Degrees of Intervention In Sport-Specific Arbitration: Are We Moving Towards a Universal Model of Decision-Making?

by

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I. INTRODUCTION

Independent and specialized dispute resolution is an accepted and integral part of the sport bureaucracy internationally and, increasingly so, within national sport systems. Independent arbitration has been operating in the United States since 19781 and in the People’s Republic of China since 1995.2 The United Kingdom, Australia, New Zealand, Japan and Canada,7 have all introduced independent, sport-specific systems of dispute resolution in the last decade. Internationally, the Court of Arbitration for Sport (CAS), which first emerged in 1983, is globally recognized as the authoritative and highest tribunal for arbitrating international sport disputes.8

The most commonly used process of dispute resolution among countries having introduced such systems has been arbitration. Some have aligned their arbitral process with CAS. New Zealand, for example, allows an appeal to CAS subsequent to its own arbitral process.9 The Canadian arbitration process is “final and binding” with no

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1 Legislation entitled Amateur Sport Act of 1978 provides for certain enumerated disputes to be referred to independent third party dispute resolution through the American Arbitration Association (AAA).

2 Legislation entitled Sports Law of the People’s Republic of China provides for the private arbitration and mediation of sport disputes.

3 United Kingdom, the Sports Dispute Resolution Panel (SDRP), now known as Sport Resolutions, was established in 2000 (http://www.sportresolutions.co.uk).


7 Sport Dispute Resolution Centre of Canada (SDRCC) began operating on a permanent basis in 2004.


recourse to CAS, although its procedures, including the scope of review and the remedial powers conferred to its arbitrators, are modeled after CAS.\(^\text{10}\) Other nations, including the United States for example, have fashioned their arbitral process without reference to CAS. Regardless of style, there appears to be emerging a universality of form to arbitral processes which brings a commonality to the arbitral decision-making process.\(^\text{11}\)

Since its beginning, CAS has produced an increasingly prolific and robust body of case law at the international level of sport. It has spurred some to describe CAS in judicial terms as the “Supreme Court of World Sport,”\(^\text{12}\) and its decisions as a form of *lex sportiva* or, as some have described it, an emerging new substantive legal order.\(^\text{13}\) More recently, however, the view that CAS decisions form a *lex sportiva* is being replaced by a more complex and nuanced interpretation of its decisions. This new interpretation reflects the application of a number of diverse and universal principles of law and the incorporation of multiple forms and degrees of intervention by CAS, all of which increasingly inform and influence the rules and operations of international sport federations (IFs).\(^\text{14}\) Erbsen argues that a pattern of intervention is emerging from the body of CAS jurisprudence that can be traced across the full range of disputes over which it presides.\(^\text{15}\) He suggests that the application and specific “tailoring” of general principles of law to the international sport context is creating a “nominally unique *Lex Sportiva*”. While the decisions of CAS have become increasingly self-referent, and some suggest that they have taken on *de facto* precedential value at the international,\(^\text{16}\) and even national levels of sport, it might be argued that one of the particularly significant values of CAS jurisprudence is found not in the outcome of decisions themselves, but in the *pattern* of intervention of arbitrators into the affairs of sport governing bodies.\(^\text{17}\)


\(^{15}\) *Id.* at 443.


\(^{17}\) Erbsen, *supra* note 14.
Notwithstanding the broad power given to arbitrators through the CAS Code of Procedure, a definite pattern of restraint and increasing levels of intervention can be identified. Rule 57 of the CAS Code vests arbitrators with the power and discretion to substitute their own decisions for those of other sport authorities, thus enabling it to constrain and even overrule the application of a sport body’s own rule or regulation. In practice, however, CAS arbitrators have exhibited a restrained, though purposive, interpretation of sport policies and regulations. In doing so, CAS arbitrators not only recognize the authority of sport governing bodies to define policy and administer their own affairs, but also seek to ensure that universal principles of fairness and good governance are recognized and respected. It is from this pattern of restraint that general principles of intervention can be identified to help describe the jurisprudence of CAS.

An examination of this pattern of intervention by CAS is useful to ensure that international sport arbitration is consistent, predictable, and fair. Numerous legal commentators have discussed both the value and need of having such a unitary and consistent system of sport dispute resolution internationally. It also raises questions regarding other sport dispute resolution processes: is a similar pattern of intervention reflected in other national sport-specific arbitral systems? If so, does it point to an increasingly universal approach to arbitral decision-making both internationally and nationally?

II. ARBITRAL INTERVENTION BY CAS

The means of intervention used by CAS are found in the rules and laws governing arbitration. According to Straubel, there are three categories of procedural and substantive law necessary for a proper system of arbitration: first, primary procedural rules and substantive laws govern arbitrators in the decision-making process; second, a back-up choice of law is necessary to fill the gaps that invariably occur in the primary procedural and substantive laws, either through lapses in the drafting or the execution of such laws; and third, a body of mandatory law that will ensure that the arbitral process itself is guided by and protects basic notions of fairness or due process. CAS is divided into two main divisions: the Ordinary Division and the Appeals Division. The Ordinary

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19 Id. at R57 which states, in part: “The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance...”.
21 Erbsen, supra note 14; Kaufman, supra note 11.
23 Straubel, supra note 20, at 1247.
24 There are two other aspects to CAS: the consultative function wherein Advisory Opinions are rendered, and the mediation procedure.
Division resolves sport-related disputes referred to it by way of first instance. The primary procedural rules are those of the CAS Code, and the primary substantive law is that which has been agreed upon by the parties, including the option of authorizing CAS to decide the matter ex aequo et bono (in a just and equitable manner). In default of any such choice, the matter will be heard according to Swiss law. The Appeals Division of CAS resolves disputes arising as appeals from decisions of sport bodies. The primary procedural rules are again those of the CAS Code, and the primary substantive law is chosen by the parties; typically the rules and regulations of the sport body whose decision is being appealed (an IF or WADA, for example). Failing such choice, a matter will be heard according to the law of the country in which the sport body whose decision is being appealed is domiciled, or according to the rules of law the Panel deems appropriate. For both the Ordinary and Appeals Divisions, general principles of law and universal doctrines of construction are used to fill any gaps in substantive rules or augment standards of procedural fairness so as to ensure an appropriate and fair decision. Finally, the domestic law of Switzerland, the legal seat of CAS, provides the legal backdrop against which standards of fairness for the arbitral process are measured.

It is within this context of a mix of procedural and substantive rules, regulations and laws that Erbsen describes a model of deference to the authoritative texts of sport, but one that authorizes an arbitrator to interfere with such texts in varying degrees, where deference would not otherwise accord with core principles of fairness and equity. At the first stage of Erbsen’s model, CAS is the least interventionist, or, described differently, most deferential to sport organizations. Where the impugned rule, regulation or policy of a sport body dealing with a particular situation in dispute is clear and unambiguous, CAS arbitrators will respect such a provision, without any particular judgment of its substantive soundness. It is within this stage that CAS recognizes the independent authority of a sport body based on the contractual relationship between the body and its members.

As Erbsen notes, “[CAS] functions as an enforcer of norms negotiated by the parties. . . .” Even where such rules or regulations do not accord with the preferred norms of CAS, there is a reluctance to intervene. In doping cases, for example, CAS has preferred flexibility and proportionality in doping sanctions, but nonetheless, as one Panel writes: It is for individual governing bodies to determine whether or not it is appropriate to . . . allow flexibility in deciding sanctions and penalties. [We] would not

25 Supra note 18, at R 27 and R 47.
26 Id. at R 45.
27 Id. at R 47.
28 World Anti-Doping Agency.
29 Supra note 18, at R 58.
30 Beloff, et al. supra, note 22; Straubel, supra note 20, at 1249.
31 Supra note 18, at R 28.
32 Supra note 14.
33 Even where it may be argued that a party has little opportunity to negotiate the terms of the contract, the rules and regulations of the organization nonetheless act as a form of “legislative code” (see Straubel, supra note 20, at 259).
34 Supra note 14, at 441.
presume to substitute any other rule for the inflexible one chosen for better or worse by the [sport federation].

In accordance with this preference for non-intervention, CAS arbitrators prefer to use the interpretive flexibility allowed by a rule rather than use their abundant authority and simply invalidate the rule. In other words, where it is possible, CAS will fashion a decision within the bounds allowed by the rule rather than simply strike it down.

Despite this deferential approach to the interpretation and application of a clear rule or regulation, CAS will intervene, regardless of the textual clarity of a rule, regulation or policy, in situations where a particular act has not been authorized or, alternatively, an improper or unauthorized party engages in a permitted act. This approach reflects CAS arbitrator’s role of ensuring good governance. There must be clear authority for an organization or individual to act, otherwise the act will be found void and of no force or effect. This approach has been most evident in the context of disciplinary matters. In USA Shooting & Q v. International Shooting Union (UIT), for example, the CAS Panel writes at p. 184:

Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion.

Turning to the second stage of Erbsen’s model, CAS takes a more interventionist stance whereby it will set aside a textual rule of a sport body if, in the view of the panel, it contravenes some core notion of justice or equity. In describing this stage, Erbsen suggests that CAS has a role in delineating the outer limits of regulatory authority, or discretion, exercised by a sport body under its governing documents, beyond which it loses its decision-making authority. CAS will take steps to intervene where these limits are exceeded. Erbsen notes, however, that “panels claim this authority more often than they exercise it” but provides little commentary about what might describe these limits.

37 See, for example, Rebagliati v. International Olympic Committee, OG 98/002 (February 12, 1998), 1 DIGEST OF CAS AWARDS 1986-1998, at 419 (Matthieu Reeb ed.,1998), where the athlete, a snowboarder in the Winter Olympics in Nagano, tested positive for marijuana and was disqualified by FIS (Fédération Internationale de Ski), the relevant sport governing body. CAS held that marijuana was not on the banned substance list of FIS and there was thus no authorized or legal basis on which to find a doping infraction.
39 Supra note 14, at 441.
40 Id. at 453.
For instance, he does reference the decision in *Poll v. FINA*, noting “CAS has left open the possibility that a ‘gross violation’ of general scientific standards might invalidate even a textually authorized laboratory procedure, but has not indicated how it would determine when such a violation has occurred.”

At Erbsen’s third stage, although a textual rule may be properly constituted, its terms may be vague, ambiguous or incomplete. CAS arbitrators will intervene in an attempt to interpret the provision using basic principles of legal interpretation. In other words, CAS will use universal principles of construction to aid its interpretation. For example, ambiguous texts will typically be construed against the drafter (*in dubio contra proferentum*), no penalty will be assessed in the absence of a law or rule mandating it (*nulla poena sine lege* – “no penalty without a law”) and, sanctions must be in proportion to the misconduct (*proportionality of sanctions*), among others. In other instances, textual rules may be properly constituted and clear in their drafting, but conflict with those of other applicable bodies within the regulatory hierarchy of sport. CAS arbitrators will prioritize the application of such competing provisions. The interpretation of ambiguous or conflicting provisions then serves as a form of “precedent” in subsequent CAS decisions. This is in accordance with CAS rules that permit panels to fall back on supplementary sources of law, including the laws of the domestic legal system or any rule of law the panel deems appropriate.

Applying the fourth and final level of his model, Erbsen suggests that where there is a “textual gap,” that is, no clear rule or provision on which to properly fall back on, or even one from which the application can be construed, CAS “infers from the parties ‘grant of jurisdiction’ [to the arbitrator] that it has the power to create common law filling the textual gap.” Arbitrators thus substitute their own decisions based largely on generally and universally accepted principles of fairness and equity, past decisions in similar cases (Erbsen’s stage three, above), or past experiences of the arbitrator. Such decisions then become the basis to guide future interpretations of the same or similar rules.

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42 Erbsen, supra note 14, at 449.
44 *Supra* note 18, at R45 & R58.
45 While Ebsen (*supra* note 14) focuses on the use of such supplementary sources in the interpretation of IF rules, Straubel (*supra* note 20, at 1254-1255) adds two other areas of interpretation by CAS arbitrators - in the application of procedural rules and doctrines and in ensuring the requirements of fairness, or due process, are met.
46 *Supra* note 14, at 442.
49 Straubel (*supra* note 20, at 1255) expresses concern about the reliability and credibility of this ‘interstitial’ decision-making: “While an arbitrator’s personal experience may be sufficient to fill some gaps in the law, relying on this personal input for qualified, fair decisions bets the entire process on the luck of finding a sufficiently experienced arbitral panel. It certainly does not enhance the credibility or legitimacy of the arbitration process” and can presumably lead to
Erbsen suggests this model reflects an approach to arbitration that crosses virtually all subject matters of CAS decision-making, including doping matters, reviewability of “on-field” decisions,\textsuperscript{50} athlete selection, and commercial issues.\textsuperscript{51} Essentially, Erbsen posits a pattern of decision-making that reflects a clear and primary deference to what he refers to as the “textual sources of positive law,”\textsuperscript{52} that is, the governing rules, regulations and policies of the sport organization. He then proposes the development of a form of interstitial common law where the primary organizational rules and regulations (i.e., the authoritative texts), although clear and unambiguous, offend core precepts of fairness as held by CAS, through the application of supplementary sources of law based on principles of justice and equity. He then invokes the use of these same supplementary sources of law for the construction of ambiguous, vague, incomplete or competing texts in order to apply the relevant, but flawed, text. Finally, where there is simply no guiding text, adjudicators will infer a grant of authority to fill, in their discretion, such gaps, using principles emerging from past CAS decisions and basic principles of due process and equity.

We would suggest Erbsen’s model reflects a deliberate pattern of increasing intervention, by CAS, into the rule making authority of sport bodies. It is a model that, although is not necessarily at odds with the broad authority granted to CAS arbitrators under its Rules of Procedure, generally affords deference to the authority of sport bodies to lawfully govern their affairs, yet retains the power to intervene in varying degrees, where this does not occur.

\section*{III. Arbitral Intervention in a National Process}

\textsuperscript{50} Erbsen’s model may not be applicable to the full scope of 'on-field' decisions. CAS has expressed extreme reluctance to intervene in 'on-field' decisions, limiting its intervention to situations where corruption or bad faith is apparent, as per Segura \textit{v.} IAAF CAS OG 00/013 (September 30, 2000), 2 DIGEST OF CAS AWARDS 1998-2000, at 680 (Matthieu Reeb ed., 2002). However, this reluctance to interfere in 'on-field' decisions does not arise out of respect for the authoritativeness of a textual rule (which Erbsen’s model is centred around), but rather a variety of other factors, including the need for certainty or finality in outcome, an arbitrator’s lack of expertise in the technical aspects of sport, and the subjective nature of many 'on-field' decisions: see Yang \textit{v.} International Gymnastics Federation (FIG), CAS 2004 / A/ 704 (October 21, 2004), 2 DIGEST OF CAS AWARDS 1998-2000, at 680 (Matthieu Reeb ed., 2002).

\textsuperscript{51} Supra note 14, at p. 443.

\textsuperscript{52} Id. at 447.
Using Erbsen’s framework, the second part of this paper focuses on an analysis of the jurisprudence of a national sport-specific arbitration process. A number of national sport-specific arbitral processes have now been operating for a sufficient period of time to accumulate a significant body of case law. Not all, in fact few, have made such decisions public, making a comprehensive analysis difficult. The Canadian system has, however, published all of its awards and thus provides a useful corpus of decisions from which patterns of decision-making might be evident. Since its inception some 119 decisions have been rendered, and all are public.53

The following section will first introduce the Canadian sport-specific arbitral process, discussing its intended focus and its rules of arbitration. It will then analyze the jurisprudence emerging from the arbitral process through the analytical lens of Erbsen’s framework. Finally, it will compare the pattern of Canadian arbitrator decision-making with that of CAS, in terms of the degree of arbitral intervention and other discrete emergent patterns of decision-making.

A. Sport Arbitration in the Canadian System

A process of sport-specific arbitration was introduced into the Canadian national sport system in 2000.54 The legislatively-mandated body responsible for managing the process is known as the Sport Dispute Resolution Centre of Canada (SDRCC). National sport organizations (NSOs) receiving government funding are required to incorporate a national sport-specific process of arbitration as a part of their own internal dispute resolution policies.55 As a significant majority of sport bodies within the Canadian sport system are dependent on government funds, the arbitral process, for all intents and purposes, is a mandatory one. This is also true for national athletes who are bound to the arbitral process through athlete agreements, which all national-level athletes must sign. Although the rules of arbitration allow parties to waive the internal appeal process, the arbitration is intended to operate subsequent to any internal appeal within the NSO.56 Parties do, on occasion, waive the internal appeal process because of tight timelines to process such a hearing, as in the case of selection disputes where a competition is imminent, or for reasons of administrative expediency and cost.57

53 Decisions can be found at: http://www.crdsc-sdrc.ca/eng/dispute-resolution-decisions.jsp.
54 An informal, non-mandatory, system of arbitration has been operating at the national level in Canada since 1995. Most of these decisions are available through the SDRCC database.
55 The requirement operates only with regard to national level decisions. Provincial or local sport bodies may bring disputes to the SDRCC through payment of a user fee to SDRCC.
57 While the internal appeal has been waived in the past, particularly in the lead-up to the Athens Olympic Games in 2004, Adjudicator Pound at p. 8 in Sodhi v. Canadian Amateur Wrestling Association and Zilberman (ADR 03-0025, November 2003) puts the arbitration process of the Canadian program into perspective:

[T]he program is not designed to encourage resort to arbitration every time a decision taken by a NSO might be unfavourable or undesirable. Its primary objective is for decisions to be made by the persons best suited to making decisions affecting sport matters, but decisions should be made in accordance with the rules applicable to everyone, with an internal recourse that will ensure an impartial review of those decisions where challenges to them are properly
Since the inauguration of the formal arbitral process, all decisions have been published in a database and are available to the public. After eight years, a substantial body of decisions has accumulated and, even though arbitral awards do not carry the same precedent weight as judicial decisions, there is clear evidence that both SDRCC arbitrators and parties using the process increasingly rely on decisions and commentary from previous cases decided by SDRCC.\(^{58}\) It seems likely that this growing body of Canadian jurisprudence is having an impact on the policies (particularly selection policies) and the decision-making of NSOs and other sport bodies subject to the jurisdiction of the SDRCC (e.g., Sport Canada\(^ {59}\) and the Canadian Olympic Committee), by bringing some degree of consistency and “know-ability” to the sport arbitral process at the national level.\(^ {60}\)

The intended function of the Canadian sport arbitral process was set out in the report of the original working group studying and advising on the implementation of a national dispute resolution system.\(^ {61}\) The “Study Group” felt strongly that in too many cases the rights of athletes and coaches to procedural fairness, or natural justice,\(^ {62}\) were being violated, and even ignored, by NSOs.\(^ {63}\) Quoting from the Report,\(^ {64}\) “Where the Work Group saw the need for dramatic improvement is where the right to natural justice is jeopardized by inconsistencies and deficiencies in an organization’s policies and procedures or where decision-makers lack proper knowledge [to make decisions in accordance with the principles of natural justice].”

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\(^{58}\) For example, in *Mayer v. CFF* (SDRCC 08-0077, May 2008). Adjudicator Pound makes reference to the growing body of jurisprudence and the deference one adjudicator will show to another “in the form of respect for decisions reached by its [SDRCC] adjudicators” (p.11).

\(^{59}\) The government department responsible for sport at the national level in Canada.

\(^{60}\) While no formal studies have been carried out, Sport Canada policy has changed its appeal process for athlete assistance funding and many sport bodies have modified various policies following arbitral decisions of the SDRCC.


\(^{62}\) “Procedural fairness” is typically thought of as a part of the broader term “natural justice”. “Procedural fairness” is a term used in Canada but more commonly referred to as “due process” in the United States.


\(^{64}\) *Id.* at 8.
Thus, the intention was that substantive policy would remain the prerogative of the sport organization, but the role of the arbitrator would be to ensure that decisions were made fairly, in compliance with principles of procedural fairness and the policies of the organization. The anticipated role of arbitration in the Canadian sport system thus, theoretically, dove-tailed with that described by Erbsen in the context of CAS: arbitrators would respect the authority of sport bodies to create their own policies, rules and regulations. Only where those rules, policies and regulations were not clearly interpreted—where they were vague or ambiguous and susceptible to unfair application, or where they were unfairly or unjustly applied—would an arbitrator intervene.

The rules of the SDRCC arbitration process were modeled after those of CAS, albeit with several distinct differences. One major distinction stands out. Unlike a number of other arbitral processes which allow a further review by CAS itself (as is the case in the New Zealand process), the Canadian process is considered “final and binding,” subject only to judicial review before a domestic court in appropriate circumstances (Doping matters involving international-level athletes are an exception to this and are heard under a separate set of rules that do allow a further application to CAS. Such recourse to CAS has occurred once, in Adams v CCES). The scope of review permitted by the Canadian rules of arbitration do, in fact, mirror those of CAS. While not literally, or explicitly, a hearing de novo, the Canadian arbitral rule does allow for something akin to it. Similar to CAS Rule 57, Section 6.1 of the SDRCC procedural code states, inter alia, “[t]he Panel shall have full power to review the facts and the law.”

It was initially anticipated that procedural disputes, particularly in the arena of selection matters, would make up a significant proportion of the arbitral workload of SDRCC arbitrators, although other types of issues were also expected, including contractual disputes of a commercial nature (i.e., sponsorship issues and trademark disputes), harassment, doping, eligibility, discipline matters, employment disputes—indeed, virtually any kind of dispute arising within a sport context. In retrospect, the scope of disputes coming to arbitration has been largely limited to selection and, to a lesser extent, discipline matters. In June 2004, it became mandatory for all doping disputes to be referred to the arbitration process. Since then, doping matters are increasingly taking precedent over other types of disputes, as is the case with other sport arbitral processes—including CAS. Doping disputes are dealt with under a separate set of rules and follow a different progression than other disputes in the Canadian system. For example, doping disputes coming to the Canadian arbitral process have essentially related to applications for a reduction in penalties. As a result, doping disputes have not been included in this paper.

INSERT TABLE 1 HERE

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65 Supra note 14.
67 See note 16.
68 CAS Rule is virtually the same - see note 18.
69 Supra note 62.
70 Employment matters are typically addressed under legislation; it is not clear how commercial disputes might be considered – no guidelines, e.g., damages.
Table 1 sets out the number and nature of disputes by year of operation for the Canadian arbitration system.

B. Analysis of SDRCC Arbitral Decisions

The varying degrees of adjudicative intervention found in CAS decisions fall along a spectrum. At the most deferential end of the spectrum is complete non-intervention by an arbitrator. As one moves down this spectrum, CAS arbitrators increasingly interfere with the decisions of sport bodies to the point of complete intervention, thus reflecting Erbsen’s four-part model. In this context, complete intervention involves interference with the substance of a sport body’s policy, regulation or by-law, to the point of their amendment by an arbitrator.

INSERT FIGURE 1 HERE

In many ways, SDRCC decisions follow a parallel spectrum of interventionism (see Figure 2), with its own arbitrators similarly acting as either an enforcer of textual sources of positive law or a source of positive law based on its own normative preferences for how sport should be regulated in Canada. The remainder of this section examines the existence of such a model within SDRCC arbitral awards, and is divided into five parts. Part one discusses SDRCC’s application of clear authoritative texts—such as an agreement, regulation or by-law—to resolve a dispute, without any substantive analysis as to whether the textual rule is sound. It is here that SDRCC exercises restraint similar to CAS by refraining from commenting on the wisdom of a textual rule that creates dissonance with SDRCC’s own normative preferences. Part two discusses SDRCC’s ability to use its own normative preferences for how to best regulate a sporting matter to fill a gap in a textual rule. In contrast to CAS, SDRCC’s gap-filling role appears non-existent, which is suggestive of its relatively more deferential stance towards the authority of sport bodies. Part three examines instances where CAS and SDRCC attempt to interpret an applicable, but ambiguous text, to resolve a dispute and are forced to rely upon their interpretive skills or knowledge of the regulatory hierarchy of sport to do so. Finally, part four discusses the authority of CAS and SDRCC to supplant an otherwise authoritative text where it contravenes core notions of equity or procedural fairness, either in application or substance. It is here that CAS and SDRCC become the source of norms for the regulation of sport, which raises concerns as to what institutional role private arbitral systems, such as CAS and SDRCC, should assume in the context of national and international sport.

INSERT FIGURE 2 HERE

1. Applying Authoritative Texts

Where there is a clear and unambiguous provision that governs a disputed matter, such as a by-law, policy, regulation or contract between parties, SDRCC adjudicators will apply such provisions. This first stage of Erbsen’s model is most clearly and often reflected in selection disputes before SDRCC.
A series of nine selection cases preceding the 2004 Summer Olympic Games in Athens illustrates and reinforces the position that selection criteria that are properly adopted and clear and unambiguous, will be respected and applied by an arbitrator. As part of the selection process, all athletes were required to meet the requirements and standards set out in the three schedules of the Olympic selection policy in order to be named to the Canadian Olympic Team. During the period of selection, a series of nine cases were brought to SDRCC disputing the criteria set out in a schedule to the policy relating to world ranking. The athletes raised various arguments in their challenges to the selection policy—all relating to the perceived unfairness of the substance of the schedule. Nevertheless, in all nine cases, arbitrators were not prepared to rewrite a selection policy that had been properly negotiated and implemented between the Canadian Olympic Committee and a NSO, and acknowledged by the athletes in an athlete agreement. Therefore, fundamental to SDRCC’s non-interventionist stance was an acceptance of the contractual nature of the relationship between the Canadian Olympic Committee, a NSO, and an athlete in the context of a selection policy. If the parties had freely negotiated and bargained for the terms in a selection agreement then, under the principle of freedom of contract, there could be no judicial interference with such terms, and all parties would be bound to their respective obligations under the agreement.

As Arbitrator McLaren writes in Badminton Canada and Milroy,

As an Arbitrator, I am called upon to primarily interpret or construe the agreement and in particular Schedule ‘A’. It is the role of an arbitrator to interpret the parties’ bargain as they drafted it and the words they used. It is not the role of an arbitrator to construct the bargain or reconstruct it. That is the role of the parties to negotiate an agreement or renegotiate it.

[The Appellant] is essentially asking me to rewrite the criteria to permit him to be nominated despite his not being qualified under Schedule ‘A’.

Similarly, in Shooting Federation of Canada v. Canadian Olympic Committee, the Arbitrator writes:

As arbitrator I have no authority, absent compelling legal grounds, to amend or rewrite the agreement the parties reached in their negotiations. It is the parties who decide what is in their negotiating interests. It is the

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71 See Badminton Canada and Milroy v. Canadian Olympic Committee, SDRCC 04-0005, July 2004 (the selection criteria was more stringent than a sport’s IF’s standards and was, therefore, unreasonable and arbitrary; in addition, the outcome of the criteria was not anticipated when the NSO agreed to the selection criteria); MacGillvary v. Swimming/Natation Canada, SDRCC 04-0020, July 2004 (the limited number of qualifying events or opportunities to meet the selection standards made the criteria unreasonable; also, a failure to select athletes because they had not met standards at the specified events, although they had qualified at other events, was unjustifiable; and finally, the athletes had no part in the actual negotiation of the criteria but were required to acknowledge the policy in order to participate in the selection process); Blais v. WTT Taekwondo Association of Canada, ADR 03-0016, May 2003 (the criteria placed an onerous and inappropriate hardship on an athlete who had been forced to change weight categories).

72 Supra note 71.

73 Id. at 8.

74 ADR 04-0029, April 2004, at 11.
parties who select the words to express the negotiated bargain they made. It is the task of the arbitrator to apply the language of their agreement to the actions of the parties to determine whether the agreement has been lived up to or improperly applied.

In summary, then, SDRCC arbitrators will interpret and apply a clear and unambiguous textual rule because of its contractual nature, thus mirroring the approach taken by CAS arbitrators. In giving deference to the textual rules established by sport governing bodies, both CAS and SDRCC serve as enforcers of the normative preferences of sport bodies over matters such as team selection and eligibility.

There is a difficulty in accepting this adjudicative approach, however, in that it obscures the power imbalance that may exist between parties to a selection agreement, particularly, that which exists between athletes and their respective sport bodies. It is this power imbalance that undermines the very justification for not interfering with a “freely negotiated agreement,” and has the effect of ignoring the weaker bargaining power of athletes within the sport system. This perspective is articulated by Foster\(^{75}\) in the context of international sport law and CAS, wherein he notes:

\[\text{Although the relationship between an international sporting federation and an athlete is nominally said to be contractual, the sociological analysis is entirely different. The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical relationship.}\]

This unbalanced power relationship is equally present at the national sport level between an athlete and his or her respective NSO. Athletes have little actual authority to participate in the bargaining or negotiation of an Olympic selection agreement, which occurs essentially between the Canadian Olympic Committee and a NSO. Instead, individual athletes are expected to accept the terms of a selection policy, as is, by signing an athlete agreement, which effectively bars them from later challenging such unilaterally imposed terms and conditions contained therein. In essence, then, a selection agreement becomes a contract of adhesion. While SDRCC has, to some degree, recognized this characterization of selection policies,\(^{76}\) it has yet to use this as a basis for setting aside a clear and unambiguous agreement containing terms and conditions that otherwise comply with core notions of justice and equity.\(^{77}\)

\(^{75}\) Foster, supra note 13, at 15-16.

\(^{76}\) See e.g. MacGillvary v. Swimming/Natation Canada, SDRCC, July 2004 supra note 71; Blais v. WTF Taekwondo Association of Canada, supra note 71, where the arbitrators recognized that athletes assented to the terms of the selection agreement under circumstances that bordered on duress.

\(^{77}\) Non-intervention by sport arbitrators would perhaps be better justified if the authoritative text governing selection is interpreted as “quasi-legislative”, rather than contractual. As noted by a British court in Breen v. AEU, [1972] 2 Q.B. 175, at 190, the rules of a sport body are “more than
This kind of deference to authoritative texts, such as selection policies, has not, however, prevented CAS and SDRCC from commenting on the wisdom of particular policies or regulations. It is generally accepted that policies relating to team eligibility, selection and appeals may not always be written by those skilled in draftsmanship. As a result, an IF or NSO can find itself in a dispute over a poorly drafted selection policy that, when implemented as written, has unintended consequences that neither party anticipated. While CAS and SDRCC arbitrators may be reticent, and may even refuse to rewrite any particular policy or regulation, they remain conscious of their educative role within the sport system by suggesting additions or amendments to a sport body’s existing rules and policies. Foster describes this ancillary educative role of CAS arbitrators:

The function of the Court of Arbitration for Sport . . . is not only to interpret the legislative codes of sports federations, but to select best examples and create a set of harmonized ‘best practice’ standards. These harmonized standards are then applied to all sport federations . . . by encouraging changes in these codes to incorporate ‘best practice’ standards.

It would seem that SDRCC has adopted a similar educative role when confronted with a textual rule that operates in a way that undermines the normative preferences of both sport bodies and arbitrators. In *Blais v. WTF Taekwondo Canada*, a dispute arose concerning athlete selection to the 2003 Pan American Games and the 2004 Olympic Games. The applicable selection criteria required the athlete to have competed in the previous national championships, which, unfortunately, he failed to do after being disqualified for weighing in five minutes late for the competition. The selection policy, thus, had the unintended effect of barring the athlete, one of the best in Canada, from being able to qualify for both the Pan American and Olympic Games. The arbitrator, obliged to apply the clear and unambiguous selection policy, dismissed the athlete’s appeal, but nevertheless chose to comment on the wisdom of the selection policy, writing:

[I cannot dismiss this appeal] without adding the observation that the Respondent might usefully consider a possible revision of its selection criteria . . . which criteria seem to pre-determine the ambit of its selection of athletes for a period of almost 18 months, based on performance in the 2003 Nationals. While it may, as a practical matter, be too late to do much

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78 Findlay, H & Corbett, R. Principles underlying the adjudication of selection disputes preceding the Salt Lake City Olympic Games: Notes for Adjudicators. 2 *Entertainment Law* (Spring 2003), pp. 109-120.


about the 2003 Pan American Games this August, in the interests of fielding the best team possible for the Olympic Games a year later, a sober second look might be in the best interests of all concerned, especially given the transitional nature of many of the current provisions. 81

Such recommendations fall short of mandatory judgments or binding arbitral orders and are more akin to “lessons to be learned” or obiter dicta, that are collateral or ancillary to the central legal reasoning underlying the arbitral award. Nevertheless, these recommendations provide a more nuanced understanding of the impact of sports arbitration decisions. Specifically, decisions which appear to be non-interventionist can actually have a large impact in shaping national and international sport policies.

To conclude, when SDRCC determines that an authoritative text, such as a selection agreement or an eligibility policy, contains a clear and unambiguous provision that governs a particular dispute, it will apply the text largely without any analysis as to its soundness, and will be unwilling to rewrite any aspect of the text. Similar to CAS, SDRCC acts as an enforcer of norms negotiated by parties or imposed by a NSO. However, this type of deference for authoritative texts may be problematic in the context of selection agreements. By over relying on the contractual nature of a selection agreement to justify its non-intervention, SDRCC fails to adequately consider the non-existent bargaining position of athletes who are forced to assent to the terms of a selection agreement as third parties. Despite this deference, CAS and SDRCC arbitrators are not afraid to voice concerns with respect to the wisdom of a poorly drafted and thought-out selection policy that, although valid and enforceable, undermines fundamental sporting norms, such as the principle of merit-based selection. Through this educative role, CAS and SDRCC help facilitate a harmonization of sport policy and practices.

2.  Filling in Textual Gaps

According to Erbsen’s model, where there is no clear rule or provision to answer a contested question, an arbitral panel will “infer from the parties’ grant of jurisdiction that it has the power to create common law filling the textual gap.” 82 CAS will apply principles of equity and procedural fairness to fill this textual gap. This type of intervention represents a shift in CAS’s role from a mere enforcer of norms established by sport governing bodies, to a source of normative preferences for how to best regulate international sports. Erbsen has labelled CAS’s normative preferences emerging from this gap-filling authority an “interstitial common law” because the norms enunciated form a body of principles which may be relied upon by future arbitrators similarly faced with the task of filling a textual gap. And, although these principles may not be binding on future arbitrators, their growing currency as a form of precedent suggests a process akin to a de facto precedent or “horizontal stare decisis.” 83

81 Blais, supra note 71, at p. 6.
82 Erbsen, supra note 14 at p. 442.
83 Horizontal stare decisis refers to the policy of an adjudicative body to stand by and adhere to decisions previously issued by that same decision-making body, not because the decisions are binding per se, but because of the need to ensure consistency in decision-making and to foster adjudicative comity. In contrast, “vertical stare decisis” refers to the mandatory binding nature of
Examples of this gap filling form of intervention are scarce in SDRCC awards and are limited to those where arbitrators review attempts by NSO’s to create their own *ad hoc* procedures to fill in gaps in their own textual rules. In those instances, SDRCC has repeatedly held that where these *ad hoc* procedures are fair and equitable in the circumstances, they will be upheld. However, SDRCC’s analysis of whether an *ad hoc* procedure is just and equitable is arguably relatively superficial, as arbitrators will not deeply probe into the soundness of the procedures. Again, this highlights SDRCC’s general respect for the policy-making function of sport governing bodies. This more deferential role distinguishes SDRCC from CAS, as CAS is more likely to fill a gap in a text with its own preferences as to how the matter should be governed.

In determining whether an *ad hoc* procedure has complied with general notions of fairness and equity, SDRCC has relied on several indicators; namely, the validity and source of the procedure, the effect of the procedure on the interests of affected parties, and compliance with standards of procedural fairness.

In *Zilberman v. Canadian Amateur Wrestling Association et al.*, an athlete submitted that the *ad hoc* procedure imposed by the NSO to fill a gap in competition rules that failed to include a ranking procedure in the event that an athlete had been disqualified, was arbitrary and unfair. The Arbitrator indicated the test to determine whether the *ad hoc* procedure was sound was to ascertain whether the NSO acted “fairly and reasonably and not arbitrarily and discriminatory in the application of its own rules and policies ...” In this case, the fact the NSO had followed precedents set by the IOC in the ranking of its athletes was sufficient to assess the fairness of the *ad hoc* procedures.

In *Garcia v. Canadian Amateur Wrestling Association*, the arbitrator concluded that the *ad hoc* procedure (specifically, a tie-breaking procedure) employed by the NSO was just and equitable because it sufficiently “balanced the interests” of all athletes involved in an even-handed manner.

In dismissing the athlete’s appeal in *Larue v. Bowls Canada Boulingrin*, the arbitrator upheld the NSO’s *ad hoc* procedures since they were all adequately communicated to athletes in a timely fashion, thus, protecting the reasonable or legitimate expectations of the athletes, as well as their right to notice.

In sum, it is within the scope of their adjudicative powers for both CAS and SDRCC to fill a gap in an authoritative text of sport governing body. Where CAS has intervened in this manner, it has acted as a source of normative preferences for how to best regulate a sporting issue—whether it concerns selection, eligibility, or “on-field” rules. In contrast, SDRCC has retained its role as an enforcer of norms by deferring to the policy-making function of sport bodies, by only reviewing the *ad hoc* procedures employed by sport bodies to fill a textual gap for gross violations of equity or fairness.

decisions within an adjudicative hierarchy whereby lower-level decision-making bodies are bound by the decisions of higher-level decision-making bodies. For example, the use of interstitial common law emerging from CAS by other independent national sport arbitration systems, such as SDRCC, is arguably akin to vertical *stare decisis*, despite the lack of a formal adjudicative hierarchy between CAS and most national sport arbitral systems.

84 ADR 03-0021.
85 Id. at p. 8.
86 SDRCC 08-0072, April 2008, at 40.
87 SDRCC 04-0012, July 2004.
3. Construing Ambiguous and Contradictory Texts

According to Erbsen’s model, where CAS concludes that an authoritative text contains a provision that will resolve a particular dispute, it will attempt to apply that textual rule as written. However, where that textual rule is vague or ambiguous, CAS will utilize universal principles of interpretation, primarily, though not exclusively, from contract law, to construe and apply the document.  

Similarly, if the ambiguity arises from a conflict between competing rules or policies, CAS will prioritize the competing sources based on its understanding of the regulatory hierarchy governing sport. Erbsen suggests that these interpretations form an “interpretive common law,” gaining the status of precedent and acting as a guide for future interpretation by arbitrators while educating drafters of policy within sport governing bodies. As will be evident, CAS’s interpretive common law can also guide future interpretations by SDRCC arbitrators.

When interpreted in degrees of interference or deference, this aspect of Erbsen’s model falls somewhere in the middle of the spectrum with respect to its degree of intervention; that is, where an arbitrator concludes that a specific textual rule governs a dispute, he or she will always first attempt to interpret and apply the textual rule as written. The arbitrator does not start out with the intention to interfere with the affairs of a sport body by creatively construing its authoritative texts to achieve an outcome that it prefers. Instead, an arbitrator, who is well versed in canons and doctrines of interpretation and who has expert knowledge of the regulatory hierarchy of sport, will resort to his or her own interpretations in order to apply the textual rule in a manner consistent with the drafter’s intent. However, as Erbsen notes, the seemingly deferential nature of this adjudicative approach “does not mean that [an arbitrator’s] efforts are rote or that [his or her] holdings are objectively predetermined. Interpretation is an art rather than a science, and CAS arbitrators, appointed because of their special expertise in sports, leave their own subjective stamp on texts that they construe.”

In other words, only where it is difficult to discern a drafter’s intent from an ambiguous text, will an arbitrator use his or her interpretive skills to reach a result consistent with his or her own normative preferences. The opportunity for some intervention by an arbitrator in the interpretation of a vague or competing text is therefore present. However, this approach does not absolutely encroach on the regulation-making authority of sport bodies since it merely educates them on what the normative preferences of an arbitrator is, and how to avoid the application of those preferences, should they choose, through clearer drafting.

The following sections examine two ways in which SDRCC arbitrators interpret and apply ambiguous or competing texts: either through an array of specific interpretive doctrines or their own expert knowledge of the regulatory hierarchy of international and national sport.

a. Specific Legal Principles of Interpretation

Both CAS and SDRCC rely on a set of interpretive canons or doctrines in order to apply an ambiguous textual rule to settle a dispute. Many of these have been previously

88 Erbsen, supra at note 14.
89 Erbsen, id.
90 Id. at p. 443.
recognized by legal commentators as being common to international arbitration. For the purposes of this paper, two will be discussed: the doctrine of contra proferentum, and the principle of nullum crimen, nulla poena sine lege.

**In dubio contra proferentem**

The term contra proferentem is a well known canon of contractual interpretation which provides that an ambiguous term will be construed against the interests of the party that imposed its inclusion in the contract. In *University of Regina v. Canadian Interuniversity Sport*, this doctrine was used to interpret and apply an eligibility rule. The dispute involved a student-athlete who sought to compete for the university’s basketball team; however, there was disagreement as to whether the athlete was a “professional” or “amateur” under intercollegiate eligibility rules. The rule designating an athlete’s status was vague and ambiguous. In interpreting this textual rule, the arbitrator resorted to the doctrine of contra proferentum, noting that the use of the doctrine is justified in instances where a policy can operate to exclude a coach or athlete from participation in sport (and particularly where one’s livelihood is affected). The Arbitrator explains:

An athlete or team cannot be held accountable under a rule that almost defies understanding . . . Particularly when dealing with strict rules . . . rule-makers and rule-appliers must begin by being strict themselves. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules . . . that can be understood only with great difficulty. . . Athletes and officials in any sport should know clearly where they stand. It would be unfair if they were found to have run afoul rules . . . [I]n circumstances where they neither knew nor reasonably could have known that what they were doing was wrong.

More interesting than the actual application of this canon on construction, however, is the fact that the Arbitrator justified his approach by citing two CAS awards where the same doctrine was used in the context of interpreting eligibility policies in relation to doping offences. The Arbitrator writes:

I immediately acknowledge, of course, that these [CAS] decisions concern the application of anti-doping rules of various international sport federations to international-level athletes, circumstances that are clearly distinguishable than those that prevail in the present case. However, I do not refer to these CAS decisions as authority. I refer to them because I consider the principles that they enunciate to be relevant and applicable in the very different circumstances of this case.

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91 See e.g. Beloff, *supra* note 22 at 10; Straubel, *supra* note 20 at 1255 and 1261.
92 *Id.*
93 SDRCC 06-0039, February 2006.
94 *Id.* at para. 59.
96 *Supra* note 93, at para. 58.
It would, therefore, appear that the interpretive common law principle emerging from CAS, namely that CAS will construe ambiguous eligibility rules in favour of athletes, is serving as an interpretive guide for SDRCC. While the influential nature of CAS’s interpretive common law falls short of a binding precedent, it is suggestive of the gradual development of a unitary system of international sport dispute resolution.

Nullum crimen, nulla poena sine lege

The principle of *nullum crimen, nulla poena sine lege* has roots in both criminal and administrative law and translates as “sanctions cannot be imposed unless there is a violation of a rule and unless sanctions are provided for in the rule.”

This public law principle was implicit in the SDRCC disciplinary case of *Canadian Amateur Diving Association v. Miranda*. The dispute involved a 32-year-old male athlete, accused of breaching the code of conduct of his governing sport body after engaging in “sexual activity” with a 15-year-old female athlete. An internal disciplinary panel concluded that the male athlete had breached the code of conduct of the sport governing body by bringing “the sport of diving into disrepute.” On appeal to SDRCC, the Arbitrator found that the code of conduct did not expressly preclude the sort of conduct in which the athlete had engaged in, and that any alleged breach of the code (i.e. any conduct bringing the sport of diving into disrepute) must have come from the age differential between athlete and the complainant or an alleged coach/athlete relationship. The Arbitrator concluded that because “bringing the sport of diving into disrepute” was such a vague standard, it was not met by the age differential between the two athletes, and while it could have been satisfied with the existence of a coach/athlete relationship, one did not exist in this case.

b. Prioritizing Competing Texts

Sometimes the ambiguity in applying a policy or rule comes from the fact that the impugned policy or rule conflicts with another rule established by another governing body within the sport regulatory framework. There are often multiple authorities involved in sport disputes. With many multi-sport games, for example, national sport federations typically nominate athletes to a team while another level of authority actually makes the selection decision. Thus, depending on the timing of the dispute, the authority to determine the composition of a team may rest with the national sport federation, the multi-sport organization or an international sport federation. It is the responsibility of

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97 Erbsen, *supra* note 14; Beloff, note 22 at 11-12.
98 Beloff, *Id.*
99 SDRCC 05-0030, October 2005.
100 The athlete may have also faced a criminal prosecution under the *Criminal Code of Canada*, R.S. 1985, c. C-46. Section 151 of the *Criminal Code* makes it an offence for a person to touch a person under the age of 16 for a sexual purpose.
101 As noted by McCutcheon, offences described in such broad and open-ended ways "do not readily facilitate reasonable notice of what is proscribed and are liable to place too much discretion in the hands of the decision-maker" (McCutcheon, J.P. Sports Discipline and the Rule of Law. In Steven Greenfield, Guy Osborn. *Law & Sport in Contemporary Society*, London: Frank Cass, pp.115-128 at 121.
arbitrators to determine which body’s authoritative text has priority, and then to apply that text.

This highlights the second way in which SDRCC arbitrators interpret and apply ambiguous or competing texts: through their own expert knowledge of the regulatory hierarchy of international and national sport.

SDRCC arbitrators have had to prioritize competing texts in relation to the rules governing a competition and the disciplinary codes of conduct at a multi-sport event. For instance, in *Adams v. Athletics Canada* 102 a dispute centred on whether a sport governing body had the jurisdiction to hear a harassment complaint against an athlete. The athlete argued that since the alleged harassment took place at the Paralympic Games, the sport governing body ought to have referred the complaint to the Canadian Paralympic Committee (CPC), the sport body responsible for athletes at the Games. The code of conduct for the CPC “complemented” the code of conduct of the sport governing body, in that the CPC’s code filled the gaps of the latter as it related to matters of harassment. In interpreting these conflicting texts, the arbitrator held that, even though the jurisdiction of both the CPC and the sport governing body overlap, they do not give both bodies concurrent jurisdiction to hear matters arising from incidents occurring at the Paralympic Games. Moreover, concurrent application of both codes of conduct would create uncertainty for athletes regarding their rights and obligations (i.e. regulated conduct, procedures for filing complaints, etc.).

A similar prioritization of competing texts, this time involving the textual rules of a NSO and an IF, occurred in *Ncube v. Canadian Amateur Wrestling Association*. 103 The conflict involved the interpretation of an “on-field” injury provision. The athlete argued that the injury provision was vague and ambiguous, and therefore should be construed in accordance with the policies of his NSO, which operated to his advantage. The NSO submitted that since the competition was governed by the rules of the IF, only those rules should be used to interpret the injury provision. In dismissing the athlete’s appeal, the arbitrator properly gave priority to the textual rules of the IF, in accordance with established regulatory hierarchy of international sport. He writes:

> I reject the argument by [the athlete] that . . . the [NSO’s] rules should somehow have legitimately informed and influenced the decisions of the match officials in responding to [his] injury. The event was held under [IF] rules, not [NSO] rules. It is not appropriate nor [sic.] fair to the competing athletes or the match officials to suggest, subsequent to the event, that two different sets of rules, intermingled in some unknown fashion, should govern. 104

The arbitrator’s prioritization of the competing textual rules of the NSO and IF demonstrate an understanding of the governance hierarchy of international sport whereby the rules of an IF governs its member NSOs.

To conclude, when confronted with a vague and ambiguous textual rule that is needed to resolve a particular dispute, both CAS and SDRCC will apply interpretive doctrines to either ascertain and implement the drafter’s intent, or if that is not possible,
to reach an interpretation that is in accordance with their own normative preferences. Similarly, where a textual rule is contradictory because it conflicts with a competing text of another sport governing body, CAS and SDRCC arbitrators will rely on their knowledge of the regulatory hierarchy of sport to reconcile or prioritize such texts. These techniques not only form an “interpretive” common law that can be used as a guide by future arbitrators, but also serve to educate sport governing bodies as to what the default preferences of arbitrators are and how to avoid them with clearer drafting.

4. Supplanting Authoritative Texts That Contravene General Equitable Norms

In the most interventionist stage of the spectrum (see Figure 2), an arbitral panel will set aside a clear and unambiguous authoritative text and supplant it with its own normative preferences to resolve a contested issue. This approach mirrors stage two of Erbsen’s framework and CAS’s approach to authoritative texts that contravene core notions of justice and equity. Within the context of SDRCC decisions, it is possible to distinguish two categories of such intervention: first, instances where SDRCC has been faced with a clear authoritative text that contravenes core notions of equity or procedural fairness in its application, and therefore must be set aside to resolve a dispute; and, second, circumstances where a clear authoritative text contravenes core notions of equity in substance. As will be evident, of the two categories, the latter is the most intrusive, which may explain why CAS and SDRCC arbitrators exercise this authority so infrequently.

The rule of law applies equally, including to private or domestic tribunals such as sport governing bodies. This principle has been recognized by CAS, which notes that “all sporting institutions, and in particular all sporting federations, must abide by general principles of law.” As Foster (2006) notes:

The respect for the autonomy of sporting federations shown by [CAS] is part of a legal tradition that interferes only in a limited way with decision-making by powerful bodies. The principles are very similar to the public law principles of common law jurisdictions that will refuse to intervene in the decision made by public authorities except in very well defined circumstances . . . In other words, there is no challenge to the substance of decision-making; there is an emphasis on fair procedure . . . and high standards of illegality are needed to justify intervention.

The authority to intervene and alter the substance or application of an authoritative text is expressly found within the procedural rules governing SDRCC arbitrations. Article 6.18 of SDRCC’s Procedural Code states that, “[t]he Panel may . . . grant such remedies or relief that [it] deems just and equitable.” An analysis of the SDRCC jurisprudence indicates that Canadian arbitrators have relied on this authority to supplant a textual rule.

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105 The concept of procedural fairness is synonymous with the notion of “due process” and “natural justice” for the purposes of this paper.


107 Foster supra note 36, at 439.

108 Supra note 56.
where it contravenes equitable norms in *substance* or *applied in a procedurally unfair* or inequitable manner. Each of these instances will be discussed below.

a. Intervention into the Application of Authoritative Texts

SDRCC arbitrators will intervene to set aside a textual rule where its application by a sport body has contravened core principles of equity and fairness. The following section will examine three such principles, namely, promissory estoppel, procedural fairness, and the sport-specific equitable principle of merit-based selection.

**Promissory Estoppel and Legitimate Expectations**

A fundamental maxim of equity is the doctrine of *promissory estoppel*. The doctrine provides that if a person makes a representation as to future conduct, and another relies on it to their detriment, then the person making the representation is estopped from later denying the truth of that representation.\(^{109}\) Promissory estoppel is closely linked with the notion of legitimate expectations and arises frequently in sporting disputes because of the contractual relationship between athletes and their respective sport bodies. Instances have arisen, for example, whereby athletes have relied on a representation made by their sport governing body concerning team selection standards or funding eligibility, only to have the sport body change the standards at the last minute or without properly disclosing the change to the athletes. In each case, SDRCC has intervened to set aside an authoritative text that, although sound in substance, was adopted and/or applied in a manner that contravened general equitable principles.

In *Canadian Amateur Boxing Association, Pascal & Gaudet v. Canadian Olympic Committee*,\(^{110}\) the athletes appealed a decision of the Canadian Olympic Committee that rejected their nomination to the national Olympic Team. Both athletes had met the qualifying *standard* set out in the selection policy, but not at a qualifying *event* designated in the applicable selection policy. The final list of qualifying events issued by the Canadian Amateur Boxing Association (CABA) was never fully disclosed to the athletes until after all of the qualifying events had commenced. Further, CABA had knowingly (mis)led its athletes to believe that a subsequent and final Olympic qualifying event was available in Rio de Janeiro. In upholding the athletes’ appeal, the Arbitrator held that the athletes should be given the benefit of the final qualifying event that they believed was available and that they relied upon. The Arbitrator writes:

> In the Arbitrator’s view, by analogy to principles of promissory estoppel, the only appropriate remedy is to give to the appellants the benefit of the Olympic qualifying standard which they were knowingly led to believe would apply to them. Because of the silence of the [CABA] as to the changed standards in [the team selection agreement] . . . [the athletes] having injuriously relied on their belief that there had been no change in standards . . . cannot now, by any principle of equity, be held to the strict terms of [the selection agreement], whose terms were never divulged to them.\(^{111}\)


\(^{110}\) SDRCC 04-003, July 2004.

\(^{111}\) *Id.* at 28-29.
Similarly, in *Island and Adam v. Equine Canada*,\(^{112}\) the national governing body for equestrian issued an addendum to an Olympic selection policy, but only four days prior to the actual selection, and without the knowledge or involvement of athletes. Prior to the addendum, the original selection policy had been in place for two years, thus creating a legitimate expectation among athletes that the selection procedure set out in the policy would not change. The Arbitrator held that the addendum threatened the integrity of the selection process and was thus, null and void, and remitted the matter back to the sport body for re-selection without regard to the addendum.

In summary, even where the textual rules of a sport body are clear and unambiguous, they will be set aside where they are adopted or applied in a manner that contravenes the legitimate expectations of athletes who have relied, to their detriment, on a previous representation made by a sport body.

**Procedural Fairness**

Sport bodies are required to satisfy the principles of “procedural fairness” or “natural justice” when making decisions that affect the rights and obligations of one of their members, including those related to team selection, eligibility, funding, and discipline. At the very least, a sport body has a duty to provide its member with notice of a potential decision, disclosure of particulars, and an opportunity to fairly present his or her case. A decision made by a sport body, which is otherwise based on the application of a valid authoritative text, will be overturned by an arbitrator if it is made in a procedurally unfair manner.

Examples of intervention based on procedural fairness concerns are relatively scarce among CAS decisions. Although CAS recognizes an athlete’s procedural “right to be heard as one of the fundamental principles of due process,”\(^ {113}\) its ability to overturn an IF’s decision for violating such procedural rights has not been interpreted as a form of intervention and, as a result, is largely absent from Erbsen’s analysis of CAS jurisprudence. This is very likely because CAS hears matters on a *de novo* basis.\(^ {114}\) As Mitten and Davis note, “CAS conducts a *de novo* hearing. As a result, if [an] athlete was denied due process in the [sport] governing body’s internal proceeding, this violation is remedied by providing a fair opportunity to be heard during the CAS arbitration.”\(^ {115}\) In other words, because CAS hears matters anew and makes its own findings of fact and law, it can resolve a dispute without ever having considered whether a prior internal proceeding made a procedural error. In contrast, SDRCC arbitrators have interpreted their scope of review powers narrowly, and to generally not include *de novo* review.\(^ {116}\) As a result, SDRCC is frequently called upon to review a sport body’s decision to determine whether it was made in a procedurally fair manner; thus providing another example of

\(^{112}\) SDRCC 04-0008, July 2004.

\(^{113}\) Mitten, *supra* note 13.

\(^{114}\) *Id.*


arbitrator intervention.\textsuperscript{117} For instance, in \textit{Mourad v. Canadian Taekwondo Association WTF},\textsuperscript{118} an athlete appealed the decision of his sport governing body not to nominate him for funding under the national athlete funding program.\textsuperscript{119} Although the athlete had been selected to receive funding for the past three years and had recently placed first at a competition designated to determine funding eligibility, the funding policy in effect at the time required him to reach a higher performance standard (a top-8 finish at the next World Championships) in order to receive future financial aid. The athlete, however, was never informed of this additional eligibility requirement, despite making an inquiry into his funding status after winning the competition. In addition, the athlete was never given the opportunity to communicate (either directly or through a representative) with the nomination committee when his funding eligibility was under examination. The Arbitrator upheld the athlete’s appeal and granted his request to receive funding. In doing so, the Arbitrator recognized that although the funding policy was clear and unambiguous, it was applied in an unfair manner and ought to be set aside in this instance. In summarizing his position, the Arbitrator writes:

\begin{quote}
It seems obvious to me that the [sport governing body] acted in good faith. It is clear that they work hard to give the association a selection system for [funding] that is objective, transparent and based on well-known criteria . . . . The arbitrator considers that the stance adopted by the [sport governing body] was perfectly legitimate. They sought to promote, according to their view, the long-term interests of the association. But as regards the level of communication and the procedure followed, the arbitrator is compelled to conclude that there were significant failures in the standard of fairness which worked to the disadvantage of the athlete . . . \textsuperscript{120}
\end{quote}

It is worth noting that the Arbitrator’s decision to set aside the policy and award funding to the athlete was made in a context where there is a finite number of funding grants reserved for a NSO, as determined by Canada’s national funding authority.\textsuperscript{121} By awarding funding to the athlete in this case, the Arbitrator not only interfered with the funding decision of the NSO, but also Canada’s regulatory body that oversees the funding program for all athletes.\textsuperscript{122}


\textsuperscript{118}SDRCC 02-0006, August 2002.

\textsuperscript{119}In Canada, eligible high performance athletes receive government funding through the Athlete Assistance Program (AAP), also known as “carding”. The AAP provides financial assistance in the form of a monthly stipend to go towards training and living expenses. Athletes are nominated for AAP funding by their respective NSO, and are generally automatically selected by Sport Canada (the federal governmental department responsible for sport nationally) to receive funding.

\textsuperscript{120}\textit{Mourad v. Canadian Taekwondo Association WTF}, supra note 118, at 6.

\textsuperscript{121}See also \textit{Dufour-Lapointe v. Canadian Freestyle Ski Association}, SDRCC 07-0065, January 2008.

\textsuperscript{122}Although Sport Canada, which oversees the athlete funding program, has been reluctant to appear as a party in appeals of funding eligibility decisions before SDRCC (for e.g. \textit{Palmer},
Other instances where SDRCC has intervened on procedural fairness grounds include those where a sport body has failed to provide sufficient procedural safeguards in reaching a decision (e.g. failing to provide notice to a member of an impending decision; 123 failing to disclose particulars in a disciplinary hearing, including the charges and evidence against a member, 124 and discouraging a member’s attempt to retain counsel 125), and where a sport body’s decision was tainted by a reasonable apprehension of bias (e.g. personal relational bias 126 and institutional bias 127).

In short, SDRCC will interfere with a sport governing body’s decision that has contravened the principles of procedural fairness, despite being made in accordance with an authoritative text.

**Merit-Based Selection**

The advantages of sport-specific arbitration in relation to litigation in courts of law are well documented. 128 A sport dispute resolution program selects arbitrators not just for their legal expertise, but also for their knowledge of sports and sport-related issues. 129 This has enabled sport arbitrators to tailor notions of justice and equity to a sporting context.

Jurisprudence emerging from SDRCC suggests that, similar to CAS, SDRCC arbitrators are also sensitive to the sport-specific context of disputes when interpreting and applying notions of justice and equity. A particular principle that has emerged from the decisions of CAS and the SDRCC, that is specific to the context of sport, is the notion of “merit-based” selection. This principle provides a means for arbitrators to set aside a clear and authoritative textual rule governing selection if its application is contrary to

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**supra** note 115), a SDRCC award granting an athlete funding would very likely be binding on Sport Canada. Article 1.1(bb)(v) of the SDRCC procedural code provides that the Government of Canada is automatically a party in disputes related to its national funding program. The likely purpose of such a provision is to ensure arbitral awards that do affect funding eligibility would be binding on Sport Canada, otherwise an award granting funding to an athlete would be of no force or practical effect.


125 Waselenchuk v. CCES et al., SDRCC 06-0038, March 2007; Gordon v. Canadian Boxing Association, *id*.

126 For example, coaches with multiple coaching roles that create conflicts of interest (Zeilstra v. Softball Canada, *supra* note 117; Wilton v. Softball Canada, *supra* note 80), and a coach’s parental relationship with an athlete (Gagnon v. Racquetball Canada, SDRCC 04-0016, July 2004).

127 See e.g. Gordon v. Canadian Amateur Boxing Association, *supra* note 124, where an adjudicator acted as an investigator - thus violating the rule of audi alteram partem.

128 Advantages of arbitration of sporting disputes over their litigation can include lower costs, privacy, the presence of an expert tribunal, and rapidity: Samueli, A. & Gearhart, R. Sporting Arbitration and the International Olympic Committee’s Court of Arbitration for Sport. *Journal of International Sports Law* 6(4) at 39; see also Burger, C.J. “‘Taking Sports Out of the Courts’: Alternative Dispute Resolution and the International Court of Arbitration for Sport” *Journal of Legal Aspects of Sport* 10(2) at 123; and Findlay, *supra* note 61.

129 Findlay, *id*. at 75. Also Canadian Sport Dispute Resolution Code, *supra*, note 56.
merit-based selection. The case of *Clegg, Albert, Ciaramidaro, Biathlon Canada v. Canadian Olympic Association*,\(^\text{130}\) illustrates this equitable principle. In *Clegg*, an athlete met the qualifying standard for selection to the 2002 Canadian Winter Olympic Team but did so in a competition after the deadline specified in the selection policy. The athlete asked that his competition results be accepted even though they were obtained outside the timeline set by the selection policy. The Respondent Olympic Committee argued that the selection policy ought to be strictly applied in order to maintain integrity and consistency in the selection process.

In reaching his decision to uphold the athlete’s appeal, the Arbitrator distinguished between administrative timelines, that is, those relating to registration, and performance timelines, that is, those relating to meeting standards of performance. He found that the application of administrative timelines ought to be capable of far greater flexibility and remedial power, than performance timelines. Administrative timelines, although ultimately necessary in the application of a selection procedure, should not undermine or preclude an athlete’s opportunity to meet performance criteria, wherever possible, in order to ensure that selection is based on merit. As a result, the athlete was named to the Olympic Team.

In *Clegg*, the remedy provided by the Arbitrator mirrors the flexible and pragmatic approach to the application of entry deadlines that CAS has appeared to take. For example, in *US Swimming v. FINA*,\(^\text{131}\) the US Swimming Federation challenged a decision of the International Swimming Federation (FINA) allowing an Irish swimmer to participate in the preliminary heats of an event, claiming that the swimmer had been entered too late. The CAS Ad Hoc Division dismissed the application, citing the fact that late entries were common occurrences at the Olympic Games for all sports and that nothing in FINA’s regulations imposed a more stringent regime of adherence to event entry deadlines.

The general equitable principle at the root of these SDRCC and CAS decisions seems to centre on the flexible and remedial nature of equity. However, subsequent arbitral awards, at least with respect to those issued by SDRCC, suggest a narrow interpretation of this principle by arbitrators. For instance, in *Janyk and Alpine Canada Alpin v. Canadian Olympic Committee*,\(^\text{132}\) an athlete sought to rely on the *Clegg* decision to challenge an Olympic selection policy by submitting that the administrative deadline to which the policy was to operate was arbitrary and contrary to the principle of merit-based selection. The Arbitrator found that the athlete had not met the criteria at the time of the appeal (in *Clegg* the athlete had met the performance criteria by the time of his appeal), and thus dismissed the athlete’s appeal. The Arbitrator was unable to consider whether the selection policy was applied in a manner contrary to merit-based selection since the athlete had not first satisfied the substantive requirements of the policy, namely the performance-related criteria.

The different outcomes in *Clegg* and *Janyk* suggest that SDRCC arbitrators may only be willing to intervene and set aside an authoritative selection policy where an athlete has satisfied certain performance-related criteria, but the strict application of the

\(^{130}\) ADR 02-0001.


\(^{132}\) ADR 02-005, February 2002.
selection policy in accordance with a purely administrative deadline would otherwise preclude the athlete from being selected.

The circumstances in which an arbitrator may be justified in intervening to uphold the principle of merit-based selection are understandably narrow and limited considering the usual importance of timeliness in the sporting context. As Beloff notes:

[T]he exercise of lex sportiva adopts an attitude more akin to that of the common law than equity, taking the strict approach to the former rather than the flexible approach to the latter . . . By contrast, ‘the Court of equity was accustomed to relieve against the failure to keep the date assigned . . . if it could do justice between the parties’. 133

Thus, the exception for administrative-related criteria may just be an exception to the general rule that sports arbitration takes a strict approach to timelines.

To summarize, both CAS and SDRCC will intervene and set aside a clear and unambiguous authoritative text where the application of that text contravenes fundamental notions of justice or equity, such as promissory estoppel, natural justice, and the sport-specific principle of merit-based selection. Importantly, however, by intervening in this manner, CAS and SDRCC arbitrators do not interfere with the substance of a textual rule.

b. Intervention into the Substance of an Authoritative Text

Interference with the substance of an authoritative text is the most intrusive example of arbitrator intervention. The process for this type of intervention would likely begin with a normative analysis of a textual rule to determine its compliance with core notions of justice and equity, followed by the displacement of the substance of the text with an arbitrator’s own normative preferences as to what is just or equitable. It is here where the distinction between an arbitrator’s role as an enforcer of norms or a source of positive law is most apparent. The difficulty with justifying this type of intervention is that it requires an underlying acceptance, or at least an understanding, that in some instances, an arbitral body will need to usurp the authority of a sport governing body to regulate its own affairs, and re-write an authoritative text. The legitimacy of such intervention raises obvious concerns regarding the appropriate institutional role of an independent arbitral system, such as CAS or SDRCC. 134

In relation to CAS, although arbitrators frequently claim the authority to override textually required rules that they deem unjust or inequitable, they rarely exercises this power. 135 Erbsen suggests that, theoretically, under CAS’s choice of law rules, parties who consent to its jurisdiction also thereby consent to the possibility that an arbitral panel will impose its own equity norms that may be inconsistent with an otherwise authoritative text. 136

With respect to the SDRCC, the jurisprudence, for the most part, suggests that arbitrators are also reluctant to embark on an inquiry as to the ultimate wisdom or

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134 See Foster, supra note 80; Findlay, supra note 130; Erbsen, supra note 14.
135 Erbsen, id. at 453.
136 Id.
advisability of a particular textual rule. This position was succinctly articulated by an
Arbitrator in an early SDRCC decision, writing:

It is not incumbent on the arbitrator to substitute his [or her] own
opinion to that of the relevant body in determining whether or not the
criteria and guidelines . . . are advisable and reasonable. The test lies in
ascertaining whether, in this case, [the national sport organization] acted
fairly and reasonably and not arbitrary or discriminatory in the application
of its own rules and policy. . . .

This deferential stance taken by many SDRCC arbitrators in the early years of
SDRCC may stem from the institutional role that it was expected to fulfill. In 2004, a
Work Group to the Government of Canada was created to conduct an interim review of
the sport dispute resolution system. In focusing on the proper role and scope of
jurisdiction of an arbitral panel, the Work Group notes the following:

There are cases in which a dispute erupts not over the
administration of a policy but over the substance of the policy itself. The
Work Group acknowledges the right of a sports body to develop and
implement its own policies through a democratic process and this Report
is not intended to infringe on that process in any way. Disputes over the
substance of a policy should continue to be dealt with through the
decision-making processes of each sport organization[138] [Emphasis
added].

This statement, along with a series of early SDRCC decisions, clearly reflects a
reluctance of arbitrators to interfere, even in the slightest way, with the substance of an
authoritative text. This has had the effect of limiting the grounds of an appeal of a sport
body’s decision to those which challenge the application of a textual rule, rather than its
substance.

Despite this early approach, a trilogy of more recent arbitral awards suggests that
SDRCC arbitrators are slowly and subtly beginning to review the substance of a textual
rule, specifically where it is alleged that the substance of the rule has breached core
notions of equity and justice. The reluctance to interfere with the substance of an
authoritative text juxtaposed with a desire to intervene in the interests of equity, has
created a visible tension for SDRCC arbitrators in this trilogy of awards.

In Dufour-Lapointe v. Canadian Freestyle Ski Association,[139] an athlete
sought to challenge the substance of a funding eligibility policy; specifically, a mathematical handicapping formula contained in the policy,
which she submitted tended to favour male athletes over female athletes,
and thus had operated to her prejudice. Although the Arbitrator upheld the
athlete’s appeal and awarded her the funding, finding that the NSO did not
have the authority to adopt the policy, he still questioned the reliability and
accuracy of the handicapping formula, writing:[Another] reason which
prompts me to find that the application of the different handicaps for male

137 Zilberman, supra note 84, at para. 42.
138 Id. at 8.
139 Supra note 121.
and female athletes represents a flaw in the ranking process is that evidence was presented which sheds very grave doubt on the reliability and verifiability of different handicaps for male and female athletes as a factor in the ranking process [used to determine funding eligibility].

Although the Arbitrator could have settled the dispute solely on the ground that the NSO had acted *ultra vires* by including the handicapping formula in the policy, he proceeded to question its validity. This, in and of itself, is suggestive of the willingness of arbitrators to engage in a normative analysis of the soundness of the substance of a textual rule.

Following *Dufour-Lapointe*, there was another gradual indication that SDRCC may be willing to override an otherwise authoritative text that was deemed inequitable or unjust. In *Palmer v. Athletics Canada*, SDRCC considered another athlete’s challenge of a NSO’s decision not to nominate him for funding. Although the Arbitrator dismissed the athlete’s appeal, his reasoning may be interpreted as expanding the jurisdiction of SDRCC to intervene into the substance of a policy, where it is absolutely necessary. The Arbitrator writes:

[SDRCC arbitrators are willing to interfere with the decisions of sport organizations] (and are required to do so) only when it has been shown to their satisfaction that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand.141

It may be inferred from the preceding excerpt that if a sport governing body makes a decision in accordance with an authoritative text, then presumably any analysis by an arbitrator as to whether that decision is manifestly unfair or unjust necessitates an inquiry into the soundness of the textual rule underlying the decision. This inference was later affirmed by SDRCC in the case of *Adams v. Athletics Canada*. In commenting on the appropriate scope of review of SDRCC, the Arbitrator notes the following:

This Arbitrator agrees with [the comments of the arbitrator in *Palmer*], a comment which, it should be noted, was expressed in the context of the *application* of [a funding policy], not in a direct challenge to the [substance of the policy itself]. That said, it would, in my view, still apply if it could be shown, or substantively alleged, that the decision of an NSO in establishing its [funding eligibility] criteria can be said to be ‘tainted or . . . so manifestly wrong that it would be unjust to let it stand’. If the submission of a claimant athlete asserts facts which, if proved, would establish that a decision taken by an NSO, including a decision in the establishing of [funding] criteria, is unlawful, arbitrary, discriminatory, in bad faith or patently unreasonable there can be no doubt about the jurisdiction of the SDRCC panel to entertain and remedy such a situation.143 [Emphasis added]

140 *Supra* note 116.
141 *Id.* at 14.
142 SDRCC 09-0098.
143 *Id.* at 19-20.
Adams clearly suggests that SDRCC has the authority to review and remedy the substance of an authoritative text if it contravenes core notions of equity and justice, or in the words of the arbitrator, is “unlawful, arbitrary, discriminatory, in bad faith or patently unreasonable.” There has not yet been a strong test case whereby the substance of an authoritative text was set aside for being unjust.

In conclusion, both CAS and SDRCC have the authority to set aside a clear textually authorized rule, if it is found to contravene a core notion of equity or justice, and supplant the rule with an arbitrator’s own normative preferences of what is fair or equitable. However, both arbitral bodies are reluctant to exercise a power that would constrain and even usurp the policy or regulation-making authority of private sport bodies. Perhaps this is wise. On the one hand, sport governing bodies possess a level of expertise and technical knowledge specific to their sport, which should command a certain level of deference by arbitrators. On the other hand, as private sports arbitration becomes increasingly relied upon to resolve sporting disputes, both nationally and internationally, resulting in less intervention by national courts, it seems logical to extend the scope of arbitrators’ review powers in order to set boundaries on the regulatory discretion of private sport authorities.

IV. CONCLUSION

Can it be said that there is an emerging universal approach to arbitral decision-making in the sport domain? To answer this question definitively at this point would be an oversimplification. On the one hand, there are similarities between the jurisprudence emerging from CAS and SDRCC, the most dominant being the clear pattern of deference shown by arbitrators to the independent authority of sport bodies. For both systems, this deference is rooted in the contractual nature of the relationship between a sport body and its members. By participating in sport, a member assents, either impliedly or expressly, to the jurisdictional authority of a sport body, as expressed in its regulations, policies and rules. These authoritative texts, in turn, become the applicable “law” that arbitrators use to decide the majority of disputes involving sport bodies. However, where these authoritative texts are deemed inappropriate to resolve a given dispute, either for being unjust or inequitable in substance or application, or vague, ambiguous and incomplete, arbitrators will intervene to ensure that sporting justice is achieved. In short, it is this over-arching pattern of restraint and varying degrees of intervention, with respect to authoritative texts, that lays the foundation for a universal approach to arbitral decision-making within sport.

On the other hand, can this pattern of arbitral decision-making accurately be described as universal, in the sense that it can it be applied to the decisions of other national systems of sport arbitration? The fact that many of the other national systems do not publish their decisions makes this difficult, if not impossible, to determine at the current time. Nevertheless, this question raises an interesting corollary issue, namely, whether the commonality seen in arbitral decision-making between CAS and SDRCC may be explained by other factors, such as an arbitration system’s procedural rules or its institutional role. If so, can these factors be used to facilitate the harmonization of

144 For further discussion on this topic in the Canadian context, see Findlay, supra note 61.
145 See Foster supra note 80.
decision-making within international sport arbitration? One factor that has played an influential role in shaping the decision-making of CAS and SDRCC arbitrators has been the procedural rules governing both systems, which afford arbitrators a broad scope of review and scope authority. With respect to SDRCC, an arbitrator has the power to review the “facts and the law” in any dispute, and may rely on such authority to engage in a normative analysis of the soundness of any authoritative text. Where the substance or application of an authoritative text contravenes SDRCC’s normative preferences, an arbitrator may, in turn, “grant such remedies or relief” that he or she deems “just and equitable in the circumstances.”

Similarly, CAS’s ability to hear appeals on a de novo basis allows an arbitration panel to conduct a broad scope of review to decide a dispute as if it is a first-instance adjudicator. In other words, an arbitration panel is not limited in its decision-making process to a review of the decision being appealed. Instead, a panel may conduct its own analysis of the textual rule underlying a given dispute; providing it with an opportunity for intervention that would otherwise not be available under a narrower scope of review.

In addition, under the procedural rules of both CAS and SDRCC, the awards of an arbitration panel are most often published. Arguably, this factor has been essential to the development of a common approach to arbitral decision-making within and between CAS and SDRCC. In relation to SDRCC, the publication of arbitral awards has enabled arbitrators to incrementally push the boundaries of their own intervention into the affairs of sport bodies. This is most evident with respect to the recognition by SDRCC arbitrators of their authority to intervene to set aside a clear authoritative text where it contravenes core notions of equity and justice, in substance.

In relation to CAS, Erbsen’s notion of a developing non-binding precedent or “common law,” to be used by CAS arbitrators to supplant authoritative texts, construe and prioritize texts, and fill textual gaps, could not be possible without the publication of decisions. Further, the publication of CAS decisions enables SDRCC arbitrators to rely on CAS awards in certain circumstances. In summary, the publication of decisions provides another basis for the development of a universal approach to arbitral decision-making.

The institutional tradition and mandate underlying both CAS and SDRCC has also likely had an impact on their approaches to decision-making. Since its inception, CAS has described itself as a “supreme court of world sport” that would serve as an independent authority specializing in sports-related disputes and authorized to pronounce binding decisions. Arguably, it is this institutional mandate that has provided a sense of legitimacy to the authority of arbitrators to frame the outer limits of regulatory discretion among sport bodies by intervening in the substance and application of their authoritative texts. In contrast, during the initial development of SDRCC there was a firm deference to

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146 SDRCC Code, supra note 56, at Article 6.17.
147 Id.
148 See id. at Article 6.21(g) and CAS Code, supra, note 18, at R 59.
149 See pp. 47 - 49 herein.
150 As articulated by former IOC President Juan Antonio Samaranch in II DIGEST OF CAS AWARDS 1998-2000, at xii (Matthieu Reeb ed., 2002). This characterization was approved by the Swiss Federal Tribunal in A. & B. v. IOC, 1st Civil Division, 27 May 2003, in Reeb, ibid. at 3.3.3.3.
151 Reeb, id.
the authority and independence of sport bodies to develop and implement their own policies through a democratic process. As such, it was not originally intended that SDRCC arbitrators intervene into the substance of sport bodies policies or regulations. This deferential position likely reflects a view among arbitrators that SDRCC is more akin to an administrative tribunal than a court. Nevertheless, as SDRCC develops, there seems to be an indication of a growing acceptance among arbitrators of their role in setting limits on the regulatory jurisdiction of sport bodies by intervening into the substance of authoritative texts where it is absolutely necessary.

To conclude, the commonalities between CAS and SDRCC in their approaches to arbitral decision-making are significant. They reflect an over-arching pattern of restraint and varying degrees of intervention that balances the need to respect the regulatory authority of sport bodies with the need to ensure that sporting disputes are resolved in a fair and equitable manner. Whether this approach to the arbitral decision-making will become a harmonizing standard for all sport arbitration may depend on additional factors, such as the procedural rules and institutional mandate of other national sport-specific arbitration systems.

Table 1: SDRCC Arbitral Decisions between 2002 - 2009 by Type of Dispute*

*Cases heard up to, and including, September 4, 2009.
**Selection for athlete assistance funding, known as "carding".

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<th>2004</th>
<th>2005</th>
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<th>2007</th>
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Figure 1: Erbsen’s Model of CAS Interventionism

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Figure 2: Model of SDRCC Interventionism

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<td>Deference to gap filling techniques of sport body. (Erbsen Stage 4)</td>
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</tr>
<tr>
<td>Replace an authoritative text when its substance breaches equitable norms (Erbsen Stage 2)</td>
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