

# SIMPLY A DRESS REHEARSAL? U.S. OLYMPIC SPORTS ARBITRATION AND DE NOVO REVIEW AT THE COURT OF ARBITRATION FOR SPORT

*Maureen A. Weston\**

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\* Professor of Law, Pepperdine University School of Law. The author would like to thank Richard McLaren and Ilhung Lee for comments on earlier drafts of this Article and Pepperdine law student Anthony Greco for his outstanding research assistance.

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## I. INTRODUCTION

In June of 2008, a federal district court judge from northern Florida found himself regretfully stating that in the case before him “the United States Courts have no power to right the wrong perpetrated upon one of its citizens.”<sup>1</sup> Americans have long been wary of subjecting individual interests to external laws. Such fears date back to the days of the Continental Congress, when separate states “ ‘grudgingly’ ” surrendered “ ‘part of their precious sovereignty’ ” to form the nation itself.<sup>2</sup> This deeply rooted apprehension has been cited as one of the foremost reasons the United States is less willing than its European counterparts to subject its people to transnational law or to allow them to be tried in international courts.<sup>3</sup> Yet, in a case that involved the liberty and very livelihood of an American citizen, the U.S. court system was powerless to offer him relief.<sup>4</sup> Instead, he had to seek redress from the supreme court of a foreign nation.<sup>5</sup>

This was the case of Justin Gatlin, an Olympic sprinter who faced a four-year ban from his sport based on a positive test for exogenous testosterone in 2006.<sup>6</sup> The four-year ban was enforced despite the fact that the punishment for a first time doping offense is two years.<sup>7</sup> Gatlin was subjected to the more severe penalty because of a “paperwork” violation,<sup>8</sup> the result of a previous positive test in 2001, caused by use of doctor-prescribed Adderall in treatment of his Attention Deficit Disorder.<sup>9</sup> Although the International Association of

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<sup>1</sup> Gatlin v. U.S. Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, at \*2 (N.D. Fla. June 24, 2008).

<sup>2</sup> Lauren Fielder Redman, *United States Implementation of the International Criminal Court: Toward the Federalism of Free Nations*, 17 J. TRANSNAT’L L. & POL’Y 35, 37 (2007) (referencing the atmosphere at the 1787–1788 Constitutional Convention) (quoting Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 85, 88 (Sarah B. Sewall & Carl Kaysen eds., 2000)).

<sup>3</sup> See Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 J. INT’L MEDIA & ENT. L. 241, 243 (2009) (“Most countries and international sports federations have acceded to the jurisdiction of the CAS [Court of Arbitration for Sport], despite some countries, including the United States, being concerned about the threat of their nationals being tried by foreigners in forums such as the International Criminal Court (ICC).”).

<sup>4</sup> Gatlin, 2008 WL 2567657, at \*2.

<sup>5</sup> *Id.* at \*1.

<sup>6</sup> Amy Shipley, *Gatlin Loses Fight, Receives 4-Year Doping Ban*, WASH. POST, Jan. 1, 2008, at E02.

<sup>7</sup> *Id.*

<sup>8</sup> Gatlin, 2008 WL 2567657, at \*2.

<sup>9</sup> Shipley, *supra* note 6.

Athletics Federations (IAAF) had reinstated Gatlin because the drug was used for legitimate medical purposes, the positive test was later deemed by an international panel of private arbitrators—and wrongfully so in the eyes of the U.S. district court judge—grounds for imposing sanctions for a second offense.<sup>10</sup> This resulted in extending the time of Gatlin's ban from sport.<sup>11</sup>

In pleading his case, Gatlin found himself caught in a web of national and international dispute resolution procedures and emerging *lex sportiva*, which govern international sports.<sup>12</sup> He was not the first American athlete to experience such a predicament. American cyclist, ostensible winner of the 2006 Tour de France, and accused doper, Floyd Landis also pursued a quagmire of arbitral and judicial procedures in seeking to clear his name. Landis ultimately withdrew his petition seeking vacatur of an international arbitral award in a U.S. court as a condition of regaining his license to return to professional cycling although he had served a full two-year suspension.<sup>13</sup> Gatlin and Landis are likely not the only American athletes to wonder why the U.S. legal system is realistically unavailable to them.

Cases involving the eligibility or disciplinary sanction of U.S. Olympic athletes typically begin in the United States, in a "binding arbitration" administered by the American Arbitration Association (AAA).<sup>14</sup> Thereafter, however, the rules governing dispute resolution in international sports, including the Olympic Charter and those adopted by international and national sport federations, provide for a *de novo* hearing, or "appeal" of the national

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<sup>10</sup> *Id.* The U.S. district court judge refers to the decisions made by arbitrators as "capricious" and refers to Gatlin's doping with Adderall as "inadvertent." *Gatlin*, WL 2567657, at \*1–2 (quoting USADA's stipulation that "Mr. Gatlin neither cheated nor intended to cheat. He did not intend to enhance his performance nor, given his medical condition, did his medication in fact enhance his performance."). Gatlin's challenge to the second violation charge was first heard before an American Arbitration Association panel, and then appealed to an international panel of the Court of Arbitration for Sport. Both arbitral panels concluded that Gatlin had committed a second violation. *Gatlin v. U.S. Anti-Doping Agency*, CAS 2008/A/1461 & CAS/2008/A/1462 (final award Sept. 10, 2008) (appeals consolidated), available at <http://www.tas-cas.org/d2wfiles/document/2153/5048/0/award%201461%20+%201462%20internet.pdf>.

<sup>11</sup> Shipley, *supra* note 6.

<sup>12</sup> Ravjani, *supra* note 3, at 243; see generally James A.R. Nafziger, *Lex Sportiva and CAS, in THE COURT OF ARBITRATION FOR SPORT 1984–2004*, at 409 (Ian S. Blackshaw et al. eds., 2006) (explaining that *lex sportiva* usually refers to the evolving precedent being created by the Court of Arbitration for Sport as the court applies it throughout international sporting federations, and events like the Olympic Games).

<sup>13</sup> See *Landis Drops Suit*, VELONEWS, Dec. 6, 2008, <http://www.velonews.com/article/85653>.

<sup>14</sup> See Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5 (2009).

arbitration award to the Court of Arbitration for Sport (CAS) in Switzerland.<sup>15</sup> The appeal to CAS is available not only to either named party, but also to other sport authorities which need not necessarily have participated in the domestic arbitration.<sup>16</sup> Thus, in a recent case involving the U.S. Anti-Doping Agency's (USADA) prosecution of U.S. cyclist Tyler Hamilton, who admitted to taking a steroid in an herbal remedy for depression, that resulted in an eight-year sanction, the World Anti-Doping Agency (WADA) filed an appeal to the CAS asking that a lifetime ban be imposed on Hamilton.<sup>17</sup> In a similar situation, although Justin Gatlin had filed an appeal against USADA of his AAA decision to CAS, the IAAF, which did not participate in the AAA hearing, filed an appeal of the same decision, seeking a lifetime ban rather than accept the arbitral panel's four-year sanction.<sup>18</sup> More problematically, in the case of U.S. Swimmer Jessica Hardy, who tested positive for Clenbuteral just weeks before the 2008 Summer Olympics, the AAA panel found that Hardy's positive test resulted from a contaminated nutritional supplement. Considering the circumstances, the panel imposed a one-year ineligibility period.<sup>19</sup> Days before

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<sup>15</sup> INT'L OLYMPIC COMMITTEE, STATUTES OF THE BODIES WORKING FOR THE SETTLEMENT OF SPORTS-RELATED DISPUTES R47 (2009) [hereinafter CAS CODE], available at <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf>. The CAS Code is also referred to as the Code of Sport-Related Arbitration.

<sup>16</sup> See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 13.2.3 (2009) [hereinafter WADA CODE], available at [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_En.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf) (identifying persons entitled to appeal to CAS as: "(a) the *Athlete* . . . who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant *International Federation*; (d) the *National Anti-Doping Organization* . . . (e) the *International Olympic Committee* . . . ; and (f) *WADA*" (emphasis added)).

<sup>17</sup> Press Release, Court of Arbitration for Sport, WADA Refers the Case of Tyler Hamilton to the Court of Arbitration for Sport (CAS) (July 16, 2009) (on file with author); see also WADA CODE, *supra* note 16, art. 13.1.1 ("Where *WADA* has a right to appeal . . . and no other party has appealed a final decision within the *Anti-Doping Organization's* process, *WADA* may appeal such decision directly to *CAS* without having to exhaust other remedies in the *Anti-Doping Organization* process."). The WADA appeal is significant because an athlete under a lifetime ban is precluded from involvement in any capacity under the control of Olympic-affiliated bodies. See Charles Pelkey, *The Explainer — What Happened to the Lifetime Ban?*, VELONEWS, June 17, 2009, <http://www.velonews.com/article/93523/the-explainer-what-happened-to-the-lifetime-ban>.

<sup>18</sup> Gatlin v. U.S. Anti-Doping Agency, CAS 2008/A/1461 & CAS/2008/A/1462 (final award of Sept. 10, 2008) (appeals consolidated), available at <http://www.tas-cas.org/d2wfiles/document/2153/5048/0/award%201461%20+%201462%20internet.pdf>. The IAAF contended that Gatlin committed a second anti-doping violation and should be declared ineligible for life. *Id.* at 6.

<sup>19</sup> U.S. Anti-Doping Agency v. Hardy, AAA No. 77 190 00288 08, ¶ 7.39 (interim award

Hardy's positive test, however, the International Olympic Committee (IOC) had amended Rule 45 of the Olympic Charter to add a provision making an athlete ineligible for the next *two* Olympic Games after receiving a doping suspension for more than six months.<sup>20</sup> Thus, Hardy's one-year suspension rendered her effectively banned from competing at the 2012 Games. As to Hardy, the AAA called the new IOC penalty "evidently grossly disproportionate" and "far in excess of what should be expected when applying the principles of fundamental justice and fairness in the circumstances of this case."<sup>21</sup> The AAA panel reserved the right to cut the length of the suspension to six months if the IOC rejected Hardy's waiver request from the Rule 45 amendment.<sup>22</sup> Both WADA and the International Swimming Federation (FINA) filed an appeal with CAS, seeking a two-year suspension.<sup>23</sup>

In such cases, the athlete is required to bear the expense, time, and uncertainty of a second proceeding before an international panel of sport arbitrators.<sup>24</sup> Even where an athlete serves a full suspension imposed under an arbitrated ruling, the athlete may be subjected to further sanction by the governing body or sports federation.<sup>25</sup> The "binding arbitration" and seeming resolution at the national level can become unraveled by anti-doping authorities' ability to bring the charges fresh before an international arbitral tribunal. Although this process is not necessarily double jeopardy,<sup>26</sup> it is

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of May 20, 2009).

<sup>20</sup> *Id.* ¶¶ 7.29–7.30.

<sup>21</sup> *Id.* ¶ 7.39.

<sup>22</sup> *Id.* ¶¶ 7.43–7.46.

<sup>23</sup> Press Release, Court of Arbitration for Sport, FINA and WADA Refer the Case of Jessica Hardy to the Court of Arbitration for Sport (CAS) (May 29, 2009), <http://www.tas-cas.org/d2wf/iles/document/3284/5048/0/2009.05.29%20PR%20Eng.pdf> (matter pending as of July 30, 2009).

<sup>24</sup> *See Hardy*, AAA No. 77190 00288 08, ¶ 8.7 ("The parties shall bear their own costs and attorney's fees."); *see also infra* note 61 (noting that the CAS proceedings itself are provided to the parties free of charge).

<sup>25</sup> Floyd Landis served a two-year suspension, as required for a first doping violation under the World Anti-Doping Code. *Landis Drops Suit*, *supra* note 13. However, the International Cycling Federation (UCI) imposes an additional sanction precluding athletes who have served their sanction from participating in international cycling competitions. UNION CYCLISTE INTERNATIONALE (UCI), ANTI-DOPING RULES OF THE UCI ¶ 313 (2009), *available at* <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NDc3MDk&LangId=1>.

<sup>26</sup> The Fifth Amendment to the U.S. Constitution protects a defendant from being tried twice for the same crime after an acquittal or conviction and from receiving multiple punishments for the same crime. U.S. CONST. amend. V. The general rule against double jeopardy has been recognized by a number of other nations as well, evinced by a double jeopardy clause within the Rome Statute of the International Criminal Court. Lorraine Finlay, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome*

arguably similar and certainly more costly and time-consuming for all involved.

Although Gatlin had sought recourse in the U.S. judicial system, as indicated by the federal district judge in his appeal, CAS rules provide that its decisions may only be reviewed by the Swiss Federal Tribunal (SFT).<sup>27</sup> The SFT rarely overturns a decision made by CAS.<sup>28</sup> Rather, the SFT has given the CAS a stamp of legitimacy that sets the bar for vacatur exceedingly high.<sup>29</sup> This Article questions the process of having both a domestic and international tribunal decide the fate of athletes when the international arbitral panel essentially operates as a court of first and final appeal, abrogating any authority or finality in the local decision. This result not only undermines the finality envisioned by Congress when charging the United States Olympic Committee (USOC) to implement a process for the “swift and equitable resolution” of Olympic sports-related disputes, it ironically illustrates how the

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*Statute*, 15 U.C. DAVIS J. INT’LL. & POL’Y 221, 225–26 (2009). While the adjudicatory process for prosecuting doping violations does not involve governmental authorities per se, some contend the process has been so entwined as to amount to state action. See Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency’s Performance-Enhanced Adjudications Should Be Treated as State Action*, 22 WASH. U. J.L. & POL’Y 645, 648 (2006) (arguing that “USADA doping adjudications using the ‘comfortable satisfaction’ standard of proof may fairly be characterized as state action”). In the context of international sports arbitration, the first hearing occurs before a national arbitral panel and the second hearing is before an international panel.

<sup>27</sup> *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, at \*1 (N.D. Fla. June 24, 2008). The judge refers to a “Swiss Supreme Court,” which accurately conveys its function, but the court is actually named the Swiss Federal Tribunal.

<sup>28</sup> See Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 52–54 (2009) (reviewing CAS decisions brought before the SFT from 1992 to 2009, noting that the SFT has vacated very few awards); see also Antonio Rigozzi, *Available Remedies against CAS Awards*, in SPORT GOVERNANCE, FOOTBALL DISPUTES, DOPING AND CAS ARBITRATION: CAS & FSA/SAV CONFERENCE LAUSANNE 2008, at 95 (M. Bernasconi & Antonio Rigozzi, eds., forthcoming Nov. 2009) (providing overview of CAS awards reviewed by the Swiss Federal Tribunal).

<sup>29</sup> See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 80–81 (2008) (noting that the SFT considers CAS to be “‘a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling . . . the CAS is more akin to a judicial authority independent of the parties’ ”); see also Darren Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport*, 4 MELB. J. INT’L L. 611 (2003) (discussing the development of CAS *lex sportiva*). In 2008, a record number of 318 proceedings in a single year were filed with CAS. TAS/CAS, Important Dates in the CAS History, <http://www.tas-cas.org/statistics> (last visited Nov. 14, 2009).

United States has implicitly assigned the protection of the rights of its citizens to a private international tribunal seated in a foreign nation.<sup>30</sup>

Part II of this Article discusses the process by which Olympic-level athletes may seek first-instance arbitration through AAA, which is subject to appeal and final determination by the CAS, situated in Switzerland. Part III explores the process and limited options for the judicial review of CAS awards under domestic and international arbitration laws. Part IV considers the role of the U.S. legal system, if any, in the review of sport arbitral awards through the cases of Gatlin and Landis, where each sought to vacate CAS awards in U.S. federal court. Part V concludes by proposing a model of appellate, rather than *de novo*, arbitral review by CAS hearings where an underlying domestic arbitration panel of national CAS arbitrators previously renders an award.

## II. ARBITRATION AS AN EXCLUSIVE MEANS FOR OLYMPIC SPORTS DISPUTE RESOLUTION

### *A. Domestic Arbitration for U.S. Athletes Competing in International Sports*

In the Amateur Sports Act of 1978 (ASA), Congress designated the United States Olympic Committee (USOC)<sup>31</sup> as a federally chartered corporation to act as the exclusive governing body for matters related to U.S. participation in the Olympic Games and international athletic competition.<sup>32</sup> The Act provides specifically that:

the [USOC] shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the

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<sup>30</sup> See Ravjani, *supra* note 3, at 266–69 (asserting that the United States has delegated its authority on international sports directly to private national actors, such as the USOC, and indirectly to CAS, an international tribunal).

<sup>31</sup> Amateur Sports Act of 1978 (ASA), Pub. L. No. 95-606, 92 Stat. 3045 (1978). In 1998, the Act was amended and renamed the Ted Stevens Olympic & Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2006).

<sup>32</sup> 36 U.S.C. §§ 220503(3), 220505(c). The USOC is the National Olympic Committee (NOC) for the United States, as recognized by the International Olympic Committee (IOC). The IOC is the governing authority for the Olympic movement and recognizes NOCs and International Sports Federations (IFs), which administer specific sports. NOCs and IFs, in turn, recognize National Governing Bodies (NGBs) “to administer and govern a particular sport within that country.” Weston, *supra* note 14, at 14. There are currently 205 NOCs over five continents. See INT’L OLYMPIC COMMITTEE, OLYMPIC CHARTER (2007), [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf).



opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Paralympic Games, the Pan-American Games, world championship competition, or other protected competition as defined in the constitution and bylaws of the [USOC].<sup>33</sup>

The section further states that:

[i]n any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, . . . a court shall not grant injunctive relief against the [USOC] within 21 days before the beginning of such games if the [USOC] . . . has provided a sworn statement . . . that it[ ] . . . cannot provide for the resolution of such dispute prior to the beginning of such games.<sup>34</sup>

The statute contemplates that the USOC will implement private dispute resolution procedures, using the American Arbitration Association (AAA); yet, it also acknowledges the possibility of an athlete pursuing eligibility determinations through the court system.<sup>35</sup>

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<sup>33</sup> 36 U.S.C. § 220509(a).

<sup>34</sup> *Id.* The purpose of this provision is to avoid judicial interference in eligibility and team selection decisions on the eve of the Olympic Games. *Lindland v. U.S. Wrestling Ass'n*, 227 F.3d 1000, 1007 (7th Cir. 2000). A history of litigation and judicial orders regarding athlete participation in Olympic and international sporting events, considered disruptive, preceded this provision. See *Lindland*, 227 F.3d at 1003 (ordering, over USOC's objection and despite conflicting arbitral decisions between competitors for nomination to Olympic Team, enforcement of award which had been confirmed before entering of the second conflicting award); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1112–13 (6th Cir. 1994) (noting the IAAF's refusal to accept the U.S. arbitral award or order by the U.S. Supreme Court to allow the athlete to compete); Mary K. Fitzgerald, *The Court of Arbitration for Sport: Dealing with Doping and Due Process During the Olympics*, 7 SPORTS LAW. J. 213, 219 (2000) (describing TAC, the National Governing Body (NGB), as "caught in the crossfire between U.S. courts and the IAAF").

<sup>35</sup> 36 U.S.C. § 220529(a) (stating "[a] party aggrieved by the determination of the [USOC] . . . may obtain review" by filing a demand for arbitration with the American Arbitration Association (AAA)). Although the Act charges the USOC "to establish and maintain provisions . . . for the swift and equitable resolution of disputes" involving athletes, it precludes a court from granting injunctive relief within twenty-one days of the start of an Olympic event. 36 U.S.C. § 220529(a). See also U.S. OLYMPIC COMM., BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE §§ 9.7–9.8 (2008) [hereinafter BYLAWS OF THE USOC] (providing for binding arbitration of athlete complaints, including affected parties), available at [http://assets.teamusa.org/assets/documents/attached\\_file/filename/4076/USOC\\_Bylaws\\_07.01.08\\_\\_execut](http://assets.teamusa.org/assets/documents/attached_file/filename/4076/USOC_Bylaws_07.01.08__execut)

The Act's reference to arbitration is specific to National Governing Bodies (NGBs), which "represent the United States in the appropriate international sports federation" and designate individuals and teams to be the American representatives in international sports competition.<sup>36</sup> An NGB for each sport may be recognized only if it "agrees to submit to binding arbitration in any controversy involving -- (A) its recognition as a national governing body . . . ; and (B) the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition . . . ."<sup>37</sup> These hearings are to be conducted in accordance with the AAA's Commercial Rules of Arbitration.<sup>38</sup>

The USOC has contracted with the United States Anti-Doping Agency (USADA) to administer doping-control, education, research, and adjudication for United States athletes competing in Olympic and international sports, consistent with the World Anti-Doping Program.<sup>39</sup> Athletes participating in sanctioned international competitions must agree to comply with the World Anti-Doping Code (WADC), thus requiring athletes to submit to random in and out-of competition doping control testing for prohibited substances.<sup>40</sup> USADA has similarly incorporated the option for domestic arbitration through

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ed\_.pdf. This process does not include claims of anti-doping violations or general field of play decisions. BYLAWS OF THE USOC, *supra*, §§ 9.11–9.12.

<sup>36</sup> 36 U.S.C. § 220523(a).

<sup>37</sup> *Id.* § 220522(a)(4).

<sup>38</sup> *Id.*; see also *infra* note 41.

<sup>39</sup> U.S. ANTI-DOPING AGENCY [USADA], PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING ¶ 1 (2009) [hereinafter USADA PROTOCOL]. USADA is an "independent, non-governmental anti-doping agency," which has full authority to implement anti-doping programs, testing, and adjudication in the United States. See U.S. Anti-Doping Agency, FAQs, <http://www.usantidoping.org/resources/faqs.aspx?showAll=1> (last visited Nov. 14, 2009). The Agency "has authority to test: any athlete who is a member of a National Governing Body (NGB)" and "any athlete participating at a competition sanctioned by the [USOC] or a NGB." *Id.* USADA also conducts "testing for International Federations (IFs), other National Anti-Doping Organizations (NADOs) and the World Anti-Doping Agency." *Id.*

<sup>40</sup> USADA PROTOCOL, *supra* note 39, ¶¶ 4–5. The WADC contains the list of banned substances and provides a framework for the anti-doping policies, rules and regulations within sport organizations. *Id.* at Annex A. All IOC recognized sport federations have adopted the WADC into their respective sporting rules to which athletes must abide. See Weston, *supra* note 14, at 25 (noting that the requirement under the Olympic Charter for all members of the Olympic Movement to adopt and implement the WADC). Proceedings for violations of anti-doping rules are technically brought by the sport governing body, which may delegate prosecution authority to the anti-doping agency, such as USADA. Accordingly, WADA is itself is not a party to these cases, yet it is accorded standing to intervene at the CAS level. See discussion *infra* Part II.C.3.

the AAA to adjudicate doping charges involving U.S. athletes.<sup>41</sup> Doping cases are administered in accordance with the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (Supplementary Procedures). Under the Supplementary Procedures, accused athletes may opt for a hearing before a panel of three arbitrators who are listed both on AAA and CAS rosters (AAA/CAS), although CAS and AAA are separate organizations.<sup>42</sup> The AAA decision may be appealed directly to CAS, or the athlete may elect to bypass the AAA process and proceed directly to CAS for final and binding determination.<sup>43</sup>

The intent of designating an arbitral process is to provide swift resolution to disputes for athletes seeking to participate in the Olympic Games. Arbitration is thought to be faster and less costly, and it provides a certainty of forum for the resolution of disputes. Arbitration here is not truly voluntary, as athletes wishing to compete in the Olympic Games must sign a waiver agreeing to submit to the final review of any appealed claim to CAS.<sup>44</sup> This

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<sup>41</sup> USADA PROTOCOL, *supra* note 39, ¶ 12. USADA's testing and adjudicatory process is guided by the USADA Protocol for Olympic Movement Testing. *Id.* The AAA hearings involving doping disputes are governed by commercial arbitration rules, as modified by the "Supplementary Procedures." AM. ARB. ASS'N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF ANTI-DOPING RULE VIOLATIONS R-1 (2009) [hereinafter AAA SUPP. PROC.], available at <http://www.adr.org/sp.asp?id=28627>.

<sup>42</sup> AM. ARB. ASS'N, SPORTS ARBITRATION INCLUDING OLYMPIC ATHLETE DISPUTES 4 (AAA Online Library 2006), <http://www.adr.org/si.asp?id=4700>. As of May 1, 2009, the eligible pool of AAA arbitrators for anti-doping cases was limited to CAS arbitrators who are U.S. citizens. AM. ARB. ASS'N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF ANTI-DOPING RULE VIOLATIONS, at R-3 (2009) [hereinafter AAA SUPP. PROC.], available at <http://www.adr.org/sp.asp?id=28627>. Under the 2004 AAA rules, the pool of arbitrators included AAA arbitrators also on the North American CAS panel. AM. ARB. ASS'N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DOPING DISPUTES, at R-3 (2004).

<sup>43</sup> The term "appeal" is arguably a misnomer because the CAS review is *de novo*; however, the applicable regulations use the term "appeal" to describe this process. USADA PROTOCOL, *supra* note 39, ¶ 15(b) (providing that "[t]he final award by the AAA/CAS arbitrator(s) may be appealed to the CAS"); see also CAS CODE, *supra* note 15, at R47 ("An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.").

<sup>44</sup> Rule 59 of the OLYMPIC CHARTER requires that any disputes "arising on the occasion of, or in connection with, the Olympic Games," including an athlete's eligibility to participate in the Olympics, shall be submitted exclusively to the CAS. OLYMPIC CHARTER, *supra* note 32, at Rule 59; see also Melissa R. Bitting, Comment, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 664

condition applies also to athletes participating in international sports competitions generally. International sports federations within the Olympic movement have adopted CAS jurisdiction as the final tribunal for appeal.<sup>45</sup>

*B. International Arbitration in the Court of Arbitration for Sport*

The Court of Arbitration for Sport (CAS) was established by the International Olympic Committee on April 6, 1983.<sup>46</sup> Its seat is in Lausanne, Switzerland, and is therefore governed by Swiss law, which applies regardless of where the actual proceedings take place.<sup>47</sup> CAS's stated objective is to convene panels which have the charge to resolve disputes arising in the field of international sports.<sup>48</sup> CAS thus provides "a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations . . . ."<sup>49</sup>

CAS is organized into two primary divisions.<sup>50</sup> The Ordinary Arbitration Division handles commercial contractual disputes relating to the field of sport, which involve parties who have agreed to CAS jurisdiction.<sup>51</sup> The Appeals Arbitration Division resolves disputes concerning the decisions of federations or sporting authorities.<sup>52</sup> CAS may also convene an Ad Hoc Division,<sup>53</sup> which

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(1998).

<sup>45</sup> Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 12, at 37.

<sup>46</sup> Mitten & Davis, *supra* note 29, at 78.

<sup>47</sup> CAS CODE, *supra* note 15, at R28, R45. Absent the consent of the parties, CAS operates under Swiss law and in accordance with the CAS Code, which sets forth the procedural rules for CAS arbitrations. *Id.* at R45.

<sup>48</sup> *Id.* at S12.

<sup>49</sup> Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 381 (2001).

<sup>50</sup> CAS CODE, *supra* note 15, at S20.

<sup>51</sup> INT'L COUNCIL OF ARB. FOR SPORT, GUIDE TO ARBITRATION 5 (1991) [hereinafter GUIDE TO ARBITRATION], available at <http://www.sportundrecht.de/ed-recht/casuidearbitration.pdf>. Contracting parties may designate CAS arbitration to resolve disputes such as sponsorship contracts, broadcasting rights, or employment and agency contracts involving athletes, managers, other third party liability, and civil liability claims, such as accidents to athletes during a sports competition. See *id.* at 11 (explaining that the Ordinary Arbitration Division is "competent to resolve all types of disputes" arising from "all types of legal relations between parties"). Ordinary arbitration proceedings are confidential and awards are not public, unless otherwise provided. CAS CODE, *supra* note 15, at R43.

<sup>52</sup> CAS CODE, *supra* note 15, at S20(b).

<sup>53</sup> *Id.* at S6(8).

operates on site at the Olympic Games to provide expedited hearings and decisions involving disputes arising during the Games. Additionally, CAS may issue non-binding advisory decisions relating to sports issues at the request of any of the Olympic regulatory bodies or WADA.<sup>54</sup> Although originally created by the International Olympic Committee, CAS is now independently managed and financed by the International Court of Arbitration for Sport (ICAS).<sup>55</sup>

### *C. Interplay Between Domestic AAA/CAS and CAS*

Rule 47 of the CAS Procedural Code provides that “[a]n appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.”<sup>56</sup> The appeals submission to CAS must contain a copy of “the decision appealed against,” in addition to the requested relief, identified parties, and selected arbitrator.<sup>57</sup> Where the hearing is before a panel of three arbitrators, one appointed by each party, the Panel Chair is appointed by the President of the Appeals Division.<sup>58</sup>

Even where a full arbitration decision is rendered by a domestic panel, CAS Rule 57 requires a *de novo* hearing before the CAS tribunal.<sup>59</sup> Regarding the scope of CAS’s review, Rule 57 provides that “[t]he Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.”<sup>60</sup> Although the appeals arbitration proceedings before CAS are at no charge to the parties, each is responsible for the expenses of its own legal fees and witnesses, which can be considerable.<sup>61</sup>

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<sup>54</sup> *Id.* at S12(c).

<sup>55</sup> ICAS serves as the administrative arm of CAS. TAS/CAS, General Information: Organisation and Structure of ICAS and CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/> (last visited Nov. 15, 2009).

<sup>56</sup> CAS CODE, *supra* note 15, at R47; *see also* USADA PROTOCOL, *supra* note 39, ¶ 15(b) (providing that “[t]he final award by the AAA/CAS arbitrator(s) may be appealed to the CAS”).

<sup>57</sup> CAS CODE, *supra* note 15, at R48.

<sup>58</sup> *Id.* at R54.

<sup>59</sup> *Id.* at R57.

<sup>60</sup> *Id.*; *see also id.* at R58 (“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”).

<sup>61</sup> *Id.* at R64–R66 (noting that other than a minimum fee, the appellate arbitration proceedings are free of charge, while parties remain responsible for the other costs of the

### I. Landis v. United States Anti-Doping Agency

The question of how the CAS panel should treat an “appeal” of an arbitration award where a full hearing before a domestic tribunal of CAS occurred was addressed by the Panel in the CAS arbitration *Landis v. United States Anti-Doping Agency*.<sup>62</sup> Floyd Landis was considered the winner of the 2006 Tour de France on July 23, 2006.<sup>63</sup> Three days later, he was notified of a positive A sample based on the detected presence of exogenous testosterone, which a test of the B sample later confirmed.<sup>64</sup> Landis filed for arbitration on September 18, 2006.<sup>65</sup> In May of 2007, after months of extensive pre-hearing proceedings between USADA and Landis, a nine-day public arbitration hearing was held at Pepperdine University in Malibu, California before a panel of three arbitrators through the AAA/North American CAS.<sup>66</sup> On September 20, 2007, the AAA Panel issued an eighty-four page decision, in a 2–1 ruling, finding Landis in violation of the anti-doping regulations and imposing automatic disqualification of his Tour de France title and a two-year suspension.<sup>67</sup> Landis timely “appealed” to CAS in October of 2007, with a hearing held in New York in March and April of 2008.<sup>68</sup>

The Panel first addressed USADA’s statement of the Issues for Appeal, one of which simply stated: “(1) Did the AAA Panel err in finding that the Appellant committed an anti-doping rule violation during the 2006 Tour de

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hearing). A similar structure applies at the AAA level, where the USOC pays the costs of the arbitration, including arbitrator fees and expenses, with parties responsible for their costs of representation. AAA SUPP. PROC., *supra* note 41, at R-47–R-49. The cost of Landis’ defense reportedly exceeded \$2 million, with USADA spending approximately \$1.3 million to prosecute. *Floyd Landis Loses CAS Appeal*, VELONEWS, June 30, 2008, <http://tour-de-france.velonews.com/article/79029/floyd-landis-loses-cas-appeal>; see Bonnie D. Ford, *Landis May Not Race Again, but He’s Not Done Fighting*, ESPN, July 1, 2008, <http://sports.espn.go.com/oly/cycling/columns/story?id=3468423> (“Two years, close to \$4 million spent by both sides combined, and an unquantifiable amount of collateral damage later, Floyd Landis’ doping case rolled across what is normally the administrative finish line . . . . The Court of Arbitration for Sport released its ruling upholding a lower panel’s opinion that Landis was guilty as charged of using synthetic testosterone to boost his performance in the 2006 Tour de France.”).

<sup>62</sup> *Landis v. U.S. Anti-Doping Agency (Landis II)*, CAS 2007/A/1394 (award of June 30, 2008), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1394.pdf>.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3–4.

France?”<sup>69</sup> Although USADA had framed the issue in a standard of review typical for judicial appellate review,<sup>70</sup> appeals to CAS are different. Counsel for USADA defended the scope of review requested, arguing:

In this case, we have a *de novo* panel looking at a decision by a prior panel after nine days of hearing and an 84 page decision. Historically, when you look at the CAS *de novo* rule, what we saw were cases coming from international federations where the facts were sketchy and there were lots of issues of procedural due process. And the *de novo* rule made a lot of sense because you could cut through all those due process issues, get right to the merits and get the case done.

That is not what we’re looking at in this case at all. Here we’ve had no due process issues below, we’ve had extensive factual findings . . . .

What we would suggest is that as you’re doing your work on this case . . . pay careful attention to the lower panel’s decision.<sup>71</sup>

The tribunal considered it inappropriate to consider or defer to the AAA decision, based on the CAS procedural rule providing for a *de novo* hearing. The President of the Panel clarified, “it’s not for us to decide whether [the AAA decision was] right or wrong.”<sup>72</sup> Rather, the CAS panel was to make a determination independent of the AAA award.<sup>73</sup>

In its written decision, the CAS did conclude differently from the AAA panel’s finding of an International Standards of Laboratories violation.<sup>74</sup> However, the CAS Panel likewise determined that Landis had engaged in doping and then issued the same two-year ineligibility sanction and

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<sup>69</sup> *Id.* at 5.

<sup>70</sup> The standard for appellate review generally is abuse of discretion for findings of fact and *de novo* review for a court’s conclusions of law. *See, e.g.*, FED. R. CIV. P. 52(a)(6) (providing that findings of fact are not to be set aside unless clearly erroneous).

<sup>71</sup> *Landis II*, CAS 2007/A/1394, at 6 (comments of USADA Attorney Richard Young).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* ¶ 188, at 37; *cf.* U.S. Anti-Doping Agency v. Landis (*Landis I*), AAA No. 30 190 00847 06, at ¶ 172 (award of Sept. 20, 2007), *available at* [http://www.usantidoping.org/files/active/arbitration\\_rulings/landis%20final%20\(20-09-07\)%20\(3\).pdf](http://www.usantidoping.org/files/active/arbitration_rulings/landis%20final%20(20-09-07)%20(3).pdf). The AAA Panel went so far as to state that “the forensic corrections of the Lab reflect sloppy practices on its part. If such practices [sic] continue it may well be that in the future an error like this could result in the dismissal of an AAF [adverse analytical] finding by the Lab.” *Id.* ¶ 290. It concluded, however, that this violation did not cause the AAF. *Id.* ¶ 289.

disqualification of results from the 2006 Tour.<sup>75</sup> It went further, however, in imposing a \$100,000 sanction against Landis personally for “litigation misconduct,” which the Panel deemed had stemmed from unsubstantiated allegations of fraud and misconduct against the French laboratory and failure to call witnesses summoned to testify.<sup>76</sup> Specifically, the Panel stated:

Although the Appellant had the right to pursue a comprehensive *de novo* appeal . . . all of its multiple defenses have been rejected as unfounded. All that the Appellant has established after a wide-ranging attack on LNDD [the French laboratory] is that there were some minor procedural imperfections.<sup>77</sup>

Interestingly, the CAS Panel cited Landis’ failure to narrow the claims raised and rejected in the AAA/CAS proceeding as grounds, *inter alia*, to impose sanctions in the *de novo* appeal to CAS. It stated:

The Appellant chose not to eliminate any of his challenges after their rejection by the AAA Tribunal and it compelled the Respondent to contest the same very wide range of issues on this appeal as had already been addressed below . . . . Appellant should have presented a much more focused challenge before this Panel . . . .<sup>78</sup>

## 2. A “Winner”: Jenkins v. United States Anti-Doping Agency

In July 2006, elite-level sprinter LaTasha Jenkins was notified of a positive test and sanction by USADA. Jenkins pursued AAA arbitration, with a complete evidentiary hearing held in July 2007. The AAA Panel noted that “[a]lthough duly invited, neither the IF (IAAF) nor WADA chose to participate

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<sup>75</sup> *Landis II*, CAS 2007/A/1394, at 54.

<sup>76</sup> *Id.* ¶ 289, at 54–55. Landis’s counsel contended that the time limitations of the hearing rendered them unable to call additional witnesses and to fully present his evidence and cross-examination. Amended Motion to Vacate Arbitration Award, *Landis v. U.S. Anti-Doping Agency (Landis III)*, No. CV 08-6330-PA, at 34 (CWx) (C.D. Cal. Oct. 3, 2008).

<sup>77</sup> *Landis II*, CAS 2007/A/1394, ¶ 289, at 54–55. The appeal filed by Landis against the award rendered by AAA was subsequently dismissed. *Id.* at 54.

<sup>78</sup> *Id.* ¶ 269, at 53.



in the proceedings either as a party or an observer.”<sup>79</sup> The Panel issued its final award in December 2007, ruling that the positive drug testing results of Jenkins be set aside due to the laboratory’s failure to follow International Standards of Laboratory practices.<sup>80</sup> Thus, Ms. Jenkins was the first and only athlete in the USADA’s history to date (then 35–1) to win a case against USADA.<sup>81</sup> Despite this clearing of her record and name, WADA filed an appeal with CAS in February 2008.<sup>82</sup> Although victorious, Jenkins had to wait eight months after she had won at the AAA before she could return to competition. In total, she was out of competition nearly two years (ironically, the same approximate duration she would have served if found guilty of a first-time doping violation).<sup>83</sup>

### 3. *The Problem of the De Novo Option*

Disputes resulting from final-instance decisions taken by tribunals within CAS, such as the domestic arbitration process used by the AAA, as well as from sporting federations or other sports bodies, are subject to de novo review and a new hearing before CAS, which renders a final and binding award.<sup>84</sup> The rationale for allowing a de novo appeal to the international CAS panel by either party, as well as by sport federations or WADA that choose not to participate in the national process, is rooted in the concern the national tribunal may be more lenient when sanctioning its own athlete. However, the option for CAS review of claims de novo does not set forth any standard for error by the national decision. The CAS Appeals Division is thus both a first and final instance tribunal.<sup>85</sup> A new hearing before a CAS tribunal for final and binding

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<sup>79</sup> U.S. Anti-Doping Agency v. Jenkins, AAA No. 30 190 0019 9 07, ¶ 20 (award of Jan. 25, 2008), available at [http://www.usantidoping.org/files/active/arbitration\\_rulings/AAA%20CAS%20Decision%20-%20LaTasha%20Jenkins%20January%202008%5B2%5D.pdf](http://www.usantidoping.org/files/active/arbitration_rulings/AAA%20CAS%20Decision%20-%20LaTasha%20Jenkins%20January%202008%5B2%5D.pdf).

<sup>80</sup> Philip Hersh, *Sprinter Jenkins Arbitration Win Appealed*, LA TIMES, Feb. 28, 2008, <http://articles.latimes.com/2008/feb/28/sports/sp-jenkins28>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> WADA CODE, *supra* note 16, arts. 10.2–10.3 (setting forth standard penalties against an athlete for a first anti-doping violation at two years, with a lifetime ban for second offenses).

<sup>84</sup> Christian Krähe, *The Appeals Procedure Before the CAS*, in THE COURT OF ARBITRATION FOR SPORT 1984–2004, *supra* note 12, at 99; see also Landis v. U.S. Anti-doping Agency (*Landis II*), CAS 2007/A/1394, at 6 (award of June 30, 2008), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1394.pdf> (noting the duty of the CAS panel to make a determination, independent of the AAA award).

<sup>85</sup> Mitten & Davis, *supra* note 29, at 79–80. Mitten and Davis describe the various roles CAS may play, stating that:

The CAS also may resolve non-Olympic athlete eligibility disputes arising out

determination can effectively render the domestic arbitration meaningless, except for the additional time and expense incurred.

### III. OPTIONS FOR JUDICIAL REVIEW OR VACATUR OF CAS AWARDS

When an athlete receives an adverse ruling from a CAS panel, at first blush it would appear he has a myriad of options for review of that decision under both national and international law. However, the number of potential options is illusory, as the grounds to vacate a CAS award are extremely limited. This section considers options and fora for judicial review or vacatur of AAA/CAS or CAS awards.

#### *A. Federal Arbitration Act and Domestic Arbitration Awards*

Under the Amateur Sports Act, awards issued by the AAA are final and binding.<sup>86</sup> As such, these domestic awards are governed by the Federal Arbitration Act (FAA).<sup>87</sup> The FAA provides for the enforcement of written agreements to arbitrate disputes, subject to contract law defenses.<sup>88</sup> The FAA, and parallel state legislation, permits judicial confirmation of arbitral awards, the effect of which results in a judgment which has the same force as those rendered in a court of law.<sup>89</sup> The FAA provides limited grounds upon which a court may vacate an arbitral award. These include:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . ; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which

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of appeals from the final decisions of an IF pursuant to its appeals arbitration procedure. These cases normally must be decided within four months after the filing of an appeal. In athlete eligibility disputes other than those arising out of the Olympic Games, the relevant IF rules and the law of the country in which the IF is domiciled generally apply.

*Id.* (citations omitted).

<sup>86</sup> Ted Stevens Olympic & Amateur Sports Act, 36 U.S.C. § 220529(d) (2006).

<sup>87</sup> Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006).

<sup>88</sup> *Id.* § 2 (“A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

<sup>89</sup> *Id.* §§ 9–13; *see also* UNIF. ARBITRATION ACT § 22 (2000).

the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers . . . .<sup>90</sup>

The U.S. Supreme Court has held that these grounds for vacatur in the FAA are exclusive and that parties may not agree to expand the scope of judicial review under the FAA, such as for review of legal error.<sup>91</sup> The *de novo* option for AAA awards, providing for review by CAS, arguably expands the scope of review for AAA awards beyond those grounds provided in the FAA. Another view, however, is that the CAS *de novo* option is a form of arbitral appellate review, which is an accepted form of administrative remedy.<sup>92</sup>

#### *B. CAS Awards as Foreign Arbitration Awards*

The CAS Code itself permits essentially no appeal or recourse of a CAS award, stating in Rule 59 only that the award is “final and binding.”<sup>93</sup> Rule 59 was amended from an earlier version of this Rule, which expressly stated challenge may be had on “an extremely limited number of grounds.”<sup>94</sup> These grounds were:

[I]ncompetence or irregular formation of the arbitration Panel, arbitration award going beyond the application of which the CAS is seized or the lack of a decision on one of the major points of the application, violation of the rights of the parties to be heard or lack of equal treatment, [and] incompatibility of the award with public order.<sup>95</sup>

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<sup>90</sup> 9 U.S.C. § 10(a)(1)–(4).

<sup>91</sup> *Hall Street Assoc. v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>92</sup> AM. ARB. ASS’N, DRAFTING DISPUTE RESOLUTION CLAUSES 37 (2007), available at <http://www.adr.org/si.asp?id=4125> (recognizing limits of judicial review, proposing that “[a]nother approach is to provide for an appeal to another panel of arbitrators who would apply whatever standard of review the parties might specify”). If so, a U.S. court would require exhaustion of remedies through CAS. However, once heard by CAS, the arbitration is deemed international and then governed by the CAS Rules and the international arbitration standards in the New York Convention.

<sup>93</sup> CAS CODE, *supra* note 15, at R59.

<sup>94</sup> GUIDE TO ARBITRATION, *supra* note 51, at 28.

<sup>95</sup> *Id.* These are the same grounds for vacatur recognized in Article V of the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

The prior rule also stated that challenges must be raised within thirty days of the award and the “only court of appeal is the Swiss Federal Tribunal.”<sup>96</sup> The rule then referenced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),<sup>97</sup> as governing enforcement of CAS awards.<sup>98</sup> The amended Rule 59 now altogether omits references to challenges to the CAS awards and expressly states that:

The award . . . shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.<sup>99</sup>

Although the CAS Code in its present form is silent as to judicial review, the awards remain subject to the standards of the New York Convention and Swiss arbitration law.<sup>100</sup> Under either of these laws, a court may refuse enforcement only under narrow circumstances.

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<sup>96</sup> GUIDE TO ARBITRATION, *supra* note 51, at 28.

<sup>97</sup> New York Convention, *supra* note 95. This treaty is codified as U.S. law, and incorporated into the United States Arbitration Act, 9 U.S.C. § 201 (2006) (providing for enforcement of the Convention in the United States).

<sup>98</sup> GUIDE TO ARBITRATION, *supra* note 51, at 28 (“If one of the parties refuses to execute the award of his own free will, the other party may obtain its execution by initiating exequatur proceedings before state courts of the place of execution. A very large number of countries are parties to the 1958 New York Convention on the recognition and compulsory enforcement of foreign arbitration awards . . . . It is therefore this agreement which governs the enforcement of awards in most cases.”); *see also* Jason Gubi, Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 997, 1007 (2008) (stating that the New York Convention compels enforcement of CAS rulings).

<sup>99</sup> CAS CODE, *supra* note 15, at R59.

<sup>100</sup> CAS awards are subject to the New York Convention, which obligates signatory countries to enforce international arbitral awards and provides limited grounds for challenge in Art. V. Challenge to CAS awards in U.S. courts under national law, such as the Federal Arbitration Act, to date, have not succeeded. *See, e.g.*, *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 03:08-cv-241/LAC/EMT, 2008 WL 2567657, at \*1 (N.D. Fla. June 24, 2008) (finding the New York Convention applicable). As the seat of a CAS arbitration is Switzerland, Switzerland’s Federal Code on Private International Law governs. *Bundesgesetz über das Internationale Privatrecht* [Federal Code of Private International Law] Dec. 18, 1987, SR 291, art. 176 (Switz.) [hereinafter Swiss PILA]. An unofficial English translation of the text of the Swiss statute can be found at <http://www.umbrecht.ch/SwissPIL.pdf>.

### *1. New York Convention*

The New York Convention enumerates the grounds upon which a domestic court may refuse to enforce an international arbitral award in Article V.<sup>101</sup> These grounds provide two types of defenses: procedural, which may be raised by one of the parties, and substantive, which a court may raise *sua sponte*.<sup>102</sup> Athletes operating within the international framework of the Olympic movement face particular difficulty because annulment of a CAS award by a

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<sup>101</sup> New York Convention, *supra* note 95, art. V. The Convention states in Article V that:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

<sup>102</sup> May Lu, Note, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. 747, 770 (2006).

U.S. court does not necessarily bind courts in other countries where an athlete may seek to compete nor non-parties and governing bodies that have power to insist terms of the CAS award be upheld.

*a. Procedural Defenses*

Procedural defenses to the recognition of an arbitral award are set forth in Section V(a)(1). A defense that challenges the validity of the arbitration agreement<sup>103</sup> is measured by the applicable contract law.<sup>104</sup> Athletes who participate in international or Olympic competition are contractually obligated to submit their grievances to arbitration as a condition of participation.<sup>105</sup>

Despite the mandatory nature of the arbitration contract for Olympic-level athletes, challenges to the arbitration obligation itself rarely succeed, unless the party can demonstrate that the arbitration provision or process itself is unconscionable.<sup>106</sup> A claim that the agreement to arbitrate itself is invalid is

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<sup>103</sup> New York Convention, *supra* note 95, art. V(1)(a) ("Recognition and enforcement of the award may be refused . . . . [If] said agreement is not valid under the law to which the parties have subjected it.").

<sup>104</sup> *Id.* (providing that enforcement may also be refused if "[t]he parties to the agreement . . . were . . . under some incapacity, or the said agreement is not valid under that law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made").

<sup>105</sup> Bitting, *supra* note 44, at 663; *see also supra* note 44 and accompanying text.

<sup>106</sup> *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (reaffirming the separability doctrine, which dictates that an arbitration agreement is not part and parcel with the underlying contract). Despite challenges to the invalidity of the overall contract, a court will enforce the otherwise unobjectionable arbitration provision. *Id.* *See also* Lu, *supra* note 102, at 757 (stating that the defense of an invalid arbitration agreement is rooted in contract law and reaffirming the separability doctrine); Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials*, in *INTERNATIONAL LAW* 348, 350 (Barry E. Carter et al. eds., 4th ed. 2003) (describing the separability doctrine as based in a separate exchange of consideration of willingness to arbitrate). The Arbitration Fairness Act of 2009, proposed in the U.S. Congress, seeks to invalidate pre-dispute arbitration contracts involving employees, consumers, and franchisees. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). Arguably, the same rationale for protecting employees and consumers from compulsory arbitration applies with equal force to athletes.

However, athletes are not named in the proposed legislation, and the Amateur Sports Act specifically delegates to the USOC the right to require arbitration. 36 U.S.C. § 220522(a)(4) (2006). Only if the athlete could show the arbitration process is so one-sided as to be procedurally and substantively unconscionable, would an athlete be able to avoid arbitration. *See* Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (holding the arbitration agreement invalid where the agreed-upon rules were "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding"); *Cole v. Burns Int'l Sec.*

unlikely to succeed. In the United States, challenging an arbitration agreement for validity is particularly difficult under current U.S. Supreme Court jurisprudence, which holds that public policy strongly favors arbitration.<sup>107</sup> A similar outcome is likely under Swiss and international arbitration law, given that CAS arbitration has been judicially recognized as a neutral process and the understandable need for a single body to hear disputes involving the Olympic movement.

The second defense applies where the arbitral panel exceeded its powers by addressing matters outside the scope of the agreement or submission.<sup>108</sup> CAS jurisdiction is expressly broad to encompass the resolution of sports-related disputes. Yet, an arbitral panel's power is circumscribed by the authority designated to it by the submission. For example, Landis argued in his vacatur petition that the CAS panel acted beyond the scope of its power in imposing monetary sanctions against the athlete that were not provided for in the arbitration agreement.<sup>109</sup> The presiding court did not have an opportunity to address whether the CAS sanction authority was implicit or in excess of its powers. However, CAS awards should be scrutinized to comport with scope of powers authorized under applicable Olympic and WADA regulations.

The third defense concerns the procedures used in creating an arbitral panel and their dealings with one another.<sup>110</sup> The CAS procedural rules set forth written guidelines governing the qualifications and procedures for its arbitral panels.<sup>111</sup> The CAS rules also require that its arbitrators are impartial and disclose circumstances that might likely affect the arbitrator's independence.<sup>112</sup> Landis also sought to vacate his CAS award on the grounds of arbitrator partiality and conflict of interests, asserting a "revolving door" among CAS

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Services, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (holding agreement valid where it did not undermine the statutory scheme). The CAS process has been reviewed as fair and thus likely not voided on this ground. *See also* Mitten, *supra* note 28 (discussing independence and impartiality of CAS as upheld by SFT).

<sup>107</sup> *Buckeye*, 546 U.S. at 443. Under the Federal Arbitration Act, "an agreement in writing to submit to arbitration an existing controversy . . . [is] valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006).

<sup>108</sup> Lu, *supra* note 102, at 757–58. Lu also notes that this defense "typically fails because the enforcing courts do not want to second-guess panel determinations from their own jurisdictions." *Id.* at 758.

<sup>109</sup> Motion to Vacate Arbitration Award, Landis v. U.S. Anti-Doping Agency (*Landis III*), No. CV 08-6330-PA (CWx) (C.D. Cal. Sept. 25, 2008).

<sup>110</sup> New York Convention, *supra* note 95, art. V(1)(d); *see also* Lu, *supra* note 102, at 758–59.

<sup>111</sup> CAS CODE, *supra* note 15, at R54.

<sup>112</sup> *Id.* at R33.

arbitrators on his panel who also represent private clients as advocates on other CAS panels. Perhaps in repose to this criticism, CAS amended its rules, effective January 1, 2010, to preclude arbitrators from also acting as advocates.<sup>113</sup>

A final procedural defense applies when a party is denied a full and fair hearing.<sup>114</sup> In the United States, this is generally considered a due process argument, judged under an American standard.<sup>115</sup> In *DeFrantz v. USOC*, the district court ruled that the USOC was *not* a state actor capable of being sued for violation of constitutional rights by athletes who, due to a political boycott, were denied the opportunity to participate in the 1980 Summer Olympics in Moscow.<sup>116</sup> The expanded role of the USADA and governmental adoption of international treaties which recognize the WADC and commit to enforce anti-doping rules upon athletes, re-energizes the debate on whether doping arbitrations involve state action and thus concomitant rights to due process and other constitutional safeguards.<sup>117</sup> If yes, the question becomes whether CAS

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<sup>113</sup> A court may also refuse to enforce a foreign arbitral award if a party proves it to be non-binding. New York Convention, *supra* note 95, art. V(1)(e). In the United States, a panel's decision is considered binding once it resolves the issues before it and "no further recourse may be had to another arbitration tribunal." Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/COMM 147, 167 (1998). CAS, is therefore required only to address the claims of the parties it has the authority to pass judgment on to prevent the defense from being available.

<sup>114</sup> New York Convention, *supra* note 95, art. V(1)(b).

<sup>115</sup> Lu, *supra* note 102, at 763–69. Lu notes several cases which may be helpful in understanding the U.S. courts' interpretation of article V(1)(b). *Id.* These include *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992), in which an arbitrator provided one of the parties with guidance on what evidence would be necessary for making a determination in the dispute, but when that arbitrator was later replaced, the party that sought his advice was ruled against specifically for following it. Lu, *supra*, at 766–67. This was deemed not to be up to the standards of American due process. *Id.* Conversely, Lu points to *Fitzroy Engineering, Ltd. v. Flame Engineering, Inc.*, No. 94-C-2029, 1994 U.S. Dist. LEXIS 17781, at \*15–16 (N.D. Ill. Dec. 2, 1994) as an example of a case where the defense was not found to be viable. Lu, *supra*, at 764–65. In the case, a party claimed a firm failed to disclose its conflict of interest when the first party chose the firm as its representative, and the second party had also done so in the past. *Fitzroy*, 1994 U.S. Dist. LEXIS 17781, at \*9–10. This was not found to meet the American standard as it could not be shown the conflict (1) existed and (2) affected the outcome. *Id.* at \*15.

<sup>116</sup> *De Frantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980).

<sup>117</sup> Weston, *supra* note 14, at 26. See UNESCO, International Convention Against Doping in Sports, Oct. 19, 2005, available at <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2>. Signatory nations to the Convention commit to enforcement of the World Anti-Doping Code.



provides the procedure and safeguards necessary to meet that level.<sup>118</sup> At the time of this article, an American court has yet to rule one way or the other.

*b. Substantive Defenses*

Substantive defenses, which may be raised by the court in a jurisdiction where enforcement of the award is sought,<sup>119</sup> include: (1) whether the subject matter of the dispute can actually be arbitrated;<sup>120</sup> and (2) whether the enforcement of the award violates the enforcement forum's public policy.<sup>121</sup> U.S. courts adopt a narrow construction of public policy, such that an award must "violate 'the most basic notions of morality and justice.'"<sup>122</sup> Even panel decisions which are "arbitrary and capricious" do not qualify under this exception.<sup>123</sup> This leaves an American athlete with an exceedingly high burden to demonstrate that a CAS award would be against U.S. public policy.

The Section V public policy ground for vacatur is subject to the varied constructions of "public policy" and thus potentially a "major loophole in the [New York] Convention's mechanism for enforcement."<sup>124</sup> The CAS procedural rules, which designate Switzerland as the exclusive forum in which to appeal, limit the possibility of varied forums' construction of public policy.<sup>125</sup> Accordingly, this public policy exception must be evaluated under Swiss law standards in the Swiss Federal Tribunal.

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<sup>118</sup> See Ryan Connolly, Note, *Balancing the Justices in Anti-Doping Law: The Need To Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 195–98 (2006) (suggesting ways for the CAS to implement new strategies to curtail performance enhancer abuse while still protecting athletes' privacy); Mitten & Davis, *supra* note 29 (discussing the powers and limitations of the CAS in regard to constitutional safeguards); Michael Strauble, *The International Convention Against Doping in Sport: Is it the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?*, 19 MARQ. SPORTS L. REV. 63 (2008).

<sup>119</sup> Lu, *supra* note 102, at 770.

<sup>120</sup> New York Convention, *supra* note 95, art. V(2)(a). With an international American athlete, it seems nearly impossible to argue that the majority of sports disputes are not suitable for arbitration, as the ASA specifically designates arbitration as the resolution mechanism to be used by the USOC.

<sup>121</sup> *Id.* art. V(2)(b).

<sup>122</sup> *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 03:08-cv-241/LAC/EMT, 2008 WL 2567657, at \*1 (N.D. Fla. June 24, 2008) (quoting *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2007)).

<sup>123</sup> *Id.*

<sup>124</sup> Lu, *supra* note 102, at 774 (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

<sup>125</sup> CAS CODE, *supra* note 15, at R28.

## 2. *Swiss Law and the Swiss Federal Tribunal*

A judicial vacatur in a U.S. court would not necessarily free up the athlete to compete in events abroad, or importantly, bind regulatory bodies which control athlete access to compete in sanctioned competition. International sporting federations are not necessarily required to abide by a U.S. court's vacatur order, making a U.S. court's ruling of little consequence when the athlete's livelihood is dependent upon his ability to compete throughout the world.<sup>126</sup> Left with limited options, particularly when it comes to disciplinary actions such as bans that result from doping, an aggrieved athlete's only recourse appears to be an appeal to the SFT. The SFT may set aside a CAS award pursuant to Swiss law, which provides limited grounds for annulment of awards, such as for improper constitution of an arbitral tribunal, improper assertion or rejection of jurisdiction, going beyond the scope of claims submitted, violation of the parties' right to equal treatment or to be heard, or where the award is incompatible with public policy.<sup>127</sup> Even if a party is successful before the SFT in obtaining vacatur of an award, the matter returns to CAS arbitration for disposition.<sup>128</sup>

Despite the option for review of CAS awards by SFT, challenges at this level are rarely successful.<sup>129</sup> The SFT has ruled that "CAS is a true arbitral tribunal independent of the parties, which freely exercises complete juridical control over the decisions of the associations which are brought before it."<sup>130</sup> After having instituted reforms in 1994 to further independence from the IOC, CAS received even higher praise from the SFT.<sup>131</sup> The SFT held that CAS had become independent from the IOC to the point where its decisions should be "be considered true awards, equivalent to the judgments of State courts."<sup>132</sup> It

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<sup>126</sup> See, e.g., *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994) (holding that international track federation was not subject to personal jurisdiction in the United States).

<sup>127</sup> Swiss PILA, *supra* note 100, art. 190(2) (a)-(e).

<sup>128</sup> Rigozzi, *supra* note 28, at 99.

<sup>129</sup> See Mitten, *supra* note 28, at 58 ("Thus far, the SFT has uniformly rejected challenges to the merits of a CAS panel's decision.").

<sup>130</sup> Mitten & Davis, *supra* note 29, at 80 (quoting *G. v. Federation Equestre Internationale* (Swiss Federal Tribunal) (Mar. 15, 1993), *reprinted in* 1 DIGEST OF CAS AWARDS 1986-1998, at 568-69 (Matthieu Reeb ed., 1998)). The case involved a horse rider named Elmar Gundel who "claimed that the CAS was not sufficiently independent of the IOC and FEI, and as a result, the CAS ruling against him should be abandoned." Ravjani, *supra* note 3, at 274. In the end, though it expressed concerns in dicta, the court found CAS to be sufficiently independent for the purposes of the case. *Id.*

<sup>131</sup> Ravjani, *supra* note 3, at 274.

<sup>132</sup> *Id.* at 275. The case involved two Russian skiers who allegedly violated Olympic doping policy where independence and impartiality issues were raised because the IOC was one of the

concluded that “ ‘[a]s a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling . . . the CAS is more akin to a judicial authority independent of the parties.’ ”<sup>133</sup>

The SFT’s recognition of CAS has essentially given CAS a stamp of legitimacy and “furthered the contention that the CAS is a ‘true supreme court of world sport.’ ”<sup>134</sup> The SFT has declared CAS an independent and impartial tribunal, but that does not necessarily imply that an award could not be vacated given particular facts.<sup>135</sup> It would, however, also appear that the SFT’s high degree of deference to CAS decisions indicates the possibility of reversal of the higher threshold, making an appeal an uphill battle for any athlete.

#### IV. THE GRIM REALITY OF ATHLETE PROSPECTS FOR VACATUR

Both Floyd Landis and Justin Gatlin took the rare step of pursuing the U.S. legal system to seek to vacate CAS awards.

##### A. Gatlin’s Federal Case

On September 10, 2008, CAS upheld the decision of the 2006 AAA arbitration panel, which determined that Gatlin’s positive doping test constituted a second violation warranting a four-year ineligibility penalty.<sup>136</sup> The CAS panel rejected Gatlin’s claim that his initial positive test was due to a substance contained in his prescribed medication to treat Attention Deficit Disorder and that assessing a penalty violation for such use violated the Americans with Disabilities Act.<sup>137</sup> In so doing, the CAS panel reasoned that “[t]he IAAF and [USA Track and Field] cannot be required to modify their doping rules to accommodate a learning disability that has no effect whatsoever on an athlete’s ability to compete . . . . [T]he ADA does not prevent [the Panel] . . . from imposing a sanction on Mr. Gatlin which takes

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parties. *Id.* at 274–75.

<sup>133</sup> Mitten & Davis, *supra* note 29, at 80–81 (quoting A. & B. v. IOC (Swiss Federal Tribunal) (2003), *reprinted in* 3 DIGEST OF CAS AWARDS 2001–2003, at 684–88 (Matthieu Reeb ed., 2004)).

<sup>134</sup> Ravjani, *supra* note 3, at 275 (quoting A. & B. v. IOC (Swiss Federal Tribunal) (2003), *reprinted in* 3 DIGEST OF CAS AWARDS 2001–2003, at 688 (Matthieu Reeb ed., 2004)).

<sup>135</sup> *Id.* at 274.

<sup>136</sup> Gatlin v. U.S. Anti-Doping Agency, CAS 2008/A/1461 & CAS 2008/A/14-62, at 16 (final award of Sept. 10, 2008) (appeals consolidated), *available at* <http://www.tas-cas.org/d2wfiles/document/2153/5048/0/award%201461%20+%201462%20internet.pdf>.

<sup>137</sup> *Id.* at 11–12.

account of the first violation.”<sup>138</sup> Here, the CAS panel ordered that the decision of the AAA Panel be amended as to the commencement date of eligibility, but otherwise remain unaltered.

Rather than filing review of the CAS decision before the Swiss Federal Tribunal Supreme Court, Gatlin filed a lawsuit in U.S. federal court, alleging violation of the Americans with Disabilities Act and seeking injunctive and compensatory relief.<sup>139</sup> The court had issued a temporary restraining order preventing USADA from enforcing the CAS suspension and thus permitting Gatlin to participate in the 2008 Olympic Trials. Three days later, however, the court denied Gatlin’s request for a preliminary injunction on the grounds that the federal court lacked subject matter jurisdiction. The court explained that decisions regarding an athlete’s eligibility to participate are statutorily granted exclusively to the USOC, which has adopted the administrative remedies of the internationally based CAS.<sup>140</sup> Although the federal court considered the CAS decision “arbitrary and capricious” and the underlying action in violation of the Americans with Disabilities Act, it acknowledged that Gatlin’s only avenue of relief was with the discretion of the Swiss Supreme Court.<sup>141</sup>

### *B. Landis’s Vacatur Petition*

After having lost in the AAA and CAS hearings, Floyd Landis also filed a lawsuit in U.S. federal court seeking to vacate the CAS award and penalty.<sup>142</sup> Landis’ petition alleged conflicts of interest among arbitrators in the CAS proceeding as grounds warranting vacatur.<sup>143</sup> This action again raised the

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<sup>138</sup> *Id.* at 11. Gatlin argued that “CAS cannot impose a sanction that would have the effect of forcing an American entity to violate American law.” *Id.* The Panel responded by asserting that “Gatlin [had] failed to demonstrate what conduct on the part of either the IIAAF or the USATF would be prohibited by the ADA” and as a result concluded that there was “no duty” on either organization to “accommodate Mr. Gatlin’s disability.” *Id.*

<sup>139</sup> *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 03:08-cv-241/LAC/EMT, 2008 WL 2567657 (N.D. Fla. June 24, 2008).

<sup>140</sup> The court acknowledged its limits, even if it assumed jurisdiction through the New York Convention, noting “even if Plaintiff were to be successful in vacating the CAS decision, he would still be faced with the prospect of petitioning the USOC to overturn its own decision as to his eligibility to compete . . . , which as has been established is beyond the jurisdiction of the Court.” *Id.* at \*1 n.1.

<sup>141</sup> *Id.* at \*2 (“Nonetheless, the result of this determination is quite troubling because Mr. Gatlin is being wronged, and the United States Courts have no power to right the wrong perpetrated upon one of its citizens.”).

<sup>142</sup> Motion to Vacate Arbitration Award, *supra* note 109.

<sup>143</sup> *Id.* at 15, 20–34.

question of whether the U.S. courts have subject matter jurisdiction to review a CAS award, and if so whether the court should apply the Federal Arbitration Act, Swiss law, or standards under the New York Convention, where the Swiss arbitration was conducted in the U.S. between two U.S. citizens, albeit before an international panel of CAS arbitrators.<sup>144</sup> Landis argued that the FAA, or in the alternative the New York Convention, applied because he sought to vacate, rather than appeal, the award.<sup>145</sup> He contended that he did not seek a review of the merits of the decision, but that the decision must be vacated due to the partiality and conflicts of interest among the arbitrators.<sup>146</sup> He also asserted that the arbitrators acted in excess of their powers because the \$100,000 sanction against him was beyond the terms of the arbitration submission.<sup>147</sup> The U.S. court did not rule on these arguments because Landis

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<sup>144</sup> *Id.* at 1–3. The FAA does not provide an independent basis of subject matter jurisdiction, but the court likely has jurisdiction under 28 U.S.C. § 1332, with diversity of citizenship between Landis and USADA. The court did not rule on the question of whether it should apply the standard for vacatur under the FAA, the public policy exception under the New York Convention, or the standard under Swiss law as provided by CAS rules. *See also* Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1246–48 (2005) (explaining that parties are generally “forced to use Swiss law,” but questioning whether U.S. law should apply). In *Gatlin*, the USOC argued that the federal court’s jurisdiction to overturn the arbitral decision issued by CAS was limited to ground stated in the New York Convention.

<sup>145</sup> The FAA may apply because both Landis and USADA are U.S. citizens. By contrast, the New York Convention applied when Justin Gatlin sought to vacate a CAS award which involved the IAAF (headquartered in Monaco). *See Gatlin*, 2008 WL 2567657, at \*1 (holding that “[p]ursuant to the [New York Convention], claims that have been properly submitted to arbitration and ruled upon by entities such as CAS are barred from relitigation in this forum”); *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580 (7th Cir. 2001) (upholding dismissal of former Olympic runner’s suit challenging the IAAF arbitration panel’s finding that she had committed a doping offense on the grounds that the New York Convention barred Slaney’s state and federal claims against the IAAF because those claims had been subject to a valid arbitration decision).

<sup>146</sup> *See Motion to Vacate Arbitration Award*, *supra* note 109, at 30–31. The FAA sets forth narrow grounds to vacate an arbitral award, including bias. 9 U.S.C. § 10 (2006). However, the choice of law provision in CAS rules provides that appeals of CAS awards be made to the Swiss Federal Tribunal. CAS CODE, *supra* note 15, at R47. Landis need not establish “actual” bias to have the award vacated. *See New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007) (holding that “lack of evidence of the arbitrator’s actual knowledge of the ongoing negotiation does not prevent a finding of evident partiality because . . . the arbitrator had a duty to investigate possible conflicts resulting from his new employment and to disclose that employment to the parties”).

<sup>147</sup> *Motion to Vacate Arbitration Award*, *supra* note 109, at 34. Article V of the Convention permits a challenge to a decision “not falling within the terms of the submission to arbitration.” New York Convention, *supra* note 95, art. V(1)(c). Landis claims that the costs issue was not

settled the case before hearings were held. Jurisdictional issues of whether CAS is subject to jurisdiction in the U.S. and against whom and where the CAS imposed sanctions may be litigated were thus avoided. Reportedly, USA Cycling had refused to issue Landis a license unless he paid the fine, regardless of the lawsuit. The court would likely have dismissed the case and concluded that any appeal of the CAS decision must be made to the Swiss courts pursuant to the CAS rules because of the designated choice of law provision. Landis declined to appeal to the Swiss courts.<sup>148</sup>

Even if Landis were successful in having the U.S. federal court vacate the award, the ensuing result and precise remedy is unclear. A vacatur would not necessarily have reversed the CAS award. If the court had taken jurisdiction under either the FAA or the New York Convention, the effect of a vacatur "win" for Landis beyond a refusal to enforce the CAS award in the U.S. is unclear. A judicial vacatur perhaps would have been enforceable against USA Cycling, the national governing body, but not necessarily against UCI, the International Cycling Union. A judicial vacatur also might have addressed the monetary sanction, but realistically, the two-year ineligibility sanction would be moot as served (other than expunging the record). A judicial vacatur could also have resulted in the parties returning to CAS to have the merits of Landis' case heard again.<sup>149</sup>

### C. In Summary

Although an athlete may seek initial relief through the domestic arbitration provided under the Amateur Sports Act, interlocking rules of the international sporting bodies permit de novo review to a separate CAS panel seated in Switzerland. An athlete's challenge to a CAS award must be made pursuant to the New York Convention and applicable Swiss law, as designated in the CAS rules. Since 1970, the New York Convention has been a part of U.S.

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listed as an issue submitted for arbitration. Arguably, awarding costs is in general an inherent issue in all court and arbitration proceedings. The statutes, including CAS, empower the judge or arbitrator the power to award costs. Both Landis and USADA argued that costs should be awarded against the other party. Motion to Vacate Arbitration Award, *supra*, at 34-41; *see also* CAS CODE, *supra* note 15, at R65.3 (providing that "[i]n the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties").

<sup>148</sup> Motion to Vacate Arbitration Award, *supra* note 109, at 34-41.

<sup>149</sup> *See* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 466 (2004) (noting the remedial inadequacy of a vacatur in U.S. courts).

treaty and statutory law<sup>150</sup> and is the means by which an athlete or court may seek to deny enforcement of a CAS award within the United States, yet only the SFT has authority to set aside the CAS award pursuant to Swiss law. Accordingly, an athlete forfeits options for judicial recourse in his home country, and U.S. courts are effectively ousted of jurisdiction to review cases involving athlete doping or eligibility decisions.

## V. CONCLUSION

U.S. federal judge Richard Posner has stated that “there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”<sup>151</sup> But the current structure for determining the rights of athletes who represent the United States in international sporting competition provides essentially no role at all for recourse to the U.S. judicial system. Although Congress in the ASA did not expressly acknowledge the international regulatory environment in which its athletes operate, the U.S. delegated this process to be finally determined by a private international tribunal and the Swiss courts.

This Article questions the wisdom of having two tiers of judicial review of sports arbitration awards, where the national tier is non-binding. U.S. athletes may lodge a grievance against USADA through the Amateur Sports Act and USOC/AAA procedural rules, but any result may be undone where WADA or others can appeal to a *de novo* panel at CAS in Switzerland. A *de novo* review prolongs and significantly increases the cost of the process by requiring both sides to repeat the full hearing conducted below and to again incur full costs. Additionally, the *de novo* process is slower than an appeal on the record. Granting standing to a *de novo* appeal, particularly by a non-participant, undermines the parties’ and arbitrators’ serious work in the national arbitration process, increases costs, can prolong an athlete’s suspension, and amounts to free-riding and forum-shopping.<sup>152</sup>

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<sup>150</sup> United States Arbitration Act, 9 U.S.C. § 201 (2006) (providing for the enforcement of the New York Convention). Section 202 provides in relevant part that “[a]n arbitration agreement or arbitral award arising out of a legal relationship, . . . which is considered as commercial, including a transaction, contract or agreement . . . falls under the Convention.”

<sup>151</sup> *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

<sup>152</sup> See Michael Straubel, Assoc. Professor of Law, Dir. Sports Law Clinic, Valparaiso University, Address at the Arbitrating Sports Symposium at the Pepperdine University School of Law (Feb. 27, 2009) (on file with author) (recommending the replacement of the *de novo* appeal by doctrines of deference and stringent standards of review, asserting that records at

In the Amateur Sports Act, Congress gives the impression that the rights of U.S. athletes will be finally and fairly adjudged in a "swift and equitable" private dispute resolution proceeding. The Act recognizes neither the international regulatory framework in which these athletes must operate, nor that, effectively, an international tribunal has the final say regarding the athlete's eligibility and sanction. The designation of Swiss law provides certainty and finality of CAS arbitral awards, preventing a disruption by application of varied interpretations of what constitutes a public policy exception under U.S. or other national law. But, from the U.S. perspective, why should Switzerland control the sports world? At a minimum, the Act should be explicit on this point, acknowledging the delegation and governance of international law.

To this end, I propose, first, that the statutory language of the Amateur Sports Act be amended to reflect the reality of the international sports arbitration system superimposed on the national arbitral process envisioned in the Act. Second, although the change likely needs to be made at the international level, the CAS rule, and similar provisions in the rules of the regulatory sport bodies, should be amended to address the concerns of the *de novo* rule where a full, fair and recorded arbitration hearing occurred at a CAS national level. While the reasoning for the *de novo* review may be to assuage concerns about "hometown" or national bias in favor of citizen athletes, it is more important to provide a standard of true appellate review which examines the underlying record for factual determinations that were clearly erroneous or an abuse of discretion, rather than allowing a *de novo* review of the lower tribunal's application of legal and regulatory provisions. Third, the rules regarding standing to seek or participate in a *de novo* CAS proceeding should delineate parties who appeared in the first-instance arbitration.

Consideration should also be given to an organizational structure whereby CAS can address the development of law in arbitral sporting decisions. CAS decision are increasingly cited by parties and arbitral panels as authority for rules upon which to decide cases, yet the persuasive effect of these citations to arbitral cases is unclear. For CAS to be a true "Supreme Court for Sport," it should institute a formal appellate body akin to a U.S. Supreme Court with discretionary review, to rule on conflicting interpretations of *lex sportiva* rendered by CAS panels.

The mirroring of judicial norms and practices into arbitration may seem antithetical to the presumed efficiency and finality benefits of arbitration. But where private arbitration is the exclusive forum whereby the careers,

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arbitral hearings must be taken to serve as records of appeal).



reputations, and participation opportunities of the world's most elite athletes are determined, process concerns warrant the utmost attention.

