Caster Semenya ruling and the pros and cons of the Court of Arbitration for Sport

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Introduction

The Court of Arbitration of Sport has given its much anticipated ruling on the case of Caster Semenya, dismissing the challenges brought by her and Athletics South Africa (ASA) regarding the validity of the International Association of Athletics Federations’ (IAAF) Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development) (the DSD Regulations).¹ The DSD Regulations require Caster Semenya, and other athletes with differences of sex development, to artificially lower their testosterone levels in order to compete in eight events, including the 400 m, 800 m and 1,500 m, in which Caster Semenya has won numerous medals. Caster Semenya appealed the CAS’s April 2019 decision to the Swiss Federal Tribunal, which has yet to make its final decision.

In this article, we provide a brief overview of CAS and its role within the framework of sports arbitration and we examine certain case studies which highlight some of the benefits and shortcomings of CAS as a leading institution in the world of sports disputes, including the case of Caster Semenya.

CAS: An overview

CAS is an arbitral institution which, like many others around the world, has benefitted from the rise of arbitration as an alternative method of dispute resolution. CAS also offers a mediation procedure and sometimes provides non–contentions advisory opinions. Unlike other institutions, however, CAS’s own governing rules limit its jurisdiction to disputes within the sports sector.² These generally fall into two categories:

- **Commercial disputes** – those relating to sponsorship agreements, television rights, player transfers, agency agreements and disagreements between players and clubs. In each case there must be an arbitration agreement between the parties (usually within a contract).
- **Disciplinary matters** – doping cases, violence, referee abuse. Such cases are usually dealt with in the first instance by the relevant sport’s governing body or authority, but are often appealed to CAS. In these cases sports governing rules often provide for appeals to be dealt with by CAS.

In both categories of cases, CAS decisions are final and binding on the parties and are enforceable in over 125 jurisdictions in accordance with the New York Convention. Since CAS is based in Lausanne, Switzerland, disputes are subject to Swiss law unless the parties choose otherwise, and CAS decisions are subject to appeal only to the Swiss Federal Tribunal (SFT), on a limited number of grounds (e.g. lack of jurisdiction or breach of the right to a fair hearing).
Original structure

Established in 1984 by the International Olympic Committee (IOC), CAS was initially very much centered around the IOC. For example:

- CAS was composed of 60 members appointed by: the IOC itself (15 members), the IOC president (15 members), the international federations of the various Olympic sports (15 members) and the National Olympic Committees (15 members);
- CAS was funded almost exclusively by the IOC; and
- CAS's governing statute was only capable of being modified if the IOC Executive Board proposed a change.  

Reformed structure

Following several challenges of CAS awards to the SFT by athletes, such as the case of Gundel v Fei,4 the structure of CAS has been analyzed and reformed in an attempt to answer accusations of financial and organizational partiality. The reforms have included the creation of a new governing body – the International Council of Arbitration for Sport (ICAS) – and the coming into force of the Code of Sports-related Arbitration (the Code), which sets out the functions, rules and procedures of CAS and CAS arbitrations.5

In its current form, CAS consists of two bodies:

ICAS

- The governing body of CAS, whose responsibilities include:
  - amending the Code;
  - electing the CAS President, Secretary General and other roles;
  - appointing and removing CAS arbitrators and mediators; and
  - managing and allocating the financing of CAS.6

- Composed of 20 members, who must all be “experienced jurists” who agree to act with “total objectivity and independence” and are appointed for one or more four-year terms as follows:
  - the international federations of the various Olympic sports appoints four members;
  - the Association of the National Olympic Committees appoints four members;
  - the IOC appoints four members;
  - the 12 members listed above then select a further four “with a view to safeguarding the interests of athletes”; and
  - finally, the 16 members listed above then select the final four, who must be “independent of the bodies designating the other members.”7

- Any modification of the Code requires a two-thirds majority of ICAS members.8

CAS

- Made up of at least 150 arbitrators (currently around 300) and 50 mediators at any one time, appointed by ICAS for one or more four-year terms.
- Arbitrators must have “appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.”9
- Before they are appointed, arbitrators are first nominated for appointment, including by the IOC and the athletes commissions.10
- Parties may agree their own method of appointment for the arbitrator(s) to decide their case, but must select from within the body appointed by ICAS.

CAS: The pros and cons

Despite the reforms and restructurings described above, questions remain over certain aspects of the current framework of international sports arbitration (including CAS). We set out below some of the pros and cons of CAS,
Illustrated by a number of recent case studies.

**Pros**

Those who support CAS stress the importance of having a universal arbiter of disputes in the sports industry, in order to avoid the inevitable issues that would arise if sanctions for rule breaches within one sport differed between various jurisdictions. Other perceived benefits include:

- The speed with which judgments can be obtained – R44.4 and R52 of the Code provide for cases to be considered on an expedited basis in certain circumstances. \[11\]
- The low cost of obtaining judgments – although each party must bear its own legal fees, CAS fees are minimal compared to court fees and, for appeals on disciplinary matters, CAS proceedings are free, save for a filing fee of CHF1,000. \[12\]
- Flexibility – including CAS’s ability to reform itself, as illustrated by the reforms following the Gundel case described above.
- Public nature of decisions – subject to the rights of individuals to privacy and confidentiality, the vast majority of CAS judgments are freely available in at least two languages, which enables parties to refer to a body of case law when making submissions and provides certainty.

**Case study 1: Russian Federation doping bans**

On November 13, 2015, following an investigation by the World Anti–Doping Agency (WADA), the IAAF suspended the All Russia Athletics Federation (ARAF) from IAAF membership and banned it from world track and field events. Over the next six months further bans were given and further investigations commissioned as the scale of the ARAF’s breaches became clear. On June 17, 2016, the IAAF voted unanimously to uphold its ban.

With the deadline for athletes to register for the 2016 Rio Summer Olympics (due to commence on August 5, 2016) fast approaching, the Russian Olympic Committee and 68 Russian athletes quickly sought to challenge the decision and filed a request for arbitration at the CAS on July 3, 2016. By July 21, 2016, within three weeks of the filing, a CAS panel of arbitrators had been appointed, a full hearing held, and a decision issued confirming the validity of the IAAF’s decision.

**Case study 2: Caster Semenya ruling**

On April 30, 2019, following a hearing in February 2019, CAS delivered its award dismissing the challenges of Caster Semenya and the ASA. Caster Semenya has since appealed CAS’s decision to the SFT, which has yet to make its final decision. However, after initially ordering the IAAF to await the SFT’s decision before enforcing the DSD Regulations against her, on 30 July 2019 the SFT revoked that super–provisional suspension, finding that Caster Semenya’s appeal “does not appear with high probability to be well founded”. \[13\]

The history of this case dates back at least as far Caster Semenya’s initial suspension and sex verification testing by the IAAF in 2009 after her dramatic rise to success in the 800 m. In April 2011 the IAAF published its Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition, (the Hyperandrogenism Regulations 2011), designed to be a fairer way of splitting athletes into male and female competition than its sex verification testing.

However, following a challenge to the Hyperandrogenism Regulations 2011 by Indian sprinter Dutee Chand, a CAS award in July 2015 concluded that the IAAF did not have sufficient evidence that hyperandrogenic female athletes benefit from such a significant performance advantage that it is necessary to exclude them from female competitions. \[14\] In its award in Chand, CAS asked the IAAF to conduct further research and collate additional expert evidence before any further attempt to regulate on the issue. Eventually, in April 2018, the IAAF succeeded in enacting its new DSD Regulations to replace the Hyperandrogenism Regulations 2011. CAS’s recent ruling in the Caster Semenya case confirms that the DSD Regulations are seemingly reasonable and proportionate, though the panel noted that there remain some potential issues with implementation to be ironed out.
Scrutiny of the decision must await the verdict of Caster Semenya’s appeal to the SFT, but the case provides a good example of CAS’s ability – as effectively the universal arbiter of disputes in the sports industry – to rule on crucial issues in a way that is, at the least, consistent across that industry.

Cons

Critics of CAS have a traditionally seen a number of its features as significant shortcomings, including:

- **Structure and composition** – despite the reforms referred to above, some have still sought to question the independence of CAS, in terms of both the membership of ICAS (which it is argued is dominated by representatives of national sports bodies rather than individual athletes) and the appointment of arbitrators to the CAS list (who are chosen by ICAS).
- **Financing** – similarly, critics continue to point out that a portion of CAS’s funding comes from institutions like the IOC and FIFA, which frequently appear as parties to CAS disputes.
- **Choice of dispute resolution method** – many athletes and clubs have little or no say in the choice of CAS as the arbiter of their disputes since they are required to enter into a CAS arbitration agreement as a condition of competing in their chosen sport.
- **Choice of arbitrators** – although parties may agree their own method of appointment for the individual arbitrator(s) to decide their case, they must select those individuals from within the body appointed by ICAS.
- **Appeal process** – like many other arbitral institutions, CAS decisions are not subject to appeal on the merits, and may only be appealed to the SFT in limited circumstances. Parties may even opt out of their right to appeal to the SFT, and many athletes and players are required to do just that when signing up to the governing rules of their respective sports.

Case study 3: **RFC Seraing v FIFA**

This case concerned a dispute between, on one side, Belgian football club RFC Seraing and the investment fund Doyen Sports Investment Limited, and, on the other side, FIFA, UEFA and URBSFA (the Belgian football association). RFC Seraing and Doyen Sports contested the validity of sanctions imposed against them by the football associations for violations of FIFA and UEFA rules prohibiting third-party ownership, but CAS upheld them.15

RFC Seraing then challenged the sanctions in the Belgian national courts on a number of grounds, including on the basis that FIFA, as one of the most frequent parties to CAS disputes (around 32%) and simultaneously one of CAS’s most significant funders (around CHF1.5 million of its CHF16 million budget) was capable of influencing CAS’s decisions. Although that argument was rejected by the Belgian Court of Appeal on August 29, 2018, the Court of Appeal did accept an alternative argument that the arbitration clause selecting CAS as the parties’ choice of dispute resolution was invalid under Belgian law because it was simply a generic clause and lacked sufficient certainty.16

FIFA’s appeal is currently pending, and the Court of Appeal did agree that the facts are likely too specific to have much impact on CAS’s future in any event. However, it is clear that the general nature of some CAS arbitration clauses may lead to serious issues.

Case study 4: **Pechstein v Switzerland**

This case concerns an athlete who sought to challenge sanctions imposed by CAS for doping violations, on the basis that CAS lacks sufficient independence and/or impartiality. Claudia Pechstein was an Olympic skater suspended by the International Skating Union after failing anti-doping tests in 2009. She appealed CAS’s decision to the SFT and, when those arguments were rejected by the SFT, she appealed to the European Court of Human Rights (ECHR).17

Pechstein’s arguments included: allegations about the way CAS is funded; the lack of CAS arbitrators appointed by athletes rather than sports federations; and the absence of any public hearing during the process which she argued...
breached Article 6 of the European Convention on Human Rights. Although the arguments on funding and appointment of arbitrators were ultimately rejected by the ECHR, they did accept that a public hearing ought to have been held, which could have implications for both CAS and other sports tribunals in future.\textsuperscript{18}

Furthermore, Pechstein had previously had some success with the arguments on funding and appointment of arbitrators in a parallel attempt to overturn her sanctions in the German national courts. Although the German Bundesgerichtshof did not see sufficient evidence to overturn the sanctions, it pointed out that issues with the structure and membership of CAS/ICAS led to “deficiencies” in terms of independence. \textsuperscript{19}

\textbf{Conclusion}

It is true that some aspects of CAS would certainly not be accepted in commercial dispute resolution where, for example, any suggestion that one party had contributed to the funding of the arbitral institution would be immediate cause for challenging the jurisdiction of the tribunal to hear that dispute. However, commercial arbitral institutions like the London Court of International Arbitration (LCIA) are funded primarily by the high administration fees parties must pay to use them. Were CAS to charge similar fees, its doors would effectively be closed to many athletes.

Sport, by its very nature, is meant to be a meritocracy; a level playing field on which athletes and teams can compete in isolation and a victor can be fairly determined. A cheap, accessible and universally applicable method of resolving sports-related disputes is a crucial element of maintaining that level playing field, and that is ultimately what CAS seeks to achieve. In the words of the SFT in the \textit{Gundel} case: “[t]here appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively.”\textsuperscript{20}

\textsuperscript{1}The full 163-page award was published, in redacted form for confidentiality reasons, on 18 June 2019. CAS also produced an Executive Summary of the award on 1 May 2019.
\textsuperscript{2}See Article R27 of the Code (as defined below).
\textsuperscript{3}For more detail on its history see the CAS website
\textsuperscript{4}CAS 92/A/63 \textit{Gundel v Fei}, a CAS decision concerning horse-doping in which a jockey named Elmar Gundel was disqualified, and the SFT’s Judgment in \textit{Gundel} (ATF 119 II 271). See also CAS 2002/A/370 \textit{Lazutina v IOC} and CAS 2002/A/371 \textit{Danilova v IOC}, two CAS decisions disqualifying Russian cross-country skiers Larissa Lazutina and Olga Danilova from the Winter Olympics, and the SFT’s Judgment in Lazutina (ATF 129 III 445).
\textsuperscript{5}The latest version of which came into force on January 1, 2019.
\textsuperscript{6}See S6 of the Code.
\textsuperscript{7}See SS4 and 5 of the Code.
\textsuperscript{8}See S8(2) of the Code.
\textsuperscript{9}See S14 of the Code.
\textsuperscript{10}Ibid.
\textsuperscript{11}Similar procedures have become common place amongst arbitral institutions worldwide in recent years. See, e.g., LCIA Arbitration Rules 2014, Article 9; ICC Arbitration Rules 2017, Articles 28-30; HKIAC International Arbitration Rules 2018 Articles 23, 42 and Schedule 4.
\textsuperscript{12}See R65 of the Code
\textsuperscript{13}See press release of the SFT dated 30 July 2019.
\textsuperscript{14}\textit{Ms Dutee Chand v Athletics Federation of India and The International Association of Athletics Federations}, CAS 2014/A/3759, para. 547.
\textsuperscript{15}\textit{RFC Seraing v Fédération Internationale de Football Association (FIFA)}, CAS 2016/A/4490 (available in French). See also the decision of the SFT which rejected an appeal by RFC Seraing and Doyen Sports (available in French).
\textsuperscript{16}See 18th Chamber of the Brussels Court of Appeal of August 29, 2018 (2018/6348) (available in French).
\textsuperscript{17}The appeal was brought jointly with Adrian Mutu, a professional football player who had his contract
with Chelsea Football Club terminated in 2004 when traces of cocaine were found in a blood sample and also sought to appeal the resulting CAS decision on similar grounds.

18Pechstein / Mutu v. Switzerland, October 2, 2018 (40575/10 et 67474/10) (available in French).

19The Bundesgerichtshof’s decision was later upheld by the German Federal Tribunal in 2016, and the sanctions against Pechstein confirmed.

20SFT’s Judgment in Gundel (ATF 119 II 271) (English translation from CAS’s website).

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