



**Strathmore University**

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**Law School**

*The lack of Autonomy and Independence of the Sports Disputes Tribunal in Kenya, in comparison to the Court of Arbitration for Sport (CAS)*

**SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE  
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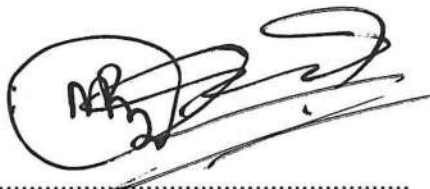
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## Declaration

I, ODONGO RICHARD MARTIN, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... *Richard.* .....  
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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..... *for*  .....  
Sarah N. Ochwada

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## **Dedication**

I dedicate this dissertation to my parents, Victor and Florence Odongo; who have held my hand every step of the way. Words will never be enough to express my sincere and heartfelt gratitude for all your unwavering support and attention.

And to my dear brothers; George and Christopher who inspire me every day, to always be a better person and to make them proud.

## **LIST OF ABBREVIATIONS:**

CAS -	Court of Arbitration for Sport
CAF-	Confederation of African Football
EU –	European Union
FIFA –	<i>Federation Internationale de Football Association</i> (International Federation of Football Associations)
FEI -	<i>Federation Equestre Internationale</i> (International Equestrian Federation)
IAAF –	International Association of Athletics Federations
ICAS -	International Court of Arbitration for Sport
ICC –	International Cricket Committee
IOC –	International Olympic Committee
KCA –	Kenya Cricket Association
KRU –	Kenya Rugby Union
JSC –	Judicial Service Commission
FKF –	Football Kenya Federation
RADO –	Regional Anti-Doping Organization
SDT –	Sports Disputes Tribunal
Swiss PILA –	Swiss Federal Statute on Private International Law
WADA –	World Anti-Doping Agency

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### **ABSTRACT:**

The problem that arises from the fact that the current position of the SDT in Kenya is a paradox. In forming the SDT as a mandate of the Judiciary Service Commission, it made the Disputes Tribunal part of the Judiciary. This then implies that it is not an independent tribunal. It is subject to the whims of the Chief Justice in terms of appeals to decisions, and even costs. This is not the custom when it comes to international sports disputes in that they are meant to be specialized autonomous bodies.

The Judiciary, and other judicial bodies have to be independent of other bodies and functions of government in order to dispense justice in an expedient manner. Though linked to the Executive through a system of checks and balances, fundamentally, the Judiciary and other quasi-judicial bodies like the SDT have to be free from influence by other arms of governance.

The main problem with SDT is lack of clear regulation on appeal from national federations and appeals to CAS. Hopefully, it will be addressed in the future SDT procedural rules as it is not addressed in the Sports Act.

The absurdity in the law that needs to be investigated is the lack of proper mechanisms and regulations in Kenya with regards to sports disputes appeals with regards to CAS. There is need for clear procedural rules on this matter

The objective of this paper is to discuss the possibility of the improvement in the legal regime that governs sports disputes settlement in Kenya

The specific objective however, is to clarify that the current position of the SDT, under the Judiciary is very detrimental to autonomy of sports bodies in Kenya and their ability to solve disputes in the ways that they know best. The tribunals need to be independent, with highly specialized individuals at the helm.

The research questions that this paper seeks to answer, are as follows;

“Does the current Kenyan legal structure provide room for reform and regulation in the settlement of sports disputes?”

“What is the current position of the SDT with regards to the international standards for example the independence and autonomy of CAS in sports and appeals procedures?”

With the help of interviews, case law and research, I was able to analyze the current laws governing sports disputes in Kenya and came to the conclusion that indeed, the Sports Disputes Tribunal is not as autonomous as it is meant to be. The use of interviews was especially vital due to the lack of some information, online. The research methodology is therefore justified in order to obtain all the information.

There is still some form of influence from the judiciary, which is very detrimental. It also in some aspects, fails to meet the high standards that are set by the Court of Arbitration for Sport

## CHAPTER ONE:

### INTRODUCTION TO THE RESEARCH

This dissertation will aim to draw a nexus between the Sports Disputes Tribunal, while identifying where each institution gets it wrong in terms of satisfying the tenets of arbitration. Special focus will be on the issues close to home, and that is on the Sports Disputes Tribunal. The Sports Disputes Tribunal, when closely compared against the model of arbitration at CAS, still lacks in some aspects. It is these issues that the paper will seek to investigate.

It is a well debated research document that introduces theories such as *lex sportiva* – which is that sports have laws and rules unique only to that field, backed up by authors who have written extensively in the area of sports laws and arbitration. The hypotheses upon which the research and writing were done, is that sports arbitration is fully functional in Kenya, and that in case of any discrepancies, they can be cured. These hypotheses will be seen in Chapters 3 and 4. Research methodology included an interview which sought to highlight the troubles at the SDT.

Chapter 5 then brings the paper to a close, with short but concise findings and recommendations on the way forward.

With regards to sports and sports related disputes, sportsmen and women are in need of a judicial mechanism that is tailored to their needs, and one that acts without much cost or delay. The tribunals have to be highly specialized and technical in nature. This is because; the rules that govern sports, or a particular sport, are very technical at times and need trained and specialized minds to adjudicate on such matters.

The Courts, worldwide generally do not interfere in disputes of a sporting nature, except in very exceptional situations. For instance, in incidences of procedural indiscretions and where careers are on the line. As *Megarry*, a former English Vice Chancellor, put it in *McInnes v. Onslow-Fane*<sup>1</sup>, sports bodies are “far better fitted to judge than the courts”. Here, the esteemed Vice Chancellor acknowledged that the national courts do not have the required

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<sup>1</sup> *McInnes v Onslow Fane and Another* [1976] Chancery Division

tools and expertise to handle specialized sports disputes. They require a certain technical “know-how”

Lord Denning, typically espoused in *Enderby Town Football Club Ltd v. Football Association Ltd*<sup>2</sup>, that fairness could often be achieved in domestic tribunals better by “*a good layman than by a bad lawyer*”. He was therefore of the view that sports disputes need specialized solutions.

Also in the cases of *Patel*<sup>3</sup>, *Law*<sup>4</sup> and the *Football Association*<sup>5</sup> case, the courts were reluctant to interfere in club affairs or domestic tribunals even if the decision involved the public. The judge stated that they have to be clearly under a state body. That the courts should be slow to interfere in such matters and the remedies are in the hands of the members of that club; as in the case of *The Jockey Club*<sup>6</sup>.

To avoid the possibility of double sanctions or punishments, the courts also generally, do not step in. In the case of *Marion Jones*<sup>7</sup>, an American female athlete who was caught doping, the injustice of a double sanction is what befell her. After she tested positive for banned substances in 2006 at a track meet in Indianapolis, the IOC in 2007, banned her from taking part in any competition. The IOC also took away all of Jones’ 5 Olympic medals going back to the 2000 Summer Olympics in Sydney<sup>8</sup>. The IOC action also scrapped Jones’ fifth place finish in the long jump at the 2004 Summer Olympics<sup>9</sup>. Later, in January of 2008, the U.S District Court in New York<sup>10</sup> also found her guilty of using performance enhancing drugs as well as involvement in a check fraud. The court in its judgement read by Judge Kenneth Karas, stated that Jones was being punished for lies told “*three years apart*” and that her actions were not a genuine mistake, but attempts done over time, aimed at breaking the law. The court also justified its involvement by stating that athletes are role models for

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<sup>2</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591

<sup>3</sup> *Patel & Another v. Dhanji* CA [1973] E.A 301

<sup>4</sup> *Law v. National Greyhound Racing Club* [1983] ALL E.R 300

<sup>5</sup> *R. v Football Association Ex parte Football League* [1993] 2 ALL E.R 833

<sup>6</sup> *R. v. Disciplinary Committee Of The Jockey Club Ex Parte Agha Khan* [1993] I WLR 909

<sup>7</sup> *Marion Lois Jones v United States Of America* [2008] in the District Court for the Southern District of New York

<sup>8</sup> [www.MSNBC.com](http://www.MSNBC.com) “IOC strips Jones of all 5 Olympic medals” Associated Press (December 12, 2007). (accessed on 9 February 2017)

<sup>9</sup> <http://edition.cnn.com/2008/CRIME/01/11/jones.doping/> (accessed on 6 February 2017)

<sup>10</sup> *Marion Lois Jones v United States of America* [2008] in the District Court for the Southern District of New York

the youth and should set a good example. If an athlete has already suffered a ban handed down by the body that allows them to participate in the sport and earn a living, why then would the Government come along, conduct another trial, and still punish the athlete? This sort of treatment is harsh and unfair on those athletes that wish to redeem themselves especially after a ban.

This paper will look at the means available to Kenyan athletes in terms of alternative dispute resolution. It will also critically analyze the formation of the Sports Disputes Tribunal in Kenya and how it carries out its functions. This paper will then compare the judicial mechanisms of the SDT as compared to the CAS in Europe and the ICAS<sup>11</sup> and why sports disputes are meant to be handled independently of any court or political autonomy.

The ICAS is the International Council for Arbitration in Sports and the role of ICAS is to assist the process of solving sports-related disputes through arbitration or mediation and to maintain the individuality of CAS and the privileges of the parties. It is also answerable for the running and bankrolling of CAS<sup>12</sup>. It is also the appointing body for CAS as seen in the statute of ICAS and CAS<sup>13</sup>, resolves challenges to arbitrators and supervises all the functions of CAS. In Kenya, this is the role the JSC<sup>14</sup> plays with regards to the SDT. In this respect, it is clear that the sports disputes resolution regime is very different in Kenya as compared to what is the norm internationally, or with CAS. This is because the JSC is a body established under the judicial arm of government whereas the ICAS is established by the sports legal regime and statute.

This paper will also address the issue of a possibility of double sanctions, if the SDT is not given full autonomy with regards to its decisions and appeals. A double sanction could occur where an athlete is subjected to the legal process of the Sports Disputes Tribunal. If such an athlete is dissatisfied with the decision and appeals it, he or she is not certain that the appeal to the High Court will be successful.

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<sup>11</sup> Section 2 of Joint Dispositions, Statutes of ICAS and CAS (22 June 1994) <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> (accessed on 6 February 2016)

<sup>12</sup> <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> (accessed on 6 February 2016)

<sup>13</sup> Section 6, Statutes of ICAS and CAS (Code) (22 June 1994) <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> (accessed on 6 February 2017)

<sup>14</sup> <http://www.judiciary.go.ke/portal/page/judicial-service-commission> The Judicial Service Commission, established under Article 171 of the Constitution of Kenya (accessed on 6 February 2017)

This being a civil court with full inherent powers to hand down a civil punishment or one that is prescribed by national laws, the athlete may even get a longer ban and time away from the sport because the legal mechanisms of the two bodies will be deemed to be independent of each other. One such possibility was as seen in the *FKF*<sup>15</sup> case where the courts acknowledged that *Article 66 of the FIFA*<sup>16</sup> Statute ousted the courts' jurisdiction, and also the statutes of the society did the same. The court also appreciated the fact that *Section 56 and 58 of the Sports Act* of Kenya removed its jurisdiction as it forms part of written law in Kenya. The judge erroneously, in my opinion went on to state that the SDT is a newly formed body with no proper structures and rules, as justification for the courts stepping in. The courts also stated that "*it was not shown that any of the sports organizations have already incorporated in their constitutions and promulgated rules specifically allowing for appeals to be made to the Tribunal and material to this dispute.*" This therefore puts sportsmen at a risk of double jeopardy, given that the Kenyan courts deem it their mandate to rule on disputes of a sporting nature.

This paper will also investigate the grounds on which sports disputes-related appeals are lodged, at the High Court of Kenya, whether it is done on procedural matters, substantive, or on the merits of the dispute. To that end, this paper will adduce evidence as to why the SDT in Kenya is a hybrid of a very formal judicial process, and at the same time, presents itself as the "go-to" arbitral tribunal for sports disputes in Kenya where the logical sequence of events will be:

1. What the Kenyan legal position is in terms of autonomy of the tribunals after analyzing the existing laws and also,
2. Whether indeed there is an efficient link between the SDT and CAS in terms of carrying out their functions
3. Whether the Kenyan legal process in terms of sports disputes adjudication, is efficient, reliable and meets the international standards in terms of access to justice and independence of courts.

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<sup>15</sup> *Football Kenya Federation v Kenyan Premier League Limited and 4 Others* [2015] eKLR

<sup>16</sup> Federation Internationale de Football Association, the international governing body of football, futsal and beach soccer <http://www.fifa.com/> (accessed on 6 February 2017)

In Kenya, like most other jurisdictions, disputes related to sports are never handled by the courts of law. There are instead established, panels, tribunals and institutions that handle these disputes. For instance, in the United Kingdom, there is, the British Athletes Commission<sup>17</sup> which provides sports resolutions in appeals, arbitration, investigation and reviews to the national governing bodies. In soccer related matters, *Article 66 of the FIFA Statute*<sup>18</sup>, which is the governing body, ousts jurisdiction of the courts in such matters.

Most sports bodies do not favour the resolution of disputes by national court systems, they instead prefer to use their internal dispute resolution mechanisms before resorting to arbitration through the CAS<sup>19</sup>. It is easier and quicker to obtain justice through such a system and with fewer delays than the actual court system. A purely sports-specific judicial system delivers better results. The CAS, is located in Switzerland, and is the highest body that deals with all cases of the dispute resolution structure for sport matters. CAS was formed at the beginning of the 1980's<sup>20</sup> when it dawned on the sports "world" that there was a definite rise in the percentage of sports related disputes. These disputes were of a highly technical nature and could not be handled competently by national courts of law or courts without any expertise in the area of sports disputes<sup>21</sup>. IOC<sup>22</sup> President at the time, H.E Juan Antonio Samaranch handed H.E Judge Keba Mbaye<sup>23</sup> the role of chairing a working group that would come up with statutes and rules of procedure leading to the promulgation of the "Court of Arbitration for Sport" This was to be a purely sports-specific jurisdiction.

In Kenya, we have the Sports Disputes Tribunal. The Sports Disputes Tribunal is one of the Sports Institutions created by the Sports Act<sup>24</sup> 2013 of Kenya. Under the main functions of the tribunal as stipulated under *Section 58* of the Sports Act, include; appeals against decisions made by national sports organizations or umbrella national sports organizations,

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<sup>17</sup> <http://www.britishathletes.org/sport-resolutions-uk> (accessed on 6 February 2017)

<sup>18</sup> [resources.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen_neutral.pdf) (accessed on 26 July 2017) and it states that; *FIFA recognizes the independent Court of Arbitration for Sport to resolve disputes between members, confederations, leagues, clubs, players, officials, licensed match agents and intermediaries*

<sup>19</sup> Court of Arbitration for Sport, Lausanne, Switzerland website; <http://www.tas-cas.org/en/index.html> (accessed on 16 November 2016)

<sup>20</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 6 February 2017)

<sup>21</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.htm> (accessed on 26 July 2017)

<sup>22</sup> The International Olympic Committee <https://www.olympic.org/the-ioc> (accessed on 6 February 2016)

<sup>23</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 6 February 2017)

<sup>24</sup> Section 56, Sports Act of Kenya (No.25 of 2013)

whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including;

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- (i) appeals against disciplinary decisions;
- (ii) Appeals against not being selected for a Kenyan team or squad;
- (b) Other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and
- (c) Appeals from decisions of the Registrar

Consequently, the Tribunal is a quasi-judicial body appointed by the Judicial Service Commission in consultation with the various National Sports Organizations. In Kenya, challenges against decisions of the Tribunal must be filed for determination in the High Court of Kenya as under the Constitution of Kenya<sup>25</sup> which states that the High Court has supervisory jurisdiction over bodies performing a judicial or quasi-judicial function, which is what the SDT, established by the Government of Kenya through the Judicial Service Commission, do. Also, in terms of appointment of tribunal members, the Judiciary of Kenya approves and rejects candidates as under the Sports Act<sup>26</sup>. This is supposed to be left to the Chairman or President of the tribunal, to decide with the members and national Sports Federations<sup>27</sup>. This then means that the tribunal is not fully autonomous in that it cannot choose individuals it believes are well-equipped to competently handle a sports arbitration: for the athletes and the sports federations.

It then results into a long tedious legal battle with athletes losing valuable time and money litigating in the High Courts of Kenya which do not even have a specialized division to hear matters of a purely sporting nature, at the appeal stage. The attitude of the Courts with regards jurisdiction, they generally do not entertain sports matters in the first instance. However, sports matters which fall under the public law of Kenya or touch on public policy<sup>28</sup> will fall under jurisdiction of the Kenyan courts.

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<sup>25</sup> Article 165, Constitution of Kenya, 2010

<sup>26</sup> Sections 55,60,61, Sports Act of Kenya, (No.25 of 2013)

<sup>27</sup> Section 60, Sports Act of Kenya, (Act No. 25 of 2013)

<sup>28</sup> These are the unwritten principles, on which social laws are based. John Peter, "Analyzing Public Policy" 1998

Therefore, an appeal against a decision relating to the decision of the sports registrar would lie to the High Court of Kenya, as seen in *Article 165 of the Constitution*, and thereafter to the CAS. This, limits the tribunals' jurisdiction

This paper will therefore also seek to establish whether there are adjudicatory bodies in Kenya that can listen to matters expeditiously.

National Courts pay too much attention to bureaucratic and technical procedures, are costly and inefficient in terms of time spans that are required for final adjudication of sports disputes. This is the sole reason for the independent formation of CAS and ICAS.

Handing down hefty punishments by a national court, and then secondarily by the national federation in charge of that particular athlete, would be unfair and against the tenets of natural justice and the doctrine of "*non bis in idem*" (no legal action should be instituted twice for the same cause of action<sup>29</sup>) which simply means that an issue once decided must not be raised again. For those that rely on sports to put food on the table, this would be akin to handing them a life sentence because more often than not, the sanctions find an athlete in the prime of his/her career. They would then miss out on the most productive chunks of their careers.

Autonomy in terms of tribunals and sports disputes is paramount. This is because in every country, there are various sports federations and organizing committees. They all link to the "grund norm<sup>30</sup>" in that particular area. For instance, in football, you have the football players' associations. These associations report to the national associations which manage and register the clubs and national leagues. From the national associations you proceed to the regional federations and then the continental ones such as CAF<sup>31</sup>. From the continental federations, the ultimate body is FIFA (*Federation of International Football Associations*). For soccer, the "grund norm" is the FIFA Statute and in this organization of bodies, it is seen to be a pyramid from the players all the way up. International law has to do with affairs

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<sup>29</sup> Bustios Savedra Case, [2007] National Criminal Chamber of Peru's Supreme Court of Justice [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_pe\\_rule100\\_sectionn](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_pe_rule100_sectionn) (accessed on 8/7/2017)

<sup>30</sup> "Grund Norm" is a concept in the Pure Theory of Law, proffered by Hans Kelsen, a jurist and legal philosopher

<sup>31</sup> Confederation Africaine de Football, the governing body of African football founded in 1957 <http://www.cafonline.com/en-us/caf/background.aspx> (accessed on 20 January 2016)

between countries that have subscribed to particular conventions willingly. These are however, private bodies, acting in a trans-national capacity, but within the principles of law. International federations oversee international sport. They have rulebooks and constitutions. They reach resolutions that can have important effects on the careers of players and that have significant economic ripple effect. They are self-directed organizations and are free from the grip of national governments<sup>32</sup>. These bodies claim an immunity to legal proceedings. This immunity is in the sense that; their functions and day to day activities are so time sensitive and highly technical, that any procedural, bureaucratic delay by courts of law would only lead to a knock-on effect whereby sporting events are seldom held on time or are hampered by litigation and the bureaucracies around it; that the events do not proceed smoothly.

Arbitration of sports disputes in Kenya is also an emerging field that is growing in tandem with Kenya's increased participation in world sporting events. The disputes within various federations in Kenya, particularly soccer also highlights the need to put in place a well-oiled independent tribunal to avoid losing good sportsmen to other leagues and teams abroad simply because they feel that the national bodies do not have their best interests at heart. The absurdity in the law that needs to be investigated is the lack of proper mechanisms and regulations in Kenya with regards to sports disputes appeals with regards to CAS. There is need for clear procedural rules on this matter.

The objective of this paper is to discuss the possibility of the improvement in the legal regime that governs sports disputes settlement in Kenya

1. To critically analyze the structures of CAS and the SDT by comparing the procedural functions of the two.
2. To determine which structure is better in terms of arbitration of sports disputes.
3. Ways in which the structures can be improved.
4. Whether the structures satisfy the conditions of impartiality and independence of tribunals.

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<sup>32</sup> Ken Foster, "Is there a Global Sports Law?" (Previously published in: *Entertainment Law*, Vol. 2, No. 1, Lecturer in Law, University of Warwick, Spring 2003, pp. 1-18.)

This paper will also analyze how independent CAS and SDT are based on the independence of each or lack thereof.

The independence of these institutions is anchored on its relations with the federations, athletes and coaches who are all stakeholders in the sports arbitration process. These stakeholders give up some of their civil rights in exchange for the right to participate in the sporting events and inclusion in the system that govern different sports worldwide. They give up some freedoms for example to participate in gambling and the like; in order to be allowed to participate in sporting events. The theory that drives this is the social contract theory.

John Locke<sup>33</sup> and Jean-Jacques Rousseau<sup>34</sup> have argued that we gain civil rights in return for accepting the obligation to respect and defend the rights of others, giving up some freedoms to do so. This social contract is actually a means towards an end to the advantage of the individuals involved and effective only to the extent that they fulfil their part of the agreement. This can be equated to the arbitration agreements sportsmen sign with federations and also before participating in international sports competitions.

#### **Summary of overall results and conclusions;**

With the help of interviews, case law and research, I was able to analyze the current laws governing sports disputes in Kenya and came to the conclusion that indeed, the Sports Disputes Tribunal is not as autonomous as it is meant to be.

What I gathered from the Sports Disputes Tribunal in Kenya especially, is that main aspects such as appointment of arbitrators and assignment of cases is not handled independently of the dispute resolution process, like in CAS, rather most functions are intertwined and we seem to make it up as we go along. The SDT is still a young body, having been established in 2013, but hopefully, some reforms will be achieved.

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<sup>33</sup> John Locke, "Treatise of Government" 1689

<sup>34</sup> Jean Jacques Rosseau "Du Contrat Social" 1762

## CHAPTER TWO:

### THEORETICAL FRAMEWORK AND LITERATURE REVIEW

Autonomy of Sports Disputes Tribunals Vis a Vis national court systems is a path that is not taken often. However, there are various publications and authors on the subject who have dissected the topic from different perspectives. The main perspective identified is to do with the independence and autonomy of sports federations and how the application of some municipal law can actually stunt the growth of sport.

There is the German doctrine of “*Ein Platz Prinzip*” in sports law, which states that in each sport, there can only be one federation per geographical or hierarchical level. Therefore, if an athlete wants to participate in a sport or competition, they have no other choice but to conform to the arbitration clauses in the contracts with that federation. This principle was recognized by the German courts in the Claudia Pechstein<sup>35</sup> case in which the applicant has filed various appeals with CAS, Swiss Federal Courts, and now the German Supreme Court.

The debate about independence of sport and its autonomy rotates around the issue of whether the area shows clear characteristics of a separate collection of laws or whether principles from other established legal spheres merely appear to be finding particular or special application for example torts, intellectual property dealing with athletes’ image rights, and the like. It has proponents like Michael Beloff who argued that sports with their transnational nature, do indeed have a separate set of rules. This is the debate about a separate set of legal principles; *lex sportiva*, or whether rules governing sport are a cocktail of well-grounded legal rules and principles in civil and common law jurisdictions plus laws of the international federations.

This view of *lex sportiva* a principle that supports the separation of powers with regards to the executive and judicial mechanisms in sports has been put forward, for example, by Beloff<sup>36</sup>. The author argues that sports law is international in nature because all the national sports federations worldwide, have constitutions.

*Lex sportiva* for Beloff has three main elements:

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<sup>35</sup> Decision of the Bundesgerichtshof in the case of Ms. Claudia Pechstein v International Skating Union [2016] German Federal Tribunal

<sup>36</sup> Michael J Beloff, “Is There a *Lex Sportiva*?” Oxford: Hart Publishing [1999]

- *It has transnational norms made by the rules and practices of international sporting federations,*
- *It has a unique jurisprudence, with legal principles that are different from those of national courts, and which is declared by the Court of Arbitration for Sport*
- *It is constitutionally autonomous from national law.*

This suggests that Beloff sees *lex sportiva* as an example of global law, without using the term and says that the functionality of these bodies comes from international agreements between the federations which are clearly dependent of their national governments and not from conventions signed by states<sup>37</sup>.

Beloff appears to be setting apart global sports law, as a prescribed private order that makes its own rules, from international law, as set up by treaties between nation states.

Beloff continues by identifying the dissimilarity of this global sports law, *lex sportiva*, as compared to other fields; witnessed by the recent decisions of the Court of Arbitration for Sport. Beloff states that the legal principles that it applies are *sui generis* principles unique only to sports. The insinuation is that these principles are not made by national laws and therefore cannot again be taken for determination in those courts. Additionally, these are not principles that base on international law. This is a feature of global law<sup>38</sup>. The difference between global law and international law then is that international law is that which is created through conventions signed by states. International law includes, customary international law such as the Geneva Conventions, ILO Conventions, and the Lieber Code. International laws are made strictly by states, and not federations or organizations. Global law is not made by states, (in form of treaties and conventions) but is made by international agreements between federations that operate separately from a state. Think of this as two types of transnational law. One is state driven and the other is driven by the bodies within a state.

International federations oversee international sport. They have rulebooks and constitutions. They reach resolutions that can have important effects on the careers of players and that have

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<sup>37</sup> Beloff, "Is There a Lex Sportiva?"

<sup>38</sup> Beloff, "Is There a Lex Sportiva?"

significant economic ripple effect. They are self-directed organizations and are free from the grip of national governments<sup>39</sup>. These bodies claim an immunity to legal proceedings. This immunity is in the sense that; their functions and day to day activities are so time sensitive and highly technical, that any procedural, bureaucratic delay by courts of law would only lead to a knock-on effect whereby sporting events are seldom held on time or are hampered by litigation and the bureaucracies around it; that the events do not proceed smoothly as was about to happen in 1984. This was seen in the case of *Martin v IOC*<sup>40</sup> where the court of first instance ruled that issuing a mandatory injunction so close to the opening day of the 1984 Summer Olympics would inflict substantive administrative and logistical pressure on the Olympics organizations.

Caiger and Gardiner<sup>41</sup> have also written about the proposed regulation and re-regulation of football clubs. They also have written about the distinct *lex sportiva* which enables all this to happen. This *lex sportiva* provides for self-regulation whereby court interference will not be needed or necessary in any capacity. They also argue the case for autonomy in sports and sports bodies.

There is Jean Loup Chappelet<sup>42</sup> who wrote about autonomy of federations and tribunals and his view is that, given the current trend, the autonomy of non-governmental sports organizations has become of high contextual concern in Europe. He argues closely for autonomy in sports given the encouraging jurisprudence from the Courts. He also opines that the days when courts had full control of sports tribunals, are over.

The IAAF expressed this classic autonomous attitude among international sports federations in 1992. When taken to the American courts for excluding Butch Reynolds<sup>43</sup> from

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<sup>39</sup> Ken Foster, "Is there a Global Sports Law?" (Previously published in: *Entertainment Law*, Vol. 2, No. 1, Lecturer in Law, University of Warwick, (Spring 2003) at page 1–18.

<sup>40</sup> *Lisa Martin et al v International Olympic Committee* [1984] United States Court of Appeals, Ninth Circuit 740 F.2d 670

<sup>41</sup> Caiger and Gardiner, *Professional Sport in the EU; Regulation and Re-Regulation*, (2000)

<sup>42</sup> Jean Loup Chappelet, *Autonomy of Sports in Europe*, Council of Europe, (2010)

<sup>43</sup> *Reynolds v International Amateur Athletic Federation*, [1992] United States District Court for the Southern District of Ohio 841, Supp 1444

international athletics, the IAAF claimed that court interference gives them many administrative headaches and that only their rules are the ultimate. The IAAF refused to accept the ruling of the US Arbitration Committee for Olympics (which had put Reynolds in the clear), because he had not complied with the procedures under *IAAF Rule 59*<sup>44</sup>, which gave Reynolds a right to have his case reviewed, of which his punishment should have been put on hold once he stated his intention to appeal. This is, pending the outcome of the hearing. He essentially was not supposed to go to the courts. Reynolds returned to district court in Ohio, suing the IAAF for breach of contract, defamation, tortious meddling with a business association, and denial of contractual due process<sup>45</sup>. The IAAF responded that an American court had no prerogative over the entity and refused to participate in any proceedings.

There is also Michael Mrkonjic<sup>46</sup>, where he states that the self-governance in sport has increasingly come into question due to the commercialization of the sports. Governments are observing the amounts of money being made by federations from events and ticket sales and now more than ever, want to be a part of the administration. He however argues that within sport, the reforms that have taken place allow it to survive without any supervision. The EU is trying to steer sports governance, but already the inter-linking of federations with partners in their various capacities, now puts sports in its own world. This goes hand in hand with the separation of powers theory as well as self-adjudication of disputes. If a body is able to govern itself and make determinations, it then follows that structures for self-adjudication are readily available. The international federations, in being inter-linked, have structures, especially in Europe, with regards to administrative functionality that ensure they do not require government interference.

‘Globalized sport’ on the other hand, has teams which have no national identity like in motorbike racing or The Dakar Rally usually held in South America, where teams take the

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<sup>44</sup> Rule 59, IAAF states that: “Every athlete shall have the right to a hearing before the relevant tribunal of his national federation before any decision on eligibility is reached”

<sup>45</sup> David McArdle “Reflections on the Harry Reynolds Litigation”, Volume 2, No.2, Entertainment Law (2003) at Pages 90-97

<sup>46</sup> Michael Mrkonjic, “Sports Organizations, Autonomy and Good Governance”, Working paper for Action for Good Governance in International Sports Organizations (AGGIS) project

identity of corporate sponsors. Globalized sport has a uniform pattern of sport that diminishes national traditions and local diversity<sup>47</sup>. It is more regulated by the federations within a state, and not necessarily state institutions. Such sports bank on corporate sponsorship rather than state funding. Houlihan *summarizes* the different frameworks of regulation thus:

*“Globalized sport would be typified by minimal regulation or a pattern of self-regulation while under conditions of internationalized sporting federations operating within sovereign states (e.g. European Union) systems of licensing, certification and training would produce a mosaic of distinctive regulatory systems and patterns of good governance”*. Therefore, without this need for state funding or control, sports and their federations should then be granted autonomy to rule itself or themselves competently. This is in areas of governance, procedures and administration. So, the federations are independent of, and run separately from national governments. However, because currencies, and certification as well as registration cannot be in conflict with the laws of the involved member states federations, this is the only instance when states come in to contact with globalized sport.

A globalized sport could be for example the RedBull sponsored<sup>48</sup> sky diving and parachuting competitions, which have no continental federations or structure, but rely on sponsorship, advertisement and interest to keep them alive and hold events around the world. There is the Arab Air Sports Federation as well as the Bahrain Air Sports Federation that run such sky diving competitions. An example of an international sport is football which in Europe, relies on the EU rules on labour, currency and migration and these are strictly adhered to. The continental confederations also provide it with a distinct appearance and pattern of governance.

*law.*

There is the German doctrine of *“Ein Platz Prinzip”* in sports law, which states that in each sport, there can only be one federation per geographical or hierarchical level. Therefore, if

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<sup>47</sup> Houlihan B, ‘Governance, Globalization and Sport’

<sup>48</sup> <https://www.redbull.com/mea-en/whats-an-indoor-skydiving-competition> (accessed on 5 December 2017)

an athlete wants to participate in a sport or competition, they have no other choice but to conform to the arbitration clauses in the contracts with that federation

For these bodies within a state to meet their full potential especially in terms of being free from government interference, need to have separate laws that govern them and the federations in the member states to a particular federation or convention. This keeps the “long arm” of the government away from meddling, negatively interfering in or influencing sports matters.

This is especially essential in the African contexts which features many dictator-type governments and states that have no regard for separation of powers and the independence of institutions away from the government. Some heads of state may actually influence selection of athletes to participate in international competition as well as nepotism when it comes to appointment of the officials to head these sports federations. Such conduct cannot allow sports to flourish especially when the government officials or heads of state seeking to influence such internal decisions have no idea of the sport, the type of preparation that is required as well as what is best for the team or state at that point in time.

One such example is from South Africa in which the Sports Minister, Fikile Mbalula, prohibited the SA Cricket, Rugby, Netball, and Athletics SA federations *to apply for the hosting* of major international sporting events<sup>49</sup>. This goes against the autonomy and independence of these national federations which are also part of international federations; to choose which events they can bid to apply and actually apply to host, as the members of international federations are obliged to do, according to the cycles or intervals prescribed. It is negative interference. The Minister can only prohibit a federation from hosting, after satisfying himself that the country does not have the infrastructure and resources needed, (and this is only after the application stage). Otherwise, prohibiting *applications to host* is ultra vires, *negative and against the tenets of autonomy of sport*.

To further investigate this issue, World Rugby<sup>50</sup>, the governing body of the sport of rugby and all its various formats, provides regulations on the hosting of international matches,

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<sup>49</sup> <http://www.politicsweb.co.za/politics/sport-ministers-prohibition-conflicts-with-interna> (accessed on 20 September 2017)

<sup>50</sup> <https://www.worldrugby.org/?lang=en> (accessed on 20 September 2017)

tournaments and tours, In these regulations<sup>51</sup>, it is clearly stipulated that for the purposes of hosting international tournaments, unions must confirm consent in writing through the Secretaries of those unions before applying to the council. It therefore means that the various unions affiliated to World Rugby are free to host, as well as accepting or rejecting other unions from hosting a Rugby World Cup. The set of laws developed by World Rugby are therefore global laws driven by a body within a state.

Fikile Mbalula in prohibiting these federations from hosting an international event, is an affront to their autonomy and independence. This was negative government interference which sports federations try to avoid by developing a different set of laws and rules of governance away from the municipal laws that govern a state. This independence will then enable the federations function in a conducive environment. This is not to say they should be in their own lacuna; but rather that national governments should let the federations run their own affairs without interference. The Minister is not under any conditions, allowed to prohibit a federation from applying to host a tournament.

Therefore, the norms of sporting federations, systems of dispute settlement and adjudication are so different from those of a national court system, that there is a clear need for distinction and separation of these “powers”. Sports matters and federations in an ideal legal framework, are supposed to be constitutionally autonomous from national law as Beloff enunciates.

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<sup>51</sup> Regulation 16, World Rugby Handbook [https://www.worldrugby.org/wr-resources/World\\_Rugby\\_Handbook/EN/pubData/source/150114%20GF%20IRB%20Handbook%20Master%20English%20Version.pdf](https://www.worldrugby.org/wr-resources/World_Rugby_Handbook/EN/pubData/source/150114%20GF%20IRB%20Handbook%20Master%20English%20Version.pdf) (accessed on 20 September 2017)

## **CHAPTER THREE: IN-DEPTH STUDY OF THE COURT OF ARBITRATION FOR SPORT:**

This chapter will contain an in-depth analysis of the CAS structure. It is imperative that attention is given to the model upon which dispute resolution institutions in sport, are based on.

### **Structure of the Court of Arbitration for Sports:**

A basic question is why CAS was established and what purposes it shall serve. It was the former president of the International Olympic Committee, Juan Antonio Samaranch from Spain, who had the initial idea to establish a separate and independent body that should serve as an international Supreme Court in the area of sport. His idea had been taken up and further developed and there was a common understanding that such Supreme Court for Sport shall have and pursue the following objectives:

1. It shall be easily accessible for athletes and other persons that are active in sports
2. It shall provide for simple procedural rules
3. It shall be available at reasonable costs
4. It shall be established as one single private body that is distinct and independent from national court systems,
5. And its cases shall be handled by specialized arbitrators,
6. So that, over time, a unified "lex sportiva" can emerge<sup>52</sup>.

There is a standard set of principles that organizations such as FIFA (who have a dispute resolution chamber), use when determining whether a certain process is fair and also meets the six Samaranch principles of accessibility, simple procedural rules, reasonable costs, distinct from national court systems, and a highly specialized process.

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<sup>52</sup> Dr. Gurovits Andras, "The Court of Arbitration for Sport" Swiss-Russian Forum Conference, (September 27, 2012), at page 2, accessed at [https://www.nkf.ch/wAssets-nkf2/docs/publikationen/andras\\_a\\_gurovits/The-Court-of-Arbitration-for-Sport-TAS-CAS.pdf](https://www.nkf.ch/wAssets-nkf2/docs/publikationen/andras_a_gurovits/The-Court-of-Arbitration-for-Sport-TAS-CAS.pdf) (on 24 September 2017)

*Article 60, para 3(c) of the FIFA Statutes* provides for independent and duly constituted arbitral tribunals. In a circular<sup>53</sup> released by FIFA, this governing body of football put forward the following objective principles by which to measure the competence of an arbitral panel. It is the criteria to be fulfilled by an arbitration tribunal in order to be classed as independent and duly constituted. It is also known as the minimum procedural standard used.

- Principle of parity when constituting the arbitration tribunal
- Right to an independent and impartial tribunal
- Principle of fair hearing
- Right to contentious proceedings
- Principle of equal treatment

The CAS has tried to effectuate these principles, when resolving matters especially in the case of Barcelona Sporting Club,<sup>54</sup> where all the five principles of the FIFA Circular were adopted. The tribunal in this case stated that the criteria that must be fulfilled for an arbitration tribunal to be classed as independent, and duly constituted, is in the terms of *Article 60 of the FIFA Statutes*. It was an employment related dispute between a club and an association, where the Appellant submitted that FIFA's Dispute Resolution Chamber was not competent to decide the claim. The Appellant wanted the matter heard at the CMRD. However, it was decided that the CMRD would also not have been the competent tribunal for the matter and could not guarantee fair proceedings in addition to lacking jurisdiction.

At the CAS, the entire Olympic movement is represented and involved<sup>55</sup>. This is because, since the Paris Agreement which established CAS, was signed, all Olympic Federations and National Olympic Committees recognized the jurisdiction of CAS, and when this Agreement

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<sup>53</sup> FIFA Circular No. 1010, at Zurich, December 2005 available at:

<https://www.google.com/search?client=safari&rls=en&q=fifa+principles+1010&ie=UTF-8&oe=UTF-8> (accessed on 17 January 2018)

<sup>54</sup> Barcelona Sporting Club v Benito Floro Sanz & Federation Internationale de Football Association [2014] CAS/203/A/3172

<sup>55</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 5 December 2017)

was signed, Presidents of the IOC and all other sports federations worldwide, were there to sign it. So indeed, through this signing and assent, the whole Olympic family was involved.

The main objective of the ICAS is to ensure the proper operation of the CAS, i.e. of the Court of Arbitration for Sport. The ICAS is composed of twenty members<sup>56</sup>, all of which are high-level jurists<sup>57</sup>. These jurists have served in various jurisdictions, Olympic committees, international federations, at a high level, around the world. The current President is Mr. John Coates, who is a Member of the IOC and President of the Australian Olympic Committee since 1990<sup>58</sup>.

Under the CAS Code, it is therefore the ICAS that is set up to safeguard independence of the CAS<sup>59</sup>. ICAS has the mandate to facilitate the resolution of sports related disputes through arbitration and mediation.

CAS maintains a list of 393 arbitrators<sup>60</sup>, and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels. CAS comprises of an Ordinary Arbitration Division and an Appeals Arbitration Division<sup>61</sup>. CAS maintains a list of mediators and provides for the resolution of sports-related disputes through mediation. The mediation procedure is governed by the CAS Mediation Rules<sup>62</sup>. These provisions alone, ensure autonomy of CAS is preserved. It also ensures accessibility by making sure claims made to CAS cannot be barred by any federation or organization.

The ICAS members represent the Summer Olympic International Federations, the Winter Olympic International Federations, the IOC, the National Olympic Committees, and the Athletes<sup>63</sup> in that, members such as Patrick Baumann (Member of IOC and WADA Board Foundation Member), Scott Blackmun (U.S Olympic Committee), Alexandra

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<sup>56</sup> <http://www.tas-cas.org/en/icas/members.html> (accessed 5 December 2017)

<sup>57</sup> Dr Gurovits Andras, "The Court of Arbitration for Sport", 4

<sup>58</sup> <http://www.tas-cas.org/en/icas/members.html> (accessed on 5 December 2017)

<sup>59</sup> Section 2, Code and Statutes of the ICAS and CAS, (1994) available at <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> (accessed 6 December 2017)

<sup>60</sup> <http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html> (accessed 5 December 2017)

<sup>61</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 5 December 2017)

<sup>62</sup> Section 3, Code and Statutes of ICAS and CAS (1994)

<sup>63</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html#c75> (accessed 5 December 2017)

Brillantova(Head of Legal at Russian Olympic Committee)<sup>64</sup>, to name but a few, are currently serving in their respective national Olympic Committees as well as the IOC. In addition, four members are always independent from these bodies so that the best possible mix of representatives can be ensured<sup>65</sup>. The ICAS is the body that not only ensures proper operation and oversight of the CAS, but also adopts and amends the CAS Code which provides the procedural set of rules for all CAS proceedings<sup>66</sup>. This is in line with one of the Samaranch principles that stipulated the procedural and administrative rules made, have to be simple for even the plainest of laymen, to understand. The CAS rules are actually in simple English, easy to understand, are clear and concise. The same can be evidenced on their website at; <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html#c255> and they were drafted in this manner so as to aid athletes, especially those with very little education.

Under Section 8 of the CAS and ICAS Code, ICAS meets when activity of the CAS so requires, but it is at the least, once a year usually. Quorum is at least half its members and decisions are taken by simple majority of votes cast. Voting by proxy is not allowed. Modification of the Code, requires two-thirds of the members. Voting during elections is also a very transparent process, with multiple rounds of voting<sup>67</sup>. It then means that in each round, the person with the least votes is eliminated. Basically, the structure of the voting and quorum system in ICAS facilitates transparency and goodwill. This independence of CAS and ICAS then demonstrates that there is no state oversight, influence, or control over selection of the President and Board members of CAS. This state oversight was previously there, with regard to the initial funding<sup>68</sup> and appointment of members of CAS, done by the IOC President, who had to choose from a number of major groups, including International Federations<sup>69</sup>. The annual Budget was approved by the CAS President, and the CAS Statute could be modified only by the IOC, at the proposal of the IOC Executive Board<sup>70</sup>.

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<sup>64</sup> <http://www.tas-cas.org/en/icas/members.html> (accessed 5 December 2017)

<sup>65</sup> Section 4, Code and Statutes of ICAS and CAS, (1994)

<sup>66</sup> Dr. Gurovits Andras "The Court of Arbitration for Sport", 4

<sup>67</sup> Section 8, Code and Statutes of ICAS and CAS, (1994)

<sup>68</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed 5 December 2107)

<sup>69</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed 5 December 2017)

<sup>70</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed 5 December 2017)

The nomination and voting process is purely internal, with the simple majority rule applying in all cases. It is also a simplified voting system in which the persons with the least votes, are eliminated at each stage. This autonomy over choice of leadership also follows one of the Samaranch principles, that CAS shall be established as one single private body that is distinct and independent from national court systems. Clearly here, the selection process is not court mandated and neither is it dependent on any national court system or parliament.

Four or more members are also appointed by the International Olympic Committee chosen from within or outside its membership<sup>71</sup>. Further, four members are appointed by the twelve members of ICAS after appropriate consultation, with a view to safeguarding interests of the athletes<sup>72</sup>. Four members are appointed by the sixteen members of ICAS, chosen from among personalities independent of the bodies designating the other members of the ICAS<sup>73</sup>. This fosters impartiality and specialization. The impartiality is theoretically stipulated that the appointment of arbitrators is done with a view to safeguarding interests of the athletes<sup>74</sup>. CAS Arbitrators are appointed at the proposal of the IOC, International Federations, and National Olympic Committees<sup>75</sup>. This multiple selection process ensures none of the organizations are marginalized. Even after appointment, the arbitrators are to sign a declaration to the effect that they will be impartial and will carry out their activities with all the independence<sup>76</sup>. The specialization is evidenced in the CAS Arbitration Code, which stipulates that, “ICAS must call upon personalities with legal training, and who possess recognized competence with regard to sport, and good command of at least one CAS working language<sup>77</sup>”

The consultation that is done before appointment, encourages specialized solutions to disputes and problems athletes face because more likely than not, the members chosen

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<sup>71</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed 5 December 2017)

<sup>72</sup> Section 4, Code and Statutes of ICAS and CAS, (1994)

<sup>73</sup> Section 4, Code and Statutes of ICAS and CAS, (1994)

<sup>74</sup> Section 14 of the Code and Statutes of ICAS and CAS (1994)

<sup>75</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> and Section 4 of the Code of Sports Related Arbitration (accessed 5 December 2017)

<sup>76</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> Section 5 of the CAS Arbitration Code and Article R.43 (accessed 5 December 2017)

<sup>77</sup> Section 14, Code of Sports Related Arbitration

retired from that particular field or sport and can therefore offer well-informed opinions and advice.

The impartiality stems from the multiple nomination and selection process. This multiple selection process is evidenced in the CAS Code<sup>78</sup>, which stipulates that IOC, International Federations and National Olympic Committees any identify arbitrators having specific expertise to deal with certain type of disputes and these tie in with specialization as well. Specially to do with the members sourced from outside the membership of the IOC and members chosen away from the bodies designating the members of the CAS. This then means that all the decisions taken at a higher level, elections and choice of arbitrators, are all done with the utmost transparency and impartiality.

The President of ICAS is also President of CAS<sup>79</sup>. And he/she is responsible for the ordinary administrative tasks pertaining to ICAS. The Board of ICAS meets at the invitation of the ICAS President. Quorum of this Board Is three members, the President, Vice President and Secretary General, and the CAS Secretary General also has a role to play in decision making<sup>80</sup>. This also still keeps in line with the tenet of autonomy in that even this Board is independent from any Parliament, or national court system, and the decisions it arrives at, are made with no duress or external influence. They are free to make any decision provided it is in furtherance of the good aims of CAS.

When they are appointed, the duration, or tenure is normally for one four-year cycle or several renewable periods of four years<sup>81</sup>. These nominations take place in the last year of the four-year cycle. They also sign a declaration undertaking to perform their duties in personal capacity, with total objectivity, and independence in compliance with the Code<sup>82</sup>. They are bound by the confidentiality obligation and form in the Code<sup>83</sup>. This particular provision of the CAS Code, was geared and designed to promote impartiality within the

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<sup>78</sup> Section 14, Code of Sports Related Disputes

<sup>79</sup> Section 9, Code and Statutes of ICAS and CAS, (1994)

<sup>80</sup> Section 10, Code and Statutes of ICAS and CAS, (1994)

<sup>81</sup> Section 5, Code and Statutes of ICAS and CAS (1994)

<sup>82</sup> Section 5, Code and Statutes of ICAS and CAS, (1994)

<sup>83</sup> Article R43, Rule 43, Arbitration Code, Procedural Rules of CAS, (1994, revised 2003)

arbitrators. The declaration they sign to perform their duties ethically and fairly; guards the purity of the arbitration process<sup>84</sup>.

The provisions<sup>85</sup> that allow for the challenge when legitimate and justified doubt is cast on his/her independence vis a vis a party to the arbitration; are that challenges as to circumstances that raise legitimate doubts over independence and impartiality are to be brought forward seven days after the grounds for challenge are known. The ICAS Board then determines challenges, which are firstly lodged by the party challenging it, with facts and this is sent to the CAS Court Office. ICAS then rules on the challenge and the arbitrator(s) being challenged may be invited to submit written comments, which are transmitted to the CAS Court Office and the parties and to the other arbitrators if any. The ICAS finally gives brief reasons for the decision and may decide to publish it.

These challenges are subject to a decision by the ICAS or the Board pursuant to *Article S6, Paragraph 4 of the Code*, which provides for resolving challenges to and removals of arbitrators, and performs any other functions identified in the procedural rules. He/she shall pre-emptively disqualify himself or herself when they are the subject of a decision or matter where a law firm they belong to, appears before the Tribunal or a sports related body to which they belong, appears as a party<sup>86</sup>. ICAS determines this process with respect to the procedure for challenge. This is a recusal procedure to stop arbitral proceedings which have elements of doubt because of impartiality<sup>87</sup>. This procedure includes claims of conflicts of interest in which either the institution or either party easily identifies a potential clash of interests and so, can advise a member of the arbitral tribunal, to step down. In such cases, the arbitrator may disclose any reasons that may compromise an impartial hearing, and step down, or offer to step down. One such case is *Finnish Ski Association case*<sup>88</sup> where impartiality of the arbitrator was challenged on the grounds that in 2003, the Arbitrator, Mr. Rauste, had represented an athlete as counsel in a doping case managed by the FIS. It was decided that participation of an arbitrator in a similar case involving similar parties does not

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<sup>84</sup> Section 5 and 18, Code and Statutes of ICAS and CAS; Article R.43

<sup>85</sup> Rule 34, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>86</sup> Section 11, Code and Statutes of ICAS and CAS, (1994)

<sup>87</sup> Rule 33, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>88</sup> Finnish Ski Association and Aino Kaisa Saarinen v Federation Internationale de Ski (FIS)[2010] CAS/A/2090

per se jeopardize in any way, the independence towards parties involved in the case and does not create conflict of interest. This was all after the arbitrator had written explanations to CAS and had even offered to step down.

The ICAS also appoints the CAS arbitrators and it takes care of the financing of the CAS and budget approval<sup>89</sup>. In CAS appointing these arbitrators and mediators, it creates a good oversight role which is important in maintaining the check and balance between the two bodies to ensure CAS is functioning as it should. It further appoints the CAS General Secretary and it supervises the activities of the CAS Court Office<sup>90</sup>. While the ICAS takes care of the operation of the CAS, the arbitration procedures are managed by the ICAS and the CAS arbitrators. It can add or remove these arbitrators from the list<sup>91</sup>. The ICAS can therefore be seen to have a supervisory<sup>92</sup> role over CAS, in as much as CAS is independent from ICAS.

According to the CAS Code there shall always *be at least* 150 CAS arbitrators and 50 CAS mediators<sup>93</sup>. This figure for arbitrators is however currently at 393<sup>94</sup>. Therefore, the ICAS, as previously stated, runs the administrative and financial side of the institution and CAS mainly deals with arbitration, as well as some administrative duties.

This appointment process however as previously stated, is guided by the ICAS, which appoints personalities to the list of CAS arbitrators, with appropriate legal training, recognized competence with regard to sports law and international arbitration and a good knowledge of sports in general and from the IOC and relevant international federations.<sup>95</sup> ICAS then goes ahead to publish such lists of arbitrators and mediators as well as subsequent modifications thereof<sup>96</sup>. In publishing this list, attention is paid to gender and cultural

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<sup>89</sup> Section 6, Code and Statutes of ICAS and CAS, (1994)

<sup>90</sup> Section 6, Code and Statutes of ICAS and CAS, (1994)

<sup>91</sup> Section 6, Code and Statutes of ICAS and CAS, (1994)

<sup>92</sup> Section 2, Code and Statutes of ICAS and CAS; “*the purpose of the ICAS is to facilitate the resolution of sports related disputes through arbitration or mediation and to safeguard independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS*”

<sup>93</sup> Section 13, Code and Statutes of ICAS and CAS, (1994)

<sup>94</sup> [http://www.tas-cas.org/fileadmin/user\\_upload/Liste\\_des\\_arbitres\\_par\\_nationalite\\_2018\\_260118.pdf](http://www.tas-cas.org/fileadmin/user_upload/Liste_des_arbitres_par_nationalite_2018_260118.pdf) (accessed on 5 December 2017)

<sup>95</sup> Section 14, Code and Statutes of ICAS and CAS, available at: <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> (accessed on 7 December 2017)

<sup>96</sup> Section 15, Code and Statutes of ICAS and CAS, (1994)

diversity, in order to serve all the disputants equally and encourage impartiality and fairness.<sup>97</sup> The general rule under this provision is that there shall *not be less than* one hundred fifty arbitrators and fifty mediators. In furtherance of impartiality and fairness, CAS arbitrators and mediators also cannot act as counsel for a party before the CAS, regardless of the circumstances<sup>98</sup>. This is done so, in order to help in the constitution of independent and fair panels so that matters are heard in a fair and expedient manner.

**Section 18 and 19** of the CAS Code tie in the two important virtues of an arbitral proceeding. One of them is the duty of confidentiality where third facts and information relating to the proceedings, may not be shared with anyone else. And the other provision at Section 18 is the already mentioned duty to perform their duties with objectivity, independence and impartiality.

CAS proceedings can be conducted, depending on the parties' decisions, either by one Sole Arbitrator or by a panel of three arbitrators<sup>99</sup>. The Panel is usually composed of one or three arbitrators. If the Arbitration Agreement does not specify a number, then The President of the Division in which the matter is being heard, shall determine the number, taking into account the circumstances of the case<sup>100</sup>. A sole arbitrator may also be appointed when the Claimant so requests and the Respondent does not comply with the costs in advance within the time limits described for a particular case<sup>101</sup>. However, parties are free to agree on the method of appointment of arbitrators and absence of such agreement, parties can choose an arbitrator by mutual agreement within 15 days. If the time lapses, then the President is free to appoint a sole arbitrator<sup>102</sup>. But this is solely in cases where time lapses and parties have failed to agree on an arbitrator. If this does not happen, parties usually have autonomy to appoint their arbitrators.

In respect of procedural matters, the CAS arbitrators are supported by the CAS Court Office. Upon request of the panel, the CAS Court Office can also appoint an ad-hoc clerk as under

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<sup>97</sup> Section 16, Code and Statutes of ICAS and CAS,

<sup>98</sup> Section 18, Code and Statutes of ICAS and CAS,

<sup>99</sup> Rule 40, Arbitration Code, Procedural Rules of CAS, <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (accessed on 24 September 2017)

<sup>100</sup> Rule 40.1, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>101</sup> Rule 40.1 Procedural Rules, Code and Statutes of ICAS and CAS

<sup>102</sup> Rule 40.2 Procedural Rules, Code and Statutes of ICAS and CAS

Section 7 of the CAS and ICAS Code<sup>103</sup>. ICAS usually exercises its functions itself, or through its Board, consisting of the President, two vice Presidents, the President of the Ordinary Arbitration Division, and President of the CAS Appeals Arbitration Division<sup>104</sup>. Quorum of the CAS Board consists of its three members and decisions are taken during meetings or by correspondence by a simple majority of those voting and the President has a casting vote in the event of a tie. Elections at ICAS and are also held by secret ballot and no correspondence allowed<sup>105</sup>. This voting process is independent from any external influence and is very transparent to ensure only the athletes' best interests are safeguarded and to ensure members of tribunal panels are always impartial.

Since it had been established, the CAS organization has significantly grown, and the CAS has now a much larger size and is presently composed of 393 arbitrators representing 78 countries as well as 66 mediators. The CAS Court Office is run by the CAS Secretary General who currently works together with 8 legal counsel who take care of the administrative side of the CAS proceedings<sup>106</sup>.

The formation of CAS meant that it would be the dedicated expert skilled in settling global differences of a sports related nature and offering a flexible, efficient and thorough procedure. It was also formed very independently of any national or European courts and government. Only the IOC<sup>107</sup> bore the costs of operations, and had a small supervisory role, which was withdrawn formally with the Paris Agreement of June 1994<sup>108</sup>; this was because of the 1992 case in which a horse rider, Elmer Gundel<sup>109</sup> lodged an appeal for arbitration with CAS challenging the FEI<sup>110</sup> at the time. It sought to separate the administrative function of CAS from the judicial function. CAS found partially in favour of the athlete but imposed

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<sup>103</sup> Dr. Gurovits Andras "The Court of Arbitration for Sport", 4

<sup>104</sup> Section 7, Code and Statutes of ICAS and CAS, (1994)

<sup>105</sup> Section 8.1 Code and Statutes of ICAS and CAS (1994)

<sup>106</sup> Dr, Gurovits Andras, "The Court of Arbitration for Sport", 5

<sup>107</sup> <https://www.olympic.org/the-ioc> (accessed on 21 January 2017) The International Olympic Committee is a non-profit independent, international organization that was created on 23 June 1894 by Pierre de Coubertin, with the first games of the modern era held in Athens, Greece in April 1896.

<sup>108</sup> <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 6 February 2017)

<sup>109</sup> CAS 92/63 G. v/ FEI in Digest of CAS Awards 1986-1998

<sup>110</sup> Federation Equestre Internationale (FEI) [www.fei.org](http://www.fei.org)

a fine. He then filed a public law appeal with the Swiss Federal Tribunal where he disputed the validity of the award, which he claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration court<sup>111</sup>. The CAS was soon granted full independence from the ICAS after this.

CAS constitutes panels whose mandate is to resolve disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules of the institution<sup>112</sup>. For such a purpose, CAS provides the necessary infrastructure, effects constitution of the Panels and conducts proceedings insofar as statutes and regulations of the sports bodies or that specific agreement provides. They also have a mandate of applying mediation where possible<sup>113</sup>. This ensures that the earlier stated *FIFA Circular 1010* principle of right to contentious proceedings, and principle of fair hearing is applied by the CAS. It is very important for an institution of such magnitude, to pay due attention to its relevant rules and procedures, to avoid procedural impropriety and also to make sure that justice is not just done but is seen to be done.

Such specialized functions that paid attention to due regard and procedural propriety needed, is like at the Olympics, to this extent, CAS had an ad-hoc division at the Rio 2016 Olympic Games<sup>114</sup>. The *Arbitration Procedural Rules of CAS* provided for such manner of expedient hearing under its *special provisions, part B*.<sup>115</sup> The tribunal consisted of twelve qualified and specialist arbitrators whose role was to hear cases during the games as efficiently and expediently as they could. Athletes would then be notified of their fate, a maximum of 24 hours from the filing of any matter. They were using CAS arbitration rules and procedure for the Olympic Games and complied with the fundamental principles of procedural fairness and due process. This was of course, sanctioned<sup>116</sup> by the IOC and IAAF<sup>117</sup>. Two such cases

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<sup>111</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed on 26 July 2017)

<sup>112</sup> Rule 27, Arbitration Code, Procedural Rules of CAS, (1994, revised 2003)

<sup>113</sup> Section 12, Code and Statutes of ICAS and CAS, (1994)

<sup>114</sup> “Preparations for the Court of Arbitration for Sport Ad Hoc Division at the Rio 2016 Games” Media Release of December 7, 2015

<sup>115</sup> Rule 44.4, CAS Arbitration Code Procedural Rules (1994)

<sup>116</sup> <http://www.lawinsport.com/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games> (accessed on 6 February 2016)

<sup>117</sup> The body governing track and field athletic sport, the International Association of Athletic Federations <https://www.iaaf.org/home> (accessed on 6 February 2017)

were the Behdad Salimi<sup>118</sup> case on application of weightlifting rules and the Aurelie Muller<sup>119</sup> case where she was adjudged to have gained an unfair advantage in the open water race and was subsequently disqualified from the competition.

Appeals to the awards rendered are granted only in specific conditions<sup>120</sup>. These reasons are that (i) the panel was constituted in an irregular way (for instance if it was not impartial<sup>121</sup>), (ii) the arbitration tribunal wrongfully accepted its jurisdiction (for instance if there was no valid arbitration agreement), also, when parties dispute the jurisdiction of a tribunal such as in the case of *WADA and UCI v Alejandro Valverde*<sup>122</sup> where the parties questioned jurisdiction of CAS in the matter and the interpretation of the UCI Arbitration clause from one parties' understanding. CAS ruled in the preliminary award, to have had jurisdiction over the matter.

(iii) the arbitration tribunal decided on points which were not submitted or disputed or disregarded points that were the subject matter of the dispute,<sup>123</sup>

(iv) the right to be heard was violated<sup>124</sup> or

(v) the award is incompatible with public policy<sup>125</sup>.

It is important to know that this list is complete and there are no other grounds based on which a CAS award can be challenged before the Federal Court<sup>126</sup>.

This means, in particular, that a CAS award cannot be challenged on the merits of the case. If a party that loses a case is of the opinion that the decision is not accurate it has practically

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<sup>118</sup> Behdad Salimi and Nociri v International Weightlifting Federation [2016] available at; <http://www.lawinsport.com/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games> (accessed on 8 February 2017)

<sup>119</sup> Aurelie Muller v International Swimming Federation [2016], available at; <http://www.lawinsport.com/features/item/a-summary-of-cas-ad-hoc-division-at-the-rio-olympic-games> (accessed on 8 February 2017) and [www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_English\\_Muller](http://www.tas-cas.org/fileadmin/user_upload/Media_Release_English_Muller)

<sup>120</sup> Rule 47 and 48, Arbitration Code, Procedural Rules of CAS, (1994) <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (accessed on 24 September 2017)

<sup>121</sup> Rule 55, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>122</sup> World Anti Doping Agency and Union Cycliste Internationale v Alejandro Valverde & Real Federacion Espanola de Ciclismo [2008] Preliminary Award CAS/ 2007/A/1396

<sup>123</sup> Rule 55, Arbitration Code, Procedural Rules of CAS

<sup>124</sup> Rule 57, Arbitration Code, Procedural Rules of CAS

<sup>125</sup> Rule 59, Arbitration Code, Procedural Rules of CAS.

<sup>126</sup> Dr. Gurovits Andras, "The Court of Arbitration for Sport",<sup>6</sup>

no means to challenge the decision, on the merits, but rather it would have to be challenged on grounds of unfairness and procedural impropriety unless, of course, it is able to prove that any of the foregoing reasons is given.

Arbitration proceedings before the CAS leave the parties the free choice of their arbitrator(s) from a list of 393 persons designated for their recognized competence regarding sports law<sup>127</sup>. This ensures that matters are handled by only the highly qualified members<sup>128</sup> of CAS and that technical disputes taken to CAS, have very sound technical solutions and produce good jurisprudence. These persons are designated by the ICAS and are included on the list of CAS arbitrators. The specialized nature of the CAS panels is what makes it a very attractive place to solve disputes, with sound solutions, and in an expeditious manner.

The arbitrators must be independent. They cannot be linked in any way to the parties nor have been previously involved in the dispute<sup>129</sup>. This is true specially to do with *Rule 33 of the CAS Arbitration Procedural Rules* stated earlier where arbitrators are urged to be independent of the parties and must immediately disclose any circumstances that may compromise this. This principle is what makes CAS the model body for resolution of sports disputes.

This impartiality is highly regarded and upheld by CAS and is in line with the Samaranch principle that these institutions run with the requisite autonomy and independence; which is geared towards sporting justice. It is a positive step that CAS took by making it a must for the arbitrators to be independent with no hint of conflict of interest. It then means that most of the awards tender good jurisprudence and cannot be challenged in courts of law. It is therefore in line with] the guiding principle of arbitration and this makes it a healthy process. A flipside to this could be that even with the large pool of arbitrators and mediators to choose

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<sup>127</sup> Section 13 to 19 CAS Arbitration Code (1994)

<sup>128</sup> Section 14 of the ICAS and CAS Statutes provides that expertise, experience and knowledge of sport in general is a prerequisite for appointment.

<sup>129</sup> Court of Arbitration for Sport; Guide to Arbitration  
<http://sportrecht.org/cms/upload/10verband/CASguideArbitration.pdf> (accessed on 24 September 2017)

from, there is a risk that very few arbitrators, actually get to handle arbitrations. This is because parties are usually handed a list of arbitrators to choose from, when appointing arbitrators<sup>130</sup>, (before the President makes his choice) and a situation could arise where some get considerably more work or are selected more than others. In addition, they must be having a sufficient degree of availability in order to perform their tasks. Those who are rarely at the headquarters in Switzerland, or are swamped with other engagements, may not also get to handle many arbitral proceedings.

#### Seat of arbitration<sup>131</sup>

The seat of the arbitration is Lausanne (Switzerland), where the CAS places its infrastructure at the disposal of the parties. However, under particular circumstances, the hearings may be held elsewhere<sup>132</sup>.

#### Arbitration language<sup>133</sup>

The arbitration is carried out in French or English. If the parties cannot decide between these two languages, the President of the Panel takes this decision. The parties may also choose another language by common accord. Since the choice of this other language requires the agreement of the Panel, it is recommended to bear this in mind when choosing the arbitrators and to inform the CAS as soon as the proceedings are initiated.

The use of another language may give rise to additional translation costs which may be payable by the parties<sup>134</sup>.

One contentious bone that has been a subject of intense debate is the perceived violation of the Samaranch principle that this procedure ought to be carried out at a reasonable cost. The costs at CAS are fairly high, and this is obviously subjective and depends on the person or the case. For most Kenyan athletes, the fee of one thousand Swiss Francs to be paid upfront

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<sup>130</sup> Rule 40.2 Arbitration Code, Procedural Rules of CAS (1994)

<sup>131</sup> Rule 28, Arbitration Code, Procedural Rules of CAS, (1994)

<sup>132</sup> Court of Arbitration for Sport; Guide to Arbitration

<http://sportrecht.org/cms/upload/10verband/CASguideArbitration.pdf> (accessed on 24 September 2017)

<sup>133</sup> Rule 29, Arbitration Code, Procedural Rules of CAS,

<sup>134</sup> Court of Arbitration for Sport; Guide to Arbitration

<http://sportrecht.org/cms/upload/10verband/CASguideArbitration.pdf> (accessed on 24 September 2017)

for just the application to be filed<sup>135</sup>(filing fees), is out of their reach. It is mostly federations and sports clubs as well as personalities with deep pockets, who can readily and easily foot this bill alongside the lawyers' costs, travel and accommodation. It then means that the high fees alone, especially in the African context, locks some athletes out and this then leads to a denial of access to justice, and only the wealthy can pay. One such example is the case whereby within the *Swiss Football League*<sup>136</sup>, one of the earliest CAS cases where, the club and league were asked to pay an advance of CHF 20,000; these are very prohibitive fees for some athletes and may lead to denial of justice.

The administrative costs are fixed by CAS pursuant to the Code. CAS has obviously, full discretion in prescribing fees when a cost is unclear, and this also depends on the particular case before the court. The base fee is CHF 2,000 being administrative fees, and this is for the smallest claim, which is from 0 CHF up to CHF 50,000<sup>137</sup>. It has been said that arbitration is a cheaper and faster alternative to litigation, but in practice, this may not be the case.

However, the ICAS, pursuant to the Code<sup>138</sup>, may create a legal aid fund to facilitate access to CAS Arbitration for individuals without sufficient financial means and it may also as a body, create CAS legal aid guidelines for the operation of this fund. The application process, proof of being unable to pay, as well as bureaucratic delays may hinder this process. Under the Legal Aid Rules<sup>139</sup>, it is at the discretion of ICAS to decide. Also, there is a requirement that one files the application form along with tax returns, contract of employment, statement of salary, lease. It is granted based on proof that the persons' income and assets are not sufficient enough to allow them cover the cost of proceedings, without drawing on that part of his assets necessary to support him/her and their family<sup>140</sup>.

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<sup>135</sup> Court Office Fee, Schedule of Arbitration costs, available at: <http://www.tas-cas.org/en/arbitration/arbitration-costs.html> (accessed on 7 December 2017)

<sup>136</sup> Gabrielle Kaufmann-Kohler "The Procedure before the Court of Arbitration for Sport" (January 2007) Newsletter by Schellenberg Wittmer – Attorneys-at-law [www.swlegal.ch](http://www.swlegal.ch)

<sup>137</sup> Rule 64, Arbitration Code, Procedural Rules of CAS, (1994)

<sup>138</sup> Section 6 (IX), Code and Statutes of ICAS and CAS,

<sup>139</sup> Article 9, CAS Legal Aid Rules available at: <http://www.tas-cas.org/en/arbitration/legal-aid.html> (accessed on 7 December 2017)

<sup>140</sup> Article 5, CAS Legal Aid Rules, (2017)

The types of CAS procedures are the ordinary procedure under the Ordinary Arbitration division<sup>141</sup>, which is also referred to as a request for arbitration, the party submitting a matter under CAS rules, must file a request<sup>142</sup> with the CAS Court Office containing a statement of facts, the claims, reliefs sought, among other supporting documents such as a copy of the contract with the arbitration clause. The court office fees is paid as stipulated in Article R64.1 and the initiation of the process is started by CAS. This included receiving a statement of defence from the respondent, formation of the panel and deciding the number of arbitrators.

There is also the appeals procedure under the Appeals Arbitration Division<sup>143</sup>. Under the CAS Procedural Rules, an appeal against the decision of a federation, or association may be filed with CAS if the statutes or regulations of the said body so provide, or the Appellant has exhausted all legal remedies prior to the appeal and in accordance with the statutes of that body<sup>144</sup>. The statement of appeal is then filed<sup>145</sup>, and thereafter, a standard time limit for the appeal to commence then starts, this is usually twenty-one days to allow for appointment of the panel of three arbitrators unless parties have agreed to a sole arbitrator<sup>146</sup>. Another important aspect with appeals, is the Appeal Brief which is a document stating the facts and legal arguments giving rise to the appeal, together with exhibits and other specifications<sup>147</sup> that the party intends to rely on.

The subject matter of an ordinary procedure can be any commercial matter that could, as a principle, also be brought to any other arbitration court, but is being brought to the CAS as it is somehow related to sports. On the other hand, the subject matter of an appeal procedure is a challenge of a decision rendered by a sports federation if the procedural rules of the federation provide that the CAS shall be the competent body to hear the case.

Such arbitration proceedings typically relate to disciplinary matters and doping cases. We can say that today all international sports governing bodies that are part of the Olympic

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<sup>141</sup> Rule 38, Arbitration Code, Procedural Rules of CAS, (1994) <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (accessed on 24 September 2017)

<sup>142</sup> Rule 38, Procedural Rules, Code of ICAS and CAS

<sup>143</sup> Section 20, Code and Statutes of ICAS and CAS

<sup>144</sup> Rule 47, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>145</sup> Rule 48, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>146</sup> Rule 50, Procedural Rules, Code and Statutes of ICAS and CAS

<sup>147</sup> Rule 51, Procedural Rules, Code and Statutes of ICAS and CAS

movement - and many other federations too - foresee that the CAS shall be competent<sup>148</sup>. This is because they all subscribe to the jurisdiction of CAS especially with the formation of the Ad Hoc divisions of CAS during the Olympic Games<sup>149</sup>. Even the UEFA (*Union of European Football Associations*) requested that CAS form an ad-hoc division for its soccer championships in 2000<sup>150</sup> and was repeated for the European Championships held in Portugal (2004) and in Switzerland/Austria (2008) The success of these ad hoc divisions has contributed to the success CAS enjoys. It is viewed as a competent body.

Arbitration proceedings submitted to CAS are assigned by the Court Office to the appropriate division. In the event that circumstances change to do with subject matter, statement and nature of claim, and a matter must be assigned to another division, the CAS court office in consultation with the panel, will re-assign. This re-assignment does not affect the constitution of a panel nor the validity of proceedings and decisions prior to such appointment<sup>151</sup>. It also ensures that the relevant division, actually has the capacity and jurisdiction to handle a certain matter till its logical and fair conclusion. The CAS Mediation system also operates pursuant to CAS Mediation Rules<sup>152</sup>. This keeps in line with the Samaranch principle that the process must be just, and expedient in order for justice to be delivered to all parties. This is because appointment of a mediator is also done by ICAS<sup>153</sup> and strict timetables adhered to in this dispute resolution mechanism<sup>154</sup>. Under these proceedings, each party is to fully cooperate with the mediator and guarantee him/her freedom to perform the mandate to advance the mediation as expeditiously as possible<sup>155</sup>. Mediation is an alternative to arbitration, for some. This is due to the fact that it is also marginally cheaper, the final costs of the mediation including administrative costs, are usually CHF 1,000.<sup>156</sup> And both parties contribute towards the CAS expenses.

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<sup>148</sup> Dr. Gurovits Andras, "The Court of Arbitration for Sport", at page 7

<sup>149</sup> Article 74, Olympic Charter states: "*any dispute arising on the occasion of or in connection with the Olympic Games shall be submitted exclusively to the CAS in accordance with the Code of Sports Related Arbitration*"

<sup>150</sup> <http://ipreff.ru/the-decentralised-cas-offices-and-the-ad-hoc-divisions.html> (accessed 5 December 2017)

<sup>151</sup> Section 20 Code and Statutes of ICAS and CAS

<sup>152</sup> Established pursuant to Article Section 2 and Section 6 of the Code and Statutes of ICAS and CAS

<sup>153</sup> Article 5 and 6, CAS Mediation Rules

<sup>154</sup> Article 8, CAS Mediation Rules

<sup>155</sup> Article 8, CAS Mediation Rules.

<sup>156</sup> Article 14, CAS Mediation Rules

Parties are also free to choose whether they want to mediate or arbitrate.

In order to minimize litigation within the world of sports, the CAS also provides the option to go for mediation instead - or before - arbitration<sup>157</sup>, and it further offers the possibility to obtain a legal opinion in respect of a particular legal problem and offers for that purpose the so-called consultation procedure. This is also recognized as a “settlement”, and it is a non-binding document drawn by the mediator after negotiation or settlement of the dispute<sup>158</sup>.

Under Swiss law<sup>159</sup> it is widely recognized that sports federations enjoy a high degree of autonomy. This autonomy is seen especially in the treatment of sports arbitrations which are defined as “atypical” and other arbitrations which are referred to as “typical<sup>160</sup>” (athletes’ inability to choose whether to consent, or not, to arbitration). Sports arbitration clauses are more mandatory than other standard arbitration clauses. The peculiarity of sports arbitration extends to the approach towards non-signatories to an arbitration clause, which would normally raise the question of jurisdiction. In sports arbitration, it is a question of procedural standing<sup>161</sup>. This was well illustrated in the *Waite and Kennedy*<sup>162</sup> case where it was also decided that, “*where the athlete has no other choice but to adhere to the arbitration clause in the federation rules, it makes no difference from the point of freedom of contract, whether the federation adopted the arbitration clause on its own initiative or if such adoption was prompted by legislation of the state where the federation has its seat.*”

This autonomy gives the federations, in particular, the right to (i) organize themselves in a manner the members deem appropriate and (ii) to administer the law and administer justice within the federation. This autonomy is far reaching and may be one important reason for many international sports federations to choose a domicile in Switzerland<sup>163</sup>. Furthermore,

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<sup>157</sup> Article 1, CAS Mediation Rules

<sup>158</sup> Article 12, CAS Mediation Rules

<sup>159</sup> Articles 3,7,25-27, ‘Swiss Federal Code on Private International Law’, (December 18,1987) <https://www.rwi.uzh.ch/dam/jcr:00000000-14c0-11a6-0000-0000115fcc32/PILA.pdf> (accessed on 24 September 2017)

<sup>160</sup> Article 190(2) (a) Swiss PILA, and Article 186(1)

<sup>161</sup> Dr. Nathalie Voser, “Swiss Supreme Court on consent in sports arbitration and a non-signatory’s standing to bring a claim before the CAS” (2012), Archives

<sup>162</sup> *Waite and Kennedy v Germany* [1999] ECHR Grand Chamber No. 26083/94 at page 59

<sup>163</sup> Dr. Gurovits Andras, “The Court of Arbitration for Sport”, at page 10

under the CAS Arbitration Code, it is made painfully clear that the statutes and procedural rules by which they operate, came into force by the decision of the ICAS, and taken by a two thirds majority,<sup>164</sup> may only be amended by ICAS pursuant to *Article S8* of the Arbitration Code. This is a manifestation of the autonomy of sport and the independence CAS enjoys.

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<sup>164</sup> Section 26, Code and Statutes of ICAS and CAS,

## CHAPTER FOUR:

An in-depth analysis of the Sports Disputes Tribunal in Kenya:

This chapter will have a very focused look at the Sports Disputes Tribunal of Kenya. This being a very young and new Tribunal, this chapter will analyze the structure and intended workings and system of this Tribunal in Kenya, once again in accordance with the Samaranch principles, which are the following;

1. It shall be easily accessible for athletes and other persons that are active in sports
2. It shall provide for simple procedural rules
3. It shall be available at reasonable costs
4. It shall be established as one single private body that is distinct and independent from national court systems,
5. And its cases shall be handled by specialized arbitrators,
6. So that, over time, a unified "lex sportiva" can emerge<sup>165</sup>. The author of the mentioned publication stated that one of the objectives of CAS is to develop a jurisprudence that can be used by all actors of world sport, therefore encouraging the harmonization of judicial rules and principles applied within the sports world. The modern nature of the sport also insists that sports law be an international law concern rather than domestic law of a national jurisdiction, this is because sport at the highest level is an international concern, and developing international jurisprudence is vital<sup>166</sup>. The development of a sports specific jurisprudence, and legal rules that apply only to sport, is what is known as lex sportiva.

### **A short history on the Kenyan sports regime;**

The SDT was very vital in the Kenyan context, in that we already had the Kenya National Sports Council and the Kenyan Olympic Association. There was an obvious need for a body that would handle disputes related to sports, which was very unprecedented especially in East Africa. Historically the framework and organization of sports was in form of sports

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<sup>165</sup> Mathieu Reeb, "Court of Arbitration for Sport: History and Operation" (2002) at page 2, Digest of CAS Awards

<sup>166</sup> Darren Kane, "Twenty years on: An evaluation of the Court of Arbitration for Sport" (2003) at page 11, Melbourne Journal of International Law [Vol.4]

clubs instituted by administrators, settlers, missionaries and teachers<sup>167</sup>. The 1920s then saw the emergence of umbrella organizations in order to be in line with international federations and to participate. This began with the Kenya Amateur Athletic Association, the Commonwealth Games Association (1952) and then the Kenyan Olympic Association (1954)<sup>168</sup>. In 1955, the two bodies then merged as the Kenya Olympic Association. At grassroots level, colonial officers were placed in charge of developing sport at the inter-location, divisional, district and provincial levels and finally, with independence, the system was abandoned due to economic inequalities between the areas<sup>169</sup>.

The Kenya National Sports Council was established in 1966 following the post-independence policy on community development and social services where the Ministry of Labour and Social Services would coordinate all forms of amateur sport in the country<sup>170</sup>. It then established the National Sports Council pursuant to the Societies Act (Cap 108) Its role was to advise government and encourage national sport<sup>171</sup>. After the 1987 All-Africa Games, The President Moi then announced a Department of Sports which was to implement a coherent and coordinated policy for sports<sup>172</sup>. And it was established within the Ministry of Culture and Social Services<sup>173</sup> to give financial, technical and personnel assistance to organizations that led to more infrastructure such as the Moi International Sports Centre and Nyayo Sports Center<sup>174</sup>. Sports was then placed in the realm of education as an institutional structure, especially at the higher education level<sup>175</sup>.

The turn of the millennium then saw further developments in terms of the Ministry name and functions, it is now the Ministry of Sports, Culture and the Arts. Pursuant to this, the Sports Act of 2013 was promulgated and under it, we have the Sports Disputes Tribunal established under the Act, *at Section 55*. At its formation, the Cabinet Secretary, Hassan Wario stated that it was meant to put an end to members of the sports fraternity laying their

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<sup>167</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi: A comparative analysis" at page 4

<sup>168</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi", 5

<sup>169</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi", 6

<sup>170</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi", 7

<sup>171</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi", 9

<sup>172</sup> Report by the Committee on the Establishment of the Department of Sports (1987) GPO, Nairobi

<sup>173</sup> Ministry of Culture and Social Services, (1987) Sports Department Estimates, GPO, Nairobi.

<sup>174</sup> Dr. J.S Nteere, "The Structure and Organization of Sport in Kenya and Malawi", 10

<sup>175</sup> Scriven F.B, "Sports Facilities for Schools in Developing countries", (1973), UNESCO, Paris.

dirty linen in courts of law, yet these cases can easily be dealt with by the federations or with help of a tribunal<sup>176</sup>. Prior to the formation of this tribunal, sports disputes would find their way to courts of law, yet the sports federations prohibit any sports disputes from being handled by the courts. It therefore solved a lacuna that previously existed with regard to sports arbitration in Kenya.

The JSC which oversaw the process, is free to appoint more members to the Tribunal<sup>177</sup>.

### **Jurisdiction of the SDT:**

This tribunal, was very well intentioned at formation, but however, the legislature failed to give it teeth with which to bite. From the Sports Act, the tribunal lacks full jurisdiction. *Section 58* provides that; “*the tribunal shall have jurisdiction to determine appeals against decisions made by national sports organizations or umbrella sports organizations, whose rules allow for appeals to be made to the tribunal including appeals against disciplinary decisions and not being selected for the Kenyan team. The Tribunal can also hear other sports related matters which parties refer to it and which it agrees to hear*”

The provisions on jurisdiction pose a problem because the tribunal will only derive jurisdiction from sports organizations rather than from statute and this is because by allowing organizations to decide whether to be subject to jurisdiction of the tribunal, the organizations can actually legally circumvent and avoid jurisdiction of the tribunal<sup>178</sup>. Therefore, if all Kenyan federations did not recognize jurisdiction of the tribunal, then it would be rendered almost useless<sup>179</sup>. The jurisdiction of the tribunal ought not to be left upon the parties to agree, this original jurisdiction should be clear and apparent from the statute<sup>180</sup>. The other shortcoming is that it is not exactly clear which remedies the tribunal can give after hearing a dispute. Statutes which establish tribunals normally at least provide for specific remedies such as damages, injunctions, quashing of orders of the various federations etc. and is

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<sup>176</sup> <https://www.nation.co.ke/sports/athletics/Wario-constitutes-seven-member-sports-dispute-tribunal/1100-2307200-h0me60/index.html> Daily Nation newspaper article, May 2014 after formation of this Tribunal (accessed 5 January 2018)

<sup>177</sup> <https://www.nation.co.ke/sports/athletics/Wario-constitutes-seven-member-sports-dispute-tribunal/1100-2307200-h0me60/index.html> (accessed 5 January 2018)

<sup>178</sup> Paul Nyaosi, “The Sports Tribunal: Hollow Victory for Sports in Kenya”, November 17 2016

<sup>179</sup> Paul Nyaosi, “The Sports Tribunal: Hollow Victory for Sports in Kenya”

<sup>180</sup> Paul Nyaosi, “The Sports Tribunal: Hollow Victory for Sports in Kenya”

mentioned nowhere in the Sports Act of Kenya<sup>181</sup>. From *Section 55 of the Sports Act* which establishes the tribunal, all the way to *Section 61*, there is no mention of any remedies. Whereas this is the case in the CAS statutes that provide for provisional, conservatory measures and preliminary reliefs<sup>182</sup>.

### **Structure and Principles of the SDT:**

With regards to the first principle on accessibility, the SDT in Kenya is actually very accessible. Matters from the national sporting organizations are presented before the Tribunal at the appellate stage. There are no exorbitant fees charged for filing<sup>183</sup>, and there is also legal aid and pro bono counsel as requested by athletes and decided by the Tribunal members<sup>184</sup>. It is very easy to have a claim filed and proceedings instituted against a body, persons, or group of people.

The main jurisdiction of the tribunal as encapsulated by the Sports Act, will be to hear appeals from the decisions of the Sports Registrar under the Act, including: - a)

Rejection of Applications for registration by sports organizations; b) licensing of, or refusal to license professional sports and professional sportspersons<sup>185</sup>;

c) Arbitration of registration disputes between sports organizations<sup>186</sup>;

d) Cancellation of a certificate of Registration of a sports organization<sup>187</sup>; and

e) Directions in relation to any matter arising out of an inspection report made under *Section 52(4) of the Sports Act*.

The Tribunal also has the jurisdiction to determine appeals by sportsmen and women against disciplinary decisions and omission of selection into national teams made by national sports organizations or umbrella national sports organizations<sup>188</sup>, subject to the condition that the rules and regulations of such national sports organizations or umbrella national sports

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<sup>181</sup> Paul Nyaosi, "The Sports Tribunal: Hollow Victory for Sports in Kenya"

<sup>182</sup> Rule 37 and 46, Code and Statutes of ICAS and CAS (1994)

<sup>183</sup> Interview with Ms. Doreen at the Sports Disputes Tribunal, on 16 January 2018

<sup>184</sup> Interview with Ms. Doreen at the Sports Disputes Tribunal, on 16 January 2018

<sup>185</sup> Section 58 (b) Sports Act of Kenya No. 25 of 2013

<sup>186</sup> Section 58 (a) Sports Act of Kenya No. 25 of 2013

<sup>187</sup> Section 58 (a) Sports Act of Kenya No. 25 of 2013

<sup>188</sup> Section 58 Sports Act of Kenya No. 25 of 2013

organizations specifically permit appeals to be made to the tribunal<sup>189</sup>. This was the thinking behind the establishment of the Tribunal in Kenya, a quick way of resolving sports disputes, and within the federations and national sports bodies. Such an appeal was like in the matter of *Thika Rugby Football Club*<sup>190</sup> in which the club was under a national sports federation. However, a failure to honor a fixture led to the opposing team being awarded a walkover (a walkover in rugby is a 24-0 score line, awarded against the team that fails to show up for a fixture). They consequently appealed this decision by the Kenya Rugby Union, at the SDT, and sought orders to set aside the decision of the Kenya Rugby Union, which the SDT has powers to do.

It further has the original jurisdiction to determine other sports-related disputes, provided that all parties to the disputes agree to refer such disputes to the Tribunal and that the Tribunal agrees to hear the said disputes. In fact, in the case of *Elly Kalekwa, Jimmy Carter Ambajo and 2 Others Vs Nick Mwendwa and 6 Others*<sup>191</sup>, the Sports Disputes Tribunal, in its deliberations and discussions, drew its jurisdiction from *Section 58 of the Sports Act*. In particular *58(b)* which provides that the Tribunal can also determine other sports related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear.

The Tribunal is a judiciary-mandated sports disputes resolution body appointed by the Judicial Service Commission in consultation with the various National Sports Organizations in Kenya. Its members are required to be at least Five, namely the chairperson who must be a person qualified to be appointed as a judge of the High Court of Kenya<sup>192</sup>, at least two lawyers of seven years having more than a mere passing acquaintance with sport and at least two (but no more than six) other persons who have been actively involved in sport for a least

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<sup>189</sup> Shivaji Simon, "Adjudication of Sports Disputes in Kenya", page 2  
[https://www.academia.edu/18633693/ADJUDICATION\\_OF\\_SPORTS\\_DISPUTES\\_IN\\_KENYA](https://www.academia.edu/18633693/ADJUDICATION_OF_SPORTS_DISPUTES_IN_KENYA) (accessed on 24 September 2017)

<sup>190</sup> *Thika Rugby Football Club v Kenya Rugby Union* [ Appeal No. 17 of 2017] Unreported

<sup>191</sup> *Elly Kalekwa and 3 Others v Nick Mwendwa and 6 Others*, Cause No. 1 of 2017 [2017]

<sup>192</sup> Section 55 (2) (a) Sports Act of Kenya, No. 25 of 2013

ten years immediately prior<sup>193</sup> to the appointment<sup>194</sup>. Experience in the sport and experience with legal matters pertaining to the sport, is very important during selection of the tribunal<sup>195</sup>.

The current Chairperson of the Tribunal is on record as stating that challenges will have to be filed at the CAS<sup>196</sup>.

However, this is debatable. As pointed out earlier, the main jurisdiction of the Tribunal is to determine appeals from the decision of the Sports Registrar. It is inconceivable therefore that appeals against decisions relating to the decisions of the Sports Registrar in the matters enumerated above would lie with the CAS, as per the Kenyan laws regulating appeals from the SDT.

The Sports Disputes Tribunal of Kenya does not have a set of Procedural Rules as of 2017<sup>197</sup>. In fact, the Sports Disputes Tribunal Rules of 2016, have been approved and are awaiting gazette at the Attorney General's office<sup>198</sup>. The Chief Justice, may, in consultation with the chairperson of the Tribunal and notice in the Gazette, make rules governing procedure and practice at the tribunal<sup>199</sup>. This illustrates how this tribunal is not very far or fully independent from the influence of the judiciary and national courts especially since it is a court mandated body.

There are however, some draft rules of the SDT<sup>200</sup>, spanning fifty-three pages. These rules provide that arbitral panels are selected by the chairman of the tribunal, and in his absence, the deputy chairperson shall do this selection<sup>201</sup>. A panel cannot have more than three

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<sup>193</sup> Section 55 (b) (ii) Sports Act of Kenya No. 25 of 2013

<sup>194</sup> Shivaji Simon, "Adjudication of Sports Disputes in Kenya" page 2

<sup>195</sup> Section 55 (2) (c) Sports Act of Kenya , No. 25 of 2013

<sup>196</sup> The Chairman of the Sports Disputes Tribunal gave a press interview in which he attempted to explain how the Tribunal was going to operate. Unfortunately, at the time of writing this article, the Chief Justice of Kenya had not yet published the rules and regulations of practice for the Sports Disputes Tribunal. The excerpts of his interview can be found at the YouTube link below.

<https://www.youtube.com/watch?v=85PmalbKlv4>

<sup>197</sup> [www.judiciary.go.ke/portal/page/sports-disputes-tribunal](http://www.judiciary.go.ke/portal/page/sports-disputes-tribunal) Draft Rules on the Judiciary Portal

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[http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/FINAL%20RULES%20OF%20THE%20SPORTS%20DISPUTES%20TRIBUNAL.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/FINAL%20RULES%20OF%20THE%20SPORTS%20DISPUTES%20TRIBUNAL.pdf) (Draft Rules of the Sports Disputes Tribunal)

<sup>199</sup> Section 61, Sports Act of Kenya No. 25 of 2013

<sup>200</sup> Rules of the Sports Disputes Tribunal

[http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/FINAL%20RULES%20OF%20THE%20SPORTS%20DISPUTES%20TRIBUNAL.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/FINAL%20RULES%20OF%20THE%20SPORTS%20DISPUTES%20TRIBUNAL.pdf) (accessed on September 24 2017)

<sup>201</sup> Rule 11, Draft Rules of the Sports Disputes Tribunal of Kenya

members but at the discretions of the chairperson or vice chairperson, can have three, more or fewer members.

The official language is English and applicable law shall be Kenyan law<sup>202</sup>.

Appeals under the draft rules, will be made to the CAS and Review that can be ordered by the Tribunal can only lie to the High Court of Kenya<sup>203</sup>.

The procedures for sports related disputes as well as the hearing are also provided for under the draft rules and they provide for service, as well as the pre-hearing process, the hearing and final determination<sup>204</sup>. These draft rules are, at the moment, simple enough to apply and follow.

It must however be noted that due to the delayed gazettment of the draft procedural rules, especially by the Attorney Generals' office, in some matters the procedure of filing documents, the timelines and way of going about the preliminary matters, at times adopts the format followed by the court, and looks less like an arbitration-style proceeding especially in the wording used. Such as, having mention dates regularly sought; to check compliance with the Tribunal's directions and instructions. One such example is the case of *Maria Chantal Brunlehrer*<sup>205</sup> in which one party applied for orders that the appeal be heard and the previous selection quashed. There was also a Certificate of Urgency on file, and Notice of Appeal. Certificate of Urgency are however allowable, together with Notice of Appeal, as seen in the Draft Rules<sup>206</sup> This is a stark contrast to the standard arbitration procedure where claimants file a statement of claim, and a response from the respondents is filed as well. The Draft Rules instead provide for a pre-hearing conference where directions are taken to bring the matter to a prompt hearing<sup>207</sup>.

Similarly, in another dispute at the SDT, another feature was the enjoining of other "interested parties" to a dispute. This was the case in the matter of Shadrack Maluki and 2

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<sup>202</sup> Rule 22 and 27, Draft Rules of the Sports Disputes Tribunal, Kenya

<sup>203</sup> Rule 29 and 34, Draft Rules of the Sports Disputes Tribunal, Kenya

<sup>204</sup> Rule 35,36,45,46, and 47 of the Sports Disputes Tribunal, Kenya

<sup>205</sup> *Maria Chantal Brunlehrer v Kenya Swimming Federation and the Joint Selection Committee* [ SDT Appeal No. 20 of 2017] Unreported

<sup>206</sup> Section 37, Draft Rules of Procedure for the SDT

<sup>207</sup> Section 46, Draft Rules of Procedure for the SDT

Others<sup>208</sup> suing on behalf of the Kenya Judo Association. The chairperson and members of the tribunal enjoined Geoffrey Mbutu as an interested party, simply because he had a reasonable interest in the outcome of the case.

In terms of procedure, the elements of a court-style procedure then at times makes the system arguably slower and this is not favorable for the athletes who may need a quick, specialized and fair process of dispute resolution.

The process at the SDT as compared to CAS still lacks obvious autonomy in terms of selection of members of the tribunal. This is because the Judicial Service Commission, first of all appoints all members of the tribunal<sup>209</sup>. Secondly, even the deputy chairperson is appointed, with consultation with national sports organizations<sup>210</sup>. Vacancies are only made open when a member resigns by giving notice in writing to the Judicial Service Commission<sup>211</sup>. The Judicial Service Commission also appoints the secretary and such other staff of the Tribunal<sup>212</sup>. As seen in the previous chapters, *lex sportiva* means sports governs itself and develops sports specific jurisprudence in line with international sports federations and rules<sup>213</sup>. Sports are to be kept at arm's length from the influence of national courts. It has a transnational autonomous private order which is to give it autonomy from national legal systems and has its own unique jurisprudence<sup>214</sup>.

The list of arbitrators to choose from is also not a big enough pool as compared to the CAS, and this can affect impartiality as well as the required level of expertise in sports disputes matters. Matters can obviously be handed to different members of the tribunal, and fresh panels constituted, but there is still a danger of lack of independence of arbitrators in some cases.

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<sup>208</sup> Shadrack Maluki, Joan Githua and Another, (suing on behalf of the Kenya Judo Association) v Registrar of Sports and 3 Others (sued for and on behalf of National Olympic Committee) [SDT Appeal No. 38 of 2016] Unreported

<sup>209</sup> Section 55, Sports Act of Kenya No. 25 of 2013

<sup>210</sup> Section 55 (3) Sports Act of Kenya No. 25 of 2013

<sup>211</sup> Section 57 Sports Act of Kenya No. 25 of 2013

<sup>212</sup> Section 60 Sports Act of Kenya No. 25 of 2013

<sup>213</sup> Ken Foster, "Lex sportiva and lex ludica: The Court of Arbitration for Sports' Jurisprudence" (2005) *The Entertainment and Sports Law Journal*, 3 (2)

<sup>214</sup> K. Foster, "Lex Sportiva and Lex ludica", 10

The Kenya Gazette, of September 2014<sup>215</sup>, published a gazette notice for appointments made under the Sports Act of 2013. In exercise of the powers conferred by Section 55 of the Sports Act, the Judicial Service Commission appointed a total of 9 individuals to be the Chairperson, Deputy Chairperson and members of the SDT for a period of 5 years, from 31 March 2014. These individuals are;

1. John Ohaga (Chairperson)
2. Elynah Wanyika Sifuna Shiveka (Deputy Chairperson)
3. Jane Njeri Onyango
4. Ouko Gabriel Ohanya
5. Kimani Nyokabi Mary
6. Ochieng Peter Anyango
7. Gichuru Kiplagat
8. Robert Okumu Asembo
9. Gilbert M.T Otieno

This again, is another argument to support the claim that indeed the SDT is a judicially mandated body, that is not fully autonomous of national courts. The Samaranch principles envisioned the sports adjudication bodies to be totally independent of national court systems, yet already the President of the Supreme Court, and Chairman of the Judicial Service Commission made these appointments. These appointments are made under powers granted to the Judiciary, by the Sports Act<sup>216</sup> which states that the tribunal shall consist of members appointed by the Judicial Service Commission in consultation with the national sports organizations<sup>217</sup>.

It then follows that any review of their conduct, procedural impropriety, recusal and dismissal would be dealt with by the courts rather than dealt with internally by the SDT- one

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<sup>215</sup> The Kenya Gazette Vol. CXVI No. 112, Gazette Notice No. 6454 [19 September 2014 at Nairobi]

<sup>216</sup> Section 55, Sports Act of Kenya, No. 25 of 2013

<sup>217</sup> Section 55, Sports Act of Kenya, No. 25 of 2013

such case is the Richard Omwela case<sup>218</sup> that was referred to the High Court for Judicial Review because conflict of interest of a tribunal member, arose at the SDT. Yet for CAS, such challenges to an appointment of arbitrator, are dealt with internally by the CAS Court Office and ICAS Board instead of approaching national courts<sup>219</sup>. It means that the SDT in Kenya is not fully independent of the national court systems and this presents a problem as to the autonomy of the tribunal. It greatly impacts their ability as to what is to be done and not done in decisions of funding and appointment of even new members to the tribunal.

SDT does not have its own fund and relies on government support and the Sports Fund<sup>220</sup> in order to run its affairs. This then means that they actually have to toe the line with government and avoid upsetting the government lest the funding is cut or budget is halved. It is however still unclear whether this fund is operational and/or is funding the SDT, because there is no mention of the Sports Fund in the provisions establishing the SDT. The Judiciary is the body that funds all tribunals in Kenya, as well as the SDT and establishes a fund for the council of tribunals<sup>221</sup>. So, for now, a reasonable assumption to make is that SDT funding comes from the Judiciary of Kenya.

This is a completely different scenario from CAS which runs all its affairs internally in conjunction with ICAS even with regards to matters of funding and has no reliance on national courts or the judiciary of Switzerland for funding, the ICAS is responsible for financing of CAS, manages funds received and allocated for its operations, approves ICAS Budget and annual accounts of CAS prepared by CAS Court Office<sup>222</sup>.

There is also no committee independent of the SDT under the sports regime that monitors the activities of the SDT the way ICAS does for CAS. For example, to do with appointment of members of the tribunal, appointment, or assessment of the propriety of the decisions of SDT – and general running of affairs. This then leads to a possibility of a scenario where the members of the tribunal have free reign over whatever they do, and complacency and impunity can set in. This is due to the fact that for the SDT, the only system for checks and

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<sup>218</sup> Richard Omwela v The Sports Registrar SDT Appeal No. 23 of 2017

<sup>219</sup> Rule 34, Procedural Rules CAS and ICAS Statutes

<sup>220</sup> Section 12, Sports Act of Kenya No. 25 of 2013

<sup>221</sup> Draft Bill on Tribunals 2015 <http://www.judiciary.go.ke/portal/blog/post/draft-bill-on-tribunals-developed> (accessed 5 January 2018)

<sup>222</sup> Section 6 (5) Code and Statutes of ICAS and CAS

balances is the Judicial Service Commission that establishes membership of the SDT which is not an autonomous and sports specific system, and the Judiciary may also be hard to access or slow to react in some cases, given the attention to processes and the backlog in national courts. In comparison, the ICAS has a check on the members constituting CAS, and steps in swiftly<sup>223</sup> when any complaint is lodged, or parties challenge appointment of an arbitrator. These checks and balances are vital in maintaining procedural propriety.

The current structure is the 9 members, with no clear board or executive and independent committees, so these 9 run all the affairs of SDT to do with appointment and hearing of matters. It is only the tribunal at CAS, and is not split into ordinary, mediation and appeals division like at the CAS<sup>224</sup>. Also, as previously stated, there is no independent body like the ICAS in Kenya that is sports specific and present to provide oversight to the activities of SDT.

Additionally, this small pool of arbitrators to choose from, is not conducive for the specialized handling of some sports arbitral matters including doping. The same tribunal handles matters ranging from the variety of sports played in Kenya, however, some matters require more in depth technical know-how like at CAS which has the Anti-Doping division, and there is a “special list of arbitrators” appointed by the ICAS Board and features arbitrators who are vastly experienced in anti-doping matters<sup>225</sup>. At the SDT, we have no such divisions which have further room for advanced expertise.

One such case which also displayed a general need in technical awareness and expertise is the SDT decision in *Ken Kirui v Africa Zone V Anti-Doping Organization*<sup>226</sup>, it was an appeal to a previous decision by the SDT; where the Tribunal reduced the ban handed to an athlete after banned substances were found in the sample. However, the crux of the matter was in how this substance was ingested by the athlete, and it was found that it was an allergy and he had been taking it for years even though no TUE (Therapeutic Use Exemption) was given. The athlete was not entirely negligent in this use; this specified substance, was

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<sup>223</sup> Section 14, 21, Code and Statutes of CAS and ICAS

<sup>224</sup> Section 20, Code and Statutes of CAS and ICAS

<sup>225</sup> Article 2 and 3, CAS Anti-Doping Division <http://www.tas-cas.org/en/arbitration/anti-doping-division.html> (accessed 5 January 2018)

<sup>226</sup> *Ken Kirui v Africa Zone V Regional Anti-Doping Organization (RADO)* [ Appeal No. 4 RADO of 2016] Unreported

*unintentionally* used and the sanction was reduced to a one-year ban after a review of the case. Under the WADA Code<sup>227</sup>, elimination or reduction of the period of ineligibility for specified substances under specified circumstances, can be granted where; “*to the comfortable satisfaction of the Independent Tribunal, a participant can establish how the specified substance came to enter his/her body, am into his/her possession and that such specified substance was not intended to enhance the performance, or to make use of the performance enhancing substance, the period of ineligibility established shall be replaced (assuming it is the participants' first doping offence) with at a minimum, a reprimand and no period of ineligibility..*” The tribunal then reduced the ban to 1 year. This was because the applicable *RADO Rule 10.2.2* which provides for 2 years of ineligibility; however, there was no intention of the athlete to cheat and therefore the Tribunal began with a reduction to 2 years. The tribunal then decided that the principle of proportionality in line with *Article 10.6.4 on application for multiple grounds of reduction of sanction* requires the panel to assess whether a sanction is appropriate to the violation committed in the case at hand and excessive sanctions are prohibited. The tribunal also agreed with the appellants submissions that this was the athletes’ first doping offence, that he had dutifully complied with the sanction handed to him, and that he suffered a disparity due to the lack of doping awareness and education. The sanction was then reduced to 1 year and 3 months.

This lack of specialization does not encourage the development of thorough sports jurisprudence and *lex sportiva* especially in the Kenyan context. This is evidenced by the lack of a special anti-doping division at the SDT.

This small pool of arbitrators at the tribunal also leads to many cases that can arise, for conflict of interest, apparent or perceived danger of bias, or demands for the recusal of a member of the tribunal from a matter. One such case where conflict of interest arose as an issue is in the *Richard Omwela* case<sup>228</sup>. In this particular case, the petitioner raised an issue that one of the Tribunal members was a sitting member of the National Sports Council for a very long time and therefore potentially had a conflict of interest when determining the

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<sup>227</sup> Article 10.2, WADA Code <https://www.wada-ama.org/sites/default/files/resources/files/wada-redline-2015-wadc-to-2009-wadc-en.pdf> (accessed on 16 January 2018)

<sup>228</sup> *Richard Omwela and 2 Others* (suing on behalf of the Kenya Rugby Union v The Sports Registrar [Appeal No. 23 of 2017] Unreported

dispute. They also averred that she should have withdrawn from being part of the panel that determined the dispute, to ensure credibility in hearing and determining the dispute.

The dispute is still ongoing, and the Sports Registrar instructed the Attorney General's office to file a Judicial Review case at the High Court in this matter. This is once again, lack of total independence and autonomy in relying on the national court systems since the SDT has no mechanisms to handle such matters internally, which can be comparable to the ICAS handling complaints made against CAS Arbitrators, their appointment and removal<sup>229</sup>. The available mechanism however, could be that the Chairperson and Vice Chairperson have the powers under *Section 55 of the Sports Act*, to re-assign cases to other arbitrators, in case matters to do with impartiality and independence of an arbitrator, arise. This also demonstrates again how the SDT is a body operating under the oversight and supervisory powers of national courts, unlike CAS. Appeals to decisions by the SDT, still lie in the High Court.

The SDT should be expanded in terms of the number of mediators and arbitrators in order to resolve the issue of lack of expertise and specialization which is caused by having a very small and limited number of arbitrators to choose from. Currently it means that some athletes and sports bodies have appeared very many times before certain arbitrators and this is not good for impartiality as it encourages familiarity.

Costs; currently, the Tribunal does not have a set schedule for costs in terms of filing claims, in fact, the Tribunal orders such costs and expenses as the Tribunal thinks fit<sup>230</sup>. It also does not prescribe the minimum fees that the arbitrators are to be paid in relation to time spent hearing a matter, transport costs, meals, and the amount in dispute, like is the case at CAS<sup>231</sup> whereby these fees are clearly prescribed in the schedule. For instance, a disputed sum of CHF 2,500,000 will attract a CHF 300 fees for the arbitrator<sup>232</sup>, and the rest of the

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<sup>229</sup> Section 13, Code and Statutes of ICAS and CAS (1994)

<sup>230</sup> Section 30 (a) Draft Rules of Procedure for SDT

<sup>231</sup> CAS Schedule of Arbitration Costs (2017)

<sup>232</sup> <http://www.tas-cas.org/en/arbitration/arbitration-costs.html> (accessed 5 January 2018)

figures are prescribed in an arbitration. Costs on a case by case basis is at the discretion of the tribunal. The tribunal usually convenes after a decision is made in a dispute; to now determine the costs of the arbitration and the party bill of costs. Actually, the party in whose favour the costs have been ordered, or the Tribunal may enforce payment of costs in any Magistrates' Court in Kenya<sup>233</sup>. A further illustration of the reliance the SDT has on national courts, to effect some of its functions, and the partial autonomy it possesses.

One such example is the decision arrived at, in *William Odera Omukowa v Kericho Golf Club and Kenya Golf Union*<sup>234</sup>, where the tribunal stated in its decision that the *Advocates Act (Remuneration and Costs) (Amendment) Order*, and in particular *Schedule 11* of the same Remuneration Order, is used when the tribunal is determining the bills of costs of each party and the taxing of such bills of costs. The tribunal relies on this simple document because at *Schedule 11(3)*, it provides that when taxing the costs, consideration shall be given by the taxing officer to either the value of the subject matter, or where the value of the subject matter cannot be determined, the following criteria shall be used;

- a. The nature and importance of the proceedings
- b. The complexity of the matter and difficulty of the question raised
- c. The amount or value of the subject matter
- d. The time expended by the advocate(s)
- e. The number and importance of the documents prepared or perused without regard to length.

There Is a lower or higher scale pinned or pegged on some matters as determined by the tribunal. The parties' bills of costs are determined on a case by case basis and also in accordance with the stipulations in the Remuneration Order, at the discretion of the Tribunal.

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<sup>233</sup> Section 30 (b) Draft Rules of Procedure for SDT

<sup>234</sup> *William Elijah Odera Omukowa v Kericho Golf Club and Kenya Golf Union* [SDT Appeal No. 31 of 2016] Unreported

## CHAPTER FIVE:

### COMPARISON, RECOMMENDATIONS, AND CONCLUSIONS

The main aims of the sports adjudicatory systems in line with an arbitral process, is to have a cheaper, faster, more expedient, specialized and autonomous process that will produce the optimum result and justice for all the parties involved in such a dispute.

There is a standard set of principles that organizations such as FIFA (who have a dispute resolution chamber), use when determining whether a certain process is fair and also meets the six Samaranch principles of accessibility, simple procedural rules, reasonable costs, distinct from national court systems, and a highly specialized process.

This earlier mentioned circular provides the focal point from which to conduct analysis; *Article 60, para 3(c) of the FIFA Statutes* provides for independent and duly constituted arbitral tribunals. In a circular<sup>235</sup> released by FIFA, this governing body of football put forward the following objective principles by which to measure the competence of an arbitral panel. It is the criteria to be fulfilled by an arbitration tribunal in order to be classed as independent and duly constituted. It is also known as the minimum procedural standard used.

- Principle of parity when constituting the arbitration tribunal
- Right to an independent and impartial tribunal
- Principle of fair hearing
- Right to contentious proceedings
- Principle of equal treatment

1. Principle of parity when constituting the arbitration tribunal; It states that the parties must have equal influence over the appointment of arbitrators. For example, each party can appoint their arbitrator and then those two arbitrators then appoint a third.

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<sup>235</sup> FIFA Circular No. 1010, at Zurich, December 2005 available at: <https://www.google.com/search?client=safari&rls=en&q=fifa+principles+1010&ie=UTF-8&oe=UTF-8> (accessed on 17 January 2018)

This is a procedure that is provided for within the CAS where there is a whole lengthy list from which parties can nominate their choice of arbitrators, with the number now at 393. This is one variation of the appointment process at CAS. At times, the President of CAS either picks a sole arbitrator at his pleasure or picks the President of a particular Tribunal after the parties also nominate their choices<sup>236</sup>. At the SDT in Kenya, it is the same case. Procedurally, within the tribunal, the Chairman and Vice Chairman are the appointing authorities when deciding which arbitrators handle certain matters. Parties have a say, as regards their choice of nominations for arbitrator. Each can choose one arbitrator and the Chairperson of the SDT then appoints the Chairperson of a panel.

2. Right to an independent and impartial tribunal; and to adhere to this, a tribunal must be re-constituted or recused if there are doubts about their independence. The rejection of an arbitrator and replacement must be regulated by agreement, rules of the arbitration or state rules of procedure.

At the CAS, the complaints are made to the ICAS, in line with *Article R.34 of the CAS Code*, which then decides whether to constitute a fresh panel or remove one particular arbitrator, in order to have regular composition pursuant to *Article 190 (2) (a) of the Swiss PILA*. These provisions provide for challenge of appointment or composition of a tribunal and the process by which they are removed. In CAS, independence and impartiality is easy to achieve also especially because of the checks and balances between ICAS and CAS especially with regards to challenge and removal of an arbitrator<sup>237</sup>.

At the SDT, the independence and impartiality of tribunal members can be easily challenged. Firstly, it has only 9 members, that is 9 in the whole country, who hear all the sports matters. These 9 have all worked in previous organizations within the sporting community, and so bias, and conflict of interest can easily arise. Currently, there are no internal mechanisms to handle such complaints, and these are taken to the High Court of Kenya, in case a party wants to appeal an award because the tribunal was not independent and impartial, like in the matter of, *Richard Omwela suing the Sports Registrar*<sup>238</sup>, which is currently at the High

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<sup>236</sup> Rule 40.2 and Rule 40.3 Code and Statutes of ICAS and CAS, Provisions to the Ordinary Arbitration Procedure.

<sup>237</sup> Rule 34, Procedural Rules of ICAS and CAS.

<sup>238</sup> *Richard Omwela and 2 Others (suing on behalf of Kenya Rugby Union) v The Sports Registrar [ SDT Appeal No.23 of 2017] Unreported.*

Court, it is a judicial review challenge to the impartiality of one arbitrator. The only doubt at the SDT is that for arbitrators, their independence and autonomy is also debatable, given the fact that they are established by the Judiciary. The fact that their appointment is not provided for in its Statute, but rather is by the Judicial Service Commission, puts doubts as to whether the body is fully autonomous of Kenyan national courts. CAS however, provides the appointment process and voting process in its Code and this process is clear of any court influence or control. It is purely done by the International federations, IOC, and National Olympic Committees.

3. Principle of fair hearing; whereby parties must be granted the right to speak on all facts, and present all their legal points of view, as well as legal representation.

Here, both SDT and CAS have fairly workable procedures on the hearings, and parties always have a chance to present their cases. Where there is no legal representation due to financial constraints, there are pro bono lawyers provided. CAS even went a step further to establish a legal aid mechanism where athletes can be granted legal aid if they prove and show that participating in the case minus the aid, will negatively impact their livelihood and standards of living. There is a *CAS Legal Aid set of rules*<sup>239</sup>, and the *Legal Aid Application Form*. This is all established in accordance with *Article S6.9 of the Code of Sports Related Arbitration*. The ICAS Board decides on these requests for legal aid from the legal aid fund. It only covers the costs athletes will incur in a present or upcoming arbitration, and has helped many athletes have their disputes heard.

4. Right to contentious proceedings; where the parties must have a chance to know the case against them, dispute, disprove and rebut such claims. So far, the SDT and CAS have done well to protect this right to contentious proceedings through their fair rules on procedure and evidence.

5. Principle of equal treatment; provides that identical issues are always dealt the same way in regards to the parties. The CAS and SDT tribunals do not grant special treatment to the

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<sup>239</sup>CAS Legal Aid Guidelines available at: <https://www.google.com/search?client=safari&rls=en&q=cas+legal+aid&ie=UTF-8&oe=UTF-8> (accessed on 17 January 2018)

composition of different panels raises the issue of very different outcomes<sup>240</sup>. Arbitral awards do not form precedent and this was the case in the Webster<sup>241</sup> case at CAS and the Shakhtar Donetsk<sup>242</sup> case where the panels decided the two cases very differently, and these were cases to do with the Application of Article 17 of the FIFA Statutes to do with Regulation and Status and Transfer of Players to the issue of compensation for breach of contract owed by football players to their former clubs.

CAS, in a number of cases, has indeed been seen to apply a particular body of rules on the basis of which arbitral case law may be created<sup>243</sup>, and this was evidenced in the Gullermo Canas case<sup>244</sup>, CAS applied the *ATP 2005 Official rulebook*, in the *Edita Danuite*<sup>245</sup> case, the panel applied the rules of *International DanceSport Federation* and in the *Marinov*<sup>246</sup> case, the arbitral tribunal applied the rules contained in the *2002 Anti-doping policy of the Australian Weightlifting Federation*. This is all due to the fact that *Rule 58 of the Statutes of Bodies Working for Settlement of Sports Disputes* provides that, “*the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association, or sports body which has issued the challenged decision is domiciled*”

For example, the way an arbitrator from Chicago may perceive and adjudicate issues will be very different from the mode and style adopted by an arbitrator from Ireland or Nigeria. The argument is that even though there is strength and quality in numbers, the fact that there are over 300 legal practitioners deciding issues, it leads to rendering of very different awards even when the facts are strikingly similar and circumstances too. It helps when the lawyers are aware of the stability of precedence in the courts in certain circumstances or when certain facts are being pled in a case. Precedent that is uniform would greatly assist the sports stakeholders, athletes and federations.

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<sup>240</sup> Section 16, CAS Arbitration Code (...in establishing the list of arbitrators, the ICAS shall whenever possible, ensure fair representation (...) of the different cultures”)

<sup>241</sup> Webster v Heart of Midlothian [2007] CAS A/1298-1299-1300

<sup>242</sup> FC Shakhtar Donetsk v Matuzalem, Real Zaragoza and FIFA [2008] CAS A/1519-1520

<sup>243</sup> Nicolas Beguin, “The rule of precedent in International Arbitration”, 5 January 2009

<sup>244</sup> Gullermo Canas v ATP Tour [2006] CAS A/951

<sup>245</sup> Editia Danuite v International DanceSport Federation [2006] CAS A/1175

<sup>246</sup> ASADA v Marinov [2006] CAS A/1175

national sports bodies and organizations simply because of their size and magnitude. Parties are always handled in the same manner and the jurisprudence emanating from these tribunals shows a trend of equal opportunities and hearing.

For CAS, the downside is that practically, the clubs and federations with very heavy pockets have the ability to select sympathetic arbitrators to hear their cases. Therefore, choice of arbitrator then becomes a problem, and they can easily influence such arbitrators.

#### Recommendations;

One glaring difference is the fact that appeals from the CAS lie at the Appeals Division in CAS and any further appeals lie at the Swiss Federal Tribunal. The process is a first appeal from a decision made by the ordinary tribunal. Whereas at SDT, an appeal to an SDT decision currently lies at the High Court. There is a need to follow the CAS model and have or introduce an Appellate as well as a whole Anti-doping division within the SDT in Kenya in order to hear appeals in a fair, expedient and efficient manner.

This intervention by the judiciary in Kenya, on matters to do with appointment and selection of members of the tribunal, should be left to an independent sub-committee within the SDT, so that it becomes a purely autonomous and independent body like it is supposed to be. With no reliance at all, on the national court systems.

Appointment of members of the tribunal to certain matters should be left to an independent committee as well, just like ICAS does. And more arbitrators should be employed in order to give the SDT capacity to handle more matters than it is currently handling, and also to facilitate the establishment of a similar committee that can carry out the budget approval and recommendations and oversight of CAS Administrative activities. It would further provide the SDT with full independence and autonomy it needs from the national court systems in order to encourage the development of a *lex sportiva* in Kenya.

The CAS also have issues of skewed jurisprudence emanating from the courts especially because the arbitrators come from very different backgrounds and legal systems and the

At CAS, there should be a re-evaluation of the costs system in place currently. Arbitration is supposed to be a cheaper and faster alternative, but the current costs at CAS make it unattractive especially for the athletes that do not earn as much as some federations do, or other athletes. It currently suits a few of the wealthy athletes, federations and clubs, but not the sports world at large. The filing fees with statement of claim from CHF 100 to CHF 2000<sup>247</sup> and minimum hourly fees for the arbitrator at CHF 300<sup>248</sup> is a bit too costly and does not make financial sense for some. This is very bad because in theory, arbitration is the cheaper and faster process.

Legally, there is room for Kenya to catch up and amend its laws to be in accordance with the standards set by CAS especially with regard to independence, autonomy and impartiality. All it takes is the establishment of an entity separate from SDT, to run the show in terms of appointment, funding and general administrative duties. For now, arbitration and mediation have a solid foundation in the adjudication of sports disputes in Kenya.

Having a tribunal that is meant to operate independently; under Judiciary supervision, greatly reduces its potential. And that is the current situation in Kenya.

#### Conclusion:

In conclusion, both bodies have tried their best to further the application and acceptance of resolution of sports disputes through alternative mechanisms in order to deliver a decision in minimal time, with maximum speed and a very low cost. On some principles, which they have both upheld, such as fair hearing, and equal treatment, it then makes the arbitration process the ideal choice. However, the principles of parity in constituting the tribunal, as well as independence and impartiality of the tribunal may present fresh issues in that the process becomes slower due to sideshows over bias, conflict of interest, and in these

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<sup>247</sup> Schedule of CAS Administrative and Arbitration costs <http://www.tas-cas.org/en/arbitration/arbitration-costs.html> (accessed 5 January 2018)

<sup>248</sup> Schedule of CAS Administrative and Arbitration costs

sideshow<sup>249</sup>, more time is wasted and, in the end, the whole arbitral process becomes even more costly than the court process. There is then a need to polish up on these two principles that are lacking, in order to develop an all-round efficient system.

Arbitration of sports disputes in Kenya is also an emerging field that is growing in tandem with Kenya's increased participation in world sporting events. The disputes within various federations in Kenya, particularly soccer also highlights the need to put in place a well-oiled independent tribunal to avoid losing good sportsmen to other leagues and teams abroad simply because they feel that the national bodies do not have their best interests at heart.

The absurdity in the law that needs to be resolved by all the stakeholders, is the lack of proper mechanisms and regulations in Kenya with regards to sports disputes appeals with regards to CAS. There is need for clear procedural rules on this matter

For the SDT in Kenya, it is currently four years old, and therefore way less developed than the CAS, and it is still sorting out its feet. This is especially true with the absence of proper procedural rules in force, the number of arbitrators is small compared to CAS, and the body is yet to be fully independent and autonomous from the JSC, to do with appointment of arbitrators and tribunal staff. Some functions and systems are still in the pipeline for instance the draft procedural rules, which when finally formalized and implemented, will go a long way to resolving some of the current procedural challenges for example to do with challenge of arbitrators. The challenge process is not clear in the current regime and statute, it is absent in the Sports Act, but it is not unreasonable to assume that these challenges may be handled between the Chairperson and Vice Chairperson for now, as recorded in my interview at the SDT.

There is also a need to make it fully independent of the national court systems and when this is done, it will be a model in the same breath as CAS. The relevant stakeholders should

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<sup>249</sup> Richard Omwela v The Sports Registrar [SDT Appeal No. 23 of 2017]

ensure that the functions and systems are modeled on the very autonomous system that CAS has, where discrepancies within the procedures are resolved internally.

Once all this is done, we will truly have an expedient, cheap, highly specialized sports arbitration system that can rival CAS, pound for pound and will be a shining light in Africa as a whole.

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## **APPENDIX ONE:**

**RESEARCH INTERVIEW CONDUCTED AT THE SPORTS DISPUTES TRIBUNAL OFFICES AT NSSF BUILDING, BLOCK 'A', 24<sup>TH</sup> FLOOR, MILIMANI - NAIROBI, KENYA ON 16 JANUARY 2018**

This interview was facilitated with the help of Ms. Sarah Ochwada, my dissertation supervisor, Ms. Caro Arimi of the Sports Disputes Tribunal and Mr. Luke Luseno – C.E.O of the Sports Disputes Tribunal. I managed to interview Ms. Doreen, and administrator at the SDT on 16 January – mid-morning.

**Richard:** Good Morning to you

**Ms. Doreen:** Good Morning

**Richard:** I am a law student from Strathmore University, conducting research on the SDT, how it was formed, and its current composition with regards to members of the tribunal. How was this done?

**Ms. Doreen:** The JSC conducted interviews after advertising the posts and qualifications needed to be a member of the SDT, this was then confirmed by a gazette notice back in 2014. The body is established as under the Sports Act.

**Richard:** So, with the number being just 9, how does the Chairman decide who will sit on which arbitral panel? How are the members rotated?

**Ms. Doreen:** The Chairman and Vice Chairman decide which members will sit to decide certain matters as well as the Coram needed, as the case demands. They also decide which members are better suited to hear other matters.

**Richard:** And recusal or conflict of interest, doesn't that arise?

**Ms. Doreen:** I am not aware of any case so far which entailed a member of the tribunal had to recuse themselves from a matter. It (conflict of interest) rarely happens. The members hear all matters.

**Richard:** How about legal aid and pro bono? How is it done here at the SDT?

**Ms. Doreen:** Well, the Tribunal has a list of about 7 advocates who are available to represent athletes and clients pro-bono, so when such a situation arises, they are immediately contacted. Some other lawyers externally agree to help pro bono as well. The legal aid regime at SDT has not yet began.

**Richard:** Are the costs at SDT too high or are they reasonable?

**Ms. Doreen:** The costs are reasonable for all the athletes and parties involved. The tribunal usually decides on the quantum of costs and who is to be awarded costs.

**Richard:** That will be all! Thank you for your time and assistance.

Ms. Doreen: You are welcome, and our doors are open, any time.

The findings from this interview were that;

- The SDT is a judiciary mandated body having been established by the former Chief Justice of Kenya, Willy Mutunga under the Judicial Service Commission– in 2014, and it gets a lot of support from the judiciary and government, this support is in terms of funding from the Judiciary, which also handles appointment of staff of the tribunal, as well as members of the tribunal. For example, the secretary who is seconded to the SDT by the JSC as under *Section 60 of the Sports Act*.
- Distribution of case load is internal. This is decided by the Chair and Vice Chair and rotation is done. The numbers are however very limited compared to the 393 at CAS and is based on availability of the 9 arbitrators. The advantage is that all the arbitrators get a fair share of case allocation each. Conflict of interest could arise in some matters. However, because the Chair and Vice Chairperson distribute the case load, challenges to a panel of arbitrators or one arbitrator in particular can be dealt with simply by appointing a fresh panel or arbitrator once the issue is raised.
- There are lawyers available on a pro bono basis. The legal aid regime is not as developed as the CAS regime.
- Very affordable process in comparison to CAS. The procedure is also easy to follow and understand.

**APPENDIX TWO:**

GAZETTE NOTICE ESTABLISHING THE SPORTS DISPUTES TRIBUNAL





## CORRIGENDUM

IN Gazette Notice No. 5200 of 2014, *amend* the first petitioner's name printed as "Rose Mutike Jaleka" to read "Agnes Mukite Jalega".

GAZETTE NOTICE NO. 6454

## THE SPORTS ACT

(No. 25 of 2013)

## APPOINTMENT

IN EXERCISE of the powers conferred by section 55 of the Sports Act, the Judicial Service Commission appoints—

John Morris Ohaga—(*Chairperson*)  
Elynah Wanyika Sifuna Shivega—(*Deputy-Chairperson*)

## Members:

Jane Njeri Onyango,  
Ouko Gabriel Ohanya,  
Kimani Nyokabi Mary,  
Peter Ochieng Anyango,  
Gichuru Kiplagat,  
Robert Okumu Asembo,  
Gilbert M. T. Otieno,

to be the Chairperson, Deputy Chairperson and members of the Sports Disputes Tribunal as here above indicated for a period of five (5) years, with effect from 31st March, 2014.

Dated the 10th September, 2014.

WILLY MUTUNGA,  
*Chief Justice/Chairman, Judicial Service Commission.*

GAZETTE NOTICE NO. 6455

## THE COMMUNITY SERVICE ORDERS ACT

(No. 10 of 1998)

## APPOINTMENT

IN EXERCISE of the powers conferred by section 7 (1) (a) of the Community Service Orders Act, the Chief Justice appoints—

JUSTICE LUKA K. KIMARU

to be the Chairperson of the National Community Service Orders with effect from 1st September, 2014.

Dated the 10th September, 2014.

WILLY MUTUNGA,  
*Chief Justice/Chairman, Judicial Service Commission.*

GAZETTE NOTICE NO. 6456

## THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

## THE PUBLIC FINANCE MANAGEMENT (UWEZO FUND) REGULATIONS, 2014

(L.N. 21 of 2014)

## APPOINTMENT OF CONSTITUENCY UWEZO FUND MANAGEMENT COMMITTEES

IN EXERCISE of the powers conferred by section 15 (5) of the Public Finance Management (Uwezo Fund) Regulations, 2014, the Cabinet Secretary, Ministry of Devolution and Planning, gazettes the following members of Constituency Uwezo Fund Committees in various constituencies as outlined below for a period of three (3) years, with effect from 5th August, 2014.

## BONCHARI CONSTITUENCY

Francis O. Kombo, Dickson O. Nyabayo and Paul M. Bosire, to the Bonchari Constituency Uwezo Fund Management Committee.

The appointment of Geoffrey A. Mbaka, Annet M. Omando, Simeon Ogero and Naom M. Bagaye are revoked\*.

Dated the 10th September, 2014.

ANNE WAIGURU,  
*Cabinet Secretary, Ministry of Devolution and Planning.*

GAZETTE NOTICE NO. 6457

## STEERING COMMITTEE ON THE DEVELOPMENT OF A NATIONAL GREEN ECONOMY STRATEGY AND IMPLEMENTATION PLAN

## APPOINTMENT

- IT IS notified for general information of the public that the Cabinet Secretary for Environment, Water and Natural Resources has appointed a Steering Committee to develop a National Green Economy Strategy and Implementation Plan that will enhance transition towards a green economy for achieving sustainable and inclusive development in Kenya.

The Steering Committee shall comprise of the following members:

Richard L. Lesiyampe (Dr.)—(*Chairperson*);  
Martha Cheruto—(*Vice-Chairperson*);  
Alice A. Kaudia (Dr.);  
Peter Odhengo;  
Jackson Kiplagat;  
Benson K. Kimani;  
Kithinji Mutunga;  
Hezekiah B. Okeyo;  
Sammy T. Nyambari (Dr.);  
Jane Nyakang'o;  
Dorcas B. Otieno (Dr.);  
Jepi Lentoijoni;  
Irene Kamunge;

## Joint Secretaries:

Charles C. Mutai (Dr.).  
Thomas Musandu.

- The terms of reference of the Steering Committee shall be to:
  - oversee the development and preparation of Green Economy Strategy and Implementation Plan (GESIP);
  - prepare TORs and oversee the selection process of experts to provide technical support and supervise the technical inputs into the process – including the Thematic Working Groups (TWGs);
  - co-ordinate the formulation and implementation of a communication strategy on green economy and growth in Kenya that includes a mechanism to showcase the holistic approach towards addressing green economy initiatives in the county, national, regional and international;
  - spearhead a national and county dialogue process and targeted advocacy on green economy;
  - develop a mechanism for strengthening and enhancing partnership for resource mobilization and innovative measures for the delivery and implementation of the GESIP;
  - ensure transparency, accountability and integrity in the GESIP process;
  - co-ordinate the preparation of a results based monitoring, evaluation and reporting plan in consultation with other key stakeholders;
  - develop a framework to support research and innovation for a Green Economy;
  - submit regular (and on demand) progress reports; draft and final Green Economy Strategy and Implementation Plan to the Principal Secretary, State Department of Environment and Natural Resources; and
  - Co-opt other members as the need arises.
- The Secretariat of the Steering Committee shall be based at the Ministry of Environment, Water and Natural Resource, NHIF Building.
- The term of the steering committee shall be a period of twelve (12) months from the date of the publication of this Gazette Notice.

JUDI W. WAKHUNGU,  
*Cabinet Secretary,*  
*Ministry of Environment, Water and Natural Resources*

