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*Arbitrating Sports: Reflections on USADA/  
Landis, the Olympic Games, and the Future of  
International Sports Dispute Resolution*

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# The Future of Sports Dispute Resolution

Michael Lenard\*

## I. INTRODUCTION

Thank you for the introduction. I would just like to add, by way of background, that when—like some of my former colleagues here—I was on the Athletes' Council for the U.S. Olympic Committee, part of my job was to review every athlete complaint filed with the U.S. Olympic Committee. And although I was a corporate partner at Latham & Watkins, for the last fifteen years I have run a large international private equity firm, and in this context I have been involved in arbitration analysis and arbitrations—sometimes in the local courts when they try to interfere—throughout Asia, South America, and Turkey. Today I will speak about arbitrations from the International Council of Arbitration for Sport's (ICAS) perspective and most importantly the future of ICAS.

Many questions or criticisms of ICAS have been raised throughout the day. I really do need to address them, but unfortunately, in doing so I am going to have to go rather off-script. Nonetheless, I think it is important to ask initially two questions about the future of or changes to be made to any organization. “What” and “how.” What should be done now? What should be done in the future? And more important than the “what” is to talk about

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“how” (if at all) these things may be accomplished. We need to increase the understanding and rigor of thinking applied to these questions. I do not usually speak at sports law associations or to practitioners. I prefer to speak to law schools because it is here I feel we are most likely to find and enhance that understanding and rigor. In law schools, commentary and the scholarly process are important, and I think speaking here is critical in helping raise the bar of discourse in the area of sports dispute resolution.

## II. CHANGE

Many ideas for change—criticisms—have been mentioned here. Organizations are never static, they are always changing, and thus discussions of change are never threatening, only natural and necessary. Analyzing these ideas is not “rocket surgery,” but this is a complex milieu, and it is easy to become lost without the proper analytical foundation. For example, people have been discussing potential changes that can or should occur in ICAS, but in reality, many would have to take place within the World Anti-Doping Agency (WADA). ICAS was formed in 1994 as the body to oversee the Court of Arbitration for Sport (CAS). For the ten years prior to that there was no body overseeing the Court; it was an appendage of the International Olympic Committee (IOC). The Court really is a set of rules by which arbitrations are administered and a group of arbitrators. ICAS comes up with those rules; the arbitrators answer to ICAS. CAS is used by many organizations in sport, WADA is one of them, and the WADA has its own set of rules applicable to its activities and to those matters subject to CAS.

All organizations, including ICAS, fit within a tradition, a culture, and a society. Sometimes society moves organizations along to improve or evolve, and sometimes the organization evolves or improves through internal forces.

My goal here is to first help you understand a way of thinking about change for CAS—before discussing any changes themselves—because although there have been some very interesting ideas mentioned here at this Symposium, as I said, I think they, in some ways, reflect a basic confusion.

Let me digress here slightly along the way. I want to tell the “box” story. When I was in law school, one of my classmates, a veteran, was defending an issue dealing with military law procedures. “Military justice makes sense if you are in the military justice box,” he said. This is an important concept. We need to understand the box that is ICAS when we discuss what needs to be changed, and by the same token, the bigger box of the Olympic Movement. Making changes inside the box requires a very different approach than changing the box itself. And not understanding the

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difference between the two will lead to confusion and failure to effect change. What makes the ICAS box? ICAS is an international arbitral body for sport. There are three key concepts here.

The first is “international.” If you do not understand comparative international law, you will fail in understanding this ICAS/CAS box. The world is filled with different legal systems. For example, there is civil law, common law, and two which we all will need to understand better—Sharia and Chinese law. Many of the criticisms or ideas for change here at this Symposium have stemmed solely from a U.S. common law perspective for discovery. And yet the rest of the world, including other common law countries, thinks that the U.S. discovery process is crazy. Most of the world does not depose people and cases to death. But I think we can all agree that the German legal system works. Even the English lawyers think Americans are crazy: although the English use common law, they do not really share our same discovery system. Many criticisms here at the Symposium arose because the commentators are not comfortable with international law. And yes, in response to a specific prior criticism, in international business or sport there often will be documents in a foreign language that you may have to have translated.

The second is “sport.” If you want to compete in sport, you must understand the structures of sport and how they operate. There are virtually no straight lines in the international sport organization chart. There are a series of overlapping obligations and responsibilities. It is beyond my purview and time limit to explain it all—but some participants have broached the topic earlier.

Third is “arbitration.” CAS is an arbitration system. Commercial disputes, particularly commercial international disputes, are the cradle of arbitration. This cradle has given rise to certain traditional hallmarks of arbitration. In arbitration, the parties pay. Arbitration is supposed to be faster (and cheaper) than litigation. Arbitration provides limited appeals to a court. Arbitration also allows flexible rules for evidence established by arbitrators to best handle the specific situation at hand. Arbitral proceedings and awards are confidential. Arbitrators are practitioners. Allow me to remark on a few points here. There was a very strong discussion earlier about the “repeat player problem,” i.e., practitioners appear as both arbitrators and counsel to parties. I will say now that this is a problem for ICAS, and that it needs to be fixed, but some of the specific complaints raised miss the point of what needs to be changed. Let us be clear: numerous courts throughout the world have ruled on this issue in other

arbitral contexts. In these rulings it simply is not unacceptable, e.g., for a person to act as counsel in front of a panel, if that individual was on a panel three years ago with someone from the current panel. So we need careful analysis of this CAS issue, not general outrage. Here is another point: Dollars are used as a proxy in commercial arbitration. The problem for CAS is, generally speaking, that no amount of money can compensate an individual for the Olympic team ring he or she deserves. Disputes frequently arise, whether because of doping sanctions or because of disagreements with the team selection process. But someone is either on the team or they are not. These experiences are unique, and money is an ill substitute. You cannot cut a baby in half for this. Similarly I have a very jaundiced view toward using mediation in team selection disputes. Many resulted in “deals” to provide aggrieved athletes some of the rights of making the team—and I, as an Olympic athlete, feel those are morally wrong. You are either on the team or you are off the team.

### III. HISTORY OF CAS AND ICAS

The full history of CAS and ICAS is beyond my available time. However, since certain aspects of this history were mentioned, let me highlight two important events. The Paris Agreement in 1994 forming ICAS was in response to a Swiss federal tribunal—the highest court in Switzerland—decision, which, although it did not vacate a challenged CAS award, raised in dictum potential problems with the potential independence of CAS. Because of that, ICAS was formed to oversee CAS. It also is important to know the composition of those who serve or have served on ICAS: cabinet level officials of France, Syria, and Egypt; the president as well as former current judges of the International Court of Justice at the Hague; the president of the Supreme Court of India and a member of Switzerland’s; two United States federal appellate judges; two presidents of the ICC Court of Arbitration (which is the premier international arbitration body); the president of the Constitutional Court for Bosnia-Herzegovina; the president of the U.S.-Iran claims tribunal at the Hague; and me . . . Michael Lenard. Well, actually there are, of course, some other people like me who know sport. But I want to emphasize that most of my colleagues are substantial people in the world of international law. My colleagues do not all think like we (American lawyers) think, and they definitely do not think like someone who has a background in athletes’ rights. But this varied group, as a whole, is necessary and works well because it contains all of the necessary backgrounds and expertise to make it a credible and respected international sports arbitration body.

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The other thing that I think was critically important in the history of ICAS was the formation of the first Ad-hoc Panel for the Atlanta Olympic Games. Another speaker previously discussed cases heard by that Panel. But for me, the interesting aspect of this Panel was its creation. You have heard earlier here that “all International Federations (IFs) are bound” by a CAS decision. Yes, they said that in Paris in 1994. They raised their hands and said “I will be bound,” and yet virtually none of them promptly changed their rules to permit CAS to overrule, in essence, their decisions. The first time we were able to test and assert the power of CAS over the Olympic Family was when we and the IOC put the Ad-hoc Panel into Atlanta. Although the IOC controlled that insertion in the Charter—and there was nothing an IF or other Olympic Family member could do—we nonetheless carefully planned its implementation.

There also were two substantive reasons we did it. The first reason was because of the Butch Reynolds case in 1992. Anyone who is interested in athletes’ rights knows that story. Butch Reynolds won a court case in the United States in order to compete in the Barcelona Olympic Games and the IAAF (the track and field IF) said, “So what? We do not live in the United States. Come and sue us in Barcelona two days before the Games start and see if we will let you in.” Because of the structure of sport, the IOC could not overrule the IAAF. That scenario posed a large problem for athletes’ rights. It became a key reason for, and the hallmark of future, Ad-hoc Panels’ purpose: “Never leave an athlete knocking at the gate of the Olympic Village.” The other reason for the Ad-hoc Panel was the fear that, without an alternative, athletes would run into federal court in Atlanta, and the rulings would disrupt the Games.

#### IV. THREE IMPORTANT PRINCIPLES TO REMEMBER

First, although there has been a lot of criticism of the system from lawyers who represent athletes, arbitration was the cornerstone of the athletes’ rights movement when it started here in this country. This was because most athletes, who are not people who make trillions of dollars, had no effective way to be heard by an independent party. Perhaps, as described earlier, the Ad-hoc Panels do not have full enough time to fully review in detail cases at the Games. What is the alternative? Should we delay the start of the finals? Should we allow some guys in “blue blazers” (sports officials) figure it out alone in the back room of the IOC? Or should we at least provide some chance to go talk to someone whose job it is to be neutral and to think about these sorts of problems? We do the best we can under the

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Games' constraints. But do not forget, arbitration was an athletes' rights initiative and the rest of the world adopted it.

Second, all right to compete issues are athlete versus athlete. It was the case with Floyd Landis where Greg LeMond is right there saying to him, "You are dirty." When Marion Jones finally admitted she was dirty, many athletes were saying, "I have been telling you that for years." It is always athlete versus athlete. This is a divisive issue, and the fact that you do not hear from some of those other athletes here does not negate the principle.

Finally, doping cases are *sui generis*. If you look at all the CAS, AAA, or Article IX cases concerning team selection, you will see they "feel and act" differently than the doping cases. It is very difficult to come up with some meta-rules that govern all the cases because doping occurs in a very different context than other cases. There is the moral distaste to it and enhanced media coverage. There is the mind-numbing science aspect. Whatever the reasons, you have to analyze those cases separately.

#### V. CHANGES TO THE SYSTEM

First let me note that I find it very interesting that prior commentators were outraged that after WADA had lost some cases, they changed the WADA rules. They said this proved bad faith. The Siraki, Lindland, Perez, and Bassani cases were fundamental failures of the CAS written or applied procedural rules, and we at ICAS then changed the rules to ensure those situations would not happen again. In our case, making certain that all the interested parties are there at the same time or that jurisdiction is always taken so as to ensure athletes can be heard in a timely manner prior to the Olympic Games were, in my view, good changes to cure problems. The concept of changing rules in response to events is not *per se* bad. The analysis must go deeper.

One change that we have to make is to increase the quality of the arbitrators. We are working on that. In particular, that means their qualifications, it means their training and it means their independence. We also have to improve and refine the access to the *lex sportiva*—the precedent of CAS. Finally, if CAS is the "supreme court of sport," does it not also have to function as more of a check and balance to the other institutional structures of sport? Because right now it does not and cannot. Generally, these changes are all in some way in contradiction to the hallmarks of arbitration I discussed earlier.

## VI. RECOMMENDATIONS FOR QUALITY OF ARBITRATORS

First, contrary to some prior comments, there should be closed lists. People should not pick just the arbitrators that they want to “represent” them. There is an important body of sport knowledge cases, even in non-doping, that arbitrators must know. This is not an unknown concept in non-sport arbitration—for example, in construction defect arbitration. How are we supposed to train them if we do not have a closed list? Second, there needs to be mandatory, real training. We have had seminars; although candidly they did not provide rigorous training. By real training I mean continuing education and leadership development. We are now “amping” the training up, including using the Ad-hoc Panels as vehicles to provide advanced training to our best arbitrators. This is a component of our plan to increase the number of arbitrators that are actually being selected for cases. Third, we need to create specific development paths to train arbitrators to become presidents of panels. We need to increase the arbitrators qualified to serve in that important role. Fourth, we need an expanded code of ethics and rules, and it needs to be real. As you know, this is a giant issue in U.S. commercial arbitration. When I describe this to my colleagues on ICAS from Europe, they think we are crazy. But commercial arbitral systems increasingly have them—California has a very strict one. Some of us on ICAS are pushing hard for ICAS to move towards these codes and rules and implementing much stronger policies on perceived conflicts. Some of us do understand that arbitration is becoming more judicial. This is leading toward the erosion of some of the customary hallmarks of commercial arbitration, but not, for example, without great debate with the arbitral traditionalists—whether in California or ICAS. Finally, a parting thought. Why do we have parties appoint the arbitrators? I have heard here that it is important to move toward using professional arbitrators, professional neutrals, right? Then should not ICAS—a professional body with staff and oversight unlike any other arbitral system in the world—be charged to find, develop, and *appoint* all these arbitrators to cases? Just a thought.

VII. RECOMMENDATIONS FOR *LEX SPORTIVA*

That a *lex sportiva* currently exists is beyond debate. You cannot read a CAS opinion or a brief to CAS that does not cite prior arbitral opinions. One can see this in commercial arbitration as well. The “black letter law” topics are many, including for example, what constitutes field of play decisions, the jurisdiction of the arbitrators, and even before WADA existed, the clear



conceptual difference between disqualification (from an event) and sanction (received afterwards). And since it does exist in both CAS and commercial arbitration, I believe we are past the point of debating whether it should exist or not—although its existence certainly is in tension with arbitral hallmark of confidentiality.

The process of *lex sportiva*, however, needs to be enhanced. First, we must ensure greater and equal accessibility to CAS opinions and precedent. We at ICAS are working on this. In the past, there was an “underground” library of opinions most utilized in CAS proceedings that were gathered by the lawyers and arbitrators. This type of closed information system is not supportive of enhancing the *lex sportiva*. Second, we need better and more commentary on and analysis of the CAS opinions and procedures. We need the law schools, we need the law professors, and we need the law students working on law reviews to provide objective, informed, rigorous, and scholarly commentaries. This is critical. It is far more valuable than position pieces written by lawyers who represented a party and think that they were wronged or even, with due respect to my [Los Angeles Times reporter] colleague on this panel, newspaper articles. A critical component of a meaningful *lex sportiva*—and a dynamic legal system—must include this type of commentary.

#### VIII. THE RECOMMENDATION FOR CHECK AND BALANCE

This is a tougher issue. A long-term issue. It fundamentally takes exception with a cornerstone hallmark of arbitration. Arbitrations are governed by the arbitration agreement, and exceeding the bounds of that agreement is a ground for judicial intervention. The people at WADA are smart; the WADA rules can be viewed as the agreement that governs and thus tries to confine the arbitrators’ scope of inquiry. In my business, we do the same thing: our arbitration agreements in Latin America carve out those things that are not appropriate for the arbitrators to review. And WADA is carving things away from the purview of CAS arbitration. There are a number of interesting and important ideas and discussions about the practical and conceptual limits of this carving that are beyond our remaining time to discuss. But I do have one WADA question for everyone. Why is everyone shocked and amazed at how WADA acts? Let’s see: nobody trusted the IFs because they were hiding their doping, so the Olympic Movement, by popular acclaim and with outside pressure, brings forth an independent doping agency. This agency is told that doping is the great evil and that only they can save sport. And then you are shocked and amazed that WADA, on its sacred mission, carves their rules to get whomever they think are the bad guys? This was perfectly foreseeable (and foreseen). Save

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your shock. Suffice it to say that a complete analysis and solution unfortunately is not simple, and its issues are beyond what I have time here to discuss.

#### IX. THE CHANGING NATURE OF CAS CASES: SPORT ON THE HORIZON

Much of what has been discussed at this Symposium stems from doping policy and cases and a plethora of criticism more properly directed at WADA—whom neither I nor anyone else here represents. I have tried, in the sorely limited time available, to correct some misunderstandings of how the sport system works. As such I have had to deviate from fully exploring my putative topic—although I can and do enjoy discussing theories of doping regulation. I have tried to provide briefly a framework for change and to highlight some ongoing or necessary changes to CAS. But in conclusion I wish to discuss, and must give very short shrift to, the most exciting changes that I foresee in sport. These changes can be gleaned by analyzing trends in sport—and are validated by the cases we are beginning to see in CAS.

The first is the erosion of nation-based sport. In spite of Naomi Klein, the world is globalizing. And yet, in spite of globalization and consistent with a number of psychographic and political trends, countries mean less. Cities and regions (and to use the sociological term of art, “tribes”) are more important. I believe we are entering into a stage of city-states and stateless people. It is very evident in sport. Elite club teams have rosters containing fewer and fewer nationals of the country in which the club is located. The work rules in the European Union mean that Olympic Committees have a harder time creating a development pipeline for their own Olympic teams. National teams compete with, and lose their athletes to, the requirements of clubs and non-national team events. The Emirates are buying elite African runners’ citizenship. An American basketball player “sold herself” to Russia, where she plays club basketball for two months a year, so she can play in the Olympic Games. Athletes more often are trying to change countries and their Olympic participation. The Court is hearing an increasing number of these eligibility cases, and that is at the forefront of thinking about this phenomenon. A law review article anyone?

Doping is called the biggest danger to sport. It is not. The most important concept in sport is integrity of outcome. And although doping affects that even playing field among the athletes in determining the outcome, doping is really just a form of cheating by athletes, and we have systems in place to catch cheating athletes. I am leaving aside for this

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purpose discussing the enhanced dangers of the systemic state-sponsored East Germany doping model—which appears to have been eradicated—as well those specific sports where the culture of doping is widespread. But if we think the game’s outcome is rigged, none of us are going to be interested in sport anymore. Sport will be run by Vince McMahon. The largest threat to the integrity of the outcome is that “rigged” games are on the rise. The most serious threat involves the referees, because they are supposed to be neutral. Some examples include an NBA referee in jail for shaving points and a recent CAS case that invalidated an Olympic qualifier in handball because videotape analysis clearly supported the contention that the referees had thrown the match. Another threat comes when one or more competitors conspire. Some examples include the thrown match inquiries of a Russian tennis player, the scrutiny on matches and games due to changes in the betting line, and college basketball point shaving. And the examples are increasing.

But I also find exploring the outer limits of this problem interesting. Are there fuzzy lines here that raise ethical issues not serious enough to reach the core integrity of sport? What about resting my best players when the game does not matter to me, but it matters to somebody else? Losing a game purposefully in order to get a better seed? There is some great work being done by the Positive Coaching Alliance and others on these issues of ethics and sportsmanship. To me, this is all very interesting to ruminate about. I wish I had time to speak with you about all of these legal, ethical, and sportsmanship issues. But I do not. And so with that, I will conclude my rumination. Thank you, and I look forward to any questions.