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The Court of Arbitration for Sport: Where are the Sidelines to its Authority?

Kendall Thielemann†

I. Introduction

The arena of international sports law is vast and far-reaching, transcending national borders through the love of sport. But, this simple love is not enough to prevent international conflicts and disputes. In 2018, a Belgian Court of Appeals declared that “enforced arbitration” to the Court of Arbitration for Sport (CAS) is illegal, as related to a 2015 complaint filed by the Belgian football club, RFC Seraing, and the investment fund, Doyen Sports, against the Fédération Internationale de Football Association (FIFA) over Third Party Ownership (TPO) rules. Specifically, the Belgian Court of Appeals ruled that the arbitration agreement in FIFA’s contract with RFC Seraing violated Article 6 of the European Convention of Human Rights and Article 47 of the European

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1 The Court of Arbitration of Sport (CAS) is also referred to as the Tribunal Arbitral du Sport (TAS), https://www.tas-cas.org/en/index.html (last visited Aug. 20, 2019) [https://perma.cc/2JD9-CXDP].

2 Cour d’Appel [CA] [Court of Appeal] Bruxelles, Aug. 29, 2018, 2016/AR/2048, Vaja 1227181 (Belg.). Note that the original transcript has yet to be formally published and was only printed in French. The decision was translated from French to English through multiple translation resources, but it is not to be interpreted as a formal translation.
Charter of Fundamental Rights. What is most interesting about the decision was “the examination of validity of the arbitration clause enshrined in the FIFA Statutes... [which, under Belgian law, was found] to be too broad to be valid since the scope is not limited to a ‘defined legal relationship’.”

The institution of interest in this matter is the CAS, an international arbitral body that hears appeals from international sports federations. While the CAS is recognized internationally as the arbitral of last resort for global sports, parties are required to formally accept the CAS’s jurisdiction in their respective contracts according to the statutes or regulations of the governing sports-related body. Within these contract negotiations between the players and the federations, there is little bargaining power allocated to the players, forming a relationship built on unequal footing and ending in rulings subject to little review or oversight.

The Belgian Court of Appeals ruling questions the legitimacy of...
arbitration clauses requiring automatic appeal to the CAS. Automatic appeals from large international federations are a foundational principle of the tribunal, and the international sports world would be altered dramatically if the CAS’s authority were seriously questioned. While this ruling is limited in its scope, it opens the door to discussing the movement of these cases from the appellate forum chosen by clubs, typically the CAS, to domestic courts on challenges to their arbitration clauses. The Belgian Court’s analysis of the arbitration clause through “a strict and objective interpretation of the arbitration clause enshrined in the FIFA statutes” turns attention to the broad scope of arbitration clauses; these clauses often lack the specificity of a defined legal relationship and are often the result of unequal bargaining. While similar challenges have been presented in the past with little institutional change, this case further shines a light on systemic issues that risk the integrity of sports and athletes around the world.

Analysis will proceed in seven parts. Part I describes the structural framework of the CAS and its parent organization, the International Council of Arbitration for Sport (ICAS). Part II breaks down the RFC Seraing and FIFA dispute and covers the ICAS’s response to the Brussels Court of Appeal’s decision. Part III provides a legal analysis of the jurisdictional issues that may be impacted by this decision. Part IV presents the foreseeable implications of this case to the international sports world. Part V analyzes elements of the CAS that run counter to American legal tradition and suggests flaws in its organization. Part VI proposes institutional changes that could strengthen the CAS amidst doubts of its authority. Part VII concludes the paper with a reflection on the future of the CAS and why despite its controversial nature, its presence is vital to the future of international sports.

10 See generally CA Bruxelles, 2016/AR/2048, Vaja 1227181. “Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. It shall communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s) from the CAS list, as well as to file an answer to the request for arbitration.” CODE OF SPORTS-RELATED ARBITRATION, R39 (2017) (Eng.) (referencing the need for an explicit arbitration clause calling for automatic appeals to the CAS to be agreed upon by both parties).

11 See generally CA Bruxelles, 2016/AR/2048, Vaja 1227181.

12 Mavromati, supra note 4.
II. Background

Sports law is a unique sector of the legal field that “presents a mixed nature, in which a regulatory framework based on private autonomy interacts constantly with public law norms.”13 This area of law “is highly heterogeneous, and, above all, it is not simply transnational, but actually ‘global’: it is made of norms enacted not only by States, but also by central sporting institutions . . . and by national sporting bodies.”14 The reach of global sport is expansive, spanning across 508 million people, and comprising more than 3% of world trade and 3.7% of combined Gross National Product (GNP) in the European Union.15 The expansive nature of sports parallels the nature of sports rules that are “genuinely [characterized as] ‘global law’ because they are applied across the entire world, they involve both international and domestic levels, and they directly affect individuals.”16 International sports law thus presents a multi-dimensional legal field that is distinctive in nature, with an evolving character that adapts to the constant changes in sport globally.

Sports do not just transcend national borders, they also operate in a global arena that directly reaches individuals on a personal level. Everyone from players and coaches, to spectators and ESPN viewers, are exposed to sports everyday through many platforms. Allegiances on teams are formed, loyalties are tested, and individuals become emotionally and even financially invested in their team’s success. As a result, we all feel part of a collective that transcends state and national borders. The CAS aims to centralize rules that are then instituted by sports federations in their respective states and nations, enabling this collective to effectively operate on an international scale.17

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13 Casini, supra note 8, at 440.
14 Id. at 441.
15 Ian Blackshaw, The Role of the Court of Arbitration for Sport (CAS) in Countering the Manipulation of Sport, in THE PALGRAVE HANDBOOK ON THE ECONOMICS OF MANIPULATION IN SPORT 223, 223 (Markus Breuer & David Forrest eds., 2018) (explaining the expansive reach of global sport as ultimately comprising 5.4% of the EU labor force (15 million people)).
16 Casini, supra note 8, at 439.
The CAS is a unique tribunal that is unlike any other adjudicatory body. It was created in 1983 with a mission to “build a centralized mechanism of international judicial review in sport,” namely to introduce a “supreme court for world sport.” Calling for this need was an increasing number of international sports disputes and the lack of an independent body to handle them “in a flexible, quick, inexpensive and binding manner.” Unfortunately, the original CAS began as a “sort of judicial branch within the International Olympic Committee (IOC) with the latter maintaining political and financial control over the former” and the inability to truly operate as an independent and insular entity. The CAS was later reform by the IOC to its modern institution during the 1994 Paris Agreement.

The modern-day CAS represents a coexistence of different jurisdictional models resembling a civil court with commercial law cases, an administrative court when deciding against sports federation decisions, a constitutional court when resolving conflicts of the Olympic movement, and a criminal court when handling doping violations. Overlooking the CAS is its governing body, the International Council of Arbitration for Sport (ICAS). After original pushback from international federations and other sporting arbitration institutions that resisted the formation of a uniform court, “the CAS defeated its opponents, gained independence and brought normative harmonization in[to] global sports law.” This “normative harmonization” stemmed from the international sports world finally having an insular judicial body to provide uniform rulings.

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18 Casini, supra note 8, at 445.
19 Blackshaw, supra note 15, at 225.
20 Casini, supra note 8, at 446.
21 Id.
22 See id. at 450 (“The CAS, in fact, resembles a civil court when it deals with commercial law cases (such as player transfers), an administrative court when it has to decide claims against sporting institutions’ decisions, a constitutional court when it must resolve conflicts between different institutions of the Olympic movement, and even a criminal court when it has to balance evidence in doping violations.”).
23 CODE OF SPORTS-RELATED ARBITRATION art. S2 (2017) (Eng.).
24 Casini, supra note 8, at 444.
25 See id.
When handling appeals, the CAS seeks “to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.”\(^{26}\) Specifically, “[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes . . . provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available.”\(^{27}\)

The CAS’s jurisdiction extends to disputes “involving national federations, affiliated clubs and individual members that concern private, nontechnical rules and statutes of the IFs [International Federations].”\(^{28}\) Jurisdiction requires an arbitration agreement that “represents the legal basis and legitimation for a CAS intervention” and only with a valid arbitration clause can the CAS hear cases.\(^{29}\) Generally, municipal courts will “recognize and enforce CAS awards, primarily under the New York Convention on Arbitral Awards.”\(^{30}\) The New York Convention requires “national courts of signatory countries to enforce valid arbitration awards if the parties agreed in writing to arbitrate their dispute.”\(^{31}\) Because of the promise of this uniform body for international sports, many international federations amended their statutes to establish the CAS as “the exclusive, final tribunal for appeal of decisions.”\(^{32}\) Today, the CAS’s status as the “arbitral of last resort” assumes an unprecedented capacity to compel all major federations to enforce automatic appeals to its tribunal.\(^{33}\)

Once a case is appealed, the CAS panel “has full power to review the facts and the law,” deciding the case through the law.

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\(^{26}\) CODE OF SPORTS-RELATED ARBITRATION art. S12(b) (2017) (Eng.).

\(^{27}\) Id. at R47.


\(^{29}\) Casini, supra note 8, at 459.

\(^{30}\) Id. (referring to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards as the “New York Convention”).


\(^{32}\) Nañéger, supra note 28, at 508.

\(^{33}\) See Frequently Asked Questions, supra note 17 (“The CAS has the task of resolving legal disputes in the field of sport through arbitration. It does this pronouncing arbitral awards that have the same enforceability as judgements of ordinary courts.”).
chosen by the parties or “according to the law of the country in which the federation, association or sports-related body . . . is domiciled . . . [or] that the Panel deems appropriate.” These arbitrations take the form of de novo review, and once concluded, they extend binding and final opinions. The CAS’s decisions may “replace[] the decision challenged or [may] annul the decision and refer the case back to the previous instance.” The award issued by the Court “shall be final and binding upon the parties . . . [and] [i]t may not be challenged by way of an action.” CAS decisions can only be challenged if the circumstances give rise to legitimate doubts over the arbitrator’s independence or over his or her impartiality.” These challenges are ultimately determined by the ICAS Board.

While the CAS’s decisions are binding, they do not hold precedential value as “no panel is bound by preceding decisions issued by other panels.” However, there is still extreme deference given to the CAS’s previous decisions, and the CAS panels tend to follow their past jurisprudence and possess persuasive authority. These decisions create a “judge-made sport law” that is often referred to as lex sportiva and consists of decisions rendered by the CAS that create a set of principles and rules specifically addressing sport. The meaning of lex sportiva has extended over time to refer more “generally to the transnational law produced by sporting

34 Code of Sports-Related Arbitration art. R57–58 (2017) (Eng.); See also Code of Sports-Related Arbitration art. R45 (2017) (Eng.) (“The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law.”).
37 Id. arts. R46, R59.
39 Id.
40 Casini, supra note 8, at 457.
41 Id.
42 Id. at 441. See also Annie Bersagel, Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field, 12 Pepperdine Disp. Resol. L. J. 189, 206 (2012) (“At a minimum, the CAS’s exclusive jurisdiction over disciplinary cases involving international-level Olympic athletes, as well as the emergence of a body of CAS jurisprudence independent of national legislation [lex sportiva], has already led to the emergence of a distinctively autonomous system of global private regulation.”).
With the continuing growth of *lex sportiva*, the “CAS is building up a discrete body of jurisprudence . . . introducing a measure of legal certainty for the benefit of all those in the worldwide sporting community, who rely on the intervention of CAS in the settlement of their disputes.”

**III. Legal Analysis**

The case at issue involves RFC Seraing, a Belgian football club, and Doyen Sports, a private equity fund involved with the financial management of football players and coaches, against the Fédération International de Football Association (FIFA), the European Football Union (UEFA), the Union Royale Belge des Sociétés de Football Association (URBSFA – the governing body of football in Belgium) – and the International Federation of Professional Footballers (FIFPRO). The original dispute arose in 2015 when “Doyen Sports Investments Ltd. signed an agreement with RFC Seraing in which the club transferred the economic rights of three players to the firm for a payment of 300,000 Euros . . . [to become] the owner of 30 percent of the financial value stemming from the players’ rights.” This transfer of rights violated FIFA’s third-party ownership (TPO) ban, leading RFC Seraing & Doyen to challenge the legality of FIFA’s ban on the basis of EU competition law in a Belgian court. The purpose of FIFA’s ban on TPO was to prevent third parties from having economic ownership rights over players, thus interfering with FIFA’s larger economic control over its players. FIFA then brought disciplinary proceedings against RFC Seraing on the basis of this TPO contract, alleging a violation of FIFA Regulations on the Status and Transfer of Players (RSTP), while imposing a four-year transfer ban on RFC Seraing. RFC Seraing and Doyen Sports appealed FIFA’s decision to the CAS, who then applied the FIFA RSTP and Swiss law to determine that

43 Casini, *supra* note 8, at 442.
48 Id.
49 Id. This decision was later confirmed by the FIFA Appeal Commission.
FIFA’s sanctions were proportionate to the violation. RFC Seraing and Doyen then subsequently filed an appeal before the Brussels Court of Appeals, challenging the legitimacy of the CAS as a true arbitral tribunal.

On August 28, 2018, the Brussels Court of Appeals issued a ruling that rejected FIFA’s arbitration clause requiring automatic appeal to the CAS. RFC Seraing successfully argued both the “generality” of the arbitration clause and the general prohibition on state courts as illegal and contrary to public order. From the FIFA Article of Agreement, any recourse to an ordinary court is prohibited, except as specifically provided for in the FIFA Regulations. Moreover, RFC Seraing connected the adverseness to public policy with the requirements of the European Convention on Human Rights (ECHR). Specifically, Article 6.1 of the ECHR entitles all individuals to “to a fair and public hearing . . . by an independent and impartial tribunal established by law,” under which RFC Seraing believes the CAS does not qualify.

The Brussels Court of Appeals held that the arbitration clause binding the parties to the appellate jurisdiction of the CAS is too generic and contains no “defined legal relationship.” The clause at issue (#59 Obligations relating to dispute resolution) reads:

The confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents; Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited; The associations shall insert a clause in their statutes or regulations, stipulating that it is

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50 Id.
51 Id.
52 Zagger, supra note 46.
54 Id. at 13 ¶ 14.
55 Id. at 9 ¶ 9.
prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognized under the rules of the association or confederation or to CAS.58

58 Fédération Internationale de Football Association (FIFA) Statutes, Regulations Governing the Application of the Statutes: Standing Orders of the Congress, 47–49 ¶¶ 66–68 (April 2015) (emphasis added) (stating the FIFA statutes in existence in 2015 when the initial dispute was filed). The statutes of interest are reprinted below.

"#66 Court of Arbitration for Sport (CAS)
1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Leagues, Clubs, Players, Officials, Intermediaries and licensed match agents.
2. The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

#67 Jurisdiction of CAS:
1. Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.
2. Recourse may only be made to CAS after all other internal channels have been exhausted.
3. CAS, however, does not deal with appeals arising from:
   a) Violations of the Laws of the Game;
   b) Suspensions of up to four matches or up to three months (with the exception of doping decisions);
   c) Decisions against which an appeal to an independent and duly constituted arbitration tribunal recognized under the rules of an Association or Confederation may be made.
4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.
5. FIFA is entitled to appeal to CAS directly against any internally final and binding doping-related decision passed in particular by the Confederations, Members or Leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.
6. The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by FIFA, the Confederations, Members or Leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.

#68 Obligation:
1. The Confederations, Members and Leagues shall agree to recognise CAS as an
The Brussels Court concluded that the will of the drafters cannot apply because the arbitration clause is too general to be recognized under Belgian law.\textsuperscript{59} This generality is illustrated by the clause’s failure to mention a limited applicability to “sports disputes.”\textsuperscript{60} Rather, as a matter of Belgian law, the arbitration clause fails to present a “specific legal relationship” that is necessary to constitute a valid arbitration agreement.\textsuperscript{61} The Court of Appeals was set to hear arguments on the broader issues of TPO rules, but no record has been released on a judgment.\textsuperscript{62}

In response to the Brussels Court’s ruling, ICAS commented that most reports “do not properly reflect the reasons” of the Court of Appeals; rather, the Court actually said the arbitration Clause between FIFA and RFC Seraing lacked specificity because it did not limit automatic arbitration to “sports-related” conflicts, violative of Swiss law.\textsuperscript{63} ICAS characterized the Court’s holding as

\begin{itemize}
\item independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.
\item Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.
\item The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognized under the rules of the association or confederation or to CAS.
\item The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. The Associations shall impose sanctions on any party that fails to respect this obligation and ensure that any appeal against such sanctions shall likewise be strictly submitted to arbitration, and not to ordinary courts of law.” \textit{Id.}
\end{itemize}

\textsuperscript{59} CA Bruxelles, 2016/AR/2048, Vaja 1227181, at 13 ¶ 14.

\textsuperscript{60} \textit{Id.} at 14 ¶ 15.


\textsuperscript{62} \textit{Id.}

narrower than the media’s interpretation, believing that its
generality was a drafting error that will “not affect the jurisdiction
of CAS globally.” However, it is undeniable that this case has
opened the door to broader questions about the CAS’s authority,
organization and effectiveness.

IV. Implications to the International Sports World

What does this ruling mean for the CAS? Will its institutional
legitimacy be questioned or its binding power on parties be diluted?
While the Brussels Court opinion can be interpreted as narrow in its
holding, it opens these questions up for discussion. As a result of
the ruling, domestic courts may now have the authority to hear
appeals in sporting disputes that were previously sent directly to the
CAS. This deterrence would strip the CAS’s autonomous control
over international sports conflicts, severely harming its authority, as
its power and legitimacy stems from its position as the sole
arbitration tribunal for sports conflicts. The implications of this
change will affect all national and international sports
organizations, most notably large football federations. Due to
football’s status as the world’s most popular and most lucrative
sport, the proper handling of large legal disputes is a central
concern.

The biggest resulting change to the sports world will be in the
location of appeals and the law applied in such cases. Rather than

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cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf [hereinafter ICAS Media
Release] [https://perma.cc/869T-BDTH].

64 Id. The ICAS believes that this case will not affect CAS internationally because
the ruling will simply require the drafting of more specific arbitration clauses. The ICAS
also addressed the connection between the present case and a 2016 case in the same court.
See Zagger, supra note 46 (“The Belgian court decision comes after the CAS faced serious
questions in a case involving German five-time Olympic gold medalist speed skater
Claudia Pechstein, who challenged a two-year suspension for irregular blood tests that she
said could be explained by an inherited blood condition. A German court ruled that the
CAS had not given Pechstein a fair hearing because the closed list of CAS arbitrators is
biased in favor of international sports governing bodies. But, ultimately, that decision was
reversed in favor of the CAS by the German Federal Court of Justice, the highest court for
civil appeals in Germany, which found she had voluntarily agreed to arbitration in the
CAS.”).

65 Diamond, supra note 3, ¶ 5.

66 Blackshaw, supra note 15, at 223 (“There is, therefore, a great deal at stake in sport
at the global and European levels—not only on but also, and perhaps more so, off the field
of play.”).
the CAS reviewing cases and issuing rulings based on previously agreed upon law or Swiss law, these cases may now be subject to the laws of individual states. The interactions between international and national regimes will become an important component to consider as appeals bring greater attention and consideration to the nature and global acceptance of the CAS. Specifically, “[i]n spite of [the] success [of the transnational nature of sports institutions], the existence of a lex sportiva is not universally accepted, in so far as some domestic orders have affirmed state law sovereignty over sport norms by contesting the legal nature of these rules.”

Players may start resorting to state adjudication, rather than appealing to the CAS because it presents them with a more neutral determining body.

Additionally, the expansive power of large sports federations makes it difficult for individual players and agencies to have equal bargaining power. Rather, the current “[r]eliance on [tribunals] may deter athletes from seeking alternative remedies such as adjudication . . . and some of their decisions, particularly those involving restraint-of-trade claims, may be unenforceable by municipal courts.” As it stands now, there is no viable way for players to improve their bargaining power. With the international federations so closely integrated with the CAS, players are forced to accept the proffered contracts without any alterations to the arbitration clauses.

The unequal bargaining power between

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67 Code of Sports-Related Arbitration art. R45 (2017) (Eng.) (“The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.”).

68 Casini, supra note 8, at 442.

69 As later discussed in this Note, the interconnectedness of the CAS with large sports federations inherently adds risks of coercion and bias into the appeal decisions of the CAS. This partisan make-up is further enhanced by the unequal bargaining power between large sports federations and individual players.

70 Id. at 461 n.80 (“Though it is doubtful that athletes are truly free to decide whether to sign or not these ad hoc clauses embodied in sporting institutions’ statutes.”).

71 Nafziger, supra note 28, at 507.

72 See Mandatory Arbitration Clauses Are Discriminatory and Unfair, PUB. CITIZEN, (last visited Aug. 20, 2019) https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/ [https://perma.cc/8DUY-NRXS] (“In addition to the denial of consumers’ and employees’ rights to seek remedies in court, arbitration between two parties with unequal bargaining power is too often a discriminatory and one-sided process, benefitting the corporations mandating it.”).
players and federations supports the idea that domestic courts might be the only judicial body with the interests and protection of the players in mind.\textsuperscript{73}

This challenge to the CAS’s jurisdiction raises further questions as to its legitimacy. While it “would be possible in theory that one State imposes its own decisions during sports events held in its own territory and against the will of the ‘\textit{authorité international} [International Federations or the CAS],’ that State would not be allowed to host any international sport competition.”\textsuperscript{74} Additionally, the “main difficulty [of being subject to one State’s law] is that one [court] may potentially end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by the CAS (and which was confirmed by the Swiss Federal Tribunal), enforceable in the rest of the world.”\textsuperscript{75} This tension between national and international law was seen during the 2006 jurisdictional challenge in \textit{UCI v. Landaluce and Real Federación Española de Ciclismo}.\textsuperscript{76} The case involved two cyclists that tested positive for doping and who alleged that a Spanish law forbade arbitration recourse in the context of doping infractions.\textsuperscript{77}

The court remarked on this conflict of law by stressing that:

\begin{quotation}
[s]tates and international sports federations are not rivals for authority; on the contrary, their roles are complementary. States are concerned only with the conduct of those who fall within the reach of their laws, while international federations administer competitions within the scope of their activity . . . National sovereignty, as expressed in a sports disciplinary measure decided by a national authority, is in principle and by its nature limited to national territorial application. A national decision may, however, be replaced by a decision of the international authority
\end{quotation}

\textsuperscript{73} \textit{Infra note 69}.

\textsuperscript{74} Casini, \textit{supra} note 8, at 463. It appears that ICAS would oppose any competitions hosted by states that fail to provide the CAS with discretion and authority over sports disputes.

\textsuperscript{75} ICAS Media Release, \textit{supra} note 63.


\textsuperscript{77} \textit{Id}.
– CAS – in order to ensure the required uniform application of law. True, it is theoretically conceivable that a state would impose its national decisions with respect to international events taking place on its territory even in disregard of the international authority. Such an attitude would, however, contradict the effort to fight doping on the international level, and could lead to the exclusion of the concerned state from the organisation of international competitions. It would be surprising for a state to wish to adopt such a posture[.]

Currently, the most appropriate location for international sports disputes to be heard is thus unsettled and unknown. In support of domestic courts hearing these cases is the increased protection afforded to the players and private parties, further suggesting that domestic courts may be better equipped to level—the rather unlevel—playing field between large international sports federations and the subservient players and agencies. Yet, UCI curbs this theory by highlighting the contradictory nature of having domestic courts fighting sports issues on an international level. Without a uniform ruling, every player and agency will be held to different standards. In addition, states that refuse to accept the jurisdiction of the CAS will not be seen as adequate locations for hosting international sports competitions. While no major bodies are currently challenging the authority of the CAS, it remains an incipient issue that will eventually gain momentum and is ripe for international reformation.

V. The CAS through the Lens of American Legal Tradition

In analyzing the CAS through the lens of American law, the tribunal’s very nature seems suspect and counter to many

78 Id. ¶ 30 (emphasis added).
79 With “States [] concerned only with the conduct of those who fall within the reach of their laws” they are not coerced by allegiances to sports federations and can thus better protect the interests of the individual parties. See id.
80 See id. (“Such an attitude would, however, contradict the effort to fight doping on the international level, and could lead to the exclusion of the concerned state from the organisation of international competitions.”).
81 See id. (inferring that hosting international competitions would be difficult if there is an “exclusion of the concerned state from the organisation of international competitions”).
fundamental legal traditions in America. These characteristics further touch on weaknesses and problems inherent in the CAS’s nature and in the tribunal’s relationships with dominant sports organizations. The notable areas for concern include the CAS’s tight integration with large sports federations and the Court’s lack of impartiality and precedence.

The organizational structure of the CAS inherently fosters an inability of arbitrators to be neutral and impartial. The CAS “may sometimes be [seen as] little more than executive panels in disguise” composed of individuals from the very parties that appeal to the tribunal. These executive panels, including the CAS and ICAS, are often made of former athletes and former executives from large international sports associations with mixed loyalties. Specifically, ICAS members are often chosen from International Sports Federations, Association of Summer Olympic IFs, Association of Winter Olympic IFs, Association of the National Olympic Committees and the International Olympic Committee.

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82 See Jan Ginter Deutsch, Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 169, 179 (1968) (discussing the “postulate that judicial decisions are legitimate only when they rest on neutral principles from the duty of constitutional adjudication that [legal scholar Professor Herbert Wechsler] finds article III to impose on the courts”).

83 Daniel H. Yi, Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 1, 31–32 (“Prior to 1994, the IOC exercised direct oversight of the CAS. After the Paris Agreement, however, ICAS was created to take on this duty. However, Olympic institutions are still very much in the picture, retaining substantial influence over both the ICAS appointment process. In fact, ICAS’ entire twenty-person roster is appointed either directly or indirectly by Olympic institutions. Based on its membership requirements, there are four ways that ICAS (and therefore the CAS) remains firmly entangled with Olympic institutions. First, Olympic institutions directly appoint 60% (12 out of 20 total) of all CAS governors. Second, the twelve ICAS members appointed by Olympic institutions have sole discretion in appointing the remaining eight members. Third, up to sixteen members of ICAS can, and mostly are, members of Olympics institutions. In fact, at last check, twelve current members of ICAS are also high-ranking members of some Olympic institution. Finally, there is no life tenure in ICAS; members are only guaranteed a four-year term. If their appointing body (most likely, an Olympic institution) is not satisfied with their performance after four years, Olympic bodies can simply refuse to re-appoint a recalcitrant member. Assuming that the Paris Agreement was intended to truly emancipate CAS from Olympic institutions, ICAS appears to be a feeble attempt to accomplish this goal.”).

84 Nafziger, supra note 28, at 506.

85 See CODE OF SPORTS-RELATED ARBITRATION art. S4 (2017) (Eng.).

86 Id. art. S4 ¶¶ a–c.
The tribunal is so heavily integrated with these federations because the very members of the CAS are appointed by ICAS to join the Court.\textsuperscript{87} “Section S6 of the CAS Code gives ICAS the power to appoint CAS arbitrators, amend the CAS Code, and elect the presidents of the Ordinary and Appeals Divisions of the CAS. In essence, \textit{the ICAS has overwhelming influence over the management, administration, and regulation of the CAS.}”\textsuperscript{88} The irony of this is that a driving reason for creating the CAS was to have a court free from the powers of the international federations and their influential nature.\textsuperscript{89} The prevalence of “enforced arbitration” clauses and the interconnectedness of the sports world illustrate how closely affiliated the CAS is with international sports associations.

From an American legal system perspective, CAS is antithetical to many of the system’s founding principles. Rather, CAS possesses similar characteristics, including inequalities in bargaining power through arbitration agreements, to that of private organizations like the National Football League (NFL).\textsuperscript{90} The NFL invokes a “collective bargaining agreement (CBA) between the NFL Player’s Association (NFLPA), the labor union representing professional football players, and the owners of football teams.”\textsuperscript{91} The CBA parallels the CAS in two respects: (1) the inequality of bargaining power between the CBA, the NFLPA, and the team owners mirrors that of the CAS, team owners, and the (little represented) players; and (2) the biased authority over appellate hearings in the CBA with relation to their Commissioner and in the CAS with relation to the intra-court selection for arbitrators that is highly influenced by sports federations.\textsuperscript{92}

\textsuperscript{87} Id. art. S14.


\textsuperscript{89} See Blackshaw, \textit{supra} note 15, at 225.


\textsuperscript{91} \textit{Id.} at 312.

\textsuperscript{92} See \textit{id.} at 311–22 (“Similar to the binding arbitration clauses found in contracts between athletes and their respective athletic federations, under the CBA, players are bound to the arbitration procedures set forth and agreed to by the NFLPA and the owners of the teams.”).
The CBA provides the commissioner of the NFL with both “discretionary and disciplinary power over conduct considered ‘detrimental to the integrity of, or public confidence in, the game of professional football.’ Essentially a catch-all, the CBA gives the commissioner the express authority to define the scope of detrimental conduct and to impose discipline he deems fit.” 93 Even more alarming, the CBA allows for the Commissioner, with only little oversight by the NFPLA, to “serve as [a] hearing officer in any appeal under his discretion.’ The NFL commissioner thus has exclusive authority to choose the arbitrators in the appeals process, and may even select himself.” 94 The Commissioner is provided with “the power to be both judge and jury” with the ability to issue binding decisions with little “neutral third-party oversight.” 95 The essence of this unchecked power and unequal bargaining is alarming and presents high risks for “structural imbalance and bias” in both the NFL and the CAS. 96

The structural imbalance can clearly be seen in this break-down:

There are 193 governments that have delegated the CAS to adjudicate sports disputes on their behalf, which means that the power of lex sportive is currently in the hands of 330 individuals. The interests of tens of thousands of athletes are at stake, yet power is centralized in the hands of the few. When it comes to fairness, there is a great cost to athletes subject to the CAS’s jurisdiction because the CAS will inevitably “disagree with, rule against, or render interpretations that run counter to what [national governments] might have wanted, and what the democratic majority might prefer.” The CAS has a monopoly over the international sports arena, and it is subject to the minimalist of review standards. 97

93 Id. at 313.
94 Id. at 313–14 (“Although this power was collectively bargained for by the NFL and the NFLPA, it is drastically different than typical arbitration clauses, in which ‘a neutral third-party arbiter is appointed by both parties to make a binding decision without preferential treatment to one side.’”)
95 Id. at 314.
96 Bondulich, supra note 90, at 319 (discussing the inability for “the president of the [Appeals Arbitration] [D]ivision, who is selected by ICAS through individual institutions and the IOC [to] be able to select an unbiased arbitrator”).
97 Hewitt, supra note 88, at 780–81.
As previously established in this paper, sports are immensely important in our society. They present a platform that intermixes extreme financial power and influence with a massive public following. A structural imbalance at the top level, directly affecting the individuals that generate a collective following in the public, is an important issue that the Belgian Court of Appeals ruling brings to light.

The structural imbalance of the CAS is further exploited by the court’s power, amidst its partisan make-up, to issue advisory opinions “on juridical matters concerning sport” that directly shape sports internationally with the “minimalist of review standards.”\(^98\) Specifically, the CAS can “provide for summary conciliation . . . [and] advise international federations and other sports organizations on problems related to their structures and procedures.”\(^99\) Ultimately, “[t]he competence of the CAS to give advisory opinions, in particular, suggests a fertile source of international sports law . . . so as to render its prescriptions and sanctions ‘justified’ [and] more proportional, in the eyes of national judges.”\(^100\) But, the CAS’s authorization to issue advisory opinions is more evidence of the CAS’s close affiliation with international federations.

How can the CAS make objective and unbiased decisions on sports conflicts when its operations are interdependent to those of the international sports organizations? This very practice runs against the United States practice of forbidding federal courts from issuing advisory opinions because it blurs the line of separation of powers.\(^101\) The insular nature of the CAS becomes tainted when it so closely associates itself with the same parties that bring it appeals. The result of these relationships is clearly seen through the CAS’s acceptance of FIFA’s sanctions as proportionate to RFC Seraing’s violation, without any consideration to the suitability of

\(^{98}\) See id; Nafziger, supra note 28, at 507.

\(^{99}\) Id.

\(^{100}\) Id. at 508.

\(^{101}\) Philip M. Kannan, Advisory Opinions By Federal Courts, 32 U. Rich. L. Rev. 769, 769 (referring to Article III, Section 2 of the United States Constitution in which the “affirmative grant of authority to federal courts . . . to hear and decide cases or controversies has been interpreted to prohibit these courts from giving advisory opinions.”).
the enforced arbitration clause. 102

While international law inherently provides for a different nature than that of American law, it is also important to compare the institutional safe-holds that are present and absent in both systems. The CAS tribunal is not bound by precedent and has the freedom to review every case de novo, even with possible disregard to the decisions of arbitral tribunals below it.103 This absence of binding precedent seems inherently suspect and questions how much trust can be placed in the Court’s constructed lex sportiva. Additionally, it highlights the absence of checks on the Court’s power. As the CAS operates through arbitration requirements forcing appeals to their tribunals, the Court has the ability to supersede national court systems and other State law when coming to its binding conclusions.104 The unlimited power of the CAS is further enhanced by the high stakes of their decisions, as the Court has the sole ability to uniformly alter sport internationally.105

While the uniform and insular nature of the CAS positively contributes to the international sports world, it is concerning that the Court’s power can continue to grow freely and endlessly. With concerns for the neutrality of the tribunal amidst minimal checks on its power, the growing power of the CAS raises concerns such as: further disadvantages for players without improvements to their bargaining power; further opportunities for the CAS’s “few” to issue policy decisions that directly impact players and their respective agents, coaches, and federations; and further chances for the “few” to risk the integrity of the very sports that are enjoyed internationally for biased gain. By reorganizing the selection process for the CAS, some oversight will be added to the tribunal to assure minimal checks to its authority.

VI. Recommendations

The Brussels Court of Appeals decision is a small flicker of

102 See Mavromati, supra note 4, at 3.
103 MCARDLE, supra note 35, at 48.
104 Frequently Asked Questions, supra note 17 (“An award pronounced by the CAS is final and binding on the parties from the moment it is communicated. It may in particular be enforced in accordance with the New York Convention on the recognition and enforcement of arbitral awards, which more than 125 countries have signed.”).
105 See id. (possessing the ability to issue “final and binding” judgments provides CAS with the power and influence to single-handedly shape sports across the world).
resistance to the CAS that will likely die out before any real movement is initiated. While there are fundamental characteristics of the CAS that are worrisome, specifically in its close relationship to authoritative sports associations and its lack of binding precedent, the CAS is likely to remain unchanged as its existence is too highly valued in international sports.

The CAS’s position as the sole arbitral body with internationally respected decisions is too advantageous to completely reform. Instead, minor reforms to protect its objectivity must be implemented to constrain the influence of international sports federations. An unbiased and uninfluenced panel can be achieved through changes in the selection process for the CAS panels. Instead of having ICAS – oftentimes itself made of IF officers – directly selecting the CAS arbitrators, there should be an external selection process. This process will balance a candidate’s former arbitration experience with his or her knowledge of sport more objectively than the ICAS.

Secondly, the arbitration clauses for all major sports federations should be reviewed by the CAS to help the clauses better reflect an equal bargaining power between players, third parties, and international federations. Additionally, both a heavier involvement of the players in making these recommendations to the sports federations and an educational program to teach players what they ascribe to when signing agreements are needed. Unequal bargaining power is the natural result of a financially equipped and experienced sports federation on the one side, with a player that likely lacks the expertise to comprehend the complexity of these agreements on the other side. Educational programs provided by the CAS to the sports federation players will help to eliminate the unequal bargaining power that exploits players.

VII. Conclusion

The CAS will continue to grow in power and influence until institutional safe-holds are put in place to restrict its power. It is important to retain a uniform ruling body that employs decisions collectively followed by all national and international sports federations; the CAS’s existence is necessary to assure that sports retain their integrity and legitimacy in pursuit of honest play. But the importance of the CAS does not rid it of the necessity for institutional safe-holds that check its power and neutrality. Unfortunately, with the current nature of the tribunal, this
continuously-growing power represents the subsequently growing power of the federations, the very problem that spurred the creation of the CAS. With a more objective look into its operations and with a mission focused on positive reform, the CAS may actually stay within the sidelines of its originally-bound field.