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Sports Arbitration:
A Coach for Other Players?

Elliott Geisinger
Elena Trabaldo – de Mestral

Editors

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Chapter 1

Sports Arbitration: Which Features Can Be "Exported" to Other Fields of Arbitration?

*Massimo Coccia**

1. INTRODUCTION: THE WIDESPREAD RESORT TO ARBITRATION IN SPORTS

The sports sector has a long history, worldwide, of resorting to arbitration procedures to solve disputes. Obviously, the Court of Arbitration for Sport (CAS) is the first and foremost illustration of the successful use of arbitration to solve disputes related to sports.

Besides the CAS, which deals in general with all sorts of sports-related disputes, there are several instances of specialized sports arbitration mechanisms at the international level.

Just to mention a few examples, disputes are referred to arbitration at the top level of sports and in competitions with important economic stakes, such as America's Cup sailing,[1] Formula One car racing[2] and basketball.[3]

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* CAS Arbitrator, Professor of International Law, Partner at Coccia De Angelis Pardo & Associati Law Firm in Rome, Italy. This paper is based on the presentation made at the Association Suisse de l'Arbitrage (ASA) Conference on 27 January 2012 in Lausanne, Switzerland.

[1] The procedures and names of the arbitral institutions adjudicating America's Cup disputes have changed over the different editions; *see* H. PETER, *The America's Cup Arbitration Panel*, in *ASA Bulletin*, 2003, vol. 21, no. 2, 249-271; H. PETER (ed.), *Arbitration in the America's Cup*, The Hague, Kluwer, 2003; T. SCHULTZ, *Sailing Away from Judicial Interference: Arbitrating the America's Cup*, in *The International Sports Law Journal*, 2006, vol. 1-2, 27-39; H. PETER (ed.), *The 32nd America's Cup Jury and Its Decisions*, Alphen aan den Rijn, Wolters Kluwer, 2009; H. PETER (ed.), *The 33rd America's Cup Judicial and Arbitral Decisions*, Alphen aan den Rijn, Wolters Kluwer, 2012.

[2] *See* G. KAUFMANN-KOHLER, H. PETER, *Formula 1 Racing and Arbitration: The FIA Tailor-made System for Fast-Track Dispute Resolution*, in *Arbitration International*, 2001, vol. 17, no. 2, 173-210.

[3] A few years ago, the International Basketball Federation (FIBA) established the Basketball Arbitral Tribunal (BAT), an efficient arbitration institution for solving disputes between agents, clubs and players. *See* A. ZAGKLIS, *Fast Break: An Overview of How the Fédération International de Basketball Handles Disputes Fairly, Quickly, and Cost-Efficiently*, in M. COLUCCI, K. JONES (eds.), *International and Comparative Sports Justice*, *The European Sports Law and Policy Bulletin*, Issue 1-2013, 2013, Sports Law and Policy Center, Bracciano, 2013, 113-128; D.R. MARTENS, *Basketball Arbitral Tribunal: An Innovative System for Resolving Disputes in Sport (only in Sport?)*, in *The International Sports Law Journal*, 2011, vol. 1-2, 54-57; I. BLACKSHAW, *Dispute Resolution: FIBA: Effectiveness of Arbitral Tribunal*, in

There are also many instances of sports arbitration at the national level, inside and outside of the Olympic Movement, sometimes even on the basis of national legislation. In particular, many National Olympic Committees around the world have put in place arbitration systems, as the following examples demonstrate.

In the United States, the United States Olympic Committee (USOC) resorts to an arbitration system, managed by the American Arbitration Association (AAA), whereby athletes who have not been selected to represent the United States in international competitions—the Olympic Games, the World Championships, Pan-American competitions and the like—may initiate arbitration proceedings to challenge their non-selection.[4] The resort to arbitration to solve certain types of disputes involving the USOC is even mandated by law, under various provisions of the Ted Stevens Olympic and Amateur Sports Act, such as Section 220529 which provides *inter alia* as follows:

> (a) RIGHT TO REVIEW.—A party aggrieved by a determination of the corporation [USOC] under section 220527 or 220528 of this title may obtain review by any regional office of the American Arbitration Association.
> (b) PROCEDURE.—
> (1) A demand for arbitration must be submitted within 30 days after the determination of the corporation.
> (2) On receipt of a demand for arbitration, the Association shall serve notice on the parties to the arbitration and on the corporation, and shall immediately proceed with arbitration according to the commercial rules of the Association in effect at the time the demand is filed, […].[5]

In France, the French National Olympic Committee (*Comité National Olympique et Sportif Français*) created in 2007 the Sports Arbitration Chamber (*Chambre Arbitrale du Sport*) for economic disputes related to sports (e.g. in relation to sponsoring contracts,

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World Sports Law Report, July 2009, vol. 7, no. 7.

[4] 36 U.S.C. 220501 at § 220509. *See*, *for example,* the following awards rendered in "selection" cases: AAA 77 190 0007 10, *Kelly Gunther v. US Speedskating Federation & Rebekah Bradford*, award of 15 January 2010; AAA 77 190 E 00105 10, *Beckom, Hines, Johnson & Radcliff v. US Bobsled and Skeleton Federation*, award of 10 February 2010.

[5] 36 U.S.C. 220501, at § 220529; this Section is entitled "Arbitration of corporation determinations". *See* also §220522 providing that United States sports federations may be recognized by the USOC only if they agree to submit some categories of disputes to AAA arbitration.

broadcasting contracts, agency contracts between agents and athletes or clubs, players transfer contracts and the like).[6]

In Belgium, the Belgian National Olympic Committee (*Comité Olympique et Interfédéral Belge*) established in 1991 the Belgian Sports Arbitration Commission (*Commission Belge d'Arbitrage pour le Sport*), which in 2012 was replaced by the Belgian Court of Arbitration for Sport (*Cour Belge d'Arbitrage pour le Sport*).[7]

In Italy, Law no. 91 of 1981 provides that labour disputes between professional athletes and clubs may be solved through arbitration if an arbitration clause is inserted in the standard employment contract mandated by the collective bargaining agreements negotiated between professional leagues, federations and players' unions.[8] In Italy, both in football and basketball, the standard contracts attached to the pertinent collective bargaining agreements include such arbitration clause and, thus, all Italian sports labour disputes are solved through arbitration. In addition, the Italian National Olympic Committee (*Comitato Olimpico Nazionale Italiano*) first instituted in 2000 the Chamber of Conciliation and Arbitration for Sport (*Camera di conciliazione ed arbitrato per lo sport*) and then, in 2008, substituted it with the National Court of Arbitration for Sport (*Tribunale Nazionale di Arbitrato per lo Sport* or TNAS), dealing with financial disputes between football agents and players and clubs (due to the arbitration clause included in the standard contract adopted by Italian football agents) and, as an appeal body from the various Italian sports federations, with disciplinary disputes arising from non-doping violations (for instance, sanctions for match fixing or illegal betting by players).[9]

Outside of the Olympic Movement, arbitration is also extensively used to solve sport-related disputes.

In the United States, the major professional sports leagues, most notably the "big four", that is, the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and Major League Baseball (MLB), all resort to arbitration to solve disputes related to their activities. Indeed, several arbitration clauses are found in the collective bargaining agreements

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[6] *See* http://franceolympique.com/art/40-la_chambre_arbitrale_ du_sport _.html.

[7] *See* http://www.bas-cbas.be.

[8] Article 4, fifth paragraph, of Law no. 91 of 1981provides that the employment contract "may include an arbitration clause pursuant to which disputes between the club and the sportsman related to the performance of the contract are decided by an arbitral tribunal. The same arbitration clause must appoint the arbitrators or provide the number of arbitrators and the manner of appointment".

[9] *See* http://www.coni.it/attività-istituzionali/tribunale-nazionale-di-arbitrato -per-lo-sport.html.

("CBAs") convened in each league between the clubs' owners and the players' union. The issues normally dealt with in such arbitration proceedings are labour disputes, injury grievances, disciplinary grievances and salary disputes. It has been remarked that one "very public aspect of labor relations in professional sports is the arbitration process".[10] For instance, a major change in baseball (from the "reserve system" to "free agency") was prompted in 1976 by a famous arbitral award rendered by a sole arbitrator in the *Messersmith-McNally* case.[11]

In Canada, the Federal Bill C-12 ("Act to promote physical activity and sport"[12]) was enacted in 2003 to establish the Sport Dispute Resolution Centre, an independent organization whose mission is to provide the Canadian sports community with a national dispute resolution service for sport disputes, including in particular the resort to arbitration, and also to provide expertise and assistance in that regard.[13]

The above sports arbitration systems tend to have common features such as a fixed seat of arbitration, tight time limits, simplified procedures (with few submissions), rosters of arbitrators with expertise in the sector, the right to "appeal" against decisions of sports organizations and, lastly, low costs of proceedings which are conducted—particularly in the United States and Canada—by mere document review or with hearings held by conference call, videoconference, web-meeting and the like.

In addition, the arbitrators appointed in these cases have the authority to grant provisional measures. Another common feature of all sports arbitration proceedings is the great precedential value given to earlier decisions.

Last but not least, it must be noted that sports arbitration awards and orders are usually enforced without problems due to an effective and self-sufficient sanctioning system and the authority of sports organizations over competitions. This is particularly evident in disciplinary or selection disputes; here, an arbitral award confirming the decision taken by a sports organization vis-à-vis an athlete or a

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[10] R.I. ABRAMS, *Sports Labor Relations: The Arbitrator's Turn at Bat*, in *Entertainment and Sports Law Journal*, 1988, vol. 5, no. 1, 1-12, at 3.

[11] *See* Award 23 December 1975, *In re Twelve Clubs Comprising National League of Professional Baseball Clubs and Twelve Clubs Comprising American League of Professional Baseball Clubs, Los Angeles and Montreal Clubs and Major League Baseball Players Association*, in *Labor Arbitration (BNA)*, 1975, vol. 66, at 101. *Cf.* D.R. SWANK, *Arbitration and Salary Inflation in Major League Baseball*, in *Journal of Dispute Resolution*, 1992, available at: http://scholarship.law. missouri.edu/jdr/vol1992/iss1/9.

[12] Statutes of Canada, 2003, Chapter 2, Second Session, Thirty-seventh Parliament, 51-52 Elizabeth II, 2002-2003; at http://www.crdsc-sdrcc.ca/eng/documents/Bill-C-12.pdf.

[13] *See* http://www.crdsc-sdrcc.ca/eng/home.jsp.

club is certainly "self-executing", given that such athlete or club cannot compete if the sports organization is complying with the award (which is to be expected given that it has prevailed in the arbitration). In principle, enforcement procedures through State courts might be needed if an award annuls a decision adopted by a sports organization and such organization refuses to spontaneously comply, denying the concerned athlete, club or association the right to compete. However, in practice, this seldom (or never) happens because the stability of the system is a very strong incentive for a sports organization to spontaneously comply with an arbitral award even if the outcome has been unfavorable.[14]

Even in sports disputes dealing with economic matters (e.g. labour or agency issues) where the sports organization is not directly interested in the outcome of the dispute, the self-executing worth of arbitral awards is evident, because lack of compliance with the award may bring about for the non-complying club, athlete or agent some prejudicial consequences. One can think, for example, of the serious sanctions provided by FIFA rules based on lack of compliance with CAS awards, such as a transfer ban preventing for some time a club from hiring or transferring players, or a period of ineligibility for a player or the temporary loss of a license for an agent.[15]

2. SHARED FEATURES OF ARBITRATION AND SPORT

The above examples of the widespread resort to arbitration to solve sports-related disputes should not come as a surprise. Indeed, the general consensus among the sports sector's stakeholders is that arbitration is preferable over ordinary litigation before State courts. Certainly, the sporting community has always had a sense that the sports sector presents many peculiarities that can be better understood by specialized hearing bodies than by ordinary judges. An important reason for this preference could be that the sports sector tends to favor a "result oriented" approach over a "truth oriented" approach,[16]

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[14] There are plenty of examples of significant CAS cases lost by prominent sports organizations such as the IOC, FIFA or WADA, which invariably complied with the awards without need for the winning side to prompt enforcement proceedings. *See e.g.* CAS OG 02/01 *Prusis & Latvian Olympic Committee v. IOC*; CAS 2009/A/2022 *Kuwait Football Association et al. v. FIFA, ICKFA et al.*; CAS 2009/A/1930 *WADA v. ITF & Gasquet*.

[15] In particular, Article 64 of the FIFA Disciplinary Code lists several sanctions for "Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a […] CAS appeal decision (financial decision), or anyone who fails to comply with another decision (nonfinancial decision) passed by […] CAS".

[16] *Cf.* the contributions published in M. WIRTH, C. ROUVINEZ, J. KNOLL (eds.), *The Search*

particularly because speed and finality are fundamental needs of organized competition, and thus of related disputes, and arbitration is able to provide them better than ordinary litigation. As an illustration, in a well-known CAS award applying the so-called "field of play" doctrine—according to this doctrine, decisions taken by sports referees or judges on the field are not to be reviewed by CAS arbitrators unless it is actually proven that those decisions were due to arbitrariness or bad faith (e.g. in case of corruption)[17]—a CAS panel chaired by the Hon. Michel Beloff QC so stated: "Finality is in this area all important: rough justice may be all that sport can tolerate".[18]

It can also be contended that there are more profound reasons, traceable to a common socio-cultural background, which can explain the sports sector's extensive resort to arbitration. In a sense, arbitration and sport—meaning modern competitive sport organized both within and without the Olympic Movement—were meant to meet and to marry. Indeed, at least six shared features of arbitration and sport are worth mentioning.

First of all, both modern commercial arbitration and modern organized sport trace their origins to the nineteenth century, when the Industrial Revolution sparked the development of economic liberty and an exponential growth of technology, manufacture and commerce, which at the same time brought about (i) the merchants' need for quick and specialized responses to disputes[19] and (ii) the increase of leisure time allowing individuals of the rising middle class to engage in sports either as performers or as spectators and to establish the first sporting clubs and sports associations.[20]

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for Truth in Arbitration: Is Finding the Truth What Dispute Resolution Is About?, ASA Special Series no. 35, Juris Publishing, 2011.

[17] *See e.g.* the awards CAS OG 96/06 *Mendy v. AIBA*, CAS OG 00/13 *Segura v. IAAF*, CAS OG 12/10 *Swedish National Olympic Committee & Swedish Triathlon Federation v. International Triathlon Union*. *See* R.J. LOCKLEAR, *Arbitration in Olympic Disputes: Should Arbitrators Review the Field of Play Decisions of Officials?*, in *Texas Review of Entertainment & Sports Law*, 2003, 199-231.

[18] Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 4.7.

[19] *See* LORD M. MUSTILL, *The History of International Commercial Arbitration—A Sketch*, in L.W. NEWMAN, R.D. HILL (eds.), *The Leading Arbitrators' Guide to International Arbitration*, 2nd Edition, Huntington, Juris Publishing, 2008, 1-30, at 4-5, noting how the England's Common Law Procedure Act of 1854 traced the outlines of modern arbitration, developing important features such as the court enforceability of arbitration agreements, the court's power to appoint an arbitrator if a party refuses to do it and the court's jurisdiction to supervise the procedural fairness of the arbitration proceedings.

[20] *See* R. CREGO, *Sports and Games of the 18th and 19th Centuries*, Westport, Greenwood Publishing Group, 2003, at 3 et seq. Indeed, as observed by S. SZYMANSKI, *The Anglo-American model of sport*, in W. Andreff, S. Szymanski (eds.), *Handbook on the Economics of Sport*, Cheltenham-Northampton, Edward Elgar Publishing, 2006, at 304, many of the

Second, both international arbitration and organized sports are expressions of, and are based on, contractual autonomy and associational freedom. As a matter of course, when parties agree to submit their disputes to arbitration they select a private mechanism for dispute resolution that tends to minimize the role of sovereign States. As has been observed by a learned commentator, it "is no coincidence that arbitration traces many of its roots to trade associations, commercial guilds, and religious associations. In each of these settings, the members of a community chose to have disputes with other people in that community resolved by a mechanism of their own choice and design. Parties in these contexts did so because they desired to minimize the effects of their disputes on their underlying and shared community. At a fundamental level, parties agreed to arbitrate in these contexts because they wanted maximum autonomy and control over the resolution of their disputes and, in particular, wanted to ensure that the resolution of these disputes did not disrupt or damage their underlying relationship, out of which their disputes arose".[21]

By the same token, modern organized sport traces its roots to sporting clubs and associations which set out their own private rules and wished to minimize the role of the State. Not coincidentally, the exact same words of the above quote could have been proffered in reference to sports instead of arbitration. The whole sports system is based on contractual autonomy and associational freedom, as the participation of athletes and teams in competitions is based on their consent to register with sports associations and to enter the competitions. Athletes and teams are thus contractually bound to comply with the rules of the game and to abide by all decisions imposed on behalf of the sports governing bodies, such as those issued by referees on the field or by disciplinary judges off the field. The widespread acceptance by people within the sporting community of rules and decisions issued by such private authorities derives from the fact that such authorities (and the related "legislative" and "judicial" mechanisms) are of their own choice and design.

Third, and related to the previous point, both the commercial arbitration community and the sporting community tend to resent the intervention of State judges, particularly in light of their need for

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important modern sports were formalized in the second half of the nineteenth century in England and in the United States, when the rules of play were written down and clubs and governing bodies were created, for sports such as baseball in 1846, soccer in 1848, boxing in 1865, cycling in 1867, tennis in 1874, American football in 1874, ice hockey in 1875, basketball in 1891, culminating in the first modern Olympic Games in 1896.

[21] G.B. BORN, *Keynote Address: Arbitration and the Freedom to Associate*, in *Georgia Journal of International and Comparative Law*, 2009, 7-24, at 17.

privacy, expertise and finality in the dispute settlement process (and, conversely, State judges have often shown some hostility towards the private process of settling disputes within both the commercial and sport domains).[22]

Fourth, both arbitration and sport have developed sets of rules that, while interacting in many respects with States' legal systems, tend to form complex private law systems, in particular at transnational level. Indeed, international arbitration is not only a transnational system of justice but has been sometimes characterized as expressing a transnational autonomous legal system, sometimes even labelled as "*ordre juridique arbitral*" or "arbitral legal order".[23] Organized sport, on its part, has been able to produce a peculiar transnational branch of law known as sports law, which has developed "under its own impetus, without any legislative underpinning to speak of" and is "inherently international in character".[24] Such coherent transnational system of law has been characterized as "*ordre juridique sportif*"[25] or "sports legal order"[26] by many scholars—starting many decades ago with some eminent Italian jurists applying the notion of legal pluralism to sports[27]—and even by State courts[28] and legislators.[29]

Fifth, and related to the previous point, international arbitration and organized sports have both yielded the application of substantive

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[22] *Cf.* A. MOURRE, L. RADICATI DI BROZOLO, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, in *Journal of International Arbitration*, 2006, vol. 23, no. 2, 171-188, at 171. R. GOODE, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, in *Arbitration International*, 2001, vol. 17, no. 1, 19-39, at 19-20.

[23] *See* E. GAILLARD, *L'ordre juridique arbitral: réalité, utilité et spécificité*, in *McGill Law Journal*, 2010, vol. 55, 891-907. For an account of the use of the expression "arbitral legal order", *see* E. GAILLARD, *Legal Theory of International Arbitration*, The Hague, Martinus Nijhoff Publishers, 2010, at 38-46.

[24] M. BELOFF, T. KERR, M. DEMETRIOU, *Sports Law*, Oxford-Portland, Hart Publishing, 1999, at 5.

[25] *See* J.-P. KARAQUILLO, *Le droit du sport*, 2nd ed., Paris, Dalloz, 1997, at 5 and 43; A. RIGOZZI, *L'arbitrage international en matière du sport*, Basel, Helbing & Lichtenhahn, 2005, at 76 ff.

[26] *Cf.* L. CASINI, *Sports Law: A Global Legal Order?*, at http://ssrn.com/abstract=2079857, *passim.*

[27] *Cf.* W. CESARINI SFORZA, *La teoria degli ordinamenti giuridici e il diritto sportivo*, in *Foro italiano*, 1933, I, 1381 ff.; M.S. GIANNINI, *Prime osservazioni intorno agli ordinamenti giuridici sportivi*, in *Rivista di diritto sportivo*, 1949, 10-28.

[28] *See, e.g.,* Italian Cassation Court, 2 April 1963 n. 811, in *Foro italiano*, 1963, I, 894, at 900.

[29] *See, e.g.,* Article 1 of Italian Law no. 280 of 17 ottobre 2003, reprinted in M. COCCIA, *Codice di diritto sportivo*, Naples, Editoriale Scientifica, 2008, 109, which states as follows: "La Repubblica riconosce e favorisce l'autonomia dell'ordinamento sportivo nazionale, quale articolazione dell'ordinamento sportivo internazionale […]", that is "The Republic recognizes and promote the autonomy of the national sports legal order, as a portion of the international sports legal order […]".

transnational principles, standards and rules, some of which date back decades, known as *lex mercatoria*[30] and *sportiva*.[31] Indeed, although the existence and nature of such sets of rules are hotly debated, and often doubted, by scholars and practitioners,[32] there can be no doubt that, both in commerce and sports, disputes are regularly adjudicated not only on the basis of State laws but also on the basis of principles, standards and rules derived from usages, practice and the spirit itself of, respectively, trade and competition.

Sixth, both arbitration and organized sports have given rise to important and influential non-governmental organisations, leading to the establishment of an institutional framework. On the one hand, disputes related to commercial contracts are nowadays commonly arbitrated under the administration of several private arbitration institutions (ICC, LCIA, AAA etc.). On the other hand, international sports institutions (IOC, FIFA, UEFA etc.) have gained in the years a prominent role in the context of international relations, also in the eyes of the public opinion, to the point that they often deal on equal footing with sovereign States (in particular, in relation to the bids for and organization of major sports events).[33]

3. EXPORTABILITY

Given the above described interweaving factors, it is natural that the relationship between arbitration and sport has given birth to "sports arbitration", that is a specialized (and in some respects simplified) model of arbitration with peculiar features of its own.

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[30] *Cf.*, among the many contributions, LORD M. MUSTILL, *The New Lex Mercatoria: The First Twenty-five Years*, in *Arbitration International*, 1986, vol. 4, 2 ff.; Y. Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, in *Arbitration International*, 2001, vol. 17, 121-128.

[31] As already submitted elsewhere, "*lex sportiva* is constituted by a set of unwritten legal principles of sports law, deriving from the interaction between sports rules and general principles of law, developed and consolidated along the years through the arbitral settlement of sports disputes, both at the CAS and at other dispute settlement institutions specialized in sports" (M. COCCIA, *International Sports Justice: The Court Of Arbitration For Sport*, in M. COLUCCI, K. JONES (eds.), *International and Comparative Sports Justice*, cit. *supra* fn. 3, at 68). *Cf.* also R.C.R. SIEKMANN, J. SOEK (eds.), *Lex Sportiva: What is Sports Law?*, The Hague, Springer, 2012; F. LATTY, *La* lex sportiva. *Recherche sur le droit transnational*, Leiden-Boston, Martinus Nijhoff Publishers, 2007.

[32] *Cf.* T SCHULTZ, *Some Critical Comments on the Juridicity of Lex Mercatoria*, in *Yearbook of Private International Law*, 2008, vol. 10, 667-710; M.J. BELOFF QC, *Is there a Lex Sportiva?*, in *International Sports Law Review*, 2005, vol. 5, no. 3, 49-60.

[33] *See* R. SAPIENZA, *Il Comitato Internazionale Olimpico*, in E. GREPPI, M. VELLANO, *Diritto internazionale dello sport*, 2nd ed., Turin, Giappichelli Editore, 2010, 11-18; C. VEDDER, *The International Olympic Committee: An Advanced Non-Governmental Organization and International Law*, in *German Yearbook of International Law*, 1984, vol. 27, 232 ff.

The downside of having such a specialized model of arbitration is that, *prima facie*, it would not appear easy to export some of its features to other sectors. For example, the unproblematic enforcement of orders and awards, due to the authority of sports organizations over competitions and their effective and self-sufficient sanctioning system,[34] would be very difficult to export, given that other sectors usually lack private bodies having such strong sanctioning powers over the parties to a dispute.

At any rate, other sectors have the advantage of not having (or having in very limited measure) one detrimental feature of sports arbitration—media and fans pressure—that sometimes makes it very hard for arbitration institutions and arbitrators in the sports sector to smoothly run arbitral proceedings and for parties to try and find a friendly settlement.[35]

In any event, some features of sports arbitration are certainly exportable to other sectors. One may think of features such as: (1) the fixed seat of the arbitration proceedings, (2) the precedential value of arbitral awards, (3) the publication of arbitral awards, (4) the use of *amicus curiae* briefs, and (5) the resort to expedited on-site arbitration proceedings, including the authority to issue very urgent provisional measures.

However, in order to be able to export such features to another sector, the necessary premise is the establishment in that other sector of some needed preconditions, from both a socio-cultural and legal standpoint.

From a socio-cultural perspective, some consensus must be built among that other sector's stakeholders, who must acknowledge that the adoption of a simplified model of arbitration may imply a "result vs. truth" trade-off.

From a legal perspective, a very elaborate standard arbitration clause must be drafted and must become generally accepted in the sector, so that the features that are "imported" from the sports sector can be readily put to use once disputes start to arise.

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[34] *See supra*, the final part of section 1.

[35] The practice of sports arbitration shows that matters of "principle" and of "public image" are important and can at times, coupled with the pressure of fans and media, hinder the possibility of finding a settlement that, from a strictly business standpoint, would be in the best interest of the parties. The same reasons may also explain why CAS awards are sometimes challenged before the Swiss Federal Tribunal with appeals that are so hopeless that should never have been filed, as more than once remarked by Charles Poncet in his excellent newsletter and website providing English translations of the opinions issued by the Federal Tribunal (*see* http://www.swissarbitrationdecisions.com).

4. EXPORTABLE FEATURES?

4.1 Fixed Arbitral Seat

It is well established in international arbitration that the seat of the arbitration is a legal concept, which must be clearly distinguished from the actual location where the arbitrators may hold hearings or other meetings. In many of the sports arbitration systems that have been previously mentioned,[36] there is a fixed arbitral seat for all arbitration proceedings and parties are not allowed to change it. For example, the Code of sports-related arbitration (the "CAS Code") provides that the "seat of CAS and of each Arbitration Panel (…) is Lausanne, Switzerland".[37]

Given that the choice of the arbitration seat yields a certain relationship between the arbitration proceedings and the legal system of the chosen territory, the establishment of a fixed arbitral seat in a given country and city can promote uniformity in solving disputes within a given sector with regard to important procedural matters such as the following ones: the national courts which have jurisdiction to set aside the award or which may be called to intervene in support of the arbitral tribunal; the applicability of certain conflict of law rules; the applicability of mandatory rules of the country where the arbitration takes place or of other countries; the national law applicable to certain procedural issues and the relevance of its public policy; the national law governing the arbitrability of a given subject matter; the nationality of the arbitral award for the purposes of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[38]

4.2 Precedential Value of Arbitral Awards

The precedential value of arbitral awards is a typical feature of sports arbitration. The practice of sports arbitration shows that both arbitral tribunals in their awards and orders and parties in their written and oral submissions regularly invoke the precedential value of earlier decisions or, conversely, distinguish their cases from previous ones.[39]

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[36] *Cf. supra*, section 1.

[37] Article R28 of the CAS Code. The same is provided by Article 7 of the Olympic Arbitration Rules: "The seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland".

[38] *See* M. COCCIA, *International Sports Justice: The Court Of Arbitration For Sport*, *cit. supra* note 31, at 28-31.

[39] *See* G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, in

Although precedents do not seem to have a fully binding effect in sports arbitration, as is demonstrated by the fact that on occasion CAS panels decide differently from previous panels on the very same issue,[40] sports arbitrators appear to be very reluctant to depart from precedents, to the point that they are not very far from actually adopting the *stare decisis* doctrine.[41] This is a result of the fact that sport inherently needs a level playing field (even for matters that are removed from the playing field) and, accordingly, the sporting community would not easily accept different outcomes in disputes dealing with the same issues. As a result, sport arbitration tends to avoid a case by case approach in the settlement of disputes.

The precedential value of arbitral awards could definitely be exported to other sectors. Indeed, some other sectors already give precedential value to earlier arbitral decisions; for example, this occurs, albeit in different measures, in domain name arbitration[42] and investment arbitration.[43]

For sector-specialized arbitrations, the precedential value of awards, both on procedural and substantive issues, could be particularly desirable to increase consistency of the awards and predictability of the outcome of the litigated issues, to the advantage of the business community of that sector. Clearly, this is easier to occur in specific sectors where the same issues tend to be litigated over and over again.

Obviously, granting a substantial precedential value to earlier awards would somewhat undermine the extensive freedom that commercial arbitrators enjoy in "minting" the law to take into account the specificities of each case.[44] In fact, it should not be overlooked that in some business sectors a case-by-case approach could be more desirable than consistency.

Arbitration International, 2007, vol. 23, no. 3, 357-378.

40 *See e.g.* the contradicting awards issued by CAS panels with regard the application of article 17 of the FIFA Regulations for the Status and Transfer of Players to the issue of compensation for breach of contract owed by football players to their former clubs: *cf.* CAS 2007/A/1298-1299-1300 *Webster v. Heart of Midlothian* and CAS 2008/A/1519-1520 *FC Shakhtar Donetsk v. Matuzalem, Real Zaragoza & FIFA*.

41 *See* M. COCCIA, *International Sports Justice: The Court Of Arbitration For Sport*, *cit. supra* note 31, at 75-76.

42 G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, *cit. supra* note 39, at 367.

43 *Id.* at 368-373.

44 *Id.* at 365, citing M.J. MUSTILL, *The New Lex Mercatoria: The First Twenty-Five Years*, in M. BOS, I. BROWNLIE (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, Oxford, Clarendon Press, 1987, 149-183, at 157.

4.3 Publication of Arbitral Awards

Of course, the issue of the public availability of arbitral awards is related to the issue of the precedential value of awards. In order to create a body of arbitral precedents, upon which subsequent arbitral tribunals could rely if appropriate, it is of fundamental importance that arbitral awards be regularly published.[45]

In sports arbitration, arbitral awards are systematically published and can be easily found on the Internet. Sports arbitration institutions are even criticized if they do not publish all the arbitral awards.[46] It is submitted that the sports sector greatly benefits from the regular publication of arbitral awards.

Other sectors could also benefit from the publication of arbitral awards, particularly in those sectors where the issues that arbitrators need to address tend to repeat themselves. The business community of a given sector could have—whenever a dispute arises—a better grasp of the pros and cons of embarking into arbitration proceedings if they had an easy access to arbitral precedents.

Obviously, the publication of complete awards would run against the privacy and confidentiality of the arbitral proceedings, that is, one of the perceived benefits of arbitration. However, the regular publication of awards does not necessarily exclude confidentiality. Even in the sports sector, confidentiality is sometimes protected. For example, in CAS arbitration, awards issued in the so-called ordinary arbitration proceedings are confidential "unless all parties agree or the Division President so decides"[47], while awards issued in the appeal arbitration proceedings (which in principle are public) may be kept confidential if all parties so agree.[48]

It can be argued that, in some specific sectors, transparency would be needed at the expenses of confidentiality and that a regular publication of the awards should be promoted. Obviously, some precautions can always be taken; for example, arbitral awards can be redacted (erasing names and other data) and can be published only after a given period of time.

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[45] *See* A. MOURRE, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions…*, in *Kluwer Arbitration Blog*, 10 May 2009, http://kluwerarbitrationblog.com.

[46] *See* M. COCCIA, *International Sports Justice: The Court Of Arbitration For Sport*, *cit. supra* note 31, at 28, noting that it is regrettable that not all (non-confidential) CAS awards are published on the CAS website.

[47] Article R43 of the CAS Code.

[48] Article R59, last paragraph, of the CAS Code.

4.4 Amicus Curiae

A feature which sports arbitration imported from common law jurisdictions—as well as from the WTO Appellate Body and several international human rights courts—is the possibility for third parties advocating a general or special interest to file an "amicus curiae" brief with the arbitral tribunal attempting to influence its decision on a given issue. In this respect, the CAS Code so provides: "After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix".[49]

In sports arbitration, this is clearly linked to the precedential value of the awards. For example, an athletes' union or a league may file an amicus curiae brief if the issue at stake before a CAS panel may affect the contractual or eligibility rights of all the athletes or clubs of a given sport or a given competition.[50]

This could be difficult to export to other sectors, but it could happen on condition that the stakeholders of that sector accept arbitration as the preferred dispute settlement system and endorse transparency rather than confidentiality.

4.5 Expedited On-site Arbitration Proceedings

There is no question that the most evident feature differentiating sports arbitration from commercial arbitration is the urgency to quickly obtain a final decision. The entire sports sector is based on a regular series of competitions that must be over before another one can start. Arbitration proceedings cannot be delayed lest the award is uselessly rendered. As has been observed, "most arbitration practitioners would probably be surprised to learn that some of the world's leading sports arbitral awards were issued at the conclusion of an expedited 24-hour arbitral process involving all-night deliberations by the arbitral tribunal".[51]

Indeed, the sports sector has been very successful in establishing expedited on-site arbitration proceedings to deal on the spot with disputes arising in the course of multi-day events—e.g. the Olympic Games, the America's Cup, world or continental championships, the

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[49] Article R41.4, last paragraph, of the CAS Code.

[50] For example, in CAS 2013/A/3340 *RCD Mallorca v. FIFA and FMF* the Panel allowed—with the consent of all parties—the Spanish football league LFP to take part in the proceedings as amicus curiae, filing written submissions and attending the hearing.

[51] W. MCAULIFFE, A. RIGOZZI, *Sports Arbitration*, in *The European, Middle Eastern and African Arbitration Review*, 2013.

Commonwealth Games—when it is a matter of hours and the resolution of the dispute cannot be deferred to a better time. The purpose of expedited on-site arbitration proceedings is to safeguard effectiveness and finality, so that organizers, athletes and teams know immediately their fate and the sporting event may go on as scheduled, considering also the economic importance of respecting broadcasting schedules and the related contracts.

In particular, since the Olympic Games of Atlanta 1996, the CAS has established an Olympic Ad hoc Division, with a dozen of arbitrators staying on-site, ready to adjudicate disputes arising during the Olympic Games or during the ten days preceding the Olympic Games' opening ceremony.[52] In CAS Olympic Games cases, the hearing must be held and the final award must be issued within 24 hours of the request for arbitration, except for "exceptional cases" where an extension may be granted. Olympic arbitration has features such as: a simplified request for arbitration that may be drafted by merely filling out an application form made available by the CAS; a simplified system of notifications, given that interested parties (that are all on site) may be informed practically by any means; an immediate appointment of the arbitral panel by the Ad hoc Division President; the possibility for parties to be represented by pro-bono lawyers made readily available upon agreement between the CAS and the local Bar; the prevalence of oral arguments and evidence, over which the Panel has large discretion; the immediate summoning of the parties to the hearing, which is typically held in the afternoon or evening and followed by the overnight writing of the award that is notified to the Parties in the subsequent morning.

In addition, even in such a speedy context, arbitrators are authorized to adopt very urgent provisional measures, which are often requested by the parties. Indeed, in sports arbitration provisional measures are often granted or denied in a matter of hours, especially when the participation in a competition is at stake.[53] In some cases, the grant or denial of provisional measures may *de facto* end the case.[54]

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[52] *See* G. KAUFMANN-KOHLER, *Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law*, The Hague, Kluwer, 2001.

[53] In sports arbitration urgent relief is so often needed (even in Olympic Games cases) that, although precise data are not available, it can be estimated that provisional measures are requested in approximately 20% of CAS cases.

[54] The fact that provisional orders can *de facto* end disputes is self evident in cases concerning participation in a sports event; however, it may happen also indirectly. An illustration could be the case CAS OG 02/04 *Canadian Olympic Association v. International Skating Union* (in the Salt Lake City Winter Olympic Games) where, among allegations of judges having favored the Russian couple over the Canadian couple due to improper pressures in a figure skating pairs competition—the case was nicknamed "skategate" by

This model of much expedited on-site arbitral proceedings could perhaps be exported, for instance, to arbitration proceedings dealing with disputes arising from construction sites, where typically contractors and subcontractors and sub-subcontractors work and often argue all at the same time. The immediate on-site hearing and decision of the various disputed issues which arise from time to time in a construction site may prevent a deadlock in the works (with penalty clauses often charged) and subsequent complex and costly arbitration proceedings, where matters occurred in many months or even years are litigated all together.

Trade fairs and exhibitions could also use this model, as proven by the Basel World Watch and Jewelry Show, where an in-house arbitration court (the "Panel") efficiently hears within 24 hours complaints about violations of intellectual property rights during the show.[55]

5. CONCLUDING REMARKS

Clearly, many features of sports arbitration would be difficult to export to other fields. However, it is submitted that in some specialized business sectors arbitration clauses may be devised in a way that gives arbitrators very effective powers to replicate some of the advantageous features of sports arbitration.

Obviously, this objective would require some complex preparatory groundwork to be laid down by the concerned industry, possibly under the guidance of the competent trade associations. The task would be difficult but the results could be rewarding, especially in terms of reducing the times and costs involved in arbitrating disputes.

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the media—the arbitral panel issued *ex parte* a "Procedural order on an application for extremely urgent preliminary relief" essentially ordering the concerned international federation (the ISU) to keep all the judges in the Olympic Village and summon them to testify before the panel. After this order, the ISU, with the consent of the IOC, decided to grant a second gold medal to the Canadian couple and, as a result, the Canadians withdrew their application thus ending the dispute.

[55] *See* C. LANZ, *The Fight against Counterfeiting and Imitations at Trade Fairs: The Panel of BASELWORLD*, in www.wipo.int/meetings/en/doc_details.jsp? doc_id=218403, WIPO/ACE/8/11, 15 October 2012, noting that between 1985 and 2012 the Panel has taken decisions in about 824 cases.