

The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness

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Intercollegiate athletics has been shaken by scandal, waning public perception of the National Collegiate Athletic Association (“NCAA”), and its system for enforcing NCAA legislation. Currently, the NCAA uses an internal governance system to resolve all types of disputes and grievances relating to NCAA legis-

lation.¹ This Article suggests that the NCAA act in accord with other sports organizations that allow for grievances and disputes to be heard by neutral arbitrators. This method of resolving disputes will provide student-athletes with a more balanced and fair alternative for addressing appeals in matters relating to student-athlete participation, such as positive drug screenings. By adopting arbitration as the forum to decide NCAA enforcement and infractions matters, the NCAA will be provided limited subpoena power as set forth in the Federal Arbitration Act and similar state statutes. Additionally, this Article proposes that the NCAA replace the Committee on Infractions (“COI”) with a panel of trained and knowledgeable arbitrators to decide NCAA enforcement and infraction matters. Also, the NCAA would provide student-athletes with neutral ombudsman similar to what is provided by the United States Olympic Committee. The ombudsman would be permitted to provide advice to student-athletes separate and apart from the NCAA structure.

Part I of this Article provides an introduction to the NCAA and its history. Part II discusses the current state of NCAA enforcement and the NCAA Committee on Infractions and, specifically, the penalties permitted under NCAA legislation. Part III discusses the Federal Arbitration Act and review of arbitration proceedings provided by courts throughout the United States. Part IV details arbitration opportunities provided in professional sports including arbitration in Major League Baseball, National Basketball Association, National Football League, National Hockey League, PGA Tour, and United States Olympic Committee. Finally, Part V of this Article provides a plan to develop an NCAA arbitration system to resolve disputes and provides a system for student-athletes to have access to an ombudsman.

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1. NAT’L COLLEGIATE ATHLETIC ASS’N, 2014–15 NCAA DIVISION I MANUAL § 19.3 (2014) [hereinafter 2014 NCAA MANUAL], <http://www.ncaapublications.com/productdownloads/D115OCT.pdf>.

I. THE HISTORY OF NCAA ENFORCEMENT
AND INFRACTIONS

The first reported intercollegiate athletics contest in the United States took place in 1852 when Harvard University challenged Yale University to a rowing contest similar to those staged in England by Oxford University and Cambridge University.² It became evident even at the earliest American intercollegiate athletic event that a governing body would be necessary to level the playing field. To tilt the competition in its favor, Harvard University sought to gain an unfair advantage over Yale University by recruiting an athlete who was not a student.³ Subsequently, colleges and universities across the country challenged one another to athletic contests in a variety of sports.

In 1905, the United States was in an uproar over the violence associated with intercollegiate football.⁴ Football student-athletes' use of gang tackling and mass formations led to numerous injuries and deaths.⁵ The public urged universities to abolish football or take steps to reform the game.⁶ As a result, President Theodore Roosevelt summoned the nation's top intercollegiate athletics leaders to discuss reformation of college football.⁷ One such leader, Chancellor Henry M. MacCracken of New York University, called a meeting of officials from the nation's thirteen most prominent universities to discuss reformation of the college foot-

2. See RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 168 (Peter Levine & Steven Tischler eds., 1988).

3. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 *IND. L.J.* 985, 989 (1987).

4. See *id.* at 990.

5. *Id.* ("In 1905, there were eighteen deaths and over one hundred injuries in intercollegiate football."); see also DON YAEGER, *UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL* 1-3 (1991) (explaining that the death of Harold Moore of Union College, the eighteenth fatality in college football in 1905, may have been the pressure necessary to reform college football); Christopher Klein, *How Teddy Roosevelt Saved Football*, *HISTORY.COM* (Sept. 6, 2012), <http://www.history.com/news/how-teddy-roosevelt-saved-football> (discussing how mass formations and gang tackling lead to numerous injuries).

6. YAEGER, *supra* note 5, at 3-4.

7. Smith, *supra* note 3, at 990.

ball playing rules.⁸ Subsequently, a sixty-two member body formed the Intercollegiate Athletic Association of the United States (“IAAUS”), which would become known as the NCAA in 1910.⁹ For the next ten years, the organization was merely a discussion group that developed rules applicable to intercollegiate football.¹⁰

As the world of intercollegiate athletics grew, the NCAA began to evolve from merely an organization that formulated football rules to creating eligibility, recruiting, and financial aid guidelines that would govern all intercollegiate sports.¹¹ However, the organization lacked an enforcement mechanism and struggled to implement its promulgated rules. Thus, in 1919, the NCAA created a policy whereby member institutions were encouraged not to compete against violating members.¹² It quickly became clear that such a deterrent was not feasible and also lacked strength.¹³ In 1948, at the urging of the Big Ten, Pacific Coast, Southwest, and Southeastern conferences, the NCAA again attempted to develop a system to enforce its legislation by adopting the “Sanity Code,” which prohibited member institutions from offering athletics-based financial aid.¹⁴ The member institutions also created a three-member Compliance Committee to enforce the “Sanity Code,” however; the “Sanity Code” was short-lived.¹⁵ In 1951, member institutions voted to repeal the “Sanity Code” because the only punishment available was termination of NCAA membership.¹⁶

8. *Id.*; *Formation of the NCAA: Un Unexpected Beginning*, NCAA HISTORY GUIDE (Nov. 21, 2012, 9:00 AM), <http://ncaahistoryguide.com/formation-ncaa-unexpected-beginning/#more-52>.

9. *Formation of the NCAA*, *supra* note 8. It was the flying wedge, football’s major offense in 1905, which spurred the formation of the NCAA. See Myles Brand, *Address to the National Press Club* (Mar. 4, 2003), <http://www.npr.org/programs/npc/2003/030304.mbrand.html>.

10. See ARTHUR A. FLEISHER III, ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 42 (1992).

11. See *id.* at 42–44.

12. *Id.* at 42 (stating the NCAA resolution recommended that “members schedule games hereafter with those institutions only whose eligibility code is in general conformity with the principles advocated by [the NCAA]”).

13. *Id.* at 46.

14. *Id.* at 47.

15. *Id.* at 47–48.

16. *Id.* at 47–49.

In 1954, the NCAA created the Committee on Infractions (“COI”) to investigate and punish member institutions.¹⁷ In 1973, the member institutions agreed to equip the committee with additional strength by providing an investigative staff that would be responsible for gathering and presenting evidence to the committee regarding alleged institutional infractions.¹⁸ In 1984, member institutions formed the NCAA Presidents Commission that produced a multitude of changes, including increased punishment for violations.¹⁹ The next year, the Presidents Commission revealed a plan to punish member institutions that blatantly violate NCAA rules by adopting the repeat violator bylaw, commonly known as the “death penalty.”²⁰ The “death penalty” has been used to punish only one institution at the Division I level, Southern Methodist University, which prohibited the football team from competing in the 1987 football season.²¹

II. THE CURRENT STATE OF NCAA ENFORCEMENT AND THE NCAA COMMITTEE ON INFRACTIONS

In mid-2011, NCAA President Mark Emmert called a meeting of more than fifty presidents and chancellors at Division I institutions with the stated goal of restoring public trust in intercol-

17. *Id.* at 50.

18. *See* JACK FALLA, *NCAA: THE VOICE OF COLLEGE SPORTS* 139–40 (1981).

19. *See* Smith, *supra* note 3, at 986–87.

20. *Id.* at 987. The NCAA repeat violator bylaw stated the institution is prohibited from

some or all outside competition in the sport involved in the latest major violation for a prescribed period as deemed appropriate by the Committee on Infractions and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities at the institution during that period.

NAT’L COLLEGIATE ATHLETICS ASS’N, 2012–13 NCAA DIVISION I MANUAL § 19.5.2.1.2(a) (2012) [hereinafter 2012 NCAA MANUAL], <http://www.ncaapublications.com/productdownloads/D113.pdf>.

21. *See* NCAA COMM. ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT (1987), http://assets.sbnation.com/assets/388698/SMU_COI_report.pdf.

legiate athletics.²² President Emmert created the NCAA Enforcement Working Group (“EWG”) to study ways to improve intercollegiate athletics. After extensively analyzing the current model, the EWG found numerous changes needed to be made to the enforcement structure.²³ Accordingly, the EWG proposed legislation to alter the COI, as well as the violation and penalty structure, which was ultimately adopted on October 30, 2012 and effective August 1, 2013.²⁴

A. NCAA Violation Structure

Historically, NCAA violations have been separated into two categories, secondary violations and major violations.²⁵ The NCAA defined a secondary violation as “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including, but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid).”²⁶ Whereas, a major violation was defined as “[a]ll violations other than secondary violations” and multiple secondary violations.²⁷ In an effort to provide more clarity in the structure of NCAA violations, the EWG proposed, and the NCAA membership ultimately codified, legislation that provided for four levels of violations. These were dubbed Level I through Level IV violations, with Level I violations being most severe and Level IV violations being incidental infractions.²⁸

Level I violations are labeled “Severe Breach of Conduct” and include violations that “provide[] a substantial or extensive recruiting, competitive or other advantage, or a substantial or ex-

22. NCAA WORKING GROUP ON COLLEGIATE MODEL – ENFORCEMENT, FINAL REPORT 2 (2012) [hereinafter NCAA ENFORCEMENT REPORT], http://www.ncaa.org/sites/default/files/Final_Report_EWG_072412.pdf.

23. *Id.* at 4–6. Specifically, the EWG proposed the following changes: (1) developing a multilevel NCAA violation structure; (2) creating an expedited procedure to dispose of NCAA infractions cases; (3) enhancing the NCAA’s penalty structure; and (4) reinforcing the sense of shared responsibility for compliance among individuals, coaches, and athletics administrators. *Id.*

24. *Id.* at 29.

25. 2012 NCAA MANUAL, *supra* note 20, §§ 19.5.1, 19.5.2.

26. *Id.* § 19.02.2.1.

27. *Id.* §§ 19.02.2.1, 19.02.2.2.

28. NCAA ENFORCEMENT REPORT, *supra* note 22, at 4.

tensive impermissible benefit.”²⁹ Level II violations are labeled “Significant Breach of Conduct” and include violations that provide or are intended to provide more than a minimal but less than a substantial or extensive recruiting, competitive or other advantage; include more than a minimal but less than a substantial or extensive impermissible benefit; or involve conduct that may compromise the integrity of the NCAA Collegiate Model as set forth in the constitution and bylaws.³⁰

29. 2014 NCAA MANUAL, *supra* note 1, § 19.1.1. Specific codified examples include: (1) lack of institutional control; (2) academic misconduct; (3) failure to cooperate in an NCAA enforcement investigation; (4) individual unethical or dishonest conduct; (5) a head coach’s violation of NCAA Bylaw 11.1.1.1 resulting from an underlying Level I violation; (6) cash payments provided by a coach or athletics administrator used to secure the enrollment of a prospective student-athlete; (7) intentional violations or reckless indifference to the NCAA constitution and bylaws; and (8) collective Level II and/or Level III violations. *Id.* NCAA Bylaw 11.1.1.1 states:

An institution’s head coach is presumed to be responsible for the actions of institutional staff members who report, directly or indirectly, to the head coach. An institution’s head coach shall promote an atmosphere of compliance within his or her program and shall monitor the activities of all institutional staff members involved with the program who report, directly or indirectly, to the coach.

Id. § 11.1.1.1.

30. *Id.* § 19.1.2. Specific codified examples are (1) violations that do not rise to the level of a Level I violation, but are more serious than a Level III violation; (2) failure to monitor; (3) “systemic violations that do not amount to a lack of institutional control;” (4) “multiple recruiting, financial aid, or eligibility violations that do not amount to a lack of institutional control;” (5) a head coach’s violation of NCAA Bylaw 11.1.1.1 resulting from an underlying Level II violation; and (6) collective Level III violations. *See, e.g.*, NCAA COMM. ON INFRACTIONS, THE GEORGIA INSTITUTE OF TECHNOLOGY PUBLIC INFRACTIONS DECISION (2014), <http://www.ncaa.org/sites/default/files/Ga%20Tech%20Public%20Infractions%20Decision.pdf>; NCAA COMM. ON INFRACTIONS, SAINT FRANCIS UNIVERSITY PUBLIC INFRACTIONS DECISION (2014), <http://www.ncaa.org/sites/default/files/StFrancisPublicInfractionsDecision.pdf>; NCAA COMM. ON INFRACTIONS, UNIVERSITY OF NEW HAMPSHIRE PUBLIC INFRACTIONS DECISION (2014), <http://www.ncaa.org/sites/default/files/New%20Hampshire%20Public%20Decision.pdf>.

Level III violations are labeled “Breach of Conduct” and include violations that are “isolated or limited in nature; provide no more than a minimal recruiting, competitive or other advantage; and provide no more than a minimal impermissible benefit.”³¹ Level IV violations are labeled “Incidental Infraction[s]” and include violations that are “technical in nature and [do] not constitute a Level III violation . . . [and] will not affect eligibility for intercollegiate athletics.”³² These violations are minor in nature and have been historically adjudicated at the conference level rather than by the NCAA.³³

B. Committee on Infractions

With the adoption of legislative reform, the NCAA membership increased the COI from ten members to twenty-four members, allowing the chair of the COI to have greater flexibility to appoint panel members to expedite processing of infractions cases.³⁴ The changes to the COI were designed to empanel committee members who have intimate knowledge of the operations of intercollegiate athletics programs, including former coaches and presidents.³⁵ However, this change permits current athletics administrators and coaches to make decisions that will, in all likelihood, affect their peers, which may result in termination of employment for coaches and administrators.³⁶ For this reason, some have argued that COI panel members should not be affiliated with an NCAA

31. 2014 NCAA MANUAL, *supra* note 1, § 19.1.3. Specific codified examples are (1) inadvertent violations that are isolated or limited in nature; and (2) extra-benefit, financial aid, academic eligibility and recruiting violations that do not create more than a minimal advantage. *Id.* § 19.1.3.

32. *Id.* § 19.1.4. NCAA legislation does not provide codified examples of Level IV violations; however, the NCAA maintains a list of incidental infractions that provides, among others, the following examples: (1) impermissible camp and clinic brochures; (2) failure to administer the NCAA Drug-Testing Consent Form; and (3) failure to submit a declaration of playing season. *See* NAT’L COLLEGIATE ATHLETICS ASS’N, LIST OF INCIDENTAL INFRACTIONS (LEVEL IV) (2015), [http://www.ncaa.org/sites/default/files/Level%20IV%20Violations%20\(September%204,%202015\).pdf](http://www.ncaa.org/sites/default/files/Level%20IV%20Violations%20(September%204,%202015).pdf).

33. *Secondary Infractions Self-Reporting*, NCAA.ORG, <http://www.ncaa.org/secondary-infractions-self-reporting> (last visited Oct. 10, 2015).

34. *See* 2014 NCAA MANUAL, *supra* note 1, § 19.3.1.

35. *Id.* § 19.3.1.

36. *Id.* § 19.3.1.

member institution because there is an inherent lack of fairness and neutrality.³⁷

The new NCAA enforcement model was calculated to increase efficiency and expedite the decision making process. With these pillars in mind, the NCAA membership adopted legislation that (1) permitted member institutions or involved individuals with the opportunity to petition COI for an accelerated hearing in Level II violation cases;³⁸ (2) increased the opportunity to resolve Level II cases on written submission;³⁹ (3) expanded the summary disposition process⁴⁰ for Level I and Level II cases to provide expanded opportunities for resolution via written submission and appearances via videoconferencing and other forms of communication;⁴¹ and (4) allowed for expedited hearings in summary disposition cases where the parties agree on the facts but not on proposed penalties.⁴²

C. NCAA Penalty Structure

The EWG sought and ultimately succeeded in substantially altering the penalty structure for NCAA infractions. In the EWG's report, the group set forth goals and guidelines as follows: (1) to provide member institutions and involved individuals with notice of the range of potential penalties; (2) to enhance consistency in applying penalties while also providing COI with discretion to alter penalties; (3) to expedite the enforcement process while not sacrificing integrity; (4) to impose penalties that require institutional responsibility for the governance of intercollegiate athletics;

37. See Brent Schrottenboer, *Alabama Case Spotlights Emmert, Saban Friendship*, USA TODAY (Oct. 15, 2013, 5:05 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/10/08/alabama-illegal-benefits-case-spotlights-ncaa-mark-emmert-nick-saban-friendship/2948023/>. But see Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 568–70 (2011).

38. 2014 NCAA MANUAL, *supra* note 1, § 19.7.7.2.

39. *Id.* § 19.7.

40. The summary disposition process is available in Level I and Level II cases when “the institution, involved individuals and the enforcement staff may elect to use the summary disposition procedures” when the parties agree to the facts of the dispute. *Id.* § 19.6.1.

41. *Id.* § 19.6.4.5.

42. *Id.* § 19.6.4.5.

(5) to hold individuals in positions of power and authority accountable for failing to appropriately oversee compliance matters; (6) to impose penalties on coaches and administrators whose conduct is inconsistent with NCAA legislation; and (7) to impose penalties that will eliminate the risk-reward analysis in committing violations of NCAA legislation.⁴³

NCAA legislation groups Level I and Level II penalties. Prior to prescribing penalties, the COI is required to determine “whether any factors that may affect penalties are present for a case.”⁴⁴ After determining whether aggravating⁴⁵ and mitigating⁴⁶ factors exist, COI shall prescribe core penalties for Level I and Level II violations.⁴⁷ The COI may only depart from the core pen-

43. NCAA ENFORCEMENT REPORT, *supra* note 22, at 15.

44. 2014 NCAA MANUAL, *supra* note 1, § 19.9.2.

45. *Id.* COI will determine whether any aggravating factors exist, which consist of: (1) multiple Level I violations by the member institution or involved individuals; (2) a history of Level I, Level II, or major violations by the member institution, involved sports program(s), or involved individuals; (3) lack of institutional control; (4) obstructing an investigation or attempting to conceal evidence; (5) unethical conduct, compromising the integrity of the investigation, and/or failing to cooperate during the investigation and provide relevant information; (6) premeditated violations; (7) multiple Level II violations by the member institution or involved individuals; (8) an individual in an position of authority condoned, participated in or negligently disregarded a violation of NCAA legislation; (9) one or more violations of NCAA legislation that cause significant ineligibility or substantial harm to a student-athlete or prospective student-athlete; (10) a pattern of noncompliance within the involved sports program(s); (11) conduct intended for pecuniary gain; (12) intentional, willful, or blatant disregarding for the NCAA constitution and bylaws; or (13) other factors that warrant additional penalties. *Id.* § 19.9.3.

46. *Id.* § 19.9.4. COI will analyze whether mitigating factors exist to warrant a lower range of penalties, which consist of the following: (1) prompt self-detection and self-disclosure of the violation(s) of NCAA legislation; (2) prompt acknowledgment and acceptance of responsibility for the violations of NCAA legislation; (3) affirmative steps to expedite final resolution of the NCAA infractions matter; (4) an established history of self-reporting Level III or secondary violations; (5) implementation of a compliance system designed to ensure rules compliance; (6) exemplary cooperation in the investigation by the member institution or involved individuals; (7) unintentional violations of NCAA legislation that represent a deviation from otherwise compliant practices; and (8) others factors that warrant lower penalties. *Id.* § 19.9.4.

47. *Id.* §§ 19.9.5, 19.9.5.1–19.9.5.7. The core penalties include: (1) limitations on the member institution’s participation in postseason play; (2) a fine,

alties upon a finding of extenuating circumstances and must explain the basis for altering the core penalties in its report.⁴⁸ NCAA legislation also groups penalties for Level III and Level IV violations.⁴⁹

return of received revenue, or reduction or elimination of distributions received from the NCAA; (3) limitations on the number of financial aid packages awarded; (4) a show-cause order that restricts an involved individual's ability to take part in athletically related duties; (5) suspension of the head coach for a certain number of athletic contests; (6) recruiting restrictions such as limitations on official visits, unofficial visits, recruiting communications, and off-campus recruiting activities; and (7) a probationary period. *Id.* §§ 19.9.5.1–19.9.5.7.

48. *Id.* § 19.9.6. In addition to the core penalties prescribed for Level I and Level II violations, COI may prescribe the following additional penalties: (1) prohibition against competition in the sport during the regular season; (2) prohibition against coaching staff members' involvement in coaching activities; (3) prohibition against institutional staff members serving on various NCAA committees and councils; (4) requirement that the member institution relinquish NCAA voting privileges; (5) recommendation that the member institution's membership in the NCAA be suspended or terminated; (6) public reprimand and censure; (7) vacation of records; (8) prohibition against television appearances; (9) disassociation of relations with a representative of an institution's athletics interests; (10) publicizing a member institution's probation; (11) institutionally imposed suspension of a staff member; and (12) other penalties that may be appropriate. *Id.* § 19.9.7.

49. *Id.* § 19.9.8. Penalties for Level III and Level IV violations include the following: (1) termination of the recruitment of a prospective student-athlete or, for enrolled student-athletes, direction to the member institution to take steps necessary to restore the student-athletes' eligibility; (2) forfeiture or vacation of athletics contests in which an ineligible student-athlete participated; (3) prohibition of the coaching staff's involvement in off-campus recruiting for up to one year; (4) a financial penalty ranging from \$500.00 to \$5000.00; (5) limitations on the number of financial aid packages awarded to a maximum of twenty percent of the maximum number of awards normally permissible in that sport; (6) recertification of institutional NCAA compliance policies and procedures to conform with the NCAA constitution and bylaws; (7) institutionally imposed suspension of the head coach or staff members for one or more competitions; (8) public reprimand; and (9) requirement that a member institution or involved staff member who has been found in violation of NCAA legislation show cause why a penalty or additional penalty should not be prescribed if it does not take appropriate disciplinary action against the involved individuals. *Id.* § 19.9.8.

III. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act (“FAA”), passed by Congress and signed into law by President Calvin Coolidge in 1925, was designed to curb judicial opposition to arbitration agreements.⁵⁰ In pertinent part, the FAA states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵¹

The legislative history of the FAA suggests Congress intended to affirm arbitration agreements that appeared in binding contractual agreements in order to reduce the cost and time of litigation in light of the substantial strain on the judiciary that resulted from a mountain of claims filed in the wake of the Industrial Revolution.⁵² Through the passage of the FAA, Congress essentially “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”⁵³

50. See JON. O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2–3 (2003), <http://digital.library.unt.edu/ark:/67531/metacrs3879/>; see also Janet M. Grossnickle, Note, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 772 (1995) (“[I]t appears that the Act was intended simply to complement state laws and make commercial arbitration agreements enforceable in federal courts.”).

51. 9 U.S.C. § 2 (2012).

52. H.R. REP. NO. 96, at 1–2 (1924).

53. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

As courts' dockets swelled, judges began to take comfort in arbitration as a form of dispute resolution.⁵⁴ The FAA, under most circumstances, "limits a court's role to that of determining whether the party seeking arbitration has raised an issue that is within the scope of the arbitration agreement."⁵⁵ Courts interpret the scope of arbitration clauses liberally and heavily favor enforcement.⁵⁶ The United States Supreme Court has gone as far as to find state statutes prohibiting arbitration are invalid.⁵⁷

The FAA also provides provisions that allow for courts to enforce written arbitration agreements involving interstate commerce.⁵⁸ Specifically, a party seeking to enforce an arbitration agreement has the ability to stay proceedings in federal courts,⁵⁹ appoint arbitrators,⁶⁰ and judicially enforce awards.⁶¹ Most importantly, in accordance with the FAA, arbitrators are also permitted to issue subpoenas requiring the attendance of a witness and/or the production of documents.⁶²

IV. ARBITRATION IN SPORTS

Arbitration is the preferred tribunal to resolve disputes in the sports industry. Arbitration provides an expedited and confidential process using appointed arbitrators with knowledge of the sports industry and arbitration. Collective bargaining agreements

54. Sherrie Kaiser Goff, *Recent Development: Federal and State Securities Claims: Litigation or Arbitration?*—Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238 (1985), 61 WASH. L. REV. 245, 247 (1986).

55. *Id.*

56. *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976) ("[I]n construing arbitration agreements, every doubt is to be resolved in favor of arbitration."); *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) ("[C]ourts will use the Federal Arbitration Act to enforce agreements to arbitrate.").

57. *Keating*, 465 U.S. at 10.

58. 9 U.S.C. § 2 (2012).

59. *Id.* § 3.

60. *Id.* § 5.

61. *Id.* § 9.

62. *Id.* § 7. Section 7 of the FAA states, "The arbitrators selected . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." *Id.*

("CBA") and athlete handbooks commonly provide for an expedited form of dispute resolution. This part details matters subject to arbitration as provided by the CBAs for Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, the PGA Tour player handbook and anti-doping policy, and the United States Olympic Committee's constitution and bylaws.

A. Major League Baseball

Major League Baseball ("MLB") offers a multi-layered system of arbitration to adjust grievances. Baseball provides a unique system for resolving salary negotiations known as salary arbitration.⁶³ Salary arbitration is a form of final offer arbitration that is invoked when a player has a total of three or more years of service⁶⁴ but less than six years of service.⁶⁵ In MLB salary arbitration, the player and his team exchange a single salary figure and submit the matter for decision to the arbitration panel.⁶⁶ The arbitrator or arbitrators must select one of the salary figures presented and may not provide for an alternate salary figure.⁶⁷ The MLB CBA also offers grievance arbitration relating to disputes involving "any agreement, or any provision of any agreement" between the

63. MAJOR LEAGUE BASEBALL, 2012–2016 BASIC AGREEMENT, art. VI § E [hereinafter MLB CBA], http://mlb.mlb.com/pa/pdf/cba_english.pdf; see also Ed Edmonds, *Labor and Employment Law Issues in Sports: A Most Interesting Part of Baseball's Monetary Structure—Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 7–8 (2009); Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It*, 1 HARV. J. SPORTS & ENT. L. 63, 77 (2010).

64. MLB CBA, *supra* note 63, art. IV § E(1). A player known as a "Super 2" is eligible for salary arbitration. *Id.* A "Super 2" is a player with at least two years of service, but less than three years of service, and is eligible for arbitration when he has accumulated at least 86 days of service during the preceding year and ranks in the top 22% in total service in the class of players who have at least two years of service, but less than three years of service. *Id.* art. IV § E(1)(b).

65. *Id.* art. IV § E(1).

66. *Id.* art. IV § E(4).

67. *Id.* art. IV § E(13).

player's association or player and an MLB club.⁶⁸ In the event a grievance arises between the aforementioned parties, the aggrieved party may seek arbitration after attempting to resolve the dispute.⁶⁹

As a part of MLB's Joint Drug Prevention and Treatment Program ("JDA"), players are afforded appellate rights including the opportunity to seek arbitration.⁷⁰ The deciding panel consists of a representative of the MLB Office of the Commissioner, a representative of the Major League Baseball Players Association, and a neutral, independent arbitrator.⁷¹ The JDA states that a player "who tests positive for a Performance Enhancing Substance," or otherwise violates the Program through the use or possession of a Performance Enhancing Substance, will receive discipline of an 80 game suspension for the first violation, a 162 game suspension for the second violation, and a permanent suspension with the opportunity to seek reinstatement for the third violation.⁷² A player may also be subjected to disciplinary action under Section 7(G)⁷³ of the JDA for "just cause" for using, possessing, selling, facilitating the sale of, distributing, or facilitating the distribution of any drug of abuse, performance enhance substance, and/or stimulant that is not otherwise referenced as a violation of another aspect in Section 7.⁷⁴ The arbitration panel is commissioned and has jurisdiction to review "[a] determination that a player has violated the [drug testing]

68. *Id.* art. XI §§ A(1)(a), D, E.

69. *Id.* art. XI § B.

70. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM § 8 [hereinafter MLB JDA], <http://mlb.mlb.com/pa/pdf/jda.pdf>.

71. *Id.* § 8(A).

72. *Id.* § 7(A). A different duration of discipline is mandated for use of stimulants, street drugs, and conviction for use of possession of a prohibited substance, and participation in the sale or distribution of a prohibited substance. *Id.* § 7(B)–(F).

73. *Id.* § 8(D) (discussing specific procedures for appeals relating to "just cause" discipline as provided in Section 7(G)(2)).

74. *Id.* § 7(G); *see also* Major League Baseball Players Ass'n v. Office of the Comm'r of Baseball, Alex Rodriguez, Panel Decision No. 131 (Jan. 11, 2014) (Horowitz, Arb.) (holding there was just cause to suspend Alex Rodriguez for the entire 2014 season in accordance with Section 7(G) of the MLB JDA).

Program,”⁷⁵ whether the level of discipline imposed was supported by “just cause,” and therapeutic use exemptions.⁷⁶

B. National Basketball Association

The National Basketball Association (“NBA”) offers multiple forms of arbitration. Disputes involving the interpretation or application of the provisions of the collective bargaining agreement or the provisions of the uniform player contract are submitted to a grievance arbitrator.⁷⁷ In accordance with the NBA CBA, a grievance may be initiated by a player, team, the NBA, or the National Basketball Players Association (“NBPA”).⁷⁸ The grievance arbitrator has broad jurisdiction and authority,⁷⁹ however, they do not have authority to “add to, detract from, or alter” the provisions of the NBA CBA.⁸⁰ Similarly, grievances relating to player injuries are decided by a grievance arbitrator, along with the assistance of an independent medical expert.⁸¹

Any dispute involving “a fine or suspension imposed upon a player by the commissioner [of the NBA] for conduct on the

75. *MLB JDA supra note 70*, § 8(A)(1). The MLB Commissioner’s Office has the burden of proof to establish that a player tested positive for a banned substance. *Id.* § 8(B)(1). A player does not violate the terms of the MLB JDA if he can show the presence of a banned substance was “not due to his fault or negligence.” *Id.* § 8(B)(3).

76. *Id.* § 8(A)(1). The arbitration panel, however, is not permitted to reduce the discipline imposed below the stated level of the violation set forth in Section 7 of the MLB JDA. *Id.* § 8(A).

77. NAT’L BASKETBALL ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT (2011), art. XXXI § 1(a)(i) [hereinafter NBA CBA], <http://nbpa.com/cba/>.

78. *Id.* art. XXXI § 2(a).

79. *See id.* art. XXXI § 6(b). The grievance arbitrators have the authority to

- (i) interpret, apply, or determine compliance with the provisions of the [NBA CBA];
- (ii) interpret, apply or determine compliance with the provisions of Player Contracts;
- (iii) determine the validity of Player Contracts;
- (iv) award damages . . . ;
- (v) award declaratory relief . . . to determine whether [an NBA] Team may properly terminate a Player Contract . . . ; and
- (vi) resolve disputes.

Id.

80. *Id.*

81. *Id.* art. XXXI § 8(a).

playing court” or any action taken by the commissioner relating to preserving the “integrity of, or maintenance of public confidence in, the game of basketball” is also subject to player discipline arbitration.⁸² The commissioner of the NBA shall decide between a fine of \$50,000 or less, a suspension of twelve (12) game or less, or both.⁸³ However, if the dispute is not resolved to the player’s satisfaction, the NBPA may seek to review the “financial impact” of the commissioner’s decision by seeking arbitration by and through the arbitrator.⁸⁴ The player discipline arbitrator does not have authority to review financial penalties imposed for “technical fouls, ejections, or the violation of other similar NBA rules” and the standard of review is *de novo*.⁸⁵ If the fine imposed by the commissioner is more than \$50,000 and/or the suspension is more than twelve (12) games, or both, then the grievance arbitrator shall serve as the arbitrator and apply an arbitrary and capricious standard of review.⁸⁶

The CBA also calls for system arbitration involving disputes between the NBA and NBPA.⁸⁷ The systems arbitrator is afforded authority to make “findings of fact and award appropriate relief including, without limitation, damages, injunctive relief and specific performance,” but does not have authority to impose an award of punitive damages.⁸⁸ The systems arbitrator has exclusive jurisdiction to determine disputes relating to matters such as basketball-related income, salary cap, minimum team salary, escrow arrangements, rookie pay scale, player eligibility, NBA draft, free agency, option clauses, circumvention, anti-collusion, certifications, mutual reservations of rights, group licensing rights, terms of

82. *Id.* art. XXXI § 1(b)(ii).

83. *Id.* art. XXXI § 9(a).

84. *Id.* art. XXXI § 9(a)(5).

85. *Id.* art. XXXXI § 9(a)(5)(b).

86. *Id.* art. XXXI § 9(b); *see also* *Sprewell v. Golden State Warriors*, 266 F.3d 979, 984–88 (9th Cir. 2001) (holding the arbitrator did not exceed his scope of authority in determining that Sprewell should be suspended for the 1997–98 NBA season for choking and assaulting P.J. Carlesimo, the head coach of the Golden State Warriors).

87. NBA CBA, *supra* note 77, art. XXXII § 1.

88. *Id.* art. XXXII §3(b).

the CBA, expansion, and contraction.⁸⁹ The system arbitrator, however, does not have authority to “add to, detract from, or alter” the provisions of the NBA CBA or a player contract.⁹⁰

C. National Football League

The National Football League (“NFL”) also provides for multiple forms of arbitration. The NFL and the NFL Players Association (“NFLPA”) agreed by and through the CBA to provide for a system arbitrator.⁹¹ The system arbitrator has exclusive authority to determine disputes relating to the terms of the CBA and other limited and specific terms.⁹² The system arbitrator shall make determinations of relief and damages including injunctive relief, fines, and specific performance.⁹³ A three-year statute of limitations is applied to matters initiated before the system arbitrator.⁹⁴

The NFL CBA provides for the appointment of a non-injury grievance arbitrator.⁹⁵ A non-injury grievance,⁹⁶ as defined by Article 43 of the CBA, is any dispute involving the interpreta-

89. *Id.* art. XXXII § 1. *See also* art. VII (listing categories in which the systems arbitrator has exclusive jurisdiction).

90. *Id.* art. XXXII § 3(e).

91. NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT art. 15 (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargain-ing-agreement-2011-2020.pdf> [hereinafter NFL CBA].

92. *Id.* art. 15, § 1. For example, the following terms must be determined by the arbitrator: (1) definitions of the CBA; (2) the NFL player contract; (3) the college draft; (4) veterans and veteran free agency; (5) franchise and transition players; (6) transition rules for the 2011 season; (7) anti-collusion; (8) certification; (9) consultation and information sharing; (10) salaries; (11) minimum salaries; (12) performance-base pool; (13) additional regular season games; (14) mutual reservation of rights; (15) duration of the CBA; (16) law and principles governing the CBA; (17) rookie compensation; (18) revenue accounting; (19) calculation of salary cap; (20) salary cap accounting rules; and (21) circumvention of salary cap. *Id.* art. 14 § 3, art. 15 § 1.

93. *Id.* art. 15 § 2(a).

94. *Id.* art. 15 § 2(f).

95. *Id.* art. 43 § 1.

96. *Id.*; *see also* *White v. Nat’l Football League*, 533 F. Supp. 2d 929, 933 (D. Minn. 2008) (refusing to adopt the non-injury grievance decision of the NFL’s special master and holding Michael Vick was entitled to retain the roster bonus he received from the Atlanta Falcons despite pleading guilty to federal criminal charges).

tion of, application of, or compliance with any provision of the CBA, the NFL player contract, the practice squad player contract, or provisions of the NFL constitution and bylaws or NFL rules that relate to the terms and conditions of employment of an NFL player.⁹⁷ A grievance may be initiated by a player, the club, the NFL management council, or the NFLPA and must be initiated within fifty-days of the date of the occurrence.⁹⁸ Additionally, the non-injury grievance arbitrator shall have authority to determine whether a player or his agent engaged in “good faith negotiations” over compensation as well as any workers’ compensation claims for teams that elect not to be covered by workers’ compensation laws of its state.⁹⁹ The non-injury grievance arbitrator does not have jurisdiction or authority to “add to, subtract from, or alter in any way the provisions of [the NFL CBA]” or

to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of [the NFL CBA] or any other applicable document, or an advisory opinion pursuant to [proposed playing rule changes].¹⁰⁰

The NFL CBA also provides for the resolution of injury grievances by and through arbitration. An injury grievance, as defined by the CBA, is any complaint or claim “that, at the time a player’s NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.”¹⁰¹ A player, or the NFLPA on the player’s behalf, must present an injury grievance to the player’s team and to the NFL Management Council within twenty-five days from the date the play-

97. NFL CBA, *supra* note 91, art. 43 § 1.

98. *Id.* art. 43 § 2.

99. *Id.* art. 26 § 4, art. 41 § 3.

100. *Id.* art. 43 § 8.

101. *Id.* art. 44 § 1.

er's contract was known to be terminated.¹⁰² The team will then make a determination whether to compensate the aggrieved player. If the player or the NFLPA do not agree with the decision made by the team, the player or the NFLPA may seek arbitration.¹⁰³

All disputes relating to a fine or suspension imposed upon a player for conduct on the playing field or conduct "detrimental to the integrity of, or public confidence in, the game of professional football" may be appealed to the NFL commissioner.¹⁰⁴ Appeals of such discipline shall be made to "hearing officer" as appointed by the NFL commissioner after consultation with the executive director of the NFLPA.¹⁰⁵

D. National Hockey League

The National Hockey League ("NHL") provides multiple forms of arbitration by and through the CBA between the National Hockey League and the NHL Players' Association ("NHLPA"). Like the MLB, the NHL also provides for salary arbitration.¹⁰⁶ The salary arbitrator has authority to establish the term of the player contract based on the player's or team's election of a one or two year agreement and the amount to be paid to the player.¹⁰⁷

102. *Id.* art. 44 § 2.

103. *Id.* art. 44 § 6.

104. *Id.* art. 46 § 1.

105. *Id.* art. 46 § 2(a); see NAT'L FOOTBALL LEAGUE, POLICY AND PROGRAM ON SUBSTANCES OF ABUSE 24 (2014), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/Drug_SOA_Policy_9-29-14.pdf.

106. COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL PLAYERS' ASSOCIATION art. 12 (2013) [hereinafter NHL CBA], http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf; see also *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 481 (E.D. Pa. 1972). The following players are eligible for salary arbitration: (1) an 18–20 year old player with four years of professional experience; (2) a 21 year old player with three years of professional experience; (3) a 22–23 year old player with two years of professional experience; and (4) a 24 year old or older player with one year of professional experience. NHL CBA, *supra*, art. 12 § 1(a).

107. NHL CBA, *supra* note 106, art. 12 § 9(n); see also Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L. J. 189, 193–96 (2003).

The NHL CBA calls for grievances to be adjusted by an “impartial arbitrator.”¹⁰⁸ A grievance is defined as “any dispute involving the interpretation or application of, or compliance with, any provision of [the NHL CBA].”¹⁰⁹ Grievances may only be initiated by the NHL or the NHLPA, unlike the NBA and NFL which both allow the players to initiate grievances as well.¹¹⁰ Either party may seek an expedited hearing upon a showing of good cause.¹¹¹ The impartial arbitrator’s decision is the full and final disposition of any grievance; however, the impartial arbitrator is not permitted to “add to, subtract from, or alter in any way the provisions” of the CBA.¹¹²

Additionally, the NHL CBA provides a mechanism to adjust system grievances. A system grievance “is any dispute involving the interpretation or application of or compliance with” the player compensation cost reduction system, team payroll range system, circumvention, entry level compensation, free agency, the team payroll range system, and the player compensation cost redistribution system as set forth in the CBA.¹¹³ A system grievance may only be initiated by the NHL or the NHLPA.¹¹⁴ The “system arbitrator” shall make findings of fact and award relief including damages and specific performance.¹¹⁵

NHL players are also permitted to appeal disciplinary matters to arbitration. The NHL commissioner is authorized to issue discipline for “on-ice conduct” by weighing the following factors: violations of league playing rules, injury to an opposing player, a history of repeated violations of league playing rules, the situation of the game in which the incident occurred, and other appropriate factors.¹¹⁶ A player receiving discipline from the NHL has a right to a hearing to address penalties for on-ice conduct.¹¹⁷ If the player believes the penalties issued are inappropriate, the NHLPA, on

108. NHL CBA, *supra* note 106, art. 17 § 5.

109. *Id.* art. 17 § 1.

110. *Id.* art. 17 § 2(a); *see supra* notes 78 & 98.

111. NHL CBA, *supra* note 106, art. 17 § 17.

112. *Id.* art. 17 § 13.

113. *Id.* art. 48 § 1.

114. *Id.* art. 48 § 2(a).

115. *Id.* art. 48 § 5(c).

116. *Id.* art. 18 § 2.

117. *Id.* art. 18 § 4(b)(i).

the player's behalf, may file an appeal to the NHL commissioner.¹¹⁸ If the NHL commissioner issues a suspension of six or more NHL games, then the NHLPA, on the player's behalf, may then file an appeal to the "Neutral Discipline Arbitrator."¹¹⁹ In the event the NHL playing rules call for the automatic suspension of a player and the suspension is five games or more, the NHLPA, on the player's behalf, may file an appeal to the neutral discipline arbitrator.¹²⁰

Players are also afforded the right to appeal "Off-Ice Conduct" to arbitration. The NHL commissioner has the authority to impose discipline on a player when the player has violated NHL rules or "has been or is guilty of conduct . . . that is detrimental to or against the welfare of the [NHL] or the game of hockey."¹²¹ In the event the commissioner makes this determination, he may discipline the player by expelling or suspending the player, cancelling the player's contract, or imposing a fine.¹²² The NHLPA, on behalf of the player, has the right to appeal any such decision to the NHL commissioner.¹²³ If the NHLPA and the NHL commissioner are unable to adjust the penalty imposed for off-ice conduct, the NHLPA may file an appeal to the impartial arbitrator on the player's behalf.¹²⁴ The standard of review used by the impartial arbitrator is whether the NHL commissioner's decision was "supported by substantial evidence and was not unreasonable based on the following considerations: (i) the facts and circumstances surrounding the conduct at issue; (ii) whether the penalty was proportionate to the gravity of the offense; and (iii) the legitimate interests of both the Player and the [NHL]."¹²⁵

Like other leagues, the NHL has developed a system to test for performance enhancing substances. The NHL is permitted to test NHL players during training camp, the regular season,

118. *Id.* art. 18 § 12.

119. *Id.* art. 18 § 13(a).

120. *Id.* art. 18 § 17.

121. *Id.* art. 18-A § 2.

122. *Id.*

123. *Id.* art. 18-A § 3(d).

124. *Id.* art. 18-A § 4.

125. *Id.* art. 18-A § 4.

playoffs, the off-season, and upon reasonable cause.¹²⁶ The NHLPA, on the player's behalf, may appeal a positive drug test on an expedited basis to the impartial arbitrator.¹²⁷ The standard for review of a positive drug test is strict liability.¹²⁸

E. PGA Tour

Unlike their contemporaries in other professional sports, PGA Tour players are not unionized and, thus, do not collectively bargain for their rights and obligations.¹²⁹ PGA Tour players are subject to sanctions for “conduct unbecoming of a professional golfer” and violations of PGA Tour Regulations.¹³⁰ Accordingly, PGA Tour players' appellate rights are limited to internal appeals made to the Chief of Operations of the PGA Tour in the case of minor penalties¹³¹ and a written appeal to the Commissioner of the PGA Tour in the event of imposition of intermediate penalties¹³² or major penalties¹³³ by the PGA Tour.¹³⁴ In the event the grievance

126. *Id.* art. 47 § 6. A player who tests positive for a prohibited substance shall be suspended for twenty games for the first positive test, sixty games for the second positive test, and a permanent suspension for the third positive test. *Id.* art. 47 § 7(a).

127. *Id.* art. 47 § 9.

128. *Id.* art. 47 § 9(e). *UCI v. Outchakov* (CAS 2000/A/272) (holding the UCI definition of doping is a strict liability offense, thus overturning the federation's determination would require a showing that the rider was “guiltless”).

129. Charles R. Daniel II, *The PGA Tour: Successful Self-Regulation or Unreasonably Restraining Trade?*, 4 *SPORTS L. J.* 41, 41–43 (1997).

130. PGA TOUR, 2014–2015 PLAYER HANDBOOK & TOURNAMENT REGULATIONS (2014), at 146 [hereinafter PGA REGULATIONS], <https://player.support.pgatourhq.com/Tour/PLP/playersupportinforegistration.nsf/xsp/.ibmmodes/domino/OpenAttachment/Tour/PLP/playersupportinforegistration.nsf/C727DB7A7733806285257CC50066F582/pgAttachments/2014-15%20PGAT%20Handbook%20&%20Regulations.pdf>.

131. The PGA Tour defines minor penalties as “a fine of not more than \$10,000.” *Id.* at 149.

132. The PGA Tour defines intermediate penalties as “a fine of between \$10,001 and \$20,000 and/or suspension from play for not more than three tournaments.” *Id.* at 150.

133. The PGA Tour defines major penalties as “a fine in excess of \$20,000, suspension from tournament play for more than three tournaments and/or permanent disbarment from play in PGA Tour cosponsored or coordinated events.” *Id.* at 150.

134. *Id.* at 150–51.

is not adjusted at this level, the PGA Tour players have the right to make a final appeal to the PGA Tour Appeals Committee, which consists of three non-player members of the PGA Tour's Board of Directors.¹³⁵

The PGA Tour, however, provides greater appellate rights in matters relating to the PGA Tour's anti-doping policies, including access to arbitration conducted by the American Arbitration Association ("AAA"). Drug testing is administered and collected by the National Center for Drug Free Sport ("Drug Free Sport").¹³⁶ If a PGA Tour player is found to have violated the anti-doping policies, he is subject to disqualification, including loss of results, points, and prize money, up to permanent ineligibility, and a fine up to \$500,000.¹³⁷ In such event, players are presented with the opportunity to appeal positive drug test results in accordance with the appellate provisions of the intermediate penalties or major penalties as stated in the PGA Tour Regulations for drug of abuse violations¹³⁸ and to AAA for anti-doping violations, therapeutic use exemptions, and other disputes relating to the PGA Tour anti-doping policies and procedures.¹³⁹

A PGA Tour player desiring to appeal to AAA shall notify the Commissioner of the PGA Tour of his desire to appeal.¹⁴⁰ The PGA Tour, then, is required to select an arbitrator, from a list of arbitrators, who is both an AAA arbitrator located in North America and an arbitrator with appointment to the Court of Arbitration for Sport.¹⁴¹ The PGA Tour player will then be provided the opportunity to select an arbitrator from a list provided by AAA. The two arbitrators selected by the Tour and the player will choose the

135. *Id.* at 151.

136. PGA TOUR, PGA TOUR ANTI-DOPING PROGRAM MANUAL 4 (2013) [hereinafter PGA TOUR DRUG TESTING POLICY], <http://usga.org/uploadedFiles/2014-2015%20Anti-Doping%20Manual.pdf>.

137. *Id.* at 15–16.

138. *Id.* at 12. The PGA Tour Drug Testing Policy defines drugs of abuse as “[s]ubstances which are normally associated with social abuse rather than athletic performance enhancement as identified on the PGA Tour Prohibited List.” *Id.* at 19.

139. *Id.* at 12–13.

140. *Id.* at 13.

141. *Id.*

third arbitrator.¹⁴² The anti-doping policies do not provide for the exchange of discovery other than the laboratory testing packet in the case and all documents considered by the therapeutic use exemption committee in ruling on a therapeutic use exemption.¹⁴³ The PGA Tour has the burden to establish by a balance of probability that an anti-doping violation occurred.¹⁴⁴ The panel shall have forty-five days from the formation of the arbitration panel to conduct the hearing and fifteen days from the close of the evidence to render a written decision.¹⁴⁵ Recently, the PGA Tour anti-doping policies and procedures came under scrutiny following the suspension of Vijay Singh, a longtime professional golfer.¹⁴⁶

F. *United States Olympic Committee*

The United States Olympic Committee (“USOC”) serves as the national representative of the United States to the International Olympic Committee. The USOC was federally chartered by Congress under the Amateur Sports Act of 1978 to act as the exclusive governing body of the United States participation in Olympic and Pan-American Games.¹⁴⁷ In 1998, the Amateur Sports Act of 1978 was amended and renamed the Ted Stevens Olympic & Amateur Sports Act (“ASA”).¹⁴⁸ The ASA mandates that the USOC establish procedures that “provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any

142. *Id.* at 13.

143. *Id.* at 14.

144. *Id.*

145. *Id.* at 14–15.

146. *Singh v. PGA Tour, Inc.*, 42 Misc.3d 1225(A), *4–6 (N.Y. Sup. Ct. Feb. 13, 2014). Singh was suspended for ninety days after admitting to using “deer antler spray” and all of Singh’s prize money was to be held in escrow. *Id.* at *1. In accordance with PGA procedures, Singh timely filed for arbitration. *Id.* at *2. While the arbitration matter was pending, the World Anti-Doping Agency (“WADA”) informed the PGA Tour it determined “deer antler spray” should be removed from the list of prohibited substances. *Id.* Shortly thereafter, Singh filed suit against the PGA Tour for recklessly administering the PGA Tour anti-doping program, subjecting him to ridicule and humiliation, and placing his prize money in escrow without legal authority. *Id.* This matter is currently pending in state court in New York.

147. 36 U.S.C. § 220503(3) (2012).

148. *Id.* §§ 220501–220529.

amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur competition.”¹⁴⁹ Additionally, the ASA requires an amateur sports organization (i.e., USOC) to submit “any controversy” to AAA and such controversy shall be conducted in accordance with AAA’s Commercial Rules.¹⁵⁰

AAA has jurisdiction over disputes involving the USOC and, specifically, over a controversy involving an athlete’s opportunity to participate in national and international competition representing the United States.¹⁵¹ Section 220522(a)(4) of the ASA states:

An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete . . . conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified

149. *Id.* § 220503(8).

150. *Id.* § 220503(a)(4).

151. Athletes have commonly attempted to circumvent the ASA and file suit in state and federal courts; however, courts commonly uphold the requirements of the ASA. *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring) (“[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”). The ASA also provides for national governing bodies (“NGB”) to “establish procedures for determining eligibility standards for participation in competition” such as drug testing. 36 U.S.C. § 220523(a)(5). Accordingly, the USOC policies require that NGBs abide by and comply with the United States Anti-Doping Agency’s (“USADA”) drug testing protocols. *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 585 (W.D. Tex. 2012). Athletes have the right to appeal doping violations to the Court of Arbitration for Sport, which is a private international arbitration tribunal based in Switzerland that provides for arbitration rulings for athletes engaged in international competition. *See* Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1212 (2005); *see also* COURT OF ARBITRATION FOR SPORT, PROCEDURAL RULES (Nov. 14, 2014), <http://www.tas-cas.org/rules> [<https://web.archive.org/web/20141114201529/http://www.tas-cas.org/rules>] (“The seat of [Court of Arbitration for Sport] . . . is Lausanne, Switzerland.”).

and provided for in the corporation's constitution and bylaws¹⁵²

Additionally, Section 220522(a)(8) of the ASA states a national governing body ("NGB") must

provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate.¹⁵³

Section 9.1 of the USOC Bylaws provides:

No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents.¹⁵⁴

152. 36 U.S.C. § 220522(a)(4).

153. *Id.* at § 220522(a)(8).

154. BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE § 9.1 (2014) [hereinafter USOC BYLAWS], <http://www.teamusa.org/~media/TeamUSA/Documents/Legal/Governance/2013%20Q4Bylaws%20Revisions%20120613.pdf>. Under USOC Bylaws Section 1.3(w), "protected competition" means:

1) any amateur athletic competition between any athlete or athletes officially designated by the appropriate [National Governing Body] or [Paralympic Sports Organization] as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign

USOC Bylaws Section 9.7 provides, “If the complaint [under Section 9.1] is not settled to the athlete’s satisfaction the athlete may file a claim with the AAA against the respondent for final and binding arbitration.”¹⁵⁵ Under both Sections 9.7 and 9.9 of the USOC Bylaws, the arbitration proceeding may be expedited.¹⁵⁶

V. A PLAN FOR NCAA ARBITRATION

The NCAA has been chastised in the media and by the general public over the course of the last several years relating to a multitude of matters. Some have argued the NCAA lacks fundamental fairness¹⁵⁷ and does not provide member institutions, coaches, and student-athletes with a proper forum to address disputed matters.¹⁵⁸ The following discussion outlines a process that

country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which, by its terms, requires that entrants be expressly restricted to members of a specific class or amateur athletes such as those referred to in Section 220526(a) of the Act; and 2) any domestic amateur athletic competition or event organized and conducted by an [*sic*] NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.

Id. § 1.3(w).

155. *Id.* § 9.7.

156. *Id.* §§ 9.7, 9.9.

157. *See, e.g.*, *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1068 n.2 (2d Cir. 1972) (affirming substitution of neutral arbitrator for professional basketball commissioner under the Federal Arbitration Act in order “to insure a fair and impartial hearing”); *Morris v. N.Y. Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1016–17 (N.Y. Sup. Ct. 1991) (holding that, under the circumstances, NFL Commissioner sitting as arbitrator had to be replaced by a neutral arbitrator pursuant to federal and state arbitral law).

158. *See* Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until* *Oliver v. NCAA*, 11 FL. COASTAL L. REV. 459 (2010).

will benefit the NCAA, member institutions, coaches, and student-athletes. Under the following procedure, disputed matters will be presented to a neutral arbitrator or a panel of arbitrators with experience in disputes involving athletes and the sports industry. Drug test appeals, NCAA enforcement and infractions matters, and matters relating to student-athlete participation should be decided by arbitrators.¹⁵⁹ Providing for a neutral process to resolve disputed matters will restore impartiality, fairness, and trust in intercollegiate athletics.

A. Drug Test Appeals

The NCAA, along with member conferences and institutions, has drug-testing programs requiring student-athletes to be tested for street drugs and performance enhancing drugs.¹⁶⁰ Student-athletes are required to execute an NCAA form consenting to the NCAA drug-testing program before he or she is eligible to compete.¹⁶¹ Student-athletes are subject to year-round testing, re-

159. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (stating when no dishonesty of the arbitrator is alleged the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987)).

160. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 669 (Cal. 1994) (holding the NCAA's drug testing program does not violate the State of California's right to privacy); *see also O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997, 1007 (W.D. Wash. 1988) (denying a request for temporary injunction and holding the student-athlete failed to demonstrate "an invasion of any constitutionally protected right requiring invalidation [of the NCAA] drug-testing program"); *Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 935 (Colo. 1993) (holding "in the absence of voluntary consents, [University of Colorado's] random, suspicionless urinalysis-drug-testing of student athletes violates the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution"); *Bally v. Northeastern Univ.*, 532 N.E.2d 49, 53–54 (Mass. 1989) (holding the student-athlete's claims that Northeastern University's drug testing program violated his civil rights and his right to privacy were unfounded).

161. 2012 NCAA MANUAL, *supra* note 20, § 14.1.4.1. 2012 NCAA By-law section 14.1.4.1 states "[e]ach academic year, a student-athlete shall sign a form . . . in which the student consents to be tested for the use of drugs prohibited by NCAA legislation." *Id.*; *see also NAT'L COLLEGIATE ATHLETICS ASS'N*, 2014–15 DRUG-TESTING PROGRAM § 3.1 (2014) [hereinafter NCAA DRUG POLICY], <http://www.ncaa.org/sites/default/files/DT%20Book%202014-15.pdf>;

ardless of when they will compete.¹⁶² In accordance with the NCAA Drug-Testing Program, “Drug Free Sport” administers and manages for all NCAA student-athletes.¹⁶³

A student-athlete who tests positive for a banned substance is subject to loss of eligibility for one full season.¹⁶⁴ A positive drug test may be appealed and the NCAA member institution shall appeal the test if requested to do so by the student-athlete.¹⁶⁵ An appeal is conducted telephonically and may be expedited if the student-athlete’s next competition is imminent.¹⁶⁶ The body reviewing the appeal consists of “[a]t least three members” of the NCAA Drug-Education and Drug-Testing Subcommittee (“Appeals Committee”).¹⁶⁷ The student-athlete is not restricted on the grounds for his or her appeal; however, the NCAA recognizes that

Stephen F. Brock, et al., *Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over?*, 97 W. VA. L. REV. 53, 110–13 (1994) (arguing the NCAA drug test consent form “is not necessarily dispositive and should not be relied upon by the NCAA”).

162. NCAA DRUG POLICY, *supra* note 161, § 4.3.1.

163. *Id.* § 2.3.

164. 2014 NCAA MANUAL, *supra* note 1, at § 18.4.1.5.1. 2014 NCAA Manual section 18.4.1.5.1 states “[a] student-athlete who, as a result of a drug test administered by the NCAA, tests positive . . . [for a banned substance] shall be charged with the loss of one season of competition in all sports in addition to the use of a season . . . if he or she has participated in intercollegiate competition during the same academic year.” *Id.*; see also NCAA DRUG POLICY, *supra* note 161, § 3.2; Floralynn Einesman, *Drug Testing Students in California—Does It Violate the State Constitution?*, 47 SAN DIEGO L. REV. 681, 696–702 (2010) (discussing *Hill v. NCAA* and subsequent refinements to the law on drug testing); Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care if Athletes Inhale?*, 8 MARQ. SPORTS L.J. 75, 89–91 (1997) (proposing less restrictive penalties for athletes who fail drug tests).

165. NCAA DRUG POLICY, *supra* note 161, §§ 8.2.4, 8.2.4.1.

166. *Id.* §§ 8.2.4.3–8.2.4.4.

167. NAT’L COLLEGIATE ATHLETIC ASS’N, 2014–15 NCAA DRUG-TESTING PROGRAM APPEALS PROCESS (2014) [hereinafter NCAA APPEAL], <http://www.ncaa.org/sites/default/files/DT%20Appeals%20Process%202014-15%20draft.pdf>. The Appeals Committee consists of the Director of Athletics from New England College, the Faculty Athletic Representatives from Dominican College and Duquesne University, the Head Athletic Trainer from University of South Florida, the Team Physician from the University of Toledo, the Deputy Director of Athletics from John Hopkins University, the Team Physician from the University of Georgia, and the Director of Sports Medicine from Harvard University. *Id.*

generally procedural and knowledge challenges are the most common arguments on appeal.¹⁶⁸ In making a procedural challenge, the student-athlete must establish that “*it is more likely than not* that any substantiated problem with the collection or testing procedures *materially affect[ed]* a sample’s integrity.”¹⁶⁹ In making a knowledge challenge, the student-athlete must establish that he or she “was not aware [he or she] had been administered . . . a substance by another person that later is found to have contained a banned ingredient” or the student-athlete asked “specific and reasonable questions” regarding a specific substance and “did not know *and* could not reasonably have known or suspected . . . the information provided by staff was erroneous.”¹⁷⁰ Additionally, a student-athlete may argue for a reduction of the penalty based on mitigating factors.¹⁷¹ If the Appeals Committee finds mitigating factors exist, the Appeals Committee may reduce the penalty imposed on the student-athlete to the first fifty percent of the regular season if the season has yet to begin or the next fifty percent of the season if the student-athlete tests positive for a banned substance during the season.¹⁷²

Student-athletes certainly do not have the protections provided to their colleagues competing in professional athletics. Without a collective bargaining agreement, the NCAA can implement policies without student-athletes having the opportunity to legitimately voice concerns. Student-athletes would benefit substantially by having a neutral arbitrator or arbitrators to consider evidence presented rather than the Appeals Committee that does not have legal training and, frankly, is likely not skilled in drug-

168. *See id.*

169. *Id.*

170. *Id.*

171. *See id.* The Appeals Committee will not consider the following as mitigating factors: (1) the type or amount of the banned substance detected; (2) the student-athlete’s good character; (3) the remorse demonstrated by the student-athlete; and (4) whether the substance used enhances athletics performance; and (5) family hardship or history of family dysfunction. *Id.* Examples of information that lean towards a finding of mitigating factors are: (1) inadequate drug education was provided by the NCAA member institution; or (2) the circumstances by which the student-athlete ingested the banned substance were outside of his or her control. *Id.*

172. *Id.*

testing analysis and review. A neutral arbitrator would have the ability to review the evidence independent of affiliation with an institution, conference, or the NCAA. Indeed, bodies like the USOC and USADA allow for the presentation of evidence to neutral arbitrators as it relates to drug testing results. At present, the only options for the Appeals Committee are to uphold the punishment, find no violation occurred, or reduce the penalty to fifty percent of athletics contests. A neutral arbitrator would not be restricted by procedures that provide limited alternative forms of punishment. Furthermore, non-lawyers are simply not equipped to address procedural arguments and, often times, these arguments are met with skepticism by laypersons.

Accordingly, the NCAA should permit student-athletes, or member institutions on behalf of the student-athlete, to present evidence to a neutral arbitrator. The arbitrator should be afforded the opportunity to review the evidence on an expedited basis, if necessary, and determine whether punishment is necessary, and provide for reduction of punishment, if deemed appropriate. This system would allow student-athletes the opportunity to present evidence to trained experts knowledgeable in deciding complex drug-testing matters, providing a sense of fairness and objectivity.

B. NCAA Enforcement and Infractions

The NCAA enforcement process is a lightning rod for debate and discussion. The enforcement process has been the subject of scrutiny and numerous lawsuits including claims for tortious interference with a contract,¹⁷³ violations of due process,¹⁷⁴ defamation,¹⁷⁵ and violations of the Sherman Act.¹⁷⁶ States have also

173. *Harrick v. Nat'l Collegiate Athletic Ass'n*, 454 F. Supp. 2d 1255, 1259 (N.D. Ga. 2006) (stating the NCAA is not a stranger to the coaching agreement between Harrick and the University of Georgia).

174. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 195–96, 199 (1988) (holding the NCAA is not a state actor); *Cohane v. Nat'l Collegiate Athletic Ass'n*, 215 F. App'x 13, 16 (2d Cir. 2007) (holding the NCAA's motion to dismiss should have been denied because *Tarkanian* is distinguishable). See also *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 939 P.2d 1049, 1050 (Nev. 1997); Larry Stewart, *Tarkanian, NCAA Settle for \$2.5 Million*, L.A. TIMES (Apr. 2, 1998), <http://articles.latimes.com/1998/apr/02/sports/sp-35333> (explaining the settlement between Jerry Tarkanian and the NCAA).

175. Scott Enyeart, *Judge in Todd McNair Suit Says NCAA 'Malicious' in Investigation of USC*, SB NATION L.A. (Nov. 21, 2012 4:49 PM),

attempted to adopt legislation that would provide greater due process to student-athletes by limiting the NCAA's authority during investigations.¹⁷⁷

Recently, the NCAA's practices were questioned during the investigation of the University of Miami ("Miami"). The Miami investigation stemmed from accusations by former Miami booster and convicted felon, Nevin Shapiro, in which he indicated he provided thousands of dollars in impermissible benefits to Miami student-athletes.¹⁷⁸ During the investigation, the NCAA hired Nevin Shapiro's bankruptcy attorney to obtain information the NCAA could not access and, thus, used the attorney's ability to subpoena records to obtain missing information.¹⁷⁹ Subsequently, the NCAA hired a law firm to investigate this practice and, ultimately, concluded the NCAA used improper means to obtain records.¹⁸⁰

The Miami investigation has not been the only source of scrutiny. In July 2014, Big 12 Conference commissioner Bob Bowlsby said "[NCAA] [e]nforcement is broken. The infractions committee hasn't had [an FBS] hearing in almost a year, and I

http://losangeles.sbnation.com/2012/11/21/3677898/judge-todd-mcnair-ncaa-malicious-usc-investigation?_ga=1.78305556.1611737641.1439999234 (stating there is evidence the NCAA acted maliciously towards Todd McNair and the NCAA infractions report contained was flawed).

176. *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (holding the NCAA sanctions enforced by the NCAA were not anti-competitive, were reasonably related to the NCAA's central objectives, and were not overbroad; therefore, the NCAA's actions to sanction the University of Arizona did not constitute an unreasonable restraint of trade in violation of the Sherman Act).

177. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993) (holding Nevada legislation that provided for procedural changes during NCAA investigations violated the dormant commerce clause).

178. NAT'L COLLEGIATE ATHLETIC ASS'N, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT 1-2 (2013) <http://www.ncaa.org/sites/default/files/Miami%20Public%20Inf%20Rpt.pdf>; KENNETH L. WAINSTEIN ET AL., CADWALADER, WICKERSHAM, & TAFF, LLP, REPORT ON NCAA'S ENGAGEMENT OF A SOURCES'S COUNSEL AND USE OF THE BANKRUPTCY PROCESS IN ITS UNIVERSITY OF MIAMI INVESTIGATION 2 (2013), <http://www.ncaa.org/sites/default/files/NCAA%2B-%2BReport.pdf>.

179. WAINSTEIN ET AL., *supra* note 178.

180. *Id.* at 2-4.

think it's not an understatement to say cheating pays presently.”¹⁸¹ The NCAA enforcement system has consistently been labeled slow and lacking the necessary weapons to obtain information. Some have recommended arbitration as the forum to alleviate these issues; however, the adoption of arbitration has been linked to federal legislation, which is unlikely to gain support on Capitol Hill.¹⁸²

The better solution is to adopt arbitration as a part of the agreement between the NCAA and member institutions, conferences, coaches, and student-athletes. The NCAA's constitution, bylaws, and regulations operate as a contract between the member institutions and conferences and coaches and student-athletes are third-party beneficiaries to these agreements.¹⁸³ As a result, the NCAA can simply adopt arbitration as the system to resolve of all NCAA infraction investigations. This approach would remove the COI as the deciding body in such cases and appoint a three-member panel of neutral arbitrators. Like many other arbitration panels, the NCAA would create a body of arbitrators from which to select and could easily use an established forum, such as the AAA, to access top arbitrators with industry knowledge.

Critics of NCAA enforcement forcefully argue that implementation is ineffective because investigators do not have the authority to issue subpoenas to obtain evidence in order to substantiate claims. Under Section 7 of the FAA, arbitrators are permitted to issue subpoenas to obtain documents and/or compel the presence of a witness.¹⁸⁴ Similarly, state laws allow arbitrators to issue subpoenas.¹⁸⁵ The ability to issue a subpoena would not only pro-

181. Jake Trotter, *Bob Bowsby Sees Bleak Landscape*, ESPN (July 22, 2014), http://espn.go.com/college-sports/story/_id/11243234/bob-bowsby-big-12-commissioner-says-cheating-pays-ncaa-enforcement-broken. *Contra NCAA Enforcement Chief Fires Back*, ESPN (July 24, 2014), http://espn.go.com/college-football/story/_id/11256975/ncaa-enforcement-director-jonathan-duncan-defends-investigators.

182. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 875–76 (2014).

183. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 623–24 (Colo. App. 2004); see also *Hall v. Nat'l Collegiate Athletic Ass'n*, 985 F. Supp. 782, 796–97 (N.D. Ill. 1997).

184. 9 U.S.C. § 7 (2012).

185. UNIF. ARBITRATION ACT § 17(A) (2000), (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS), <http://www.uniformlaws.org/shared/docs/>

vide NCAA investigators with the information needed to corroborate a claim but would also move cases forward more expeditiously. However, subpoena power should not be taken lightly. In order to obtain a subpoena, the requesting party would be required to establish that the information sought is relevant and cannot be obtained from another source.¹⁸⁶ If there is a dispute regarding the relevancy of such information or allegations that such information is intrusive, the objecting party can seek to quash the subpoena and/or seek an in-camera review where documents and information can be redacted, if necessary. Similarly, a witness would also be afforded the opportunity to seek protection by arguing either that he or she cannot provide relevant testimony or that he or she the request was made for a malicious purpose, such as harassing the witness.

Creating a system of arbitration conducted by neutral parties with industry knowledge will restore the faith in NCAA enforcement by (1) granting greater access to witnesses and information; (2) the ability to rectify “prosecutorial overreaching”; and (3) providing more expedient resolution of cases. The opportunity to subpoena witnesses and documents will expedite the investigation process, which will be closely monitored by a panel of arbitrators. The goal of arbitration is to advance matters more quickly. Arbitrators are more readily available than athletics administrators and others currently sitting on the COI. Additionally, arbitrators would be permitted to address “prosecutorial overreaching” like that which allegedly occurred in the Miami case. By having a panel of arbitrators oversee the process, all those involved will be forced to respond to a higher body (i.e., the arbitration panel) and

arbitration/arbitration_final_00.pdf. In 2000, the Uniform Law Commission created the Revised Uniform Arbitration Act, which has been enacted by 19 states. See UNIFORM LAW COMMISSION, *Legislative Enactment Status, Arbitration Act* (2000), UNIFORMLAWS.ORG, <http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%282000%29>. Other states have existing legislation that provides for the issuance of subpoenas by an arbitrator. See, e.g., CAL. CIV. PROC. CODE §§ 1283.05, 1283.1 (2007); FLA. STAT § 682.08 (2015); IND. CODE § 34-57-2-8 (2008); TEX. CIV. PRAC. & REM. CODE ANN. § 171.051 (2011).

186. Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 294 (2010).

will be forced to conform to the applicable standards as called for in NCAA legislation. Established neutral parties will restore fundamental fairness and create a more positive public perception of NCAA enforcement.

C. Participation Appeals

Student-athletes are only afforded a short period of time to compete in intercollegiate athletics. Specifically, student-athletes have five years to participate in four seasons of intercollegiate athletics competition in any one sport.¹⁸⁷ It is not uncommon for student-athletes to assert their demand to compete in court after the NCAA process fails to provide the relief sought.¹⁸⁸ As a result, student-athletes are often left believing they do not have an impartial forum to resolve their disputes.¹⁸⁹

The USOC has provided a guide that delivers a process that will provide a version of due process to student-athletes. Section 9.1 of the USOC Bylaws provides American athletes with the opportunity to seek arbitration for a matter that negatively impacts participation and, specifically, prohibits the athlete's opportunity to compete.¹⁹⁰ Presently, if a student-athlete has a grievance or desires to supplement treatment under NCAA legislation, he or she is afforded the opportunity to file a waiver of NCAA legislation.¹⁹¹ 2014 NCAA Bylaw 14.02.13 defines a waiver as "an action ex-

187. 2014 NCAA MANUAL, *supra* note 20, §§ 12.8, 12.8.1 (stating student-athletes "shall not engage in more than four seasons of intercollegiate competition" within five calendar years beginning the first semester the student-athlete triggers full-time enrollment at an institution of higher learning).

188. *Matthews v. Nat'l Collegiate Athletic Ass'n*, 79 F. Supp. 2d 1199, 1207–08 (E.D. Wash. 1999) (holding a penalty requiring the student-athlete to miss three football contests does not constitute irreparable harm and, thus, a preliminary injunction was not warranted); *Hall v. Nat'l Collegiate Athletic Ass'n*, 985 F. Supp. 782, 802 (N.D. Ill. 1997) (holding the student-athlete was not entitled to injunctive relief that would allow him to compete); *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 870 (Tex. 2005) (holding a court does not act as a "super referee" in the interpretation of NCAA legislation).

189. *See generally* Travis L. Miller, *Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings*, 20 FLA. ST. U. L. REV. 871 (1993) (noting that NCAA's procedures have been criticized as unfair).

190. USOC BYLAWS, *supra* note 154, § 9.1.

191. 2012 NCAA MANUAL, *supra* note 20, § 14.02.15.

empting an individual or institution from the application of a specific regulation. A waiver requires formal approval . . . based on evidence of compliance with the specified conditions or criteria under which the waiver is authorized or extenuating circumstances¹⁹²

NCAA legislation provides a plethora of waiver opportunities, but requires a member institution to file a waiver on behalf of a student-athlete.¹⁹³ A student-athlete is not afforded the opportunity to file a waiver on his or her own without the support of a member institution.¹⁹⁴ Obviously, this is contrary to the USOC arbitration system that permits athletes to challenge the USOC or NGB.¹⁹⁵ This is certainly a concern if the student-athlete is considering transferring to a new institution or the member institution does not politically want to advance certain waiver requests.

The NCAA's numerous waiver opportunities should continue as the initial layer of review for student-athlete participation matters as this process often times provides relief to student-athletes. NCAA representatives, conference representatives, and representatives from member institutions sit on various waiver committees that attempt to resolve disputes involving student-athletes. In the event a waiver request relates to the student-athlete's ability to participate in intercollegiate athletics competitions and such request is denied, student-athletes should be afforded an opportunity to appeal to a neutral arbitrator or special master that presides over these matters. Additionally, if time is of the essence and/or athletic competition is imminent, student-athletes should be afforded the opportunity to present matters directly to a neutral arbitrator or special master to accelerate the time necessary for response and decision. Unlike the present legislation, student-athletes should not be required to obtain the support of a member institution to file a request to be heard by a neutral arbitrator.

The most glaring NCAA legislation that must provide for appellate opportunities for student-athletes include initial-

192. 2014 NCAA MANUAL, *supra* note 1, § 14.02.03.

193. 2012 NCAA MANUAL, *supra* note 20, § 14.1.7.3.2.1.

194. *See id.*

195. USOC BYLAWS, *supra* note 154, § 9.

eligibility,¹⁹⁶ progress towards degree,¹⁹⁷ transfer regulations,¹⁹⁸ and national letter of intent appeals.¹⁹⁹ A neutral arbitrator or special master with knowledge of the NCAA's system and sports industry should be appointed to hear these cases and others that relate to any restriction on student-athlete participation. Student-athletes would be afforded the opportunity to present all evidence in writing and hold a hearing telephonically. Like USOC legislation, hearings could be expedited upon request of the student-athlete.²⁰⁰ This subtle change would provide student-athletes with the opportunity to present their cases to a neutral third-party not connected with the NCAA or a member institution. Again, arbitration provides for fundamental fairness in a process that has historically been heavily chastised and considered arduous.

196. The Initial-Eligibility Waivers Committee decides waivers relating to initial-eligibility "based on objective evidence that demonstrates circumstances in which a student's overall academic record warrants a waiver." 2012 NCAA MANUAL, *supra* note 20, § 14.3.1.5.

197. Student-athletes are required to meet certain NCAA requirements to maintain athletics eligibility. *See id.* § 14.4.3.1. If a student-athlete fails to meet such requirements, then he or she may seek a waiver of NCAA legislation by appealing to the Division I Progress-Toward-Degree Waivers Committee based on a showing of "objective evidence that demonstrates circumstances that warrant the waiver." *Id.* §§ 14.4.3.7, 14.4.3.9.

198. A student-athlete who transfers to a new member institution is required to complete one full academic year in residence, unless he or she can satisfy an exception to NCAA legislation. *Id.* § 14.5.1. If a student-athlete fails to meet an exception to NCAA legislation, then he or she may seek a waiver to the Academic Cabinet. *Id.* §§ 14.5.6.8.1, 14.5.6.9.

199. A student-athlete who executed a national letter of intent ("NLI") faces a substantial penalty if he or she does not abide by the requirements of the NLI. Specifically, the NLI language states "[a] student who does not attend the signing institution for at least one academic year (two semesters or three quarters) must serve one academic year in residence and will lose one season of competition in *all sports* upon enrollment at another NLI member institution." NAT'L LETTER OF INTENT, NLI APPEALS PROCESS (emphasis in original), <http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf>. Student-athletes are afforded the right to a final appeal before the NLI Appeals Committee and are permitted to present their case via telephone conference call. *Id.*

200. USOC BYLAWS, *supra* note 154, §§ 9.7, 9.9.

VI. CONCLUSION

The NCAA has recently been heavily scrutinized and some believe the NCAA has lost the faith of the general public. Many of these concerns relate to a perceived lack of fundamental fairness in the process governed by the NCAA. By shifting to arbitration, the NCAA is afforded the opportunity to bring neutrality to a process that has historically been challenged *ad nauseam*. Any arbitration package adopted by the NCAA through enacted legislation should include the opportunity for student-athletes to appeal positive drug tests and matters affecting participation to arbitration and remove the COI from deciding infractions matters in favor of neutral arbitrators. By adopting arbitration as the forum to resolve these matters, the NCAA would be afforded the opportunity to issue subpoenas on a limited basis to better obtain evidence in NCAA infractions proceedings. Arbitration is the answer to improving the NCAA's system for adjudicating matters. Arbitration will bring fundamental fairness to the NCAA structure.