

# SUCCESS



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# THE GAMES AND THE LAW. THE CAS AD HOC DIVISION

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# THE RATIONALE

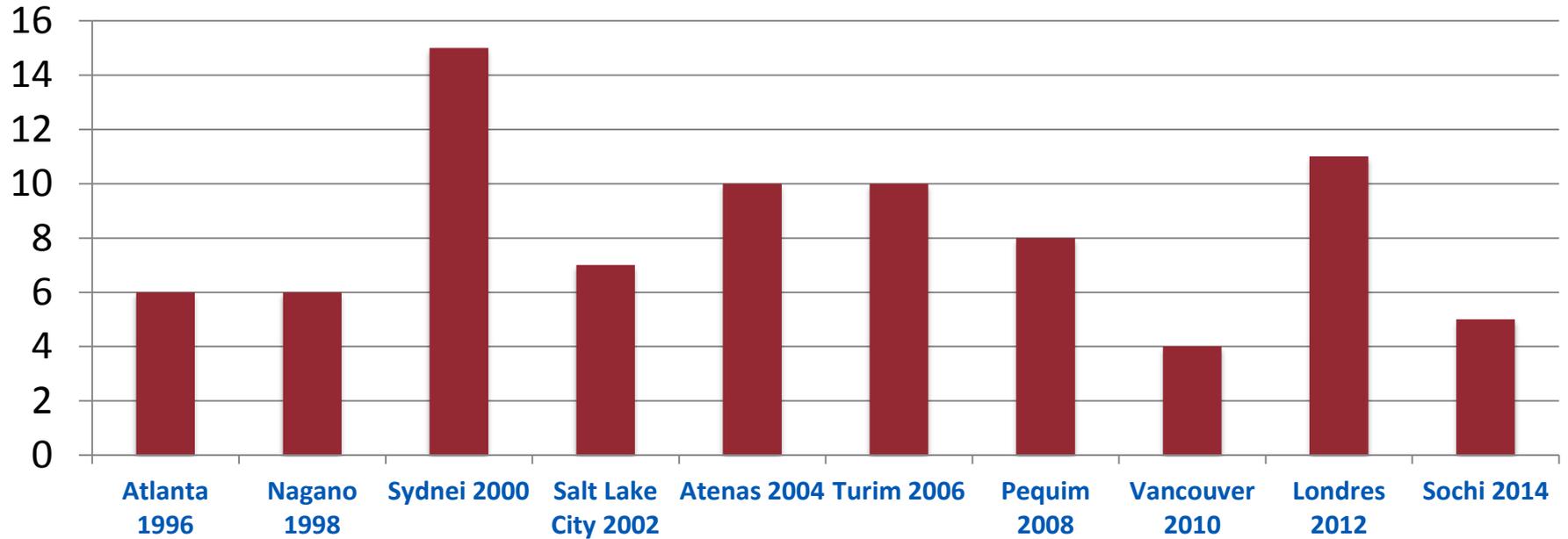
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## The Lazutina / Danilova case

*“In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events, that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues (...). Thanks in particular to the creation of ad hoc divisions, [CAS] enables the parties concerned to obtain a decision quickly, following a hearing conducted by persons with legal training and recognized expertise in the field of sport, whilst protecting their right to a fair hearing”.*

# HISTORY

## Cases Ruled by the *Ad Hoc* Division



# MATTERS

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## **Disputes before *Ad Hoc* Division mostly relate to:**

- Eligibility of athletes or teams
- Qualification of athletes or teams
- Nationality
- Doping
- Jurisdiction
- Results of competitions (Field of Play doctrine)

# Fair, Fast and Free

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## Organization:

- The CAS headquarters in Rio 2016
- The 12 arbitrators
- The CAS Anti-Doping Division arbitrators
- Assisting the Panel:
  - ✓ Experts
  - ✓ Interpreters
  - ✓ Translators
  - ✓ Assistants

# The Parties

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## Who may be a Party?

- Athletes
- Coaches and *staff*
- IOC
- NOCs
- IFs
- NFs
- WADA
- Others (NADOs, etc)

## Interested parties

- “[T]he defending party has standing to be sued (*légitimation passive*) if it is personally obliged by the ‘disputed right’ at stake (see CAS 2006/A/1206 [...]). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it”. (CAS 2006/A/1189 and CAS 2006/A/1192)

# Jurisdiction

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## The CAS Code – *Arbitration Rules for the Olympic Games*

### “Art. 1 – Application of the Present Rules and Jurisdiction of the CAS

*The purpose of the present Rules is to provide, in the interest of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise **during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.***

*In case of a request for arbitration against a decision pronounced by the IOC, an NOC, an IF or an OCOG, the claimant must, before filing such request, have **exhausted all the internal remedies** available to her/him pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”.*

# Jurisdiction

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## Art. 61 of the Olympic Charter

*“The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).*

*Any dispute arising **on the occasion of, or in connection with,** the Olympic Games shall be submitted exclusively to the [CAS], in accordance with [its Code]”.*

## The Entry Form

## The IFs Regulations

- Art. 57 FIFA Statutes
- Art. 15 IAAF Statutes
- Art. 74 *and ff.* UCI Bye-Laws
- Art. C26 FINA Bye-Laws



# Jurisdiction

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## **Jurisdiction *ratione temporis***

- From 26/07 to 21/08/2016

## **Jurisdiction *ratione materiae***

- Salt Lake City (2002): The *PETA* case (*People for the Ethical Treatment of Animals*) vs. *OCOG*

## **Jurisdiction *ratione personae***

- Issue with athletes not qualified and that, therefore, did not sign the entry form (CAS OG 06/002 *Andrea Schuler vs. Swiss NOC & Swiss Ski*)

# The Powers of the Tribunal

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## The *'de novo'* principle

### ***“Art. 16 – The Panel’s Power to Review***

*The Panel shall have full power to establish the facts on which the application is based”.*

## The curing effect of the appeal to CAS

*“[A]ny infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised”. (CAS 2006/A/1177 e CAS 2009/A/1920)*

# Lex Arbitri

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## The Seat of the Arbitration

- **Chapter 12 of the Swiss Private International Law Act (“PILA”)**
- **Switzerland:**
  - Headquarters of IOC and IFs
  - Stability and legal certainty
  - Autonomy and freedom granted to associations
  - Arbitration friendly

# Lex Arbitri

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- **Arbitrability (Art. 177 PILA)**

*“Any dispute of financial interest may be the subject of an arbitration”.*

➤ *“Est de nature patrimoniale au sens de cette disposition toute prétention qui a une valeur pécuniaire pour les parties, à titre d’actif ou de passif, autrement dit tout qui présente, pour l’une au moins des parties, un intérêt pouvant être apprécié en argent”. (ATF 118 II 353, 356)*

# Applicable Law

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## Substantive Applicable Law

- The olympic charter
- The Applicable Regulations
- General principles of law (e.g. *ne bis in idem*, *res judicata*, proportionality, interpretation principles, etc)
- Rules the application of which the Panel shall deem appropriate
  - National law (**IMPORTANT**: existence of the rule shall be proven)
  - *Lex mercatoria*
  - *Lex sportiva*
  - International public law

# The Olympic Charter

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## Main Purposes

- Foundations of the *Olympic Movement*, sets forth and recalls the Fundamental Principles and essential values of the *Olympism*
- IOC Statutes
- Defines the main reciprocal rights and obligations of the main constituents of the *Olympic Movement*: the IOC, the Ifs and the NOCs, as well as the OCOG

# The Olympic Charter

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## Nationality of Athletes (R41 and BLRs)

### *“41 Nationality of competitors*

*1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor*

### **BLR 41**

*1. A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. (...)*

*2. A **competitor who has represented one country in the Olympic Games**, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has **changed his nationality or acquired a new nationality**, may participate in the Olympic Games to represent his new country provided that at least **three years have passed** since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case”.*

# The Olympic Charter

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## Qualification of Athletes or Teams (R40 and BLRs)

### ***“40 Participation in the Olympic Games***

*To participate in the Olympic Games, a competitor, team, official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC.*

# The Olympic Charter

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## **BLR 40**

- 1. Each IF establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.*
- 2. The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.*

# The Olympic Charter

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## Athletes Selection (BLR 2.1 to R27 and R28)

**“2. NOCs’ tasks:**

*The NOCs perform the following tasks:*

**2.1** *They constitute, organise and lead their respective delegations at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. **They decide upon the entry of athletes proposed by their respective national federations.** Such selection shall be based not only on the sports performance of an athlete, but also on his ability to serve as an example to the sporting youth of his country. The NOCs must ensure that the entries proposed by the national federations comply in all respects with the provisions of the Olympic Charter”.*

**Objective criteria vs. Subjective criteria (Case Schuler vs. Case Dal Balcon)**

# The Selection Disputes

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## Objective Versus Discretionary Selection Criteria

- If the selection criteria are exclusively objective, the CAS will review the selection decision without restrictions.
- If, by way of contrast, the selection criteria entail a subjective assessment by the selection body, the CAS will limit its review to whether
  - ✓ The selection body has exceeded the limit of that discretion
  - ✓ Whether it has been exercised in a reasonable, fair and non-discriminatory manner.

# Stay of Decision and Preliminary Measures

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- **Competence**
- **Requirements**
  - Likelihood of success (*fumus boni iuris*)
  - Risk of irreparable harm [or hardly reparable?] (*periculum in mora*)
  - Balance of individual and common interests (between the parties and in relation to the “Olympic Community”!)
- **Exceptional: *inaudita altera pars***

# The Arbitral Tribunal

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## 3 arbitrators or Sole Arbitrator

**Appointed by the President or, when required, by the Co-President of the *Ad Hoc* Division**

## **Possibility of consolidating 2 or more cases. Criteria:**

- Circumstances of the cases
- Relation between the two cases
- Progress already made in the first case

## **Possibility to challenge the appointment**

# Principles of Natural Justice

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## Impartiality of the Arbitral Tribunal

- Independence requirement
- Disclosure duty
- Removal proceedings

# Principles of Natural Justice

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## **Equal treatment and opportunity to present one's case**

- Notice of proceedings
- Evidence and oral submissions at hearing
- Possibility to extend 24 hour time-limit for award
- Possibility to refer the dispute to usual CAS proceedings extending beyond the Games

# Effectiveness

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## How to give a decision in 24 hours?

- Notices given by fax, telephone and e-mail
- Hearings called on a few hours notice (verified by phone call)
- Parties not involved in the constitution of the Panel (President appoints the arbitrators; conflicts are checked in advance)
- No written pleadings except for Request for Arbitration (in Standard Form)
- Single hearing as a rule

# Effectiveness

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## Accelerating the decision-making process

- Operative part of the Award may be communicated before the reasons
- Interim Relief if 24 hours is too long
- Whenever possible, reference to national law governing the merits of the dispute is avoided (global nature of Olympics)

# THANK YOU FOR YOUR ATTENTION

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