

HORSE SENSE AND HIGH COMPETITION: PROCEDURAL CONCERNS IN EQUESTRIAN DOPING ARBITRATION

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Rodrigo Pessoa, the world-famous Brazilian show jumper, enjoys a list of sponsors including Rolex, AMG, and Moët Chandon.¹ Pessoa's endorsed products, including bits, blankets, and saddles, are priced from \$22.90 for gullet plates to \$2,099 for saddles.² Anky van Grunsven, the Dutch dressage champion, lists nine sponsors³ and endorses products retailing for 4.99€ (\$6.00) for scarves⁴ to 1,799€ (\$2,699) for saddles.⁵ With sponsorships from the likes of Rolex and Volkswagen on the line, the tension between doing whatever it takes to win and ensuring a clean victory can stretch any competitor to the breaking point.

In an unfortunate number of cases, that breaking point is reached, causing riders and their horses to face sanctions from the Fédération Équestre Internationale (hereinafter the "FEI") for doping violations. For instance, the Beijing Olympics resulted in the investigation of six horses for doping violations, including a charge against Pessoa for the use of nonivamide, a synthetic form of capsaicin, which is a pain reliever sometimes used illicitly to induce hypersensitivity in a jumping horse's legs.⁶ Because of the violation, Pessoa was disqualified from the games and lost his fifth-place finish. Pessoa additionally received a four and a half month suspension from international competition and a fine of 2,000 Swiss francs.⁷ Ironically, Pessoa received a gold medal in the 2004 Athens

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¹ Rodrigo Pessoa, Curiosities, http://www.rodrigopessoa.com.br/rod_curiosidades_eng.php (last visited Oct. 12, 2009).

² Dover Saddlery Catalog, <http://www.doversaddlery.com> (follow keyword search "Pessoa") (last visited Oct. 12, 2009).

³ Anky van Grunsven Official Website, Sponsors, <http://www.anky.nl> (follow "Sponsors" hyperlink) (last visited Oct. 12, 2009).

⁴ Anky Webshop, <http://77.61.40.27/ankyshop/index.asp?open=shop&groepid=09&productid=ATC52503> (last visited Oct. 12, 2009).

⁵ Dover Saddlery Catalog, <http://www.doversaddlery.com> (follow keyword search "Anky saddle") (last visited Oct. 12, 2009).

⁶ *Pessoa's Olympic Horse Tests Positive for Nonivamide*, EQUISEARCH, Sept. 5, 2008, <http://www.equisearch.com/equiwire%5Fnews/olympics2008/jumping/pessoa%5Fnonivamide%5F090508/>.

⁷ *Pessoa Stripped of Beijing Result for Drug Offense*, GMANEWS.TV, Oct. 4, 2008, <http://www.gmanews.tv/story/124878/Pessoa-stripped-of-Beijing-result-for-drug-offense>.

Olympics after the previous gold medal winner was disqualified for doping.⁸

Doping has become an ever-present problem in the world of professional sports. As the stakes get higher and the records get harder to break, athletes in every sport face the temptation to cheat. Some go to great lengths to avoid cheating but find themselves unintentionally violating the rules. Once a blood or urine test has shown the presence of a prohibited substance (or a “related substance” that is chemically similar to a prohibited substance⁹), athletes find themselves embroiled in a unique system of dispute resolution, the Court of Arbitration for Sport (hereinafter the “CAS”).

CAS is a creature of the International Olympic Committee (hereinafter the “IOC”) and has exclusive jurisdiction over almost all nonprofessional sport-related disputes.¹⁰ This dispute resolution mechanism suffers from significant procedural shortfalls and fails to account for the distinctions between Olympic equestrians and other types of athletes. Because of this lack of distinction, the refusal to consider participation in amateur sport employment is especially troubling to equestrians. Significantly more problematic is the acceptance of the “consent” of athletes to the arbitration process, as well as the strict liability doctrine applied to sanctions beyond disqualification.

This Article considers the unique issues emerging in the arbitration of equestrian doping violations. Section I provides the backdrop of competitive sports: the International Olympic Committee and its arbitration body, the Court of Arbitration for Sport. Section II presents the argument for considering equestrian sports employment based on the cost and commitment involved in reaching the sports’ upper levels. Section III discusses whether, under these employment considerations, equestrians can give meaningful consent to arbitrate. Finally, Section IV considers the fallacies and inequities of the doctrine of strict liability as applied to doping violations by equestrians.

Ultimately, this Article asserts that equestrians embark on a lifelong profession, not simply a brief competitive pursuit. Therefore, an equestrian’s consent to arbitrate must be scrutinized in the context of an employment contract. Furthermore, strict liability is not an appropriate standard by which to impose sanctions for equestrian doping.

⁸ *Pessoa’s Olympic Horse Tests Positive for Nonivamide*, *supra* note 6.

⁹ Ryan Connolly, Note, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L. J. 161, 186 (2006).

¹⁰ JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW 40–41 (2d ed. 2004).

I. THE COURT OF ARBITRATION FOR SPORT

The IOC is a private organization that has owned the Olympics since the 1894 Congress of Paris.¹¹ The IOC is the sole governing body for this most famous international sporting event.¹² Operating essentially as an international nonprofit organization, the IOC exercises control over all nontechnical¹³ aspects of the Olympics directly and through its associated National Olympic Committees (hereinafter “NOCs”), which govern sports within their respective countries according to IOC rules.¹⁴

Alongside the IOC are International Federations (hereinafter “IFs”) of individual sports. IFs regulate single sports in accordance with IOC rules and regulations.¹⁵ IFs include groups like FEI for equestrians, FIFA for soccer, and FINA for swimming.¹⁶ Each IF also has national governing bodies.¹⁷ For example, the United States Equestrian Federation (hereinafter the “USEF”) is the American arm of the FEI. These national bodies administer the rules and regulations of the IF in their home countries, and members of the national federation are bound to the rulings of the IF.¹⁸ National federations are responsible for organizing the competitions in which athletes compete to achieve status as top performers and gain eligibility for Olympic teams.¹⁹

As with any governing body, the IOC has developed dispute resolution procedures. In 1984, the CAS²⁰ was introduced by the IOC and heard its first case in 1986.²¹ CAS requires its arbitrators to possess “expertise” in sport, but “expertise” is undefined, leaving standards of expertise for nominating bodies and the International Council for

¹¹ *Id.* at 19.

¹² *Id.*

¹³ *Id.* at 41; Bruno Simma, *The Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 21, 23–24 (Ian S. Blackshaw, Robert C. R. Siekmann & Janwillem Soek eds., 2006) (not reviewing decisions made on the field, the rules, or the organization of events, disputes which the sports bodies handle internally).

¹⁴ Simma, *supra* note 13, at 22–23.

¹⁵ NAFZIGER, *supra* note 10, at 21 n.23.

¹⁶ FEI - Fédération Équestre Internationale, Profile, http://www.fei.org/FEI/FEI_Organisation/Profile/Pages/Profile.aspx (last visited Nov. 05, 2009); FIFA- Fédération Internationale de Football Association, About FIFA, Who We Are, <http://www.fifa.com/aboutfifa/federation/index.html> (last visited Nov. 05, 2009); see FINA - Fédération Internationale de Natation, <http://www.fina.org/project/> (last visited Oct. 12, 2009).

¹⁷ Jason Gubi, Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 997, 1002 (2008).

¹⁸ *Id.*

¹⁹ *Id.* at 1002–04.

²⁰ The CAS is commonly referred to by both its English and French acronyms as CAS-TAS. This paper will only use the CAS.

²¹ *THE COURT OF ARBITRATION FOR SPORT 1984-2004 XVII* (Ian S. Blackshaw, Robert C. R. Siekmann & Janwillem Soek eds., 2006).

Arbitration for Sport²² to determine.²³ Parties like IFs can select their own choice of law and procedural rules, but CAS provides its own default procedures and specifies that Swiss law will govern when the IF has not otherwise specified.²⁴ Thus, unless an IF chooses other governing law, Switzerland is named the seat of all the CAS arbitrations.

The seat of arbitration is a legal fiction that anchors proceedings under a particular jurisdiction's authority, while the actual hearings may be conducted in any physical location to which the parties and the arbitration panel consent.²⁵ Thus, hearings may be held on-site at major events worldwide while Swiss courts maintain jurisdiction and apply Swiss law.²⁶ Switzerland's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards enables recognition and enforcement of binding arbitration decisions rendered by the CAS under Swiss law.²⁷ For example, an ad hoc division was established at the Sydney Olympics to resolve disputes quickly and keep the games moving²⁸; a New South Wales court declined jurisdiction over a dispute covered by the CAS ad hoc panel and referred review directly to the Swiss courts. Although all of the events surrounding the dispute had occurred in Australia, the Court upheld Lausanne, Switzerland as the seat of arbitration.²⁹

The CAS is unique among arbitral bodies in a number of ways. First, the CAS is empowered to issue advisory opinions and frequently does so.³⁰ Second, decisions are not subject to challenge unless the parties include, in the arbitration clause, a provision that permits review if a new and critical fact becomes known after the decision.³¹ Third, one of the

²² The International Council for Arbitration of Sport (ICAS) is the body created by the IOC to govern the CAS in response to the *Gundel Case*. See *infra* Part I.

²³ IAN S. BLACKSHAW, *MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES* 122 (2002).

²⁴ NAFZIGER, *supra* note 10, at 41. Article 34.3 of FEI Rules specifies that Swiss law governs all disputes. FÉDÉRATION EQUESTRE INTERNATIONALE, *STATUTES* art. 34.3 (22nd ed. 2007), <http://www.fei.org/Rules/Documents/Statutes%20-%2022nd%20ed%202007%20-%2015April2007,%20updated%2021November2008.pdf>.

²⁵ *Memorandum on the CAS Ad Hoc Division* (2002), in GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* 49 (2001).

²⁶ See *id.* at 49.

²⁷ See Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 31, 37; Gerry Tucker, Antonio Rigozzi, Wang Wenying & Robert Morgan, *Sports Arbitration for the 2008 Beijing Olympic Games*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 160, 174-75 (explaining that Switzerland's accession to the New York Convention did not exercise the option to limit application of the Convention to commercial matters only, recognizing binding sports arbitrations as identical to other types of binding arbitration).

²⁸ See Gabrielle Kaufmann-Kohler, *Arbitration at the Sydney Olympic Games*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 105, 116-17.

²⁹ *Id.*

³⁰ See NAFZIGER, *supra* note 10, at 43.

³¹ Simma, *supra* note 13, at 27.

major goals of creating the CAS was to expedite disputes in order to avoid interfering with the completion of Olympic, or similar, events.³² Thus, the IOC empanels ad hoc tribunals to sit at major events to enable 24-hour dispute resolution.³³ This abbreviated time span avoids barring an athlete who disputes disqualification from competition, but introduces new potential problems relating to proof and the ability of a competitor to present an adequate defense while focusing on performing in a top level event.

Finally, the operation of CAS was initially funded almost entirely by the IOC.³⁴ This raised serious concerns about fairness, since the IOC was essentially CAS's client. A Swiss Civil Court suggested this structure was not adequate to ensure the independence of CAS³⁵ and in 1994 reforms based on the Court's recommendations resulted in the creation of the International Council of Arbitration for Sport (hereinafter the "ICAS") by the IOC to govern CAS directly.³⁶ CAS was also split during this period into a two-tier system for ordinary disputes and appeals.³⁷ Ordinary disputes can be heard by CAS as a tribunal of first instance. Appeals come to CAS only after final adjudication by a governing sports body.³⁸ While there are numerous differences between ordinary disputes and appeals, the most significant distinction may be that appeal decisions are usually published unless both parties agree to confidentiality, while original decisions are assumed confidential unless all parties agree to publication.³⁹ Despite an assumption of confidentiality, a decision to publish may still be made if the arbitrator decides that there is a public interest in the information, thereby outweighing the right to confidentiality.⁴⁰ In many doping cases there is a strong public interest in providing access to the decisions,⁴¹ so doping cases are frequently published for their presumed deterrent effect.⁴²

By December 2001, every Olympic IF, except FIFA, and several non-Olympic IFs, including chess, waterskiing, motorcycling, and European football, had adopted arbitration clauses granting jurisdiction

³² See KAUFMANN-KOHLER, *supra* note 25, at 102–03.

³³ See *id.* at 30–32.

³⁴ Simma, *supra* note 13, at 28.

³⁵ Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 ASPER REV. INT'L BUS. & TRADE L. 289, 297–98 (2006).

³⁶ Mary K. FitzGerald, *The Court of Arbitration for Sport: Dealing with Doping and Due Process During the Olympics*, 7 SPORTS LAW. J. 213, 221 (2000).

³⁷ NAFZIGER, *supra* note 10, at 43.

³⁸ Reeb, *supra* note 27, at 23–25.

³⁹ Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *The Ordinary Arbitration Procedure of the Court of Arbitration for Sport*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 13, at 69, 96–97.

⁴⁰ Reeb, *supra* note 27, at 38–39.

⁴¹ *Id.* at 39.

⁴² See *id.*

over all non-technical disputes to CAS.⁴³ Today, even FIFA has adopted arbitration clauses granting jurisdiction to CAS.⁴⁴ Decisions and awards by the CAS “are governed by the Swiss Federal Act on Private International Law” (hereinafter the “Swiss Act”) and are enforceable under the New York Convention.⁴⁵ The Swiss Act contains grounds for vacatur similar to the narrow grounds permitted under the Convention.⁴⁶ Although the theory does not yet appear to have been tested, a country’s determination that sports disputes are not arbitrable may find itself in conflict with the rules of an IF that require arbitration.

The United States’ passage of the Ted Stevens Amateur Sports Act of 1978 requires the United States Olympic Committee to provide for the resolution of disputes involving national governing bodies, amateur sports organizations, and amateur athletes and gives the Committee the exclusive authority to delegate jurisdiction over all matters relating to the United States’ participation in the Olympic Games.⁴⁷ This statute predates the CAS and originally granted jurisdiction over sports disputes exclusively to the American Arbitration Association (hereinafter the “AAA”).⁴⁸ This conflict was resolved through the creation of the AAA-CAS, a division of AAA specifically designed to hear disputes as a partner to the CAS.⁴⁹ AAA-CAS decisions are appealable directly to the CAS.⁵⁰ The Tonya Harding scandal in 1994 led to an amendment to the Ted Stevens Act that limits challenges to 21 days or more prior to a major competition.⁵¹ This mechanism prevents a flurry of challenges and accusations from creating a potential tactical advantage for athletes who would rather not compete with a superstar.⁵²

The very first IF to adopt a CAS arbitration clause as part of its membership was the FEI, whose clause binds all riders competing in FEI-sanctioned events to arbitrate any disputes according to CAS rules.⁵³ In the

⁴³ NAFZIGER, *supra* note 10, at 42; Reeb, *supra* note 27, at 37.

⁴⁴ Christian Krähe, *The Appeals Procedure Before the CAS, in THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 99, 99.

⁴⁵ Reeb, *supra* note 27, at 37–38. *But see* JANWILLEM SOEK, *THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES* 369-70 (2006) (suggesting that arbitration is a deceptive term employed as a means of bringing awards under the jurisdiction of the New York Convention, because the word “arbitration” implies that parties are of equal power, whereas CAS operates as a disciplinary body in doping cases).

⁴⁶ Reeb, *supra* note 27, at 37–38 (including erroneous acceptance or declination of jurisdiction, incorrect constitution of the tribunal, failure to rule on a submitted claim or ruling on a claim not submitted, violation of due process rights, and violation of public policy).

⁴⁷ 36 U.S.C. § 220503(8) (2000); *See generally* 36 U.S.C. §§ 220501-220509 (2000).

⁴⁸ BLACKSHAW, *supra* note 23, at 117 (the Ted Stevens Act was initially passed in 1978).

⁴⁹ Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1206-07 (2005).

⁵⁰ *Id.* at 1210–11.

⁵¹ *See* NAFZIGER, *supra* note 10, at 85.

⁵² *See id.*

⁵³ Gubi, *supra* note 17, at 1013.

United States, this clause binds USEF competitors to CAS rules, just as all national equestrian organizations affiliated with FEI are similarly bound. Coincidentally, the first significant challenge to the CAS also came from the FEI.⁵⁴ In 1992 the case of *Gundel v. FEI* was filed in Swiss court and is lauded as “a model of dispute resolution.”⁵⁵

The events leading to the *Gundel v. FEI* case began with the discovery of a prohibited substance in the horse’s urine.⁵⁶ This discovery led the FEI to disqualify both the horse and rider, suspend the rider from competition for three months, and impose a fine to the rider.⁵⁷ Gundel appealed to the CAS who upheld the disqualification but reduced the suspension and fine.⁵⁸ The rider, Gundel, then filed an appeal with the Swiss Federal Tribunal challenging, *inter alia*, the independence of the CAS based on its close ties to the IOC.⁵⁹ The Swiss Court upheld the CAS award and officially recognized the CAS as a true court of arbitration, but also pointed out significant potential conflicts, most notably if the IOC were ever to be a party to arbitration.⁶⁰ This case led to the reforms that separated the CAS from the IOC and restructured the funding scheme of the CAS.⁶¹

Procedurally, the CAS largely operates independently as an appellate tribunal.⁶² Although the CAS is bound to apply the rules of the IFs with which it contracts,⁶³ appeals to the CAS from a final IF ruling are not limited to the complaint or to the regulatory scope of the IF’s decision.⁶⁴ An appeal panel can uphold the decision of the IF, replace the IF’s decision with its own, or quash the lower decision and refer the case back for rehearing, though this third option is rarely invoked.⁶⁵ Parties must pay for their own witnesses in advance, but these costs can be reallocated to either party by the CAS. In determining who pays, the CAS considers factors such as fairness, the conduct of the parties, and each party’s ability to pay.⁶⁶

⁵⁴ Yi, *supra* note 35, at 297.

⁵⁵ NAFZIGER, *supra* note 10, at 104.

⁵⁶ *Gundel v. FEI* (CAS 92/63), 1 Digest of CAS Awards 115, 115–16 (1992).

⁵⁷ *Id.* at 123.

⁵⁸ Reeb, *supra* note 27, at 33.

⁵⁹ *Id.*

⁶⁰ *Id.* at 33–34.

⁶¹ Yi, *supra* note 35, at 298.

⁶² See Simma, *supra* note 13, at 27.

⁶³ *Rebagliati v. IOC* (CAS 98/002), 1 Digest of CAS Awards 419, 424 (1998) (finding that CAS could not find a doping violation for marijuana despite the IOC’s prohibition on marijuana usage, because the governing sport body did not specify that marijuana was a prohibited substance); See Christoph Vedder, *The IAAF Arbitration Panel. The Heritage of Two Decades of Arbitration in Doping-Related Disputes*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 276, 276–77; Soek, *supra* note 45, at 370–73.

⁶⁴ Krähe, *supra* note 44, at 99.

⁶⁵ *Id.* at 102.

⁶⁶ *Id.* at 103.

The jurisdiction of the CAS extends to any sports-related dispute, except disputes regarding the application of field-of-play or technical rules, unless the rule was applied arbitrarily, illegally, in bad faith, or with malice, corruption, or favoritism.⁶⁷ The CAS can also review a field ruling if the official had no discretion to make it according to the rules of the game.⁶⁸ The decision of whether or not to hear a dispute concerning a field ruling is made by the CAS. The CAS generally declines to make such decisions because the rulings have no off-field effect.⁶⁹ When a ruling has an impact beyond the confines of that game, such as determining eligibility for an Olympic or world-championship event, the CAS may opt to hear the dispute rather than have athletes seek relief from the courts, which has had disastrous consequences in the past.⁷⁰

II. WORKING THE RING: EQUESTRIAN SPORTS AS EMPLOYMENT

When one considers the nature of sports, two opposing thoughts may come to mind: hobbies and multi-million dollar professional contracts. But between these two extremes lie the many shades of commitment that represent most Olympic athletes. Some athletes manage to hold jobs, raise families, and still train hard enough to make it to the top. For others, sports are all-consuming. Outside the professional leagues of more commercialized sports like baseball and football, there is little opportunity for most athletes to make a living at their craft.

For most athletes, training to reach the Olympic level means relying on grants and subsidies that pay for living expenses and training costs. Funding may merely pay for a gym membership or trainer, or, on the other hand, could constitute the entirety of an athlete's income. In the context of funding, several concerns separate equestrians from other athletes. The cost of becoming and staying a top competitor, as well as the burden of bearing nearly all of the disproportionately high costs of training during a sanction period, make equestrian sports far more comparable to employment than other sports. For these reasons, it is appropriate to reconsider how equestrian sports are viewed and recognize that a competitive career for an equestrian is just that: a career.

⁶⁷ KAUFMANN-KOHLER, *supra* note 25, at 121.

⁶⁸ Frank Oschütz, *The Arbitrability of Sport Disputes and the Rules of the Game*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 13, at 200, 206.

⁶⁹ *Id.* at 205-06.

⁷⁰ *Id.* at 203, 206-07. See also James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 360-67 (2001) (discussing the multiple conflicting arbitration awards, court rulings and contradictory outcomes in the Sieracki-Lindland case).

A. Amateur vs. Professional

Much has been written on the benefits and pitfalls of employment arbitration, but, in general, courts have not considered sports to be employment outside the professional arena.⁷¹ Originally, Olympic Charter Rule 1 limited competition to amateur competitors, and Rule 26 defined amateur as “without material gain of any kind.”⁷² A complex Eligibility Code developed to explain these Rules, which prohibited “playing, teaching, or coaching competitive sports,” accepting promotional endorsements, or subsidization by the government.⁷³ The Eligibility Code led athletes to find more inventive ways of supporting themselves while in training. Efforts to get around the rules eventually made the amateur classification nothing more than a technicality. The distinction between amateur and professional athletes largely evaporated as the practical (and frequently illusory) differences between them became obsolete.⁷⁴ Maintaining amateur status in a time where competitiveness required year-round, full-time training had become little more than a shell game by the time the IOC dropped the word “amateur” from its Charter in 1988.⁷⁵ The IOC now leaves eligibility rules up to IFs, and very few IFs still distinguish between amateur and professional athletes.⁷⁶

Historically, the “classic amateur” was a gentleman of means who engaged in a sport “for the love of it alone.”⁷⁷ The term “professional” emerged to describe English racing jockeys who rode horses for a fee and were viewed as money-grubbing commoners who competed for the payoff.⁷⁸ In this respect, equestrians lead the way in defining the sport and separating hobbyists from capitalists. Originally, the term “elite athlete” referred to an athlete who belonged to the social elite and had the free time and financial means to invest in the pursuit of sporting ability, not to a top competitor.⁷⁹

⁷¹ See, e.g., *Freeman v. Sports Car Club of Am.*, 51 F.3d 1358, 1363 (7th Cir. 1995) (finding that amateur auto-racing is a hobby, albeit an expensive one, and that Plaintiff had the option to race under other organizational rules and had done so on several occasions); *Blubaugh v. Am. Contract Bridge League*, 2001 WL 699656 (S.D. Ind. 2001) (finding that a professional bridge player had no sustainable cause of action for dismissal from a voluntary membership organization absent fraud, illegality, or abuse of civil or property rights originating elsewhere, denying claim for tortious interference with livelihood); *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1317, 1319 n.6 (D. Conn. 1977) (hearing a restraint-of-trade claim from an amateur hockey player based on the unusual structure of Canadian “amateur” leagues wherein players are actually paid as professionals).

⁷² NAFZIGER, *supra* note 10, at 137.

⁷³ *Id.* at 137–38.

⁷⁴ *Id.* at 136–38.

⁷⁵ *Id.* at 136–38, 143.

⁷⁶ *Id.* at 132–34.

⁷⁷ *Id.* at 136.

⁷⁸ NAFZIGER, *supra* note 10, at 135–36.

⁷⁹ See *id.*

As time went by, society came to see amateurs not as purists but as inferiors who were not skilled enough to be professionals. At the same time, amateur athletes began receiving compensation in a variety of ways that avoided undermining their amateur status. This form of compensation allowed amateur athletes to forgo time-consuming employment that would otherwise distract them from training. Scholarships, no-show government jobs, subsidies, and other forms of indirect payment began to muddy the waters that divided amateurs from professionals, and eventually lead most IFs to abandon their attempts to define and police amateur status requirements.⁸⁰ This resulted in more arrangements under which athletes received non-salary payments and support during their competitive lives so they could continue training full-time.⁸¹ Today, eligibility is a matter for the IFs and as long as their rules comply with the IOC rules, NOCs can provide funding and facilities for qualified athletes.⁸²

B. Who Signs the Paychecks: Funding Athletes

The U.S. Olympic Committee (hereinafter the "USOC") has five different types of grants available to support athletes in training.⁸³ If an athlete is on the Olympic roster, the USOC issues a basic grant of \$2,500 per year to be dispensed by the National Governing Body (hereinafter the "NGB") of the athlete's individual sport.⁸⁴ A recipient of a basic grant with an income below a predetermined amount and adequate performance can also receive special assistance.⁸⁵ There are also options from the USOC for college tuition assistance and job placement assistance,⁸⁶ but grants cannot exceed \$15,000 per year, excluding training costs for coaches and facilities.⁸⁷ However, one must also consider the availability of prize money. At the 1996 Atlanta Olympic games, the USOC alone granted \$15,000 per gold medal, \$10,000 per silver medal, \$7,500 per bronze medal, and \$5,000 for fourth place finishers.⁸⁸ In addition, NGBs have their own prize money schemes. For example, the American gold medal winners in the Atlanta wrestling games took home \$25,000, while

⁸⁰ See *id.* at 136-37.

⁸¹ *Id.* at 136-37.

⁸² NAFZIGER, *supra* note 10, at 143.

⁸³ Melissa R. Bitting, *Mandatory Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for 'Job Security'?*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 13, at 368, 375.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 375-76.

⁸⁷ *Id.* at 376.

⁸⁸ *Id.*

swimmers winning gold medals received \$50,000.⁸⁹ Similar, but lower, amounts are granted to winners of world-championship games in non-Olympic years.⁹⁰

The USEF, the NGB for American equestrian sports,⁹¹ is affiliated with a separate body dedicated to raising funds to support high performing equestrian athletes. The U.S. Equestrian Team Foundation (hereinafter the "USET") raises money to provide grants to equestrians in eight performance disciplines.⁹² In 2007, USET awarded nearly \$2.3 million in grants to eligible athletes.⁹³ The current campaign aims to raise \$20 million to support athletes throughout the period between Olympic games.⁹⁴ In large part, this is necessary due to the enormous cost of maintaining a competitive equestrian team.

C. Horse Cents: The Cost of Equestrian Sports

While the cost of buying, maintaining, and training a horse and rider to achieve competitive status varies widely, there is no comparison between training a runner or swimmer and training an equestrian. A track is a track and a pool is a pool, but equestrian facilities run the gamut. Some facilities are just an extra stall and no arena, while others have top-notch training facilities with on-site trainers, vets, medical equipment, and professional staff. A quick internet search finds full-care⁹⁵ facilities available from \$300 per month in Illinois⁹⁶ to \$800 per month in North Carolina.⁹⁷ One prominent barn in Illinois charges up to \$935 per month for board and care, and an additional \$850 per month for training.⁹⁸ A rider using these facilities spends \$1,785 per month for basic ownership and

⁸⁹ Melissa R. Bitting, *Mandatory Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for 'Job Security'?*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 376.

⁹⁰ *Id.*

⁹¹ USEF Foundation, Who We Are, http://www.usef.org/_IFrames/AboutUs/WhoWeAre.aspx (last visited Oct. 13, 2009).

⁹² USET Foundation, USET Foundation Home Page, <http://uset.org/index.php> (last visited Oct. 13, 2009). USET issues grants for High Performance athletes in dressage, driving, endurance, eventing, para-equestrian, reining, show jumping, and vaulting. *Id.*

⁹³ *Id.*

⁹⁴ USET Foundation, Campaign to Achieve Competitive Excellence, <http://uset.org/campaign.php> (last visited Oct. 13, 2009).

⁹⁵ For the purposes of this article, full board means that the barn feeds, cleans, and moves the horses between stalls and pastures.

⁹⁶ Brier Bank Farm, Boarding, <http://www.brierbankfarm.com/boarding.htm> (last visited Oct. 13, 2009).

⁹⁷ Finncastle Farms, Boarding and Services, <http://www.finncastlefarms.com/services.htm> (last visited Oct. 13, 2009).

⁹⁸ E-mail from Courtney Tripp, Program Coordinator for Tempel Lipizzans, to Holly C. Rudolph (Mar. 27, 2009, 06:07 PDT) (on file with author). Many of the top barns do not publish their rates and require personal interviews to provide information to prospective boarders. These barns are very likely more costly than the amounts available online.

training. Considering other expenses such as horse feed, veterinary care, farrier services, and dietary supplement costs, a rider can easily spend \$25,000 or more per year to own a horse. A rescue horse that may not show any ability can cost a few hundred dollars, while a dressage horse competing one level below the top can cost nearly \$70,000.⁹⁹ One proven dressage stallion is offered for sale for \$200,000.¹⁰⁰ Other websites advertise jumping horses for sale at over \$100,000 based on potential.¹⁰¹ These amounts are likely to be misleadingly low, as owners of horses with the best pedigrees and highest achievements tend to keep their prices private. Therefore, it is fair to expect that a top-level horse with the athleticism to achieve at the Olympic level will cost at least \$100,000.

Once a horse is bought and boarded, and the training of both horse and rider begins, then the competition starts. Riders and horses must be members of the USEF, and consequently, the FEI. Lifetime membership for riders is \$2,500, plus \$200 for each horse, and an additional \$300 horse passport fee.¹⁰² Then, annual registration fees are \$15 per rider and per horse, \$75 per competition per year for international events, and international High Performance fees cap at \$420 per rider per year.¹⁰³ Fees for individual competitions vary as well, partly depending on prize money offered. A jumping show offering \$30,000 in prize money may cost \$500 to enter, plus fees for stalls to board the horses at approximately \$250 per weekend, and additional costs for bedding.¹⁰⁴ Finally, in order to compete, a horse and rider must travel to the venue. This is much more expensive than the transportation costs of a single athlete who can drive alone or take a commercial flight. Horses require unique transportation either by trailer or by specialized air carrier, and travel with wagonloads of equipment.

These costs are unique to equestrians. Additionally, equestrians bear the same personal costs as other athletes with regard to trainers, equipment, and travel. While all IFs have membership fees and event entry fees, these expenses are required for the athlete alone and do not entail the significant costs required for single or multiple horses to travel and stay at the specialized venues that host equestrian events.

⁹⁹ Dressage Horse Unlimited, Listing #H-788, <http://www.dressagehorsesunlimited.com/horseDetails.asp?id=788> (last visited Oct. 13, 2009) (Monte Cristo, sold for \$65,000, shown at Prix St. George level).

¹⁰⁰ Dreamhorse.com, Listing # 1368318, http://www.dreamhorse.com/show_horse.php?form_horse_id=1368318&share_this=Y (last visited Apr. 15, 2009) (Lautrec, a prepotent Holstein stallion offered for \$200,000).

¹⁰¹ Dreamhorse.com, listing # 1366597, http://www.dreamhorse.com/show_horse.php?form_horse_id=1366597&share_this=Y (Caliombo, \$100,000) (last visited Apr. 15, 2009).

¹⁰² E-mail from Christy Baxter, Executive Assistant to the Director of Sport Programs, U.S. Equestrian Federation, Inc., to Holly C. Rudolph (Mar. 16, 2009, 13:02 PDT) (on file with author) (a one-time fee for international competition).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

D. Falling Off the Horse: What it Means to be Out of Competition

In order to receive USOC grants, an athlete must be eligible to compete. This may mean forfeiting potentially conflicting opportunities like collegiate eligibility and scholarships, which limits the athlete to competition exclusively.¹⁰⁵ Because an athlete suspended from competition is no longer eligible for grants or competition, an equestrian facing eligibility sanctions is not only faced with losing access to personal support and coaching, but also left with a host of costs that cannot simply be put on hold during the suspension.

A suspended equestrian's horse still has to be housed, fed, and cared for during the time when subsidies cannot be received. When an equestrian's life is dedicated to training, the athlete is unlikely to find sudden employment that would pay enough money to support him or herself and the horse (which alone may cost up to \$1,785 per month plus food). This circumstance tips the scales of an employment analysis for equestrians more strongly than it does for other athletes, who may more easily forgo competition and continue training during a suspension. Because of the cost of training a top level equestrian, the disproportionate effect of sanctions on a rider, when compared to other athletes, makes equestrian sports more akin to employment than other sports.¹⁰⁶

E. Clearing the Fence: Precedent and the New Analysis

Gasser v. Stinson suggested that a denial of livelihood might occasion a court review of an arbitration award for reasonableness under English law.¹⁰⁷ *Gasser* began by recognizing that "amateur" status did not dispose of a restraint of trade claim because of the mechanisms in place allowing amateurs to receive payments and support.¹⁰⁸ The Court specifically declined to answer the question of whether a contract existed between the athlete and her IF, although dicta indicated that the court viewed any such contract as a fallacy.¹⁰⁹ Since the athlete in *Gasser* dropped her contract-based claims prior to the hearing, they were not adjudicated.¹¹⁰ Ultimately the decision left the suspension in place based

¹⁰⁵ Bitting, *supra* note 82, at 375–77.

¹⁰⁶ See SOEK, *supra* note 45, at 381–86 (discussing the proportionality principle as applicable in international law and opposed to fixed penalties, requiring fairness and humanity).

¹⁰⁷ *Gasser v. Stinson*, (1988) (Q.B.) (LEXIS); See also NAFZIGER, *supra* note 10, at 68.

¹⁰⁸ *Gasser v. Stinson*, 3 (1988) (Q.B.) (LEXIS).

¹⁰⁹ *Id.* at 13 ("There is an unreality, I think, about the notion of a contract coming into existence between each competitor and the IAAF [International Association of Athletics Federations] -- not least because entries in competitions are made by the National Federations and not by the competitors themselves -- and even more unreality about the notion of a contract being formed when the competitor presents himself or herself for dope testing.")

¹¹⁰ *Id.*

on a balancing of interests: the difficulty for the IF to prove intent compared to the athlete's individual interests in continuing to compete.¹¹¹

The fact that the *Gasser* analysis employed such a balancing test indicates that there are, in fact, interests to be balanced. In the context of equestrian sports, the balance should rightfully tip in the athlete's favor, because the cost to the rider severely outweighs the opposing party's burden in the fight against doping. This balance also tips in favor of the rider when one considers the trustworthiness of lab tests, which are increasingly drug-sensitive and can result in false positives. The *Gasser* court did not declare that the decisions of sports organizations are beyond court review, but only that courts should be "slow to interfere," while expressly finding that the English rules governing restraint of trade do apply to IF rules.¹¹² Conversely, another English court determined that the International Cricket Conference was not an employer for purposes of immunity from judicial scrutiny.¹¹³ This allowed the court to review the Conference's decisions, which would have been immune from judicial oversight otherwise.¹¹⁴ Some nations do not permit the arbitration of right-to-work claims, while other jurisdictions require that a defendant whose livelihood may be affected must have access to the courts, regardless of the presence of an arbitration clause.¹¹⁵

Discrepancies also exist between groups of athletes with regard to both the length of a potential career and the need to plan for post-competition life. In 1999, the Federal Tribunal of Switzerland heard a challenge from four Chinese swimmers who claimed that their two year suspension was "a serious and unwarranted violation" of their rights, because the sanction was not proportional to the charged violation of Triamterene's presence in their urine samples.¹¹⁶ The swimmers claimed that the short time an athlete can remain competitive at top levels meant that the "suspension effectively ended their careers."¹¹⁷ The Court agreed, but also maintained that the swimmers had agreed to abide by CAS decisions when becoming members of FINA and the national affiliate.¹¹⁸ For equestrians, this element is a double-edged sword. Competitive life span is arguably a mitigating factor, as riders generally enjoy longer competitive life spans than many other types of athletes. On the other hand, extended viability supports the employment view of equestrian sports. A

¹¹¹ *Id.* at 18–19.

¹¹² *Id.* at 19.

¹¹³ *Greig v. Insole*, (1978) 1 WLR 302 (Ch.); *see also* NAFZIGER, *supra* note 10, at 69.

¹¹⁴ *Greig v. Insole*, (1978) 1 WLR 302, 313 (Ch.); *see also* NAFZIGER, *supra* note 10, at 69.

¹¹⁵ NAFZIGER, *supra* note 10, at 45–46.

¹¹⁶ *Connolly*, *supra* note 9, at 194 (quoting *N., J., Y., W. v. FINA* (5P. 83/1999), 2 Digest of CAS Awards 775, 778 (Tribunal Fédéral Suisse 2009)).

¹¹⁷ *Id.* at 194.

¹¹⁸ *Id.* at 194–95.

rider does not face the short career of a gymnast or skater, so an equestrian embarks on a competitive athletic career with the expectation that their riding skills will advance over the years. These riders anticipate a lifetime of competition. A gymnast entering competitive life knows of the precious few years available to achieve stardom and likely makes plans for support post-competition, while equestrians can work their entire lives to reach peak performance.¹¹⁹ This reality defeats the presumption that a rider will necessarily pursue another career after a competitive career ends. A rider's long-term dedication and the very real possibility of a lifelong athletic career weighs strongly toward viewing equestrian sports as employment.

The Swiss court in the case of the Chinese swimmers ultimately focused on their consent to arbitrate, but presumed that sports are not employment. But even absent the designation of employment, two issues unique to equestrians must be considered by the courts: the disproportionate expense of becoming and remaining a competitive equestrian and the continuation of expenses even during a period of suspension. The structure of the CAS permits a great deal of flexibility in the decision-making process, but over the years this structure has become more of an analytical pattern than a fixed legal doctrine. Therefore, there is room for proportionality in the arbitrator's decision to sanction an athlete, making the extreme burden imposed on equestrians by even a short suspension a potential factor in the court's analysis. By incorporating an employment-based analysis into equestrian cases, the CAS can account for these issues without necessitating any alteration in the standards of review applicable to any other category of athlete.

III. CONSENT

The issue regarding consent to sports arbitration has been raised, and disposed of, by various tribunals. In the context of equestrians, the issue should be scrutinized more closely because an equestrian athlete's career is more similar to employment than other athletes'. The employment analysis, combined with the absence of a collective bargaining structure, makes the question of consent to arbitration extremely significant. Article 74 of the Olympic Charter requires all athletes, coaches, trainers, and

¹¹⁹ The three 2008 US Olympic equestrian teams averaged 42.5 years old, with Courtney King-Dye at 31 to Debbie McDonald at 54 – both dressage riders. The Equinest, 2008 Olympics Equestrian Cheat Sheet, <http://www.theequinest.com/2008-olympics-equestrian-cheatsheet/> (last visited Oct. 13, 2009). The majority of the teams were in their mid-forties, with eventers slightly younger, mostly in their mid-thirties. See *id.* Of the top 20 ladies figure skater in the world, the average age in 2008 was 20.7 years, spanning 15 to 28, with only a handful over 20. IceNetwork.com, Ranking (2008), <http://web.icenetwork.com/rankings/index.jsp?disc=ladies> (last visited Oct. 13, 2008). The members of the US Women's Senior gymnastic team average 17.2 years old as of 2008, with the majority at 16 years. The age range for gymnasts is 16-21. USA Gymnastics, Women's National Teams, <http://usa-gymnastics.org/home/nationalteams/women.php> (last visited Oct. 13, 2009).

officials to submit any disputes to the CAS exclusively.¹²⁰ All 205 National Olympic Committees operate like franchises of the IOC, with exclusive power to enter an Olympic team in the games, and consequently, the power to bind an athlete to the IOC's rules.¹²¹ Currently, all athletes seeking to compete in the Olympics or other international competitions must sign a waiver granting exclusive jurisdiction to the CAS.¹²² This requirement becomes ever more meaningful as the "distinction between 'amateur' and 'professional' . . . fade[s]" away, and athletes are faced with sanctions that put their very livelihood at stake.¹²³

Recognition of an IF by the IOC is necessary for members to be eligible to compete on an Olympic team.¹²⁴ Since 2004, recognition has required incorporation of the code of the World Anti-Doping Association (hereinafter the "WADA") into the constitution of each Olympic IF.¹²⁵ The Olympic Charter requires all athletes, trainers, and coaches to comply with this code.¹²⁶ These requirements flow from the IOC to the IFs and then to the NGBs. Therefore, regardless of whether an athlete has the ability, or intent, to reach the highest levels of competition, the athlete is bound to the IOC's rules, including the World Anti-Doping Code and the exclusive jurisdiction of the CAS. The chain of consent runs as though the employee/athlete was "hired" by the NGB, owned by the IF, and governed by the IOC, which imposes the World Anti-Doping Code and CAS.

The 2004 Athens Olympics required all members of a delegation to agree to the following language as part of their entry form:

I agree that any dispute, controversy or claim arising out of, in connection with, or on the occasion of, the Olympic Games, not resolved after exhaustion of the legal remedies established by my [National Olympic Committee], the International Federation governing my sport, . . . and IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration

The CAS shall rule on its jurisdiction

¹²⁰ BLACKSHAW, *supra* note 23, at 124–25.

¹²¹ Anita L. DeFrantz, *Which Rules?: International Sport and Doping in the 21st Century*, 31 HOUS. J. INT'L L. 1, 5 (2008); Olympic.org, National Olympic Committees, <http://www.olympic.org/en/content/National-Olympic-Committees> (follow "What is a National Olympic Committee (NOCs)?" hyperlink) (last visited Oct. 16, 2009).

¹²² NAFZIGER, *supra* note 10, at 42.

¹²³ *Id.*

¹²⁴ DeFrantz, *supra* note 121, at 5.

¹²⁵ *Id.*

¹²⁶ NAFZIGER, *supra* note 10, at 148.

The decisions of the CAS shall be final and binding.

I shall not institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal.¹²⁷

The document containing this language also acted as a visa for families and guests based on Rule 53 of the Olympic Charter.¹²⁸ Contracts between the host city and the IOC, and the adoption of all Charter rules by the host nation, permit this unique arrangement.¹²⁹ This arrangement places the IOC in a distinctly superior position vis á vis its member nations. One English court expressly rejected the contract view of arbitration in sports, declaring the rules of an approved sport organization “a legislative code.”¹³⁰ In that court’s view, the imposition of a legislative code should be subject to review by the courts because the code is setting up a judicial body (such as a court of arbitration) and giving it discretion, implying that the body will be accountable for exercising that discretion fairly.¹³¹ Belgian, French, and EU Courts of Justice have all confirmed that, in some contexts, the international rules of sport supersede conflicting national policies and laws.¹³² These decisions put athletes almost solely at the mercy of the IOC and its divisions, with no alternative, no equivalent competitive structure, and no ability to engage in any sort of negotiation over the arbitration clause.

“Arbitration is a creature of contract. . . . Consent to arbitrate is one of the main characteristics of arbitration.”¹³³ American courts have an unpredictable relationship with what consent to arbitrate means, but some form of consent must be present for an arbitration clause to be valid,. What is less settled is how meaningful that consent must be or how consent can be obtained. Overall, where courts truly scrutinize consent as a separate issue is where a party must have agreed to the clause in some way. The Court in *Hill v. Gateway 2000, Inc.*,¹³⁴ relying heavily on *ProCD, Inc v. Zeidenberg*,¹³⁵ affirmed that so-called “shrink wrapped” agreements are enforceable if the buyer does not return a product according to the terms of

¹²⁷ DeFrantz, *supra* note 121, at 8.

¹²⁸ *Id.* at 9.

¹²⁹ *Id.*

¹³⁰ *Breen v. Amalgamated Eng’g Union*, (1971) 2 Q.B. 175, 190 (A.C.); *see also* NAFZIGER, *supra* note 10, at 68.

¹³¹ *Breen v. Amalgamated Eng’g Union*, (1971) 2 Q.B. 175, 190 (A.C.).

¹³² NAFZIGER, *supra* note 10, at 25.

¹³³ EDWARD BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* 501 (3d ed. 2006).

¹³⁴ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

¹³⁵ *Id.* (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

the agreement.¹³⁶ The *Gateway* Court noted that in *ProCD*, the defendant had the option of not purchasing software to avoid being bound by disagreeable terms and said the same of the *Hill* plaintiffs; they were free to return the computer once they discovered the terms.¹³⁷ Thus, the courts implied that a consumer who does not want to be bound to arbitration is free to find another vendor with more agreeable terms.

While arbitration is clearly the darling of the American judicial system, people cannot be compelled to arbitrate where they have not agreed to do so "openly and fairly."¹³⁸ Open and fair agreement is wholly absent from Olympic competition, or, for that matter, any competition involving an IF. Because organizations producing equestrian competitions are always bound by the IOC's rules, there are no alternative organizations through which equestrians could compete. "The distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms."¹³⁹ The IOC rules demonstrate the very essence of an adhesion contract and seriously undermine the consent element of arbitration agreements by forcing anyone who wants to compete to arbitrate on a "shrink-wrap" basis. An equestrian cannot negotiate different rules for the FEI, nor can he or she compete without the FEI.

In *Bauman v. IOC*,¹⁴⁰ the CAS ad hoc division in Sydney, Australia recognized that a particular IF did not have an arbitration provision in its by-laws at the time a suspension was imposed on the athlete.¹⁴¹ Despite the undisputed lack of consent by the federation, the CAS nevertheless used Olympic Charter Rule 29 to seize jurisdiction.¹⁴² Rule 29 requires that all IFs conform to the Olympic Charter, which granted jurisdiction to the CAS.¹⁴³ Through this bit of maneuvering, the CAS imposed arbitration on the IF and heard the case. It is apparent that the CAS exercises an extreme amount of power over athletes and leaves little room, if any, for parties to opt not to be bound.

An athlete is not only bound to IOC rules outside of competition. The World Anti-Doping Agency (hereinafter the "WADA") was developed in 1999 to monitor competitors according to a universal standard and

¹³⁶ *Id.* at 1149.

¹³⁷ *Id.* at 1150.

¹³⁸ *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 356 (Cal. Ct. App. 1976) (quoting *Player v. Geo. M. Brewster & Son, Inc.*, 18 Cal. App. 3d 526, 534 (Cal. Ct. App. 1971)); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993-94 (Cal. Ct. App. 1972)).

¹³⁹ *Id.* at 356 (citing *Smith v. Westland Life Ins. Co.*, 15 Cal.3d 111, 122 n.12 (Cal. 1975); *Steven v. Fid. & Cas. Co.*, 58 Cal. 2d 862, 882 (Cal. 1962)).

¹⁴⁰ *Baumann v. IOC* (CAS 00/006), 2 Digest of CAS Awards 633, 633 (CAS ad hoc Division 2000).

¹⁴¹ *Id.* at 637.

¹⁴² *Id.*

¹⁴³ NAFZIGER, *supra* note 10, at 58.

procedure at all times.¹⁴⁴ Beginning with the 2004 Athens games, no nation was permitted to compete at the Olympics without acquiescing to the WADA.¹⁴⁵ The provisions of the WADA require all athletes be available for, and consent to, testing at any time regardless of whether or not they are actively competing.¹⁴⁶ Out of competition testing was initiated because doping allows an athlete to train harder, even if the athlete cycles off the drugs prior to the competition in order to test clean.¹⁴⁷ This not only supports the argument that amateur sports have become employment that does not end after an event is over, but throws into stark light the extent of the burden imposed by the IOC on an athlete to “consent” to CAS.

Employers have gone before courts numerous times with regard to disputes arising out of arbitration clauses in employment contracts.¹⁴⁸ Courts tend to analyze employees’ claims of unconscionability according to the individual elements of each contract to determine whether the agreement is procedurally and substantively fair. For example, Hooters restaurant lost this type of dispute when the court found the employment contract’s arbitration terms “so one-sided [as to] undermine the neutrality of the proceeding[s],” thereby invalidating the arbitration clause.¹⁴⁹

The enforceability of the FEI arbitration clause is supported by the fact that the organization is also bound to arbitrate. In another case involving Circuit City, Circuit City was not bound to arbitrate.¹⁵⁰ However, it cannot be overlooked that applicants to Circuit City were, in a broad sense, applying for retail jobs at one of any number of stores where employers would hire them for the same type of work. A multitude of employers and employment contracts are available within the retail category. An equestrian athlete does not have such options. Within the category of equestrian athletics, the IOC’s rules are the only set available. Therefore, an equestrian athlete’s consent to arbitrate needs more careful consideration than it has received. In the employment context, it cannot be taken for granted that a competitor who has signed a membership agreement has meaningfully consented.

¹⁴⁴ DeFrantz, *supra* note 121, at 17–18.

¹⁴⁵ *Id.* at 18.

¹⁴⁶ WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 2.4 (2009), http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

¹⁴⁷ DeFrantz, *supra* note 121, at 17.

¹⁴⁸ See, e.g., *Ingle v. Circuit City Stores*, 328 F.3d 1165 (9th Cir. 2003); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931 (9th Cir. 2001); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). Other courts have faced adhesion contract claims, but failed to find the contracts in question invalid based on a view that the contracts were not adhesion contracts. See, e.g., *C.H.I., Inc. v. Marcus Brothers Textile, Inc.*, 930 F.2d 762 (9th Cir. 1991) (finding no evidence that the contract at issue was a contract of adhesion); *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178, 1179–80 (Cal. 1976) (rejecting adhesion contract argument based on plaintiff’s opportunity to negotiate and bargaining strength).

¹⁴⁹ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

¹⁵⁰ *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1180–81 (9th Cir. 2003).

Three additional factors indicate that sports disputes will continue to be submitted to arbitration, indicating a continuing need to focus on fairness and the burden of arbitration on athletes. First, the Ted Stevens Olympic and Amateur Sports Act provides for arbitration of sports disputes without regard for the effect on an athlete. The fact that arbitration is forced upon athletes, not only by the international sports structure but also by the U.S. Congress, should add weight to the necessity of careful review and contextualization of conflicts.

Second, Swiss courts have upheld CAS decisions despite their legal consequences to the athlete. The Swiss Federal Tribunal found in *A. & B. v. IOC*¹⁵¹ that two cross-country skiers, who were suspended for two years for doping, had suffered "a genuine statutory punishment that affect[ed] the legal interests of the person," but nevertheless found that the decision was sufficiently independent to constitute a "true award[], equivalent of the judgment of State courts."¹⁵² Thus, the governing judiciary backs CAS awards, even where they affect legal rights.

Finally, American courts have upheld CAS decisions. In *Slaney v. International Amateur Athletic Federation*,¹⁵³ the Seventh Circuit affirmed doping rulings under the New York Convention, confirming the "unavailability of judicial intervention in disciplinary hearings . . . except in the most extraordinary circumstances."¹⁵⁴ The Court found that requiring athletes "to prove by clear and convincing evidence that" test results were physiological and not chemical was not contrary to public policy.¹⁵⁵ Generally, U.S. Federal Courts have opted not to intervene in a sports dispute that is based on the merits of the case, but the courts have indicated that they will hear disputes based on breach of contract, due process, or between sports bodies pursuant to federal law.¹⁵⁶ This indicates that a case could be constructed that would open judicial review to athletes.

The question of meaningful consent has largely been dismissed because courts consider amateur sports to be hobbies rather than employment. The general view is that consent occurs when the athlete agrees to the terms of membership and enters a competition. However,

¹⁵¹ NAFZIGER, *supra* note 10, at 53 (quoting *A. & B. v. IOC*, Swiss Fed. Tribunal, 1st Civil Chamber, May 27, 2003).

¹⁵² *Id.*

¹⁵³ *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001).

¹⁵⁴ NAFZIGER, *supra* note 10, at 159-60.

¹⁵⁵ *Slaney*, 244 F.3d at 594. See also NAFZIGER, *supra* note 10, at 159-60.

¹⁵⁶ BLACKSHAW, *supra* note 23, at 4. See also, e.g., *Tonya Harding v. U.S. Figure Skating Ass'n*, 851 F. Supp. 1476 (D. Or. 1994) (expressing reluctance to intervene in the private dispute between and athlete and governing body, but finding that the body had acted unreasonably and denied due process to the defendant. Finding was moot as defendant had already resigned from the body); *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 158 (7th Cir. 1984) (Finding that U.S. federal law created no private right of action for athletes but a means of resolving disputes between sports bodies). But see generally SOEK, *supra* note 45 (arguing that the punitive nature and goal of enforcing the rules of a governing agency make doping cases criminal).

once the extraordinary hardships that are unique to equestrian competition are considered in the analysis, and the rider's quest is considered employment, a more critical examination of whether or not the "employee" has truly consented to arbitrate will be required.¹⁵⁷ Acknowledgment of consent may not destroy the availability of the arbitration process, but whether the arbitration process is appropriate to settle disputes is a question that should also consider that strict liability is applied in equestrian doping proceedings.

IV. SADDLE BAGS: BEARING THE BURDEN OF PROOF

A Swiss Court has ruled that doping sanctions are civil and not criminal and, therefore, not subject to the same standard of proof or presumption of innocence.¹⁵⁸ This decision left the CAS to fashion its own standard of proof, thereby a doctrine was developed very much akin to traditional strict liability.¹⁵⁹ "Thus, the mere fact of a positive doping result may justify the disqualification of the person responsible."¹⁶⁰ Although some scholars have found this strict liability policy to conform with international legal standards,¹⁶¹ little has been done to consider the application of this standard in the context of equestrian sports. Contrarily, some scholars have criticized the use of strict liability in imposing sanctions beyond disqualification.¹⁶² One commentator suggested that changes in sport have shifted the balance of the analysis; fairness to other athletes is no longer a sufficient consideration to allow a finding of guilt without proof of fault when competition is often the only activity and employment of the athlete.¹⁶³ With such high stakes to the individual, the aforementioned commentator suggested that panels should consider the "subjective

¹⁵⁷ Cf. SOEK, *supra* note 45, at 318–22 (discussing the lack of consent to arbitrate doping violations even by traditional professional athletes, which makes doping regulations more akin to criminal law of a private organization).

¹⁵⁸ Frank Oschütz, *International Sports Law Perspectives: Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L.J. 675, 695 (2002).

¹⁵⁹ See BLACK'S LAW DICTIONARY 934 (8th ed. 2004) ("Strict Liability: Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. Strict liability most often applies either to ultrahazardous activities or in products-liability cases.").

¹⁶⁰ Oschütz, *supra* note 158, at 686.

¹⁶¹ Connolly, *supra* note 9, at 195; GABRIELLE KAUFMANN-KOHLER, GIORGIO MALINVERNI & ANTONIO RIGOZZI, LEGAL OPINION ON THE CONFORMITY OF CERTAIN PROVISIONS OF THE DRAFT WORLD ANTI-DOPING CODE WITH COMMONLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW, WORLD ANTI-DOPING AGENCY 53 (2003), <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>.

¹⁶² Oschütz, *supra* note 158, at 688–89; e.g., SOEK, *supra* note 45, at 386–89 (asserting that the CAS itself is one of the main critics of the strict liability system that denies athletes the opportunity to exonerate themselves).

¹⁶³ Oschütz, *supra* note 158, at 688–89.

elements of each case.”¹⁶⁴ The monopolistic hierarchy of modern sports regulation amplifies both the power imbalance and the cost to the athlete.¹⁶⁵ Against this split of authority and the universal application of strict liability by CAS, the unique concerns of equestrian competitors demand recognition and a more sophisticated analysis during dispute resolution.

A. Bringing the Charge

The CAS confirmed in 2002 that the IOC must initially prove three things in a doping case: “that [the] sample was properly taken,” that the chain of custody is complete, and that the test for the substance in question is reliable.¹⁶⁶ Proving these preliminary elements establishes a rebuttable presumption that testing and custody were in accordance with prevailing acceptable standards.¹⁶⁷ Following a positive test and the satisfaction of these three elements, the CAS shifts the burden to the athlete to rebut the double presumption of the use of the prohibited substance and culpability for use.¹⁶⁸ The athlete must show either a lack of knowledge of ingestion, or innocence of ingestion of any item containing a prohibited substance, including pills, injections, or food.¹⁶⁹ If an athlete can establish either of these defenses, his or her sanctions may be mitigated, with the exception of event disqualification.¹⁷⁰ There is no way for an athlete to lift disqualification absent disproving one of the elements that the IOC or IF demonstrated initially.¹⁷¹ To rebut the presumption of guilt, the athlete must prove that the doping was the result of an act of ill will by a third party or that an error existed in the testing lab’s result.¹⁷² Otherwise, the CAS has settled on a standard 2-year suspension of eligibility for unmitigated violations and termination for repeat offenders.¹⁷³

The CAS has established a “comfortable satisfaction of the hearing panel” burden of proof standard, which the CAS defined as “greater than a mere balance of probability but less than proof beyond a reasonable

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 689.

¹⁶⁶ NAFZIGER, *supra* note 10, at 156 (citing *Lazutina v. IOC* (CAS 2002/A/370), 3 Digest of CAS Awards 273, 279 (2002)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 157.

¹⁶⁹ *Id.* (citing *A. v. FILA* (CAS 2000/A/317), 3 Digest of CAS Awards 159 (2001)).

¹⁷⁰ *Id.* at 157–58.

¹⁷¹ *See id.*

¹⁷² Frank Oschütz, *Doping Cases Before the CAS and the World Anti-Doping Code*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, *supra* note 13, at 246, 254 (citing *S. v. FEI* (CAS 91/56), 1 Digest of CAS Awards 93, 96 (1992); *N. v. FEI* (CAS 92/73), 1 Digest of CAS Awards CAS 153, 157 (1992); *Gundel v. FEI* (CAS 92/63), 1 Digest of CAS Awards 115, 121 (1992)).

¹⁷³ NAFZIGER, *supra* note 10, at 159.

doubt.”¹⁷⁴ The official comment in the CAS code compares this standard to that applied to professional misconduct cases in most countries.¹⁷⁵ The previously discussed *Gundel v. FEI* Decision¹⁷⁶ upheld the burden shifting embodied in the FEI rules for doping cases because the procedure is not criminal *per se*, and the presumption of innocence standard “belongs to the realm of criminal law.”¹⁷⁷ One rationale proposed to justify this burden of proof is that sports federations lack the prosecutorial authority to investigate claims and compel the production of sufficient evidence to satisfy a criminal court.¹⁷⁸ This reasoning is flawed, however, because federations may have less power and fewer resources than prosecutors, but they do have exponentially more resources than most athletes, who do not have the guarantee of constitutional protections, prosecutorial ethics limitations, or meaningful appeal rights. By limiting the comparison to the relative power and resources of an IF versus a prosecutor, the most relevant comparison in any case is ignored: the power imbalance between the charging body and the accused person.

B. Defenses

A federation is required to prove nothing other than the presence of a substance. Any other proof must be offered by the athlete who may not know that he or she has tested positive until long after a competitive event. This burden puts an athlete in the position of having to remember details and coincidences of an event that may have taken place weeks before. By that time, countless other horses, people, and events will have passed through the facility. Any chance for the athlete to collect evidence or discover the cause of the violation could be long gone, destroying any possibility of a defense. The IF may argue the difficulty of proving intent, but the fact remains that an athlete has almost no opportunity to investigate or present a defense.

The CAS has similarly claimed that requiring a federation to prove intent would make the fight against doping “practically impossible.”¹⁷⁹ But like all slippery slope arguments, this one deals in absolutes, weighing in on sport’s side of the teetering balance between fairness to the athlete and fairness to the sport. There is room for proof of intent to play a role,

¹⁷⁴ WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 3.1(2009), http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

¹⁷⁵ James A. R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L.J. 45, 51 (2005).

¹⁷⁶ *Gundel v. FEI* (CAS 92/63), 1 Digest of CAS Awards 115, 121 (1992).

¹⁷⁷ Jan Paulsson, *Arbitration of International Sports Disputes*, in THE COURT OF ARBITRATION FOR SPORT 1984-2004, *supra* note 13, at 40, 47.

¹⁷⁸ Oeschütz, *supra* note 172, at 255.

¹⁷⁹ Connolly, *supra* note 9, at 182.

however, especially where an allegation of doping involves a drug that could actually suppress performance, or where no doubt exists regarding the inefficacy of the drug or its concentration in the athlete's system. Simply raising the burden of proof to "beyond a reasonable doubt" in equestrian cases would give athletes a reasonable opportunity to vindicate themselves without undermining the legitimate fight against doping.

The CAS stated in one case that individual fairness was *not* their objective, at least not with regard to the individual athlete.¹⁸⁰ The CAS justified this policy on grounds of fairness to the other athletes rather than to the accused, comparing unintentional doping to food poisoning as an accidental and irreparable unfairness of life.¹⁸¹ CAS asserted that unintended faultless doping and doping without actual effect, though unfortunate (like food poisoning), remain insufficient to justify allowing a tainted athlete to compete against a clean athlete.¹⁸² But unlike unintentional doping, the misfortunes of food poisoning cannot be controlled by an adjudicatory body or corrected by administrative policy. There is, however, room to prevent the fight against doping from overshadowing the very sports that the CAS seeks to protect.

Not only do lack of intent and ordinary diligence remain insufficient to escape a doping charge, a rider cannot use lack of actual performance enhancement as a defense either. Sixteen year-old gymnast Andreea Raducan won the gold medal at the 2000 Sydney Olympics, but was essentially stripped of her medal for being treated for a cold.¹⁸³ Raducan had been given a standard cold tablet during the Olympic Games after she consulted the team's physician regarding her cold symptoms.¹⁸⁴ Unbeknownst to Raducan, the tablet contained pseudoephedrine, a prohibited substance.¹⁸⁵ While recognizing that the amount of pseudoephedrine detected could not have affected her performance, the panel disqualified her anyway under the banner of a "drug-free sport" and "enforce[ment] without compromise."¹⁸⁶

In a similar case, a member of the National Wheelchair Basketball Association was found guilty of doping during the 1992 Barcelona Paralympics.¹⁸⁷ The athlete's coach checked the list of prohibited

¹⁸⁰ USA Shooting & Quigley v. Int'l Shooting Union (CAS 94/129), 1 Digest of CAS Awards 187, 194 (1995).

¹⁸¹ *Id.* at 193.

¹⁸² *Id.* at 193-94.

¹⁸³ See Andreea Raducan v. IOC (CAS 00/011), 2 Digest of CAS Awards 665 (CAS ad hoc Division 2000).

¹⁸⁴ *Id.* at 673.

¹⁸⁵ Connolly, *supra* note 9, at 181.

¹⁸⁶ Andreea Raducan v. IOC (CAS 00/011), 2 Digest of CAS Awards 665, 673 (CAS ad hoc Division 2000).

¹⁸⁷ Nat'l Wheelchair Basketball Ass'n (NWBA) v. Int'l Paralympic Comm. (CAS 95/122), 1 Digest of CAS Awards 173, 173 (1996).

substances prior to giving the athlete a Darvocet tablet for an injury,¹⁸⁸ but unfortunately, one of the components of Darvocet was on the list of prohibited substances which lead to disqualification despite the substance's lack of effect on performance and the attempts by the coach to assure compliance with the rules.¹⁸⁹ The CAS panel refused to subject doping to "subjective factors" and found the athlete's guilt of doping sufficiently established due to his "fail[ure] to keep his body free of banned substances."¹⁹⁰ The justification for this guilt standard is based on the extraordinary level of care expected of athletes. The most basic presumption underlying this approach is that,

athletes themselves are the only ones who can properly take responsibility to proactively ensure that no banned substances enter their bodies. This duty is thrust upon them contractually and ethically by their participation in their sport. This burden on the athletes is essential to ensure the integrity of the sports in which they compete.¹⁹¹

The CAS does not accept as a defense that an athlete was given a medication or supplement by someone who should have known better (such as physicians or trainers) because it is the sole responsibility of the athlete to monitor and regulate what enters his or her body.¹⁹²

For an equestrian athlete charged with doping her horse, the above theory fails. The rider is responsible for both him or herself and for testing their horse to ensure that any properly administered, but prohibited substances, have been eliminated from the horse's system prior to competition. If the medicines have not disappeared, the rider is obliged to refrain from participation.¹⁹³ A review of all published CAS decisions concerning horse doping shows that this issue is not discussed in any published analysis.¹⁹⁴ The CAS seems to have taken a "tough luck" approach to the separation of rider and horse. Panels process horse doping allegations the same way they process charges against human athletes, despite the fact that horses and riders are almost always housed separately and sometimes miles apart. Equestrians have an exceedingly difficult task in this respect, considering that they may have no way of knowing all that a

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 177-78.

¹⁹¹ Connolly, *supra* note 9, at 184.

¹⁹² *Id.* at 192-93.

¹⁹³ *SJ. v. FEI* (CAS 92/71), 1 Digest of CAS Awards 135, 135 (1992).

¹⁹⁴ See DIGEST OF CAS AWARDS I 1986-1998 (Matthieu Reeb ed., 1998); DIGEST OF CAS AWARDS II 1998-2000 (Matthieu Reeb ed., 2002).

horse has been exposed to in a shared stabling area while being attended to by various staffers.

According to arbitrators following the WADA guidelines, an athlete must establish that even with the “utmost caution,” he or she could not have reasonably suspected that a prohibited substance had been administered in order to avoid fault or liability.¹⁹⁵ This “very high standard [can] be met only in exceptional circumstances.”¹⁹⁶ Some federations even specify that allegations of mistake, contamination of supplements, or intentional sabotage will not be considered “exceptional,” and as of 2005, no decision under the WADA’s rules contained a finding of “no fault or liability.”¹⁹⁷ A lesser standard of no *significant* fault or liability is available if an athlete shows that “his or her negligence . . . was not significant in relation[] to the” doping violation.¹⁹⁸ Proof of no significant fault or liability can reduce a sanction only by half, and occasionally athletes take advantage of this standard and had their sanctions reduced.¹⁹⁹

There has been some recognition among CAS arbitrators that a higher burden must be met to find an athlete guilty of more serious allegations, such as those involving deliberate dishonesty.²⁰⁰ This indicates that the “comfortable satisfaction of the hearing body” standard of proof is less of a standard, and more of a spectrum.²⁰¹ One CAS advisory opinion authorized panels to consider subjective elements of individual cases, but only in terms of adapting sanctions.²⁰² Under this opinion, the duty remained with the athlete to “show why maximum sanctions should not be imposed.”²⁰³ Therefore, the CAS has the ability to fashion standards of review to suit narrower classes of cases, as opposed to simply grouping all “doping” cases in the same category, and could theoretically establish an altered review system for equestrians.

¹⁹⁵ Connolly, *supra* note 9, at 188.

¹⁹⁶ *Id.* at 188–89.

¹⁹⁷ *Id.* at 189.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 189–92 (citing Squizzato v. FINA (CAS 05/A/830) (2005) (unpublished) (where a 17 year-old swimmer used a cream given to her by her mother for an infection between her toes, which contained a prohibited substance); Knauss v. Fédération Internationale de Ski (CAS 05/A/847) (2005) (unpublished) (where a downhill skier took a multivitamin after reading the label and checking with the distributor about banned substances, but later tested positive for prohibited substance)).

²⁰⁰ Connolly, *supra* note 9, at 176.

²⁰¹ *See id.*

²⁰² Oschütz, *supra* note 158, at 698–99 (citing Fédération Française de Triathlon & International Triathlon Union (CAS 93/109), 1 Digest of CAS Awards 467, 471 (CAS Advisory Opinion 1994)).

²⁰³ Oschütz, *supra* note 158, at 699 (citing N., J., Y., W. v. Fédération Internationale de Natation (CAS 98/208), 2 Digest of CAS Awards 234, 253 (1998)).

C. False Positives

False positives are a pervasive and evolving problem. Louisiana State University recently studied the stabling areas of racetracks and found enough medication in the dust and water to produce false positive test results.²⁰⁴ Substances such as flunixin and phenylbutazone (“bute”) were present and potentially detectable in a horse’s excreta. The refusal of the FEI and CAS to set minimum levels of contamination seems highly problematic as tests become more sensitive. As a consequence of atmospheric contamination, horses that are not competing but receiving legitimate veterinary treatments could contaminate competing horses in the same stable.

Despite the high degree of care used by groomers and riders, and the safeguards of taking two test samples, the realistic chance of a false positive throws the strict liability doctrine, as applied to equestrians, into serious question. False positives are a threat to both the doping fight and the livelihood of athletes. For example, human growth hormone testing was withdrawn from the 2005 Tour de France due to uncertainty about the test’s validity.²⁰⁵ Pulling a test that is already in use shows that athletes may be disqualified and sanctioned based on faulty tests with no reasonable way to prove it.

D. New Developments

Another growing problem in the sports world is the use of undetectable or difficult-to-detect drugs.²⁰⁶ Unfortunately, the responses to these drugs exaggerate the issues surrounding testing and sanctioning of athletes. Two possible responses to undetectable drugs include the use of non-analytical positive evidence, such as documents indicating purchase of prohibited substances, and athletic profiling.²⁰⁷ Athletic profiling proposes a system of gathering biological profiles of each athlete and putting the information on an identification card.²⁰⁸ Then, significant deviations in the elements of an athlete’s unique biological profile (e.g., hormone levels or hemoglobin concentrations) could trigger investigation of the athlete’s possible use of prohibited substances.²⁰⁹

²⁰⁴ *Sources of False Positives?*, EQUUS, Mar. 2009, at 12, 12 (citing S. A. Barker, *Drug Contamination of the Equine Racetrack Environment: A Preliminary Examination*, 31 J. OF VETERINARY PHARMACOLOGY AND THERAPEUTICS 466 (2008)).

²⁰⁵ Nafziger, *supra* note 175, at 46.

²⁰⁶ For brevity’s sake, both types will be referred to as “undetectable” drugs.

²⁰⁷ Nafziger, *supra* note 175, at 47.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 55.

Perhaps the best example of the implications of using non-analytical evidence can be seen in the Bay Area Laboratory Co-Operative (hereinafter "BALCO") incident of 2004.²¹⁰ BALCO was reported anonymously to the U.S. Anti-Doping Agency for manufacturing and selling an undetectable drug, THG.²¹¹ Following an investigation of the substance and BALCO itself, BALCO's records were used to pursue doping charges against a significant number of athletes.²¹² Suspensions followed, reputations were compromised, and some careers were ended based on no more than the documents of a laboratory.²¹³ Many of these records were coded, cryptic, and did not mention athletes by name.²¹⁴

So-called "blood doping"²¹⁵ illustrates yet another problem with the drive to combat new doping techniques. Blood doping involves the use of rEPO (recombinant erythropoietin), which occurs naturally in humans and boosts the production of red blood cells, in turn boosting endurance by increasing the blood's oxygen-carrying capacity.²¹⁶ Because rEPO occurs naturally and the operative mechanism is simply more of the athlete's own blood cells,²¹⁷ it is extremely difficult to tell when an athlete uses this technique. A test for identifying blood doping was first accepted as valid during a legal proceeding in 2002 and resulted in the suspension of several athletes.²¹⁸ The panel hearing the proceeding determined that WADA criteria "largely eliminate[d] the risk of false positives."²¹⁹ Unfortunately, it was later shown that the WADA criteria could result in false positives and depended inordinately on the expertise of the laboratory technician interpreting the test results.²²⁰ This problem led WADA to institute an additional requirement that rEPO test results must be reviewed by a lab known to have expertise with rEPO tests before positive results could be reported.²²¹

²¹⁰ *Id.* at 51–52.

²¹¹ *Id.* at 51.

²¹² *Id.* at 51–52 (including 4 NFL players, 4 track and field athletes, and 5–7% of all tested MLB players).

²¹³ *Id.* at 52–53.

²¹⁴ *Id.* at 52.

²¹⁵ World Anti-Doping Agency, *Q&A: Blood Doping*, <http://www.wada-ama.org/> (follow "Resources - Q&A" hyperlink; then follow "Q&A on Blood Doping" hyperlink) (last visited Oct. 13, 2009).

²¹⁶ Connolly, *supra* note 9, at 168.

²¹⁷ *Id.*

²¹⁸ *Id.* (citing *Meier v. Swiss Cycling* (CAS 2001/A/345), 3 Digest of CAS Award 238, 238 (2002)).

²¹⁹ *Id.* (citing *Int'l Ass'n of Athletics Fed'ns v. Fédération Royale Marocaine d'Athlétisme & Boulaïmi* (CAS 2002/A/452), 3 Digest of CAS Awards 440, 440 (2003)).

²²⁰ *Id.*

²²¹ *Id.* at 169.

Undetectable drugs and blood doping are among the primary rationales behind the argument for using athletic profiling.²²² New developments in undetectable drugs and blood doping undermine the fight against doping, especially when viewed in combination with the low standard of proof required to disqualify or suspend an athlete.

E. Conclusion

The CAS may only impose penalties according to the rules set out by the governing body of each individual sport. For equestrians, the body that sets the penalties is the FEI. FEI regulations specifically empower the CAS to increase the penalties imposed by the body below, essentially permitting *de novo* review of penalties by CAS and putting athletes at risk for greater sanctions if they appeal a decision by a lower body.²²³ The FEI itself may impose warnings, fines up to 20,000 Swiss francs (approximately \$19,825), disqualification, and suspension for any duration, including life.²²⁴ Although most CAS decisions affirm or reduce the penalties imposed by an IF, the potential for increased sanctions operates as a threat to an athlete who contemplates challenging an IF decision. When faced with the threat of greater sanctions, athletes may be less willing to challenge test results when they have no access to proof and, therefore are less likely to raise questions about accuracy.

Reliance on the strict liability doctrine in sports arbitration creates significant difficulties. The inconsistent imposition of this standard of proof leads one to believe it is more flexible than a fixed standard. In the case of equestrian sports, this inconsistency may actually open the door to a fairer system of examination. Equestrians lack the basic corporeal control over their mounts that other athletes are presumed to have over their own bodies. Riders are held responsible for things that happen to their horses, even when they are far away from the stable areas. Research on false positives indicates that even with the highest care by athletes and caretakers, a horse may still be exposed to detectable levels of prohibited substances by simply being in a stable where other animals have received such substances.²²⁵

²²² Nafziger, *supra* note 175, at 55; Ian Austen, *Athletic Profiling: A Better Way to Catch Those Who Dope*, N.Y. TIMES MAG., Sept. 12, 2004, at 24, 24.

²²³ FÉDÉRATION EQUESTRE INTERNATIONALE, FEI GENERAL REGULATIONS art. 162 (23rd ed. 2009), <http://www.fei.org/Rules/Documents/General%20Regulations%2023rd%20edition%20-1%20January%202009%20-%20final.pdf>.

²²⁴ *Id.* at art. 161.

²²⁵ *Sources of False Positives?*, EQUUS, Mar. 2009, at 12, 12 (citing S. A. Barker, *Drug Contamination of the Equine Racetrack Environment: A Preliminary Examination*, 31 J. OF VETERINARY PHARMACOLOGY AND THERAPEUTICS 466 (2008)).

Consideration of these issues must enter into the analysis of the strict liability doctrine applied to horse doping cases, which require not just fairness to the athlete but recognition that no amount of care can prevent some violations from occurring. While it is easier to support a sanction of disqualification to prevent unfairness to other athletes, additional sanctions need to be considered in light of problems with the system itself as well as the differences between other athletes and equestrians who compete as a team of rider and horse.

V. ANALYSIS

Currently, the IOC recognizes 205 separate nations or entities, and 192 of these independent entities are states recognized by the United Nations.²²⁶ Litigation subject to the laws of so many legal systems would be crippling to an endeavor as massive as the Olympics.²²⁷ The Sieracki-Lindland conflict, which involved the denial of an award by USA Wrestling's Standing Greco-Roman Sport Committee, demonstrates the mind-boggling mess that courts can make of a sports dispute, as well as the failure of domestic court remedies in international competition.²²⁸ Internal administrative remedies also remain insufficient because an athlete is put in the position of defending against the very body that writes the rules, makes the accusation, and then sits as prosecutor, witness, judge, and jury.²²⁹

Internal administrative remedies could prove more satisfactory, however, if an athlete keeps a home in Switzerland, as German cyclist Danilo Hondo did.²³⁰ By maintaining a residence in Vaud, Switzerland, Hondo successfully classified his dispute as a domestic/local dispute under Swiss law and sought intervention by the Vaud Court of Appeals.²³¹ His remedy under Swiss law included an injunction against his suspension, pending a full hearing into whether the strict liability principle violated basic Swiss rights.²³² Hondo was the first athlete ever to convince a domestic court to suspend a CAS ruling.²³³ The Swiss court eventually overturned the suspension, but it was later reinstated by the Swiss Supreme

²²⁶ Olympic.org, National Olympic Committees, <http://www.olympic.org/en/content/National-Olympic-Committees> (follow "What is a National Olympic Committee (NOCs)?" hyperlink) (last visited Oct. 16, 2009).

²²⁷ Yi, *supra* note 35, at 301-02.

²²⁸ See *id.* at 302-03 (discussing the Butch Reynolds case); Nafziger, *supra* note 70, at 360-

71.

²²⁹ Yi, *supra* note 35, at 304-05.

²³⁰ *Id.* at 337-38.

²³¹ *Id.*

²³² *Id.* at 338.

²³³ *Id.*

Court.²³⁴ This loophole has yet to be closed and allows disputes between Swiss residents and organizations access to a court system that most athletes do not enjoy.

Another recent development is *lex sportiva*, the emerging body of law based on the accumulation of semi-precedential CAS opinions regarding international sports law.²³⁵ Unlike *lex mercatoria*, it is not currently developed enough to be available as a choice of law in and of itself.²³⁶ However, it may eventually develop to such a level as CAS becomes more deeply entrenched in the world of international sports. But as with any private arbitration scheme, confidentiality, limited discovery, and flexibility of remedies will likely keep the development of *lex sportiva* slow and limited in effect.²³⁷

One of the elements making sports dispute arbitration unique is the very small number of disputes with a win-win result,²³⁸ especially when the outcome determines who receives a place on the Olympic team or whether an accused athlete is disqualified and stripped of a medal and prize money. Most sports disputes require an A or B decision with very little room for compromise²³⁹; the CAS cannot simply declare two gold-medalists or place an extra athlete on an Olympic team. This limitation may add to the legitimacy of the CAS by creating a more judicially analytical system or could undermine the system with the impression that the CAS is beholden to its primary financier because it finds parties guilty to justify anti-doping efforts.

The CAS provides the Olympics the distinct advantage of removing public relations snarls from the shiny medal podiums and pristine fields of the games. When an unpopular decision comes down, it is the adjudicatory body of the CAS that bears the criticism, not the IOC.²⁴⁰ Thus, the “cash cow” of the greater Olympic program keeps grazing while the CAS cleans up the manure.²⁴¹ Athletes, on the other hand, get a mixed bag from the CAS. Forced to agree to rigid, standard terms or be excluded from competition, athletes have zero bargaining power with respect to their rights.²⁴² However, the CAS does require that arbitrators have expertise in sport, which many judges lack.²⁴³ Additionally, the IF and IOC typically

²³⁴ *Hondo Still Waiting for Decision*, CYCLING NEWS, Apr. 19, 2007, <http://www.cyclingnews.com/editions/first-edition-cycling-news-for-april-19-2007>.

²³⁵ NAFZIGER, *supra* note 10, at 48–49.

²³⁶ *Id.*

²³⁷ *Id.* at 49.

²³⁸ BLACKSHAW, *supra* note 23, at 118.

²³⁹ *Id.*

²⁴⁰ Yi, *supra* note 35, at 309.

²⁴¹ *Id.* at 312.

²⁴² *Id.* at 312–13.

²⁴³ BLACKSHAW, *supra* note 23, at 121.

honor a CAS ruling in favor of an athlete, which may not always be true for an independent court's decision.²⁴⁴

An imbalance in power remains with regard to the pool of arbitrators, however, since the IOC, IFs, and NOCs appoint three-fifths of the pool of 250 arbitrators.²⁴⁵ The ICAS itself appoints the remaining arbitrators.²⁴⁶ The list of appointees clearly favors those who are recommended by the institutions who bring charges against an athlete.²⁴⁷ While *Gundel* prompted the restructuring of CAS funding, the CAS is still fully funded by governing bodies, with three-fourths of the budget coming from the IOC and Summer and Winter Olympic Committees.²⁴⁸ The remaining one-fourth of the CAS budget comes from NOCs.²⁴⁹ CAS' funding method still causes concern, as the CAS remains financially dependent on its most frequent litigants.²⁵⁰ A paradoxical situation results because athletes are forced to agree to the jurisdiction of a body appointed and funded by the very organizations that levy charges against them and are then left with no access to courts in the event of an unfair outcome. At least one commentator has suggested that the formation of a union of Olympic athletes may be on the horizon.²⁵¹ Such a union could protect athletes from the stacked system, even if only as a means of acquiring appointment rights to the arbitrator list.

"Sports are special and so are athletes. But their special status means a higher standard of conduct In all litigation and arbitration of all sports-related disputes, the public interest, including the best interests of sports, should be paramount."²⁵² For equestrians, safety is an additional concern, as potentially dangerous drugs risk the health and safety of both the athletes and their horses. An athlete who drugs a horse also creates a serious risk of injury or death to bystanders and workers should the horse break loose with stimulants or excessive pain medication in its system. These concerns support the current policy of automatic disqualification when a horse tests positive for prohibited substances, but still permits quantitative assessment and should not always warrant the imposition of additional sanctions.

²⁴⁴ Yi, *supra* note 35, at 313.

²⁴⁵ *Id.* at 316.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 316, 318.

²⁴⁸ *Id.* at 317.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 317-318.

²⁵¹ *Id.* at 318.

²⁵² NAFZIGER, *supra* note 10, at 108.

The FEI rules permit the consideration of other individuals as responsible for a violation,²⁵³ but no published CAS case involving horse doping has held anyone other than the rider responsible. The FEI rules, therefore, do account for the fact that a rider is not always able to fully control or monitor a horse the way an archer controls his or her body. There is no reason to think that in finding one other than the rider responsible for doping that the CAS would undermine the interests of the public or the sport. A rider simply cannot oversee everything the horse is exposed to, nor can a rider reason with a horse like a relay runner might reason with a teammate, asking her to be cautious about what she eats or touches lest the team be held accountable. The standard applied to a gymnast who seeks a physician's advice and takes a cold tablet is simply not appropriate to apply to a rider housed at a distance from her horse during an event.

VI. THE FINISH LINE

Rules were "designed many years before the current Olympic Charter and Amateur Sports Act" to govern amateur athletes who, at that time, were expected to have independent means of support.²⁵⁴ These rules are now applied to "all athletes, amateur (under the modern definition unrelated to financial circumstances) or professional, who seek to become eligible for sanctioned international competition under the Olympic Charter and Amateur Sports Act," to those who are dependent on subsidies and required to be eligible for Olympic competition.²⁵⁵ Violations that would keep a multi-million-dollar professional athlete out of play for 10 days can put an unsalaried Olympic amateur athlete with no player's union out for two years.²⁵⁶ Equestrian athletes are especially hard hit by the one-size-fits-all approach of the CAS. These competitors have far less control over their horses than over themselves, but are held to the same standards. Penalties that would force a sprinter to run at a local high school track instead of a state-of-the art facility can drive an equestrian into an untenable situation: selling his horse and losing the development of a successful relationship and years of investment, or provide substandard care in hopes of waiting out the penalty.

²⁵³ FÉDÉRATION EQUESTRE INTERNATIONALE, FEI GENERAL REGULATIONS art. 118 (23rd ed. 2009), <http://www.fei.org/Rules/Documents/General%20Regulations%2023rd%20edition%20-1%20January%202009%20-%20final.pdf>.

²⁵⁴ Telephone interview with James A. R. Nafziger, Professor, Williamette College of Law (Mar. 24, 2009).

²⁵⁵ *Id.*

²⁵⁶ L. ELAINE HALCHIN, ANTI-DOPING POLICIES: THE OLYMPICS AND SELECTED PROFESSIONAL SPORTS CRS-12 (2005), https://www.policyarchive.org/bitstream/handle/10207/2423/RL32894_20050429.pdf?sequence=1.

A dual track of penalties or a more thorough consideration of proportionality should be introduced into the *lex sportiva* of equestrian doping arbitration.²⁵⁷ Arbitration rules and decisions must account for the potential discriminatory effect of sanctions on equestrians. Sanctions affect a competitor with the financial ability to support his or her horse significantly less than they affect a competitor of modest means. At the very least, the CAS should consider the proportionality of sanctions on equestrians compared to other athletes, particularly the disparate financial impact suffered by riders under the standard two-year penalty.²⁵⁸ The CAS can reasonably consider that a three or six month suspension is as severe a penalty to a rider as a two year suspension is to a skater.

While CAS decisions show less concern for fairness to an accused athlete than to other competitors, dogma cannot be so powerful as to render the CAS a blind hammer. Recognizing the very real difference in control over the ingestion of prohibited substances and that equestrian athletes remain bound to their employment regardless of competitive eligibility would not undermine the CAS' purpose or the fight against doping. Introduction of such considerations has the potential to complicate decisions, but this alone cannot be sufficient cause to deny equestrians such fundamental safeguards. Evolving sophistication is the hallmark of any legal system, and if the CAS is here to stay, it will have to accept this change. Change should begin with fair consideration given to the unique concerns facing Olympic level equestrians and their magnificent horses.

²⁵⁷ Nafziger, *supra* note 254.

²⁵⁸ See NAFZIGER, *supra* note 10, at 107.