

## 2016 RIO AD HOC COURT OF ARBITRATION FOR SPORT

Rio de Janeiro, Cidade Maravilhosa – the marvelous city – home to over 6 million people and the iconic Cristo Redentor, or Christ the Redeemer statue, was the host of the 2016 summer Olympics from August 5 to 21, 2016. I was privileged to attend as a member of the ad hoc Court of Arbitration for Sport (“CAS”).

The Games were historic in many respects. It was the first time the Olympics were held in South America and competitors included the first-ever Refugee Olympic Team. The Games were historic for CAS as well, with a record number of arbitrations and the first ad hoc Doping Panel.

### Background

Founded in 1983, CAS is a specialised sport arbitral institution offering a flexible, quick and inexpensive method of resolving international sporting dispute. The seat of CAS, including the ad hoc Division, is in Lausanne, Switzerland in order to provide a uniform legal framework and route of challenge to the courts.

Arbitrations are governed by Chapter 12 of the Swiss Act on Private International Law and all appeals are to the Swiss Federal Tribunal. Challenges to the choice of Lausanne as the place of arbitration have been upheld in a number of jurisdictions including Germany and Australia, recognizing the need of global sports to be governed by a global system of dispute resolution.

Under Swiss law, arbitration awards may only be set aside on limited grounds. Procedural grounds include lack of jurisdiction, irregular composition of the panel, denial of natural justice and violation of due process. Substantive grounds are limited to incompatibility with Swiss public policy, which embraces concepts of good faith, and prohibition of abuse of rights or discrimination, expropriation without compensation and *pacta sunt servanda*.

CAS awards are recognized and enforced by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

CAS applies not only the regulations of the particular sport or national legal provisions, but general principles of law drawn from domestic legal systems. The *lex sportiva* includes principles similar to well established common and civil law concepts such as legal certainty, the presumption against retrospectivity, the prohibition against discrimination and arbitrariness, proportionality, freedom of contract and other rules of statutory construction and *lex mitior*. Principles that are unique to sports law include the ‘field of play’ doctrine, which limits interference with an official’s decision, the strict liability rule in relation to doping violations and the concept of ‘comfortable satisfaction’ as the standard of proof for disciplinary offences.

### CAS ad hoc Division

The CAS ad hoc division was established in 1996 with the task of settling finally and within a 24-hour time-limit any disputes arising during the Olympic Games in Atlanta. Work commences 10 days prior to the start of the Games to accommodate pre-games issues including asserted anti-doping challenges and selection issues.

The Swiss Federal Tribunal outlined the rationale for the ad hoc division as follows: *In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports related issues.*

The ad hoc Division's jurisdiction is founded in contract. All participants – athletes, coaches and officials sign, as a condition of their participation, a document conferring exclusive jurisdiction on the panel for disputes arising in connection with the Games. The scope of jurisdiction has been recognized as extending to international governing bodies of Olympic sports based on Article 44 of the Olympic Charter providing for the CAS's jurisdiction over such governing bodies.

The ad hoc division has operated at all summer and winter Olympic Games since 1996. Ad hoc divisions have also been established for other major sporting events including the Commonwealth Games since 1998, UEFA European Football Championships since 2000, the FIFA World Cup and the Asian Games. There are 12 arbitrators at the Summer Olympics, nine arbitrators at the Winter Olympics and six arbitrators at the Commonwealth Games.

Arbitrations are commenced by written applications and heard by panels of three arbitrators. To ensure easy access to the ad hoc division for all those taking part in the Olympic Games (athletes, officials, coaches, federations, etc.), the process is simple, flexible and free of charge. Decisions are made within 24 hours and are immediately enforceable. CAS ad hoc division has its own set of rules and has the power to review facts and law.

Issues dealt with by the ad hoc division range from team selection, national eligibility, satisfaction of entry requirements, the application of completion rules, advertising and athlete misconduct.

The Rio 2016 CAS ad hoc Division was headed by Michael Lenard, (USA) President, and Justice Ellen Gracie Northfleet (Brazil). The 12 arbitrators were from Australia, Papua New Guinea, Germany, United Kingdom, Costa Rica, Slovakia/Canada, Brazil, Korea, Spain, Egypt, Iraq/Switzerland and Canada, ensuring that all regions of the world have been considered and that the selection of arbitrators is representative of the athletes taking part in the Games.

A record 28 cases were registered, although 16 were related to the status/eligibility of Russian athletes following the International Olympic Committee's ("IOC") Executive Board ("EB") July 24, 2016 decision relating to their eligibility for the Rio 2016 Olympic Games. That decision was, in turn, based on unprecedented findings of the independent person inquiry related to state sponsored doping by the Russians (the "McLaren report") and the banning of a significant number of Russian athletes by

International Federations. In fact, before the Games officially opened, 18 appeals were filed with CAS, almost all directly related to steps taken by International Federations in response to the McLaren report.

An ad hoc Anti-doping division was also established for the first time at this Olympics, handling doping related matters arising at the Games as a first-instance authority.

Cases decided by the ad hoc division include the following:

1. Yulia Efimova v. Russian Olympic Committee (ROC), IOC and Federation Internationale de Natation (FINA) (Eligibility Case):

The athlete was disqualified from the entry list of the ROC for the Olympic Games as a result of the IOC EB's decision providing that ROC was not allowed to enter any athlete for the Rio 2016 Olympic Games who had ever been sanctioned for doping, even if he/she served the sanction. The Panel found that one clause of the IOC EB's decision was an additional sanction and that it denied natural justice to the athlete; as such, it was unenforceable. The Panel dismissed other requests for relief, including the request that Ms. Efimova be declared eligible to participate in the Games and the request to oblige the IOC to accept Ms. Efimova's entry to compete.

2. Mangar Makur Chuot Chep and the South Sudan Athletics Federation (SSAF) v. South Sudan National Olympic Committee (SSOC) (Eligibility case):

The athlete challenged his non-selection for the 2016 Olympic Games. The Panel found that because none of South Sudan's athletic (track and field) athletes had met qualifying times, the SSOC had acted in accordance with the International Amateur Athletic Federation (IAAF) qualification system in choosing another athlete to represent the country.

3. Russian Weightlifting Federation (RWF) v. International Weightlifting Federation (IWF): (Disciplinary case):

The RWF appealed against its ban by the IWF from participating in the Olympic Games. The matter had been brought to an end by a UCI letter of July 18, 2016 stating that the matter was "closed." The Panel then found that the dispute was inadmissible given that it was outside the timeframe set out in the CAS ad hoc Rules. The Panel dismissed the application, finding that the IWF Rules allowed the IWF to sanction a national federation which "*by reason of conduct connected with or associated with doping or anti-doping rule violations, brings the sport of weightlifting into disrepute*" was valid and properly applied in the circumstances.

4. Daniil Andreinko and 16 other rowers v. World Rowing Federation (FISA) and IOC (Eligibility case).

The athletes challenged the decision of the FISA Executive Committee to declare them ineligible because they had not undergone a minimum of 3 anti-doping tests analyzed by a World Anti-Doping Association (WADA) accredited laboratory other than the Moscow laboratory. The Panel dismissed the application considering that the FISA decision was in accordance with the IOC EB decision setting forth the criteria for the admission of Russian athletes.

5. Karen Pavicic v. Federation Equestre Internationale (FEI) (Eligibility Case):

The athlete alleged that a judge had given artificially high scores to another rider to ensure that the latter qualified ahead of her for the 2016 Olympics. There was no hearing. A sole arbitrator determined that the athlete had not exhausted all internal legal remedies available to her with the FEI prior to filing her application with CAS ad hoc division. Consequently, CAS had no jurisdiction to entertain the application.

6. Czech Olympic Committee (COC) and Czech Cycling Federation (CCF) v. Union Cycliste Internationale (UCI) (Eligibility case):

The COC and CCF challenged the quota allocation of the UCI for the time trial portion of the women's road cycling event. The COC did not receive a quota. The Panel found that, while it was not certain that the UCI had made a "decision" regarding the non-allocation of a quota to the COC, the many communications between the applicants and the UCI regarding the matter had been brought to an end by a UCI letter of 18 July 2016 stating that the matter was "closed." The parties had therefore been in a dispute since that date, which was outside the time frame set out in the ad hoc Rules and the application was found to be inadmissible.

7. Ihab Abdelrahman v. Egyptian National Anti-doping Organization (EGY NADO) (Doping case):

During an out-of-competition test, a sample of the athlete was found to contain testosterone. The athlete challenged the EGY NADO decision to provisionally suspend him pending the analysis of his B sample set to take place on August 30, 2016 and asked to be allowed to compete at the 2016 Rio Olympic Games. The Panel determined that it was beyond its jurisdiction to determine whether or not an anti-doping rule violation had been committed, and if so, whether or not the athlete should be sanctioned. The Panel found that the athlete had not established a legal basis for the lifting of the provisional suspension and the application was dismissed.

8. Vanuatu Association of Sports and National Olympic Committee (VANASOC) & Vanuatu Beach Volleyball Association v. Federation Internationale de Volleyball (FIVB) & Rio 2016 Organizing Committee (Eligibility case):

The applicants challenged the FIVB decision to accept the replacement of Victoria Orsi Toth by Laura Giombini on the Italian team following the positive doping test of Victoria Orsi Toth for clostebol, an anabolic substance, and requested the exclusion of the entire Italian team from the female beach volleyball competition and a reallocation of the quota position to the Vanuatu team. The Panel found that the Late Player Replacement Policy for the 2016 Rio Olympic Games provided discretion on the part of the Rio 2016 Organizing Committee to authorize a replacement on a case-by-case exceptional basis and that the Applicants had not satisfied the onus of proving that the circumstances of this case were exceptional. The application was dismissed.

9. Carvin Nkanata v. IOC (Eligibility case):

The athlete challenged the IOC's verbal decision to deny him access to the Olympic Village because he could not produce a Kenyan passport or identity card proving that he was a national of the country of the NOC which had entered him into the Rio 2016 Olympic Games. Following a hearing, the Panel found that the athlete was unable to prove he was a Kenyan national and dismissed his application.

10. Federation Francaise de Natation (FFN), Aurelie Muller & Comite National Olympique et Sportif Francais (CNOSF) v. FINA ("Field of play" case):

The applicants challenged the decision of the FINA Jury of Appeal to reject the protest filed by the FFN against the disqualification of the French swimmer for an unsporting act (Swimming over the top of her opponent and preventing her from touching the wall). Applying the "field of play" doctrine, the Panel found that it could only review a decision taken by the referees on the field if such decision was taken in violation of the law, or the rules and regulations of the federation or general principles of law; however, in the instant case, neither had been infringed. The application was dismissed.

Full decisions are available on the CAS website: [www.tas-cas.org](http://www.tas-cas.org).