Fair Trial Guarantees before the Court of Arbitration for Sport

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FAIR TRIAL GUARANTEES BEFORE THE COURT OF ARBITRATION FOR SPORT

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**Abstract**

The right to a fair trial is one of the backbones of the rule of law and a condition sine qua non for the protection of human rights and fundamental freedoms. This article examines whether fair trial guarantees also exist before the Court of Arbitration for Sport. It attempts to identify whether the Court of Arbitration for Sport follows the fair trial guarantees developed in the jurisprudence of the European Court of Human Rights. This article thereafter tries to draw out an understanding of fair trial guarantees in sports arbitration.

**Keywords:** Court for Arbitration for Sport; European Court of Human Rights; fair trial guarantees; human rights; sports arbitration

A. INTRODUCTION

On 6 February 2012, the Court of Arbitration for Sport (CAS) delivered the eagerly awaited decision in the appeals arbitration procedure between the World Anti-Doping Agency (WADA), the International Cycling Union (UCI), the Spanish cyclist Alberto Contador and the Spanish Cycling Federation (RFEC).\(^1\) As the International Cycling Union and the World Anti-Doping Agency disagreed with the decision made by the Spanish Cycling Federation in Contador’s favour, they had appealed to the CAS. The CAS upheld the appeals 'filed by WADA and has found Alberto Contador guilty of a

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doping offence'. More specifically, the arbitration panel concluded that 'the Athlete’s positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat'; that 'no evidence has been adduced proving that the Athlete acted with no fault or negligence or no significant fault or negligence'; that 'a two year period of ineligibility shall be imposed upon the Athlete, running as of 25 January 2011'; and that 'the 2010 Tour de France result of Mr Contador shall be disqualified as well as the results obtained in all competitions he participated in after 25 January 2011 when the ineligibility period is decided to have begun'. The Court’s decision in the above case did not come as a surprise. On the contrary, commentators widely predicted the outcome of the Court’s deliberations. Nonetheless, the decision still echoes in the international sports community and the determination has been widely criticised in the Spanish media, while the public, including the highest representatives of political parties, still supports the story put forward by Mr Contador. They have described the final CAS decision as unjust and unfair, as has Contador himself.

The right to a remedy for victims of human rights violations is a tenet of every functioning judicial system. The effectiveness of all other rights rests on access to an effective legal remedy. As such, the normative order places a burden, or obligation, on everyone to not breach their legal duties at the expense of third parties. Regular court systems are less suited to resolving sports-related disputes owing to their long and

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4 Ibid.
5 Ibid.
6 Ibid.
complicated procedures and lack of specialised knowledge of sports law. In contrast, the sports arbitration procedure offers greater expediency and meets the wishes of the parties, while the arbitrators possess knowledge and experience in sports law.\textsuperscript{12} As with commercial arbitration, the parties agree to abide by the sports arbitration procedure according to their wishes.

The Contador arbitral award illustrates the dilemma encountered by the CAS in reconciling two conflicting values in a contemporary sport competition. This concerns whether the prevention of doping may undermine the protection of athletes’ fundamental human rights, and whether the protection of fundamental human rights may impede the suppression of doping. De Montmollin and Pentsov eloquently note that ‘while the World Anti-Doping Program certainly has noble objectives, the fight against the evil of doping in modern sports must also be conducted by using noble means, ensuring respect for the human rights of the athletes’.\textsuperscript{13} Traditionally, the protection of human rights has concentrated on balancing the interests of the individual with those of society as a whole. More specifically, the Contador arbitral award is dependent on the exercise of delicately balancing the interests of the individual against those of sports society as a whole. Such situations can be described as sports dilemmas. The arbitral award illustrates the general situation of fair trial guarantees in arbitral procedures before the CAS, and raises a number of pertinent questions relating to minimum fair trial standards. Do fair trial guarantees apply, and if not, should they apply to the sports arbitration proceedings before the CAS? If so, is the nature and scope of such fair trial guarantees broader, narrower or the same as in regular judicial proceedings? What happens when the CAS violates one of the fundamental principles of a fair trial? What are the most appropriate ways to improve the guarantee of a fair trial before the CAS? Is the monitoring jurisdiction of the Swiss Federal Tribunal sufficient to guarantee procedural public policy guarantees, including fair trial guarantees?

The right to a fair trial is one of the backbones of the rule of law and a \textit{conditio sine qua non} for the protection of human rights and fundamental freedoms. This article examines whether fair trial guarantees can also be exercised before the CAS. It attempts to identify whether the procedural rules and case law of the CAS should follow all four component parts of the right to a fair trial (the right to a fair hearing, the right to an independent and impartial tribunal established by law, the right to a public hearing and the public pronouncement of judgments, and the right to a fair trial within a reasonable time). The balance of this article is devoted to exploring the concept of the right to a fair trial before the CAS. It will attempt to explore the nature, value and status of this concept through its fundamental principles developed in the


\textsuperscript{13} J. De Montmollin and D. Pentsov, Do Athletes Really Have the Right to a Fair Trial in “Non-Analytical Positive” Doping Cases?, 22(2) American Review of International Arbitration 239 (2011).
jurisprudence of the European Court of Human Rights (ECtHR). The examination is divided into four steps. Section B discusses the CAS, in particular the different arbitration procedures it has available. Section C discusses and analyses the constituent parts of the right to a fair trial in the CAS’s procedures, and will try to establish whether a fair trial standard exists in the CAS’s arbitration procedures, subject to the monitoring jurisdiction of the Swiss Federal Tribunal, which examines whether the arbitration panel respected procedural public policy guarantees, including fair trial guarantees. Section D assesses the right to a fair trial before the CAS, while Section E presents some proposals to improve the CAS’s arbitration procedures from the viewpoint of fair trial guarantees. Based on the analysis, the conclusion in Section F assesses the application of fair trial guarantees before the CAS. In general, the article attempts to argue that fair trial guarantees as developed by the ECtHR should also apply to proceedings before the CAS.

B. THE COURT OF ARBITRATION FOR SPORT

The CAS is not part of ordinary court systems. Rather, it was established by the International Olympic Committee as its highest arbitration body for resolving sport-related disputes. It appears that it is not entirely clear whether the CAS is a court or merely an arbitration body. McLaren describes it as ‘a forum for the world’s athletes and sports federations to resolve their disputes through a single independent and accomplished sports adjudication body’.14 It was initially created by the International Olympic Committee on 6 April 1983.15 In 1994 it was placed under the International Council of Arbitration for Sport (ICAS), which was established to ensure the greater independence and impartiality of the CAS16 and now regulates its administrative and financial matters.17 Its normative position as an independent and autonomous body exercising an arbitral function is further regulated by the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (the Statutes).18 Section 12 of the Statutes


16 The Statutes of the Bodies Working for the Settlement of Sports-Related Disputes provide at section S2: ‘The task of 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’.


provides that 'the CAS sets in operation Panels which have the task of providing for the resolution by arbitration and/or mediation of disputes arising within the field of sport in conformity with the Procedural Rules'. Parties must comply with the principle of *pacta sunt servanda* and can submit a dispute voluntarily to the Court. Arbitration proceedings may arise from ordinary or appeals arbitration proceedings. Ordinary arbitration proceedings arise 'out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement'. The CAS also rules over disputes relating to the Olympics. As a fundamental normative document of the Olympic movement, the Olympic Charter provides in Rule 59 that 'any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport'. Appeal arbitration proceedings deal with 'an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS'. In the last few decades, the CAS has proven to be a very successful forum for resolving sports-related disputes. Its success was at first surprising. In 2009 and 2010 alone it delivered 568 decisions, half of them stemming from football-related disputes. All in all, the CAS has in its history so far delivered 1,433 arbitral awards and 26 opinions. Nonetheless, its success rate may be described as debatable, although McLaren notes that 'the CAS is in the course of developing universal principles that will some day be widely recognized as the *lex sportiva*'. The CAS has jurisdiction to deal with different aspects of sports-related disputes. Procedural Rule 27 provides that 'such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and,

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generally speaking, any activity related or connected to sport'. 28 The CAS deals with a wide range of disputes, including doping cases, 29 disputes over eligibility, 30 contracts, registration and televisions rights. The next section turns to fair trial guarantees before the CAS.

C. DOES THE RIGHT TO A FAIR TRIAL APPLY TO CAS PROCEEDINGS?

This section attempts to identify whether fair trial guarantees also apply to proceedings before the CAS. It examines the different component parts of the right to a fair trial before the CAS as developed in the jurisprudence of the ECtHR. 31 The ECtHR is generally assumed to prescribe only minimum standards of human rights protection that are normally surpassed by national constitutional standards. The ECtHR's approach to fair trials has been chosen as a basic component of the right to a fair trial that is also enshrined as the lowest common denominator of European ordre public (public policy). In this way, it not only reflects the prevailing consensus about fair trial guarantees in the ECtHR's case law but also fundamental principles of the constitutional orders of Council of Europe member states.

It is first necessary to examine whether arbitration proceedings or quasi-judicial proceedings fall within the definition of 'civil rights and obligations' in Article 6 of the European Convention on Human Rights (ECHR, or the Convention) on the right to a fair trial. What is important is the nature of the rights and obligations in question. Accordingly, in Ringeisen v. Austria the ECtHR noted that 'the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little

31 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force 3 September 1953, Article 6 (1) reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'
consequence’. The ECtHR does not provide a fully fledged definition of civil rights and obligations, so the main question is whether Article 6 (1) of the ECHR applies to arbitration proceedings, or whether it suffices that the possibility exists of appeal to a regular court, ie the Swiss Federal Tribunal.

This article argues that Article 6 (1) of the ECHR applies to arbitration proceedings before the CAS subject to the monitoring jurisdiction of the Swiss Federal Tribunal, which examines whether the arbitration panel respected procedural public policy guarantees, including fair trial guarantees. In doing so, it argues that fair trial guarantees must therefore be respected both before the CAS and also before the Swiss Federal Tribunal. Procedural public policy guarantees are found in Article 190 (2) of Switzerland’s Federal Code on Private International Law, which provides that the arbitral award can be challenged only ‘if a sole arbitrator was designated irregularly or the arbitration tribunal was constituted irregularly; if the arbitration tribunal erroneously held that it had or did not have jurisdiction; if the arbitration tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; if the equality of the parties or their right to be heard in an adversarial proceeding was not respected; and if the award is incompatible with Swiss public policy’. Fair trial guarantees in the Swiss legal order also form part of *ordre public*, which the CAS is obliged to observe. In other words, fundamental fair trial guarantees are included in *ordre public*. The Swiss Federal Tribunal has in several cases affirmed the importance of the fair trial guarantees in arbitration proceedings before the CAS. That fundamental fair trial guarantees apply also to the CAS was also explicitly confirmed by the Swiss Federal Tribunal in *Marc Biolley [Representative of A. Sport] v. Association Y. & TAS* as regards composition of CAS panel and *Canas v. ATP* as regards right to fair hearing. For instance, the Swiss Federal Tribunal noted in the *Lazutina* case the ‘right to an independent ruling on the conclusions and facts submitted to the arbitration tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognised principles are infringed, resulting in an intolerable contradiction with the sentiments of justice, to the effect that the decision appears incompatible with the values

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34 Switzerland’s Federal Code on Private International Law, Article 190 (2).
recognised in a State governed by the rule of law'. The Swiss Federal Tribunal therefore considers that fair trial guarantees must be also employed before the CAS in its arbitration proceedings. Most fair trial guarantees certainly fall in the category of ‘fundamental, commonly recognised principles’ whose abuse may cause ‘an intolerable contradiction with the sentiments of justice’. All in all, the Swiss Federal Tribunal considers that Article 6 (1) guarantees apply also in arbitral proceedings. It therefore monitors the extent to which fundamental fair trial guarantees belonging to public policy have been respected in proceedings before the CAS. However, the Swiss Federal Tribunal can only consider ex post facto whether the arbitration panel has respected procedural public policy guarantees, including fair trial guarantees, and provided that one of the parties challenged the arbitral award on the basis of Article 190 (2) of Switzerland’s Federal Code on Private International Law.

The ECtHR noted in Osmo Suovaniemi v. Finland that ‘waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6’. The next sections therefore examine which fair trial guarantees before the CAS are protected by public policy and which can be waived in its arbitration proceedings.

1. THE RIGHT TO A FAIR HEARING BEFORE THE CAS

The right to a fair hearing must be complied with in arbitration proceedings before the CAS. The ECtHR noted that the ‘right to a fair trial holds so prominent place in a democratic society that there can be no justification for interpreting Article 6 (1)... restrictively’. Such an argument has been put forward by the Swiss Federal Tribunal on several occasions. The Swiss Federal Tribunal obliged the CAS to follow this fundamental principle as it derives both from Swiss constitutional law and from the ECHR. As noted earlier, the right to a fair hearing belongs to ordre public and must be respected in both compulsory and consensual arbitration proceedings. More specifically, Article 190(2)(d)

39 X. v. Y., 30 April, 1991, ATF 117 Ia 166 (1991) confirmed by unreported ATF Hitachi v. SMS, 30 June 1994, 15 Bull. ASA 99 (1997) and Egemetal v. Fuchs, 28 April, 2000, ATF 126 III 249 (2000), cited in Landrove, supra note 35, p. 96. However, the Swiss Federal Tribunal has so far refused to overturn CAS’s arbitral awards on merit, even though several sportsmen have attempted to challenge them on the basis of violation of Swiss public policy. See, for instance, N., J., Y., W. v. FINA, 5P.83/1999 (1999), cited in Mitten, supra note 36, p. 58.
41 ECtHR, Perez v France, [GC], Application no. 47287/99, ECHR 2004-I, 40 EHRR 909, para. 64.
of Switzerland’s Federal Code on Private International Law provides for ‘the equality of
the parties or their right to be heard’. The fairness of the arbitral proceedings therefore
follows from two levels, the ECHR and the Swiss national legal order.

If the right to a fair hearing is not followed, the parties can challenge the arbitral
award before the Swiss Federal Tribunal. The right that everyone is entitled to a fair
hearing refers to ‘the right of access to court, a hearing in the presence of the accused,
freedom from self-incrimination, equality of arms, the right to adversarial proceedings
and a reasoned judgment’. One of the most essential aspects of the right to a fair
hearing is thus the right of effective access to a court. However, the right of access to a
court is not so important in the case of the CAS, as the CAS is not a proper court but
an arbitration tribunal. The right of effective access to the CAS therefore refers to
access in fact and law. The right of access to a court can be provided by right of
appeal to the Swiss Federal Court. Access to the CAS is open to any party that submits
a request to the CAS. Further, ‘unless it is apparent from the outset that there is
manifestly no arbitration agreement referring to the CAS, the CAS Court Office shall
take all appropriate actions to set the arbitration in motion’. In most proceedings the
arbitration is forced on the athletes. Montollin and Pentsov note that ‘the athlete who
wants to participate in such competition does not have a choice and must accept
the arbitration clause, in particular by adhering to the by-laws of the sports federation
containing the arbitration clause, all the more when the athlete is a professional.
Otherwise, he would be confronted by the following dilemma: agree to arbitration or
practice his sport as an amateur’. It is debatable whether accepting the arbitration clause
means automatically waiving the athlete’s right to bring the case before an ordinary national court.

Switzerland’s Federal Code on Private International Law (CPIL) of 18 December 1987,
www.umbricht.ch/pdf/SwissPIL.pdf.
Nuala Mole and Catharina Harby, A Guide to the Implementation of Article 6 of the European
www.humanrights.coe.int/aware/GB/publi/materials/1093.pdf (last visited on 16 August 2012),
30, 38.
D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, Law of the European Convention on Human
Statutes, R 38.
Ibid., R 39.
Montollin and Pentsov, supra note 13, p. 207.
See also Deliège v. Ligue francophone de judo (ECJ, C-51/96 in C-191/97), para. 8.
For example, Article 61(1) of the UEFA Statutes notes that ‘the CAS shall have exclusive jurisdiction,
to the exclusion of any ordinary court or any other court of arbitration, to deal with the following
disputes in its capacity as an ordinary court of arbitration: a) disputes between UEFA and
associations, leagues, clubs, players or officials; b) disputes of European dimension between
MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNnLOAD.pdf
(last visited on 16 August 2012). Further, Article 38 of the FIBA Statutes provides that ‘... any dispute
Olympic Games if she does not sign the Olympic entry form, which includes a mandatory arbitration clause.\footnote{Andrew Goldstone notes that ‘an essential instrument in the IOC’s campaign against doping is the mandatory arbitration clause contained in the Olympic entry form. In order to receive permission to compete in the Games, every athlete must sign this form. The language of the clause compels every Olympic participant to consent to mandatory, final and binding arbitration for any dispute that arises during the course of the Games.’ Andrew Goldstone, Obstruction of Justice: The Arbitration Process for Anti-doping Violations during the Olympic Games, 7 Cardozo Journal of Dispute Resolution 386–387, footnote 58.}

Equality of arms is another constituent part of the right to a fair hearing. The ECtHR noted in \textit{Kress v. France} that equality of arms ‘requires each party to be given a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage \textit{vis-à-vis} his/her opponent’.\footnote{ECtHR, \textit{Kress v. France}, Grand Chamber, Application number 39594/98, 7 June 2001, para 72.} The ECtHR describes the right to an adversarial trial as ‘the opportunity for the parties to a civil or criminal trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the Court’s decision’.\footnote{ECtHR, \textit{Vermulen v. Belgium}, 32 EHRR 313, para. 33.}

The arbitral proceedings must also indirectly follow the equality of arms principle as all decisions are the subject of a potential challenge before the Swiss Federal Tribunal, which examines arbitral awards on the basis of Switzerland’s Federal Code on Private International Law. Ultimately, the right to equality of arms can be waived by an agreement on arbitration, although the Swiss Federal Tribunal judicially monitors the arbitration proceedings from a procedural policy point of view. More specifically, the Swiss Federal Tribunal has noted that ‘the Appellant confuses the Federal Tribunal with a court of appeal, which would oversee the CAS and freely review the accuracy of the international arbitral awards rendered by that private jurisdictional body’.\footnote{The Swiss Federal Tribunal, \textit{Adrian Mutu v. Chelsea Football Club Ltd}, 4A_458/2009, 10 June 2010, www.ucdc.info/cd/doc/1233/10%20juin%202010%204A%20458%202009.pdf (last visited on 16 August 2012), 4.4.2.}

Another important element of the fairness of proceedings is the burden and standard of proof. In the Contador case, the CAS made a confident announcement about the banned substance and did not consider Contador’s arguments to be plausible. The athlete carries the burden of proof in anti-doping procedures as they must prove that no prohibited substance entered their body in an unauthorised manner. The question is whether the institution of strict liability is appropriate for the
exercise of anti-doping rules. The liability of athletes regarding the use of illicit substances must not override their right to a fair trial before an independent and impartial tribunal. In the Contador case as in previous cases, the arbitration tribunal met the standards of proof of likelihood (the balance of probabilities), and did not with certainty determine whether the presence of clenbuterol was due to the systematic use of banned dietary supplements. Applying this standard of proof in anti-doping procedures is likely to be controversial, but it is often all that is possible since it is very difficult to demonstrate the use of illicit substances beyond a reasonable doubt.\textsuperscript{56} Decisions in arbitration procedures before the CAS would be more convincing if the CAS were to decide beyond a reasonable doubt that in a particular case prohibited substances had been taken.\textsuperscript{57} On the other hand, such a standard of proof would render it largely impossible to combat the use of doping in sport. What should then be the more appropriate standard of proof? A more likely requirement would perhaps be that substantial grounds had been shown for believing that the person concerned had used prohibited substances. The applicable standard of proof would be whether there are substantial grounds for believing that the sportsman committed such offences. It is questionable whether ‘proof beyond a reasonable doubt’ would be more appropriate. It may appear necessary to prove past events beyond reasonable doubt, but such a high standard may not be appropriate in the context of the fight against doping in sport. It seems, however, that the application of any standard of proof apart from beyond reasonable doubt will be subject to a degree of speculation. Nonetheless, it seems that those two conflicting objectives should be reconciled by introducing a burden of proof which is not placed on the athlete.

The CAS’s decisions show that its case law in the fight against doping is developing, both in terms of standards of evidence and to ensure the fairness of the process. The Contador decision is an important development in the resolution of sport-related disputes. The decision also reveals some problems with the system, particularly the lack of equality of arms. The decision nonetheless suggests that the CAS could play a constructive role in efforts to improve its procedures so as to enhance the fairness of the procedure involved.

Goldstone notes, by referring to the comments made by high-ranking WADA and IOC officials on the \textit{Tyler Hamilton} case, that a ‘lack of due process protections during the arbitration process should expose the decisions of the panel to judicial review in national courts’.\textsuperscript{58} Article 6 (1) of the ECHR may provide for the possibility to apply for judicial review of arbitration decisions, but the question remains whether this would be to any national court. However, the fact that full fair trial guarantees before the CAS have yet to be developed does not imply that at the moment they are non-


\textsuperscript{57} See Straubel, \textit{supra} note 12.

\textsuperscript{58} Goldstone, \textit{supra} note 52, p. 371.
existent. On the contrary, it would be futile to argue that an arbitration procedure before the CAS will be wholly biased and unfair until it is accompanied by all constituent parts of the right to a fair trial as developed by the ECtHR.

2. THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

This section examines whether the right to an independent and impartial tribunal established by law can also be exercised in proceedings before the CAS. Article 6 of the ECHR requires the tribunal to be independent and impartial. These requirements are interconnected and interdependent. The ECtHR noted that ‘a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial’. In this way, McLaren argues that it is necessary to ‘recognize the necessity for the arbitration panel to be independent, neutral, and impartial’.

a) The right to an independent tribunal

The right to an independent tribunal requires that a tribunal is not dependent on an outside institution or person in its decision-making. The right to an independent tribunal refers to questions of how the tribunal members are appointed; whether their position is permanent or ad hoc; if the former, how long their mandate lasts and whether it is permanent; safeguards against external pressures; and whether the tribunal displays an external appearance of independence.

The CAS was established by the IOC but it was not until the case of *Gundel v. Fed. Equestre Int’l* that its independence was first formally examined by the Swiss Federal Tribunal. *Gundel* raised the issue of ‘the organic and economic ties existing between the CAS and the IOC’. The Swiss Federal Tribunal noted the inherent connection between the two institutions and held that ‘it was desirable for greater independence of the CAS from the IOC’. Consequently, the ICAS was established to govern the

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63 ECtHR, *Campbell and Fell v. UK*, 7 EHRR 165, para. 78.
CAS. In a later case, the Swiss Federal Tribunal noted that ‘the CAS is more akin to a judicial authority independent of the parties’. The ICAS selects arbitrators ‘for a renewable period of four years’. This length of their mandates ensures their independence. Naismith notes that ‘the term of a judge’s mandate may constitute a significant safeguard against pressure or influence being exerted on him by other authorities’. However, the arbitrators do not hold a permanent position, only an ad hoc one. This rule opens the door to potential pressure on arbitrators. The list itself is reviewed every four years and ‘there are at least one hundred and fifty arbitrators and at least fifty mediators’. At the moment there are over 264 arbitrators on the CAS’s list. The ICAS follows several principles in the selection process, in particular ‘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, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs’. However, the phrase ‘brought to the attention’ reveals that the selection process is not as transparent as it would be in the case of an open call for papers. Further, it is unclear how the arbitrators are appointed in practice and whether the fact that they are appointed by the executive hinders their objectivity and independence. The selection process considers equal representation and ‘fair representation of the continents and of the different juridical cultures’.

In contrast, the arbitrators’ independence seems to be ensured first by their obligation to declare their independence, and second by the possibility of their removal. More specifically, ‘the CAS arbitrators and mediators sign a declaration undertaking to exercise their functions personally with total objectivity and independence…’. The external appearance of independence follows from the ability to remove the arbitrators. Section 19 of the Statutes provides that ‘the ICAS may remove, temporarily or permanently, an arbitrator or a mediator from the list of CAS members if he violates any rule of this Code or if his action affects the reputation of ICAS/CAS’. Theoretically, such provisions ensure that the CAS fulfils the criteria of independence included in fair trial guarantees. However, the Swiss Federal Tribunal noted in the Lazutina decision that:

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71 Statutes, supra note 69, S14.
72 Statutes, supra note 69, S16.
73 Statutes, supra note 69, S18.
An arbitrator’s independence... can only be evaluated on a case-by-case basis; there are no absolute grounds for a challenge. Doubts about the independence of an arbitrator must be based on the existence of objective facts which are likely, for a rational observer, to arouse suspicion concerning the arbitrator’s independence. On the other hand, the purely subjective reactions of one party should not be taken into account.74

In order to underline the independence of arbitrators, the Statutes note that ‘CAS arbitrators and mediators may not act as counsel for a party before the CAS’. Moreover, the Swiss Federal Tribunal noted that ‘members of a tribunal are capable of rising above the eventualities linked to their appointment when they are required to render concrete decisions in the discharge of their duties’.75 Finally, the Swiss Federal Tribunal can examine CAS decisions from a procedural point of view. McLaren observes that ‘the strongest proof that the CAS has achieved independence can be found within numerous decisions of the court. Indeed, the CAS has asserted its independence by overturning cases decided differently by the IOC and by criticizing the IOC where it has failed to act with decisiveness’ (footnotes omitted).76 Further, McLaren aptly notes that:

An international arbitration system that is not independent and for which there is a political override, no matter how well intended, will ultimately bring both itself and its sports federation into disrepute. In the end, the international panel is no more independent in its actions than the national panels whose decisions they are reviewing.77

The right to an independent tribunal may be indirectly waived if the party to arbitration proceedings is inactive and is aware of potential doubts about the independence of the arbitrators. However, the Swiss Federal Tribunal must examine whether the arbitration panel which delivered the arbitral award followed the principle of independence.

From this analysis of the independence principle of the CAS, it becomes clear that a number of sources underline the CAS’s commitment to ensuring independence.78 The CAS has striven to ensure the independence of its arbitrators. Yet, in spite of these developments, the right to an independent arbitration panel through the CAS is still problematic as the appointment of qualified persons and their later selection in individual cases is not very transparent. Nevertheless, it appears there is growing support for the notion that the principle of independence should be evolved not only in theory but also in practice. Having gained an understanding of the right to an independent CAS, the next part of this section turns to the development of the principle of impartiality.

75 Ibid., 692, cited in Mitten, supra note 36, p. 56.
76 McLaren, supra note 26, p. 383.
77 Ibid., p. 390.
78 Also see Straubel, supra note 12, pp. 1233–1247.
b) The right to an impartial tribunal

Another important element of the right to a fair trial is the impartiality of those who resolve the disputes. In the case of the CAS, the arbitrators are persons entrusted with the decision-making. In *Piersack v. Belgium*, the ECtHR held that:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6(1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.\(^{79}\)

The Statutes are clear on impartiality and require that ‘every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties’.\(^{80}\) Further, Rule 33 of the Statutes specifies that ‘every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties’. This provision is further underlined by the provision for changing or removing an arbitrator. If legitimate doubt arises over the independence of an arbitrator, they may be challenged within seven days ‘after the ground for the challenge has become known’.\(^{81}\) Even the appearance of the possibility of bias towards one party will suffice to disqualify an arbitrator from further proceedings. If such a challenge proves justified, the ICAS or its board decides on the removal of the arbitrator from the panel.\(^{82}\) The Swiss Federal Tribunal also examines whether the arbitration panel acted impartially when judicially reviewing an arbitral award from a procedural policy point of view.

c) A tribunal established by law

The right to a fair trial demands that the tribunal is established by law. The former European Commission of Human Rights noted in *Zand v. Austria* that:

> It is the object and purpose of the clause in Article 6(1) requiring that the courts shall be “established by law” that the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, this does not mean that delegated legislation is as such unacceptable in matters concerning the judicial organisation.\(^{83}\)

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\(^{80}\) Statutes, *supra* note 69, Rule 33.

\(^{81}\) Statutes, *supra* note 69, Rule 32.

\(^{82}\) Statutes, *supra* note 69, Rules 34 and 35.

\(^{83}\) ECtHR, *Zand v. Austria*, Application number 7360/76, 16 May 1976. Further, the ECtHR noted in *Van de Hurk v. the Netherlands* that ‘the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of
It is still questionable whether the CAS is a tribunal established by law in the strict meaning of the phrase as it was initially established by the International Olympic Committee. The CAS cannot be considered a tribunal established by law since its proceedings are arbitral, meaning that only the parties to a dispute can agree whether to bring it to an arbitral resolution.

The Swiss Federal Tribunal has so far prioritised the quick settlement of sports-related disputes before the CAS over an athlete’s right to bring a case before ordinary courts. However, in the recent case of UEFA v. FC Sion concerning the illegal registration of six players and the subsequent exclusion of FC Sion from UEFA, a Swiss regional court took another approach and issued a provisional measure and fined UEFA for illegally excluding the club from competition. Such a case reopens the perennially controversial question concerning the legal nature of the internal rules of a sports association. Are such rules autonomous or dependent on a particular national legal order? Do domestic and international sports associations need to comply with the fundamental principles of national constitutional courts? The ECtHR noted in Osmo Suovaniemi v. Finland, one of the rare decisions on the waiver of rights, that ‘the waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner’ and that ‘in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance’. In this case, the ECtHR did not find a violation of an article, as an unequivocal waiver had been given and therefore the bias of one of the arbitrators did not matter. It is also important that the waiver of a guarantee to a fair trial 'must not run counter to any important public interest'.

It is necessary to examine whether a determination by the CAS is arbitral, judicial or mixed in or not. The term judicial body refers to ‘an independent and impartial body, competent to give, on the basis of the facts determined by due process, legally binding judgments’. A quasi-judicial body is not a judicial body, yet it nonetheless

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87 ECtHR, Hermy v. Italy, Application no. 18114/02, para. 73.


carries out some judicial functions. Quasi-judicial bodies play a role in providing a right to an effective remedy. However, it is not always completely independent and its decisions are of a non-binding nature, often without sanctions. Even though some argue that only a court of law is competent to review complaints in relation to human rights violations, quasi-judicial mechanisms do have a role to play. Toebes argues that ‘the effectiveness of a decision does not always depend on its (non-)binding nature, so the impact of some decisions may be equal or similar to that of judicial bodies’ decisions’. The issue of whether the CAS’s awards are judicially binding or not cannot be answered with a simple yes or no. The response to this question is that it is more likely that both answers may be true in some respects. The CAS is primarily an arbitration tribunal which includes mostly arbitral and some minor judicial functions. The CAS is thus not a judicial body, although its arbitral awards show some ‘important characteristics of a judicial decision’. An issue of terminology also arises. The CAS implicitly opines that its awards are binding, even though it never explicitly refers to the binding nature of its view. The CAS’s arbitral awards do not have an \textit{erga omnes} effect and only apply to parties in the arbitration procedure. More specifically, the CAS has noted that ‘in CAS jurisprudence there is no principle of binding precedent, or stare decisis’. Ultimately, one can argue that despite the mostly arbitral function of the CAS, the right to an independent and impartial tribunal established by law must also be respected. However, the provision of guarantees can be supervised through the judicial review procedure of the Swiss Federal Court. Having acquired an understanding of the right to an independent and impartial tribunal established by law, the next part of this section turns to the right to a public hearing and the public pronouncement of judgments.

3. THE RIGHT TO A PUBLIC HEARING AND THE PUBLIC PRONOUNCEMENT OF JUDGMENTS

The guarantee of a fair trial requires hearings to take place in public. The right to a public hearing is an essential part of the right to a fair trial. However, a trial cannot be described as fair simply because it takes place in public – other constituent parts of the right to a fair trial must also be present for a trial to be considered fair. The ECtHR noted in \textit{Martine v. France} that:

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\item[91] Toebes, supra note 88, p. 168.
\item[92] Ibid.
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The public character of proceedings before the judicial bodies referred to in Article 6 §1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 §1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.\footnote{Martine v. France, Application no. 58675/00, 12 April 2006, para. 39.}

A public trial is therefore a \textit{conditio sine qua non} for a fair trial. However, it is debatable whether this requirement must also be followed in arbitration proceedings such those before the CAS. Collins notes that 'strangers are to be excluded from the hearing of the arbitration'.\footnote{M. Collins, Privacy and Confidentiality in Arbitration Proceedings, 30 Tex. Int’l L. J. 121 (1995).} It was noted earlier that proceedings before the CAS have a quasi-judicial and quasi-arbitral nature. What is more, hearings before the CAS are not open to the public. The Rules note that ‘proceedings under these Procedural Rules (of the CAS) are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of the CAS.’\footnote{Statutes, supra note 69, Rule 43.} This rule derives from a traditional pillar of any arbitration – confidentiality. Buys correctly notes that ‘confidentiality is often cited as one of the main benefits of arbitration as opposed to litigation.’\footnote{C.G. Buys, The Tensions between Confidentiality and Transparency in International Arbitration, 14(121) American Review of International Arbitration 121 (2003). See also R.C. Reuben, Confidentiality in Arbitration: Beyond the Myth, 54 Kansas Law Review 1255 (2006).} One could also argue that in arbitration proceedings the publicity requirement may be waived. Nonetheless, Rule 43 of the Statutes\footnote{Rule 43 of the CAS Statutes provides as follows: ‘Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of the CAS. Awards shall not be made public unless all parties agree or the Division President so decides.’} does not help to enhance the transparency and openness of proceedings. Public proceedings would also ensure the greater legitimacy of the arbitral award and create a stronger appearance of independence.

The confidentiality of CAS proceedings is at odds with the increasing interest in transparency on the part of sportsmen and their respective organisations. Despite a commitment to confidentiality on the normative level, signs appear to be emerging of the CAS’s greater openness to public hearings. For instance, the CAS website lists upcoming hearings and specifies the names of the parties.\footnote{See the website of the Court of Arbitration for Sport, www.tas-cas.org/en/infogenerales.asp/4–3–544–1092–4–1–1/5–0–1092–15–1–1/ (last visited on 16 August 2012).} This novelty is a step in the right direction for ensuring the full fairness of procedures before the CAS since one could ask what is the purpose of having implementation mechanisms if the procedure must remain confidential? This leads to a situation where arbitration
procedure mechanisms are potentially stripped of their raison d’être. In contrast, the former European Commission of Human Rights noted in Nordström-Janzon and Nordström-Lehtinen v. the Netherlands that ‘in some respects – in particular as regards publicity – it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6 (Art. 6), and the arbitration agreement entails a renunciation of the full application of that Article’.\textsuperscript{101} However, it must be noted that the implementation of certain CAS decisions could be envisaged even if the proceeding were not open to public. More importantly, it seems that the right to a public hearing and the public pronouncement of an arbitral award does not fall within the category of procedural public policy, which is judicially supervised by the Swiss Federal Court.

The fairness of judicial procedures is also ensured by the public pronouncement of decisions. However, Rule 43 provides that ‘awards shall not be made public unless all parties agree or the Division President so decides’.\textsuperscript{102} In practice, arbitral awards are not pronounced publicly. However, almost all of the more recent arbitral awards are publicly accessible in full on the CAS webpage.\textsuperscript{103} This development illustrates the CAS’s stronger commitment to public hearings and to ensuring the greater legitimacy of its decisions. Overall, the publication of proceedings has not yet gained a foothold as a fundamental principle in sports arbitration procedures. In contrast, the publication of arbitration proceedings is traditionally not required. However, with more concentration on the fundamental principle of transparency, the publication of the CAS’s proceedings may gain traction and could gradually be included in all of its procedures.

4. THE RIGHT TO A FAIR TRIAL WITHIN A REASONABLE TIME

One advantage of arbitration proceedings is that, in theory, they should be finished within a reasonable time. Article 6 of the ECHR protects the right to a trial without undue delay. Allegations of a violation of the right to a trial without undue delay under Article 6(1) feature prominently among cases against several countries before the Strasbourg Court. The length of the proceedings is a very complex and systemic problem in many cases. The Venice Commission aptly noted that:

The undue postponement of judicial decisions may result in a denial of justice for the parties to the proceedings (although it may happen that parties delay the proceedings on purpose). In more general terms and in the longer run, it risks to affect the confidence which the general public places in the capacity of the State to dispense justice, to decide disputes (…) This may cause or even incite the recourse by individuals to alternative means

\textsuperscript{101} European Commission of Human Rights, Nordström-Janzon and Nordström-Lehtinen v. the Netherlands, Application Number 28101/95, 27 November 1996.

\textsuperscript{102} Statutes, supra note 69, Rule 43.

\textsuperscript{103} See the website of the Court of Arbitration for Sport, www.tas-cas.org/recent-decision (last visited on 16 August 2012).
of dispute settlement or dispensation of punishment. The deleterious effects on the rule of law of such a situation are evident.\textsuperscript{104}

The length of proceedings before the CAS is in ordinary arbitration between six months and one year, and in an appeals procedure three months.\textsuperscript{105} The exact length of a case depends on the complexity of the case, the conduct of the parties, the conduct of the arbitration panel and the particularities of each case.

For instance, the Contador case took one and a half years to resolve, which is three times longer than the time envisaged for appeal procedures. It is in the interest of the fight against doping that such procedures be rapid since it is also thereby possible to protect the integrity of sport and the athlete’s rights. It is true that even here we can apply the criteria of normal court proceedings in terms of the duration of their assessment of the complexity of the case, the conduct of the parties to the proceedings and any other circumstances of the case. However, given the sensitivity of doping allegations, local sports associations and the CAS should strive to make decisions quickly without any undue delay. Undoubtedly, the CAS has a primary duty to protect human rights and freedoms first within its own proceedings. The CAS system does not suffer from a backlog of cases, which would undermine the importance of administering justice without delay and the right to an effective legal remedy. In short, the CAS must diligently pursue an interest in the proper functioning and use of justice. The inclusion of cost-effective management is another important element. Parties before the CAS do not have the option to file an administrative action pursuant to which someone alleging a violation of this right can bring a complaint before a court against lengthy proceedings in pending cases and request compensation for any damage caused.

D. ASSESSMENT

The arbitration procedures before the CAS reveal some problems with respect to fair trial guarantees, particularly the inability to challenge its arbitral awards apart from before the Swiss Federal Tribunal, which nonetheless may be sufficient under


\textsuperscript{105} The CAS webpage, www.tas-cas.org/en/20questions.asp/4–3–228–1010–4–1–1/5–0–1010–13–0–0/ (last visited on 16 August 2012). The CAS Statutes do not provide any time limits for arbitration at first instance in the so-called Ordinary Arbitration Division. In contrast, the appeals procedure provides for time limits. Rule 49 sets out the following time limits for an appeal: ‘in the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late’ (Statutes, Rule 49).
Article 6 (1) ECHR. However, the main question has been whether fair trial guarantees also apply in arbitration proceedings before the CAS. In other words, does it suffice that the Swiss Federal Tribunal has only *ex post facto* power to consider whether the arbitration panel respected procedural public policy guarantees, including fair trial guarantees, provided that one of the parties challenged the arbitral award on the basis of Article 190 (2) of Switzerland’s Federal Code on Private International Law?

The examination of the constituent parts of the fundamental right to a fair trial has shown that the right to a fair hearing and right to an independent and impartial tribunal established by law must be respected at all times in arbitration procedures before the CAS. This is because they form part of *ordre public*, adherence to which is judicially supervised by the Swiss Federal Courts in appeals proceedings. As for the remaining constituent parts of the fundamental right to a fair trial, such as the right to a public hearing and the public pronouncement of judgments, and the right to a fair trial within a reasonable time, these should ideally also be secured in the CAS’s arbitration proceedings in order to assure greater legitimacy and fairness of the proceedings. Moreover, the waiver of any of the constituent components of the right to a fair trial is in any case hardly voluntary and unequivocal. At best, such waivers are signed in order for an athlete to compete at the highest level in national and international competitions. Further, the absence of some elements of the right to a fair trial, such as the rights to an independent and impartial arbitration panel, to a public hearing and to the public pronouncement of judgments, does not contribute to the greater persuasiveness and legitimacy of the CAS’s arbitral awards. What is more, the *ex post facto* judicial review of respect for fundamental fair trial guarantees by the Swiss Federal Tribunal does not suffice to ensure the respect for fair trial guarantees before the CAS. Moreover, such *ex post facto* judicial review only takes place if the arbitral award is delivered and challenged before the Swiss Federal Tribunal. Accordingly, the most appropriate alternative would be for the CAS to take preventative measures to ensure respect for fair trial guarantees in its proceedings.

CAS decisions highlight both the promise and problems of the arbitration system. The arbitral awards suggest that the CAS could play a constructive role in efforts to improve state responsibility for human rights, even with its lack of authority to issue binding decisions and impose sanctions. Empowering the CAS to engage in binding judicial dispute resolution and to apply sanctions would, however, require a significant revision of its statutes, potentially undermining or strengthening the entire system in its current form. All in all, the nature and scope of fair trial guarantees before the CAS are narrower than in regular judicial proceedings, which is usual for arbitration proceedings.

When states interfere with the rights of individuals, effective complaint mechanisms have to be established to provide remedies for allegations of human rights violations. Similarly, when sports organisations interfere with the rights of athletes, effective complaint mechanisms have to be established to provide remedies...
for allegations of human rights law and sports law violations. The right to judicial review before the Swiss Federal Tribunal is the only option so far for challenging the CAS’s arbitral awards; however, even this option is limited as it only provides for *ex post facto* judicial review.

The lack of fully effective access to a judicial organ in sports-related cases is still the major obstacle to the enjoyment of an individual’s fundamental human rights. Given that there is only one relatively effective mechanism within the architecture of accountability, several more effective mechanisms would have to be developed. Many of the underlying weaknesses of the CAS’s work can be directly tied to conundrums related to weak respect for the right to fair trial guarantees in its arbitration proceedings, which cannot be corrected later by *ex post facto* judicial review of those proceedings. To be clear, the argument here is not that the CAS should be dissolved. It plays a seminal role in resolving sport-related disputes. Instead, the argument is that the CAS could provide an incentive by setting up an advantageous and regulated judicial framework for resolving sport disputes. By all accounts, it is therefore not unreasonable to conclude that the CAS’s arbitration procedure at least must be strengthened in order for the CAS system to comply effectively with fundamental fair trial guarantees.

E. PROPOSAL FOR IMPROVEMENT

Transparent enforcement mechanisms and procedures are required to assess compliance with national and international sporting standards. Where a sport organisation fails to meet its obligations, adequate and effective remedies must be available to victims whose human rights have been violated. In the future, the International Olympic Committee could consider establishing an expert working group to examine whether existing sport dispute resolution mechanisms such as the CAS comply with fundamental human rights standards, including the right to a fair trial. Some commentators have already discussed the currently utopian possibility of a world court of human rights. Such a complaints body might also consider individual communications from sport victims of human rights violations. Such a court already envisages the possibility of hearing complaints directed against non-state actors.


107 See, for example, Article 6 of the Draft Statute of World Court of Human Rights, www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/WorldCourtReport30April2009.pdf (last visited on 16 August 2012).
Strengthening the CAS’s existing arbitration system would help to overcome the shortcomings of the CAS when it comes to the protection of an athlete’s human rights. Four proposals can be made for enhancing mechanisms under the CAS. First, it would appear possible to translate the arbitration mechanism under the CAS into a quasi-judicial organ which could also have the power of compulsory jurisdiction. To this end, an independent and impartial supervisory mechanism could be developed at the national level, possibly in the form of a sports ombudsman. Such an ombudsman would represent the public interest by investigating and addressing complaints made by any athlete. On the other hand, such a proposal might also seem overly bureaucratic when it would perhaps be better to change the internal workings of the CAS rather than adding an extra layer.

The second proposal is to introduce the ability to challenge the CAS’s arbitral awards before the ECtHR; however, such a proposal would require substantial changes to the ECHR. A proposal along these lines has already been submitted. However, in its jurisprudence the ECtHR has already observed that ‘states enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings’. While such an amendment would ensure that the CAS complies with basic human rights standards, it would also mean that the ECtHR would be faced with the possibility of an even greater caseload. This step may thus seem questionable in light of the fact that several thousand cases are currently waiting to be examined by the ECtHR.

Third, the CAS has to strive towards an effective role in promoting fair trial guarantees in its arbitration procedures and ensuring transparency and accessibility. It could recognise that its main purpose is to serve parties in arbitration procedures and that such a service requires proper administration, including the acknowledgement of mistakes when they occur and the provision of appropriate remedies. In this context, the Swiss Federal Tribunal could examine all constituent parts of the right to fair trial, not only those which fall in the *ordre public*. Moreover, it appears necessary that some kind of preventive mechanism be established to monitor respect by the CAS for fair trial guarantees in its proceedings.

Fourth, irrespective of the structure adopted, for the instrument to work the CAS has to be informed, authoritative and command the confidence of all parties. Along these lines, a further revision of the wording of the CAS Statutes to ensure that they comply with fair trial guarantees would be the most appropriate solution. Many criticise the Statutes for their vague wording and grand ambitions, which have proven...
difficult to implement effectively. A good way to remedy this drawback would be to initiate a comprehensive reform the Statutes and include basic fundamental rights principles so as to clarify the impact the new provisions would have, and how they would be interpreted and given effect. All in all, arbitration before the CAS is moving in the right direction as regards fair trial guarantees; what is needed is more detailed fine-tuning.

F. CONCLUSION

This article has attempted to examine fair trial guarantees before the CAS from the viewpoint of the principles and jurisprudence of the ECHR. The CAS holds jurisdiction over the resolution of sports-related disputes between all parties that have agreed to submit a matter for it to resolve. While it can be concluded that the arbitration procedures before the CAS generally abide by the majority of the constituent parts of the right to a fair trial, it is also evident that they could be better incorporated and implemented by ordinary and appeals arbitration procedures.\textsuperscript{110} The underlying weakness of the CAS arbitration procedure can be directly tied to the nature of its proceedings since an effective and coherent judicial system does not exist for resolving sports-related disputes. The chief problems lie in the lack of procedural fairness, the non-publication of its proceedings, the issue of burden of proof and the absence of a right to an independent and impartial arbitration panel (the lack of transparency involved in appointing arbitrators to the CAS list). It seems that parties do not possess sufficient knowledge to respond adequately to the minimum standards of fair trial rights as developed by the ECHR in identifying the substantive obligations and responsibilities of relevant parties. Just as important is the question of how these obligations or violations can be identified in fair and equitable procedures. Judicial enforcement means the right to effective protection of human rights and the right of access to an impartial judge or arbitration panel. It refers to questions of whether human rights have reached the individual. Parties to arbitration procedures before the CAS must have effective access to justice, with the ability to challenge the content of a CAS decision before a court of appeal. However, the \textit{ex post facto} judicial review of respect for fundamental fair trial guarantees by the Swiss Federal Tribunal does not suffice to ensure respect for fair trial guarantees before the CAS. Moreover, such \textit{ex post facto} judicial review before the Swiss Federal Tribunal only takes place if the arbitral award is delivered and provided that it is challenged. Statistics on compliance with the CAS’s determinations illustrate that the CAS’s arbitral awards are rarely overturned.

Human rights, including in sports arbitration proceedings, are usually best protected within national legal orders. International sport arbitration enforcement

\textsuperscript{110} CAS, CAS 2011/A/2384.
can only be an emergency brake that complements judicial protection afforded by national legal orders. The national level could be strengthened by introducing an international arbitration mechanism, which would be mandatory for certain sportspersons. An international arbitration regime for sports should offer a clear set of minimum standards for the protection and promotion of fair trial rights guarantees. National sports associations should have to comply with these minimum standards and be *a fortiori* encouraged to go beyond them. In short, it may be necessary to explore the possibilities of constructing a stronger national sports judicial or arbitration rights regime coupled with a stronger CAS to better protect human rights in sports-related arbitration or judicial procedures. Most of the normative framework for supporting the work of the CAS is already in place. What appears to be missing is a clarification of the existing framework. However, until attempts are made to reform how the CAS operates, a vital part of athletes’ access to justice will remain absent. The current state of the regulation of sports-related disputes before the CAS is a step in the right direction. However, it is not fully advancing the cause of the protection and promotion of procedural human rights in its arbitration procedures.