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ARBITRATOR IN CAS: AN UPHILL BATTLE  
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**INTERNATIONAL ARBITRARY ARBITRATOR IN CAS: AN UPHILL BATTLE AGAINST  
SPORTS ORGANIZATIONS' CORRUPTION**

**JAE SOOG LEE**

**I. INTRODUCTION**

The two largest battles raging in sports today involve doping and organizational corruption. Doping occurs when an athlete uses a prohibited substance for the purpose of performance enhancement—offenders are disqualified and suspended under a strict liability standard. Corruption committed by sports organizations, its members, and officials is—when prosecuted—held to the more lenient standard of reasonable doubt. Athletes who choose to violate anti-doping regulations may destroy their lives and damage the “spirit of sport,” but corruption in sports organizations can have extraordinary financial ramifications, and—more insidiously—can erode the protections of law and the fundamental human rights of athletes.

The intended advantages of arbitration with CAS include lower costs and speedier decisions than offered by civil court systems. However, while sanctions in doping are

handled similarly to criminal offenses, sports arbitration can be spoiled by the influence of political power. As the stakes are especially high in doping cases - the decision of a sports body can affect an athlete's professional career and livelihood - the quality of the arbitrators and corruption in the organization is drawing increased scrutiny. In connection with this uncertainty, the question is raised whether binding arbitration is the best way to proceed.

Although the WADA is not a "public" body in the traditional sense but rather an international private association, its due process standards must be reviewed publicly. WADA exercises enormous power over international and even local sporting rules, and a public evaluation of its specific due process standards should be conducted, especially in cases where application of the WADA Code and binding arbitration by the CAS result in disputes. One of the issues is that World Anti-Doping Agency (WADA)'s nebulous legal status invokes concerns regarding the constitutional standards of due process. If doping regulations and procedures violate the general due process principle and/or conflict with national laws, should national constitutional standards of due process apply? The sanctions imposed by the international bodies are only considered "private" sanctions, and can range from the non-recognition of world records and ineligibility to compete in

sponsored events. And if such standards and sanctions apply, which country's due process standards should be the benchmark? Furthermore, where the arbitration awards are in dispute, can a party appeal to the Court of Arbitration for Sport (CAS) or the court?

This article examines the intersections between doping offenses by athletes and their punishments doled by the WADA, as well as cases of doping arbitration by CAS. The outcomes of these interactions may be influenced by corruption in sports organizations, as seen through a general discussion of these issues as well as a specific case, *Kim Bum-Suk v/ Korea Skating Union*.<sup>1</sup> These issues include the justification of binding arbitration, applicability of public due process standards to WADA and appealability of arbitration ruling are covered at II. Arbitrary arbitrator in CAS explores problems posed by the application of WADA rules in *Kim* and uses this specific instance to argue for a more sensitive approach to athletes violating the WADA code, as well as better protections for these athletes in due process at III. To study this intersection of athlete rights and the national and international organizations that have jurisdiction over them, I focus on the sole arbitrator's erroneous determination of the jurisdiction issue and failure to rules on claims based on relevant facts. Also, this examination contains

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<sup>1</sup> CAS 2007/A/1259 *Kim Bum-Suk v/ Korea Skating Union*.

challenges to the arbitrator's independence. Suggestions are put forward to improve sports dispute settlements, arguing that a real danger is posed by the unbalanced WADA Code, which emphasizes punishment of athletes without guarantee of their fundamental rights and lacks equal provisions for the punishment of WADA or other organizations, including the International Olympic Committee (IOC), the KSU, and CAS, when they engage in corrupt or mistaken practices as well as fail to meet their responsibilities to the athletes at IV.

## **II. DISPUTE RESOLUTION IN DOPING**

### **A. Arbitration**

Arbitration is a method of dispute resolution between parties by an independent party or parties.<sup>2</sup> It is meant to offer dispute resolution more speedily and at less cost compared to a court system. It appeared from the practice and the enactment of modern arbitration registration, and international treaties, such as the New York Convention, the English Arbitration Act of 1996 and others.<sup>3</sup> Arbitration may occur in several possible

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<sup>2</sup> Ian S. Blackshaw, Robert C. R. Siekmann, & Janwillem Soek, *THE COURT OF ARBITRATION FOR SPORT 1984-2004* at 294 (2006).

<sup>3</sup> Edward Brunet, Richard E. Speidel, Jean R Sternlight, Stephen J. Ware, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* at 30-31 (2006).

legal areas, particularly in matters concerning international, commercial, interstate, and labor.<sup>4</sup> The United States Supreme Court now recognizes a liberal federal policy favoring arbitration agreements.<sup>5</sup> The court ruled that “Congress explicitly created the Federal Arbitration Act (FAA) to overcome an anachronistic judicial hostility to agreements to arbitrate.”<sup>6</sup> The FAA covers commerce among the several states and with foreign nations with the exception of employment contracts<sup>7</sup> although later, in *Gilmer*,<sup>8</sup> the Court found that not all employment contracts are excluded.<sup>9</sup> With respect to sports disputes in the United States, Congress has recognized the United States Olympic Committee’s (USOC) exercise of exclusive jurisdiction—either directly or through its constituent members of committees—over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games.<sup>10</sup> Congress has also granted any party not satisfied with the USOC decision-making process the right to review from any

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<sup>4</sup> Blackshaw et al., *supra* n. 2 at 29-30.

<sup>5</sup> Melissa R. Bitting, MANDATORY, BINDING ARBITRATION FOR OLYMPIC ATHLETES: IS THE PROCESS BETTER OR WORSE FOR JOB SECURITY? in Blackshaw, et al. at 377 (2006) (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990).

<sup>9</sup> Bitting, *supra* n. 5, at 377.

<sup>10</sup> 36 U.S.C. para.374 (3). (1994); Bitting, *supra* n. 5 at 369.

regional office of the American Arbitration Association (AAA).<sup>11</sup> To resolve disputes by arbitration with the AAA, an arbitration agreement should exist between parties, the arbitrators should be impartial and qualified, and the arbitrator's decision should be regarded as final between the parties with no appeals on the merits.<sup>12</sup>

National level courts exercise their authorities under significant judicial control, while decisions rendered by the international level frequently deviate from such judicial controls.<sup>13</sup> Domestic courts, thus, do not take part in many international sports-related disputes because of the "inherent difficulties to apply a specific country's laws to the rules and enforcement activities of sports organizations whose governing authority is exercised world-wide."<sup>14</sup> In 1983, the International Olympic Committee (IOC) established the CAS, which is based in Lausanne, Switzerland, and subject to Swiss law.<sup>15</sup> The CAS was created to resolve sports disputes with specialized knowledge, low

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<sup>11</sup> Bitting, *supra* n. 5 at 369, 395 (c).

<sup>12</sup> Brunet, et al., *supra* n. 3 at 30-31.

<sup>13</sup> Jochen von Bernstorff, PROCEDURES OF DECISION-MAKING AND THE ROLE OF LAW IN INTERNATIONAL ORGANIZATIONS, 9 German L.J. 1939 1951 (2008).

<sup>14</sup> Matthew J. Mitten, Davis Timothy, Rodney K. Smith, Robert C. Berry, SPORTS LAW AND REGULATION. CASES, MATERIALS, AND PROBLEMS, at 330 (2005)..

<sup>15</sup> <http://www.tas-cas.org/en/histoire/frmhist.htm> (last visited Feb. 20, 2008).

cost, and rapid action.<sup>16</sup> The awards rendered by the CAS can only be challenged before the Swiss Federal Tribunal concerning five limited grounds (*see infra* II D3). Questions in sports arbitration mainly arise over whether binding arbitration is the best solution, to what extent court intervention should be permitted after commencement of the arbitration but before the final award, and how to enforce the arbitration decision after the final award. These issues will be addressed within this discussion.

### **B. Is Binding Arbitration the Best Way to Proceed?**

Sports disputes require prompt resolution in light of the nature of the athletic world. If an athlete loses the opportunity to compete, the athlete may experience irreparable harm due to missed matches, meets and competitions. In this aspect, arbitration provides a better alternative for the resolution for sports disputes. By the same token, the IOC requires athletes to waive their right of access to court concerning for disputes over eligibility to compete in the Olympics as a condition of participation for

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<sup>16</sup> <http://www.tas-cas.org/en/histoire/frmhist.htm> (last visited Feb. 20, 2008).

fast resolution whether the athlete is eligible to compete or not.<sup>17</sup> The Olympic binding arbitration requirement applies to all disputes brought by competitors to the CAS.<sup>18</sup> WADA explicitly requires exclusively mandatory binding arbitration both for appeals involving international-level athletes to the CAS and appeals involving national-level athletes to the athletes' National Anti-Doping Organization.<sup>19</sup> It may deprive national citizens of their right of access to a trial because athletes are required to waive the right to take their disputes to the courts. Because the CAS resolves sports disputes including doping with a final and binding arbitration,<sup>20</sup> its importance in protecting due process and fairness in sports cannot be understated. However, due to that the mandatory binding arbitration system in CAS is non-judicial, human rights can be denied by arbitration procedures as the due process principle may not be applied if the sports organizations apply their customary rules.

Ian S. Blackshaw gives an example of how mandatory binding arbitration might fail to address conflicts in jurisdiction between local and national courts and the

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<sup>17</sup> Bitting, *supra* n. 5 at 369.

<sup>18</sup> Jason Gubi, THE OLYMPIC BINDING ARBITRATION CLAUSE AND THE COURT OF ARBITRATION FOR SPORT: AN ANALYSIS OF DUE PROCESS CONCERNS, 18 Fordham Intell. Prop. Media & Ent. L.J. 997, 1022 (2008).

<sup>19</sup> WADA art. 13.2.1., 13.2.2.

<sup>20</sup> Blackshaw et al., *supra* n. 2 at 374.

international sports organizations.<sup>21</sup> The question remains as to whether mandatory and binding arbitration is the best way to proceed in sports disputes. It may cause double harm to the athlete in terms of time and costs, as well as the lost opportunity to compete in certain events forever. The mandatory binding arbitration system should thus be changed. First, because the IOC or CAS-designated arbitrators within their arbitrators' list cannot be independent and/or unbiased if tied to the sports organizations, athletes should have the right to choose an equivalent certified arbitration system over the one designated by the sports organization. Second, to avoid arbitrators' qualification and responsibility problems, qualified arbitrators, such as a court-designated neutral panel—*e. g.* the United

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<sup>21</sup> *id.* at 372-73. (stating that after competing in a track event in Monte Carlo in August 1990, Butch Reynolds submitted to a random drug test and tested positive for trace amounts of the steroid Nandrolone. Banned by the International Amateur Athletic Federation (IAAF) from all international track competitions for two years, Reynolds was effectively shut out of any opportunity to compete in the 1992 Olympics. The United States National Governing Body (NGB) for track and field then called the Athletics Congress (TAC), but no date had been set when Reynolds filed suit in Ohio, alleging that the test was given negligently and provided incorrect results. Having failed to exhaust all administrative remedies, and finding no state action that would implicate due process rights under the Fifth Amendment, the district court dismissed the due process claim and stayed any further proceedings until the administrative remedies were exhausted. Reynolds submitted his dispute to the American Arbitration Association (AAA) and the arbitrator's decision completely cleared Reynolds. The IAAF, however, did not honor the arbitrator's findings because the arbitration did not conform to IAAF rules. In compliance with IAAF procedure, Reynolds appealed to TAC, and that body also cleared him, finding that 'substantial doubt' had been cast on the validity of the drug test. Refusing to change its decision, the IAAF initiated another independent arbitration on the theory that TAC had "misdirected itself." Reynolds had to submit an emergency motion to Supreme Court Justice John Paul Stevens to reserve his opportunity to compete in the trials. The IAAF threatened to bar from the Olympics every athlete who competed with Reynolds in the trials, but eventually the USOC and the IAAF reached an agreement that allowed Reynolds to compete and to qualify as a relay alternative. However, the IAAF would not allow Reynolds to actually compete in the Olympics and added four months to the two-year ban as a penalty for competing in the United States trials. This example demonstrates how efforts to comply with conflicting regulations from an NGB and an IF proved fruitless for an athlete trying to compete).

States District Court for the Southern District of New York Median Panel—should be provided. When arbitrators’ faults and biases are discovered by the CAS or reported by the parties, the CAS should discipline them by disqualifying them from the arbitrators list. Third, the enforcement of the arbitrators’ decision against a sports organization should be effective immediately in order to allow the athlete to compete in a timely manner, without being at the sports organization’s discretion as to whether or not to accept the arbitration decision. Particularly if parties negotiate for binding arbitration, whether to either keep the decision of the organization or rather to go to the CAS arbitration system through mutual consent, there is no reason to be disturbed by outside interference.<sup>22</sup>

### **C. Are Due Process Standards Applicable to the WADA?**

#### **1. WADA Legal Status**

The WADA is a nongovernmental organization (NGO) that enforces doping controls at national and international sporting events. NGOs such as the WADA are organizations related to "international matters and, usually multi-national membership

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<sup>22</sup>

*Kim supra* n.1

and activities.”<sup>23</sup> Some NGOs “have a recognized legal status under treaties and other international arrangements.”<sup>24</sup> Two types of treaties exist: one is executory, “a ratified treaty that requires implementing legislation before it takes effect as domestic law.”<sup>25</sup> The other treaty is self-executory, being “a ratified treaty that takes effect as domestic law immediately upon ratification.”<sup>26</sup> The IOC, for example, is not an intergovernmental organization within the United Nations (UN), yet the IOC’s international legal personality has been recognized by a federal appeals court in the United States as having special status. The IOC controls the international amateur athletic organizations and governs the Olympic Games.<sup>27</sup> The IOC is “a body corporate by international law having juridical status and perpetual succession,” and the IOC can enforce its rules if they do not conflict with international law.<sup>28</sup> As subordinate to the IOC, there are many specific international federations, for example, IAAF. these international federations oversight

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<sup>23</sup> David J. Ettinger, THE LEGAL STATUS OF THE INTERNATIONAL OLYMPIC COMMITTEE, 4 Pace Y.B. Int'l L. 97, 101 (2d ed. 1997)

<sup>24</sup> *Id.* (quoting LOUIS HENKIN ET AL., INTERNATIONAL LAW 319 (2d ed. 1987)).

<sup>25</sup> John E. Nowak, Ronald D. Rotunda, PRINCIPLES OF CONSTITUTIONAL LAW at 124 (3d ed. 2007).

<sup>26</sup> *Id.*

<sup>27</sup> Owen S. Solomon, THE POLITICIZATION OF AMATEUR ATHLETICS: SOUTH AFRICA AND THE AMERICAN ATHLETE'S LEGAL DILEMMA OF PARTICIPATION, 14 Loy. L.A. Int'l & Comp. L.J. 937 967 (1992).

<sup>28</sup> *Id.* 967 (citing James A.R. Nafziger & Andrew Strenk, The Political Uses and Abuses of Sports, 10 Conn.L.Rev. 259, 259-61 (1978)).

their affiliated national federations.<sup>29</sup> Each country's Olympic activities are controlled by their country's Olympic Committee, by the federations and the IOC.<sup>30</sup>

The Olympic Games are organized and conducted under the terms of an international agreement. Specifically, the Olympic Charter indicates that the IOC is reluctant to “undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.”<sup>31</sup>

The United States Supreme Court rules (1987)<sup>32</sup> and the Swiss Federal Council (1981) have established the IOC as an international legal personality as well.<sup>33</sup> Thus, nations and individuals who violate the IOC rules and regulations receive sanctions recognized by state and customary international law, although the IOC cannot force governmental compliance.<sup>34</sup> Customary international law is defined as “international custom, as evidence of a general practice and accepted as law.”<sup>35</sup>

The WADA is an NGO like the IOC. Indeed, the European Court of Justice

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<sup>29</sup> *Id.* 967 (quoting Olympic Charter rules 4(3), 29, 30.)

<sup>30</sup> *Id.* 967 (quoting Olympic Charter rules 4, 31-33.)

<sup>31</sup> James A. R. Nafziger, INTERNATIONAL SPORTS LAW 25 (2d ed., 2004); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670,677 (9<sup>th</sup> Cir. 1984).

<sup>32</sup> *San Francisco Art & Athletes, Inc. v. USOC & IOC*, 483 U.S. 522 550, 107 S. Ct. 2971 2988 (1987) (“The USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community. The USOC is, by virtue of 36 U.S.C. §§ 374 and 375, our country's exclusive representative to the International Olympic Committee (IOC), a highly visible and influential international body.”).

<sup>33</sup> *Ettinger*, *supra* n 23 at 102.

<sup>34</sup> *Id.* at 104.

<sup>35</sup> *Id.* at 68.

recently confirmed a legitimate purpose for the WADA in that “even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective.”<sup>36</sup>

The problem is that since the absence of a general body of procedural law for international organizations, violations of human rights and due process standards issues may rise when they exercise their power worldwide, including horizontal delegation from international organizations to other international organizations and/or private institutions.<sup>37</sup> Human rights norms are viewed as a part of international customary law and bind international organizations.<sup>38</sup> Many administrative tribunals of international organizations, such as UNAT, and the Administrative Tribunal of the International Labour Organization (ILOAT) have endorsed international organizations' human rights obligations as general principle of law.<sup>39</sup>

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<sup>36</sup> Peter Charlish, Rob Heywood, ANTI-DOPING INCONSISTENCIES SNARE AMERICAN STAR, 8 Tex. Rev. Ent. & Sports L. 79, 84 (2007) (quoting Meca-Medina, 2006 ECJ CELEX LEXIS 373, para. 45.).

<sup>37</sup> Bernstorff, *supra* n 13 at 1940-41, 1947.

<sup>38</sup> *Id.* at 1962.

<sup>39</sup> August Reinisch, The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals, 7 Chinese J. Int'l L. 285 290 (2008) (citing Statute of the

## 2. Application of the External Standards of WADA to Private Sports

### Organizations

As Jochen von Bernstorff stated, most international organizations officially keep up an organizational hierarchy by delegating tasks to subordinated bodies and creating of mandates.<sup>40</sup> The controlling power of the international organizations enhanced by performing disruptive power politics of individual member states or preventing those members to participate in important events of the international organizations.<sup>41</sup> Those international organizations' influence of their political and legal control through hierarchical internal structure to their members may confront domestic administrative law

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ILOAT, adopted by the International Labour Conference, 9 October 1946, amended on 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998: [www.ilo.org/public/english/tribunal/stateng.htm](http://www.ilo.org/public/english/tribunal/stateng.htm). Art. II (5) ILO of the Administrative Tribunal Statute provides that "[t]he Tribunal shall also be competent to hear complaints [ ... ] of officials [ ... ] of any other intergovernmental organization approved by the Governing Body which has addressed to the Director General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the tribunal for this purpose, as well as its Rules of Procedure." Among others, WHO, UNESCO, FAO, WMO, IAEA and GATT have made such declarations. For a detailed list, see [www.ilo.org/public/english/tribunal/orgs.htm](http://www.ilo.org/public/english/tribunal/orgs.htm)).

<sup>40</sup> Bernstorff, *supra* n 13 at 1942.

<sup>41</sup> *Id.* at 1942-43.

traditions that cannot be integrated.<sup>42</sup>

As it is considered the international organizations' new role without invading their member states' legal and cultural environment, one question, therefore, that arises is to what extent, if the WADA is recognized as a legitimate worldwide organization, the external standards of the WADA can be made to apply to private clubs and sports organizations in different countries around the world. As a sign of the universality of the standards within, virtually all of the rules of the WADA Code can be applied to the entities that signed an acceptance of the Code.<sup>43</sup> However, WADA must publish a list of all acceptances.<sup>44</sup> The acceptance can be withdrawn with a six-month advance notice.<sup>45</sup> The signatories include WADA, the IOC, International Federals, the International Paralympics Committee, National Olympic Committees, the National Paralympics Committee, major event organizations, national anti-doping organizations,<sup>46</sup> and other sports organizations by WADA's invitation.<sup>47</sup>

The (external) due process standards of the WADA are not different from general

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<sup>42</sup> *Id.* at 1945, 1951.

<sup>43</sup> WADA Code, art. 23.1.1.

<sup>44</sup> *Id.* art. 23.1.3.

<sup>45</sup> *Id.* art. 23.7.1.

<sup>46</sup> *Id.* art. 23.1.1.

<sup>47</sup> *Id.* art. 23.1.2.

law due process, and must conform to the minimum standards of due process and provide eight principle guarantees:<sup>48</sup> (1) a timely hearing; (2) a fair and impartial hearing body; (3) a person's right to representation, at her expense; (4) fair and timely notification of the asserted anti-doping rule violation; (5) the right to respond to the asserted anti-doping rule violation and resulting consequences; (6) each party's right to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission); (7) an interpreter, if necessary; and (8) a timely, written, reasoned decision by the hearing examiner.<sup>49</sup> These principles are the same as those of national and international law and internationally recognized human rights.<sup>50</sup> WADA applies these standards for all hearing proceedings mandatory to protect athletes' minimum rights because many international sports bodies fail to respect their athletes' rights.<sup>51</sup>

The problem is that, in practice, due process regarding the WADA Code can be abused by the WADA, IFs, National Anti Doping Agency (NADA), as well as by local sports organizations and clubs. Therefore, the scope of the application of the WADA

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<sup>48</sup> *Id.* art. 8.

<sup>49</sup> Andrew Goldstone, OBSTRUCTION OF JUSTICE: THE ARBITRATION PROCESS FOR ANTI-DOPING VIOLATIONS DURING THE OLYMPIC GAMES, 7 *Cardozo J. Conflict Resol.* 361, 369-70 (2006).

<sup>50</sup> *Id.*

<sup>51</sup> WADA Code, art. 8.

Code is important to balance between the war against doping and the protection of human rights. For example, the Abuse of the Application of the WADA Code by the WADA may occur where the regulation was not supported by fair and reasonable data (e.g. the list of prohibited substances is without reliable scientific evidence) or a breach of its responsibilities (e.g. a lack of education or information about the doping regulations). If doping offences arose under these circumstances, the WADA Code should not be empowered. Abuse of the Application of the WADA Code by IFs may also appear where IFs (e.g. ISU) have signed and accepted the WADA Code; IF is forced to apply the WADA Code to their sub-organizations (e.g. KSU: not a national anti-doping organization). This is obviously a violation of WADA Code 23.1. Such an instance occurred in 2007 by the ISU, which threatened the KSU to impose a two year suspension on Kim.

Also, Abuse of the Application of WADA Code can arise from local sport organizations that ignore the WADA Code and punish athletes without prior education of the doping rules and/or violation of doping process at WADA Code 8.2. No one has conferred the absolute power of depriving athletes of their careers to the WADA, and in

fact, the WADA must enforce the Code fairly and reasonably in order to morally justify their jurisdiction over athletes.

### 3. Whether “Due Process” Can Be Applied to the WADA

English common law expressed due process in Article 39 of the Magna Carta: “no freemen shall be taken or imprisoned or dismissed or exiled or in any way destroyed...except by the legal judgment of his peers or by the law of the land.”<sup>52</sup> The due process in common law has been expanded not only to criminal law but also to civil proceedings, other tribunals, and administrative and arbitral bodies.<sup>53</sup> Constitutional due process assures that “both federal and state agencies must accord due process to individuals affected by agency action.”<sup>54</sup> The Fifth Amendment of the US Constitution requires due process for the federal government, ensuring that “No person shall be ... deprived of life, liberty, or property, without due process of law...”<sup>55</sup> The Fourteenth Amendment incorporates due process to apply to the states: “nor shall any State deprive

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<sup>52</sup> Andrew Mitchell, DUE PROCESS IN WTO DISPUTES *in* Rufus Yerxa, Bruce Wilson, KEY ISSUES IN WTO DISPUTES SETTLEMENT: THE FIRST TEN YEARS at 145-46 (2005).

<sup>53</sup> *Id.*

<sup>54</sup> Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE, Current through the 2007 Update, Admin. L. & Prac. § 2.20 [1] Introduction 1 (2d ed.).

<sup>55</sup> Amendment V.

any person of life, liberty, or property, without due process of law....”<sup>56</sup> To meet procedural due process requirements, an aggrieved party must show three requirements to claim due process protection: state action was involved in depriving a person’s right; the state or government actor infringed on the party’s life , liberty, or property right; violation of the protected rights.<sup>57</sup> To determine whether state action was involved, before 1982, by using an "entanglement theory", the courts recognized that public high school and collegiate athletic associations as state actors for due process purpose because the government supported or sanctioned the activities even though these activities were private, voluntary.<sup>58</sup> Under this theory, national amateur athletic federations may be considered as state actors.<sup>59</sup> In 1982, the court in *Arlosoroff* held that the National Collegiate Athletic Association ("NCAA") was not a state actor because such indirect involvement with the state was insufficient.<sup>60</sup> By 1986, in *Graham*, in order to attribute the NCAA’s conduct to the state, the alternative test applies that either (1) the NCAA was serving a function which was traditionally and exclusively the state's prerogative, or (2)

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<sup>56</sup> Nowak and Rotunda, *supra* n 25 at 124; Amendment XIV, § 1.

<sup>57</sup> Solomon, *supra* n 27 at 972 .

<sup>58</sup> *Id.* at 972 973-74 .

<sup>59</sup> *Id.* at 974.

<sup>60</sup> *Id.* at 972 974 ;746 F.2d 1019 (4th Cir.1984).

the state or its agencies caused, controlled or directed the NCAA's action.<sup>61</sup> In 1988, in *Tarkanian*, the NACC was not a state actor because the NCAA did not act jointly with the state.<sup>62</sup> Thus, most of athletic associations such as , NCAA, Amateur Basketball Association, USOC, and Ohio High School Athletic Association are not considered state actors.<sup>63</sup> Without mentioning state act involvement, the court in *Behagen*, vacated the suspension because a hearing was not provided to Behagen, which is a minimum standard of due process.<sup>64</sup> Overall, the Unites States would not consider these athletics associations as state actors. On the other hand, some other countries acknowledge athletes' due process rights, for example, the former Soviets and their satellite countries Cuba and the People's Republic of China, supported an elaborate system of schools, training, and competitions aimed at developing the best athletes possible.<sup>65</sup>

To satisfy infringed interest, even if a claimant provided state action requirement, there must be infringements of a life, liberty or property interest protected by the Fourteenth Amendment that states must not deprive individual rights, and by the Fifth

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<sup>61</sup> *Id.* at 974;804 F.2d 953 at 958 (6th Cir.1986).

<sup>62</sup> *Id.* at 972 975.; 488 U.S. 179 (1988)

<sup>63</sup> *Id.* at 972 976 (quoting *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953 (6th Cir.1986); *McHale v. Cornell Univ.*, 620 F.Supp. 67, 70 (D.N.Y.1985); *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524, 530 (10th Cir.1989); *DeFrantz v. United States Olympic Comm.*, 492 F.Supp. 1181, 1193 (D.D.C.1980); *Burrows v. Ohio High School Athletic Ass'n*, 891 F.2d 122 (6th Cir.1989).

<sup>64</sup> *Id.* 975-76; 346 F.Supp. 602 (D.Minn.1972).

<sup>65</sup> *Id.* at 972 977.

Amendment that the federal government must not violate on rights by the Bill of Rights without due process of law.<sup>66</sup> Liberty interest is not mere freedom from bodily restraint but individual rights to engage in any of the common occupations of life and to pursue happiness.<sup>67</sup> Damage to the reputation alone is not sufficient to claim liberty interest.<sup>68</sup> To invoke a liberty interest, something more tangible damages are required, such as a coach's dismissal from violation of NCAA rules affect the coach's ability to pursue his career and therefore, the NACC violated the couch's liberty interest.<sup>69</sup> However, student athletes' interest to compete intercollegiate athletics is not a constitutionally protected right.<sup>70</sup>

In order to claim a property interest that can be infringed by the state actors, the person must have a legitimate claim of entitlement to it beyond unilateral expectation.<sup>71</sup> However, it does not require actual ownership of the real estate, chattels, or money.<sup>72</sup> Therefore, the athletes must show their talents for a future financial benefit

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<sup>66</sup> *Id.* at 977-78.

<sup>67</sup> *Id.* at 978; Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

<sup>68</sup> *Id.* at 977; Paul v. Davis, 424 U.S. 693, 711-12 (1975).

<sup>69</sup> *Id.* at 978-79; 463 F.Supp. 920 929(W.D.Mo.1978).

<sup>70</sup> *Id.* at 979; 570 F.2d 320 (10th Cir.1978).

<sup>71</sup> *Id.* at 980; Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

<sup>72</sup> *Id.* at 980; Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972); *id.*(quoting Linda Sharp, Sport Law

to have a right to participate.<sup>73</sup>

Once satisfying above requirements, courts take into account a three-prong test to determine due process<sup>74</sup> One may raise an issue that athletes challenge sanctions by their respective sports federations under the Amateur Sports Act of 1978. However, the court denied it and established four factors to test whether an implied cause of action existed.<sup>75</sup>

Although WADA's doping discipline would not constitute a governmental act, public due process standards must be brought in where the rules are determined by unauthorized bodies or adopted in constitutionally improper ways.<sup>76</sup> In such cases, the *Lynhan* Liberal

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53 (NOLPE Monograph Series No. 40, 1990). Athletics property rights are recognized where determined scholarship in involved not a future scholarship or future professional contract); *Id.* at 980-81 (quoting *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F.Supp. 602 (D.Minn.1972); *Hall v. University of Minn.*, 530 F.Supp. 104 (D.Minn.1982); *530 F.Supp. 104 (D.Minn.1972)*; *346 F.Supp. 602 (D.Minn.1972)*, however, some cases gave property rights to attending university, substantially diminishing prospective career by suspension, and severely limit future employment with a professional sports franchise).

<sup>73</sup> *Id.* at 981 (*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972))

<sup>74</sup> *Id.* at 982 (*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)): (1) the magnitude or importance of the interest involved; (2) the extent to which the requested procedure would reduce errors in decision making; and (3) the burden on the administrative body to provide appropriate procedural safeguards).

<sup>75</sup> *Id.* at 984 (citing *422 U.S. 66 78 (1975)*): four factors test: (1) whether the plaintiff is a member of a class that the statute intends to benefit; (2) whether there is an indication of Congress' intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the statute's underlying purposes; and (4) whether the cause of action traditionally is relegated to state law.

<sup>76</sup> *Blackshaw et. al.*, *supra* n.2 at 251.

Construction Rule may apply. Although the rule applied only to treaties with foreign states, it may apply other international legal sources, such as sponsions, customary international law, and general principles of law recognized by civilized nations.<sup>77</sup>

If doping regulations or the process of their enforcement violate general due process principles and/or conflict with national laws, should national constitutional standards of "due process" apply in such circumstances, even though the sanctions imposed by the international bodies are "private" sanctions? The key consideration for answering this question lies in whether the private sports clubs or organizations can be considered public bodies when applying national constitutional standards of "due process;" the protections provided by national constitutions of the world are designed precisely to avoid possible public intrusion into bodies like the sporting world by governments aggrieved over cases. WADA may not be considered a legitimate governmental concern, so constitutional public due process may not be applicable. However, procedural fairness or natural justice widely requires administrative and

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<sup>77</sup> Francisco Forrest Martin, *THE CONSITUTION AS TREATY*, at 202 (2007) (For example, a CIA agent kills a foreign national A in Rumania, the family of the dead A sues alleging a Fifth Amendment violation. □ "The right to life extends extraterritorially under the American Convention on Human Right (ACHR) not the ECHR....because it is most liberal construction." Thus, regional customary international law would apply.).

judicial proceedings to guarantee fairness for legitimacy and effectiveness.<sup>78</sup> Doping controls are not an exception.

#### 4. Which Country's Due Process Standards Should Be the Benchmark?

International law has recognized the principle of due process, which originated in domestic law.<sup>79</sup> The decision-maker must consider any relevant fact or law and the decision must be based on the applicable law.<sup>80</sup> In deciding which country's law should be applied in a dispute, the law chosen by the parties to the dispute, or the nation's law in which the sports body resides, is applicable before a case reaches the CAS.<sup>81</sup> However, the sports bodies involved are not required to agree on whether that law protects athletes' interests.<sup>82</sup> Therefore, the substantive law applied by CAS may be the least favorable to the athlete.<sup>83</sup> In a case of a failure to reach arbitration agreement on the applicable law, the CAS will apply Swiss law, based on Articles 23 and 29.<sup>84</sup> In some cases, the CAS

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<sup>78</sup> Mitchell, *supra* n 52 at 144.

<sup>79</sup> *Id.* at 145, 148.

<sup>80</sup> *Id.* at 148 (citing B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Grotius Publication, 1987), pp. 258, 279, 291).

<sup>81</sup> CAS R58.

<sup>82</sup> Straubel, *supra* n 54 at 543 .

<sup>83</sup> *Id.* at 543.

<sup>84</sup> Blackshaw et. al., *supra* n. 2 at 26-27.

applies general principles of law and concepts of natural justice.<sup>85</sup>

However, the advantages of not applying public due process standards to WADA do exist. For example, given the necessity of effective measures for meeting the legitimate objectives concerning of the fight against doping, stricter doping rules and procedures would be justified.<sup>86</sup> Furthermore, the CAS is limited to applying the rules of the existing bodies and is not allowed to control the validity of existing rules and regulations.<sup>87</sup> The CAS also has no reason to assume that these doping rules are unreasonable or contrary to natural justice.<sup>88</sup> Indeed, another reason to accept WADA's own rules is for fear that imposing national public standards on the actions of heretofore private and independent sports associations might lead to a complete loss of that independence, with many possible negative consequences for competitive sports.

#### **D. Appealability of Arbitration Ruling**

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<sup>85</sup> Straubel, *supra* n 54 at 542.

<sup>86</sup> Blackshaw et. al., *supra* n. 2 at 250.

<sup>87</sup> *Id.* at 250-51.

<sup>88</sup> *Id.* at 250.

## **1. Appeal to the National Anti-Doping Agency in Korea**

### **a. National Sports Arbitration Committees: KSAC**

An example of a national arbitration body that is insufficiently distinct from the sports organizations whose athletes it is meant to serve is the Korea Sports Arbitration Committee (KSAC). The KSAC was established on May 16, 2006, based on Constitution Art. 54 of the KOC for the purpose of resolving sports disputes by arbitration or mediation.<sup>89</sup> Nine committee members preside, one of whom is Elisa Lee, the president of Players Village, a department of the KOC.<sup>90</sup> The KSU is an affiliated sports body of the KOC and is subsidized by the KOC.<sup>91</sup> Thus, the KSAC is not independent of or impartial to the KOC and /or the KSU as required under WADA Code 13.2.2.<sup>92</sup>

Although the KSAC was created on May 16, 2006 for sports dispute resolution, the organization still needs testing and revision. The discussions below address how it might improve its efficiency. First, with respect to fees, the KSAC charges KRW 500,000 (on April 9, 2007, roughly CHF660, USD540) for arbitration, which is unreasonably high compared to other arbitration fees in Korea.<sup>93</sup> In Korea, the Press Arbitration

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<sup>89</sup> KOC Con. 54; KSAC reg. 2.

<sup>90</sup> <http://www.sportsksac.org/>.

<sup>91</sup> <http://www.sports.or.kr/ksekoc.sport>.

<sup>92</sup> WADA Code, art. 13.2.2.

<sup>93</sup> <http://www.sportsksac.org/>

Commission (PAC) fee is free,<sup>94</sup> and the Labor Arbitration Committee (LAC) also charges no fee for arbitration.<sup>95</sup> Athletes are naturally reluctant to apply for sports arbitration due to its comparatively high expenses. Second, no time limits exist on KSAC's decision-making for arbitration. Again, in comparison, the PAC requires resolution of arbitration within 14 days from the date of application, and the LAC requires it within ten days of the application. The KSAC has no limitation, but, according to the organization, resolution might take about six months. Turnaround time is a serious concern for athletes, as their careers are relatively short (five to ten years) and the fact that they are sometimes required to register for competitions months or even years in advance. Thus, even if a dispute is resolved in an athlete's favor, he or she may miss important competitions, irrevocably damaging their careers. In its first year of existence, many questions have been raised about the KSAC's actual independence, costs, efficiency, lack of sports law expertise, and more. These factors mentioned have led to the complete ineffectuality of the KSAC, as no athletes have requested KSAC arbitration for their disputes since its inception in May 2006. This does not mean that sports disputes have not arisen in Korea during this time period.

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<sup>94</sup> [http://www.pac.or.kr/html/arbitration/at\\_jo jung\\_01.asp](http://www.pac.or.kr/html/arbitration/at_jo jung_01.asp).

<sup>95</sup> [www.seoul.nlrc.go.kr](http://www.seoul.nlrc.go.kr).

## **b. National Anti-Doping Agencies: KADA**

Unfortunately, the history of doping in sports in South Korea is not well documented, as no doping-related regulation existed up to the time Kim's case occurred. As a national anti-doping agency, the KADA was established on June 22, 2007, pursuant to section 35 of the National Sports Promotion Act.<sup>96</sup> It grants the KADA authority to carry on doping-related business and activities upon authorization by the Minister of Culture and Travel.<sup>97</sup> Before that, the Korea Players Village of the KOC handled doping control over amateur national players.<sup>98</sup>

The scope of the KADA includes the education, promotion, gathering information and research for anti-doping, planning and enforcement of the doping test, management of the doping results and disciplinary action on the results, national and international exchange and cooperation to prevent doping, cooperation among national anti-doping agencies, the standardization of the plan and enforcement for treatment exemption, and

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<sup>96</sup> [http://www.kada-ad.or.kr/a03\\_job.asp](http://www.kada-ad.or.kr/a03_job.asp); <http://www.klaw.go.kr>.

<sup>97</sup> [http://www.kada-ad.or.kr/a03\\_job.asp](http://www.kada-ad.or.kr/a03_job.asp).

<sup>98</sup> <http://www.sports.or.kr/player>.

other necessary business and activities for anti-doping efforts.<sup>99</sup> Notably, KADA policies do not include the protection of athletes' rights and health.<sup>100</sup>

Appeals against decisions related to an international event or among international-level athletes may be made to the CAS exclusively.<sup>101</sup> Cases involving national-level athletes may be appealed to the Korea Doping Appeal Panel.<sup>102</sup> The Doping Disciplinary Penal and Korea Doping Appeal Panel are operated independently from the KADA.<sup>103</sup>

Government policy in Korea regarding appeal bodies in sports disputes is dubious. Currently, the two appeal bodies exist for sports-related disputes: the Korea Doping Appeal Panel for doping matters and the Korea Sports Arbitration Committee for general sports disputes. Funding of the two bodies is ultimately provided by the government. As the KSAC has not arbitrated a single case since its inception in 2006, one must certainly wonder - considering the volume of many cases expected to be arbitrated - whether the existence of two separate bodies is justified. Perhaps not enough to justify

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<sup>99</sup> [http://www.kada-ad.or.kr/download/01.%20한국도핑방지규정\(최종\).hwp](http://www.kada-ad.or.kr/download/01.%20한국도핑방지규정(최종).hwp) (the Korean character means Korea Anti-Doping Regulation) (Final) (last visited Feb. 25, 2008).

<sup>100</sup> *Id.*

<sup>101</sup> KADA reg. 59.2.

<sup>102</sup> KADA reg. 59.1.

<sup>103</sup> [http://www.kada-ad.or.kr/download/01.%20한국도핑방지규정\(최종\).hwp](http://www.kada-ad.or.kr/download/01.%20한국도핑방지규정(최종).hwp) (the Korean character means Korea Anti-Doping Regulation) (Final) (last visited Feb. 25, 2008).

the taxes required to maintain the two systems. On the other hand, the government does not care to provide minimal protection of athletes' rights. Ideally, the KADA and the KSAC should be unified as one independent body that would be created with the purpose of protecting athletes to avoid the issues mentioned above in the arbitration of Kim's case.

## 2. Appeal to the CAS

The CAS is an arbitration system rather than a “court.”<sup>104</sup> One purpose of the CAS is to protect “the integrity of athletics competition, to safeguard athlete’s rights, and to adhere fundamental principles of natural justice.”<sup>105</sup> The International Council of Arbitration for Sport (ICAS)<sup>106</sup> chooses CAS arbitrators based on the following qualifications: full 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.<sup>107</sup> The distribution of the arbitrator numbers is as follows:<sup>108</sup> one-fifth of the arbitrators are proposed by the IOC, one-fifth of them are proposed by the IFs, one-fifth of them are proposed by the NOCs, one-fifth of them through appropriate consultations to safeguard the interests of the athletes, and one-fifth of them are proposed by independent bodies.<sup>109</sup> Additionally, the ICAS elects the

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<sup>104</sup> CAS S20.

<sup>105</sup> Mitten et al., *supra* n. 14 at 330.

<sup>106</sup> CAS S2. (“the ICAS is to facilitate the settlement of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties.”)

<sup>107</sup> CAS S14.

<sup>108</sup> *Id.*

<sup>109</sup> CAS S14.

arbitrators from among its members for renewal.<sup>110</sup>

The WADA has designated the CAS to resolve appeals involving international-level athletes.<sup>111</sup> As an appeal body for decisions of a national-level reviewing body, the CAS also has been designated by WADA and the International Federation.<sup>112</sup> The CAS's jurisdiction is established by involved parties' written agreement to file their dispute with the CAS pursuant to final adjudication.<sup>113</sup> The CAS is divided into two divisions, the ordinary arbitration division and the appeals arbitration division.<sup>114</sup> Any dispute arising out of doping in sport may be resolved by the CAS. An ordinary arbitration proceeding of the CAS initiates the arbitration agreed upon either by prior acceptance of an arbitral clause in a party's contract or regulations or of a later agreement against a decision made by a federation, association, or sports-related body.<sup>115</sup> Any individuals or legal entities may appeal the decision of a federation, association, or sports-related body based on statutes or regulations of the sports body or a specific arbitration agreement for an appeal to the CAS, having exhausted the legal remedies according to the statutes and regulations

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<sup>110</sup> CAS S6.  
<sup>111</sup> WADA Code, art.13.2.1.  
<sup>112</sup> WADA Code, art. 13.2.3.  
<sup>113</sup> Mitten et al., *supra* n. 14 at 331.  
<sup>114</sup> CAS S20.  
<sup>115</sup> CAS R27.

of the sports-related body prior to the appeal.<sup>116</sup> CAS Rule 49 provides a time limit for an appeal, which is normally 21 days from the receipt of the decision. The Division President, however, has discretion to review this if it is not unreasonably late.<sup>117</sup> An expedited arbitration may proceed by the parties' agreement, the decision of the Panel, or the decision of the President of the Division if a panel is not yet appointed.<sup>118</sup>

The arbitrators in the CAS play the role “generally to hear appeals de novo,” in which a panel “reconsiders a presentation of the facts and arguments on the law without any presumptions and without a specified standard of review.”<sup>119</sup> The CAS then reviews new facts or allegations to discover whether they are true or false. Finally, it renders judgment on any activity related or connected to sports, such as pecuniary matters, the development of sports, etc.,<sup>120</sup> according to applicable law or agreed-upon law.<sup>121</sup> The decisions made by the arbitrators bind the parties and are final.<sup>122</sup>

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<sup>116</sup> CAS R47.  
<sup>117</sup> CAS R49.  
<sup>118</sup> CAS R52.  
<sup>119</sup> Straubel, *supra* n 54 at 543.  
<sup>120</sup> CAS Art. R27.  
<sup>121</sup> CAS R58.  
<sup>122</sup> CAS R59.

### 3. Appeal to the Court: Tribunal Federal Courts (Swiss Supreme Court)

In the USA, arbitration awards can be vacated on grounds of arbitrator's misconduct<sup>123</sup> or public policy.<sup>124</sup> A challenge to an arbitration award based on an arbitrator's misconduct may include partiality and bias,<sup>125</sup> corruption, fraud, or undue means<sup>126</sup> through either arbitrator's procedural ruling or evidentiary ruling. For example, arbitrator's procedural ruling denied fair hearing and resulted from prejudice, or<sup>127</sup> arbitrators' evidentiary ruling refused to hear or consider certain evidence in the arbitration proceedings can be challenged to arbitration awards.<sup>128</sup> In order to vacate arbitration awards based on grounds of misconduct, the challenging party must show a direct, definite, and demonstrable interest of the arbitrator and the outcome of the

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<sup>123</sup> George Chamberlin, CAUSE OF ACTION TO VACATE ARBITRATION AWARD ON GROUND OF PARTIALITY OR MISCONDUCT, OF ARBITRATOR, 25 Causes of Action 473 § 15 (2008)

<sup>124</sup> In general: Ann C. Hodges, JUDICIAL REVIEW OF ARBITRATION AWARDS ON PUBLIC POLICY GROUNDS: LESSONS FROM THE CASE LAW, 16 Ohio St. J. on Disp. Resol. 91 (2000).

<sup>125</sup> Chamberlin, *supra* n 125 (quoting Hilton Construction Co v Martin Mechanical Contractors Inc, 251 Ga 701, 308 SE2d 830 (1983)).

<sup>126</sup> *Id.* at §4.

<sup>127</sup> *Id.* at §8( for example, “the arbitrary denial of a reasonable request for the postponement or reopening of a hearing, a refusal to hear material evidence, or a ruling that otherwise precludes a party's efforts to develop a full record”)

<sup>128</sup> *Id.* at §16.

arbitration.<sup>129</sup> Additionally, the court must find that “the rights of one of the parties were prejudiced by corruption, fraud, or misconduct.”<sup>130</sup> According to Grossman, et al, vacation on public policy grounds arbitration awards requires a two step analysis: (1) whether a well-defined and dominant public policy has been identified; and (2) if so, whether the arbitrator's award violates that public policy. The public policy exception, however, should be narrowly construed.<sup>131</sup> A motion to vacate an arbitration award must be made within specified time.<sup>132</sup> It occurs mostly within three months from the filing date or delivery of the award, as stipulated for instance, in the Federal Arbitration Act, Uniform Arbitration Act, and [New York civil procedure](#).<sup>133</sup>

An arbitration award in sports rendered by the CAS can be appealed to the Federal Tribunal (hereinafter Swiss Supreme Court) under Art. 190 (2) of the Swiss Federal Code on Private International Law (CPIL) only for five limited grounds:<sup>134</sup>

1. If a sole arbitrator was designated irregularly or the arbitral tribunal was

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<sup>129</sup> *Id.* at § 13 (quoting B-S Steel of Kansas, Inc. v. Texas Industries, Inc., 321 F. Supp. 2d 1214, 2004-2 Trade Cas. (CCH) P 74477 (D. Kan. 2004).

<sup>130</sup> *Id.* at § 13.

<sup>131</sup> Eleanor L. Grossman, Glenda K. Harnad, Jeffrey J. Shampo, 4 Am. Jur. 2d Alternative Dispute Resolution § 216 (2008); reinstated discharged employee (142 ALR Fed 387; 112 ALR5th 263).

<sup>132</sup> Chamberlin, *supra* n 125 at § 9.

<sup>133</sup> *Id.* (90-day time limit: 9 U.S.C.A. § 12, ULA § 12(b), New York CPLR § 7511. 30- day time limit: Mass Gen Laws ch 251, § 12(b), no time limit: Ohio Council 8, American Federation of State v Central State University, 16 Ohio App3d 84, 16 Ohio BR 89, 474 NE2d 647 (1984)).

<sup>134</sup> <http://www.umbrecht.ch/pdf/SwissPIL.pdf> (last visited Feb. 20, 2008).

constituted irregularly;

2. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;
3. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
4. If the equality of the parties or their right to be heard in an adversarial proceedings was not respected;
5. If the award is incompatible with Swiss public policy.

The request for appeal has to lodge with the Swiss Supreme Court within 30 days from the notification of the award.<sup>135</sup> Only registered attorneys may represent the parties in appeals before the Court.<sup>136</sup> However, if neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, the two may completely or partially exclude the appeals against the award of the arbitral tribunal.<sup>137</sup> In *Guillermo Cañas v ATP Tour*,<sup>138</sup> Guillermo Cañas agreed to the ATP Official Rulebook that '[t]he

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<sup>135</sup> FSCA art. 100(1) (Switzerland).

<sup>136</sup> FSCA art. 40(1) (Switzerland).

<sup>137</sup> CPIL art. 192(1) (Switzerland).

<sup>138</sup> Meinrad Vetter, THE CAS AN ARBITRAL INSTITUTION WITH ITS SEAT IN SWITZERLAND, Faculty of Law, sports Law eJournal at 7 (2008) (Decision of the Swiss Supreme Court 4P.172/2006 dated 22 March 2007, published under the official collection number 133 III 235 <[http://www.bger.ch/index/jurisdiction/jurisdiction\\_inherittemplate/jurisdiction\\_recht/jurisdiction\\_recht\\_leitentscheide1954.htm](http://www.bger.ch/index/jurisdiction/jurisdiction_inherittemplate/jurisdiction_recht/jurisdiction_recht_leitentscheide1954.htm)> at 4 July 2008.)

decisions of CAS shall be final, non-reviewable, nonappealable and enforceable'.<sup>139</sup> The Swiss Supreme Court, however, held that the waiver of appeal of article 192(1) does not apply to sports arbitrations' verdicts because these verdicts virtually ban the sportspersons from competition and no examination of the arbitral award was established by a court of the recognition and the enforcement.<sup>140</sup> Also the sports federations' negotiation power is superior to the sportspersons, who cannot help accepting the rules of the sports federations to join their events.<sup>141</sup> The Swiss Supreme Court stated that most of waivers of appeal are basically void with respect to sports arbitrations' verdicts.<sup>142</sup>

Unfortunately, although Kim prepared to appeal to The Swiss Supreme Court based on all of the reasons of the article 192(2), he ultimately had to give up his case because he did not have enough money to go to the Swiss Supreme Court. From this example, we can learn that even though an appeal system is available to the athletes, various reasons may prevent them from taking advantage of it. If an arbitrator ruled erroneously and/or did misconduct, athletes could suffer irreparable damages, and might be unable to appeal

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<sup>139</sup> *Id.* 8-9.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 9.

<sup>142</sup> *Id.*

the decision. Therefore, all decisions at the CAS must be justified, and if an arbitrator's faults cause damages to the athletes, a self-review system should exist within the CAS with the cost borne by the CAS, especially if the decision was made by a sole arbitrator. Considering such a short period of 30 days to appeal to the Swiss Supreme Court and that most arbitration parties are from foreign countries, the challenging parties against the CAS arbitration awards face considerable difficulties to appeal in a timely manner.

The enforcement of the arbitration awards applies the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.<sup>143</sup> It was adopted by diplomatic conference and established on June 10, 1958, to promote an integral part of the Commission's program.<sup>144</sup> The Commission is composed of sixty member states elected by the General Assembly.<sup>145</sup> The Convention is an international convention requiring signatory states to enforce the arbitration judgments of other states.<sup>146</sup> There are, however, some exceptions, which need not be enforced by the

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<sup>143</sup> CPIL art. 192 (2) (Switzerland); The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

<sup>144</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

<sup>145</sup> <http://www.uncitral.org/uncitral/en/about/origin.html>

<sup>146</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S 38; Gubi, *supra* n. 215, at 1006.

foreign arbitration decisions; namely, “if the arbitration panel acted against its own stated rules or there is reason to believe one of the arbitrators may have been biased on his actions or his failure to disclose a potential conflict of interest; when the court system where the arbitration was held has vacated the judgment.”<sup>147</sup> Also, the arbitration award may be enforced by a court in a signatory country according to the New York Convention on the Uniform Enforcement of Foreign Arbitration Awards.<sup>148</sup>

### **III. Arbitrary Arbitrator in CAS: Case Study**

#### **A. Summary of Kim’s Case**

Kim has been skating for the past thirteen years. He had suffered from arthritis in both knees from May 22, 2000, to January 3, 2005, then experienced no pain for one year. He stopped skating from June 2005 to early September 2005, when he re-started practice skating in order to participate in the National Winter Festival scheduled for February 2-4,

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<sup>147</sup> Gubi, *supra* n. 18 at 1006-07.

<sup>148</sup> Mitten, et al., *supra* n.14 at 134;

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

2006, at Sunnam Ice Link, in Sunnam City, Gyenggi-do, South Korea. After excessive practice, Kim's knee pain returned. His grandmother, who lives in the countryside, visited him to watch his competition in the National Winter Festival. Upon seeing Kim in severe pain, she had Kim take some of her own prescription arthritis medication to relieve the pain. Kim took the medication twice, the night before the competition on February 2, 2006, and the morning of the competition on February 3, 2006. The taking of the medication could be considered an emergency situation, as neither time nor facilities provided for an available doctor for Kim on the Festival grounds. The KSU has never provided a doctor during their events and still does not. On February 3, 2006, Kim was selected for a doping test because he clocked a new competition record, and tested positive for "triamterene" - not known as a performance-enhancing drug for skaters.

The decision of the Disciplinary Committee of the KOC on March 17, 2006 was to issue a "warning." Subsequently, the decision of the Disciplinary Committee of the KSU on May 15, 2006 was to issue a "warning." According to the KSU's regulations, this decision was final because Kim did not request a review within 15 days of its

receipt.<sup>149</sup> However, about seven months later, on December 29, 2006, the KSU changed its decision and instead declared a “two-year ineligibility” following the direction of the ISU. On April 9, 2007, the KSU and Kim agreed to appeal to the CAS to resolve the dispute. On April 17, 2007, upon the CAS’s instruction to select arbitrator(s), both parties chose a sole arbitrator. Later, the KSU raised a jurisdictional objection, alleging that there was a condition in the Agreement on Applying for Arbitration that an appeal must be filed to the Korea Sports Arbitration Committee (KSAC) first. However, no such condition was found to have existed. At that time of the KSU’s objection, it was working feverishly with the Korean government on a bid to host the 2014 Winter Olympics in PyeongChang.

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<sup>149</sup> KSU Award/Disciplinary Committee reg. 13.1 (If any disciplined athletes are not satisfied with the decision, they may request to review the case with the KSU within 15 days from the receipt of the decision notice).

## B. Erroneous Application of the WADA Code

WADA's definition of "athlete" and WADA Code Art. 5.1.1 holds that the athletes subject to the Code perform at the international level and national level. Therefore, Kim was not subject to WADA rules because he was neither an international-level or national-level player, nor did he qualify under the "additional person" clause because no Korean national anti-doping organization existed at the time of his doping test.

Neither the KOC<sup>150</sup> nor KSU<sup>151</sup> had anti-doping rules available at the time of Kim's testing. Accordingly, Kim was not covered by the WADA Code for the purpose of doping control. More importantly, according to WADA Code Article 23.1.1, to apply the WADA Code, Signatories must sign a declaration of acceptance upon approval by each of their respective governing bodies,<sup>152</sup> or upon invitation by the WADA.<sup>153</sup> However, WADA must publish a list of all acceptances.<sup>154</sup> Therefore, the WADA Code should not have been applied to Kim's case because neither did the KSU sign the declaration of

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<sup>150</sup> <http://www.sports.or.kr/search.sport> (last visited Feb. 16, 2008).

<sup>151</sup> <http://skating.or.kr/> (last visited Feb. 16, 2008).

<sup>152</sup> WADA Code, art. 23.1.1.

<sup>153</sup> *Id.* art. 23.1.2.

<sup>154</sup> *Id.* art. 23.1.3.

acceptance nor did WADA make it public.

### C. Violation of Doping Due Process

Due process in doping can be divided into two stages: (1) before the doping test, when evidence is obtained from an athlete by collecting urine or blood for the test; and (2) after the doping test, to punish an athlete who tests positive for prohibited substances. Due process is violated where the accused has been denied an opportunity to retain counsel, or been given such opportunity but no provision of counsel where a private retainer is financially impossible. According to the WADA Anti-Doping Control Video, produced by WADA in collaboration with the Swiss Federal Office of Sports in 2005, the anti-doping agency must inform an athlete that he or she has a right to representation before collecting urine or blood, and the athlete must attest to what he or she was informed.<sup>155</sup> Kim, however, was not informed of these rights. Even the agency in Korea was not know the regulations. WADA Code Art. 8 also establishes the athlete's right to be represented by counsel during the hearing process at the athlete's own expense.<sup>156</sup> WADA Code Art.

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<sup>155</sup> WADA Anti-Doping Control Video, *available at* <http://www.wada-ama.org> (last visited Mar. 31, 2007).

<sup>156</sup> WADA Code, art. 8 (Right to a Fair Hearing):  
[T]he hearing process shall respect the following principles:

- A timely hearing

8 provides for written notice and a timely hearing. There was no timely hearing in Kim's case since over six months lapsed between the "warning" finalized by the KSU on May 15, 2006 and the suspension decision on December 29, 2006. The ISU Doping Code 8.2.2 regulates that hearings arising out of national testing must be completed expeditiously, and hearings related to an Event may be conducted by an expedited process. Furthermore, the results management process must be decided within three months.<sup>157</sup> Therefore, the hearing and decision on a ineligibility of two years was not executed in a timely manner.

#### **D. Erroneous Determination on Jurisdiction**

##### **1. Specific Arbitration Agreement**

In compliance with CAS Art. R47 and ISU Anti-Doping Code 13.2.2,<sup>158</sup> the KSU and Kim signed a specific arbitration agreement to appeal to the CAS on April 9,

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- Fair and impartial hearing body
  - The right to be represented by counsel at the Person's own expenses
  - The right to be fairly and informed of the asserted anti-doping rule violation
  - The right to respond to the asserted anti-doping rule violation and resulting consequences.

<sup>157</sup> ISU Doping Code, art. 8.2.2.

<sup>158</sup> CAS, art. R47; ISU Anti-Doping Code, art. 13.2.2: "the Member may alternatively elect to give its level directly to CAS." The KSU is a "Member."

2007.<sup>159</sup> Based on the specific arbitration agreement, the CAS assigned the case to the Appeals Arbitration Division and a case number was assigned on April 13, 2007.<sup>160</sup> Accordingly the sole arbitrator, Mr. Loh Lin Kok, an advocate and solicitor from Singapore was selected by the both parties' agreement on April 17, 2007, to expedite the proceeding. On April 20, 2007, the KSU raised its jurisdiction objection to the CAS and to return this case to KSAC alleging that the agreement on April 9, 2008 was invalid.

The sole arbitrator erroneously decided that the non-existent March 20, 2007 agreement was valid.<sup>161</sup> The arbitrator misstated that “Kim and KSU agreed to proceed to arbitration by the KSAC by virtue of a specific Arbitration Agreement dated 20 March 2007 entered into between the two parties.”<sup>162</sup> Further, the arbitrator misstated that the agreements were made one after another—March 20, 2007 for the KSAC and April 9, 2007 for the CAS.<sup>163</sup> The KSU's letter dated April 18, however, indicates that Kim and the KSU

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<sup>159</sup> Agreement on Applying for Arbitration, Appellant: Bum-Suk Kim, Respondent: Korea Skating Union, To: Court of Arbitration for Sport, Date: April 9, 2007:

The parties above have agreed on complying with the final decision to be made by Court of Arbitration for Sport on the disputes occurred with reference to the appeal to be filed for having withdrawn the disciplinary action given, dated December 29, 2006 by the decision from Korea Skating Union imposing a two- year suspension. Whereby this is submitted herewith in writing. However, this is to within WADA Anti-Doping Code.

<sup>160</sup> CAS 2007/A/1259 Kim Bum-Suk v/Korea skating Union.(hereinafter in *Kim*).

<sup>161</sup> In *Kim* 6.7; In *Kim* 4.2

<sup>162</sup> In *Kim* 4.2.

<sup>163</sup> In *Kim* 4.2.

made both agreements at the same time.<sup>164</sup> Even if the agreement on March 20, 2008 were executed by the both parties, the Korean Civil Act, section 137 and/or section 141, which was the applicable law for Kim’s case, could be applied to determine that the last identified version of the agreement—duly executed in writing on April 9, 2007—was a final decision.<sup>165</sup> More importantly, Kim’s mother alleged that Tae-Hwan Kim, who was an officer of the KSU, confessed to her that agreement dated March 20 had been altered by himself.<sup>166</sup> In fact, the KSU conceded that the April 9, 2007 agreement was valid because the KSU raised its objection about the condition alleging that an appeal must be submitted to the KSAC first.<sup>167</sup> This was further confirmed by the KSU’s faxed letter dated May 9, 2007, stating that Kim reserved the option to elect to file the appeal with either the CAS or the KSAC.<sup>168</sup> Therefore the agreement on applying for arbitration to the CAS, dated April 9,

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<sup>164</sup> Letter from KSU to CAS, April 18, 2007

<sup>165</sup> Code civil, art. 137 (R.O.K): “where a part of the legal affairs is void, the whole parts of the legal affairs are void.” Civil Act section 141: “where cancellation of legal affairs occur, the legal affairs are void from the date of the original agreement.”

<sup>166</sup> Tae-Hwan Kim is a staff-member of the KSU who admitted to having changed the date himself on April 2, 2007, when he retyped both agreements as directed by Chisang Lee, vice president of the KSU. The alteration was found on April 9, 2007 when the appeal application was about to send to the CAS and both parties agreed to discard the old documents and to merge them into new ones on the date of April 9, 2007. The alteration was admitted after Kim’s mother protested that she did not even visit the KSU on March 20, 2007.

<sup>167</sup> The first jurisdictional objection was made by the KSU on April 18, 2007. It alleged that the agreement dated April 9, 2007, contained the condition. On April 20, 2007, the KSU faxed the CAS the exact allegation that its agreement with Kim contained a condition that an appeal must be submitted to the KSAC before the CAS. On April 22, the KSU faxed the same information, adding the allegation that the KSAC and KADA had jurisdiction over Kim. Again, it was obvious that the agreement did not include this condition.

<sup>168</sup> Letter from KSU to CAS, May 9, 2007 at 5 line 5-9.

2007, constituted a valid agreement to establish CAS jurisdiction between the parties as an exception to Rule 49 of the CAS.<sup>169</sup>

Nonetheless, the arbitrator failed to rule on Kim's arguments that the agreement dated March 20 was altered by Tae-Hwan Kim and the validation was proven by the KSU's faxed letter dated May 9, 2007. The arbitrator also failed to retain evidence or provide a hearing to challenge that evidence on close examination despite the fact that it was the main dispute.<sup>170</sup> By doing so, the arbitrator violated the CAS Code.<sup>171</sup>

## 2. Exhausted All Available National Remedies

In addition to the specific arbitration agreement by the parties, all mandatory systems for review of the decision in Korea had to be exhausted before an appeal to the CAS was allowed.<sup>172</sup> A review body in doping must be established in accordance with the National Anti-doping Organization's rules, and the appeal body must be independent and

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<sup>169</sup> CAS R49.

<sup>170</sup> In *Kim* 6.7; Despite the fact that on May 1, 2007, Kim submitted enough documents to prove what had happened, the arbitrator neither stated the facts nor analyzed the issue in it.

<sup>171</sup> CAS R57.

<sup>172</sup> CAS R47.

impartial.<sup>173</sup> At the time of Kim’s case, no national body in Korea existed to review doping decisions involving national-level athletes rendered by sports organizations in accordance with WADA Code Art. 13.2.2. The KADA was established sixteen months after Kim’s case occurred on June 22, 2007—long after Kim’s case, which happened on February 3, 2006. Even the KSU and KOC, who acted to test doping, did not have a set of established doping rules.<sup>174</sup>

The KSAC was neither a mandatory arbitration body for doping cases in sports, nor an impartial or independent body, nor an exclusive arbitration body in doping designated by doping rules of the National Anti-Doping Agency.<sup>175</sup> Also, the KSU added the provision that the KSAC could act as a review body for sports disputes on January 23, 2007, about one year later from date of Kim’s doping case.<sup>176</sup> Because Kim’s doping offence occurred on February 3, 2006—prior to this regulatory addition—the KSAC had no jurisdiction, and would not unless the parties filed an appeal with all required

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<sup>173</sup> WADA Code, art. 13.2.2.

<sup>174</sup> <http://www.kada-ad.or.kr> ( last visited 2.20.08); <http://www.sports.or.kr/ksckoc.sport> (no doping rules found. last visited 2.20.08)

<sup>175</sup> WADA Code, art. 13.2.2; the later-founded KADA may have been an appeal body over Kim’s case if the dispute had occurred after the KADA was established on June 22, 2007. Therefore, relating to Kim’s case, there was no mandatory appeal body for doping matters in Korea.

<sup>176</sup> KSU reg. 8.2.

documents.<sup>177</sup> None of these documents were submitted to the KSAC by Kim or the KSU. Also, further information must be entered for the successful submission of an arbitration application.<sup>178</sup>

Again, Kim provided none of this requisite information. The KSAC also violated its duty not to disclose information obtained during counseling<sup>179</sup> by revealing such information at the meeting on April 19, 2007, to all attendees, including the KOC member whom Kim's mother later claimed had threatened her to withdraw the case from the CAS. All things considered, the KSAC was neither independent nor impartial, and was obviously irrelevant to Kim's case.

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<sup>177</sup> KSAC reg.16, 16① (the following documents are required to file an appeal to the KSAC:1. A document certifying arbitration agreement. 2. The rules of the organization with which the persons are associated. 3. Power of attorney if there is an agent.)

<sup>178</sup> KSAC reg. 16□:

1. Names and addresses of both/all parties. If the applicant is a corporation, then the name of the CEO and his address must be entered.
2. If there is an agent, his name and address must be entered.
3. Details explaining the circumstance of applying for arbitration.
4. Summary of dispute.
5. Reason for applying for arbitration and proof
6. Specific points of the decision leading to application for arbitration.
7. Designation of the recipient of notices of the arbitration process.
8. If there are several persons to a party, then one person should be designated as the representative and any documents evidencing the relationship should be submitted.

<sup>179</sup> KSAC Reg. 40:

- (1) Arbitration proceedings and recording thereof are held in closed-door session.
- (2) The Arbitration Board shall disclose its decisions to the public by appropriate means. However, under special circumstances, the Board may decide not to disclose all or part of its decisions.
- (3) Except for the scope of disclosure described in Section 40.2, the parties themselves, their agents, assistants, or the persons related to the Board shall not disclose any confidential information to outsiders.

The arbitrator, however, decided that Kim had a legal remedy in Korea to apply for arbitration to the KSAC, even though the legal remedy appeared not to be a mandatory one.<sup>180</sup> The arbitrator said that Kim filed an appeal to the KSAC based on the letter from the KSAC to the KSU dated May 8, 2007.<sup>181</sup> The KSU could not provide any evidence of these allegations because no such application existed. He should not have interpreted broadly or analogically to give the KSAC authority as a review body in doping in Korea, where there was no available review body for Kim in Korea. The arbitrator violated the principles of strict construction—not to mention ethics and professional responsibility—by deciding without evidence or hearing.

### 3. Procedural Imperfection

Kim was alternatively seeking the voiding of decisions made in his case due to procedural imperfection, based on CAS case 96/129, in *USA Shooting and Quigley v UIT*.<sup>182</sup> According to the CAS case law, “*if the ‘hearing’ in a given case was insufficient*

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<sup>180</sup> In *Kim* 7.1.

<sup>181</sup> In *Kim* 6.3; letter from KSAC, May 8, 2007 (there was no supporting document or evidence, only mention of a faxed six-page draft).

<sup>182</sup> CAS 96/129.

*in the first instance, the fact is that as long as there is a possibility of full appeal to the Court of Arbitration for Sport the deficiency may be cured.*” Kim contends that the KSU violated due process proceedings and deprived him of his rights because (a) Kim was not informed about his rights (as under the WADA Anti-Doping Control Video;<sup>183</sup> WADA Code Art. 8 (Right to a Fair Hearing);<sup>184</sup> Regulation 21 of the KOC Award/Disciplinary Committee;<sup>185</sup> and Regulation 22 of the KOC Award/Disciplinary Committee)<sup>186</sup> and (b) no person should be punished twice for the same offence (as under §13 of Korean Constitutional Law).<sup>187</sup> At no point was Kim informed that he had the right to representation by counsel for the three hearings held. Furthermore, no written notice of the March 17 and May 15 hearings and decisions was provided. The CAS may cure the procedural deficiency, but the arbitrator erroneously held his decision.

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<sup>183</sup> WADA Anti-Doping Control Video (The anti-doping agency must inform an athlete that he or she has a right to have representatives before the collecting of urine or blood, and the athlete must sign a statement about what he or she was informed.).

<sup>184</sup> WADA Code, art. 8  
 “[T]he hearing process shall respect the following principles:  
 • A timely hearing  
 • Fair and impartial hearing body  
 • The right to be represented by counsel at the Person’s own expenses  
 • The right to be fairly and informed of the asserted anti-doping rule violation  
 • The right to respond to the asserted anti-doping rule violation and resulting consequences.”

<sup>185</sup> KOC Award/ Disciplinary Committee reg. 21 ☼: Request for reevaluation may be made within seven days of receiving a notice of disciplinary action.

<sup>186</sup> KOC Award/ Disciplinary Committee reg. 22 ☼: In regards to the Korea Sports Union Committee, if there is no request for reevaluation by the accused person, then the Board of Directors of Korea Sports Union shall pass a resolution, at which time the disciplinary action shall immediately become effective.

<sup>187</sup> Constitution art.13 (1) (R.O.K) (“[N]o person shall not be subject for the same offence to be twice put in jeopardy of life or limb....”).

The CAS has also held firmly that it always has jurisdiction to overrule the rules of any sports federation, even if those rules provide that the federation's final determination of competition results is not appealable.<sup>188</sup> Not only was CAS jurisdiction established in Kim's case based on the arbitration agreement between Kim and the KSU, but several imperfections in the handling of his case based on CAS case law<sup>189</sup> further solidified this jurisdiction. First, at no point during the collection of his urine sample or during the three hearings was Kim informed that he had the right to be represented by counsel, and no written notice was provided him under the WADA Code Art. 8.<sup>190</sup> Second, both the hearing on November 27, 2006 and the decision of December 29, 2006, were groundless, as they occurred six months after the supposedly final hearing on May 15, and did not follow proper protocol, as no new facts were found or requests submitted of a post-review by Kim. Finally, the KSU violated the principle of double jeopardy established in section 13 of the Korean constitution.<sup>191</sup> The arbitrator failed to rule this claim even in his facts or issues statements.

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<sup>188</sup> Mitten et al., *supra* n. 14 at 351 (Quoting CAS 2000/A/284, *Sullivan v. The Juno Federation of Australia, Inc.*).

<sup>189</sup> CAS 98/185.

<sup>190</sup> WADA Code, art.8.

<sup>191</sup> Constitution art. 13 (1) (R.O.K)

To conclude, having taken more than four months to rule on the jurisdiction objection alone—which was itself a violation of the CAS Code, given the extensive delay and given that the parties had requested expedited review<sup>192</sup>—the arbitrator failed to address the validity of the jurisdictional objection and to explain what evidence he used to decide the validity of the agreement, how the decision that the KSAC had jurisdiction had been reached, why the due process imperfections in the case were not permitted, as well as consideration of the delayed proceedings. Obviously there was an agreement by the interested parties, and all available legal remedies in Korea had apparently been exhausted. However, to reach this decision, the arbitrator ruled on matters erroneously, failed to rule on claims, and reached issues not submitted by the parties.

## **E. Failure to Rule on Claims by Kim**

### **1. Facts and Issues Statements**

The arbitrator failed to rule on most of the facts and issues in Kim’s case or to

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<sup>192</sup> CAS, *20 Questions about the CAS*, available at <http://www.tas-cas.org/en/20questions.asp/4-3-228-1010-4-1-1/5-0-1010-13-0-0/> (last visited Apr. 4, 2008). “*How long does CAS arbitration last?* The ordinary procedure lasts between 6 and 12 months. For the appeals procedure, an award must be pronounced within four months of filing the statement of appeal. In urgent cases and upon request, the CAS may, within a very short time, order interim measures or suspend the execution of a decision appealed against.”

include them in his facts and issues statements. The arbitrator disregarded all factors, including appeal statements, submitted by Kim. In *Kim* 4.1, the arbitrator left out the following facts from Kim's appeal brief:<sup>193</sup> Kim had three hearings and three decisions (March 17, May 15, and December 29, 2006), even though he did not request review of the decision and no additional facts were found; especially surprising was the decision to impose a two-year suspension, rendered on December 29, after seven months had elapsed since the "final" decision of May 15. Kim's appeal to the CAS was based on those facts, in addition to the violation of due process and the erroneous application of the WADA Code.

## **2. Doping Rules**

The arbitrator failed to mention the crucial factor that the KSU had no doping regulations or statutes and never priorly communicated any doping rules to its athletes, including Kim. In the absence of substantive law or regulations, or formal procedures in the KSU regarding doping, Kim had no way of anticipating the risk of suspension. In *Quigley*, the court held that doping rules must be provided clearly and with ample notice

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<sup>193</sup> CAS 2007/A/1259, in *Kim* 4.

to protect athletes' legitimate expectations, and reversed the sanction that had been issued in that case, saying that there was no legal basis for it.<sup>194</sup> In *Rebagliath*, the CAS also ruled that the IOC's sanction was vacated because neither the IOC's rules nor those of the international skiing federation clearly banned the usage of marijuana.<sup>195</sup> To punish doped athletes, both substances law and the procedural provisions of a disciplinary code must be strictly interpreted, although the WADA doping rule remains a strict liability standard. Because doping discipline is related to criminal law, what is at stake is the athlete's right to earn, his or her property interests, and his or her reputation. The arbitrator also failed to mention that, in Korea, the national doping agency is the KADA, and the exclusive arbitration body in doping is the Appeal Penal of the KADA under WADA Code Art. 13.2.2.<sup>196</sup> Nonetheless, the arbitrator insisted that the KSAC was an available review body for Kim's case.<sup>197</sup> The arbitrator also avoided stating that the KSAC was formed on May 16, 2006, and that it wasn't until January 23, 2007 that the KSU added the provision that the KSAC could serve as a review body for sport

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<sup>194</sup> Mitten, et al., *supra* n.14 at 339, 343.

<sup>195</sup> *Id.* (quoting *R. v. International Olympic Committee (IOC)*, Arbitration CAS ad hoc Division (O. G. Nagano 1998) 002).

<sup>196</sup> KADA reg. 59.1; WADA 13.2.2.

<sup>197</sup> In *Kim* 7.1.

disputes.<sup>198</sup> Kim's case precedes both events: it occurred on February 3, 2006, and the decision in appeal was made on December 29, 2006. The arbitrator ignored all of Kim's submissions in this regard as well. The arbitrator, acting almost like a spokesman for the KSU, excused these inconsistencies by saying, at 6.7, that "KSAC in fact was waiting for further documents from KIM."<sup>199</sup> It was clear that Kim did not file an application to the KSAC, despite the arbitrator's insistence that "Mr. Kim did make such an application for arbitration by KSAC" at 7.1.<sup>200</sup> At this point, the arbitrator should have summoned a hearing to verify this but he did not.

## **F. Speed and Costs**

At the Olympics, the speed of a trial is a must because a delayed decision may be useless if the final competition has ended. The issue is not the speed itself, but the achievement of the speed without jeopardizing quality.<sup>201</sup> Due to this special circumstance, the CAS encourages expedited proceedings under CAS R44.4 (Expedited Procedure), which provides that "with the parties' consent, the Panel may proceed in an

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<sup>198</sup> KSU Con. 8.2.

<sup>199</sup> In *Kim* 6.7.

<sup>200</sup> *Id.* at 7.1.

<sup>201</sup> Blackshaw et al., *supra* n. 2 at 125.

expedited manner for which it shall issue appropriate directions.” Also, CAS R33.2 provides that “Every arbitrator...shall have the availability required to expeditiously complete the arbitration.” For the appeal procedure an award must be rendered within four months of filing the statement of appeal.<sup>202</sup> In urgent cases and upon request, the CAS “may within a very short time, order interim measures or suspend the execution of a decision appealed against.”<sup>203</sup> The Games of the XXVII Olympiad in Sydney provide an example of such facilitation. Article 18 of the Arbitration Rules for the Games required decisions within 24 hours.<sup>204</sup> Regarding the enforceability and scope of decisions in a regular appeal to the CAS, where taking into account all the circumstances of the case, the Panel could either make a final award or refer to the case to regular CAS procedure, but could, even without the parties’ application, grant preliminary relief.<sup>205</sup> Also “if the athlete is dissatisfied with the USOC’s decision, the athlete has thirty days to appeal to the American Arbitration Association and if a situation is determined to be an emergency, an expedited forty-eight hour process is available.”<sup>206</sup> By contrast, the US Anti-Doping

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<sup>202</sup> CAS, 20 Questions about the CAS, *available at* <http://www.tas-cas.org/en/20questions.asp/4-3-228-1010-4-1-1/5-0-1010-13-0-0/> (last visited Apr. 4, 2008).

<sup>203</sup> *Id.*

<sup>204</sup> Arbitration Rules for the Games of the XXVII Olympiad in Sydney, art. 18.

<sup>205</sup> *Id.* at art. 20. a), b).

<sup>206</sup> Edward H Jurith, Mark W. Beddoes, THE UNITED STATES’ AND INTERNATIONAL RESPONSE TO THE PROBLEM OF DOPING IN SPORTS, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 461 at 535-36 (2002).

Agency (USADA), for example, has a strict time limit of three months in the case of an American Arbitration Association (AAA) hearing.<sup>207</sup> The parties to Kim’s case agreed that it was an urgent case. Based on that agreement, the arbitrator was obliged to render the award within “a very short time.”<sup>208</sup> He failed to do so, instead taking over four months to render his decision on August 15, 2008 on the jurisdictional objection only. It seems to be more than mere coincidence that the arbitrator’s delayed decision came out after the bidding to host the 2014 Winter Olympics in PyeongChang, which took place July 7, 2007. To carry out due diligence in sports, the CAS requires under R33.2 that “every arbitrator required to expeditiously complete the arbitration,”<sup>209</sup> and it must facilitate this process.

In theory, the merits for an athlete of arbitration in the CAS include lower costs and speedier decisions than are available in the regular judicial system. However, it can actually be more expensive because the parties must pay the court office fees CHF500 (on April 9, 2007, roughly KRW 381,990, USD 499.0275) in court office fees<sup>210</sup> and

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<sup>207</sup> Straubel, *supra* n. 54 at 567.

<sup>208</sup> *Id.*

<sup>209</sup> CAS R33.2.

<sup>210</sup> CAS R65, R65.1, R65.2.

salaries of the arbitrator(s). Kim, for instance, paid an advance payment CHF12, 000 (on April 9, 2007, roughly KRW 916,776, USD11, 976.66) for the sole arbitrator. This CAS fee was about 2.2 times higher than a Korean attorney's average fee per case 4,700,000 Korea Won (approximately CHF5, 251.57, or USD4, 370) in the year 2000 and less now due to an increasing number of attorneys).<sup>211</sup> Consequently, the CAS proceeding was much slower and more expensive than the court system.

The reason provided was that Kim's dispute was domestic, not international.<sup>212</sup> The question is what the standard defining an "international nature dispute" was. Doping rules govern sports organizations internationally,<sup>213</sup> and doping is one of the main areas of international sports law.<sup>214</sup> Thus, Kim's case was "international" in nature because the disputes arose from application of the WADA Code, which belongs to an international entity. Furthermore, the ISU directed the KSU to impose the two (2) year suspension on Kim. Thus, Kim's appeal procedure should have been free under R65 and 65.1, as it was international in nature: the decision in *Kim* 8.1 was not correct.<sup>215</sup>

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<sup>211</sup> [http://www.lawtimes.co.kr/Lawtimes\\_Web/index.aspx](http://www.lawtimes.co.kr/Lawtimes_Web/index.aspx) (last visited Feb. 20, 2008); Straubel, *supra* n. 54 at 553 ("[M]ost notably the CAS, as a whole, the doping control process' dispute settlement system is expensive, unpredictable, and often renders poor quality decisions.").

<sup>212</sup> CAS R65.

<sup>213</sup> Robert C. R. Siekmann, Janwillem Soek, ARBITRAL AND DISCIPLINARY RULES OF INTERNATIONAL SPORTS ORGANIZATIONS, T. M. C. at XX1 5 (2002).

<sup>214</sup> *Id.* at Introduction, XX1.

<sup>215</sup> In *Kim* 8.1.

### **G. Breach of Fiduciary duty**

The CAS rule requires an arbitrator to proceed with a case expeditiously<sup>216</sup> and independently.<sup>217</sup> The Arbitrator's Acceptance and Statement of Independence requires the attestation that: "I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances that need be disclosed because they might be of such a nature as to compromise my independence in the eyes of any of the parties."<sup>218</sup> The signed arbitrator can be considered an agent who represents both parties, allowing each some discretion over decision-making in the arbitration. One of the arbitrator's duties is due diligence in not delaying a decision in an urgent and expedited case. The arbitrator in Kim's case breached the duty of loyalty when he allowed the KSU to submit ungrounded allegations for its jurisdiction objection. Even after the CAS jurisdiction was established, the arbitrator acted in a manner seemingly designed to delay the decision until after the vote on the 2014 Winter Olympics host city on July 4, 2007.

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<sup>216</sup> CAS R33.2.

<sup>217</sup> CAS R33.1.

<sup>218</sup> Arbitrator's Acceptance and Statement of Independence, signed by Sole Arbitrator, Lin Kok Loh, Attorney at Law in Singapore on May 9, 2007.

Professor Timothy D. Watson illustrated that the duty of care requires that a partner not act in a grossly negligent or reckless manner, engage in intentional misconduct, or break any laws.<sup>219</sup> Misconduct is defined as “[a] transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior.”<sup>220</sup> The sole arbitrator breached his duty of care, acting with arguably intentional misconduct, when he rendered a decision without evidence or hearing, adopting only the KSU’s fraudulent allegations and not ruling on Kim’s claims. He violated CAS Rule 33, which provides that “every arbitrator shall be and remain independent of the parties,”<sup>221</sup> and proceed in an expedited manner.<sup>222</sup> He also broke Art. 190 of Switzerland’s Federal Code on Private Law, by erroneously holding that the CAS did not have jurisdiction over Kim’s case. Having failed to rule on one of the claims by Kim, and not respecting the equality of the parties or their right to be heard in an adversarial proceeding, the award is incompatible with

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<sup>219</sup> Timothy D. Watson, What’s “Love” Got to Do with It?: Potential Fiduciary Duties among Professional Sports Team Owners 9 *Sports Law. J.* 153, 166 (2002).

<sup>220</sup> *Id.* (quoting Black’s Law Dictionary 999 (6th ed. 1990)).

<sup>221</sup> CAS R33.1.

<sup>222</sup> CAS R33.2.

Swiss public policy.<sup>223</sup> The arbitrator, therefore, breached both his duty of care and his duty of loyalty.

## **H. Challenges to the Arbitrary Arbitrator**

An appellant can request the appointment of a sole arbitrator within five days after receiving an adverse decision. In Kim's case, the CAS appointed a sole arbitrator.<sup>224</sup> The independence of the sole arbitrator plays a crucial role. In this respect, the CAS secures a sole arbitrator to be independent from the parties and to give an opportunity for the parties to challenge the sole arbitrator's biased behaviors. CAS Rule 33 provides that "every arbitrator shall be and remain independent of the parties"<sup>225</sup> in a case and to proceed in an expedited manner.<sup>226</sup> CAS Rule 34 says that an arbitrator may be challenged where there is legitimate doubt over his independence, however "the challenge must be brought immediately after the ground for the challenge has become known."<sup>227</sup> As discussed above, the arbitrator in Kim's case was biased and not independent. Upon receiving the decision, Kim realized how biased the arbitrator was.

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<sup>223</sup> CPIL art. 190. (Switzerland)

<sup>224</sup> CAS faxed letter to Kim and KSU, 13 April 2007.

<sup>225</sup> CAS R33.1.

<sup>226</sup> CAS R33.2.

<sup>227</sup> CAS R34.1.

However, the parties must be bound by an arbitrator's decision under CAS R59.3, which states that "the award shall be final and binding on the parties. It may not be challenged by way of an action for setting aside."<sup>228</sup> The aggrieved party only can challenge with the Federal Tribunal (Swiss Supreme Court) in Switzerland on the grounds of extremely limited five factors.<sup>229</sup> Kim's case is satisfied with all of those appealable factors as follow:

The arbitrator's findings and decision in Kim's case were inconsistent and groundless because he had no evidence to support the KSU's allegations, nor did he hold a hearing to decide that the CAS had no jurisdiction. He did not consider Kim's claims and only seemed to consider those that worked in the KSU's favor. It would be a terrible calamity for sports if corrupt arbitrators and sports organizations posed a bigger problem than doped athletes participating in doping activities. Athletes should fight against corruption among sports organizations and arbitrators, and against WADA, for athletes' human rights. Furthermore, the award was incompatible with Swiss law.<sup>230</sup> The arbitral tribunal erroneously held that it did not have jurisdiction based on documents that the

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<sup>228</sup> CAS R59.3.

<sup>229</sup> CPIL. art. 190 (Switzerland), *available at* <http://www.umbricht.ch/pdf/SwissPIL.pdf> (last visited Feb. 20, 2008).

<sup>230</sup> *Id.*

KSU forged and altered in an attempt to deceive the CAS. The arbitral tribunal failed to rule on one of the claims, where the arbitrator failed to explain why a case, 1994 C.A.S. No. 129, which was squarely on point, did not apply here. The Arbitrator also failed to rule on what counts as “international nature” to decide on the refund of CHF12,000 paid for arbitration. The arbitrator failed to treat the parties equally or to recognize their right to be heard in adversarial proceedings.

If the damaged party does not challenge with the Federal Tribunal in Switzerland for whatever reason, such as poverty, distrust of the law, or the perception that it is too late to salvage one’s sports career, etc., an unjust arbitrator can remain on CAS lists and commit the same injustices time and time again. Another problem lies in that no penalty exists for the unethical arbitrator; it is only the athlete taking the risk in submitting to the arbitration. Therefore, the CAS itself must regulate the punishment of a corrupted arbitrator.

CAS awards are treated as judicial in nature.<sup>231</sup> The CAS is the final hope for

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<sup>231</sup> Blackshaw et al., *supra* n. 2 at 5.

justice in sports, but if it exists to support sports organizations and their spokesmen, where is the athletes' haven from unfair, unreasonable punishment and corrupted justice?

#### **IV. Suggestions**

##### **A. To the CAS**

###### **1. Qualification Requirements for CAS Arbitrators**

Arbitration systems may provide the advantage of saved time and money as an alternative dispute resolution to trials. However, if there is an arbitrator who is not fit for the position, the choice of an inappropriate arbitrator may only make the system worse by depriving athletes' chances to correct the decision of the sports related in dispute. It is therefore critical that only qualified arbitrators be nominated. At a minimum, requiring proof of sufficient knowledge of sports law and sports in general would be a fair measure of balance in an independent review of the qualifications of CAS arbitrator candidates.

The following are suggestions that seek to reduce the injustice of CAS arbitration. To be listed as an arbitrator, first, the International Counsel of Arbitration for Sport (ICAS) should designate persons, depending on their "recognized competence with

regard to sports law and /or international arbitration, a good command of at least one CAS working language with full legal training and reviews every four years.<sup>232</sup> Currently, no system exists that supervises the arbitration process and administrates penalties upon arbitrators who violate its rules. The legitimacy of CAS is thus seriously called into question, given that injured athletes cannot rely on its arbitration system unless its arbitrators' abilities to administer justice are guaranteed. Therefore, the ICAS must look into the quality of the arbitrator, not just count the number of referral documents.

## **2. Distribution of the Arbitrators**

The CAS should retain a list of arbitrators to resolve sports-related disputes through the intermediary of arbitration (there are currently 268).<sup>233</sup> Currently, this list is unequally weighted towards sports organizations.<sup>234</sup> Thus, at least three-fifths of the arbitrators are proposed by sports organizations, while on the other hand, arbitrators

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<sup>232</sup> CAS S13.

<sup>233</sup> [http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste\\_des\\_arbitres2008.pdf](http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste_des_arbitres2008.pdf). (last visited April 30, 2008).

<sup>234</sup> CAS S14.( each one-fifth of the arbitrators are proposed by the IOC, IFs, and NOCs; one-fifth of them through appropriate consultations to safeguard the interests of the athletes; and one-fifth of them are proposed by independent bodies.).

selected specifically for the athletes' interests consist of at best one-fifth of them.<sup>235</sup>

However, there is no published data about how many and which arbitrators are selected by sports organizations or athletes or independently, and their backgrounds. Therefore, for better service to the parties involved, the CAS needs to publish this information.

Furthermore, the list of arbitrators must be divided into three groups as follows.

1. The arbitrators proposed by sports organizations, including the IOC, must not exceed one-third of the total. Arbitrators proposed by sports organizations may not be independent from sports organizations and may then bring an organization-related bias into the dispute resolution.

2. At least one-third of the arbitrators must be referred by athletes' organizations.

3. And the remaining one-third must be independent.

The selected arbitrators should be published by the groups with full details including those who recommended them and who first proposed them for selection – in order to evaluate the candidates for potential conflicts of interest. If there are three arbitrator panels, one of them must be independent.

Finally, CAS should not make the appointment of the arbitrator, as the

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<sup>235</sup> CAS S14.

appointment must be made only by the parties involved. Additionally, clear guidelines should be available to athletes so that they may choose arbitrators wisely. This review of arbitrators can accomplish balance in the establishment of the independence and legitimacy of the CAS. Moreover, no published data about how many and which arbitrators are selected by sports organizations or athletes or independently, and what kinds of background they have currently is available. The CAS should therefore keep public records of various information, including who proposed each arbitrator, as well as the experiences and perspectives each arbitrator has, so that all interested—especially athletes—can make informed decisions.

### **3. Review Committee in CAS**

CAS must have review systems for arbitration decisions if any party claims that an arbitrator was biased or corrupt,<sup>236</sup> either during or after the decision process of the arbitrator. Because an appeal against the arbitrator's award is currently permitted only to the Federal Tribunal (Swiss Supreme Court) in Switzerland,<sup>237</sup> athletes from another country may face geographic, monetary, and time difficulties in appealing. Granting a

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CAS R33.1.

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<http://www.umbricht.ch/pdf/SwissPIL.pdf> (last visited Feb. 20, 2008).

choice of final award also would be considerable for an aggrieved party in exceptional circumstances, such as being appointed a non-independent arbitrator.<sup>238</sup>

Although athletes may currently challenge an arbitrator's independence,<sup>239</sup> many potential barriers exist: the difficulty of proving legitimate doubt as well as the lost opportunity of athletes to challenge if such proof is found after the decision was made. Further, rather than being left in the hands of a sole arbitrator, it should be left to the parties to choose arbitrators for their arbitration, at least if they so request. Also, during the process, the CAS needs to supervise and screen the selected arbitrator to make sure she or he strictly adheres to its rules, whether regarding a decision deadline, hearing, formalities, and admissible evidencing. After a decision is made, the parties should be able to evaluate the sole arbitrator and the arbitration process in order to keep better track of their quality. The CAS must penalize arbitrators who breach its rules and/or violate their professional responsibilities, and compensate for any damages that arise from the arbitration to the parties, without costly litigation. Thus, a self-review system for special circumstances is desirable.

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<sup>238</sup> Arbitration Rules for the Games of the XXVII Olympiad in Sydney, art. 20. a), b).  
<sup>239</sup> CAS R34.1.

#### 4. Set Time Limits

For an appeal case, the CAS may expedite a proceeding upon agreement of the parties and the panel, or president of the division if one has not been appointed.<sup>240</sup> In the CAS procedural rules as a whole, there is no specific time limit placed on the arbitrator's decision in an urgent case, but CAS's "20 Questions" claims that for an appeal procedure, "an award must be pronounced within four months of filing the statement of appeal, in urgent cases and upon request, the CAS, may within a very short time, order interim measures or suspend the execution of a decision."<sup>241</sup> This guideline can thus be abused in many ways especially for urgent cases. If there is an unreasonable delay of the process, an athlete is not allowed to issue a formal complaint, even though the delay may cost the athlete her sports career. Therefore, the CAS must facilitate arbitrators to serve in a timely manner according to its own rules, which say that "every arbitrator is required to expeditiously complete the arbitration."<sup>242</sup> To enforce this, an exact time limit on decisions is required.

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<sup>240</sup> CAS R52.

<sup>241</sup> CAS "20 Questions about the Court of Arbitration for Sport," *available at* <http://www.tas-cas.org/en/20questions.asp/4-3-228-1010-4-1-1/5-0-1010-13-0-0/> (last visited Apr. 5, 2008).

<sup>242</sup> CAS R33.2.

## **5. Define Standard for Determining “International Nature”**

With respect to the costs of appealing to the CAS,<sup>243</sup> the CAS R65 provides that disciplinary cases of an international nature ruled in appeal proceeding are free. However, the lack of a clear elaboration of the standard defining “international nature” gives the CAS too broad discretion. Therefore, this definition and the standard of the “international nature” must be straightened from a domestic one; the most important factor to be considered should be whether the main dispute arises out of the application of international or domestic regulations. These suggestions may protect athletes from abuse at the hand of the powerful and international sports organizations.

### **B. To the KSU**

The KSU should have well-prepared doping rules ratified and publicly established prior to enforcement. The KSU must adopt the WADA Code by signing a declaration of acceptance upon approval by each of their respective governing bodies, and enact its own implements for imposing suspension on its athletes.<sup>244</sup> The KSU

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<sup>243</sup> CAS R65, R65.1, R65.2.

<sup>244</sup> WADA Code, art. 23.1.1 (2003) at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf)

should not be directed by the ISU, which would be a violation of Korean law. Also, to overcome vast corruption within various sports organizations, the KSU must contribute to guaranteeing athletes' human rights under Korean law, not its own "customary rules." Finally, it must honor its fiduciary duty and exercise its power on behalf of the athletes, not over them.

### **C. To the Korean Government**

Two appeal bodies now exist concerning sports-related disputes in Korea. One is the KADA, which was established on June 22, 2007,<sup>245</sup> and belongs to the Ministry of Culture and Tourism.<sup>246</sup> The other is the KSAC, which was founded in May 16, 2006.<sup>247</sup> The former is charged specifically with handling doping matters, while the latter is for general sports disputes. No coherent reason has been proposed as to why there should be two similar appeal bodies for sports disputes funded by the same source. No high volume of sports disputes exists in Korea, as evidenced by the fact that, since the KSAC was established, not a single sports dispute was brought to it for a single year. Therefore, only

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<sup>245</sup> [http://www.kada-ad.or.kr/a03\\_job.asp](http://www.kada-ad.or.kr/a03_job.asp); <http://www.klaw.go.kr>.

<sup>246</sup> [http://www.kada-ad.or.kr/a03\\_job.asp](http://www.kada-ad.or.kr/a03_job.asp).

<sup>247</sup> KOC Con. 54; KSAC reg. 2.

one review body should be established for the handling of sports disputes.

The power of sports diplomats is important in the current competitive global sports market, but not if it comes at the expense of the protection of Korean athletes' rights. It is time to put more effort into emphasizing sports law education and to protect athletes' rights nationally and internationally, than is currently placed on education in sports diplomacy. No law schools in Korea have yet to offer coursework in sports law, although the Korea National Sport University opened a sports and law course in fall 2006 (it was a course which I taught). The government should be aware that very little sports law expertise is available in Korea, and should make moves toward fostering that expertise to protect their athletes' rights. It is one of the government's duties to foster sports industry experts;<sup>248</sup> as such sports law should be added to university curricula.

Further, the government must seriously supervise and punish sports organizations' corruption, at least where funded by the government or public foundations.<sup>249</sup>

It is a government's duty to protect its athletes who suffering from sports organizations' ignorance, corruption, and unfair treatment by international bodies whether due to a lack of regulations and as well as a lack of sports law experts. However, throughout Kim's

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<sup>248</sup> Constitution. art. 13.1 (R.O.K.)

<sup>249</sup> Code civil, art. 37 (R.O.K.)

case, the deficiencies of global and national sports policy and sports regulation were exposed. In order to accomplish this reform within Korean sports organizations and foster sports law expertise within the country, more than just the Korean government's participation is needed. To develop sports business in Korea and to elevate the nation's sports status to meet the general public's hopes, reform-minded leaders must take an active role in government and sports organizations.

I hope that my suggestions help crystallize a plan for the government and the KSU, CAS and WADA regarding sports disputes concerns.

## **V. Conclusion**

Sport is not simply a forum for recreation or health but it symbolizes a nation's power. The sports industry has grown into a market of hundreds of billion dollars expanding without accompanying checks on ethics or responsibility. It is due to the uncontrolled self-determination of sports organizations both global and national that corruption in the industry has built up and, recently, begun to burst. This corruption systemically affects politics, administration, and institutions and globally degrades the standing of a nation.

On a human level, the corruption in sports organizations may lead to athletes' loss of human rights and earning capacity, and destroy families' lives and dreams. Since high-level athletes' careers are so short, if an athlete who has lost her or his career, due not to negligence or to self-fault but to a sports organization's corruption, should rise up to confront the organization, the athlete would be likely to be further frustrated by her or his powerlessness in the situation. When it comes to litigation or arbitration, one of the disadvantages for athletes is their inability to gather evidence because of information asymmetries and constraints on public power in favor of the sports organizations.

Corruption by athletes may destroy their lives and damage the “spirit of sport,” but corruption in sports organizations may cause economic collapse, as the amount of money involved is sometimes astronomical. Kim’s case was entangled in a web of corruptions; he was victimized socially by organizational corruption, culturally by customary rules, politically by powerlessness, and legally by unclear regulations. How are unreasonably treated amateur athletes to defend their rights, and against whom? Combative doping rules? Corrupted sports organizations and government? Arbitrary arbitrators? Athletes are central actors in the sports industry, and are not to be made use of for sports-related organizations’ power.

In turn, the CAS must prevent corrupt arbitration and prepare adequate systems to protect athletes’ fundamental rights, by strict themselves, for example, arbitrators’ independency and impartiality, qualification, etc as well as by observance of universally admitted general law principles, such as public due process and applicable national law etc. Although the WADA is a non-governmental organization, since the punishment of doping violation is deemed criminal nature and the resolution of disputes in doping is prerequisite binding arbitration, athletes’ human rights can be deprived by those private organizations without public disclosures or justified court decisions, public due process standards must be assured. The KSU must be exposed and punished for its ignorance of

rules and for imposing sanctions regardless of jurisdiction, while violating fundamental laws in the process. Finally, the Korean government must reform sports policies to develop sports with national and international integrity and protection for its athletes for not being used as a tool to showcase political achievement.

It is time to keep balance between the sports organizations that hold paramount power worldwide and athletes who should be guaranteed their own human rights by revising WADA, CAS, sports organizations and governments' role in sports.