

2018

Player 3 Has Entered the Game: Arbitration Comes to the eSports Industry

Ryan Boonstra

Follow this and additional works at: <https://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Ryan Boonstra, *Player 3 Has Entered the Game: Arbitration Comes to the eSports Industry*, 10 (2018).

This Student Submission - Article is brought to you for free and open access by the Law Reviews and Journals at Penn State Law eLibrary. It has been accepted for inclusion in *Arbitration Law Review* by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

PLAYER 3 HAS ENTERED THE GAME: ARBITRATION COMES TO THE ESPORTS INDUSTRY

By
Ryan Boonstra*

I. INTRODUCTION

The days of parents scolding their children for wasting their lives away playing video games may be quickly coming to an end. Competitive video gaming has become quite a large industry in recent years and continues to maintain its expansive steam.¹ In 2016, the eSports industry received approximately \$493 million in revenue.² While this may not be a large number for a sporting industry,³ the revenue made in 2016 was fifty percent larger than it was the previous year.⁴ According to Newzoo,⁵ a prominent research company, this growth is anticipated to continue in subsequent years with revenues for 2017 predicted to reach \$660 million.⁶ While these are numbers for the industry itself, the players in some of the larger tournaments are making millions of dollars per win per bracket.⁷ Two thousand eighteen's DOTA 2⁸ tournament, commonly referred to as "The International,"⁹ has a

* Ryan Boonstra is a Senior Editor of the Arbitration Law Review and a 2019 Juris Doctor Candidate at Penn State Law.

¹ See Newzoo, <https://newzoo.com/insights/markets/esports/> (last visited Sep. 23, 2017).

² See Daniel Rapaport, *What to expect from the booming esports industry in 2017*, SPORTS ILLUSTRATED (Feb. 9, 2017), <https://www.si.com/tech-media/2017/02/09/esports-industry-expectations-billion-dollar>.

³ Cf. Steve Kutz, *NFL took in \$13 billion in revenue last season — see how it stacks up against other pro sports leagues*, MARKET WATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> (showing that the NFL took in \$13 billion in revenue in its 2016 season and the MLB took in \$9.5 billion).

⁴ See Rapaport, *supra* note 2.

⁵ Newzoo is a market research company that focuses on the eSports industry and has provided data on the industry since approximately 2007. See Newzoo, *About*, <https://newzoo.com/about/> (last visited Sep. 23, 2017).

⁶ See Newzoo, <https://newzoo.com/insights/markets/esports/> (last visited Sep. 23, 2017).

⁷ See The 2016-2017 DOTA 2 HUB, http://www.espn.com/esports/story/_id/18749881/the-dota-2-espn-esports-homepage (last visited Aug. 14, 2017). This page shows the various prize pools for individual teams many of which are in the seven-figure range. Teams need not win the entire tournament to win large prizes, simply winning their portion of the standard bracket is enough to acquire large prizes.

⁸ DOTA 2 is an arena style real time strategy game, developed by the Valve Corporation, where players have a vast array of heroes and play styles to choose from. Two teams then face-off in the arena to secure the other team's objective while also protecting their own. This is a simplistic summary of the game; the full summary and all its complexities can be found at the source link. See DOTA 2, *About This Game*, STEAM https://store.steampowered.com/app/570/Dota_2/ (last visited March 5, 2019).

⁹ The International is an annual round-robin style international DOTA 2 tournament in which 18 teams from across the world compete for a portion of the tournament's general prize pool. See DOTA 2, The

record breaking prize pool of \$25,322,995¹⁰ and 2017's winning team took home \$10,805,832.¹¹ With millions of dollars on the line, video games should no longer be considered a waste of time. The growing and lucrative eSports industry will likely increase the need for contracts between players, which will, in turn, increase the probability of contract disputes.

This paper explores the benefits and shortcomings of the Arbitration Court for eSports ("ACES"), a court created by the World eSports Association ("WESA") in August 2016.¹² Given its focus on eSports, this court is the first of its kind and has the potential to improve dispute resolution in the eSports industry. The first section of this article provides a brief background on eSports and the problems in the industry that led to the establishment of ACES. Then, the article discusses the court's structure, rules, and purpose. The following section examines the pros and cons of using arbitration in the eSports industry, while the final section of this article presents a comparative analysis of the successes and shortcomings of arbitration in other sporting industries and the ACES.

II. BACKGROUND: THE DEVELOPMENT OF ESPORTS AND THE RECENT PROBLEMS OF THE ESPORTS INDUSTRY

A. *Background and Common Problems*

eSports are "a form of sports where the primary aspects of the sport are facilitated by electronic systems; the input of players and teams as well as the output of the esports system are mediated by human-computer interfaces."¹³ Many different examples of eSports exist,¹⁴ but what makes them unique is that any new game can create a new set of tournaments and leagues. An eSport is typically governed by leagues where players belong to specific

International, Announcement <https://www.dota2.com/international/announcement/> (last visited Oct. 16, 2017).

¹⁰ See THE 2017-2018 DOTA 2 HUB, http://www.espn.com/esports/story/_/id/18749881/the-dota-2-espn-esports-homepage (last visited Aug. 14, 2017).

¹¹ See Jack Ballenger, *Team Liquid Sweeps Newbee for The International 7 title*, ESPN (Aug. 13, 2017), http://www.espn.com/esports/story/_/id/20326424/the-international-7-main-event-team-liquid-sweeps-newbee-international-7-title.

¹² See WORLD ESPORTS ASS'N ARB. RULES, 1 (Aug. 17, 2016).

¹³ Juho Hamari & Max Sjöblom, *What Is eSports and Why Do People Watch It?*, Internet Research (Forthcoming, 2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686182.

¹⁴ Examples of eSports include "League of Legends," "Counter-Strike: Global Offensive," "DOTA," and "Call of Duty," all of which have 'seasons' and leagues that teams compete in. See E-SPORTS EARNINGS, Games (2018) <https://www.esportsearnings.com/games>.

sponsored teams that compete in tournaments.¹⁵ eSports have existed since the early days of video games.¹⁶ However, the formal structure and vast prize pools are new.¹⁷

One common problem in eSports is the potential for corruption. eSports draw large revenue streams from sponsorships and advertisements.¹⁸ Similar to any other sport, winning teams attract more sponsors. However, unlike in other sports industries, the eSports industry is particularly vulnerable to cheating.¹⁹ A video game's digital nature allows third parties to develop specific software designed to breach the specific game's integrity.²⁰ To illustrate the propensity of the issue and its implications, consider the case of Riot Games, the company responsible for "League of Legends,"²¹ which recently received a \$10 million award against a company that violated the *Digital Millennium Copyright Act*²² by bypassing the "League of Legends" anti-cheating software.²³

Contracting problems are also prominent in the eSports industry. Last year, a contract dispute between players of the team "Luminosity" and "SK Gaming" nearly resulted in the

¹⁵ See John T. Holden et al., Article, *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS OF SPORT 46 (2017).

¹⁶ See Chris Baker, *Stewart Brand Recalls First 'Spacewar' Video Game Tournament*, ROLLING STONE (May 25, 2016), <http://www.rollingstone.com/culture/news/stewart-brand-recalls-first-spacewar-video-game-tournament-20160525> (explaining that the first competitive video game tournament was held on October 19, 1972, six weeks before the first *Pong* machines would be installed. The tournament was held at Stanford University and the game was *Spacewar*).

¹⁷ *Id.* (explaining that video games have not always been a "spectator sport" and that the winner of the first video game tournament only received a one-year subscription to Rolling Stone magazine).

¹⁸ See Peter Warman, *ESports Revenues Will Reach \$696 Million this Year and Grow to \$1.5 Billion by 2020 as Brand Investment doubles*, NEWZOO (Feb. 14, 2017), <https://newzoo.com/insights/articles/esports-revenues-will-reach-696-million-in-2017/>.

¹⁹ See Aaron Swerdlow, *Cheating And Gambling In Esports: Reform Is Needed*, LAW360, (April 18, 2017).

²⁰ *Id.*

²¹ League of Legends is another arena style game similar to DOTA 2. The games website states, "League of Legends is a fast-paced, competitive online game that blends the speed and intensity of an RTS with RPG elements. Two teams of powerful champions, each with a unique design and playstyle, battle head-to-head across multiple battlefields and game modes." LEAGUE OF LEGENDS, *What is League of Legends*, (last visited Oct. 6, 2018) <https://na.leagueoflegends.com/en/game-info/get-started/what-is-lol/>.

²² In relevant part, the Digital Millennium Copyright Act states:

2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; [or]

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title;

17 U.S.C.S. § 1201. Thus, the League of Legends suit was based on a claim that a technology was used to circumvent their copyrighted anti-cheating software. See Swerdlow, *supra* note 16.

²³ See Swerdlow, *supra* note 19.

removal of “SK Gaming” from the ELeague.²⁴ In that case, “SK Gaming” attempted to convince “Luminosity” players to break their two-year letters of intent with “Luminosity” and join “SK Gaming” instead.²⁵ “SK Gaming” made promises of protection and pay, and even offered legal services to help the players break their letters of intent.²⁶ “SK Gaming” representatives tricked the players into signing contracts with “SK Gaming” and when they attempted to renege, “SK Gaming” threatened legal action.²⁷ Luckily, the teams were able to settle without facing any harsh consequences from the ELeague, such as suspension.²⁸

“Luminosity” and “SK Gaming” settled; but had they not, they would likely have to resort to the courts and face an expensive and lengthy trial. Given the eSports industry’s rapid pace, both teams would have missed multiple tournaments.²⁹ In other words, litigation is a poor legal solution in the eSports world.

B. *Arbitration as a Solution*

Earlier than most, Aaron Swerdlow³⁰ called attention to the need for arbitration in eSports, given the industry’s uniqueness and need for specialists.³¹ For example, the concept of cheating, according to its definition, is determined by the rules of the game and breaking said rules.³² Presumably, an eSports arbitration court would have a more thorough understanding of specific games and their rules and be able to reach the appropriate decision in cheating allegations.³³ Arbitration also provides the parties with a confidential

²⁴ “ELEAGUE is a premium esports content and live tournament brand that has created globally-reaching esports events for games such as Counter Strike: Global Offensive, Street Fighter V, Overwatch and Rocket League, focusing on innovative production and compelling storytelling.” TBS, *ELeague*, (last visited Oct. 6, 2018) <https://www.tbs.com/sports/eleague>; See Jacob Wolf, *SK Gaming, Luminosity Locked in Contract Disputes After SK Attempted to Poach Luminosity Players*, ESPN (May 27, 2016), http://www.espn.com/esports/story/_id/15774305/sk-gaming-luminosity-locked-contract-disputes-sk-attempted-poach-luminosity-players.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *LG & SK AGREE TO SETTLE CS:GO DISPUTE*, LUMINOSITY, (June 24, 2016), <http://luminosity.gg/articles/news/gaming/40/lg-sk-agree-to-settle-csgo-dispute>.

²⁹ *Id.*

³⁰ Aaron B. Swerdlow is of counsel in the Los Angeles and Washington, D.C., offices of Gerard Fox Law PC. See Swerdlow, *supra* note 19.

³¹ See Swerdlow, *supra* note 19.

³² See *Cheating*, MERRIAM-WEBSTER ONLINE DICTIONARY, INTRANSITIVE VERB 1 (B) (2018).

³³ See Swerdlow, *supra* note 19; THOMAS CARBONNEAU, *ARBITRATION LAW IN A NUTSHELL* 24 (West Academic, 4th ed. 2017).

and quicker solution.³⁴ Further, arbitration is cheaper than lengthy legal proceedings involving trials, discovery and motion practice.³⁵ Finally, so long as impartiality is maintained, arbitration provides parties with a neutral decision-maker.³⁶

As a result of negative litigation experiences, teams interested in taking advantage of the ACES already exist.³⁷ For example, a European eSports organization allegedly failed to pay its players nearly \$25,000 in monthly earnings during October of 2016.³⁸ These type of issues fall within the ACES's governance.³⁹ In arbitrating these issues, the players will likely recover a larger portion of the \$25,000 owed to them by saving on litigation costs.⁴⁰ Further, teams will be able to take advantage of the benefits discussed in the preceding paragraph.

III. ESTABLISHING STRUCTURE: THE WORLD eSPORTS ASSOCIATION (“WESA”) AND THE ARBITRATION COURT FOR eSPORTS

One organization recognized this need for arbitration and better legal representation of eSports teams in general: WESA. Established in 2016, WESA is primarily made up of professional eSports teams and players who are attempting to restructure the representation of eSports teams in legal conflicts.⁴¹ The association's goal is to set the standard in creating and enforcing tournament rules and regulations, while always keeping the players' best interests at the forefront.⁴²

One of the most unique aspects about WESA is its players council, which is made up of players from the teams comprising WESA.⁴³ The council has a direct say on the regulations created by WESA and provides players a chance to be a part of the decision making process in WESA-governed tournaments and leagues.⁴⁴ Essentially, WESA aims

³⁴ See THOMAS CARBONNEAU, *ARBITRATION LAW IN A NUTSHELL* 19-20 (West Academic, 4th ed. 2017).

³⁵ *Id.*

³⁶ *Id.* at 24-25. Issues surrounding arbitrator neutrality are discussed later in this article.

³⁷ The bottom of the homepage shows the fourteen teams who have joined WESA. WESA, <http://www.wesa.gg/> (Last visited Sep. 29, 2017).

³⁸ See Bob Garcia, *WESA Opens First Esports Arbitration Court*, AMERICAS CARDROOM (Nov. 4, 2016), <https://www.americascardroom.eu/poker-blog/2016/11/wesa-opens-first-esports-arbitration-court/>.

³⁹ *Id.*

⁴⁰ See CARBONNEAU, *supra* note 34 (explaining that one of the benefits to arbitration is its cost savings compared to litigation which leads to larger direct recovery by plaintiffs).

⁴¹ See *WESA (World Esports Association) Founded*, News, WESA (May 13, 2016), <http://www.wesa.gg/2016/05/13/world-esports-association-wesa-founded/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

to be the *Fédération Internationale de Football Association*⁴⁵ (“FIFA”) of the eSports world by becoming a governing body over the many different eSports teams.⁴⁶ This is a very realistic goal given the current lack of structure in the industry and WESA’s close relation to one of the largest eSports companies in the world, the Electronic Sports League (“ESL”), which gives WESA access to many teams.⁴⁷

In pursuit of its goal, WESA established ACES to better resolve player disputes.⁴⁸ WESA is a new organization but has an appreciation and understanding for the benefits that arbitration provides for dispute resolution. WESA lists several benefits of arbitration as the rationale for establishing ACES.⁴⁹ For example, the parties can agree on arbitrators who have subject expertise.⁵⁰ Further, the proceedings are kept confidential, can be conducted electronically, and the awards are enforceable in more than 150 countries.⁵¹ Finally, WESA explains that lack of an appeals process grants parties prompt dispute resolutions.⁵²

An analysis of ACES rules show that the court was truly established with these goals in mind.⁵³ The ACES, “is designed for the resolution of a wide array of issues such as contract disputes, prize money pay-out and distribution, financial misconduct and player representation.”⁵⁴ Outlining these benefits is one thing; achieving them is another. As the next section will explore, the ACES has many strengths that will help the court achieve these benefits, but also has several gaps.

⁴⁵ According to its website, FIFA is football’s (soccer) international governing body and “FIFA supports the associations financially and logistically through various programmes. But they also have obligations. As representatives of FIFA in their countries, they must respect the statutes, aims and ideals of football’s governing body and promote and manage [their] sport accordingly”. FIFA, *Who We Are*, ASSOCIATIONS <https://www.fifa.com/associations/> (last visited Oct. 7, 2018).

⁴⁶ See Colin Campbell, *The Who, What and Why of the World Esports Association*, POLYGON (May 13, 2016), <https://www.polygon.com/2016/5/13/11668182/what-is-wesa>.

⁴⁷ See WESA, <http://www.wesa.gg/> (Last visited Sep. 29, 2017).

⁴⁸ See *Arbitration Rules*, Rules and Regulations, WESA, <http://www.wesa.gg/rr/arbitration-rules/> (Last visited Sep. 29, 2017).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See generally WORLD ESPORTS ASS’N ARB. RULES, (Aug. 17, 2016).

⁵⁴ GERHARD WEGEN & STEPHAN WILSKE, GETTING THE DEAL THROUGH: ARBITRATION, Introduction (2017).

IV. AN ANALYSIS OF THE STRENGTHS AND GAPS OF THE ACES'S RULES AND REGULATIONS

This section presents a thorough analysis of the ACE's rules. The goal of this section is to showcase how some of the rules provide substantial benefits to the eSports industry, while other rules can be improved. The section will first discuss the legal concept of "Freedom of Contract." It will then proceed into WESA's unique "Emergency Arbitration" and the potential this concept has for the eSports world. Impartiality and other common attributes of arbitration are then discussed. The section concludes with a discussion on the areas of the rules that WESA can improve to better serve their goals.

Before the discussing the strengths and gaps, it is important to note that WESA's website is user-friendly, helping teams who lack resources understand what arbitration is and how they can take advantage of it.⁵⁵ The website provides an easily accessible copy of the rules as well as a 'Model Arbitration Clause,'⁵⁶ which any team or player can incorporate into their contracts. WESA's arbitration will obviously apply to any tournament or league that they directly establish.⁵⁷ Their close relationship with ESL might mean that ESL will adopt their arbitration rules as well. However, most importantly, the rules provide that they will apply in any situation where the parties have agreed to the WESA arbitration clause, even if agreed to at a later time.⁵⁸

A. *Freedom of Contract in the ACES's Rules*

Freedom of contract⁵⁹ is a common theme throughout the ACES's rules.⁶⁰ For example, the rules state, "The place of arbitration . . . shall be Zurich, Switzerland, unless the parties agree on a different place of arbitration."⁶¹ eSports is an international phenomenon and

⁵⁵ See generally GERHARD WEGEN & STEPHAN WILSKE, GETTING THE DEAL THROUGH: ARBITRATION, Introduction (2017).

⁵⁶ The 'Model Arbitration Clause' reads:

All disputes arising out of, relating to, or in connection with this [contract/regulation/etc.], its validity, enforcement, or the breach thereof, shall be finally settled by arbitration in accordance with the World Sports Association (WESA) Arbitration Rules. For the purpose of enforcement, judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

While this resembles a standard arbitration clause, it is courteous for WESA to provide it to the uninformed and teams that lack funding. WORLD ESPORTS ASS'N ARB. RULES, 2 (Aug. 17, 2016).

⁵⁷ See WESA, <http://www.wesa.gg/> (last visited Oct. 18, 2017).

⁵⁸ See WORLD ESPORTS ASS'N ARB. RULES, 2.1 (Aug. 17, 2016).

⁵⁹ Freedom of contract is, "a judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by undue external control such as governmental interference." *Freedom of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶⁰ See generally WORLD ESPORTS ASS'N ARB. RULES (Aug. 17, 2016).

⁶¹ WORLD ESPORTS ASS'N ARB. RULES, § 3.1 (Aug. 17, 2016).

allowing parties to agree on the place of arbitrating signals WESA's focus on making the process player-centered. The choice of law clause operates in a similar fashion; the parties agree to the applicable law, and if no agreement can be reached, the law of the state most closely related to the dispute applies.⁶²

Allowing the parties to agree on important aspects of the arbitration proceeding is a fundamental aspect of arbitration and is recognized as carrying great weight by the court,⁶³ though admittedly it does leave some room for abuse. The default rule for an ACES proceeding is that there will be three arbitrators unless the parties agree to have a sole arbitrator.⁶⁴ Each party will nominate an arbitrator and then the two nominated arbitrators will choose a third to act as the chairman.⁶⁵ This is the common approach or default arrangement in the arbitration field.⁶⁶

However, most teams involved in eSports have little experience in the arbitration and could be manipulated into agreeing to a sole arbitrator who may be biased towards one team. ACES attempts to compensate for this by requiring all arbitrators to be impartial.⁶⁷ Nonetheless, when a team suspects impartiality, the only way to enforce impartiality is to challenge the arbitrator,⁶⁸ which could delay the proceedings or lead to awards being vacated.⁶⁹ Furthermore, arbitrators rule on arbitrator impartiality challenges,⁷⁰ which creates an obvious problem in the case of a sole arbitrator asked to rule on his own impartiality. If the challenged arbitrator does not resign, the parties can seek a decision by the governing state court,⁷¹ but this will cost more money and time. Allowing the parties to agree on a sole arbitrator is an occasion where freedom of contract could become a problem.

⁶² See WORLD ESPORTS ASS'N ARB. RULES, § 17.1-17.2 (Aug. 17, 2016).

⁶³ See CARBONNEAU, *supra* note 34 at 48.

⁶⁴ See WORLD ESPORTS ASS'N ARB. RULES, § 5 (Aug. 17, 2016).

⁶⁵ *Id.* § 6.1-6.2.

⁶⁶ See CARBONNEAU, *supra* note 34 at 37-38.

⁶⁷ See WORLD ESPORTS ASS'N ARB. RULES § 7.1-7.2 (Aug. 17, 2016).

⁶⁸ Under the rules, a party may challenge an arbitrator, "if circumstances exist which give rise to doubts about his/her impartiality or independence or if he/she does not fulfil the requirements agreed between the parties." *Id.* § 8.1-8.3.

⁶⁹ See CARBONNEAU, *supra* note 34 at 148-49.

⁷⁰ See WORLD ESPORTS ASS'N ARB. RULES § 8.1-8.3 (Aug. 17, 2016).

⁷¹ *Id.*

B. *Emergency Arbitration in the ACES's Rules*

The ACES rules allow for, what they term, emergency arbitration.⁷² As previously stated, eSports is a fast-paced industry and if a team cannot compete in a tournament because of an ongoing contract dispute, the team will suffer revenue losses. WESA established emergency arbitration proceedings for teams and players in time-sensitive disputes in need of preliminary measures.⁷³ WESA allows emergency arbitration “if the other party tries to remove all its assets or if you want to stop the other side from a certain action as long as the arbitration proceedings are not finished yet.”⁷⁴

The ACES rules allow for emergency arbitration decisions to be made without oral arguments⁷⁵ and without hearing from the respondent.⁷⁶ However, the respondent may request that the applicant initiate formal arbitration proceedings within fourteen days, and if the applicant fails to comply, the emergency decision may be voided.⁷⁷ As discussed above, eSports' fast-pace and tournament schedule make emergency arbitration a great benefit to the eSports industry because it helps protect the players' best interests.⁷⁸ Furthermore, emergency arbitration's safeguards prevent players from being taken advantage of by last minute decisions that affect their ability to compete in tournaments.⁷⁹ Players who use emergency arbitration will be able to seek injunctive relief that will allow their team to compete, even if a dispute is ongoing during a tournament.⁸⁰

C. *Impartiality in the ACES's Rules*

The ACES's rules promote impartiality, one of the hallmarks of arbitration, which ensures that the entire decision-making process is conducted by a neutral third party.⁸¹ The ACES's rules designate the court as “an ad hoc facility independent from the [WESA] or its members or the WESA teams and its players.”⁸² While ACES has not had an opportunity

⁷² See *Emergency Arbitration*, Rules and Regulations, WESA (Sep. 29, 2017), <http://www.wesa.gg/rr/emergency-arbitration/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See WORLD ESPORTS ASS'N ARB. RULES § 10.5 (Aug. 17, 2016).

⁷⁶ *Id.* § 10.6.

⁷⁷ *Id.* § 10.7.

⁷⁸ See *Emergency Arbitration*, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ WESA explains that this a great benefit for players. *Id.*

⁸¹ See CARBONNEAU, *supra* note 34 at 147.

⁸² WORLD ESPORTS ASS'N ARB. RULES § 1 (Aug. 17, 2016).

to prove its independence from the other eSport entities, incorporating the concept of impartiality into the rules is a good start, because it provides parties an avenue to challenge future arbitral awards on partiality grounds. This language helps align ACES's rules with the core concepts associated with arbitration.⁸³ Should this provision not be followed, the new court's reputation could be undermined. In this sense, the provision acts as a self-regulation. Theoretically, the clause's presence operates to instill confidence in players and teams that other teams will not take advantage of them. Furthermore, WESA is an organization made up of players and teams, and thus even if it is not completely independent from the court, at least players and teams are the ones behind the scenes, not an individual or a corporate entity.

D. *Common Attributes of Arbitration and their Benefits to eSports.*

One common attribute of arbitration is that it provides access to content area specialized experts who, for example, will better handle eSports disputes.⁸⁴ However, with the ACES being the first court of its kind, it may take time for these experts to make themselves known. To illustrate, at the time of this writing, a search for 'eSports' on the American Arbitration Association's website returns no results.⁸⁵ Nonetheless, specialized attorneys are taking their own steps to advertise their capabilities as the eSports trend continues to develop.⁸⁶ Should the ACES grow in popularity and use, the development and increase of arbitrators focused solely on eSports will likely follow.

Arbitration is also known to help parties in a dispute save money.⁸⁷ Table 1 outlines how the ACES directly addresses the cost of proceedings and allocates costs based on the amount in dispute:

⁸³ See CARBONNEAU, *supra* note 34 at 147-48.

⁸⁴ See Swerdlow, *supra* note 19; *see also* CARBONNEAU, *supra* note 34 at 24.

⁸⁵ Search Results, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/search/gss/esports> (click the magnifying glass on the home page and search "esports").

⁸⁶ See Dejan Zalik, *Attorney Launches First Law Firm Focused Entirely On Esports*, ESPORTS BETTING REPORT (Jan. 5, 2017), <https://www.esportsbettingreport.com/esports-law-firm/> (Bryce Blum, a known eSports attorney, launched Electronic Sports and Gaming Law ("ESG") a firm dedicated to eSports, which already represents four international teams); BASHIAN & PAPANTONIOU P.C., eSport & Electronic Gaming, <http://bashpaplaw.com/practice-industries/industries/esport-and-electronic-gaming-attorneys/> (last visited Sep. 29, 2017) (showing an example of a firm that has a practice area dedicated to the eSport industry); KELLY WARNER, ESports and Gaming Business, <http://kellywarnerlaw.com/esports-law-contracts-agent/> (last visited Sep. 29, 2017) (showing an example of a sponsorship agency that provides services in the eSports contracting and mediation realm).

⁸⁷ See CARBONNEAU, *supra* note 34.

Table 1. ACES's Arbitration Costs

Amount in Dispute	Fee of the Chairman of the Arbitral Tribunal/Sole Arbitrator	Fee of each Co-arbitrator
up to EUR 6,000	EUR 1,100	EUR 1,000
up to EUR 7,000	EUR 1,300	EUR 1,150
up to EUR 8,000	EUR 1,500	EUR 1,300
up to EUR 9,000	EUR 1,700	EUR 1,450
up to EUR 10,000	EUR 1,900	EUR 1,600
up to EUR 12,500	EUR 2,100	EUR 1,750
up to EUR 15,000	EUR 2,300	EUR 1,900
up to EUR 17,500	EUR 2,500	EUR 2,050
up to EUR 20,000	EUR 2,700	EUR 2,200
up to EUR 22,500	EUR 3,000	EUR 2,350
up to EUR 25,000	EUR 3,200	EUR 2,500
up to EUR 30,000	EUR 3,400	EUR 2,650
up to EUR 35,000	EUR 3,600	EUR 2,800
up to EUR 40,000	EUR 3,800	EUR 2,950
up to EUR 45,000	EUR 4,000	EUR 3,100
up to EUR 50,000	EUR 4,200	EUR 3,250

*Adapted from World Esports Association Arbitration Rules⁸⁸

There are two important things to note about this table: (1) the values are in Euros; and (2) the costs do not exponentially increase as the amount in dispute does. While the ACES could have easily justified taking more money from larger suits, the jump is quite small when comparing, for example, a €6,000 suit to a €50,000 suit.

Conceptually, smaller teams will greatly benefit from this scheme, especially given the ACES's rule on the assignment of costs. According to the rules, the default is to assign the costs of the proceedings to the losing party.⁸⁹ Therefore, a smaller team who is confident in their claim, but short on funding, might be more likely to pursue the claim. This could backfire, as well, should that team lose the suit and be responsible for the costs of the proceedings. However, WESA seems to have taken that into consideration when drafting the ACES rules. Section 29.2 allows the arbitrator to consider the particular circumstances of the proceedings, including each party's behavior when assigning costs.⁹⁰ In theory, an arbitrator could decide to protect a smaller team from bearing the total cost.

⁸⁸ WORLD ESPORTS ASS'N ARB. RULES § 19 (Aug. 17, 2016).

⁸⁹ See *id.* § 29.2. (Also worth noting, is that § 29.1 allows the parties to agree otherwise, thus continuing the theme of Freedom of Contract).

⁹⁰ *Id.*

The rules also allow teams to use the ever-evolving area of online arbitration; with the arbitrator's consent, electronic communication can be used during the arbitral proceedings.⁹¹ This is a relatively new trend in the arbitration,⁹² and will benefit the eSport industry. eSports are commonly international events with teams traveling from other countries to compete.⁹³ Therefore, online arbitration would allow parties from different continents to connect and resolve their disputes remotely, saving large sums of money on travel and similar expenses.

E. *Possible Areas of Improvement*

There are two areas where the ACES rules can improve. The first is the possibility of allowing courts to resolve some of the issues with the arbitration itself. The ACES rules do not provide a standard way for a party to raise certain issues arising under, for example, § 10 of the Federal Arbitration Act ("FAA").⁹⁴ These issues include corruption, fraud, undue means, and arbitrators exceeding their powers.⁹⁵ Instead, impartiality issues arising under § 10 are covered by § 8 of the ACES rules, which allow arbitrators to be challenged if there are doubts regarding their impartiality.⁹⁶ Similarly, FAA § 10(a)(3), which allows for the challenging of an award based on the failure of the arbitrators to hear evidence,⁹⁷ is also covered by § 22.1 of the ACES rules.⁹⁸ Section 22.1 provides that the taking of evidence will be governed by the International Bar Association ("IBA") Rules on the Taking of

⁹¹ WORLD ESPORTS ASS'N ARB. § 19.5 (Aug. 17, 2016).

⁹² See Karen Stewart & Joseph Matthews, *COMMENT: Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1124 (citing Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months*, (May 22, 1996) <http://www.umass.edu/dispute/ncair/gellman.htm>) (explaining that the first notable online arbitration took place in 1996).

⁹³ For example, The International brought together teams from Asia, North America, South America, and Europe. See *DOTA 2, The International*, *supra* note 7.

⁹⁴ See generally WORLD ESPORTS ASS'N ARB. RULES (Aug. 17, 2016).

⁹⁵ See 9 U.S.C.S. § 10(a) (2012).

⁹⁶ See WORLD ESPORTS ASS'N ARB. RULES § 8 (Aug. 17, 2016).

⁹⁷ See 9 U.S.C.S. § 10(a)(3) (2012).

⁹⁸ See WORLD ESPORTS ASS'N ARB. RULES § 22.1 (Aug. 17, 2016).

Evidence in International Arbitration.⁹⁹ The IBA rules are quite extensive¹⁰⁰ and widely recognized as an efficient mechanism governing the taking of evidence.¹⁰¹

Yet, despite WESA's silence on such claims, parties may be able to pursue FAA § 10 claims using another rule provision. ACES § 19 governs the conduct of the arbitral proceedings and § 19.1 states that, "the mandatory arbitration law at the place of arbitration," shall also govern.¹⁰² Therefore, should the place of arbitration be the United States, all the protections of the FAA will apply to the parties.

The next area of improvement is that the rules are silent regarding the enforceability of the arbitral awards.¹⁰³ ACES §§ 27 and 28 outline the issuance and substance of an arbitral award, but they do not state whether the award is enforceable.¹⁰⁴ The only evidence WESA offers that ACES awards are enforceable is within the website's description, which states, "Arbitral awards are enforceable in more than 150 countries," and "There is no appeal against the decision."¹⁰⁵ Thus, WESA's intent is clear, but without this language being in the rules it may not carry much weight.

However, as was the case with having an award vacated, a party can most likely use §19.1 of the ACES rules to enforce the award.¹⁰⁶ For example, the general rule in the United States is that the court system has very little discretion in vacating arbitral awards and the federal policy is to support and encourage arbitration as much as possible.¹⁰⁷ Therefore, so long as the mandatory arbitration rules of the place of arbitration point towards enforcement, the awards issued under these regulations will likely be recognized.

⁹⁹ See WORLD ESPORTS ASS'N ARB. RULES § 22.1 (Aug. 17, 2016).

¹⁰⁰ See generally Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration* (May 29, 2010), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

¹⁰¹ See PETER ASHFORD, *THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION: A GUIDE*, 5-6 (2013) (explaining that the IBA is made up of "more than 2,500 arbitration practitioners from 90 countries" and that the rules "were well received as a useful harmoni[z]ation of the procedures commonly used in international arbitration and were widely used in international arbitrations.").

¹⁰² WORLD ESPORTS ASS'N ARB. RULES § 19.1 (Aug. 17, 2016).

¹⁰³ See *id.*

¹⁰⁴ See *id.* §§ 27-28.

¹⁰⁵ Arbitration Rules, Rules and Regulations, WESA (Sep. 29, 2017), <http://www.wesa.gg/rr/arbitration-rules/>.

¹⁰⁶ See generally WORLD ESPORTS ASS'N ARB. RULES § 19.1 (Aug. 17, 2016).

¹⁰⁷ See *Fine v. Bear Stearns & Co.*, 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (stating, "It is well-settled that a court's power to vacate an arbitration award must be extremely limited" to avoid undermining the point of arbitration); *Remey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) ("Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts").

To summarize, the ACES rules will greatly benefit eSports players, providing them with a more efficient and affordable dispute resolution mechanism. While the ACES may need to add in sections addressing FAA § 10, court involvement, and enforceability, the rules provide great structure for this new arbitration court.

V. COMPARISON TO THE INTERNATIONAL CHAMBER OF COMMERCE’S ARBITRATION RULES AND THE COURT OF ARBITRATION FOR SPORT.

To better evaluate WESA’s approach and the ACES’s rules, this section compares them to the rules of well-established arbitration courts. Specifically, this section compares the International Chamber of Commerce’s (“ICC”) rules and the Court of Arbitration for Sport’s (“CAS”) rules to the ACES rules. The objective of this section is to show that the ACES’s rules contain similar provisions and themes to already established arbitration courts. The section will first show the similarities of the ICC and ACES to establish that ACES has a similar structure to a historically successful court. Lastly, this section compares ACES to CAS to point out strategies ACES can use to avoid receiving the same types of criticism that CAS has garnered.

A. *Similarities Between the ICC and ACES*

To gain the eSports industry’s and legal profession’s respect as a reputable entity and become sustainable over time, ACES must gain recognition. One way for this court’s rules to gain visibility as well as respect is to have rules similar to well-established, respected arbitration courts. Doing so helps the ACES be easily compared to successful institutions should someone ever question their processes.

The rules of the ICC are quite similar to the ACES’s rules, and the ICC has been recognized as a successful institution since 1923¹⁰⁸ and operates in more than 100 countries.¹⁰⁹ Thus, should a party ever question the ACES’s rules, the court could simply point to their similarities to the ICC’s rules, which might instill faith in potential parties. It would be rather difficult for a person to question the ACES when their rules nearly mirror the rules adopted by the ICC, which enjoys a nearly century-old positive reputation.¹¹⁰

The similarities are numerous. For example, one similarity the ACES rules and ICC rules have is freedom of contract in deciding the place of arbitration and the applicable law,¹¹¹ described in detail above.¹¹² The emergency arbitration proceedings of the ICC are also quite similar to the ACES.¹¹³ Which as discussed above, would provide a unique

¹⁰⁸ See *History*, INTERNATIONAL CHAMBER OF COMMERCE, About Us, Who We Are, <https://iccwbo.org/about-us/who-we-are/history/> (last visited Sep. 27, 2017).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See 2017 ARBITRATION RULES AND 2014 MEDIATION RULES ART. 18, and 21.

¹¹² See *supra* notes 60-72 and accompanying text.

¹¹³ See 2017 ARBITRATION RULES, *supra* note 112, at Art 29.

benefit for eSports; ICC rules illustrate what emergency arbitration looks like in an internationally recognized arbitration court.¹¹⁴ With these similarities in mind, a knowledgeable person in the field of arbitration would be hard-pressed to criticize the structure of the ACES.

B. *Lessons to be Learned from Other Well-Established Courts*

Building off the concept of similarities, other well-established courts can teach a few lessons based on their past shortcomings. One lesson from the ICC that the ACES should consider is adopting a section or clause on enforceability of awards.¹¹⁵ The ACES's rules state that an award is final and binding but fail to mention the necessary steps to ensure enforceability.¹¹⁶ In contrast, the ICC has an article dedicated to ensuring that the parties can take the appropriate steps to enforce an award.¹¹⁷ The ICC also contains an article dedicated to the effect of the arbitration agreement and outlines remedies a party may seek regarding the award's enforceability.¹¹⁸ Furthermore, while the ACES allows for the *ex aequo et bono* principle,¹¹⁹ the ICC allows for both the *ex aequo et bono* and the *amiable compositeur*¹²⁰ powers to be applied.¹²¹ These principles give the arbitrators more power to reach a fair agreement for the parties.¹²²

The criticisms that CAS has endured can also teach the ACES a lesson. Similarly to the ACES, CAS has a specialized body of governance over any sports team whose contract contains a CAS arbitration clause.¹²³ The court was set up with the same intentions as that of WESA, yet it has long been criticized for its biases.¹²⁴

¹¹⁴ See *History*, *supra* note 109.

¹¹⁵ See 2017 ARBITRATION RULES AND 2014 MEDIATION RULES ART. 42.

¹¹⁶ See generally WORLD ESPORTS ASS'N ARB. RULES (Aug. 17, 2016).

¹¹⁷ See 2017 ARBITRATION RULES AND 2014 MEDIATION RULES ART. 42.

¹¹⁸ *Id.* Art 6.

¹¹⁹ See WORLD ESPORTS ASS'N ARB. RULES, 17.3 (Aug. 17, 2016).

¹²⁰ *ex aequo et bono* is defined as, "a decision-maker (esp. in international law) who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles. *ex aequo et bono*, BLACK'S LAW DICTIONARY (10th ed. 2014). *amiable compositeur* allows an arbitrator, while still considering law binding on the agreement, to modify the law so long as the parties agree. *amiable compositeur*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹²¹ See 2017 ARBITRATION RULES AND 2014 MEDIATION RULES ART. 21.

¹²² See *ex aequo et bono & amiable compositeur*, *supra* note 120.

¹²³ See Rachele Downie, *Article: Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELBOURNE J. OF INT'L LAW 315, 317 (2011).

¹²⁴ *Id.* at 335

As discussed above,¹²⁵ the ACES rules have specific procedures addressing impartiality to avoid bias, but CAS does as well.¹²⁶ Yet, CAS is still being criticized for their lack of transparency throughout their procedures particularly when it comes to arbitrator impartiality.¹²⁷ Thus, the importance of these procedures underscores that ACES's reputation could suffer in the same way CAS's reputation has suffered should arbitrators fail to enforce these procedures.

CAS has also received criticism for not being an appropriate remedy for anti-doping cases,¹²⁸ which makes up a great proportion of its cases.¹²⁹ The ACES rules also have specific procedures relating to anti-doping, however they are welcoming to relevant anti-doping organizations joining arbitration proceedings.¹³⁰ This shows the concern WESA has for anti-doping regulations and the associated anti-doping organizations interest in the outcome of the proceedings. WESA's focus on these policies is well-placed, as enforcing policies such as this could help tailor public support in ACES's favor. Being relatively new, the ACES has time to look to the established histories of these other courts. The ACES can draw on their mistakes and successes to be successful themselves.

VI. CONCLUSION

The ESL pro league of "Counter Strike: Global Offensive" will be the first eSports league to operate under WESA regulations.¹³¹ Should the dispute arise and lead to a successful resolution, other leagues' will likely become interested in WESA and the ACES. By exploring the structure of the ACES, this article has shown and highlighted several benefits arbitration can bring to the eSports world. WESA has adopted comprehensive rules, furthering and facilitating accessibility to arbitration. Similarly, given the ACES's rules similarities to well-established rules, the court should have no problem establishing itself in the legal world. Only time will tell if the ACES and WESA will accomplish their goals vis-à-vis arbitration, but the industry seems ready to embrace arbitration.¹³²

¹²⁵ See *supra* notes 82-84 and accompanying text.

¹²⁶ See Rachele Downie, *supra* note 124, at 335.

¹²⁷ See Saverio Spera, *Time for Transparency at the Court of Arbitration for Sport*, INTERNATIONAL SPORTS LAW CENTRE (Jan. 31, 2017), <https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera>.

¹²⁸ See Rachele Downie, *supra* note 124, at 329 (explaining that since anti-doping cases have a criminal component, CAS is not the correct venue for them yet the court frequently handles them).

¹²⁹ See *id.*

¹³⁰ See WORLD ESPORTS ASS'N ARB. RULES, 18 (Aug. 17, 2016).

¹³¹ See Hans Oelschlägel, *Announcing the Founding of WESA - the World Esports Association*, ESL MAGAZINE (May 13, 2016), <https://www.eslgaming.com/article/announcing-founding-wesa-world-esports-association-2856>.

¹³² See Colin Campbell, *supra* note 32 (stating that WESA indicates eSports is growing up).