COMPELLED CONSENT – *PECHSTEIN* & THE DICHOTOMY AND FUTURE OF SPORTS ARBITRATION

By Nick De Marco[1]

"The plaintiff has signed the arbitration agreement voluntarily. The fact that she acted determined by others since she would not have been able to compete otherwise does not render the agreement invalid". With this contradictory reasoning, Germany's Federal Court of Justice (the *Budesgerichtshof*, **"the BGH"**) announced its judgment in the much anticipated *Pechstein* case.[2] The BGH held that a clause requiring players[3] charged with anti-doping rule violations to submit to the jurisdiction of the Court of Arbitration for Sport (**"the CAS"**) and exclude the jurisdiction of national courts was consensual and lawful, despite the fact that any professional sportsperson who wished to compete was required to agree to that clause.

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[2] See the BGH's press release dated 7 June 2016: http://www.rdes.it/Decision%20Pechstein%20Case.pdf. The BGH has not yet published its judgment in English. The facts and history of this litigation is as follows. In July 2009, Claudia Pechstein (**"CP"**) was banned for two years by the ISU, after an in-competition blood test showed unusually high levels of red blood cells, indicative of doping. CP appealed to the CAS, who dismissed her appeal, and then to the Swiss Federal Tribunal, who also dismissed her appeal. In Germany, CP sued the ISU and German Skating Federation for damages. This claim was dismissed at first instance despite the court finding the arbitration clause was invalid and in breach of CP's Article 6 rights. The Munich Court of Appeal allowed CP's appeal applying German competition law finding that the ISU was the only provider in the market for speed-skating world championships and therefore had a monopoly on that market and a dominant position. The Munich court also found that the structure of the CAS and the system for appointing arbitrators was biased in favour of sports federations. The Munich court concluded that in those circumstances the exclusive arbitration clause in favour of the CAS which the ISU required players to sign, was an abuse of ISU's dominant position and a violation of German anti-trust law and that as a result it was contrary to German public policy to recognise the CAS award. On appeal, the BGH overturned this decision.

[3] The term "*players*" is used in this article to refer to all sportsmen and women, whether otherwise described as athletes or players in their respective sports.

This article reflects on that judgment. First, briefly considering the role of consent in arbitration and then considering whether it is necessary to require players to consent to sports arbitration. In postulating that effective international sports regulation depends on a compulsory, specialised, centralised system of international dispute resolution, the article suggests reforms to the procedure of both the CAS and domestic sports arbitral bodies in order to promote fairness and impartiality and protect players.

I. Consent

Consent is central to the entire concept of arbitration. It is only following an *agreement* to arbitrate that parties can exclude the jurisdiction of national courts and submit a dispute to be finally resolved by an independent, impartial third party.[4] There are few exceptions to this rule—even international investment disputes (where there is often no privity of contract between the parties to the arbitration) can only be submitted to arbitration if both parties consent in writing.[5] Accordingly, where consent has been compelled (owing to a significant inequality between the parties, for example) how can an arbitration agreement be regarded as valid and enforceable?

So foundational is mutual consent to arbitration that compulsion, or the undue influence of one party over the other, is protected against in a number of statutory regimes. The Arbitration Act 1996, which regulates all arbitrations that have their seat in England and Wales or Northern Ireland, provides that *"parties should be free to agree how their disputes are resolved"*.[6] Party autonomy is one of three general principles that underpins the whole of the Act.[7] The Consumer Rights Act 2015, which regulates consumer contracts in the UK, provides that in a contract between a trader and a consumer, a term that *"has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—(a) requiring the consumer to take disputes exclusively to arbitration not*

[4] *Russell on Arbitration* (24th ed., 2015) at [1-001] and [1-011]; R Merkin *Arbitration Law* (1st ed., 2004) at [1.23]

[5] Where two states agree an investment treaty, any legal dispute between one of those states and a national of the other arising directly out of the investment can be submitted to the International Centre for Settlement of Investment Disputes only where both parties consent in writing to do so (see Arbitration (International Investment Disputes) Act 1996, Schedule 1, paragraph 1, articles 25(1) and 36(2)).

[6] s. 1(b) of the Arbitration Act 1996

[7] *ibid.*, s. 1

covered by legal provisions" shall be presumed unfair and unenforceable.[8] It is then for the trader to prove that the contract was fair and did not create a significant imbalance of rights and obligations before the clause can be relied on.[9] The Employment Rights Act 1996 (which applies in England, Wales and Scotland) prevents parties to an employment agreement from excluding the provisions of the Act and precluding a person from bringing proceedings under the Act before an employment tribunal.[10] Such provisions properly reflect the gravity of an arbitral agreement and guard against parties being forced to surrender their legal rights.

Unequal bargaining positions, however, are not uniformly well-protected against. In an employment relationship, for example—where employees (in the great majority although clearly not all employment contracts) usually depend more on their employer for work and income than the employer does on that individual employee for service and labour—employees are often unable to freely negotiate the terms of their employment contract. And yet, in the USA mandatory (non-negotiable) arbitration agreements are regularly drafted into contracts of employment, which the US Courts regularly uphold.[11] Even in the UK, despite legislation preventing employees from contracting out of their statutory rights, there has recently been favourable discussion of the suitability of arbitration to the resolution of

[8] Paragraph 20 of Schedule 2 and s.63(a) of the Consumer Rights Act 2015. It was held in *Mylcrist Builders Ltd v Mrs G Buck* [2008] EWHC 2172 (TCC), [2008] BLR 611 that an arbitration governed by the Arbitration Act 1996 was not an arbitration *"covered by legal provisions"*; that *"covered by legal provisions"* only excluded arbitrations required by statute ([54] per HHJ Ramsey). In *Mylcrist*, the High Court considered the validity of an arbitration agreement in the standard terms and conditions of a construction agreement. The court held the term to be unfair and void for the following reasons: (i) the clause caused a significant imbalance in the parties' rights to the detriment of Mrs Buck, (ii) the arbitrator's fees were significant in relation to the small claim, (iii) the impact of the clause had not been clearly set out and was not immediately apparent to the lay client, (iv) had the clause been drawn to Mrs Buck's attention she would likely have objected to it ([52-60] per HHJ Ramsey).

[9] s. 62 of the Consumer Rights Act 2015

[10] s. 203 of the Employment Rights Act 1996 restricts contracting out of statutory rights (subject to certain limited exceptions including settlement agreements); and see for application of the principle, *Clyde & Co LLP v Bates van Winkelhof* [2011] EWHC 668 (QB); [2012] I.C.R. 928 in which Slade J. found a clause in a limited liability partnership providing for disputes to be settled by arbitration could not be relied upon to enforce a stay of employment tribunal proceedings for discrimination or whistleblowing as it offended s. 203 of the Employment Rights Act 1996.

[11] See discussion in T Giles and A Bagley 'Mandatory Arbitration of Employment Disputes: What's New and What's Next?' in 39 *Employee Relations Journal* 22 vol. no. 3 (Aspen Publishers, New York: Winter 2013), available at: https://www.crowell.com/files/Mandatory-Arbitration-of-Employment-Disputes-Whats-New-and-Whats-Next.pdf

employment disputes.[12] These mandatory arbitration clauses in employment contracts are concerning, not only because of the unequal bargaining power between (most) employers and employees, but also as employment disputes often concern questions of broad public importance—such as whistle blowing, discrimination and equality—which are better suited to resolution in a public forum with certain statutory and procedural protections available to the parties than a private and procedurally *ad hoc* arbitration. Nonetheless, even where those mandatory arbitration agreements are upheld in the US, the courts have held that the equalities commission (or similar body) may bring legal proceedings on the employee's behalf in the national courts.[13] In England and Wales, it has been suggested that the protections of the Employment Rights Act 1996 could be incorporated into arbitration agreements in order to protect the employee's statutory claims.[14] Accordingly, even where an arbitration agreement is mandatory, or non-consensual to some degree, the party that has not given free consent should be protected by provisions in the agreement itself, or a system that allows commissions—such as the Equality and Human Rights Commission—to bring claims in domestic courts on their behalf when fundamental rights are infringed.

In that context, the BGH's ruling that consent that was *"determined by others"* was nonetheless *"voluntary"* is surprising. Where there is such a clear imbalance between the parties—where a player depends for their livelihood on being granted permission to compete by their governing body—how can it be said that an arbitration agreement between the player and governing body is freely consented to? And if, as it should, that imbalance gives rise to a concern as to the consensual nature of the agreement then why are players given no protection against unfair agreements? It is on this basis (amongst others) that Ms Pechstein seeks to challenge the BGH decision to the German Federal Constitutional Court.[15]

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[12] See, for example, P Goulding and P Frost 'Arbitration of employment disputes' in *ELA Briefing* (May 2014) pp.13-15, available at: http://www.blackstonechambers.com/news/publications/arbitration.html

[13] See *EEOC v Waffle House, INC* 534 US 279, 122 S CT 754 (2002), and discussion in J Byrnes and E Pollman 'Arbitration, consent and contractual theory: the implications of EEOC v Waffle House' in *Harvard Negotiation Law Review* (Spring 2003) 290

[14] See, Goulding and Frost *ibid*.

[15] See a link to CP's statement (in German) here: http://www.sportsintegrityinitiative.com/analysis-pechstein-to-appeal-after-german-court-throws-out-her-case/

However, the case has provoked much broader discussion of and demands for a structural and procedural reform of the CAS.[16] Drawing on many of those demands for reform, this article goes on to consider why mandatory arbitration agreements might be necessary in international sports regulation and dispute resolution and, if such coercion is necessary, what reforms may be made to make the system fairer for players.

II. Compulsion

Shortly before the *Pechstein* decision, John G Ruggie[17] published a report on FIFA and Human Rights.[18] Professor Ruggie considered the prohibition of legal claims in sports disputes (that is, mandatory arbitration clauses) to be a *"complex issue, especially as it relates to human rights"*.[19] However, the report dismissed the alternative scenario of resolving disputes in domestic courts as unworkable: it would *"wreak havoc on common standards and consistency of application"*; it is too time consuming; and it is vulnerable to bias in favour of national clubs or associations.[20] The report concluded that mandatory arbitration clauses, despite problems of consent, were the most suitable dispute resolution procedure in the context of international sport. But the report also made quite clear that FIFA needed to strive to make those tribunals human rights compliant: *"if an arbitration system is going to deal effectively with human rights-related complaints, it needs certain procedural and substantive protections to be able to deliver on that promise"*.[21]

Those observations are relevant to arbitration in all sporting fields. As Professor Ruggie identified, the alternative to international sports arbitration is resolution of those disputes in domestic courts. There are obvious disadvantages to this. Litigation would often take longer and cost more than arbitration and the courts, as non-specialist tribunals,

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[16] Such demands have been made by many athletes' and players' unions. See, for example, UNI Global Union: http://www.uniglobalunion.org/news/players-will-continue-claudia-pechsteins-heroic-fight-reform-sports-justice-system; FIFPro: https://fifpro.org/en/news/despite-decision-pechstein-must-trigger-reform, https://fifpro.org/en/news/does-football-need-cas

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[18] J G Ruggie, *"FOR THE GAME FOR THE WORLD." FIFA and Human Rights.* Corporate Responsibility Initiative Report No 68. (Cambridge, MA: Harvard Kennedy School, 2016)

[19] *ibid.* p.26

[20] *ibid.*

[21] *ibid.*

would not be well-placed to resolve these specialised disputes. These disadvantages could be partly overcome by the creation of a system of national sports tribunals with specialist judges and expedited procedures. However, such a system would be expensive and time-consuming to implement and would remain ill-placed to accommodate the inherent internationalism of these disputes—the application of international rules to players in international competitions—and would make consistent decision making and the development of common standards extremely difficult.

It is precisely for these policy reasons that the BGH dismissed Pechstein's case finding, "*[T]he benefits related to single international Arbitration such as harmonized standards and rapid decisions apply not only for federations but also for athletes.*"[22] Other learned authors have recognised the "*myth of consensual arbitration*" in sport;[23] the reality is that reasons of sporting necessity require a compulsory international system of alternative dispute resolution supported by arbitral law. Whilst this article accepts this necessity on policy grounds, and goes on to set out the reforms to sports arbitration that should reflect its hybrid role, it must remain open to players to consider further challenges, in different jurisdictions, to the validity of compelled arbitral clauses in sports contracts on grounds of fundamental principle, as and when the appropriate case arises.

What is required, in this hybrid system of compelled consent, is reform of the CAS and other arbitral bodies to increase transparency and fairness. Such reform could alleviate concerns over a player's right to an effective remedy and a fair trial. If the CAS and other arbitral bodies could be relied upon to give open, fair, transparent judgments then the criticisms of coerced consent loose their potency.

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[22] Press release, see footnote 2, above.

[23] See, e.g. A Rigozzi and F Robert-Tissot (2015) '"Consent" in Sports Arbitration: Its Multiple Aspects' in E Geisinger and E Trabaldo de Mestral (eds) *Sports Arbitration: A Coach for other players?*, ASA Special Series, pp. 59-95., at p. 59-60: "*sports arbitration is far from the traditional idea of arbitration being the consensual alternative dispute adjudication process that we read about in every textbook on arbitration […]. Rather, it is clear that sports arbitration is fundamentally non-consensual in nature, since athletes have no other choice but to agree to whatever is contained in the statutes or regulations of their sports governing bodies*"; and see A Duval and B Van Rompuy, *The compatibility of forced CAS arbitration with EU competition law: Pechstein reloaded*, 23 June 2015, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983

III. Reform

In response to the *Pechstein* decision the CAS itself issued a press release.[24] Despite the BGH having found the CAS procedure to be fair, that press release confirmed that the CAS was considering reform and was willing to *"listen and analyse the requests and suggestions of its users, as well as of judges and legal experts in order to continue its development, to improve and evolve with changes in international sport and best practices in international arbitration law with appropriate reforms"*.[25] This article suggests where and how those reforms could be made.

(i) Appointment of arbitrators

The 2016 Code of Sports-related Arbitration (**"the 2016 Code"**)[26] provides that in choosing an arbitrator, parties before the CAS are limited to those appointed by the International Council of Arbitration for Sport (**"the ICAS"**).[27] The ICAS itself is composed of twenty members, which are appointed as follows, and in this order: first, four members are appointed by the International Sports Federations (**"IFs")**; then four by the Association of National Olympic Committees (**"ANOC"**); then four by the International Olympic Committee (**"IOC"**); then four chosen by those twelve members already so appointed *"after appropriate consultation with a view to safeguarding the interests of athletes"*; finally four chosen by those sixteen members already so appointed and *"chosen from among personalities independent of the bodies designating the other members of ICAS"*.[28] Only four members (one fifth) of the ICAS, therefore, are required to be independent from global sports governing bodies; and only one fifth is appointed to represent the interest of players – and even then, that fifth are themselves appointed by those appointed by the governing bodies. In choosing arbitrators, the ICAS *"shall appoint personalities … whose names and qualifications are*

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[24] http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English_.pdf

[25] *ibid.*

[26] http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html; http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final__en_.pdf

[27] S6(3) of the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes to the 2016 Code and R.33 of the Procedural Rules to the 2016 Code

[28] S4 of the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes to the 2016 Code

brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs."[29]

The President of the ICAS also serves as the President of the CAS.[30] That President is elected from the members of the ICAS, after those members have consulted with the IOC, the IFs and the ANOC.[31] The President is, therefore, likely to reflect the interests of sports governing bodies. The current President, for example, is also the Vice President of the IOC, Chair of the IOC Tokyo 2020 Coordination and Legal Affairs Commissions, Member of the IOC Rio 2016 Coordination Commission and President of the Australian Olympic Committee (since 1990).[32] The Presidents of the CAS Divisions are also elected from the members of the ICAS.[33]

As well as appointing the CAS arbitrators to the list from which the parties can appoint their arbitrator, the ICAS resolves challenges to and removals of arbitrators;[34] and the Presidents of the Divisions can appoint a sole arbitrator (where the Claimant so requests and the Respondent does not pay its share of the advance of costs),[35] and decide who the President of each panel of three is where the parties do not agree, or select the arbitrator for the Respondent where it has failed to do so.[36]

Such a system, unsurprisingly, does not inspire confidence in players. Although parties are free to chose an arbitrator, that freedom is curtailed by the fact that (i) the parties can only choose from a limited list of arbitrators, and (ii) those arbitrators are appointed by a council that is dominated by representatives of sports governing bodies. There is no route by which a player can challenge the impartiality of the ICAS itself, a body that is clearly weighted against players. In any event, even if the ICAS and the CAS are truly independent

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[29] S14 *ibid*.

[30] S9 *ibid*.

[31] S6(2) *ibid*.

[32] http://www.tas-cas.org/en/icas/members.html

[33] S6(2) of the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes to the 2016 Code.

[34] S6(4) *ibid*.

[35] R.40.1 of the Procedural Rules to the 2016 Code

[36] R.40.2 *ibid*.

and impartial, this organisational structure does not give that appearance. It would therefore be in the CAS's own long term interests to reform it.

To guard against this (at the very least) appearance of bias, the CAS could adopt the following procedures:

- First, the membership of the ICAS should be reformed. Bodies representing players should be able to appoint members directly, as sports governing bodies and Olympic committees are currently able to. For example, eight members could be appointed by bodies representing players' interests; eight by bodies representing the sports governing bodies; and the remaining four appointed by agreement between those sixteen.

- Second, the President of the ICAS and the Presidents of the CAS Divisions should be independent both of all regulators and Olympic committees and of those bodies representing the interests of players. Alternatively, at the very least, those Presidents could be elected from the ICAS (constituted as recommended in the preceding paragraph), with no parties permitted to make recommendations or suggestions for the posts. The independence of the Presidents of the CAS Divisions is particularly important given that those persons have a power to decide a number of case management matters, including whether a dispute should be resolved by a sole arbitrator or three arbitrators if the arbitration agreement does not specify the number,[37] who (in the absence of agreement between the parties) the sole arbitrator shall be,[38] and who (in the absence of agreement between the two arbitrators nominated by the parties) the president of the arbitral panel shall be.[39]

- Third, parties should not necessarily be limited to a closed list of arbitrators. In the arbitration procedure set out at Rule K of The FA's Rules of the Association 2015-2016, for example, the parties can either agree an arbitrator or nominate their own arbitrators, chosen from any arbitrator willing and able to accept the appointment.[40]

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[37] R.40.1 and R.50 of the Procedural Rules to the 2016 Code

[38] R.40.2 and R.53 *ibid.*

[39] R.40.2 and R.54 *ibid.*

[40] See The FA's Rules of the Association 2015-2016 in The FA Handbook 2015-2016 at p.126

The CAS could recommend arbitrators by promoting its list, but if a party is not satisfied with those on the list it should arguably have the right to appoint someone of its own choice (subject to safeguards guaranteeing independence and some minimum level of expertise). Alternatively, the ICAS could appoint more arbitrators—with these arbitrators offering a wide range of expertise in different sports and from different international regions—to offer parties a genuine choice. If the ICAS were reformed as suggested above then the appointment of arbitrators to the CAS would be less likely to favour sports governing bodies and regulators. Nonetheless, it would benefit both parties to an arbitration and the CAS itself (by way of improving its perception and reputation) if parties were able to choose from as wide a pool of arbitrators as possible, and were not limited to choosing an arbitrator from the 352 currently on the ICAS approved list.[41]

(ii) Legal assistance

The CAS, as it made clear in the *Pechstein* press release, has recently implemented a procedure for legal aid to assist players without sufficient financial means to have their case fairly resolved.[42] The CAS' Guidance on Legal Aid before the Court of Arbitration for Sport[43] provides, *inter alia*, that the ICAS Board decides upon requests for legal aid;[44] that legal aid is granted on the basis of a reasoned request by a person who does not have sufficient assets, whose claim/defence is not obviously frivolous or vexatious;[45] that the CAS will provide a list of "*pro bono*" counsel from which a successful legal aid applicant may choose;[46] that at the end of the arbitral proceedings, the CAS can order costs against the legally aided party but will waive its right to claim those costs.[47]

[41] http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html?GenSlct=2&nmIpt=

[42] S6(9) of the Procedural Rules to the 2016 Code provides that the ICAS *"may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund."*

[43] Those legal aid guidelines / rules came into force on 1 September 2013 and are available here at: http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_ENG_.pdf.

[44] article 3

[45] article 5

[46] articles 6 and 18-20

[47] article 15

These provisions are a welcome development. However, to enable parties to be on a more equal footing the legally aided party (who will almost always be the player, rather than the sports body) should not have to rely exclusively on the assistance of *pro bono* counsel. Instead, the panel of counsel established by the CAS should be paid by the CAS on behalf of the legally aided party (as with the system of legal aid in the UK). This is of vital importance in enabling equality of arms between the parties. There will necessarily be fewer counsel willing and able to act for free than those willing to act for payment, and those *pro bono* counsel will likely be of lesser quality and lacking in the relevant expertise (the reason why many lawyers offer to do such *pro bono* work being that they are keen for experience in that area). The ICAS would be able to finance these sums through charging those parties who can afford it a slightly higher administration fee.

(iii) Publication of decisions

Under the Procedural Rules to the 2016 Code, proceedings under the Ordinary Arbitration Procedure are confidential and awards will not be published unless agreed by all parties or decided by the President of the Division.[48] Likewise, proceedings under the Appeal Arbitration Procedure are confidential but the award itself shall be made public unless both parties agree otherwise.[49] This is a sensible distinction. It is right that where a regulator is a party to the dispute there should be a presumption that the decision is published not least because of the implications the decision may have for the sport and other participants and so as to enable consistency in decision making. Nonetheless, there is yet scope for improvement of these rules in order to better reflect the general interest in publication of arbitration awards:[50]

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[48] R.43

[49] R.59

[50] This general interest in the publication of awards in some form (albeit summary or redacted) is recognised in other arbitral proceedings, even purely commercial ones where the points about regulation made above do not apply. The London Maritime Arbitrators Association, for example, provides at [26] of the 2012 LMAA Terms that *"if the tribunal considers that an arbitration decision merits publication and gives notice to the parties of its intention to release the award for publication, then unless either or both parties inform the tribunal the tribunal of its or their objection to publication within 21 days of the notice, the award may be publicised under such arrangements as the Association may effect from time to time. The publication will be so drafted as to preserve anonymity as regards the identity of the parties, of their legal or other representatives, and of the tribunal."* (The terms are available at: http://www.lmaa.london/uploads/documents/2012Terms.pdf.) The LMAA's Notes on London Arbitration observe that *"since the number of arbitration awards going to the courts has been considerably curtailed since the introduction of the Arbitration Act 1979 (a situation which is not going to change under the*

- First, with regard to "public" decisions—that is, where one of the parties is a regulator—the parties should not be able to simply agree not to have the decision published. Instead, the Procedural Rules should provide that there is a presumption that the decision be published unless one of the parties can establish, for example, that publication would cause them to undue hardship or harm. Strengthening the presumption of publication in this manner would:

    - Better enable consistent sanctions. Although one CAS panel is not bound by another those panels should nonetheless be slow to depart from similar decisions. Given that, at least for doping violations, each sport, the world over, is regulated by the same WADA Code and that it would therefore be extremely unfair on one player to be more severely sanctioned for the same act under the same rules than another, it is particularly important that violations be consistently sanctioned. Publication of a greater number of decisions would clearly assist in the development of such consistency; and,

    - Further disincentivise participants from committing anti-doping rule violations. If the circumstances and sanctions of anti-doping rule violations were clearly known, players would be less likely to inadvertently or deliberately commit anti-doping rule violations.

- Second, a similar test should be considered for "private" decisions—that is, those under the Ordinary Arbitration Procedure. Despite these disputes being between private parties, the very fact that they have reached the CAS (and have not been settled or resolved at an earlier stage in proceedings) reflects the likely public importance of the CAS' final decision, and the implications it may have for other players and the sport as a whole. Many of these decisions, although arising from private disputes, relate to carefully regulated areas—such as agreements between football clubs, players and agents—and publication would assist in clarifying the effect of those sports regulations and other legal duties that frequently arise in sports

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1996 Act) there may be something to be said for greater publicity being given to arbitration decisions which are likely to be of general interest. The Association has made arrangements with Lloyd's Maratime Law Newsletter for summaries of awards to be published by it, provided the parties agree. These summaries do not disclose the names of the parties or the arbitrators or the ship (if any)." (The Notes are available at: http://www.lmaa.london/notes-on-arbitration.aspx.)

disputes. Accordingly, even in these private cases there should be no presumption that the decision remain private. Instead, if the decision is of a sensitive or confidential nature and the parties agree to redactions or non-publication then the panel may decide not to publish the decision. If the parties cannot agree, then the panel or Division President, on the basis of representations from each party, should reach a final decision as to whether redactions or non-publication is necessary.

- Third, once it has been decided that a decision be published the CAS should make that decision readily available on its database. At present, only a small portion of CAS decisions are available on the database. This places players at a disadvantage. Regulatory bodies, unlike players, have access to previous decisions which they were party to, irrespective of whether the CAS has chosen to publish those decisions. Players have no such access. The CAS can easily remedy this inequality of arms, and at the same time protect itself from further criticisms of bias that these reforms seek to protect it from, by simply publishing all decisions on their database.

- Fourth, and as a result, the CAS should seek to establish a system of precedent that its own panels and domestic arbitral bodies are bound to apply. Such a system could provide that: (i) as set out above, individual CAS panels should aim for consistency in their decisions and should only depart from similar cases in exceptional circumstances; (ii) appellate domestic sports arbitral bodies should be bound by CAS decisions and consider their own decisions persuasive, and only to be departed from in exceptional circumstances; and, (iii) first instance domestic sports arbitral panels should be bound by both CAS decisions and those of the domestic appeal panel, and should consider their own decisions persuasive and only to be departed from in exceptional circumstances. This would provide for an integrated, consistent, global regulatory dispute resolution procedure and thereby provide an appropriate forum for decisions regarding sports regulatory regimes of global application. As referred to above, this would greatly assist players in providing some certainty with regard to the outcome of decisions and it would thereby greatly assist the CAS in improving its fair trial reputation.

(iv) Domestic sports arbitration

These recommended reforms, although discussed in relation to the procedure of the CAS, should equally apply to domestic sports arbitral bodies. The English FA, for example, would greatly benefit from reform to its disciplinary process (which is currently non-arbitral)[51] and its arbitral procedure for resolving other disputes. First, the disciplinary procedures should be arbitral in nature. One of the many disadvantages of the current procedure is that members of the first instance and appeal panels are drawn from the same group of persons. So, although different persons will hear a matter at first instance and at appeal, the limited number of persons who sit on these panels makes it inevitable that panel members are frequently reviewing one another's decisions. The attendant risks of a less scrupulous review are of great concern to players. There should, at the very least, be a separate pool of persons able to sit on both first instance and appeal panels. Further, as a result of these proceedings being non-arbitral, The FA's arbitral procedure under Rule K can be used to challenge the decisions of appeal boards. This is inefficient, and could be avoided were the disciplinary panels (or at least the disciplinary appeals panels) arbitral proceedings.

Second, although The FA does have a sophisticated arbitral procedure for resolving other disputes (referred to above and set out at Rule K of the Rules of the Association 2015-2016), this too would benefit from reform. Most notably, ss. 44, 45 and 69 of the Arbitration Act 1996 are excluded from the Rule K arbitration procedure[52]—accordingly, in a Rule K arbitration parties cannot apply to the court to exercise certain powers in support of arbitral proceedings, cannot apply to the court for a preliminary determination on a point of law, and cannot appeal on a point of law. These exclusions not only impact on the fairness of arbitral proceedings but they also detrimentally effect the efficacy of those proceedings. In *Paul Smith & Jamie McDonnell v British Boxing Board of Control Ltd, Frank Warren & Dennis*

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[51] See General Provisions Relating to Inquiries, Commissions of Inquiry, Regulatory Commissions of the Association, Other Disciplinary Commissions, Appeal Boards and Safeguarding Review Panel Hearings at [1.1] (p.316 of The FA Handbook 2015-2016).

[52] s. 4(1) of the Arbitration Act 1996 provides that there are mandatory and non-mandatory provisions of the Act: the mandatory provisions have effect notwithstanding any agreement by the parties to the contrary; the non-mandatory provisions can be excluded or amended by agreement between the parties. The mandatory provisions are listed at Schedule 1 of the Act, which does not include ss. 44, 45, and 69. S. 43 of the Act, however, which allows parties to apply to the court to secure the attendance of witnesses, is listed at schedule 1 and therefore cannot be excluded by parties to an arbitration.

Hobson,[53] for example, the boxers sought to challenge an agreement (which contained the arbitration clause) as unenforceable as an unreasonable restraint of trade, they also argued that the BBBC tribunal was biased and should not hear the matter. Because s. 45 of the Arbitration Act 1996 had not been excluded from the arbitration, the BBBC tribunal was able to give the boxers permission to make an application to the Court under s. 45 to have the Court determine whether the contract was enforceable.[54] A s. 45 application enabled the arbitral tribunal to continue to hear the matter where they may otherwise have felt unable to (by reason of allegations that they had an interest in the validity of their own rules). By excluding s. 45, The FA makes its tribunals vulnerable to challenges on points of law which they are unable to determine. Further, exclusion of the courts' supervisory powers under s. 69 leads to concerns about the quality of some Rule K arbitral panel decisions (because they cannot be appealed even if obviously wrong in law). The fairness of a Rule K arbitration would be much improved if these sections were applicable.

Consideration of the particular relationship between Rule K tribunals and the courts leads to a more general point, which is especially pertinent to sports arbitral bodies not governed by the Arbitration Act 1996 and therefore not bound by that Act's mandatory provisions. It is vital that both the parties and the tribunals of all sports arbitral proceedings should have access to the courts to make applications for orders in support of the arbitration, or to avail themselves of the supervisory jurisdiction of the court. Indeed, without such access the arbitral body may be unable to reach a just result. In *England and Wales Cricket Board Limited v Kanerira*,[55] for example, the Claimant had to apply to the court for a witness summons for its main witness (under s. 43 of the Arbitration Act 1996)—without resort to the court, the tribunal would have been unable to secure the witness' attendance and would as a result have been unable to fairly resolve the matter.

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[53] QB, Liverpool DR, Mercantile Court, 13 April 2015, unreported; and see also discussion at https://sportslawbulletin.org/2015/09/10/another-round-in-favour-of-sports-arbitration-court-confirms-boxing-disciplinary-appeal-panel-is-an-arbitration/

[54] As it happened in this case, the boxers did not make an application under s. 45 within the time frame allowed by the tribunal. Six months later the boxers then applied to the Court under s. 24 of the Arbitration Act 1996 asking that the arbitrators be removed for reasons of bias. This application failed, partly because the boxers had accepted the jurisdiction of the arbitral tribunal and had failed to make a s.45 application to the Court when they had an opportunity to do so.

[55] [2013] EWHC 1074 (Comm); see also discussion at: https://sportslawbulletin.org/2013/05/13/cricket-disciplinary-appeal-is-an-arbitration/

More generally, the reforms identified above in relation to the CAS are of particular importance in domestic sports arbitrations, in all countries, and for all sports, where there is an even greater risk of pro-regulator bias. In most sports disciplinary proceedings, the governing body (which is the prosecuting body) has a close relationship with those who sit on panels as arbitrators. That proximity has two worrying possible consequences. First, it risks arbitrators giving decisions favourable to the governing body in hope of re-appointment. Second, the mere familiarity between the prosecution and the panel of arbitrators risks an unconscious bias against players, in favour of governing bodies.

Further, domestic arbitral tribunals would benefit from adopting the CAS' provisions on joinder of parties and interim relief:

- With regard to joinder, the Procedural Rules to the 2016 Code provides that a third party may participate in an arbitration if it is a party to the agreement or if the other parties agree in writing. If there is no such agreement, then the President of the Division or the Panel (if formed) may decide.[56] This procedure is welcome and should be adopted by domestic sports arbitral tribunals, many of which currently do not allow for joinder unless both parties agree (which is the presumptive position under the Arbitration Act 1996). Only allowing for joinder when all parties agree risks agreement not being reached for tactical reasons. For example, in 2007 Fulham FC requested that arbitral proceedings they had commenced against The FA Premier League (**"FAPL"**) be consolidated with arbitral proceedings that Sheffield United FC had commenced against the FAPL where both proceedings were based on similar allegations and sought similar relief. The FAPL refused to agree to full consolidation; although Fulham could make submissions in the proceedings, they could not call witnesses or cross examine.[57] Such problems could be easily avoided by the question of joinder being resolved on application to the panel, which would enable a decision on joinder to be made on the basis of whether it is appropriate in the proceedings as a whole (rather than strategically advantageous for one party) with each party able to make submissions to that end. Joinder is to be particularly encouraged in sports arbitration (as opposed to commercial arbitration) for the

[56] R.41.4

[57] See [2007] ISLR SLR-77 for the Sheffield United decision. For discussion of these cases see https://sportslawbulletin.org/2013/10/10/behind-closed-doors-how-to-avoid-the-problems-of-private-proceedings/

benefits it has for consistent decision making, as well as being greatly more cost and time effective then the institution of separate proceedings.

- With regard to interim relief, the CAS has a power (as do FA Rule K arbitral tribunals) to order interim measures and interim relief. Where possible, domestic sports arbitral bodies should also enable parties to apply to the panel for interim relief. Where this is not possible (because, for example, the panel does not have the necessary powers to order interim relief) then arbitral bodies should allow parties to apply to the court for orders in support of arbitral proceedings (by s. 44 of the Arbitration Act 1996). The availability of interim relief is important to protect parties' positions pending resolution of their dispute, and it would be of particular benefit to sports governing bodies who would thereby be able to request provisional suspension, or to prevent dissipation of assets prior to a final decision. Such an amendment, therefore, would be unlikely to be opposed.

IV. Conclusion

"*Compelled consent*" in international sports arbitration is deeply concerning, especially for the players forced to submit, but it is almost certainly necessary for the effective and consistent resolution of international sports disputes. Sport is not like other private commercial disputes and requires a tailor made arbitral approach that reflects the combined requirements of consistency, equality, transparency, efficiency and fairness. Commerce is not usually about the creation of a level and fair playing field (often the opposite), yet those principles are integral to sport and to the resolution of disputes in sport. The need for a unified system of arbitration in sport requires great care to be taken to ensure the fairness of proceedings, particularly for players who are forced to accept arbitral clauses drafted by the regulators who control entry into the sport and who often form one of the parties to the dispute. Fairness is also essential for the regulators themselves – to guarantee the integrity of their dispute resolution processes, but also their very survival (from legal challenges such as those bravely and importantly brought by Ms Pechstein). The CAS's invitation for suggested further reform is welcome and reflects the fact that ensuring that players have a fair hearing and an effective remedy is beneficial to the CAS as well as to players

themselves. For such reform to be meaningful proposals such as those above ought to be implemented by both domestic sports arbitral processes as well as the CAS.