitration (6)

- **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)

Main Features of CAS Arbitration (7)

- “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” → *lex sportiva*
- More expedited procedure
 - fewer procedural hearings/CMC
 - 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

Main Features of CAS Arbitration (8)

- 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

Main Features of CAS Arbitration (9)

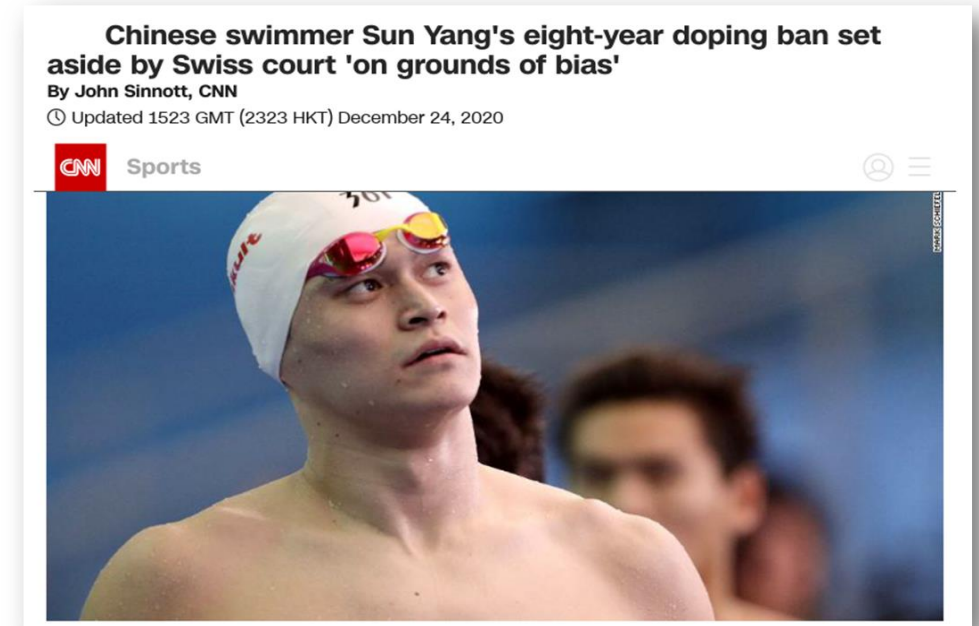
- **Applicable law on the merits:**
 - Sports regulations + *lex sportiva*
 - Mostly Swiss law
 - By “choice” (see for instance Art. 56(1) of FIFA Statutes)
 - By default (Arts. R45 and R58 CAS Code, A20 CAS ADD Rules)
 - In support (Arts. 17 CAS ADD Rules Beijing 2022, 18 Arbitration Rules 2002 FIFA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

Legal Remedies against CAS Awards (1)

– Swiss Supreme Court:

- **Set-aside** (Art. 190 PILA): 30 days
 - Rule: only written submissions
 - Very limited power of review (\neq 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 (Article 190a(1)(c) PILA): *WADA vs Sun Yang & FINA*



Legal Remedies against CAS Awards (2)

- Languages: official Swiss languages and (since 1 January 2021) English (Art. 77(2bis) 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 (Article 192 PILA) (Cañas case, DSC 133 III 235)

Legal Remedies against CAS Awards (3)

- CAS seated in Dublin:
 - remedies according to Irish arbitration law
 - referral of questions of EU law to the CJEU
- **Case C-600/23 - Royal Football Club Seraing v. FIFA, UEFA et al, Opinion of AG Ćapeta of 16 January 2025**
 - EU law guarantees the right to effective judicial protection
 - Judicial protection of EU-based rights must be protected by a ‘court or tribunal’ under Article 267 TFEU and CAS / SSC are *not* such courts
 - EU law is breached when an arbitral award is granted *res judicata* without the possibility of subsequent review by a Member State, able to refer a question to the ECJ for a preliminary ruling
 - National courts should be able to review FIFA’s rules against EU law

Legal Remedies against CAS Awards (4)

- ECtHR:
 - “Human rights-focused” application
 - *Mutu and Pechstein vs Switzerland* and *Semenya vs Switzerland*



5 Hot Topics

«Hot Topics» - Consent

“Consent”?

- CAS arbitration in disciplinary matters is “forced arbitration” (ECtHR in *Mutu and Pechstein vs Switzerland*)
- Athletes have no choice but to accept CAS arbitration (*Cañas case*, DSC 133 III 235)
- Case C-600/23 - Royal Football Club Seraing v. FIFA, UEFA et al, Opinion of AG Ćapeta of 16 January 2025

«Hot Topics» - Legitimacy of CAS

CAS' 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

«Hot Topics»- Human Rights

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

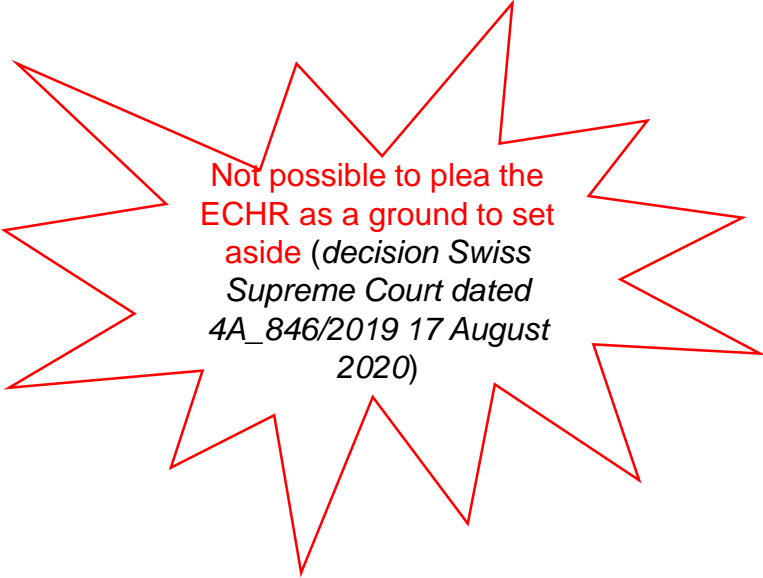
Plans to allow for transgender swimmers at World Cup meet scrapped due to no entries

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

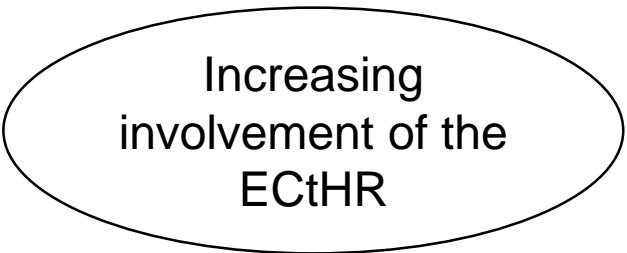


«Hot Topics» - Human Rights (2)

- 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
ECtHR

«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)

«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)

«Hot Topics» - Competition law

– CAS-124/21 P – International Skating Union (ISU)

- Sport is an economic activity (para. 91)
- Arbitration rules imposed on 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.

«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

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 (FIFA exception)
Mainly based on the contract + choice of applicable law	Mainly based on sports regulations & <i>lex sportiva</i> + (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 → sometimes public scrutiny (<i>Sun Yang; Jordan Chiles; Russian Doping Scandal</i>)
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 → <i>Royal Football Club Seraing v. FIFA, UEFA et al, Opinion of AG Ćapeta of 16 January 2025</i>

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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Dr. Christopher Boog

christopher.boog@swlegal.ch

Schellenberg Wittmer Ltd / Attorneys at Law

Löwenstrasse 19 / P.O. Box 2201 / 8021 Zurich / Switzerland

T +41 44 215 5252 / F +41 44 215 5200

www.swlegal.ch

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