LEGAL RESEARCH FOUNDATION SEMINAR

THE HEARING OF SPORTING DISPUTES - A QUIET REVOLUTION?

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Introduction

1. A period of about 15 years has passed since the Legal Research Foundation last held a seminar dealing with legal issues affecting sport. The topics covered in that seminar - anti-doping regimes, employment contracts, the conduct of disciplinary hearings by sporting tribunals – still produce a range of legal issues, and in each area, there has been a great deal of legal development. Around the time of the last seminar, it was fairly predictable that the development of sport in economic terms, and the ever-increasing importance of sport for individuals and societies, would create a new field for lawyers.[1] However, the way in which sports disputes are handled has seen a quiet revolution at the international and national level which was, perhaps, harder to predict.

2. This paper outlines the rise (at both national and international level) of independent arbitral tribunals which are dedicated to the determination of sports-related disputes, and considers some of the consequences of this development. The two distinguished speakers who follow will provide a more detailed insight into the workings of sports tribunals at national and international level.

The background in the courts

3. The general legal background to this development of arbitral tribunals was one of considerable legal uncertainty where disputes in sport were taken to the courts. In most common law jurisdictions, there was (and remains) considerable uncertainty as to the availability of a claim by judicial review proceedings where a challenge related to the decision of a sporting organisation, primarily because the decision was likely to be characterised as a private, rather than public, law matter[2].

4. Even if a claim could be brought in private law relying on a member's position under the rules of a particular sporting organisation, some national courts might still refuse to intervene on the grounds that there was no clear positive indication that the parties intended to create legal relations in the rules,[3] or, on a more simple approach, because the courts should defer to the decision making of a private organisation. A

[1] *Sport and the law – A New Field for Lawyers?,* New Zealand Law Review [1992] Part 1, page 80.
[2] See eg, the discussion of the position in the English Courts in *Taylor and Lewis: Sports Law,* Chapter 4, p 177-223; New Zealand, of course, adopted a more liberal approach to the availability of judicial review in one well known case, *Finnigan v NZRU* [1985] 2 NZLR 189 (No.s 1, 2 and 3), but this does not detract from the general difficulty and uncertainty in this area
[3] This extreme position applied in Australia, particularly where the rules of non-profit making or amateur organisations were in issue. See, e.g. *Cameron v Morgan* (1934) 51 CLR 358.

sporting organisation should be left to regulate its own affairs.[4] Generally, courts would circumnavigate restrictive precedent in the private law area, if personal rights to work or rights to property were affected, and there was illegality or absence of proper process. However, the uncertainty as to the availability of legal redress, no doubt, contributed to the relative rarity of challenge to the decisions of sporting bodies in such matters as selection decisions, refusals to grant licences or to permit athletes to compete. The cases which were brought tended to involve decisions affecting personal or property rights where a fair process had not been followed, or where the decision by a sporting body gave rise to a claim that it was acting in restraint of trade.

5. Overall, the position might be summarised as being one in which it was difficult, in most common law jurisdictions, to decide whether a court would consider that it had jurisdiction over a matter, and could set aside a sporting decision and grant relief. Courts were reluctant to become involved in ruling on sporting disputes, and, fairly regularly, showed a strong desire to defer to the internal decision making of sporting organisations.

6. Judges might say things like:

> *"Sport would be better served if there was not running litigation at repeated intervals by people seeking to challenge the decisions of the regulating bodies."*[5]

or this:

> *"The kinds of organisations with whose internal decisions the courts have declined to meddle include social clubs…, sporting associations…, trade unions…, professional associations…, political parties…, friendly societies…, parochial councils and other church bodies… and schools. The reasons for the courts' declining to interfere with cases such as these have been various….."*[6]

7. This approach meant that a grievance was unlikely to go beyond a decision by a sporting governing body, or a domestic tribunal established by the sporting organisation. Generally, the cases which did reach courts tended to be those which involved significant economic interests in contractual disputes – the cases in the

[4] For a recent example of this kind of approach in the UK, see, *Flaherty v NGRC* [2005] EWCA Civ 1117 CA (Civ Div), where the court referred to its role in controlling illegality, but emphasised it had no role "to double guess regulating bodies in charge of domestic arrangements".

[5] Per Browne-Wilkinson V-C, in *Cowley v Heatley* (1986) Times, 24 July a challenge to a ban from amateur representative selection.

[6] In *Australian Football League v Carlton Football Club Limited* [1998] 2 VR 546, Tadgell JA, at 549-550. This case concerned a decision to suspend a player by a sporting disciplinary tribunal. Australia has, perhaps, the most restrictive precedent in this area going back to the decision of the High Court in *Cameron v Hogan* (supra).

various Commonwealth jurisdictions applying the restraint of trade doctrine and, more recently, competition law principles, in the sporting context, are good examples. To an extent, the position taken by many courts did not accord with the increasing importance given to the right to compete and participate in sporting activity by those involved in sport, whether amateur or professional. Where those rights were affected by decisions, it was natural for an aggrieved party to seek redress in the form of some kind of independent adjudication. On such sporting issues as selection, while there were disputes, there were very few court decisions. By way of example, no dispute over selection for Olympic teams had reached a hearing in the courts in New Zealand, before the advent of the Sports Tribunal.

8. It is, perhaps, not surprising, given this background, that sport developed specialist tribunals under its own rules (whether internal, or independent tribunals) which are dedicated to the hearing of disputes relating to such matters as selection and doping. This development has been wide ranging and rapid over the last decade. It now means that, by way of example, an elite athlete who is not selected for a national team in New Zealand will, by agreement, be able to challenge a selection decision before the Sports Tribunal on the grounds provided by the Rules of the Tribunal.[7]

The rise of arbitration and tribunals

9. The procedural framework for the hearing of sports-related disputes which has been established in the sporting world means that it is likely that many disputes which arise in relation to sport, such as doping, selection, disciplinary matters, will be decided by international, national or domestic specialist tribunals under agreements which bind the sporting participants to that process. Sport, at the international level, led by the Olympic movement, has chosen to establish a global regime for the arbitration of disputes. No doubt those responsible for the choice considered that specialist tribunals were required to give ready access to dispute resolution services in a manner which could not be provided by national courts. The obvious advantage is that, if a tribunal has jurisdiction by agreement, the avenue for dispute resolution beyond any internal decision made by a sports organisation, is established and known. In addition, the scope of the review should be clearly set out by the rules of the sport or of the tribunal itself, even if there will still remain, in such matters as selection appeals, an element of deference to the decision of sporting experts.

The Court of Arbitration for Sport

10. At the international level, the rise of the Court of Arbitration for Sport ("**CAS**") as a central international tribunal for the handling of sports-related disputes has proceeded

[7] See, Rules of the Sports Tribunal of New Zealand, Part C, Appeal Proceedings.

apace in the last few years. At the time of the last Legal Research Foundation seminar, CAS had not established any significant role and had very little business. It was only in the mid 1990s that some International Federations began to use CAS for doping and disciplinary appeals. Appeals to CAS in the late 1990s established the key principles relating to the interpretation and application of anti-doping regimes upon which the World Anti-Doping Code is based.[8] Since the adoption of the Code across sporting bodies worldwide in 2003, CAS has had a central role in doping appeals and there has been a rapid growth in its work.

11. At the national level, some States have also established (or are considering establishing) specialist tribunals for the hearing of sports-related disputes.

The international level – the Court of Arbitration for Sport

12. CAS was founded as a result of an initiative by the International Olympic Committee in 1984. After dealing with only a few cases in its first few years, CAS has, in the last ten years, developed into an important arbitral forum for the resolution of sports-related disputes. By agreement, which is usually found in the rules of a sporting body, or the conditions of participation in an event, parties submit disputes for determination by CAS in accordance with the CAS Code of Procedure. CAS hears and determines sports-related disputes[9], whether at first instance in its Ordinary Division, or on appeal from a sporting tribunal in its Appeal Division. In the doping area, CAS was designated as the mandatory appeal tribunal under the World Anti-Doping Code 2003 for an international athlete.[10] Under this appeal structure the usual "day in court" for an international athlete facing allegations that he or she has committed an anti-doping rule violation under the Code will be before CAS, not a domestic tribunal or the national courts. (The diagram **attached** to this paper sets out the structure for the process of hearings under the Code.)

13. After an initial expression of concern by the Swiss Federal Tribunal (in an early appeal from a CAS award) about the independence of CAS, where the IOC was involved as a party in a dispute before CAS, the International Chamber of Arbitration for Sport was created as an independent body with responsibility for ensuring the independence of

[8] See *Paul David: A Guide to the World Anti-Doping Code 2008*, p 25-28 for a review of the key principles which CAS tribunals developed and applied in the doping area.
[9] There has been very little consideration of what amounts to a sports-related dispute by CAS Panels. No case has been rejected on the basis that there was no jurisdiction because the dispute was not sports-related.
[10] See Article 13.2.2 of the World Anti-Doping Code. See *A Guide to the World Anti-Doping Code* by P David, Cambridge University Press 2008, page 208-218.

CAS.[11] After this, the Swiss Federal Court strongly endorsed the role and independence of CAS in an anti-doping appeal.

> *"The plaintiffs submit…that the CAS is not an independent tribunal in a dispute in which IOC is a party. On the basis of Article 190, paragraph 2(a) LDIP, in conjunction with Article 6, paragraph 1 ECHR and Article 30, paragraph 1 of the Constitution, they argue that the two awards in which IOC named as a party should be set aside… Under the terms of Article 13.2.1 of the new WADA Code, the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes. This is a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought that it was controlled by the IOC.*
>
> ***To conclude it is clear that the CAS is sufficiently independent vis-à-vis the IOC as well as other parties that call upon its services, for decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State Courts****."* [emphasis added][12]

14. While many CAS awards still concern anti-doping appeals, CAS is now handling a broader range of sports-related disputes arising from sporting rules and contracts and there has been a significant increase in referrals to CAS relating to commercial claims in sports such as association football. The work of CAS appears to be growing and diversifying with more parties including CAS arbitration clauses in a wide range of contracts and rules.[13]

15. In the Olympics and other major sporting events such as the Commonwealth Games, the FIFA World Cup, CAS sits in its *Ad Hoc* Division to determine disputes which may arise during the course of the event, in accordance with strict time limits. In this context, CAS has developed the "field of play" rule in an effort to delineate the scope of its ability to review sporting decisions. This is, perhaps, one of the areas in which it can truly be said that CAS has developed sports specific legal principle.[14]

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[11] The challenge to the independence of CAS in a doping matter where the IOC was the party was rejected in *A and B v IOC and FIS*, 1st Civil Division of the Swiss Federal Tribunal , 27 May 2003, CAS Digest 2001-2003 p 674, David *op cit* Chapter 10 , p 234.

[12] *A and B v IOC and FIS*, 1st Civil Division of the Swiss Federal Tribunal, 27 May 2003, CAS Digest 2001-2003, p674.

[13] For the standard arbitration clause, see the CAS website, www.tas.cas.org

[14] There are a number of CAS decisions in this area which uphold the autonomy of decisions on the field of play. See, eg. CAS 2004/A/704 *Yang v Hamm*. The approach is one of restraint not complete lack of jurisdiction. A true field of play decision will only be revisited by CAS, if there is corruption or bad faith.

16. In its general jurisdiction, CAS also has to decide matters quickly by reason of the nature of sporting competition.[15] Recent examples in the sport of cycling have seen CAS Panels rule on short notice on whether cyclists can compete in such events as the Tour de France and the World Championships. Tom Boonen, the Belgium cyclist, was recently declared eligible to compete in this year's Tour de France by CAS, notwithstanding his criminal conviction for the possession of cocaine, after a French Court had held that it did not have jurisdiction (presumably, on the basis of the matter being subject to the binding agreement to refer such matters to CAS). Alexandro Valverde won a similar claim to be allowed to compete in a recent World Cycling Championships, but currently awaits a decision from CAS on the scope of a ban for doping violations which is currently only applicable in Italy.

Agreement-based jurisdiction

17. The requirement of agreement to the jurisdiction of CAS must be kept in mind. While submission to the jurisdiction of CAS by agreement is unavoidable, in a practical sense, for athletes who wish to compete in international sporting events such as the Olympic Games, or in anti-doping matters, where the World Anti-Doping Code, with its mandatory reference to CAS for appeals by international athletes, applies, the question whether there has been an agreement to the jurisdiction of CAS arbitration can arise as an initial jurisdictional issue. If an athlete is not bound by an agreement to arbitrate before CAS, whether in the rules of the sport, the event or a particular contract, CAS will have no jurisdiction and the relevant national legal system will provide the forum for the dispute.[16] The contractual nature of the arrangements before CAS means that it is quite possible that an athlete may be subject to national law, as well under the jurisdiction of CAS, at the same time, for the same conduct with, potentially, different results. Where CAS does have jurisdiction by agreement, attempts to bring proceedings in national courts will be met with an application for a stay on the basis that the parties have agreed to submit the dispute to arbitration.[17]

Appeals from CAS

18. The effect of a reference to CAS is to agree on an arbitration which, under the CAS Rules, has its seat at Lausanne, Switzerland. While the hearing can be held in another place,[18] this will not change the seat of the arbitration. While the principles of several legal systems may be relevant to aspects of the arbitration, the legal system

[15] Under Rule 37 of the CAS Code a CAS Panel has the power to grant provisional measures.
[16] For a case which shows the importance of finding a binding agreement see *CAS/A/1190 WADA v PCB and Akhtar and Asif* where CAS ruled that it had no agreement to hear the appeal brought by the World Anti-Doping Authority against a decision by the Pakistan Cricket Board Appeals Committee.
[17] See e.g. *Raguz v Sullivan* [2000] NSWCA 290.
[18] CAS has Registries in New York and Sydney.

which will have jurisdiction in relation to a CAS award would generally be the law of Switzerland, as this is the law of the seat of the arbitration. If the arbitration is international in nature, then the grounds for appeal in Swiss law are contained in the Swiss Code on Private International Law. These grounds reflect the grounds in the UNCITRAL Model Law on arbitration and an appeal will be to the Swiss Federal Supreme Court. The grounds for any appeal are narrow, and, to date, there appears to have been only one appeal from a CAS award in the anti-doping area which has been successful, with the court ordering that certain matters relevant to the period of ineligibility for a doping violation should be reconsidered by CAS.[19]

19. The general affect of the rise of CAS is that where the parties have agreed to refer their disputes to CAS, national courts have been removed from the field, and any challenge to a CAS award will be by reference to the Swiss law, and not, as previously was the case, with decisions by a domestic tribunal, by the application of the legal rules of public or private law under the national legal system of one or other of the parties or as agreed by them.

National level

20. This movement towards a specialised tribunal system for the determination of sports-related disputes is being mirrored at the national level. Domestic tribunals have developed considerably in some sports. They have become increasingly sophisticated in their regulation and role, and deal with ever more significant matters for individuals or teams. The domestic tribunal system established by a sporting organisation may, on the proper interpretation of its rules, amount to a submission of a dispute to arbitration. Often such internal tribunal systems provide for an appeal to CAS.

21. There is, however, an increasing trend towards the establishment of independent national level sports tribunals to hear sports-related disputes and appeals from the decisions of domestic tribunals of sporting organisations. This development removes much of the burden of conducting domestic tribunals (in particular internal appeals) from national sporting organisations and creates an external independent process by the application of the agreement under the rules of the sporting organisation. Such a tribunal offers the opportunity to provide for the consistent application of the developing legal principles in such specialist areas as anti-doping, where the creation of a harmonised international regime is of paramount importance. It also provides certainty of access to an independent tribunal with an agreed jurisdiction for identified

[19] For examples of challenges to CAS arbitration awards to national courts, before and after the Code, whether on the enforcement or recognition of the award, see *David op cit* Chapter 10.

sporting disputes at reasonable cost. As with access to CAS at the international level, the establishment of a tribunal provides certainty of access to an independent tribunal.

Sports Tribunal in New Zealand

22. In New Zealand, the Sports Tribunal has been in existence since 2002. While the Tribunal is a creature of statute (and it implements anti-doping rules which are made under statute),[20] its jurisdiction, like that of CAS, is agreement based.[21] The Tribunal has jurisdiction under its rules in relation to national selection appeals, anti-doping matters, appeals from national sporting organisations and sports-related disputes. Each head of jurisdiction requires an agreement by the parties to the jurisdiction of the Tribunal. To date the Tribunal's work has largely been focussed on anti-doping matters and selection disputes, although there have been cases relating to appeals in disciplinary and other matters, and other sports- related disputes.[22] In other countries, sporting tribunals have either been established, or are being considered. Germany and the United Kingdom have recently established similar tribunals.

23. In New Zealand, the availability of a tribunal with low level fees and procedural requirements of a straightforward nature, has meant that cases have been brought which would not have been brought to the courts in the past. In the anti-doping area, the Sports Tribunal provides an effective forum for dealing with anti-doping rule violation allegations under the WADA Code, which would previously have been dealt with by internal sporting tribunals.[23] In selection disputes, the Tribunal provides access to an independent tribunal for many parties which would probably not have pursued a grievance in the past. The Sports Tribunal offers the opportunity to build a body of expertise and precedent, in sports disputes. By way of example, the presence of the Tribunal has ensured that, in New Zealand, the SADR (which implement the World Anti-Doping Code) have been applied in a fashion which is in harmony with the approach to the Code worldwide.

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[20] The Sports Tribunal existence is continued under the Sports Anti-Doping Act 2006.
[21] While the Tribunal's provide for the hearing of anti-doping rule violations under the Sports Anti-Doping Rules ("**SADR**"), the SADR are only effective by agreement, as is the reference of anti-doping rule violation proceedings to the Tribunal.
[22] For the Tribunal's work, see website www.sportstribunal.org.nz and the Tribunal report for 2008.
[23] Under the old legislation, repealed by the Sports Anti-Doping Act 2006, the question whether a doping infraction had been committed was decided by the Board of the Sports Drug Agency. This determination was noted on a register, then referred to the sport in question to deal with questions of ineligibility under its rules. The athlete had appeal rights to the District Court from the determination by the Agency. This has now been replaced by a system in which Drug Free Sport New Zealand refers an allegation to the Sports Tribunal for determination under the SADR.

Areas of concern

24. This shift away from national courts systems to arbitration has not taken place without some concerns being raised, although there has been surprisingly little general objection to a system which sees the "day in court" for an athlete like Floyd Landis or Oscar Pistorius take place before CAS, and not the national courts of the athlete's own country.[24] The underlying reason for this has, perhaps, been the general acceptance, at national and international level of the need to have specialist tribunals for sports-related disputes, and the growing trust which is placed in arbitration generally, and in CAS specifically. The general trust in arbitration is exemplified by the widespread acceptance of the international Conventions relating to arbitration.[25]

25. The main concerns have related to the difficulty of access to CAS awards and the cost of the CAS process where CAS Rules on costs are applied.[26] To a certain extent, the availability of CAS awards has now been (somewhat belatedly) addressed by the publication of previous CAS awards on the CAS website in a searchable archive. If CAS is to perform its central function as a kind of "Supreme Court" for Sport, particularly in such areas as anti-doping, where harmony and the development of consistency between the decisions of arbitral panels, access to previous decisions is essential.[27]

26. In Australia, where CAS is used by sports in its Ordinary Division as a first instance tribunal, as well as for appeals, concern has been expressed that the requirement of the CAS Rules, which requires payments in advance for arbitration costs, works against athletes with limited resources, and can be a barrier to the use of CAS.[28] The cost of access to CAS and the different domestic tribunals which currently have to deal with such matters as anti-doping allegations, has lead to renewed consideration of the possible establishment of a national sports tribunal in Australia, so that low cost access to a specialist forum for dispute resolution can be provided to all.

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[24] As noted, recourse to national courts will only be available on narrow grounds where the athlete seeks to challenge a CAS award on appeal. Similarly, the grounds to resist the enforcement of an award will be narrow where the New York Convention applies. See, eg. *Mary Decker Slaney v IAAF & USOC*, 244 F 3d 580

[25] For a consideration of the way in which CAS has been accepted internationally by many countries (and the reasons for this) without the same concerns being expressed about loss of sovereignty as with agreement to trials in such *fora* as the International Criminal Court - *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, *Abbas Ravjani Journal of International Media and Entertainment Law* Vol 2 No 2 page 241 – 283.

[26] See, eg. *The Rule of Law and Sporting Justice*, Paul J Hayes, Editorial ANZSLJ (2007) Vol 2 No.1.

[27] There is, of course, a tension between the usual confidentiality of arbitration and the need to publish decisions if they are to have general use. Where the Code applies, the parties will have agreed to publication of the decision, although the hearing process will be confidential. For the CAS Rules, see, CAS Code of Procedure, Rule 43 Ordinary Division – decision confidential unless parties otherwise agree – and, Rule 59, Appeal Division – decision made public, unless parties agree confidential.

[28] CAS Procedural Rules, Rule 64.2.

27. The difficulty of access to CAS awards has been a significant problem, and it is plain that, if sport is to develop and maintain its own specialist body of legal principle in areas such as anti-doping and selection, in a manner which is consistent with the general principles concerning access to the law, there must be a consistent effort in this area. Generally, the trust which has been placed in CAS by sporting organisations and their members will have to continue to be generated by the production of sound legal decisions which are available to those who advise in the area.

Role of courts

28. The specialist sporting tribunals, whether internal or independent, have provided dispute resolution mechanisms for sports-related matters at national and international level, which were either simply not brought before the courts in the past, or which arose in areas where the courts were reluctant to tread. However, national courts are far from going out of business in the sporting area. Where a dispute is the subject of an agreed referral to a tribunal amounting to an arbitration agreement, a national court may have a significant role in supervising the arbitral proceedings. A national court may also have to consider applications to stay proceedings[29] brought in breach of an arbitration clause, and challenges to arbitration awards, whether on appeal, or a challenge to enforcement, by reference to the applicable legal principles.

29. Where there is no applicable arbitration agreement, the courts will continue to have jurisdiction over the decisions of domestic sporting tribunals, usually as a matter of private law, by reason of the contractual nexus between the parties (with principles of fairness or natural justice drawn from public law implied into the contract) or by way of judicial review proceedings. Outside this supervisory jurisdiction a wide, ever-increasing, range of cases across all aspects of sporting activity - contractual disputes, claims for wrongful exclusion from sporting opportunity or competition, competition law claims - will continue. Even in specialist sporting areas such as anti-doping, although the parties have agreed to the application of the World Anti-Doping Code, the law of a State, in particular its constitutional protections, may allow a party to challenge the anti-doping regime on constitutional grounds before the national courts or before supra-national tribunals or courts such as the European Court.[30]

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[29] *Raguz v Sullivan*, *infra*.

[30] See an example of the challenges to anti-doping rules on the basis that they contravened EC law on economic freedom, Case C-519/04 P, *Meca-Medina and Majcen v Commission of European Communities.* The recent New Zealand case of *Cropp v Judicial Committee* [2008] 3 NZLR 774 is an example of a challenge by way of judicial review proceedings based on Bill of Rights grounds to anti-doping regulations under a domestic statutory regime. The case did not involve a regime based on World Anti-Doping Code.

30. While the growth of specialist tribunals serving the needs of sport, whether arbitral or internal domestic tribunals, is continuing at a time when national courts are probably more aware of the importance of sporting disputes and the need to hear and determine them, the movement has considerable momentum and appears destined to continue. While there will always be limits to the scope of challenge to sporting decisions, even where specialist tribunals have jurisdiction, the specialist tribunals have the advantage of providing a clearly established path for an aggrieved party and can provide a review of a sporting decision by arbitrators who are specialised in the field.

Concluding comments

31. The challenge for the lawyer who becomes involved in this area is to acquire knowledge of the rules under which the specialist tribunals operate, and the legal principles which will be applied. There is a developing body of law which, while possibly not capable of being described as "sports law", has seen the making of sport specific regimes such as the World Anti-Doping Code and does contain some particular principles which will be applied to sports disputes by specialist tribunals. In addition, to borrow from Bill Shankly, while lawyers need first and foremost to know the law, it helps if they, at least, understand the game.

32. The presentations by the distinguished speakers who follow will provide a more detailed assessment of the work of CAS and the Sports Tribunal of New Zealand.

Paul David
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HEARINGS UNDER CODE