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FINANCIAL INDEPENDENCE OF THE COURT OF ARBITRATION FOR SPORTS: WHY CAN CAS BE CONSIDERED A TRULY INDEPENDENT BODY?

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Abstract

In the world of sport, the Court of Arbitration for Sport ["**CAS**"] *has proved its importance and value in the resolution of sports-related disputes since its inception in 1984. However, the independence of this settlement body continues to be an ongoing issue due to its close links with the Olympic Movement. Although initial concerns about the interrelationship between CAS and this movement, particularly the International Olympic Committee* ["**IOC**"]*, have resulted in positive structural reforms, the ongoing issues associated with the independence of CAS continue to be invoked by athletes for challenging CAS awards. This article aims to analyse one of these issues, namely the funding system of CAS, to answer the question of whether CAS can be considered an independent settlement body or not.*

To approach this inquiry, the article first examines the relevant standards for assessing the independence of CAS. Afterwards, it evaluates whether the funding system of CAS affects its independence and suggests that because of the unique features of sports arbitration, the current funding system does not make CAS depend on the Olympic Movement. Finally, the article proposes some suggestions for refinement of the CAS funding system to enhance its independence.

I. Introduction

In response to the need for resolution of the growing number of international sports disputes, "*the idea of creating an arbitral jurisdiction devoted to resolving disputes*…"[1] has been presented by Matthieu Reeb. Subsequently, CAS was created by the IOC with the aim of dealing with crisis of legitimacy in the sports world.[2]

Contrary to other international sports organisations, CAS is a settlement body with jurisdiction to arbitrate any sport-related dispute.[3] CAS administers two types of arbitration procedures. The first type is the Ordinary Arbitration Procedure, which includes cases in which CAS decides disputes as a

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1 Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2 INT'L SPORTS L. J. 23 (2002) [*hereinafter* "Matthieu Reeb"].

2 Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better* 36 LOYOLA UNIV. CHICAGO L. J. 1206 (2005) [*hereinafter* "Michael Straubel"].

3 Rachell Downie *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport* 12 MELB. J. INT'L L. 12 (2011) [*hereinafter* "Rachell Downie"].

first instance court.[4] The second type is the Appeals Arbitration Procedure, in which CAS deals with disputes concerning the decisions of federations, associations or other sports-related bodies.[5]

The CAS arbitrations are usually seated in Switzerland. Consequently, the *lex arbitri* is the Swiss law, and the judicial review of CAS arbitral awards is subject to the Federal Supreme Court of Switzerland ["**the Court**"].[6] Accordingly, domestic courts do not have the authority to review the arbitral awards.[7]

Since the establishment of CAS, its independence from its founders and funders, the Olympic Movement, which is composed of the IOC, International Federations, and Association of National Olympic Committees, has been under considerable scrutiny.[8] In consequence of the conclusion of the Paris Agreement,[9] the CAS structure was reformed, leading to the establishment of the International Council for Arbitration for Sport ["**ICAS**"] as the managing body of CAS. The establishment of ICAS resulted in an improvement in the independence of CAS. Nevertheless, there are still a number of concerns regarding its independence that not only challenge the legitimacy of CAS, but also question whether CAS tribunals are capable of independently arbitrating disputes that involve members of the Olympic Movement. These issues have their roots in CAS's original self-governance and close financial links with the Olympic Movement.[10] Although CAS represents itself as independent vis-à-vis its funders, its independence has been the subject of several important decisions of the Federal Court. With regard to the issues raised in the Court's judgments, this article will critically analyse whether the funding system of CAS reduces its independence or not.

II. Independence of CAS: Independence Standards & CAS Funding System

Independence is the hallmark of a fair judicial process. It is the independence of the process that ensures the independence of the tribunal or adjudicatory forum in the minds of its members and the public.[11] For a tribunal or adjudicator to be independent, no connection must exist between them and the executive or regulatory body that adopts, implements, or enforces the rules.[12] Additionally, independence pertains to the ability of the adjudicator to form an opinion without being influenced by the structure or organisation participating in the process.[13] Given that the CAS dispute resolution system has developed organically under the control of the sports' governing bodies, including the federations, structural conflicts of interest and concerns about the independence of CAS can arise.

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4 Jan Paulsson, *Arbitration of International Sports Disputes*, ENTM'T & SPORTS L. 16 (1993) [*hereinafter* "Jan Paulsson"].

5 Code of Sports-related Arbitration (CAS Code), § R. 27 (2021).

6 Federal Act on Private International Law (PILA), § 190 (2) (1987).

7 Marcus Mazzucco and Hilary Findlay, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System*, INT'L J. SPORT SOC. 135 (2010); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, Can. T.S. 1986 No. 43., art. V(1)(e) [*hereinafter* "New York Convention"].

8 Rachell Downie, *supra* note 3, at 6.

9 Agreement Related to the Constitution of the International Council of Arbitration for Sport, June 22, 1994, *available at* https://arbitrationlaw.com/sites/default/files/free_pdfs/ICAS%20Agreement.pdf [*hereinafter* "Paris Agreement"].

10 John Forster, *Global Sports Organizations and Their Governance*, 6 CORP. GOVERNANCE 73 (2006).

11 Leanne O'Leary, *Independence and impartiality of sports disputes resolution in the UK*, INT'L SPORTS L. J. 245 (2021) [*hereinafter* "Leanne O'Leary"].

12 Gillies v. Secretary of State for Work and Pensions, 1 WLR 781 (HL) (2006).

13 Leanne O'Leary, *supra* note 11.

The first step in examining the CAS's independence is to identify the appropriate standards, which are determined in this section. Further, this section also sheds light on the different financial links of CAS with the Olympic Movement.

A. What are the Most Appropriate Standards for Assessing the Independence of CAS?

While several standards would be appropriate, the most suitable one is found under Swiss law as it is the *lex arbitri* of CAS arbitrations. Further, by virtue of the ruling of the European Court of Human Rights ["**ECHR**"] in Tabbane v. Switzerland,[14] the fairness standard enshrined in Article 6 the European Convention on Human Rights ["ECHR"] may be applied as well. The Court held that parties waive the protections provided in Article 6 of the ECHR[15] when they enter freely into the arbitration agreement. However, in its considerations concerning the validity of the waiver, the ECHR distinguished between voluntary and compulsory arbitration. While parties in a voluntary arbitration can waive the protections accorded in Article 6 (1) of the ECHR, they cannot waive them in a compulsory arbitration.

In *Mutu and Pechstein* v. *Switzerland*, ECHR took the same position and held that "*[i]f arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 (1) of the Convention.*"[16] In this case, the ECHR found that Mutu entered into the arbitration agreement voluntarily as he had the option of going to Court according to the applicable regulations for football players at the time.[17] However, the ECHR considered Pechstein's arbitration compulsory since her only option was to enter into the arbitration agreement or be unable to participate in competitions. It further stated that even though CAS arbitration had been imposed by a federation's regulations, and not by law, acceptance of CAS jurisdiction by Pechstein should be considered as compulsory arbitration.[18]

In light of the above, according to the Swiss law standards, arbitrations mandated by CAS have to offer protections enshrined in Article 6 of ECHR.

i. The independence standard under Swiss law

The Swiss Federal Law on International Private Law ["**PILA**"] does not define independence in any provision, while Article 180(1)(c) solely requires arbitrators to be independent. The violation of this mandatory rule results in a breach of Article 190(2)(a) of the PILA, whereby an illegal composition of an arbitral tribunal suffices for challenging an arbitral award. One of the factors that can impact the independence of arbitrators is the independence of the arbitral body administering the proceeding.[19]

In this regard, the Federal Court has stated that in order to evaluate whether a judicial body offers sufficient guarantees of independence, reference must be made to the principles provided for state

14 Tabbane v. Switzerland, 41069/12, EUR. CT. H.R. (2016), ¶ 29.
15 EUR. CONV. ON H.R., art. 6(1), guarantees the right to a fair hearing before an independent and impartial tribunal established by law.
16 Mutu & Pechstein v. Switzerland, 40575/10, 67474/10, ¶ 95 EUR. CT. H.R. (2018) [*hereinafter* "Mutu v. Switzerland"].
17 *Id.* ¶ 120.
18 *Id.* ¶ 115.
19 Leanne O'Leary, *supra* note 11.

courts in the Swiss Federal Constitution ["**the Constitution**"].[20] In doing so, no strict distinction should be drawn between the concepts of independence and impartiality.[21] Under Article 30(1) of the Constitution, every person whose case is being decided in judicial proceedings has the right to have this done by an independent and impartial court.

This principle "*makes it possible to challenge a judge whose situations are such as to cause doubt as to his impartiality; it [the principle] seeks, in particular, to avoid that some external circumstances may influence the decision in favour of or against a party. A challenge is not only justified when the judge's actual bias is established*"*… [and] it is sufficient that circumstances produce the appearance of prejudice and cast doubt over the judge's impartiality.*"[22]

As it can be seen, under Swiss jurisprudence, the fundamental understanding is that an arbitrator should have the same degree of independence as expected from state judges.[23] According to the Court's previous case law, CAS has been considered by the Court as a state court and its judgment as a court judgment.[24] Therefore, like a state court, CAS must present itself as an independent body and prevent external circumstances from influencing its arbitrators' independence. Otherwise, an appearance of prejudice is sufficient under Swiss law to challenge the independence of CAS and its tribunals.

The subsequent sections show how the Court has acknowledged the CAS awards as true awards[25] of an independent tribunal[26] and applied a very high standard of proof in assessing the independence of CAS, requiring the absence of independence to be definitively proven.[27]

ii. *The ECHR independence standard*

The independence requirement of the ECHR stipulated in Article 6(1) of the convention has often been determined based on the previous case law before the ECHR.[28] Article 6 also requires the independence of judicial bodies, in addition to tribunals. Under Article 6 of the ECHR, the independence of a body can be evaluated with respect to some criteria, such as "*the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure, and the question of whether the body presents an* ***appearance of independence***".[29] In this regard, ECHR placed emphasis on the

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20 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2004, 129 III 445 (Switz.), ¶ 3.3.3.

21 Tribunal Fédéral [TF] [Swiss Federal Tribunal], Oct. 29, 2010, 4A_234/2010 (Switz.), ¶ 3.3.1.

22 *Id.* ¶ 3.2.1 (emphasis added).

23 Matthias Leemann, *Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator*, 29 ASA BULLETIN 10 (2011), at 16.

24 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2003, III ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 129 445 (Switz.), translated into English in MATTHIEU REEB, DIGEST OF CASE AWARDS III, 2001-2003, 545, 688 (2004); Matthias Scherer, *First Reference to the IBA Guidelines on Conflicts of Interest in International Arbitration: Case Note on Swiss Supreme Court Decisions 4A_506/2007 & 4A_528/2007*, 26 ASA BULLETIN 599 (2008) [*hereinafter* "Mathhias Scherier"].

25 Richard H McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQUETTE SPORTS L. REV. 309 (2010).

26 *Id.*

27 Matthias Scherer, *supra* note 24.

28 EUR. CT. H.R., Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb) (Guideline) 49 (2013).

29 *Id.* 59 (emphasis added).

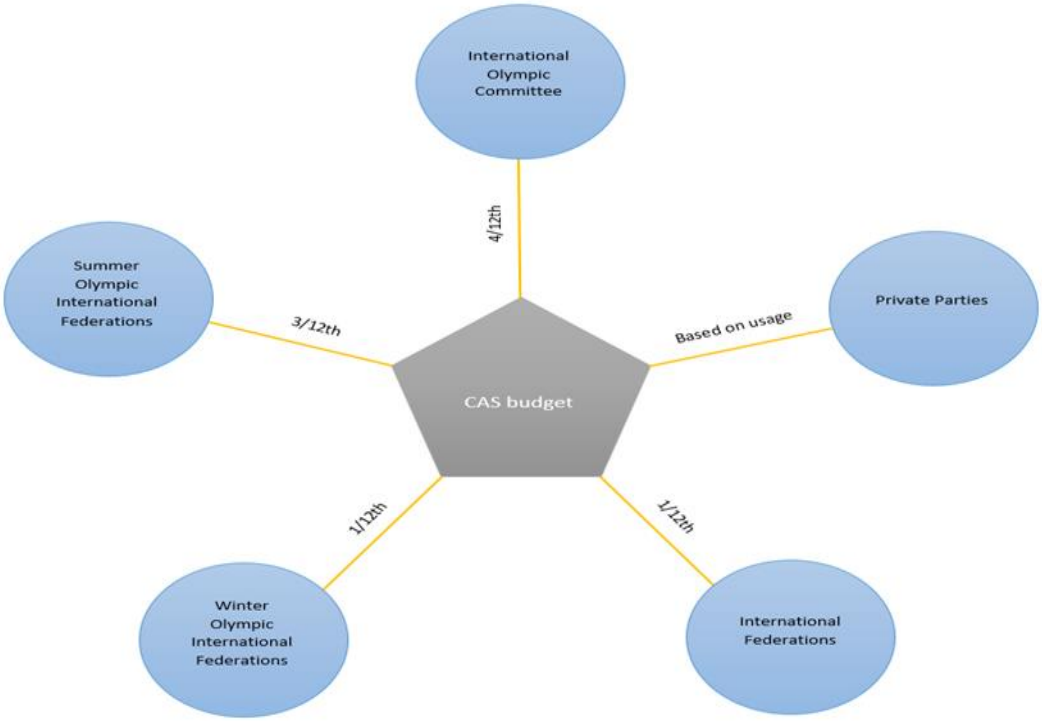
fact that "*justice must not only be done, it must also be seen to be done*", which has direct effects on the confidence the national courts in society must inspire in the public.[30]

Thus, it can be concluded that, like under the Swiss law, an appearance of lack of independence is sufficient for challenging the independence of an arbitral body under the ECHR framework.

B. How can the CAS funding system raise questions about its independence and capability to provide a fair arbitral proceeding?

The funding system of CAS is as follows:

The Funding System of CAS[31]



The vast majority of cases before CAS are Appeals Arbitration Procedure in which parties do not need to pay CAS's and arbitrators' fees, save for a filing fee. Therefore, as CAS itself should bear these costs, including arbitrators' fees, it has to find other funding sources to continue its operations. This issue was considered in the Paris Agreement, in which the top sports governing bodies agreed to make annual contributions to the CAS budget over the years.[32] In accordance with the agreement, one-third of the CAS budget is provided by the IOC, and other members of the movement provide the other two-thirds. As a result, it seems that CAS is almost dependent on the Olympic Movement for financial viability.

30 Mutu and Pechstein v. Switzerland, 40575/10, 67474/10, ¶ 95 EUR. CT. H.R. (2018), ¶ 143.

31 Paris Agreement, *supra* note 9.

32 Giulio Palermo, Anna Sokolovskaya, *Independence of CAS vis-à-vis its Funders and Repeat Users of its Services*, KLUWER ARB. BLOG (May 25, 2018), *available at* http://bit.ly/3VgSZKS [*hereinafter* "Giulio Palermo"].

III. How can the CAS funding system raise questions about its independence and capability to provide a fair arbitral proceeding?

As illustrated, the Olympic movement remarkably influences the CAS funding system. This external circumstance may cast doubt on the CAS's independence and, therefore, on its arbitrators' independence. In the following sections, these financial links of CAS with the Olympic movement would be analysed to evaluate whether CAS as an arbitral body provides sufficient guarantees of independence under the elaborated standards or not.

A. The Federal Court rang the bell: Why did the Funding System of CAS create some concerns?

In early 1990, there were some concerns that CAS might be dependent on the IOC due to the financial links between these two bodies. These concerns were voiced obiter in the judgment of the Swiss Federal Tribunal ["**Tribunal**"] in *Gundel* v. *FEI* ["**Gundel**"].[33] At that time, CAS was financed almost exclusively by the IOC.

In *Gundel*, the FEI imposed a fine and suspension on Elmar Gundel, a German equestrian competitor, due to his horse testing positive for drugs.[34] In 1993 Gundel appealed the FEI disciplinary decision to CAS. Although CAS reduced the penalties,[35] Gundel remained unsatisfied and challenged the validity of the award on the ground that CAS was not a genuinely independent arbitral body as it was controlled by Olympic institutions like FEI and the IOC.[36]

Rejecting Gundel's claim, the Tribunal found CAS to be independent of the Olympic institutions. The Court qualified CAS as a truly independent body, despite the financial links between CAS and IOC.[37] However, it also expressed its concern as an *obiter dictum*. The Tribunal referred to three main connections between IOC and CAS, one of them being that: "*1) the CAS was funded almost entirely by the IOC*".[38] Ultimately, it noted that "*it would be desirable for greater independence of the CAS from the IOC*."[39] This clear message was also taken into account by the CAS Secretary General.[40]

The Court's message was absolutely critical since the financial links between CAS and IOC had created concerns about the integrity of arbitral proceedings, and it is undeniable that if IOC had been a direct party in *Gundel*, the Court might very well have set aside the CAS award.[41] One can argue that the Court's approach is not reasonable since IOC fully funded CAS, and as one of the disputant parties

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33 Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, J. DISP. RESOL. 63 (2012); Tribunal Federal [TF] [Swiss Federal Tribunal], Mar. 15, 1993, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 119, 271 (Switz.).

34 Jan Paulsson, *supra* note 4, 14-15.

35 L v. IOC, Award of Nov. 29, 2002, CAS 2002/A/370 (1993) [*hereinafter* "L v. IOC"].

36 Matthieu Reeb, *The Court of Arbitration for Sport, in* MATTHIEU REEB, DIGEST OF CAS AWARDS I, 1986-1998 (1998) [*hereinafter* "Matthieu Reeb"].

37 Matthieu Reeb, *supra* note 1, 23.

38 Michael Straubel, *supra* note 2, 1209.

39 Matthieu Reeb, *supra* note 36, 570.

40 *Id.* xxvi.

41 James H. Carter, *The Law of International Sports Disputes, Speech to the Annual Meeting of the Indian Society of International Law* 4 (Nov. 2004), *available at* http://www.asil.org/pdfs/carterspeech0411.pdf.

was a member of the Olympic Movement, this circumstance would create an appearance of prejudice required under Swiss law and ECHR on the CAS independence.[42]

Contrary to this view, the author opines that the Court's position seems justifiable since, at that time, there were alternatives neither for CAS nor for its financing system; hence, the Court tried to acknowledge CAS as an independent court of arbitration and, meanwhile, sent shockwaves through CAS to amend its financing system.[43]

B. The 1994 Reforms

In light of *Gundel*, in 1994, IOC and other governing sports bodies agreed to modify the governance of CAS. This resulted in the signing of the Agreement related to the Constitution of the International Council of Arbitration for Sport ["**Paris Agreement**"], leading to some amendments to the structure of CAS. One of the major reforms was concerning the CAS funding system. By virtue of this agreement, CAS tried to reduce its financial dependence on the IOC by splitting its costs between the members of the Olympic Movement and private parties that used its service.[44]

Nevertheless, despite the new reforms, two main issues remained: First, while IOC diminished its contribution to the CAS budget to 1/3, it was still the most significant contributor. Second, the funding system was changed to a one-sided system rather than a balanced one since still the entire budget was provided by the top sports bodies.

C. The second challenge to the CAS funding system

Approximately ten years later, once again in *A. and B.* v. *IOC, ISF, and CAS*[45] ["**Lazutina**"], the Court was called to assess the CAS independence.

During the Salt Lake City Winter Olympic Games of 2002, two skiers' doping tests became positive, and consequently, both athletes[46] were banned for two years. Subsequently, IOC decided to disqualify the skiers and revoke the gold medal of Lazutina, obtained during the competition. The athletes filed appeals to CAS; however, unlike in the previous case, herein, the IOC was a direct party in the arbitral proceeding. CAS rejected the appeals and confirmed the imposed sanctions against the athletes.[47] An appeal was filed to the Federal Court, alleging that CAS could not be considered as an independent arbitral body in an arbitration involving IOC as a party.

In a nutshell, the appellants put forward three main arguments concerning the independence of CAS. This article only discusses the argument raised about the financial links of CAS. In this regard, the appellants argued that CAS and ICAS were financially dependent on IOC, and IOC had complete control over the financing of the ICAS and CAS. Also, they added that IOC would pay all the costs

42 Viktoriya Pashorina-Nichols, *Is the Court of Arbitration for Sport Really Arbitration?*, INT'L ARB. DISP. SETTLEMENT 37 (2015).
43 Daniel H Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal*, ASPER REV. INT'L BUS. TRADE L. 298 (2006).
44 *Id.* 301.
45 Tribunal Fédéral [TF] [Swiss Federal Tribunal], May 27, 2004, 129 III 445 (Switz.).
46 The skiers in question were Larissa Lazutina and Olga Danilova.
47 L v. IOC, Award of Nov. 29, 2002, CAS 2002/A/370 (1993).

of the CAS arbitrators, including travel expenses and accommodation fees, when they were asked to sit in the ad hoc chambers during sports events. Hence, this would impact the CAS arbitrators' ability to act independently.[48] However, finding in favour of the IOC, the Court pointed out that "*the CAS is sufficiently independent vis-a-vis the IOC… in cases involving the IOC.*"[49]

The Court put forward three main arguments. First, it argued that solely one-third of the CAS annual budget was provided by the IOC, and other members of the Olympic Movement provided the other two-thirds of the funds allocated by the IOC to them every year.[50] However, this does not mean that IOC controlled the remaining two-thirds of the funds allocated to CAS since even if the IOC had not allocated the funds to the said organisations, they would find other sources to fulfil their obligations under the Paris Agreement. Also, the CAS funding by IOC did not affect the CAS arbitrators' independence since the costs of arbitrators in ad hoc chambers were covered by ICAS, but never by IOC.[51] Therefore, it can be concluded that this amount of contribution by IOC was admissible and would not threaten the CAS independence.

Second, the Court stated that there was no alternative to the financing system of CAS. This Court's argument was based on the unique feature of sports arbitration, which is quite different from other types of arbitration, including commercial arbitration. As explained by the Court, "*the financial capacity of the parties (the federation and the athlete sanctioned) is by far unequal (with rare exceptions) to the detriment of the person at the bottom of the pyramid, namely the athlete.*"[52] The author considers the Court's position reasonable since, due to this particular feature of sports arbitration before CAS, providing an alternative funding system for CAS seems to be rather tricky, and it is challenging to imagine who could CAS turn to obtain necessary fund to pay its cots, other than the sports organisations.

Third, the Court contended that even if a judicial body was financed by another organisation, it was independent, and there was no cause-and-effect relationship between the financing of a judicial body and its independence. This reasoning of the Court was based on a historical fact. The experience of governments demonstrates that they usually contribute to the budgets of national courts.[53] However, these contributions do not mean that the national courts and their judges lack independence.[54] The fact that supports this argument is that while the states provide budgets for national courts, the courts, in many cases, adjudicate against them. Based on that, the Court concluded that CAS was independent vis-à-vis IOC, even though the IOC was the most significant contributor to the CAS budget.

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48 Emile Vrijman, *Experiences with Arbitration before the CAS: Objective Circumstances or Purely Individual Impressions?* In Ian S Blackshaw, Robert C R Siekmann et al. (eds.), THE COURT OF ARBITRATION FOR SPORT 1984–2004 (2006).

49 Matthew Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations* PEPPERDINE DIS. RESOL. R. J. 53 (2009).

50 Charles Poncet, *The Independence of The Court of Arbitration for Sport,* 1 EUR. INT'L ARB. REV. (1) 48 (2012) [*hereinafter* "Charles Poncet"].

51 Arbitration Rules, CAS ad-hoc division for the Olympic Games, 2003, art. 22.

52 *Id.*

53 Kate Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, 58 INT'L. COMP. L. Q. (3) 676 (2009).

54 James W. Douglas, Roger E. Hartley, *State Court Budgeting and Judicial Independence: Clues from Oklahoma and Virginia*, 33(1) ADMIN. & SOC'Y 76 (2001).

Nevertheless, the author believes that the Court's reasoning may be criticised because the analogy drawn by the Court is not acceptable for two reasons. First, the procedures in litigation and arbitration are different, and each dispute settlement method has its own rules and features. Therefore, the parties are not treated the same in each method. In other words, there are some protections for a weak party in the proceedings before national courts making the position of parties more balanced, while this is not valid for the CAS arbitrations, and there is not any protection for athletes.

Further, the principal reason for the preservation of judicial independence in a domestic sphere is the renowned doctrine of separation of power between the various branches of a state, including legislative and executive.[55] However, in the context of CAS arbitration, there is no separation of power between CAS and the top sports bodies. These bodies effectively control ICAS through their participation in its funding and appointment mechanism, and ICAS also has complete control over CAS. This chain suggests a very hierarchical structure, opposing the horizontal structure among the state branches.

In conclusion, the author has the same position as that of court since the funcding system of CAS had improved since the enforcement of the Paris Agreement, and it was compatible with the specific features of sports arbitration. However, the analogy of national courts to CAS by the Court is not persuasive.

D. The third challenge to the CAS funding System

After *Lazutina*, it seemed that the Court's belief in the appropriateness of the CAS funding system had been confirmed by the athletes as well, and no one challenged this system. Surprisingly, in March 2017, another CAS award was challenged before the Federal Court by a sports club based on the annual contributions of an international federation to CAS.[56]

This case was concerning a sports arbitration between RFC Seraing, a Belgian third division football club ["**The Club**"], and FIFA with regards to a TPO agreement.[57] After initiating a disciplinary procedure, the FIFA Disciplinary Committee banned the Club from the registration of players and imposed a fine of CHF 1,50,000. The FIFA Appeal Committee confirmed this decision in 2016, and subsequently, an appeal was filed by the Club with CAS to vacate this decision. In March 2017, CAS upheld this decision while reducing one of the bans.[58] Ultimately, the Club challenged the award before the Court seeking the annulment of the award based on, inter alia, the financial dependence of CAS on FIFA.

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55 Shimon Shetreet, *Judicial independence and accountability: core values in liberal democracies* in H P Lee (ed.) JUDICIARIES IN COMPARATIVE PERSPECTIVE 9 (2011).

56 Caroline Dos Santos, *Swiss Federal Supreme Court Confirms Independence of CAS, note on Decision 4A_260/2017 of 20 February 2018*, 36 ASA BULLETIN (2) 429 (2018); Bundesgericht [BGer] [Federal Supreme Court] Feb. 20, 2018, X. v. Fédération Internationale de Football Association, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [TPF] 4A_260/2017 (Switz.).

57 X v. International Federation of Association Football, Judgment of Feb. 20, 2018, Decision 4A_260/2017 [*hereinafter* "X v. FIFA"].

58 RFC Seraing v. Fédération Internationale de Football Association (FIFA), Award of March 9, 2017, CAS 2016/A/4490 (2017).

The Club claimed that with the development of FIFA, this federation had become a big client of CAS in terms of "*business volume*," which financially supported CAS by making significant financial contributions, and a considerable proportion of the turnover of CAS came from this client. It added that although the Court previously considered the relationships between CAS and IOC, the significant commercial relationship between CAS and FIFA – described by the Club as a mafia ("*une organisation mafieuse*") – had never been taken into consideration. It concluded that if CAS had issued an award against FIFA, it would lose one of its important clients, and this fact could impact the CAS's decisions to the detriment of parties opposed in a proceeding to FIFA. The Club also asserted that, unlike national judges, arbitrators and other employees of CAS would suffer direct financial consequences if FIFA were to give up its affiliation with CAS, inducing arbitrators to issue awards in favour of FIFA in disputes involving this federation.

In response, FIFA contended that the CAS independence was deeply analysed and confirmed in Swiss law. FIFA also rejected the Club's claim, providing that the CAS arbitrators had to be in favour of FIFA, and stated that in case FIFA had become a losing party, it would continue its affiliation with CAS so that the income of the arbitrators and other CAS's employees would not have to suffer. Acting through its Secretary General, CAS rejected the Club's assertion, arguing that FIFA had been involved in only approximately thirty-two per cent of CAS's cases, and its annual contribution was only CHF 1.5 million. This contribution was relatively modest compared to CHF 7.5 million paid by IOC out of the CAS's total annual budget of CHF 16 million. Thus, the Secretary-General concluded that if FIFA had decided to renounce its contributions, CAS's existence would not be jeopardised since the only consequence of the decrease in the CAS budget would be a reduction of its current size and changes in its services.

The Court decided that there was no reason to revisit its jurisprudence, the *Gundel* and *Lazutina* judgments.[59] By making a distinction between IOC and International Federations, the Court held that the CAS financial relationships with International Federations, including FIFA, had always been less problematic than the CAS relationships with IOC, and without compelling reasons, it would not be justifiable to categorise FIFA differently to other International Federations. The Court highlighted that FIFA's contribution of CHF 1.5 million to CAS was less than ten per cent of the CAS total budget, and this contribution remained significantly below the CHF 7.5 million paid by IOC. Hence, it ruled that the Club's assertations were not strong enough to justify a departure from the established case law.[60]

Further, the Court observed that the Club did not provide any statistical analysis or any other evidence, revealing that CAS would grant FIFA a preferential status when dealing with cases involving this federation.[61]

59 X v. FIFA, Judgment of Feb. 20, 2018, Decision 4A_260/2017, at 3.4.2.
60 *Id.*, at 3.4.3.
61 *Id.*

This decision was an important victory for CAS. Prior to the in-depth analysis of *Lazutina*, it is noteworthy that in Appeals Arbitration Procedure, parties do not need to pay CAS's and arbitrators' fees, and CAS itself should bear these costs.

However, one can argue that if in arbitrations before CAS, parties demand to pay the arbitration's fee, similar to the model adopted in commercial arbitration, not only would the CAS budget be provided from a sustainable resource, but also CAS would become more independent of the governing sports bodies. This argument seems unreasonable as sports arbitration before CAS has a unique feature. As also explained by the Court in *Lazutina*, in disciplinary proceedings before CAS, contributory capacities of parties are unequal, and while a sports body is located at the top of the pyramid, an athlete is located at the bottom trying to battle against that sports body. Therefore, if the model adopted in commercial arbitration applies to all proceedings before CAS, this would harm athletes and result in their being denied access to CAS. It results that there is no better alternative to the current form of CAS financing, and adopting the ordinary arbitrations' model, namely each party paying half of the advance on costs, would make athletes deprived of their right to a judicial remedy.

However, there is still a big challenge in the CAS Code concerning the payment of the advance on costs. It is well established that when an athlete starts a proceeding against FIFA before CAS, upon filing the request/statement of appeal, he will receive a letter from the CAS Secretariat, stipulating that, as a general rule, FIFA does not pay any advance on costs when a proceeding has been initiated against it.[62] This behaviour of FIFA is permissible according to Article R64 of the CAS Code, meaning that the claimant has to pay the full advance on costs.

From the author's perspective, this provision of the CAS Code and FIFA's behaviour are unacceptable for three main reasons. *First*, they may harm players and clubs with low budgets or insufficient means, limiting their access to CAS. *Second*, they are contrary to the Court's argument, providing that the CAS funding cannot be the same as the model adopted in commercial arbitration. *Third*, it is not justifiable that while FIFA pays about nine per cent of the CAS total budget, it does not contribute to the funding of an actual case. Consequently, modifying Article R64 of the CAS Code in the future is of paramount importance to avoid such behaviour from the federations.

Concerning the relationship between the funding of CAS and the independence of CAS and its members (arbitrators and employees), the Court took the same position as *the Lazutina judgment,* holding that there was no necessary connection between financing a judicial body and its independence. However, in the author's view, the roles of an international federation are not analogous to the roles and functions of a state and, inevitably, are not similar in their relationship with the judiciary. The central role of a state is to control its citizens on a wide variety of issues, and the judiciary body is one of the pillars of the state in performing this function.[63] However, the same is not valid for CAS as it is not a judiciary branch in the same sense. Therefore, it can be concluded that

62 Hansjörg Stutzer, Michael Bösch and Simon M. Hohler, *The Independence of CAS Confirmed*, THOUVENIN RECHTSANWALTE (Apr. 4, 2018), *available at* https://thouvenin.com/publication/the-independence-of-cas-confirmed/.

63 Gerard McCoy, *Judicial recusal in New Zealand, in* H P Lee (ed.) JUDICIARIES IN COMPARATIVE PERSPECTIVE 324 (2011).

sports federations are not identical to the legislative and executive branches of the state, and CAS is not comparable to the judiciary body.

In addition, one can argue that the Court rejected the Club's argument because it considered the issue of financing to be irrelevant to the issue of independence. Nevertheless, this conclusion seems to be incorrect. It seems the Court would assess the relationships between funding and independence case by case and would require proof of any assertation concerning the lack of independence.[64] The Court's position regarding FIFA's contribution seems unsurprising since the CHF 1.5 million contributed by FIFA was roughly ten per cent of the CAS total budget of CHF 16 million, which is significantly lower than the one-third contribution of IOC that had already been confirmed in the *Lazutina* case. Nevertheless, it is still questionable whether contributions beyond one-third can cast doubt on the CAS independence or not, and what level of contributions could be considered as possibly intimidating the independence of CAS.[65]

Moreover, based on the indirect contributions of FIFA, namely payment of the CAS's administrative fee, the Club raised a question on the CAS independence. Rejecting the allegation, the Court held that there was no evidence demonstrating that CAS would grant FIFA preferential status. However, like the direct contributions, it is unclear what level of indirect contributions can endanger the independence of this arbitral body.[66]

IV. Conclusion & Recommendations

Considering the foregoing analysis, the author concludes that it is undeniable that the current funding system of CAS creates some reasonable concerns for athletes that CAS may be in favour of its funder. Nevertheless, as the contributory capacity of athletes is far below that of the top sports organisation, for the time being, it is impossible to adopt other funding systems since they are not compatible with this unique feature of sports arbitration. Therefore, the current funding system of CAS*, per se,* does not create any doubt about its independence of CAS.

The author believes that diversifying the funding sources of CAS is a practical solution for reducing the concerns about its independence, which is discussed in the next part.

The suggestions attempt to draw an arbitration system for international sports disputes that satisfies the fundamental requirements of a fair proceeding. In this part, the main focus is on improving the CAS funding system, resulting in the improvement of the CAS independence.

In order to enhance the CAS financial independence, there is no other way but to amend the current funding system. Although ICAS was established to guarantee that "*CAS [would be] totally independent of IOC*",[67] in terms of funding, CAS still receives its entire budget from the IOC and other top sports

64 Giulio Palermo, *supra* note 32.

65 *Id.*

66 *Id.*

67 Darren Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport*, 4 MELBOURNE JOURNAL OF INTERNATIONAL LAW 618 (2003).

bodies. To reduce the CAS's reliance on the Olympic movement, one possible modification could be raising CAS's services fees,[68] including charges for filing,[69] arbitration,[70] and issuing advisory opinions.[71] Adopting this system could provide higher income for CAS while its dependence would be reduced since other sources for the CAS budget would be provided.

In addition, raising the charge for CASs provision of advisory opinion has some advantages. *"[T]he allocation of costs is perhaps the best means available to the CAS … to ensure that its Advisory Opinions are released into the public domain*."[72] Also, increasing the fee for issuing advisory opinions would ensure that this service does not become a cheap way for parties to have access to institutional legal advice.[73]

Nonetheless, this method can be criticised as it puts the athletes into a difficult situation. Many athletes, particularly those from developing countries, do not have high incomes and cannot afford to use the CAS services. Therefore, adopting this system may keep athletes deprived of having access to CAS.

Another possible modification is to dedicate a proportion of gains achieved during a sports competition to CAS, making a balanced system compared to the current system of funding. During sports competitions, not only do the governing sports bodies have some financial achievements, but also the athletes obtain several financial gains depending on their performance. Therefore, by charging a special fee on the financial gains in favour of CAS, a considerable part of its budget would be provided. This method of financing is of numerous benefits. First, a part of the CAS budget would be obtained indirectly from the committees and federations instead of their direct contributions.

Also, the application of this system does not impose a heavy burden on athletes and, meanwhile, would foster their trust in CAS as they also make contributions to its budget. Finally, more transparency would be provided concerning the monetary contributions, diminishing the suspicion of CAS being influenced by the sports bodies.

Finally, the third possible way to improve the CAS financial system is through the participation of athletes in CAS funding. In this model, every professional athlete who has been registered in a federation must pay a part of the compulsory contribution of his federation to CAS. For instance, since FIFA has to pay ten percent of CAS's annual budget, registered athletes and clubs should pay for half of this amount and FIFA should pay the remaining. This model also has the advantages of the previous one, while it would provide a more significant proportion of the budget. On the other hand, this model has the drawback that if the athletes refuse to fulfil their obligation, this would have detrimental effects on the financial viability of CAS and its operations.

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68 Rachell Downie, *supra* note 3, 22.

69 COURT OF ARBITRATION FOR SPORT, Code of Sports-related Arbitration, § R64 (2022) [*hereinafter* "Code of Sports-related Arbitration"].

70 Code of Sports-related Arbitration, § R64.

71 Code of Sports-related Arbitration, § R66.

72 Richard McLaren, *CAS Advisory Opinions 188* in Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (eds.), THE COURT OF ARBITRATION FOR SPORT 1984–2004 (2006).

73 *Id.*