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INTERNATIONAL SPORTS LAW PERSPECTIVE

CHINA AND CAS (COURT OF ARBITRATION FOR SPORT)*

SHULI GUO**

China is one of the great powers in the international Olympic Movement, and the Court of Arbitration for Sport (CAS) is “the supreme court for the world [of] sports.” What role does China play in the development of CAS? How does CAS help to resolve sports disputes involving Chinese parties? Can China follow the successful example of CAS to setup its domestic court of arbitration for sports, China’s Court of Arbitration for Sport (CCAS)?

I. CHINA AND THE ESTABLISHMENT OF CAS

After mainland China got its recognition from the United Nations and most western countries in the 1970s, the International Olympic Committee (IOC) needed to deal with the problem of “two China[s]” in the Olympic Movement. The IOC recognized the mainland’s China National Olympic Committee as the representative of China and made the Taiwan Chinese National Olympic Committee a Regional Olympic Committee in China. The Taiwanese could not accept the resolution; one Taiwanese IOC member, Mr. Henry Heng Hsu (徐亨), filed a lawsuit in a Swiss district court against the IOC in 1979, alleging discrimination by the IOC against the Taiwanese National Olympic Committee. Meanwhile, before the 1980 Lake Placid Winter Olympic Games, a Taiwanese athlete brought another lawsuit in the United States District Court in Plattsburgh, New York, against the Organizing Committee of the Winter Olympic Games. The plaintiff applied for injunctive relief to represent Republic of China

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(Taiwan) in the Lake Placid Olympic Games. *Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*, 403 N.W.2d 178 (N.Y. 1980).

Although these two cases did not overturn the resolution of the IOC, these cases made the leaders of the IOC think about resisting the judicial intervention of national courts. The IOC especially could not tolerate an IOC committee member filing suit against the IOC in a national court. The IOC wanted all these kinds of disputes resolved in the world Olympic community.

In 1980, Mr. Samaranch became President of the IOC. With his recommendation, the IOC began to consider the establishment of an international sports dispute settlement body. Mr. Samaranch asked Judge Keba Mbaye, a former judge of the United Nations International Court of Justice (ICJ) and member of the IOC, to lead this work. On April 6, 1983, the IOC made the decision to set up CAS and adopted the statutes and arbitration rules (the CAS Code) of CAS. The CAS Code came into force on June 30, 1984, and the CAS institution was also put into operation on that day. CAS's office was located at the IOC's headquarters in Lausanne, Switzerland. The purpose of setting up CAS was to build a permanent arbitration institution for the international sports community to resolve sports disputes. Another aim was to provide a reference of arbitration for sport for each country to develop its own internal mechanism.

Hitherto there were six Chinese arbitrators in CAS.

Chen Naiwei (陈乃慰)	Attorney, Shanghai Jingtian law firm
Ms. Cheng Yeuk-wah, Teresa (郑若骅)	Attorney-at-law, Vice President of the International Court of Arbitration of the International Chamber of Commerce (ICC)
Huang Jin (黄进)	President and Law Professor, China University of Political Science and Law
Liu Chi (刘驰)	Partner, Jun He Law Offices
Lu song (卢松)	Law professor, University of Diplomacy
Wu Wei (David) (吴炜)	Senior Partner, Boss & Young Attorneys at Law

II. CHINESE ARBITRATORS IN THE CAS OLYMPIC AD HOC DIVISION

In 1995, the IOC revised the Olympic Charter, and added a rule (Rule 74, now Rule 61.2), which allowed the establishment of the special arbitral tribunal in the Olympic Games. It provides:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS) in accordance with the Code of Sports-Related Arbitration.”

In the summer of 1996, CAS set up its first CAS special ad hoc arbitration tribunal during the Atlanta Olympic Games (CAS OG ad hoc Division). To ensure that all participants in the Olympic Games could easily take advantage of this mechanism, CAS also set up a fast, flexible, and completely free special arbitration procedure for the Olympic Games.

In the 1996 Atlanta Olympic Games, a Chinese arbitrator, Professor Mingzhong Su (苏明忠), was nominated as a CAS ad hoc Division arbitrator. Professor Mingzhong Su was a law professor at the China Diplomatic Institute, and was the first Chinese arbitrator in CAS. During the Atlanta Olympic Games, Professor Su heard the case *Andrade/Cape Verde NOC, CAS OG 96/002 and 005*. Mr. Andrade was a 110-meter hurdler for the Cape Verde Olympic team and was suspended by his National Olympic Committee (NOC) for his misconduct—unauthorized carrying of his nation’s flag during the Olympic Games opening ceremony; the flag should have been carried by the head of his country’s delegation. The result of this case was the athlete won because only the IOC, not the NOC, had the authority to suspend athletes during the Olympic Games and the right to a hearing was a due process requirement of the discipline procedure.

For the 2004 Athens Olympic Games, Chinese Law Professor, Jin Huang (黄进), from Wuhan University (now, he is the President of China’s University of Political Science and Law) was nominated as a CAS ad hoc Division arbitrator. During the Athens Olympic Games, Professor Jin Huang heard the case *Munyasia/IOC, CAS OG 04/004*, the doping case of Kenyan boxer David Munyasia. Because of the strict liability principle for doping, the athlete lost the case.

In the 2008 Beijing Olympic Games, Chinese lawyer, Mr. Liu Chi (刘驰), from the Jun He Law Firm, was nominated as a CAS ad hoc Division arbitrator.

During the Beijing Olympic Games, Mr. Liu Chi heard the case *Simms/FINA, CAS OG 08/02*, a qualification dispute involving Philippine swimmer Joan Christel Simms. She had both the United States nationality and a Philippine nationality, and competed for the United States before 2008. Simms won the case for qualification for the Philippine swimming team because of the principle of estoppel. The International Federation for Swimming (FINA) could not deny Simms' qualification for the Beijing Olympic Games, for it had allowed Simms to compete for the Philippines in a 2008 International Swimming Championship just before the Beijing Olympic Games with implied permission.

Another case presided over by Mr. Liu Chi of the CAS ad hoc Division Panel in the Beijing Olympic Games was the case *Azerbaijan Field Hockey Federation (AFHF)/Fédération Internationale de Hockey (FIH), CAS OG 08/01, 04 and 05*. The applicant alleged that Spain's women's hockey team should be removed from the Beijing Olympic Games because of doping, and the Azerbaijan team should obtain the qualification. The applicant lost her suit because she had no standing to file an application before the CAS ad hoc Division because no adverse finding had been made against her by the Judicial Commission of FIH and, thus, there was no breach of the rules of procedural fairness in not giving the applicant an opportunity to be heard.

In the 2010 Vancouver Winter Olympic Games, Mr. Liu Chi (刘驰) was nominated as a CAS ad hoc Division arbitrator again. During the Vancouver Winter Olympic Games, Mr. Liu Chi decided the case *Virgin Islands NOC/IOC, CAS OG 10/03*, a qualification dispute related to the proper interpretation of the provisions of the International Bobsleigh and Skeleton Federation's (FIBT) Qualification System dealing with the reallocation of unused quota positions. The applicant lost the case, for the CAS Panel ruled that the interpretation of the qualification rules by the IOC was right.

In the 2014 Sochi Winter Olympic Games, Mr. Wu Wei (David) (吴炜), a lawyer from Boss & Young Attorneys at Law, was nominated as the CAS ad hoc Division arbitrator. Mr. David Wu heard a case, *Maria Belen Simari Birkner/Argentinean Ski Federation (FASA) and the Argentinean NOC (COA), CAS OG 14/03*. Maria Belen Simari Birkner requested CAS order the Argentinean NOC to enter her in the Olympic Winter Games to compete in the Alpine Skiing events of Slalom, Super G, and Giant Slalom, but the CAS ad hoc Division found that it did not have jurisdiction over the application because the dispute happened ten days before the opening ceremony of Olympic Games. Supposing that the ad hoc Division had jurisdiction, the athlete's claims on the merits would have failed because she could not establish that the COA decision was discriminatory. The athlete alleged that the NOC eliminated her case so that her family did not dominate the Olympic team, because there were already three

sisters and one brother from her family at the top of the winter sports in Argentina.

III. CAS CASES INVOLVING CHINESE PARTIES

A. *N., J., Y., W./Fédération Internationale de Natation (FINA), CAS 1998/A/208 (1998).*

In 1996, four Chinese swimmers were suspended for two years because of doping violations, but they insisted that it was an innocent mistake caused by their nutritional drugs. They lost their case in both the CAS arbitration and the appeal to the Swiss Supreme Court because of the principle of strict liability in doping cases. This case is a leading case, which laid down that the burden of proof in a doping case is neither “beyond any reasonable doubt” as in criminal law, nor “the balance of probability” as in civil law. Instead, the burden of proof in a doping case is “comfortable satisfaction,” the degree of which is between “beyond any reasonable doubts” and “balance of probability.” This special burden of proof was codified in the World Anti-Doping Agency’s Code (WADC) after this case.

B. *P./Shangai Shenhua Football Club, CAS 2005/A/840 (2005).*

In 2004, Serbian football player Dusan Petkovic filed a complaint with the Fédération Internationale de Football Association (FIFA) Dispute Resolution Chamber (DRC) against Shangai Shenhua Football Club, China. He claimed the Club terminated his player contract unilaterally and requested compensation. The Club contended that the player did not play as was required—seventy percent of the club’s matches in the last year—so the Club had the right to terminate the contract with him. The FIFA DRC rejected the player’s claim and he appealed to CAS. In 2005, CAS overturned the calculation of the number of matches by the DRC and upheld the appeal of the player. Petkovic got a compensation award in the amount of more than \$1 million USD.

C. *M./Tianjin Teda Football Club, CAS 2005/A/909, 910, and 912 (2005).*

In 2004, Italian football coach Giuseppe Materazzi filed a complaint with the FIFA DRC against the China Tianjin Teda Football Club for unilaterally terminating his employment contract as the head coach. Both parties disagreed with the decision of the FIFA DRC and appealed to CAS. The CAS Panel determined that the conclusive behavior of the Club could be interpreted as an early termination of the employment agreement and the Coach could understand from all the circumstances that his exclusion from the Club was definitive, and

that their employment agreement had come to an end. So, the coach could get the indemnities (about \$1.5 million USD) provided by the contract.

D. Wen Tong/International Judo Federation (IJF), CAS 2010/A/2161 (2010).

Chinese judoka Wen Tong (佟文) filed an application with CAS against the decision of the International Judo Federation (IJF), dated April 4, 2010, pursuant to which a two-year ban was imposed on the athlete following a positive doping test for clenbuterol (an anabolic agent). Wen Tong was the Beijing Olympic champion in the women's 78+kilogram category. On September 8, 2009, the athlete's A sample tested positive for clenbuterol. Then, on November 25, 2009, the IJF "nevertheless had [the athlete's] B sample tested, without informing her or offering her an opportunity to attend herself or through a representative. The B sample also tested positive for clenbuterol." On April 4, 2010, the IJF Executive Board imposed a two-year suspension on Wen Tong. On July 6, 2010, Wen Tong filed an appeal to CAS requesting annulment of the suspension.

The CAS Panel noted that the athlete was not given the opportunity to be present herself or by her representative for the opening and testing of the B sample. The CAS Panel recognized that the right of the athlete to be present applied whenever a B sample is analyzed, irrespective of who asks for it. Considering the B sample analytical results could not validly confirm the A sample analytical results, accordingly, CAS annulled the IJF's decision because the athlete was not given an opportunity to be present herself, or by her representative, for the opening and testing of B sample, in violation of Articles 7.1.4 and 7.1.6 of the 2009 IJF Anti-doping Regulations.

After this case, Wen Tong won the bronze medal at the 2012 London Olympic Games.

This was the first case in which a Chinese athlete won in CAS, and it was one of the few cases in which athletes win a challenge against a doping allegation. This case underpins the principle of due process in doping investigations and discipline procedures.

E. Liao Hui/International Weightlifting Federation (IWF), CAS 2011/A/2612 (2011).

Liao Hui was the Beijing Olympic Games weightlifting champion, and in 2010, he was suspended for four years by the International Weightlifting Federation (IWF) due to doping. There is an inconsistency between the anti-doping rules of the IWF and the WADC. In the IWF doping rules, for the first offense, the athlete shall be suspended for four years; while in the WADC, he shall be suspended for two years. The CAS Panel upheld the appeal by Liao Hui and

changed the suspension from four years to two years, but Liao Hui still missed the 2012 London Olympic Games.

This case suggests that the compulsory nature of the suspension period in the WADC and the priority of the WADC to the doping rules of the International Federations (IFs).

The new 2015 version of the WADC revised the two-year suspension to four years.

F. Mu-yen Chu & Chinese Taipei Olympic Committee/International Olympic Committee (IOC), CAS 2012/A/2913 (2012).

Mu-yen Chu (朱木炎) is the Athens Olympic Games Taekwondo champion. In 2012, during the London Olympic Games, he campaigned for being elected as a member of the IOC Athletes' Commission. The IOC Executive Board withdrew him from the candidates due to violations of the rules for the election campaign because he used unauthorized promotional materials and distributed gifts to voters. Although Chu lost his case in CAS as another Japanese athlete, the CAS Panel concluded that his behavior was due more to "excessive zeal rather than a desire to cheat," and his reputation and integrity as a sportsman should not be affected by this decision.

IV. CAS AND THE 2008 BEIJING OLYMPIC GAMES

CAS set up an ad hoc Division in Beijing during the 2008 Olympic Games. At that moment, there were some worries that the CAS ad hoc Division in Beijing would have some conflicts with the laws of China.

Firstly, the nature of the cases accepted by CAS during the 2008 Beijing Olympic Games broke through the relevant provisions of China's Arbitration Law. According to The People's Republic of China Arbitration Act, the usual sense of "arbitration" in China is the civil and commercial arbitration involving property relations amongst equal entities. The object of CAS applies to disputes related to sports, although the sports disputes can be viewed as a kind of "civil and commercial disputes" because the sports are self-regulated and commercial (professional sports). But looking into decisions dealt by the CAS ad hoc Division, we can find that most cases do not involve "property relations," but only "personal relation." For example, athletes dissatisfied with decisions on the qualification requirements made by the sports federations or athletes rejected by referees' awards appealed to the CAS ad hoc division of the Olympic Games. Moreover, most cases do not involve the relation of private law between the equal subjects; it is "the public law relationship between the manager and the managed," such as the disciplinary disputes caused by the doping issues.

Secondly, the 2008 Beijing CAS ad hoc Division could have taken the preliminary measures by itself in the arbitration procedure, but according to the relevant provisions of Chinese law, only the people's courts were authorized to do so. The CAS Code (R37) provides that the CAS Panel in arbitration cases can be based on the application of a party to take coercive measures, such as interim measures and protective measures. Article 28 of The People's Republic of China Arbitration Act and Article 258 of The People's Republic of China Civil Procedure Act provide that only the people's courts have the right to make mandatory protective measures in China, and the arbitral tribunals have no right to take such measures. The procedural law applied in CAS's arbitration procedure was the Swiss Federal Private International Law. Article 183 of the Act also provides that the arbitral tribunal has the power to take interim measures and protective measures.

All in all, there may be a problem of the International Public Law: if the foreign institutions take activities in China, how can they be immunized from the laws of China? Considering that the foreign public law—the Swiss Private International Code, Chapter 12, on the procedural requirements of "international arbitration"—can be implemented in China, would the CAS ad hoc Division of the Olympic Games violate China's judicial sovereignty?

As early as June 27, 2001, when China's NOC, the Beijing Municipal Government, and the IOC signed the 28th Olympic Games Host City Contract, the Host City Contract Annex M on the CAS arbitration provisions of the Olympic Games had made it clear that the Olympic Games would set up an ad hoc Division of CAS during the Beijing Olympic Games. China had an obligation to assist the work of the ad hoc Division. However, the Beijing municipal government was not representative of the Central Government, so the Chinese government's attitude toward the special arbitration body of the CAS Beijing Olympic Games had to be further clarified.

On the eve of the Beijing Olympic Games, China's Supreme People's Court issued a notification to the lower provincial High Courts. The notification ultimately clarified the supportive attitude of the Chinese judiciary branch to the CAS ad hoc Division of the Beijing Olympic Games. This notice was sent to the High Courts of the six provinces and cities hosting the Olympic Games. The notice required the courts where the Olympic Games matches were occurring to respect the jurisdiction of the CAS ad hoc Division and support the arbitral tribunal in exercising its arbitral authority.

This notice, named "Whether the People's Court Should Accept and Hear the Case Related to Sports During the Beijing Olympic Games," mentioned the three kinds of cases the People's Courts should not accept and hear during the Beijing Olympic Games: (1) competition qualification disputes; (2) doping dis-

putes; and (3) competition result disputes and ones against the referees' decisions. The CAS ad hoc Division in Beijing had jurisdiction over these three kinds of cases and its awards could not have been put to any judicial review by the People's Courts.

V. THE SHANGHAI CAS ALTERNATIVE HEARING CENTER

In 2012, after the Beijing Olympic Games, CAS concluded its partnerships with the cities of Shanghai (China), Abu Dhabi (United Arab Emirates), Kuala Lumpur (Malaysia), and Cairo (Egypt) in order to promote sports arbitration in these regions and to use local facilities to hold hearings and meetings. The CAS Alternative Hearing Center in Shanghai had its inauguration on November 12, 2012. CAS held its first hearing at the CAS Alternative Hearing Center in Shanghai on August 12, 2013. The case concerned an appeal filed by the South Korean Football Club FC Seoul against the Australian Football Club Newcastle Jets FC with respect to a monetary claim for training compensation.

VI. CHINA'S OWN CCAS?

In the People's Republic of China's Sports Act of 1995, Article 33 stipulates that "[d]isputes arising in competitive sports activities shall be mediated and arbitrated by sports arbitration institutions. Measures for the establishment of sports arbitration institutions and the scope of arbitration shall be prescribed separately by the State Council." But almost twenty years later, the CCAS has not been set up. In the People's Republic of China's Legislation Act of 2000, Article 7 stipulates:

The National People's Congress and its Standing Committee exercise the legislative power of the State.

The National People's Congress enacts and amends basic laws governing criminal offences, civil affairs, the State organs and other matters.

The Standing Committee of the National People's Congress enacts and amends laws other than the ones to be enacted by the National People's Congress, and when the National People's Congress is not in session, partially supplements and amends laws enacted by the National People's Congress, but not in contradiction to the basic principles of such laws.

Article 8 states that “[t]he following affairs shall only be governed by law: . . . (9) Systems of litigation and arbitration. . . .” Therefore, there is a conflict between the Legislation Act and the Sports Act. Then, who—the National People’s Congress and its Standing Committee, or the State Council—shall wield the power to set up the sports arbitration? The Legislation Act shall have priority over the Sports Act because the former is constitutional in nature.

Now, China has the People’s Republic of China’s Arbitration Act of 1994 (applicable to the general civil and commercial arbitration), the People’s Republic of China on Mediation and Arbitration of Labor Disputes Act of 2007, and the People’s Republic of China’s Mediation and Arbitration of Rural Land Contract Disputes Act of 2009, all of which were enacted by the National People’s Congress and its Standing Committee. Given that, shall the coming Sports Arbitration Act also be enacted by the People’s Congress and its Standing Committee?

As sports disputes are not as important as other disputes, like labor disputes and rural land contract disputes, there has not yet been any urgency for the People’s Congress and its Standing Committee to make prompt legislative progress. As a result, we are still waiting after several years for the birth of CCAS. That is bad news for Chinese athletes and sports clubs.

Another suggestion is to follow the examples of the United States’ American Arbitration Association (AAA) and the Russian Chamber of Commerce’s Court of Arbitration for Sport of the Russian Federation (CCAS). In this view, the China International Economic and Trade Arbitration Committee (CITAC) can establish a set of special arbitration rules to deal with the sports disputes. This set of rules would be non-governmental in nature, and would not violate the Sports Law Act or the Legislation Act. However, there may be little chance for the CITAC to accept this suggestion because the sports arbitration is not civil or commercial in China.