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by

Andre M. Louw

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During this year the world of sports law has continued to evolve. Sports now generate more than \$35 billion dollars per year in revenue worldwide. This figure alone assures sports a certain degree of influence and attention. However, in addition to this impressive figure, the profile of sports athletes, clubs and organizations remains high. This is not only due to the popularity of a particular sport, but also the endless encounters between sports and the law. Several key legal issues that affect the world of sports have made indelible marks this year on the sports law landscape. For example the *Murphy case* which addresses the correlation between free movement and broadcasting rights in Europe; the recent finding that the threat of a playing ban by FIFA against *Matuzalem* was contrary to public policy; the endless saga involving the doping allegations that span the career of *Lance Armstrong* and is having a rippling affect across the world of competitive cycling; the rise of national and European Union issues in sports that impact the area of *competition law* since the decentralization of competition law enforcement in 2004; and daily accounts of *sports fraud* particularly in the area of match-fixing which has been highlighted as a serious global issue in the world of sports. These important issues have been addressed by such tribunals as the European Court of Justice (ECJ), Court of Arbitration for Sport (CAS), Swiss Supreme Court, and national courts, and will continue to have significant impact on sports and the law helping to contribute to the ever expanding area of sports law.

Not only is the world of sports evolving, but likewise to keep pace with the needs of the sports law community and to ensure that we are addressing the changing needs of our constituents, the ISLJ continues to evolve. Over this past year, we have formalized our peer-review process, streamlined the contents of the ISLJ, entered into agreement with other sports centers internationally to bring you an even greater depth of information and perspectives, and have made plans to ensure an even brighter future for the ISLJ by moving our publishing, beginning in 2013, to a collaborative effort between Asser Press and Springer-Verlag. As we begin the new year the ISLJ will have a new cover and a new Editor-in-Chief. I will resume my role as managing editor, but look forward to the new Editor-in-Chief providing increased guidance, integrity and credibility to carry forward the goals of improved quality and greater readership for the ISLJ.

As we close out this year, as always, I thank our Editorial and Advisory Boards for their continued support and dedication. We have accomplished a lot this year with the expectation of even more to come.

The future for sports law and the ISLJ remains bright.

Karen L. Jones, JD, MA
December 2012



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A Critical Analysis of Article 4.3 of the World Anti Doping Code*

By Steve Cornelius**

1. Introduction

Doping is as old as sport itself and the modern phenomenon of doping emerged as soon as modern sport emerged in the nineteenth century.¹ Initially doping seemed to be an acceptable and even necessary element of sport.² However, as reports of side-effects on the psychological, physical and physiological well-being of athletes began to surface, a steady call for measures to redress the problem began to arise. The International Amateur Athletics Federation³ was the first International Federation to address the problem of doping in sport when it adopted a simple rule against doping in 1928.⁴ However, the fight against doping only truly gained momentum after the deaths of cyclists Knut Jensen at the 1960 Olympic Games and Tommy Simpson during the 1967 Tour de France.⁵ In 1967 the International Olympic Committee (IOC) established a Medical Commission and approved a ban on doping the following year, in time to conduct the first tests on athletes at the 1968 Winter- and Summer Olympic Games.⁶ However, because of the inconsistency in measures to deal with doping from one sport to the next and from one country to the next, the World Anti-Doping Authority (WADA) was established in 1999 to harmonise and strengthen anti-doping actions and rules across all sports and countries.⁷ This resulted in the adoption of the World Anti-Doping Code (the Code) in March 2003.⁸ The legal status of WADA and the Code was elevated with the adoption of the International Convention against Doping in Sport 2005 (the Convention), which expressly refers to WADA and the Code.

The result is that athletes are now subject to the doping control measures of WADA and the terms of the Code on at least two grounds. In the first instance, any athlete participates in sport on the basis of a contractual relationship,⁹ the terms of which are derived from the constitution, laws, rules and regulations of the various bodies, unions, associations and federations which govern the particular sport. Secondly, in view of the express recognition which the Convention accords to WADA and the Code and the adoption and/or ratification of or accession to the Convention by most countries affiliated to the IOC, compliance with the Code and the authority of WADA also becomes matters of national and international law. In addition, many countries have adopted legislation to deal with the issue of doping in sport as envisaged in article 5 of the Convention. This also brings compliance with the Code and the authority of WADA into the sphere of national law.

This article provides a critical analysis of article 4.3 of the Code and questions whether the Prohibited List can be challenged on the grounds

that one or more of the substances or methods have been inappropriately classified in terms of article 4.3 and should therefore not be included on the Prohibited List. This article does not address issues relating to the prudence or desirability to include or not to include any particular substance or method on the Prohibited List. It merely highlights flaws in the drafting of article 4.3, warns of a potential basis on which WADA and the Prohibited List can be challenged and proposes ways to deal with this risk.

2. Prohibited List

In terms of the Code¹⁰ WADA must now revise and publish the Prohibited List of substances and methods which are prohibited as doping. A substance or method is considered for inclusion on the Prohibited List if WADA determines that it meets two of the following three criteria:

- a It is performance enhancing.
- b It is dangerous to the athlete's health.
- c It is contrary to the spirit of sport.

A substance or method can also be added to the list if WADA determines that it has the capacity to mask the use of other prohibited substances or methods.

In particular, article 4.3 provides:

4.3 Criteria for Including Substances and Methods on the Prohibited List

WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.

4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.

4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List and the classification of substances into categories on the Prohibited List is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

WADA publishes a revised version of the Prohibited List at least once per annum. The 2012 Prohibited List contains an elaborate list of substances and methods across 15 categories.

To act lawfully and be compliant with article 4.3 of the Code, WADA must, in deciding which substances and/or methods should be included on the Prohibited List, apply its collective mind to the matter and in good faith make a determination which meets the standards set in the Code.¹¹ This means that in respect of each substance

* This article is based on a paper presented at a conference on Doping in Sport hosted by the South African Institute for Drug Free Sport at the South African Doping Control Laboratory in Bloemfontein on 7 May 2012.

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1 Sheehan "Doping in Sport - A Deadly Game" *The Athlete* (available at <http://www.theathlete.org/doping-in-sport.htm> accessed on 2 May 2012).

2 Woodland *Dope: The Use of Drugs in Sport* (1980)

3 As it then was. Now it is the International Association of Athletics Federations.

4 Brown (ed) *IAAF Medical Manual* (2009)

chapter 15.

5 "History of Performance Enhancing Drugs in Sport" available at <http://sport-sanddrugs.procon.org/view.resource.php?resourceID=002366> accessed on 2 May 2012.

6 Brown (2009) ch 15.

7 *Idem*.

8 *Idem*.

9 *Jockey Club of South Africa v Transvaal Racing Club* 1959 1 SA 441 A 446F, 450A; *Turner v Jockey Club of South Africa* 1974 3 SA 633 A; *Jockey Club of South Africa v Forbes* 1993 1 SA 649 A 645B, 654D; *Natal Rugby Union v Gould* 1999 1 SA 432 SCA 440F; *Rowles v Jockey Club of SA and others* 1954 1 SA 363 A 364D; *Johannesburg Country Club v Stott and another* 2004 5 SA 511 SCA.

10 Article 4.1.

11 *Feinstein v Taylor* 1961 4 All SA 366 W.

or method included on the Prohibited List, WADA must consider whether the substance or method is performance enhancing and/or harmful and/or whether its use is contrary to the spirit of sport, alternatively, whether it could mask the use of a prohibited substance or method. But the Code does not confer on WADA a discretion to determine which substance or method WADA deems performance enhancing or harmful.

The drafters of the Code sought to make the process of determining which substances and/or methods should be included on the prohibited list, more transparent by providing objective standards according to which the determination must be made. These standards are mostly scientific. Both article 4.3.1.1 and article 4.3.1.2 require WADA to consider scientific or medical evidence or pharmacological effect to determine whether a substance or method is or could be performance enhancing or harmful, as the case may be. This seems somewhat tautologous as both medicine and pharmacology are also sciences and evidence on these grounds would also constitute “scientific evidence”.

In other words, the Code imposes a duty on WADA to determine whether there is medical or other scientific evidence, pharmacological effect or experience which indicates that the substance or method is or could be performance enhancing or harmful. Article 4.3 of the Code therefore imposes on WADA a duty to make a determination in accordance with the relevant evidence, rather than a discretionary competence to weigh the various factors and make up its own collective mind on the matter.

There is an apparent problem with this formulation. Even though we live in the golden age of science and we strive towards the discovery of exact scientific conclusions through the application of proper scientific method, medicine and pharmacology, like the law, are not certain and precise. Scientific and medical evidence relating to the impact which substances and methods have on the human body, are often inconclusive and sometimes contradictory. There are innumerable variables that could at different times and in different studies impact in various ways on the eventual results. Vagelos and Galambos¹² explains this succinctly when they recall

[m]edicine, I suddenly realised, is not an exact science. It could not be learned and applied by rote, even from a body of knowledge as comprehensive as Loeb's. Once the disease was understood, the physician could treat the patient in a variety of ways, using similar drugs and solutions on the basis of the blood sugar level, the amount of dehydration, the concentration of certain salts in the patient's blood, and so forth. Harvard medicine was different from Columbia medicine in that it was more flexible and left more to be determined by a thoughtful physician. It required more intellectual input. I was free to think, to use my understanding of the basic disease process, and to explore the 'art' of medicine.

Molzone¹³ also explains that the interface between medicine and pharmacology, where clinical trials are conducted to determine whether any particular substance or method has a favourable effect, no effect or an adverse effect, is equally uncertain. Most often, substances do not provide miraculous results. Their effects are often much more subtle and often difficult to qualify and quantify. Substances may have various effects on the human body by relieving symptoms, altering clinical measurements and influencing physiological processes. Because of differences in physiological make-up, different people react differently to the same substance. Furthermore, the reaction which an individual may have towards a particular substance may also differ from time to time. In addition, the so-called “placebo-effect” means that the ability of a substance to enhance performance depends also on psychological factors, which in turn are affected by the socio-economic and cultural environment.¹⁴ Scientific and medical evidence, therefore, seemingly pro-

vides an inadequate standard for determining whether a substance or method should be included on the Prohibited List.

The standard of pharmacological effect is no less problematic. The pharmacological effect of a substance depends on various factors, including the exact composition of the preparation or solution which contains the substance, the mode of ingestion, genetic and biological variables, as well as the medical history and history of drug use of an individual.¹⁵ The amount of a substance which is ingested and the period over which it is ingested, could also have an impact on the pharmacological effect. For example, in small quantities below 60 micrograms ingested over a short term, clenbuterol is a decongestant and bronchodilator. If you increase the dosage somewhat and it is used over a longer period, clenbuterol becomes a nonsteroidal anabolic and metabolic accelerator which improves muscle protein synthesis. In doses above 120 micrograms, the stimulating and thermogenic effects of clenbuterol often cause trembling, headaches and dizziness. In addition, after prolonged use without interruption, the pharmacological effect of clenbuterol dissipates so that it eventually has no effect.¹⁶

Because the science seems to be so uncertain, WADA would apparently be hard-pressed to justify the inclusion of any substance or method on the Prohibited List. It is arguably for this reason that the drafters of the Code added an alternative standard for determining whether a substance or method meets the requirements in article 4.3.1.1 and/or article 4.3.1.2. WADA may also rely on “experience” which shows that a substance or method is or could be performance enhancing or harmful. This is a misguided attempt at resolving the difficulties relating to scientific, medical and pharmacological evidence. This alternative standard poses many questions: Whose experience is considered? How is the experience established? How much or how little experience is required? Etcetera. Molzone¹⁷ warns that

[d]rawing a conclusion about whether a medication or other treatment works based on anecdotes is logically flawed. The reason is that there are numerous alternatives, other than the treatment, that could explain anecdotal findings (these are called ‘confounding variables’).

If called upon to justify the inclusion of a substance or method on the Prohibited List based on this standard, WADA would be even more hard-pressed to find convincing arguments.

As a result, the way in which article 4.3 of the Code is drafted, it leaves no discretion and demands that WADA make a determination based on evidence, which could be medical, scientific, pharmacological or anecdotal. This could expose WADA to attack and lead to challenges of the Prohibited List. For instance, category So in the Prohibited List refers to non-approved substances and provides:

Any pharmacological substance which is not addressed by any of the subsequent sections of the List and with no current approval by any governmental regulatory health authority for human therapeutic use (e.g drugs under pre-clinical or clinical development or discontinued, designer drugs, veterinary medicines) is prohibited.

However, article 4.3 of the Code only allows WADA to consider “a substance or method” for inclusion on the list; Article 4.3 does not allow WADA to list categories of substances or methods. As a result, the inclusion of this blanket category is *ultra vires*. Furthermore, on what medical or other scientific evidence, pharmacological effect or experience could WADA possibly have relied to determine whether any particular substance within this category should be included in the Prohibited List when, at least at the time when WADA made its determination, it would have been impossible to compile a comprehensive list of these substances? As a result, WADA did not adhere to Article 4.3 of the Code when it included category So in the list of Prohibited Substances. Clearly, then, the inclusion of category So in the Prohibited List would not survive judicial scrutiny if it should be challenged in court.

3. Can the Prohibited List be Challenged?

It seems that WADA may have anticipated challenges to the Prohibited List and sought to pre-empt any challenge by providing in article 4.3.3 that WADA's determination that a substance or method should be included on the Prohibited List cannot be challenged. However, this

¹² *Medicine, Science and Merck* (2004) 27.

¹³ In O'Donnel and Ahuja *Drug Injury: Liability, Analysis and Prevention* (2005) 61.

¹⁴ Hanson, Venturilli and Fleckenstein *Drugs and Society* 11 ed (2011) 1, 155.

¹⁵ Hanson, Venturilli and Fleckenstein (2011) 1, 5, 155 *et seq.*

¹⁶ <http://www.clenbuterol.net> accessed on 6 May 2012. See also Kearns *et al* “Chronic administration of therapeutic levels of clenbuterol acts as a repartitioning agent” 2001 *Journal of Applied Physiology* 2064.

provision may not be as effective as it may appear at first glance to prevent challenges to the Prohibited List.

Where the Code is binding by virtue of adoption and/or ratification of or accession to the Convention, or by virtue of national legislation to give effect to the Convention, clause 4.3.3 may be subject to scrutiny under the national laws of the countries concerned.

For instance, section 34 of the Constitution of the Republic of South Africa, 1997, provides:

34. Access to courts. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

A provision, such as article 4.3.3 of the Code, which seeks to exclude the jurisdiction of courts or other dispute resolution mechanisms would therefore be unconstitutional and invalid in South Africa.

Furthermore, courts in South Africa have always maintained that they have an inherent power of judicial review derived from common law.¹⁸ To withstand judicial scrutiny, the board making the determination must apply its mind to the matter and a determination must be lawful, made in good faith and not be grossly unreasonable.¹⁹ In *Lengene v Johannesburg City Council*²⁰ the court held that where a statutory power must be exercised

[t]his is not an unfettered discretion that can only be attacked on the narrow grounds available on review in such cases. The official must be 'reasonably satisfied' ... Where his finding must be purely one of fact with merely some discretionary latitude as to his methods of enquiry, his findings would, on review be almost as fully open to attack as they would have been on appeal.

And even where a limitation of the right of access to the courts is allowed, such a limitation is interpreted narrowly. In *Stanton v Minister of Justice*²¹ Jansen J held that a provision which precluded any appeal against or review of certain decisions by the Minister of Justice, did not prevent a court from determining whether the actual decisions had been made in good faith.

In addition, article 6 of the European Convention on Human Rights provides that everyone, whether in a civil or criminal case, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Golder v UK*²² the European Court of Human Rights held that by implication article 6 also enshrines the right of access to a court. Rozakis²³ explains²⁴ that

the right of access concerns both the factual circumstances of a case and its legal substratum. In other words, a person within the jurisdiction of a State-party to the Convention must have effective access to a court to settle his grievances on arguable civil claims. The Court does not make a distinction between impediments to this right deriving from factual difficulties and those stemming from legal regulations. Furthermore, as far as effectiveness is concerned, a person must have the facilities to vindicate his right before the courts and be able to enforce a decision determining that right.

The right of access to a court may be limited, provided that the limitation does not impair the very essence of the right,²⁵ the limitation pursues a legitimate aim and there must be some proportionality between the aim sought to be achieved and the means of limitation employed to achieve that aim.²⁶

In *R v Medical Appeal Tribunal ex parte Gilmore*²⁷ Lord Denning explained that a determination can only be final if the determination is made lawfully. A determination will only be lawful if there are sufficient grounds to make that determination. In *Pearlman v Keepers and Governors of Harrow School*²⁸ Lord Denning also held that a statutory provision which expressly provided that a decision is final and conclusive, merely excluded the possibility of an appeal on the merits, but it did not exclude the possibility of judicial review. Furthermore, in *Anisimic Ltd v Foreign Compensation Commission*²⁹ Lord Reid explained that a statutory provision which provided that a determination shall not be called into question in any court of law, only applied in the event of a valid determination being made. As a result, the provision did not

prevent the court from establishing whether a valid determination had in fact been made. In addition, in *R v Secretary of State for the Home Department, ex parte Fayed*³⁰ Lord Woolf held that even where a statutory provision expressly provided that a decision could not be taken on appeal or review, a court could still review a decision on procedural grounds to ensure that the decision was arrived at after following a fair and proper procedure.

In other words, in spite of article 4.3.3 of the Code, a court could still in appropriate circumstances review whether WADA has made a valid determination in terms of article 4.3 of the Code and whether WADA had sufficient grounds in terms of article 4.3 of the Code to include a substance or method on the Prohibited List.

The matter is no different where the Code is binding by virtue of the contractual relationship between the athlete and the various sports authorities. A term in a contract which purports to exclude the jurisdiction of the courts, is contrary to public policy and therefore void.³¹ In *Sasfin (Pty) Ltd v Beukes*³² one of the issues related to a term in the contract which provided that a certificate of indebtedness constituted the sole memorial of the indebtedness of the debtor. Smalberger JA held³³ that the clause concerned

purported to oust the Court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud. As such they run counter to public policy.

English law similarly does not allow any term in a contract which would have the effect of ousting the jurisdiction of the courts. In *Scott v Avery*³⁴ Wightman J explained that the

question in this case is, whether the effect of the 25th rule of the association, referred to in the policy, is to withdraw the cognizance of the whole cause of action from the courts of law, and to oust them of their jurisdiction, or only to impose upon the assurer a condition preliminary to his right to sue for a loss, that the amount of the loss shall be ascertained by arbitration. It may be that if the effect of the 25th rule would be to oust the courts of law of their jurisdiction, ... that rule would be bad.

This was further explained in *McGowan v Summit at Lloyds*³⁵ where Lord Reid held that

[c]ourts possess jurisdiction by the operation of law. One of the powers which jurisdiction confers is the power to decide whether or not to exercise that jurisdiction in the sense of allowing a case to proceed. ... A jurisdiction clause is relevant to the exercise of that power ... but it cannot and does not oust the jurisdiction from which that power is derived.

Similarly, Waller J held in *The Glacier Bay*³⁶ case that the court will not allow a term to stand which precludes the party from enforcing the right by an action in court. Such a term would be repugnant giving the right by one hand and taking it away with the other and/or is an ouster of the jurisdiction of the court and unenforceable for that reason. Even if the contract limits, as opposed to completely ousts, recourse to the court, that term may be unenforceable depending on the extent of the ouster.

He explains³⁷ further that

17 In O'Donnel and Ahuja (2005) 62.

18 *Mahmood v Secretary for the Interior* 1974 2 All SA 495 C 501.

19 *Feinstein v Taylor* 1961 4 All SA 366 W.

20 1958 1 SA 647 T.

21 1960 3 All SA 208 T.

22 (1979) 1 EHRR 524 par 28 *et seq.*

23 "The Right to a Fair Trial in Civil Cases" 2004 *Judicial Studies Institute Journal* 96.

24 98.

25 *Philis v Greece* (1991) 13 EHRR 741.

26 *Asghingane v UK* (1985) 7 EHRR 528 par 57.

27 1 QB 574.

28 2 QB 56.

29 2 AC 157.

30 [1997] 1 All ER 228.

31 *Bristown Municipality v Beunderman (Pty) Ltd* 1967 1 All SA 36 C 39.

32 1989 1 All SA 347 A.

33 358.

34 10 ER 1121.

35 2002 SC 638.

36 *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd ('The Glacier Bay')* 1995 CLC 242.

37 250.

the question of ouster is said to be a question of public policy, I ought to address a point made by Mr Gross QC. He has submitted that this is an international contract and that thus English public policy really has no application. That point is in my view not well taken for the following reasons.

... Third, in any event, the public policy is not just to see that English people can come to an English court, but it is a policy to ensure that any person can get to some court. It is not thus a parochial or insular concept.

Williston³⁸ indicates that in the various jurisdictions in the United States the right of an injured party to legal redress is jealously guarded by the courts.

In *Central Contracting Co v Maryland Casualty Company*³⁹ the Third Circuit of the United States Court of Appeals held that while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.⁴⁰

The judgment of the Iowa Supreme Court in the case of *Wallace v Brotherhood of Locomotive Firemen and Enginemen*⁴¹ is quite informative. Mitchell J held⁴² that

[i]f the provision in the constitution [of the Brotherhood] is construed as appellee contends, then it is void as far as it attempts to oust jurisdiction of the courts.

The Iowa court in the case of *Prader v Nat'l Masonic Accident Ass'n*, 95 Iowa 149, 63 N.W. 601, 605, said: 'A general provision by which the parties to an agreement in terms bind themselves to submit to arbitration all matters of dispute which may thereafter arise, and making the arbitration final, will not deprive the courts of their appropriate jurisdiction, nor be enforced by them.'

In *Goodwin v Mut Ins Co*, 118 Iowa 601, 92 N.W. 894, 895, we said: 'A litigant cannot be expected to consent that his case shall be tried to his antagonist in person or by agent.'

'One of the oldest and most [salutary] maxims of law is that no man shall be a judge in his own cause.'

'The judicial mind is so strongly against the propriety of allowing one of the parties ... to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid that result.'

The reason for the above quoted rule is sound. The courts are open for the redress of injury done to person or property. To permit parties to agree before a dispute arises to submit their differences to the adjudication of one of the parties to the agreement is against public policy. Appellee rather agrees with this proposition but claims it has no application to a mutual benefit certificate which creates no liability, it says upon the occurrence of the disability but only upon the approval of the claim by the appropriate officer of the company. With this we cannot agree, for it gives to some officer of the defendant company a right to say whether or not the appellant can recover. It gives to the appellee the right to be judge in its own case. This is against public policy. The practice of permitting one of the parties to a dis-

pute to be the judge, it just as vicious, whether one of the parties is a mutual benefit society or not.

In Australia also, a clause in a contract which purports to exclude the jurisdiction of a court, is contrary to public policy and therefore void.⁴³ In *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc*⁴⁴ Tamberlin J explained:

The common law doctrine that the jurisdiction of the Court should not be ousted is based on public policy that the access of citizens to the courts should be preserved. This public policy as applied by the courts overrides the intentions of the contracting parties who insist on such a provision in their contract. However, the principle is not one which is concerned to delimit the power of the legislature. The principle does not, and indeed cannot, prevent the legislature from permitting specified types of dispute or differences to be referred to and determined by arbitration where certain conditions are satisfied.

As a result, article 4.3.3 of the Code is not only a misplaced attempt to avoid scrutiny of the substances and methods included on the Prohibited List, but it may also turn out to be a futile attempt in the end.

In final analysis, article 4.3.3 of the Code also does not accord with the spirit with which the Court of Arbitration in Sport (CAS) was established. Just as WADA was established to provide more consistency in the fight against doping, so CAS was also established to provide a uniform dispute resolution mechanism which could avoid the inconsistencies that would arise if sports federations were faced with legal action in different countries with different legal systems.⁴⁵ By inserting article 4.3.3 in the Code, which is clearly unlawful in many countries, WADA runs the risk of destabilising the uniform international sports law order which CAS has been developing over the past twenty years.

4. The Way Forward

It is clear from the way in which article 4.3 of the Code has been drafted, that the drafters either did not have an adequate understanding of the law in so far as it would relate to determinations by WADA or they showed a blatant disregard for the law. Secondly, the drafters also clearly did not understand the legal nature of the function which WADA would fulfil in determining the substances and methods which should be placed in the Prohibited List.

In exercising its functions in terms of article 4.3 of the Code, WADA is an administrative agency in much the same way as a licensing authority or an urban planning council is an administrative agency. Weber⁴⁶ explains that a body is an administrative agency if

[t]here is an obligation to obedience only within the sphere of the rationally delimited jurisdiction which, in terms of the order, has been given to him.

The following may be said to be the fundamental categories of rational legal authority:

- (1) A continuous rule-bound conduct of official business.
- (2) A specified sphere of competence (jurisdiction). This involves:
 - (a) A sphere of obligations to perform functions which has been marked off as part of a systematic division of labor.
 - (b) The provision of the incumbent with the necessary powers.
 - (c) That the necessary means of compulsion are clearly defined and that their use is subject to definite conditions. A unit exercising authority which is organized in this way will be called an 'administrative organ' or 'agency'. ...

There are administrative organs in this sense in large-scale private enterprises, in parties and armies, as well as the state and the church.

As an administrative agency, WADA is called on to perform certain administrative functions in terms of the Code. The performance of these functions requires that WADA exercise an administrative discretion.⁴⁷ WADA should merely determine which substances or methods should or should not according to certain guidelines be included in the Prohibited List. The Code should not require that WADA should make a scientifically unassailable finding that a particular substance or method is or is not performance enhancing or harmful and therefore WADA should not have to show that there are incontrovertible or even com-

³⁸ Williston on Contracts - Forms 4 ed (2011) § 15F:19.

³⁹ 367 F2d 341. See also *AC Miller Concrete Products Corporation v Quikset Vault Sales Corporation* 309 F Supp 1094.

⁴⁰ For some examples, see also *Whirlpool Corporation v Certain Underwriters at Lloyd's London* 662 NE 2d 467 (Illinois); *Haakinson and Beatty Co v Inland Insurance Co* 344 NW 2d 454 (Nebraska); *Appliance Sales and Service Inc v Command Electronics Corporation* 115

NC App 14 (North Carolina); *Eads v Woodmen of the World Life Insurance Society* 785 P 2d 328 (Oklahoma).

⁴¹ 300 NW 322.

⁴² 325 - 326.

⁴³ *Compagnie des Messageries Maritimes v Wilson* 94 CLR 577 at 585-586; *Brooks v Burns Philp Trustee Co Ltd* 121 CLR 432. ⁴⁴ 75 FCR 583.

⁴⁵ *Blackshaw Sport Mediation and Arbitration* (2009) 151.

⁴⁶ *Economy and Society* (1978) 218.

elling scientific, medical or pharmacological evidence that a substance is indeed performance enhancing and/or harmful.

An administrative agency considers the evidence and arguments at its disposal and makes up its own collective mind to make a particular determination. An urban planning council deciding on the construction of a new road is often confronted with evidence and opinions that are contradictory. It considers the evidence and submissions from opposing parties and makes a determination which will always in some way or another conflict with some of the evidence or opinions. So therefore, even if the scientific evidence may not be certain and sometimes even contradictory, the discretion as to whether or not a substance or method should be included in the Prohibited List should be WADA's and WADA's alone. A court or other tribunal cannot usurp that function merely because it would have reached a different conclusion. A court or tribunal can only determine whether a determination has been validly made. And to be valid, a determination must be made in good faith, the agency must apply its collective mind in making the determination, it must be done in accordance with the procedures and guide-

lines which prescribe how the determination must be made and it must be rational in the sense that, based on the evidence and arguments at its disposal, the determination is not grossly unreasonable.⁴⁸

The way in which article 4.3 of the Code has been drafted, could complicate matters for WADA, as it seems to suggest a procedure in terms of which WADA may only make the determination if it finds medical or other scientific evidence, pharmacological effect or experience that a substance is or could be performance enhancing and/or harmful.

5. Conclusion: Proposed Amendments

The difficulties which I have highlighted in this paper can all be adequately addressed with careful amendments of the Code. I propose that the article 4.3 should be amended as set out in the table. The aim of the amendment would be to emphasise that WADA has a discretion to determine which substances or methods should be included in the Prohibited List. Crucially, the proposed amendment only requires WADA to consider the relevant scientific, medical, pharmaceutical and other evidence before it applies its collective mind to determine whether a substance or method should be included in the Prohibited List. But unlike the current article 4.3, the proposed amendment does not require WADA to determine that there is indeed scientific, medical, pharmaceutical and other evidence that the substance or method is or could be performance enhancing or harmful.

⁴⁷ Barry and Whitcomb *The Legal Foundations of Public Administration* (2005) 9.

⁴⁸ *Feinstein v Taylor* 1961 4 All SA 366 W.

Current text	Proposed amended text
<p>4.3 Criteria for Including Substances and Methods on the Prohibited List</p> <p>WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.</p> <p>4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:</p> <p>4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;</p> <p>4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;</p> <p>4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.</p> <p>4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.</p> <p>4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List and the classification of substances into categories on the Prohibited List is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.</p>	<p>4.3 Criteria for Including Substances and Methods on the Prohibited List</p> <p>4.3.1 WADA shall, after considering the available scientific, medical, pharmacological and other relevant evidence and any submission made to WADA, determine whether to include a substance or method on the Prohibited List if WADA finds that the substance or method meets at least two of the following criteria:</p> <p>4.3.1.1 The substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;</p> <p>4.3.1.2 The Use of the substance or method represents an actual or potential health risk to the Athlete;</p> <p>4.3.1.3 There is a risk that the substance can be abused by Athletes because of its performance enhancing qualities or perceived performance enhancing qualities.</p> <p>4.3.1.4 The Use of the substance or method violates the spirit of sport described in the Introduction to the Code.</p> <p>4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.</p> <p>4.3.3 In performing its function in terms of article 4.3.1 or article 4.3.2, WADA may also determine that a category of substances or methods shall be included on the Prohibited List.</p> <p>4.3.4 WADA's determination under article 4.3.1, article 4.3.2 or article 4.3.3 is final and can only be reviewed by a panel constituted by the Appeals Arbitration Division of the CAS if it can be shown that WADA did not follow a fair procedure in making such determination or if such determination was not made in good faith or is grossly unreasonable.</p> <p>4.3.5 If the CAS finds that WADA did not follow a fair procedure in making a determination under article 4.3.1, article 4.3.2 or article 4.3.3, or if such determination was not made in good faith or is grossly unreasonable, the CAS may instruct WADA to reconsider the determination within a set period or the CAS may annul the determination with prospective effect only.</p> <p>4.3.5 An Athlete or other Person may not challenge the validity of WADA's determination under article 4.3.1, article 4.3.2 or article 4.3.3 in a hearing on an anti-doping rule violation and a hearing panel may not take cognisance of any challenge to the validity of WADA's determination in terms of article 4.3.4 or otherwise.</p>

Proportionality and the application of the World Anti-Doping Code

By Herman Ram¹

1. INTRODUCTION

Even since before the first version of the World Anti-Doping Code (the Code) came into force in January 2004, there has been an intense debate about the principle of proportionality in the Code. Much of the debate focussed on the possibility of 'individual case management', in a Code which was designed to establish world wide harmonisation and standardisation. The question (or perhaps "fear" is a more accurate term) was whether this wish for harmonisation would take over the need for rules which would allow an athlete to receive a sanction which was in accordance with (i) the offence and (ii) the individual or exceptional circumstances under which the offence was committed. The debate continued during the first Code revision process, which led to the adoption of the revised Code in 2007.² Now that the second Code revision process has commenced, it may be expected that proportionality will again be a hot topic, revived in the months to come.³

The Code is the foundation of all the anti-doping rules and procedures world wide. A recurring aspect of the Code discussion is the tension between the necessity to harmonize anti-doping rules on the one hand, and the wish to treat individual doping cases individually on the other hand. The Code should allow sufficient flexibility for taking the individual aspects of each case into consideration, while at the same time ensuring global harmonization through the Code. The tension between these two goals is quite significant, especially because the Code aims at equal treatment *across sports*. This has inspired and will continue to inspire a lively debate about - for instance - whether or not imposing a two year sanction is *equal treatment* for athletes from different sports.⁴

The tension between individual assessment and global harmonization may be reduced over the years if more flexibility will be allowed for taking the individual aspects of each case into consideration, but global harmonization through the Code is the cornerstone of the World Anti-Doping Program, and the Code is a central and indispensable tool within that program.⁵

But still, the present Code offers relevant possibilities for individual assessment of doping cases. This is not always recognized by the general public and, more importantly, it is not always understood by legal counsel, which acts on behalf of the athlete in doping cases. In other words, there is limited but relevant room for flexibility and proportion-

ality within the Code, but this room is not always used as it could and should be.

In this article, we will try to shed some light on the positions of athletes (paragraph 2) and Anti-Doping Organizations (paragraph 3), in relation to the proportionality issue we have introduced above. In the fourth paragraph, we will describe the approach of the Dutch Doping Authority, and the fifth and last paragraph provides some conclusions and input for further discussion.

2. THE ATHLETES' POSITION

The possibilities that the Code offers for individual assessment of doping cases should be fully used by panels *and* legal counsel, in order to reach decisions that are both Code-compliant *and* proportionate. The extent to which this is actually realized is largely dependent on the defence of the athletes who are involved in doping cases. Athletes are dependent on others to defend their case, *others* meaning people with a relevant legal and/or scientific background. Athletes themselves are very seldom able to defend their own case in a knowledgeable way, because athletes with both a Law degree and a PhD in Chemistry are rare indeed. So the question is: who helps the athlete?

2.1 LEGAL COUNSEL

When we try to answer that question, it is important to note that the majority of athletes that get involved in disciplinary proceedings because of an (alleged) Anti-Doping Rule Violation (ADRV) are *not* top level, professional athletes. On the contrary, most (alleged) doping offenders are amateurs who more often than not are unknown to the general public.

WADA's Laboratory Statistics 2010 mention 2790 Adverse Analytical Findings. The global number of Non-Analytical Findings (refusals, tampering, etc.) is unknown, but it is safe to say that each year more than 3,000 doping cases are brought before disciplinary panels around the world (or at least they *should* be brought before panels). It is unknown in how many of these cases legal counsel has been involved, but it is our estimate that not more than 20% of *Dutch* athletes have enough financial resources to hire legal counsel: out of 61 Dutch cases in 2009-2011, legal counsel was involved in only 11 cases.

The situation in other countries may be very different (both better and worse), but there can be no doubt that most athletes cannot afford to hire legal counsel, considering the costs of legal counsel and the average income of athletes.⁶

And even if an athlete can afford to hire legal counsel (because he is a well paid athlete, or he has a generous sponsor, rich parents, or an adequate legal aid insurance) it may be quite hard to find a lawyer who has adequate knowledge about the World Anti-Doping Code and the national anti-doping regulations, because the number of doping cases in a certain country is usually (far) too low to enable law firms to specialize in the field.

In short, adequate legal counsel is available in only a limited number of doping cases, and in the majority of cases, no counsel is available to help the athlete. And the outcome of procedures where legal counsel is absent, or fails to offer adequate legal support can be disastrous.⁷

2.2 CONFIDENTS AND ACTIVISTS

As a result of the inaccessibility (due to the high costs) or unavailability (due to the lack of relevant expertise/experience) of adequate legal counsel, many athletes put their trust in confidants who may be their parent, teammate or spouse, or someone who profiles himself as an anti-doping expert.

¹ CEO Anti-Doping Authority Netherlands, the National Anti-Doping Organisation (NADO) for the Netherlands, and so recognised by the Government of the Netherlands in accordance with the World Anti-Doping Code.

² See for some comments on the results of the first Revision: Steven Teitler and Herman Ram: 'Analyzing the new World Anti-Doping Code: a different perspective', ISLJ 2008,(1-2), p. 42-49

³ The present revision process started in November 2011 and will culminate in the adoption of the revised Code in November 2013

⁴ Two recurrent issues being the contract between professional and amateur athletes, and the contrast between athletes in sports with a short (for instance: gymnastics) and a long (for instance: shooting) athletes' career

⁵ To be sure: the principle that 'the punishment of an offender should fit the crime'

is not the only proportionality issue at stake. This article focuses almost exclusively on the proportionality of a sanction in relation to the nature and severity of the offence, but other principles, 'that the measure must be suitable, be necessary and be reasonable to achieve the aim', are just as relevant. This last principle is for instance used as criterion for composing a Registered Testing Pool and imposing the whereabouts obligation onto athletes.

⁶ In CAS-procedures, athletes can apply to ICAS (the governing body of CAS) for free legal counsel. CAS Rule S6 reads: The ICAS exercises the following functions: [...] 9. If it deems such action appropriate, it creates a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means. The operation of the legal aid fund including criteria to access the funds is set out in the CAS legal aid guidelines.

If an athlete solely relies on a trusted member of his team or family that may be of great psychological help to him, but it usually does not add much to the quality of his defense. We have witnessed several hearings in which the confidant went to great lengths to convince the panel that the athlete involved is an honest, reliable and likeable human being, but this unfortunately does not bear much weight in assessing doping cases.

Some athletes do not rely on their social surroundings, but try to find support elsewhere. We are not at all sure about other countries, but at least in the Netherlands we have a number of activists who oppose the current anti-doping policies, and who try to get involved in doping cases in order to promote their views on the subject. They seek publicity, and more or less offer themselves as counsel. The result of the involvement of such activists in doping cases is ineffective at best and disastrous at worst. Several athletes have been severely disadvantaged by this kind of counsel. For instance, some athletes missed their right to appeal because they were misinformed about their position, the procedures, the deadlines, etc. On top of that, athletes may end up with costs and fines that they're not warned about.

In short, for an athlete to rely on confidants or activists for help is inadequate, and sometimes even dangerous.

2.3 DISCIPLINARY PANELS

Dutch disciplinary panels tend to compensate for the lack of adequate counsel in their proceedings and decisions. Panels may - for instance - refer to mitigating circumstances which have *not* been put forward by the athlete himself, or panels may apply Code provisions that have not been mentioned by the athlete. We have heard the same about disciplinary panels in some other (European) countries, although we're not sure about the exact situation in those countries, let alone the situation worldwide. The tendency to compensate for the lack of counsel is clearly recognizable in some CAS decisions as well, as for example is the case in the CAS decisions that we refer to in footnotes 10 and 13.

The effort that panels invest in helping the athlete may be very laudable, but it unfortunately does not always lead to decisions in conformity with the Code. On the contrary, in the period 2003/2008, in 66 out of 192 Dutch doping cases (34%), the disciplinary decisions were *not* compliant with the Doping Regulations, according to the Dutch *Audit Committee Doping*⁸, and the non compliant sanctions were *always too lenient, never too harsh*. In 2007 and 2008 half of the decisions violated the rules.⁹

Panels are - apparently - willing to ignore the Code and the Doping Regulations in order to reach decisions that they consider to be proportionate, or they do so without even knowing it.

This situation may have brought joy to a number of athletes, but it is unacceptable that disciplinary panels - deliberately or even unknowingly - disregard the rules of the Code that both the Dutch government (by acceptance of the International Convention Against Doping In Sport of UNESCO) and the Dutch Olympic Committee NOC*NSF (by signing the Code) have embraced. This consistent and recurring disregard of the rules has forced the Dutch Doping Authority to appeal a number of exemplary and/or strategically relevant decisions, and to bring one specific case before CAS¹⁰, in order to overcome the unwillingness of disciplinary panels to apply the rules correctly. In this partic-

ular case that we have brought before CAS, the Appeals Committee of the Dutch Institute for Sports Law¹¹ did not only reject *the application* of the Code / Doping Regulations, but it rejected that Code and those Regulations *per se*. The panel used phrases as '*WADA ideology*', and '*draconic and implacable regulations*' to express their abhorrence of the Code.

We considered it to be a serious problem that this Appeals Committee (the most important one in the Netherlands) rejected the Code. But at the same time, we appreciated the fact that they had written it down so eloquently, and we confirmed that in an article that we wrote on the issue at that time: "The openness - not to say: defiance - with which the Appeals Committee distances itself from the Code, deserves praise and appreciation because herewith the road is open for an open debate and a principal assessment of the case."¹² After the CAS Award was issued, there have been no further decisions by the Institute for Sports Law that were as hostile to the Code as this one.¹³

But nevertheless and in short, diverging of the rules by disciplinary panels is a dead end street: helping individual athletes by 'bending the rules' will eventually turn out very bad for the athletes' community as a whole.¹⁴

3. THE NADO'S¹⁵ POSITION

It is rather evident that the NADO's position is quite different from the athlete's position. Most NADOs have solid knowledge about doping proceedings, and access to more resources than the general athlete. When we see athletes and NADOs as opposing forces, this fact may lead to question about the 'equality of arms' which after all is a fundamental principle in legal proceedings. But it is doubtful whether NADOs should (only and always) be seen as opponents of the athletes. In order to shed light on the position of NADOs, we will first turn to the Code, and next we will make some remarks on the specific position of the Dutch NADO.

3.1 THE POSITION OF NADO'S IN THE CODE

The Code defines an Anti-Doping Organization (ADO) as: '*A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process*'.¹⁶ This definition makes the Doping Control process the core business of an ADO.

A National Anti-Doping Organization is defined as: '*The entity[ies] designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of Samples, the management of test results, and the conduct of hearings, all at the national level*'.¹⁷ As such, this definition enumerates four tasks, all directly linked to the Doping Control process, so it more or less specifies the main ingredients of the NADO's core business: the Doping Control process.

Both definitions fall severely short of describing the many other tasks that (N)ADOs have, like - for instance - offering education, issuing Therapeutic Use Exemptions (TUEs), managing a Registered Testing Pool, etc. Although not part of the definitions, these tasks are true (N)ADO-tasks, and many of these tasks are mentioned elsewhere in the Code or in the International Standards.

On top of all the tasks that stem from the Code, NADOs may do other things as well, including offering support to athletes who are involved in disciplinary procedures, and the Code does not limit the

7 In a recent (unpublished) case, we encountered the somewhat bizarre situation that the Doping Authority argued that the adverse analytical finding might have been the result of a contaminated nutritional supplement and that this could possibly be verified by analysis of the food supplement, while *counsel* did not choose to cooperate along these lines. Thus, a possible ground for reduction of the sanction was set aside *by counsel*, and the athlete was sanctioned with two years ineligibility.

8 Reports 8-15 (2003-2008) Audit Committee Doping [Rapportages 8-15 (2003-2008) Auditcommissie doping]. This

committee has been installed by the General Assemblée of the Dutch Olympic Committee, and its task is to assess whether or not disciplinary decisions in Dutch doping cases are in conformity with the applicable Doping Regulations (and as a consequence, with the World Anti-Doping Code)

9 Steven Teitler & Herman Ram: 'Dutch disciplinary proceedings and the application of the World Anti-Doping Code [Nederlandse tuchtrechtspraak en de toepassing van de World Anti-Doping Code]', Tijdschrift voor Sport & Recht 2010 (2), p. 57-70

10 CAS 2009/1/2012 Anti-Doping Authority the Netherlands v. Nick Zijkerbuijk.

11 In Dutch: *Instituut Sportrechtspraak*. Dutch sports federations can transfer their disciplinary proceedings to this institute on a voluntary basis, and about half of the federations had done so at the end of 2011.

12 Steven Teitler & Herman Ram: 'Dutch disciplinary proceedings and the application of the World Anti-Doping Code [Nederlandse tuchtrechtspraak en de toepassing van de World Anti-Doping Code]', Tijdschrift voor Sport & Recht 2010 (2), p. 61

13 There has, however, since then been a decision of the Appeals Committee of the

Royal Dutch Skating Union that reasoned - although formulated less extreme - along the same lines. This decision was also corrected by CAS in its arbitral award of 22 August 2011: 2010/A/2310, 2311 Anti-Doping Authority the Netherlands & Royal Dutch Skating Union v. Wesley Lommers

14 The situation in the Netherlands has changed considerably since 2009, and the percentage of decisions that are not in conformity with the Doping Regulations has dropped sharply.

15 National Anti-Doping Organisation.

16 Appendix 1 of the Code

17 Appendix 1 of the Code

activities of a NADO (at least as long as they do not interfere with Code-related tasks).

3.2 THE POSITION OF THE DUTCH NADO

The position of a NADO is not only defined by the Code. The 'scope' and 'room to maneuver' of a particular NADO may also be defined (and limited) by national regulations, by legislation, by the legal structure of the NADO's organization, and also by its resources and even by its traditions. For this reason it is not possible to give a general picture of what NADOs can do on top of their Code-obligations.

The Dutch Doping Authority is a foundation under private law, and is funded by both the Ministry of Health, Welfare & Sport *and* by the NOC (basically this is not NOC-funding but Lottery-money). There is no Doping Law in the Netherlands that defines the position and tasks of the Doping Authority, nor are there other formal limitations that the organization has to take into consideration when defining its own position. The Doping Regulations of Dutch sports federations are drafted by the Doping Authority and these regulations do not limit the scope of the organization either. In short: the Dutch NADO has numerous obligations under the Code, but is not restricted when considering tasks outside the Code. And one of the most prominent of those additional tasks is helping the athlete, which is the core subject of this article.

4. THE APPROACH OF THE DUTCH DOPING AUTHORITY

One of the tasks of the Dutch Doping Authority is the result management, including providing information for the disciplinary Panels that deal with doping cases. On top of that, we report to WADA about problems that we encounter in Dutch disciplinary decisions. Unfortunately, the picture that we have painted above in paragraph 2.3. about the quality of the decisions of disciplinary committees is rather grim, notwithstanding the fact that the quality of the decisions has - on average - risen since. And we are fully convinced that the lack of professional and knowledgeable support for the athlete contributes to this problem. It seems that most athletes who get entangled in a disciplinary procedure because of a doping charge, have little chance to find their way around all of the pit holes that they encounter. Many examples can be given. Athletes have to decide whether or not to spend money on the analysis of the B-sample, but it is almost impossible for them to oversee the possible consequences of waiving this right. Athletes may want to 'come clean' on their rule violation, but more often than not, they are not able to oversee the consequences in terms of the sanctioning and otherwise. Athletes may waive their right for a hearing without having properly considered the chances a hearing can offer for the defence, etcetera.

So, unfortunately, the situation often *is* quite bad for athletes. Even athletes with (some) legal training almost never have a scientific background, vice versa. And - as a rule - both legal and scientific aspects must be thoroughly assessed in order to assess a case in its entirety.

Anti-Doping Organizations usually do have officers with ample legal and scientific knowledge, or at least, ADOs have access to this knowledge. And athletes know that, or at the very least: *Dutch* athletes do.

This situation has consequences, not only for the athletes and their federations, but also for the Dutch Doping Authority. In the follow-

ing four subparagraphs, we will describe the different tools that we use in order to help the athlete.

4.1 PRE-HEARING INFORMATION

Athletes can (and do) contact the Dutch Doping Authority before the hearing to obtain information and advice. At present, about 40% of the athletes contact the Doping Authority after receiving notice of the ADRV, in order to prepare for the disciplinary proceedings.¹⁸ Upon his request, the athlete can meet with representatives of the Doping Authority, before the disciplinary proceedings have even started.

We have found that this approach can be extremely helpful, especially in cases where additional research is an option. An athlete may, for instance, ask for the analysis of nutritional supplements that he has used, in order to explain the analytical finding. Or it may be relevant to do an extensive search in the scientific literature in order to support or dismiss a theory that the athlete brings forward. The available time for this kind of research is always limited and if additional research is initiated at the first possible moment, this may prove beneficial. But even in clear-cut cases (that is: from an analytical point of view) it can be of great value for the athlete to be informed about his rights and about the ins and outs of the upcoming disciplinary proceedings.

We are well aware that this approach is not without risks. Athletes may - at a later point in time - try to gain an advantage by accusing the Doping Authority of providing incomplete or even wrong information, and he may even accuse the Doping Authority of 'taking advantage of an athlete in a vulnerable position'. Such behaviour may weaken a case (from our point of view), and thereby it may jeopardize the obligation that the Doping Authority has to 'vigorously pursue Anti-Doping Rule Violations'.¹⁹ The Dutch Doping Authority is, after all, also the organisation that brings cases to the national federations in order to start disciplinary proceedings.²⁰ Formally, in Dutch doping cases, the national sports federation and *not* the Doping Authority actually starts disciplinary proceedings, and the board of the federation acts as prosecutor.²¹ However, this kind of subtle legal distinctions are usually overlooked by athletes (and all other parties involved), and the Doping Authority is perceived to be prosecuting the case, no matter what. And on top of this, we are also responsible for ensuring that the Code is applied correctly in our country.²²

In order to objectify the situation during pre-hearing contacts as much as possible, the Doping Authority has adopted five basic rules that it applies as part of the Results Management Process;

- a. *Initiative*: The Doping Authority does *not* contact the athlete after he is notified in writing about the ADRV, but leaves the initiative to the athlete (or his entourage).
- b. *Meeting*: Upon request, the Doping Authority agrees to arrange a meeting with the athlete, preferably with an official of the sports federation present as well, preferably at the office of the Doping Authority, and preferably with two officials of the Doping Authority present. Unfortunately, time pressures and other issues do not always allow for all this.
- c. *Rights Caution*: At the start of the meeting, the athlete is explicitly informed about his rights, and about the roles and position of the Doping Authority, both before, during and after the disciplinary proceedings.
- d. *Minutes*: Minutes are written and sent to the athlete and his federation, and the minutes are added to the case file. The Rights Caution is explicitly mentioned in the minutes.
- e. *Intervention*: All contacts with athletes who are involved in disciplinary proceedings are reported and discussed in biweekly Case Management Meetings, which are attended by all members of the Management Team.

4.2 LEGAL OPINIONS

The Dutch Doping Authority submits written Legal Opinions to disciplinary panels. The Opinions are meant to inform and advise the panels about the (interpretation of the) applicable rules and about relevant case law, including CAS decisions. In some complicated cases, these Opinions tend to grow into manuals on 'how to treat the case', while in other cases, we can limit the Opinion to one or two pages with some

¹⁸ It is important to note that this percentage is specific for the Netherlands, and not a global figure at all. In some countries the percentage is higher, in other countries it is (near to) 0%.

¹⁹ Code art. 20.5.6

²⁰ In the Dutch situation, the sports federations are responsible for starting disciplinary proceedings, but they do so on the basis of files that the Doping Authority presents to them. The federations cannot easily refuse to start the proceedings, because that can have quite negative consequences for their relationship with the Dutch Olympic Committee NOC*NSF (in terms of funding, etc.).

²¹ A position which is rather foreign to

most boards, who more often than not would like the case to evaporate as soon as possible, and who sometimes might even contradict their formal position during hearings by pleading for acquittal of the athlete, notwithstanding the fact that they themselves brought the case before the panel.

²² In a recent case, legal counsel stated in his Statement of Defence that '[...] the Doping Authority cannot combine the role of prosecutor, guardian of the Code and advisor of the athlete in one person' [unpublished]. A true word indeed, which unfortunately does not bring us one step closer to a solution.

basic facts and references to the applicable articles in the Doping Regulations and elsewhere. The right to submit these Opinions is embedded in the latest version of the Dutch Doping Regulations, so the practice is now standard and enforceable. The Opinions have a noticeable influence on the decisions rendered, and in a (maybe) surprisingly high number of cases, these Opinions have been beneficial to the athlete, in terms of reduced sanctions or even elimination of the entire sanction. One of the reasons that these Opinions are so influential is the fact that the Doping Authority has knowledge about decisions in all Dutch and many foreign cases, while Dutch panels often do not see more than the decisions in their own sport on the national level.²³

4.3 RIGHT TO APPEAL

The Dutch Doping Authority has the right to appeal decisions of disciplinary panels in doping cases (per article 13.2.3 of the Code). Again, it may be surprising to some, that our right to appeal can be beneficial to the athlete. Out of nine appeals by the Dutch Doping Authority in the period 2009-2011, at least three have been in the interest of the athlete (in terms of a reduced sanction, etc.)

4.4 IMPARTIAL ADVICE

The Dutch Doping Authority can advise (in writing or otherwise) in cases, provided that the Dutch Doping Authority is not a party and has no right to appeal in that particular case. The Dutch Doping Authority has been and still is involved in several cases between an athlete and an International Federation, on the initiative of the athlete. Our involvement can take different shapes, depending on the case. In one case between a Dutch athlete and his International Federation, we have done additional research into the absorption of cannabis through passive smoking and skin contact, and we have made the results of this research available to the athlete who presented it to the disciplinary panel.²⁴ In another case, we have been given Power of Attorney by the athlete, who had otherwise not been able to get access to legal counsel.²⁵ And in yet another case we voluntarily decided to be party to the case, partly because we considered this to be the most adequate way to give the athlete involved access to adequate support.²⁶

5. CONCLUSIONS AND DISCUSSION

In the four subparagraphs above, we have tried to sketch the approach that the Dutch Doping Authority has chosen to help athletes that get involved in disciplinary proceedings concerning an ADRV. At present, athletes turn to the Dutch Doping Authority because no alternative is available or affordable. The Dutch Doping Authority does not choose to turn the athlete down, but provides its support and advice.

The Dutch Doping Authority, however, is limited in what it can do. Not so much by its formal and legal position, but certainly by its position as an ADO under the Code (which defines the roles and obligations of NADOs and International Federations, as we have demonstrated in paragraph 3).

Still, we dare say that *lacking better solutions*, the Dutch Doping Authority is at present often the best (and sometimes: the only) choice for an athlete to get help. The Doping Authority is not specifically equipped for this task, but it has at least four different tools that it can use to provide that help (and without charge).

Very little is known about the way that other ADOs deal with this issue. We know that at least a number of ADOs have pre-hearing contacts with athletes, but little is known about the intent and content of these contacts. Not much is known about the role of other ADOs in disciplinary proceedings either. It is not known (at least to us) if other ADOs file appeals against decisions in the interest of athletes, and if so: how often and on what grounds. And it is not known (to us) if other ADOs take a position that is comparable with ours in (international and national) disciplinary proceedings where they are not a party and have no right to appeal. Our policy may be quite particular, or it may be more common than we think.

What we do know for certain, is that athletes worldwide do not have access to adequate and knowledgeable support in their doping cases. So we can hardly imagine that other NADOs are *not* facing the same kind of predicaments that we encounter during our work. And we know for sure that ADOs go through great length in order to produce scientific or other information that may be beneficial to the athlete. Still a great example of this is the case of the Canadian triathlete Kelly Guest: the Canadian Center for Ethics in Sports (CCES) did everything within its power to enable the athlete to prove that he had unknowingly digested the prohibited substance, knowing that the chance for success was slim.²⁷ From our own recent practice, the case of the Dutch mountain biker Rudi van Houts is rather illustrative: the Dutch Doping Authority did everything within its means to bring to light the probability of Van Houts' claim that the Adverse Analytical Finding was a result of the consumption of contaminated meat during a stay in Mexico.²⁸

In an ideal situation, an ADO only has to provide technical information and documentation, because

1. the athlete has access to good (legal) advice, and
2. an independent prosecutor presents the case.²⁹

Offering affordable legal advice to all athletes, and introducing an independent prosecutor in all doping cases could improve our present problem substantively.

How to achieve this worldwide, is a question which should probably be answered in many different ways, depending on the legal situation and the organization of sports and anti-doping activities in different countries, among others.

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²³ In some cases where the Doping Authority did *not* yet have the right to submit Opinions, we have submitted an overview of decisions in comparable cases *to the athlete*.

²⁴ Decision ADC Case no. 4/2011, Federation Internationale de l'Automobile (FIA) v. X, 20 december 2011

²⁵ The CAS-case is still in progress under number CAS 2011/A/2675

²⁶ This is a CAS-case - still in progress under number CAS 2012/2747 - in which WADA has filed a CAS-appeal against a decision of the Appeals Committee of a

Dutch sports federation; the athlete, the federation and the Dutch Doping Authority are all respondents in the case, but WADA stated explicitly in the Statement of Appeal/Appeal Brief that '[...] WADA would have no objection in the event that the NADO resolved not to participate in these proceedings.' We decided to participate anyway, because we fundamentally disagree with WADA's position, but also because of the athlete's interests.

²⁷ The Canadian Center for Ethics in Sports (CCES, the Canadian NADO) assisted

the athlete in his efforts to prove that he had unknowingly digested the prohibited substance, years after the sanction had ended. The efforts unfortunately did not lead to the clarity the CCES and the athlete wished for. See for instance: <http://slam.canoe.ca/Slam/Columnists/DallaCosta/2008/08/15/6463491-sun.html> (read on 12 April 2012).

²⁸ Decision 16 March 2011, Institute for Sports Law (ISR) T 2011001/2011-32-01, Royal Dutch Cycling Union (KNWU) v. Rudi van Houts. In this case, the information we were able to collect led to a deci-

sion in which Van Houts was found guilty, but no sanction was imposed. This decision was reflected in other decisions on clenbuterol cases, as for instance the Nielsen Case (Doping Board of the Sports Confederation of Denmark, Decision 21 March 2011 in case no. 2/2011, Sports Confederation of Denmark v. Philip Nielsen).

²⁹ The Dutch Institute for Sports Law is presently considering to embed such an independent prosecutor in the existing structure of the Institute.

See no evil, hear no evil, speak no evil... and it will all disappear: The biggest corruption scandal in Turkish football's history

By Alara E. Yazicioglu*

I. Introduction

"[Sport] brings out the noblest human qualities (good sportsmanship, the quest for excellence, a sense of community), and the basest (chicanery and mob violence)".¹ Unfortunately, since 2011, Turkish football has been dealing with the basest. Throughout the investigation started by Turkish police in the summer of 2011, over 90 individuals, including football players, trainers, club managers and club presidents, were arrested/interrogated and most of them stood trial. They were suspected of different crimes such as match fixing, bribery, incentive premium, establishing/participating to a criminal organization, extortion and threat.

The importance of the affair relies mostly within the involvement of the three major sports clubs taking part in the Turkish premier football league namely Trabzonspor SK, Besiktas JK and Fenerbahce SK. As a result of investigations and proceedings before the Criminal Court, which rendered its decision² on 2 July 2012³, Sadri Sener and Nevzat Sakar⁴ have been acquitted, diminishing thereby doubts about Trabzonspor. With regards to Besiktas JK, it was proven that during the finale of the Ziraat Turkish Cup⁵, Tayfur Havutcu⁶, the manager of the club at date, offered money to two footballers⁷ of the rival club⁸ and promised to transfer them at the end of the season. All the individuals that took part in the process were found guilty by the Court.⁹ It is important to underline that, Besiktas returned the Cup to Turkish Football Federation (TFF) immediately after the arrest of Tayfur Havutcu, without waiting for the decisions of the Criminal Court and TFF. Regarding Fenerbahce, league champion of the 2010-2011 season, the extent of participation in corruption revealed to be significantly important. It has been proven that match-fixing and offers of incentive premiums were made during 13 games of the season. Operations were led by Aziz Yildirim, the president of Fenerbahce, Ilhan Eksioglu and Sekip Mosturoglu, board members of the Club. It is important to note that according to the Criminal Court's decision, a criminal organization has been formed under the leadership of Aziz Yildirim.¹⁰ Given the importance of the Club's involvement, this article mainly focuses on Fenerbahce SK.

As it can be deduced, the affair has two major legal aspects: criminal law and sports law (disciplinary proceedings). This contribution aims

to critically analyze the interesting sports law questions arising from the affair in the light of TFF's, and UEFA's regulations. However, reference will be frequently made to the Criminal Court's decision in order to establish the facts and to demonstrate the gravity of the situation.

II. Facts¹¹

A. Affected games

2010-2011 season comprised thirty-four weeks. Match-fixing and incentive premium initiatives of the criminal organization led by Aziz Yildirim focused on the second half of the league.¹² Out of seventeen games that took place during the second half, thirteen were proven to be corrupted.¹³ Seven of the games played by Fenerbahce were affected, namely Fenerbahce-Kasimpasa (26.02.2011), Genclerbirligi-Fenerbahce (07.03.2011), Eskişehirspor-Fenerbahce (09.04.2011), Fenerbahce-IBB Spor (01.05.2011), Karabükspor-Fenerbahce (08.05.2011), Fenerbahce-Ankaragücü (15.05.2011) and Sivasspor-Fenerbahce (22.05.2011). Incentive premiums were also offered by the criminal organization to the rivals of Trabzonspor and Bursaspor, closest teams to the championship. Six of the games were thereby affected, namely Manisaspor-Trabzonspor (21.02.2011), Bursaspor-IBB Spor (06.03.2011), Genclerbirligi-Trabzonspor (20.03.2011), Trabzonspor-Bursaspor (17.04.2011), Eskişehirspor-Trabzonspor (22.04.2011) and Trabzonspor-IBB Spor (15.05.2011).

B. Benefits obtained by corruption

"Sport is now big business accounting more than 3% of world trade."¹⁴ Sport constitutes an important source of income also in Turkey with a total value of 820 million dollars, which represents approximately 4% of the European Football industry.¹⁵ Fenerbahce, as one of the biggest clubs in Turkey, gets hold of a considerable share of this significant amount.¹⁶ Aziz Yildirim, the president of Fenerbahce since 1998, certainly aimed to keep his position that gave him important privileges. In accordance with that intention, he promised three championships in a row at the beginning of the season 2010-2011. As Fenerbahce obtained its last championship in 2006-2007 season, discontentment within the club and among supporters was growing day by day and threatening thereby the continuity of his presidency. Hence the importance for him to keep the promise he made in the beginning of the 2010-2011 season.¹⁷

Given the high number of affected games, it is beyond doubt that the criminal organization's operations helped Fenerbahce become the 2010-2011 champion to a great extent. As a result of its championship, Fenerbahce obtained, in addition to the prize money allocated by TFF, 18 million Turkish Liras (TL)¹⁸ as champion's share, 21 million TL¹⁹ in accordance with the results obtained within the season (26 victories, 4 draws), 15 million TL²⁰ as championship prize and 16 million TL²¹ for its entitlement to participate directly in the Champions League. Moreover, the club was also entitled to the biggest share of the broadcasting income. In Turkey, the income deriving from broadcasting rights is distributed according to league position. The top three clubs are entitled to 40% of the income while the other clubs share the remaining 60%.²² Consequently, the sum accorded to Fenerbahce, precisely 64.1²³ million TL, was considerably superior to amounts obtained by other clubs. For example, Trabzonspor, which completed the league in second position, was granted 49.875 million TL.^{24, 25}

C. Amendments made to the applicable law

Another important, and highly controversial, facet of the facts is certainly the amendment made to the applicable criminal law during the procedures.²⁶ A new Act on the Prevention of Violence and Disorder in Sport had entered into force on 14 April 2011.²⁷ It had replaced the Act no 5149, entered into force in 2004, with the purpose of regulating bet-

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1 PAULSSON J., Arbitration of International Sport Disputes in BLACKSHAW I. / SIEKMANN R. / SOEK J (eds), The Court of Arbitration for Sport 1984-2004, T.M.C. Asser Press, 2006, p. 40.

2 T.C. Istanbul 16. Ağır Ceza Mahkemesi, Decision no 2012/71.

3 It is important to emphasize that the decision is subject to appeal.

4 President and Vice-President of Trabzonspor.

5 2010-2011 season, Besiktas won the Cup.

6 The offer has been made to the footballers by their manager, Yusuf Turanlı. Serdar Adalı, the vice-president of Besiktas at date, was also involved.

7 Ibrahim Akin and Iskender Alin.

8 Istanbul Büyükşehir Belediye Spor (IBB Spor).

9 Decision no 2012/71, p. 356.

10 See especially pages 66 and 67 of the Decision.

11 This contribution points out the most

important facts of the affair as established by the Criminal Court (Decision no 2012/71). Some aspects will be left out in order to facilitate the summarization.

12 Decision no 2012/71, p. 67.

13 Ibid, p. 75ff.

14 BLACKSHAW I., Sports Marketing Agreements: Legal, Fiscal and Practical Aspects, T.M.C. Asser Press, Springer, p. 1.

15 Decision no 2012/71, p. 267.

16 Ibid, p. 290.

17 Ibid, p. 66-67.

18 Approximately 7'725'000 Euros.

19 Approximately 9 million Euros.

20 Approximately 6'425'000 Euros.

21 Approximately 6'860'000 Euros.

22 GRATTON C. / SOLBERG H., The economics of sports broadcasting, Routledge, p. 162.

23 Approximately 27'460'000 Euros.

24 Approximately 21'365'000 Euros.

25 Decision no 2012/71, p. 67.

26 In this respect, see especially comments made by Declan Hill, www.howtofixsoccergame.com/

ter and penalizing more severely the offences taking place before, during and after a sports competition.²⁸ Most importantly, the new act penalizes chicanery and incentive premiums, which was not the case for the Act no 5149.²⁹ However, after the arrests related to sports corruption and before the establishment of the bill of indictment, the relevant article³⁰ of the new Act was modified.³¹ As per the modification, the initial imprisonment penalty from five to twelve years was diminished to one to three years.³² At the same time, the scope of aggravating circumstances was extended. Before the amendment, the sentence was to be increased by one-half, if the offence had been committed by “the president of the sports club or by members of the board of directors”.³³ After the modification, the circle of concerned persons was enlarged to “the chairman or members of board of directors and technical or administrative managers of federations, sports clubs and legal persons operating in the sports field, as well as managers or representatives of clubs and players”.³⁴

The amendments were not to the advantage of all of the defendants. However, this does not have a significant importance as according to Article 7 (2) of the Turkish Criminal Code³⁵, if the provisions of the law in force when the crime was committed are different than the provisions subsequently entered into force, the provisions that are in favour of the defendant apply. Thus, the modification was mostly beneficial to the defendants, in some cases to a great extent.³⁶

III. Analysis of the Disciplinary Proceedings

A. Proceedings before TFF

i. Close relationship between Aziz Yildirim and TFF

The Criminal Court’s decision also demonstrates the significant influence of Aziz Yildirim over the TFF at the time of the events. Conforming to the facts stated in the decision, administrators of the TFF were intimidated by the president of Fenerbahçe.³⁷ More importantly, as per the report established by the Department of Associations of the Ministry of the Interior³⁸, Mahmut Ozgener, the president of TFF at date, had provided Aziz Yildirim with support “in all matters”.³⁹ According to the report, illegal payments - which were later used in corruption operations - were made to Fenerbahçe, decisions of Professional Football Disciplinary Board (PFDB)⁴⁰ and TFF Board of Arbitration⁴¹ were manipulated in the criminal organization’s favor and some referees were intimidated during half-times.⁴²

On 14 June 2011, Mahmut Ozgener declared that he would not become a candidate for presidency during the following election, which took place on 29 June 2011. Therefore, his presidency ended before the beginning of the corruption scandal, 3 July 2011. He was replaced by Mehmet Ali Aydinlar, an ex-Fenerbahçe vice-president and the main sponsor of Fenerbahçe’s volleyball team.

ii. Steps taken during the presidency of Mehmet Ali Aydinlar

On 11 July 2011, Mehmet Ali Aydinlar stated that TFF did not have any

concrete evidence on corruption and therefore they would wait until the indictment is drawn up in order to take action.⁴³ Accordingly, the 2010-2011 league result was approved and communicated to the UEFA.

However, the football federation’s investigation began earlier than planned as the Prosecutor’s Office in charge of the corruption case communicated the relevant documents and information to TFF.⁴⁴ Respectively, the case was remitted to TFF’s Ethics Committee⁴⁵. On 26 July 2011, Mehmet Ali Aydinlar declared that due to the corruption suspicions and the ongoing investigation the league would be delayed a month.⁴⁶ On 15 August 2011, after the completion of the Ethics Committee’s report⁴⁷, TFF’s Board of Directors made a brief statement about the affair. It was reported that as no evidence of corruption or incentive premiums had been found, none of the clubs would be punished; nonetheless all the involved persons would be transferred to PFDB.⁴⁸ It could be argued that this first decision of the TFF is somewhat contradictory.⁴⁹ If there was no evidence of faulty behavior, the investigation should have been terminated and the persons concerned should not have been sent before PFDB.⁵⁰ The referral of the case to PFDB indicates that the Ethics Committee’s report contained evidence of corruption and/or incentive premiums to a certain extent.

Needless to say, corruption suspicions and the arrests made by the police caused a significant stir within the football world as well as among supporters. In order to minimize the economic loss of football clubs and the broadcasting company and also to render football more attractive⁵¹, TFF suggested adding play-offs to the Turkish League. This proposal was accepted during a meeting between TFF, the broadcasting company⁵² and the Union of Clubs⁵³.⁵⁴

In accordance with TFF’s decisions, the league began on 9 September instead of 7 August, for the first time in Turkish Football’s history play-offs were added at the end of it and neither any team nor any other involved person with corruption was sanctioned. Given the number of clubs, players, administrators and even managers under suspicion, the inaction of the TFF cannot be criticized severely at this stage. Nonetheless, this does not completely legitimize the rather contradictory decision rendered on 15 August 2011 and the newly added play-offs.⁵⁵ These two steps did nothing but penalizing the clubs and the persons that did not undertake any illegal activity. Absence of any sanction caused a deep feeling of injustice among the non-involved football clubs. This perception was only strengthened by inclusion of play-offs despite the clearly expressed doubts of some teams.

On 24 August 2011, TFF declared that Fenerbahçe would not be participating to the Champion’s League.⁵⁶ According to TFF’s statement, UEFA had sent a letter to the TFF and demanded the withdrawal of Fenerbahçe from the Champion’s League “due to the fact that the club has been involved in match-fixing”.⁵⁷ The letter made it clear that if this request was not respected, disciplinary procedures against the TFF would be initiated.⁵⁸ After the disqualification of Fenerbahçe, the UEFA Emergency Panel decided that Trabzonspor, runners-up in the 2010/2011

blog/?tag=fenerbahce (accessed on 12/09/2012).
27 Act no 6222, Sporda Siddet ve Düzensizligin Onlenmesine Dair Kanun.
28 Decision no 2012/71, p. 273.
29 Ibid.
30 Article 11, Sike ve Tesvik Primi (“Chicanery and Incentive Premiums”).
31 By the Act no 6250, which was approved by the Parliament on 24/11/2011.
32 Article 11 (i) of the Act.
33 Article 11 (4) (b) before the amendment. Translated by the author.
34 Article 11 (4) (b) after the amendment. Translated by the author.
35 Turkish Criminal Code, no 5237.
36 See p. 284ff of Decision no 2012/71 for a detailed comparison.

37 See p. 307 of Decision no 2012/71 for details on that point.
38 Established on 23 September 2011, See Decision no 2012/71, p. 69ff for its content.
39 Decision no 2012/71, p. 71.
40 “Profesyonel Futbol Disiplin Kurulu”.
41 Tahkim Kurulu.
42 Decision no 2012/71, p. 71.
43 <http://spor.bugun.com.tr/federasyon-dan-sike-aciklamasi-162168-haberi.aspx>, (accessed on 02/09/2012).
44 KÖSE H.A., TFF’nin 15 Agustos 2011 tarihli kararinin degerlendirilmesi, p. 1 [Online]. Available: <http://www.sporhukuku.org.tr/dosyalar/makale-tff-karari-degerlendirme.pdf> (accessed on 02/11/2012).

45 Etik Kurulu.
46 www.cnnurk.com/2011/spor/futbol/07/25/super.lig.ertelendi/623969.0/index.html, (accessed on 13/09/2012).
47 Etik Kurulu Raporu, No 2011/29, 15 August 2011.
48 KÖSE H.A., TFF’nin 15 Agustos 2011 tarihli kararinin degerlendirilmesi, p. 1 [Online]. Available: www.sporhukuku.org.tr/dosyalar/makale-tff-karari-degerlendirme.pdf (accessed on 02/11/2012).
49 Ibid, p. 1-2.
50 Ibid.
51 Declarations of Mehmet Ali Aydinlar and Yildirim Demirören, www.cnnurk.com/2011/spor/futbol/08/23/toplantidan.play.off.karari.cikti/627036.0/, (accessed on

13/09/2012).
52 Digiturk.
53 Klüpler Birliği.
54 On 23/08/2011, www.cnnurk.com/2011/spor/futbol/08/23/toplantidan.play.off.karari.cikti/627036.0/, (accessed on 13/09/2012).
55 It is important to underline that play-offs were abrogated on 12.07.2012.
56 www.tff.org/default.aspx?pageID=285&fxtID=13257, (accessed on 15/08/2012).
57 www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1666823.html, (accessed on 10/08/2012).
58 www.tff.org/default.aspx?pageID=285&fxtID=13257, (accessed on 15/08/2012).
59 Ibid.

league, would replace the league champion.⁶⁰ This decision is arguable to some extent as at that date it was not very clear whether Trabzonspor had been involved with the corruption activities or not. However, it was demonstrated later on by the Criminal Court's decision that neither the club nor any of its members was faulty.⁶¹ For this reason, this aspect does not need to be commented in details.

Mehmet Ali Aydinlar resigned from his position on 31 January 2012. He was replaced by Yildirim Demirören, ex-president of Besiktas JK. When he took over the presidency on February 2012, Demirören stated that the disciplinary proceedings could take a certain amount of time, most probably until the end of the 2011-2012 season.⁶²

iii. Amendments made to the Disciplinary Regulations

After the election of its new president⁶³, TFF made a significant amendment to the relevant article⁶⁴ of its disciplinary regulations⁶⁵. As per the old version of the article 58, it was forbidden to influence or to attempt to influence the outcome of a sports competition in an illegal and/or against the sports ethics way.⁶⁶ The persons violating this rule would be sanctioned with a ban (from one to three years) and the clubs would be relegated to a lower division. Depending on the severity of the violation, an additional point deduction could be enforced against the relegated football team.⁶⁷

The new article 58, distinguishes between "influence" and "attempt to influence".⁶⁸ If the result is effectively influenced, the persons involved will be sanctioned with a "permanent"⁶⁹ ban.⁷⁰ Moreover, in cases where the concerned person is a board member of a club, the club will be relegated to a lower division.⁷¹ A fine can also be imposed on persons involved in the process.⁷² On the other hand, if there is an attempt to influence the outcome, involved persons will be penalized with a ban from one to three years.⁷³ In cases where the involved persons are board members of a club, one of the sanctions provided in the Disciplinary Regulations can be imposed upon the club.⁷⁴ In cases of "grave violation", the club will be sanctioned with a minimum of twelve-point deduction.⁷⁵ Whether the violation is grave or not is to be determined on a case-by-case basis.⁷⁶

In order to grasp the significance of this modification, which happened to take place in the middle of an important corruption scandal, it is necessary to underline the argument of TFF about the illegal activities conducted by the criminal organization: "Corruption activities had not been reflected on the field". For most of the involved individuals and clubs, the illegal activities were finally not even considered to be an "attempt to influence" competition results.⁷⁷

The amendment of article 58 caused significant reactions among football clubs. Galatasaray⁷⁸, Trabzonspor⁷⁹ and Bursaspor⁸⁰ contested the modification through their website. TFF reacted to the clubs' concerns

in a timely manner by sending Galatasaray⁸¹ and Trabzonspor⁸² to the PFDB. The analysis of the disciplinary proceedings initiated against these two clubs is beyond the scope of this article.

iv. Decision rendered by PFDB

PFDB rendered its decision about the corruption affair on 6 May 2012⁸³, approximately two months prior to the Criminal Court's decision. Given the number of people involved⁸⁴, the analysis will be limited to the persons mentioned in the Introduction part.⁸⁵ Sadri Sener and Nevzat Sakar⁸⁶ did not take any sanctions.⁸⁷ As per the illegal activity conducted during the Ziraat Turkish Cup finale, Tayfur Havutcu⁸⁸, Iskender Alin and Ibrahim Akin were not found faulty.⁸⁹ However Ibrahim Akin was found guilty of influencing the outcome of the competition during the match played on 01 May 2011 between Fenerbahce and IBB Spor and was sanctioned with a three-year football ban in accordance with the old Article 58 (1) of the Disciplinary Regulations.⁹⁰ Regarding the administrators of Fenerbahce, while Aziz Yildirim⁹¹ was not found guilty,⁹² Ilhan Eksioglu⁹³ and Sekip Mosturoglu⁹⁴ were penalized with a three-year respectively a one-year ban in accordance with the new Article 58 (2) (a) of the Disciplinary Regulations. Finally, none of the football clubs was found faulty.⁹⁵

v. Decision rendered by the TFF Board of Arbitration

There had been twelve appeals against the PFDB decision. The competent authority, TFF Board of Arbitration, rendered its decision on 4 June 2012⁹⁶, approximately one-month prior to the Criminal Court's decision. No significant changes were made to the initial PFDB decision. Board of Arbitration confirmed the sanctions imposed upon Ilhan Eksioglu⁹⁷ and Sekip Mosturoglu⁹⁸. Ibrahim Akin's three-year ban was reduced to a two-year ban in accordance with the new Article 58 (2) (a), as there had been only an attempt to influence the outcome.⁹⁹ Finally, Trabzonspor's appeal against the PFDB decision on Fenerbahce was rejected.¹⁰⁰

There is one interesting point that needs to be invoked. Engin Tuzcuoglu¹⁰¹, the president of the TFF Board of Arbitration¹⁰², is the lawyer who wrote the expert opinion in favor of Fenerbahce during the criminal proceedings of the corruption case. Given this circumstance, the fact that Mr. Tuzcuoglu was chosen to be the president of the Board at such a critical time is highly controversial. Moreover, shortly before he became the president of the Board of Arbitration, he made statements implying that sanctions imposed on persons involved in the illegal activities should be kept at a minimal level.¹⁰³ For these reasons, it is not possible not to question whether the principle of impartiality has been respected or not.¹⁰⁴

vi. Exhaustion of domestic remedies

Since March 2011, the Constitution of the Republic of Turkey¹⁰⁵ contains a specific rule on arbitral awards related to sport in its Article 59¹⁰⁶.

60 www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1666823.html, (accessed on 10/08/2012).
61 As already mentioned, the Criminal Court's decision is subject to appeal.
62 www.cnnturk.com/2012/spot/03/20/tff.karari.sezon.sonunda.vermek.istiyyor/653894.o/index.html, (accessed on 10/08/2012).
63 Precisely on 30 April 2012.
64 Article 58, "Influencing the outcome of the competition".
65 Futbol Disiplin Talimati.
66 Old version of article 58 (1) of the Disciplinary Regulations.
67 Old version of article 58 (2) of the Disciplinary Regulations.
68 New version of Article 58 (1) and (2) of the Disciplinary Regulations.
69 Lifetime.
70 New version of Article 58 (1) (a) of the

Disciplinary Regulations.
71 New version of Article 58 (1) (b) of the Disciplinary Regulations.
72 New version of Article 58 (1) (c) of the Disciplinary Regulations.
73 New version of Article 58 (2) (a) of the Disciplinary Regulations.
74 New version of Article 58 (2) (b) of the Disciplinary Regulations.
75 New version of Article 58 (2) (b) of the Disciplinary Regulations.
76 Except cases where a connection with betting activities can be established, new version of Article 58 (2) (b) of the Disciplinary Regulations.
77 See below.
78 www.galatasaray.org/kulup/haber/12052.php (accessed on 10/09/2012).
79 www.trabzonspor.org.tr/default.asp?Sayfa=HaberDetay&IND=9305 (accessed on 10/09/2012).
80 www.bursaspor.org.tr/haberler/index/

haber/1383/kategori/1/1/1 (accessed on 10/09/2012).
81 www.zaman.com.tr/haber.do?haberno=1222266 (accessed on 10/09/2012).
82 www.aktifhaber.com.trabzonspordan-pfdk-tepkisi-540233h.htm (accessed on 10/09/2012).
83 www.tff.org/default.aspx?pageID=246&fxtID=15123 (accessed on 14/09/2012).
84 A total of 71 people.
85 See above I.
86 President and Vice-President of Trabzonspor.
87 N. 34 and 38 of the Decision.
88 Manager of Besiktas at date.
89 N. 7, 10 and 9 of the Decision.
90 N. 9 of the Decision.
91 President of Fenerbahce.
92 N. 1 of the Decision.
93 N. 3 of the Decision.
94 N. 2 of the Decision.
95 N. 56-71 of the Decision.

96 www.tff.org/default.aspx?pageID=247&fxtID=15398, (accessed on 14/09/2012).
97 N. 1, E.2012/128.
98 N. 3, E.2012/131.
99 N. 4, E.2012/132.
100 N. 11, E.2012/138.
101 He became the president of the Board after the election of the new TFF President, Yildirim Demirören.
102 The president has a significant role and influence on decisions taken by the board in accordance with the Code of TFF Board of Arbitration (Türkiye Futbol Federasyonu Tahkim Kurulu Talimati). In this respect, see especially Article 12 of the Code.
103 www.hurriyet.com.tr/spot/futbol/20033380.asp, (accessed on 14/09/2012).
104 See below Section III D i.
105 Türkiye Cumhuriyeti Anayasası. Hereinafter Constitution.

This article states that ¹⁰⁷, “[t]he only form of appeal against sports federations’ decisions relating to sports activities’ management and disciplinary aspects is compulsory arbitration procedure. Decisions rendered by arbitral authorities are final, with no possibility of appeal to another judicial body”.¹⁰⁸

Decisions relating to sports activities’ disciplinary aspects consist of decisions rendered by a federation’s board of directors or disciplinary board in accordance with the relevant statutes and regulations of the concerned federation.¹⁰⁹ Accordingly, decisions rendered by PFDB falls within the scope of the article. Procedures before the TFF Board of Arbitration constitute compulsory arbitration procedures in the sense of the article 59 of the Constitution.¹¹⁰ Consequently, the decision rendered on the corruption case by the TFF Board of Arbitration is final and binding upon the parties with no possibility of appeal to another judicial body. In other words, all domestic remedies have been exhausted.

It is important to underline that the amendment of Article 59 of the Constitution had been subject to controversy. The Constitutional Court of Turkey¹¹¹ rendered a decision on the matter¹¹², which states “guarantee of access to judicial authorities is the prerequisite of fair trial”.¹¹³ According to the Constitutional Court’s decision, such an amendment is therefore unconstitutional. Following this decision, further changes were made to the Constitution to “legalize” the amended article 59, which entered into force shortly after. These interesting constitutional law aspects will not be developed further in this contribution.

Beyond any doubt, one of the main purposes of the amendment was to guarantee the efficiency of arbitration procedures related to sport. Certainly, in order to do so, it is essential to limit the possibility of appeal against arbitral awards. However, it is also crucial to ensure on a national level the quality of the arbitral awards, i.e. respect of natural justice rules such as proper opportunity to be heard and protection against impartiality, compliance with public policy etc. Therefore, it could be argued that the new constitutional rule prohibiting all appeal to any judicial body is too strict to meet the purpose. The efficiency of arbitration procedures can also be assured by permitting appeals to only one instance and on highly limited grounds.

vii. Absence of sanction

At the end of the proceedings before TFF, no major sanctions were imposed. None of the involved clubs got the slightest punishment; most of the individuals were not found faulty, those that were found faulty were penalized in a rather insignificant way compared to the offence committed.

The Criminal Court rendered its decision on 2 July 2012.¹¹⁴ In this decision, containing more than 600 pages, all the committed offences are demonstrated with details. As already mentioned, the Court judged that a criminal organization was formed under the leadership of Aziz Yıldırım

and thirteen of the games of 2010-2011 season were affected. It is beyond doubt that chicanery and incentive premiums had been committed, and not merely attempted, during the season.¹¹⁵

On 15 August 2012, Trabzonspor¹¹⁶ applied to TFF and requested the cancellation of the games that were proven to be corrupted. Their request was answered by a letter written by the secretary-general of the TFF.¹¹⁷ According to the letter, the decisions concerning the matches are already rendered by PFDB and by the Board of Arbitration and as per the Article 59 of the Constitution¹¹⁸ it is not possible to appeal against TFF Board of Arbitration’s decisions.¹¹⁹

The decision of the Criminal Court is not an ordinary and rather insignificant development. First of all, even if there is an appeal right and the appeal body will certainly render a decision on the matter, the detailed and proven facts stated in the decision are clear evidences of corruption activities. Given the obviousness of the acts committed by the persons concerned, one can only assume that the facts were not entirely known during the procedures before TFF. In this respect, they can be considered as “new facts”. Moreover, in accordance with Turkish case law¹²⁰, a civil court cannot review facts that the existence, or non-existence, is established by a criminal court. Consequently, if a criminal court establishes that chicanery and incentive premium operations were conducted, a civil court cannot state the contrary. As a result, TFF Board of Arbitration’s arguments, stating no clear evidence of chicanery and/or incentive premium was found, are not sustainable any more. For these reasons, the decision taken by the Board has to be revised. As the revision procedure is to be carried out by the Board of Arbitration itself, it cannot be considered as an appeal to another judicial body in the sense of article 59 of the Constitution.¹²¹ Surprisingly TFF refuses to take action and as detailed above¹²² there are no other Turkish instances that can review its decisions.

The fact that a person qualified as a leader of a criminal organization by a criminal court did not receive any penalties from a football federation defies all logic. Refusal of the cancellation of the thirteen games proven to be affected is beyond understanding. Finally, TFF’s arguments stating that “Corruption activities had not been reflected on the field” and that “The clubs cannot be responsible for the actions of their presidents and board members” are simply absurd. The TFF’s handling of the case can be summarized in one sentence: see no evil, hear no evil, speak no evil... and it will all disappear.

B. UEFA’s position

As mentioned above¹²³, UEFA blocked the participation of Fenerbahçe in the 2011/2012 Champions League. Other than this decision, however, the association did not take any further steps for the moment. On its decision issued on 22 June 2012, the UEFA Control and the Disciplinary Body declared that Fenerbahçe was eligible for the 2012/2013 Champions League.¹²⁴ The UEFA also stated that the decisions of the TFF Board of Arbitration has been received but not yet reviewed in details and that a final decision of the UEFA Disciplinary Body on the matter was pending.¹²⁵

Considering the fact that the case has been going on for more than a year¹²⁶, it is rather surprising that UEFA could still not reach a decision. It cannot be denied that the case is complicated and there are surely lots of documents and information to be reviewed but the facts established by the Criminal Court’s decision are self-speaking. Moreover, the more time passes the more the feeling of injustice grows within the country.

C. Critical analysis

As it is widely known, football is organised as a hierarchical pyramid. FIFA, the international federation, is situated on top and is generally the ultimate source of laws of the game and has a regulatory function in policing them. Continental confederations, such as UEFA, which are formed by national associations, are subordinated to the international federation. Simply put; as a member of UEFA TFF should respect UEFA’s and respectively FIFA’s statutes and regulations. This obligation

¹⁰⁶ Amended on 17 March 2011 by the Act no 6214.

¹⁰⁷ Article 59 of the Constitution.

¹⁰⁸ Translated by the author.

¹⁰⁹ ORHAN U., Spor Hukuku’nun Adli Mercilerden Bagimsizligi ve Sike Sorusturmasi, p. 1-2 [Online]. Available: <http://www.sporhukuku.org.tr/dosyalar/makale-umit-orhan.pdf> (accessed on 31/10/2012).

¹¹⁰ Ibid, p. 1.

¹¹¹ Anayasa Mahkemesi.

¹¹² Decision no 2011/7 of 6 January 2011.

¹¹³ Translated by the author, Decision no 2011/7, p. 7.

¹¹⁴ See above Introduction, Section I.

¹¹⁵ Even if there is an appeal right, the facts have been established with great certainty during the criminal proceedings.

¹¹⁶ That completed the 2010-2011 season in the second place.

¹¹⁷ Prof. Dr. Emre Alkin.

¹¹⁸ Article 59 of the Constitution.

¹¹⁹ www.dha.com.tr/ts-baskani-sadri-senerden-federasyona-tepki_362426.html, (accessed on 14/09/2012).

¹²⁰ See the Decision no 2005/727 of the Supreme Court Assembly of Civil Chambers (Yargitay Hukuk Genel Kurulu).

¹²¹ Article 59 of the Constitution.

¹²² Section III A vi.

¹²³ Section III A ii.

¹²⁴ www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1832524.html, (accessed on 11/09/2012).

¹²⁵ Ibid.

¹²⁶ Since 3 July 2011.

of complying with UEFA's statutes, regulations and decisions made under them is also concretized in Article 7¹²⁷(1) (b)¹²⁷ of the UEFA Statutes¹²⁸.

In accordance with Article 52 of the UEFA Statutes "[d]isciplinary measures may be imposed for unsportsmanlike conduct, violations of the Laws of the Game, and contravention of the UEFA's Statutes, regulations, decisions and directives as shall be in force from time to time."¹²⁹ The disciplinary measures are regulated by the Disciplinary Regulations issued by the Executive Committee.¹³⁰

As per the Disciplinary Regulations of the UEFA¹³¹ (DR), persons engaging in or attempting to engage in active or passive bribery and/or corruption are in violation of the principles of loyalty, integrity and sportsmanship ("principles of conduct").¹³² Moreover, persons acting in a way that is **likely** to exert an influence on the course and/or on the result of a match or competition by means of behaviour in breach of the statutory objectives of UEFA with a view of gaining an advantage for himself or a third party, are infringing the integrity of matches and competitions.¹³³ A team, player, official or member in breach of the principles of conduct¹³⁴ may be subject to disciplinary measures provided for in Articles 14 and 15 of DR.¹³⁵

As per Article 14 DR¹³⁶, the following measures can be imposed on member associations and clubs¹³⁷: annulment of the result of a match¹³⁸, deduction of points¹³⁹, disqualification from competitions in progress and/or exclusion from future competitions¹⁴⁰, withdrawal of a title or award¹⁴¹. On this point, it is important to underline that "member associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match on behalf of the member association or club".¹⁴² Article 15 DR¹⁴³ states that the following measures can be taken against individuals¹⁴⁴: fine¹⁴⁵, suspension from carrying out a function for a specified number of matches or for a specified or unspecified period¹⁴⁶, ban on exercising any football-related activity¹⁴⁷. Determination of the type and extent of the disciplinary measures is incumbent on the competent authority, which will conduct a case-by-case analysis taking into account the objective and subjective elements of the offence as well as aggravating and mitigating circumstances¹⁴⁸. As put by CAS¹⁴⁹ in a recent decision¹⁵⁰ "match-fixing, money-laundering, kickbacks, extortion, bribery and the like are a growing concern, indeed a cancer, in many major sports, football included, and must be eradicated. The very essence of sport is that competition is fair; its attraction to spectators is the unpredictability of its outcome",¹⁵¹ "[i]t is therefore essential [...] for sporting regulators to demonstrate zero-tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in such criminal activities"¹⁵². It is possible to conclude that influencing or attempting to influence the outcome of thirteen football games during one season is a severe act.

In the light of UEFA's regulations, persons **engaging in or attempting to engage** in active or passive bribery and/or corruption¹⁵³ and persons acting in a way that is **likely to exert an influence** on the course and/or

on the result of a match or competition¹⁵⁴ are subject to disciplinary measures. "Reflection on the field" is not a criterion. Therefore, it can be easily concluded that **all the persons involved** within the corruption as proven during the criminal proceedings must be sanctioned. On this point, it is not possible to understand how a person who is the leader¹⁵⁵ of the criminal organization is not sanctioned at all by TFF whereas the other two persons¹⁵⁶ that take part in the same criminal organization are. More importantly, Aziz Yildirim still continues¹⁵⁷ to be the president of Fenerbahce.

In accordance with the UEFA's DR, it is also clear that the member clubs **are responsible** for their officials' actions.¹⁵⁸ Accordingly, TFF's second argument "The clubs cannot be responsible for the actions of their presidents and board members" is not sustainable either. If thirteen games are corrupted during a season for a team to be champion, isn't it reasonable to, at least, demand the return of the award¹⁵⁹? Even if the footballers are not faulty, corruption activities had helped this team to become the champion of the season. Withdrawal of the award should be the minimum sanction that needs to be imposed in order to restore fairness.

D. Future steps

This section aims to briefly describe the remaining available proceedings. It should be underlined that, currently¹⁶⁰, mainly Trabzonspor, runners-up in the 2010/2011 league, is still continuing its legal battle against the decision taken by the TFF Board of Arbitration. Therefore, the reference will be made to Trabzonspor for the purposes of this section.

i. European Court of Human Rights

In accordance with Article 34 of the European Convention on Human Rights¹⁶¹, any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or its Protocols may apply to the European Court of Human Rights¹⁶². ¹⁶³Turkey is one of the Contracting States of the Convention and therefore Trabzonspor is entitled to apply to ECHR. This possibility has recently been used by the club. On 4 October 2012, Trabzonspor filed a complaint to ECHR against Turkey.¹⁶⁴

Pursuant to Article 35 of the Convention, Trabzonspor's application is admissible as all domestic remedies¹⁶⁵ have been exhausted¹⁶⁶, the time limit of six months has been respected¹⁶⁷ and none of the criteria for inadmissibility has been fulfilled¹⁶⁸.

The application of Trabzonspor has certainly been made for violation of Article 6 of the Convention¹⁶⁹. This article states that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".¹⁷⁰ The concept of civil right is an autonomous one that has to be interpreted and determined by the ECHR.¹⁷¹ However as Article 6 covers proceedings before a plethora of statutory or non-statutory bodies exercising punitive or regulatory decision; it is clear that rights

127 Article 7bis, Obligations of member associations.

128 UEFA Statutes, Edition 2012.

129 Article 52 of the UEFA Statutes.

130 Article 56 of the UEFA Statutes.

131 UEFA Disciplinary Regulations (DR), Edition 2011.

132 Article 5 (1) and (2) (a) DR.

133 Article 5bis (1) and (2) (a) DR.

134 Article 5 DR.

135 Article 11 (1) (a) DR.

136 Article 14, Disciplinary measures against member associations and clubs.

137 This is a selective list of possible sanctions that can be applied to the corruption case.

138 Article 14 (1) (d) DR.

139 Article 14 (1) (f) DR.

140 Article 14 (1) (k) DR.

141 Article 14 (1) (l) DR.

142 Article 6 (1) DR.

143 Article 15, Disciplinary measures against individuals.

144 This is a selective list of possible sanctions that can be applied to the corruption case.

145 Article 15 (1) (c) DR.

146 Article 15 (1) (e) DR.

147 Article 15 (1) (f) DR.

148 Article 17 (1) DR.

149 Court of Arbitration for Sport.

150 CAS 2010/A/2172 Mr Oleg Oriekhov v/ UEFA.

151 Ibid, § 78.

152 Ibid, § 80.

153 Article 5 (2) (a) DR.

154 Article 5bis (2) (a) DR.

155 Aziz Yildirim.

156 İlhan Eksioğlu, Sekip Mosturoğlu.

157 November 2012.

158 Article 6 (1) DR.

159 In accordance with Article 14 (2) (l) DR.

160 November 2012.

161 Hereinafter Convention.

162 Hereinafter ECHR.

163 Article 34 of the Convention.

164 www.cumhuriyetspor.com.tr/

trabzon-tffyi-insan-haklari-mahkemesine-sikayet-etti.html, (accessed on 02/11/2012).

165 See Section III A vi.

166 Article 35 (1) of the Convention.

167 Ibid.

168 Article 35 (2), (3) and (4) of the Convention.

169 "Right to a fair trial".

170 Article 6 (1) of the Convention.

171 QC PANNICK D./MULCAHY J., The Human Rights Act 1998 and Sport in LEWIS A. / TAYLOR J., Sport: Law and Practice, 2nd Edition, Tottel Publishing, 2008, p. 524.

involved during hearings of sporting bodies fall within the scope of “civil rights”.¹⁷²

As explained above¹⁷³, one of the arguments that can be invoked by Trabzonspor is violation of impartiality principle.¹⁷⁴ For the purposes of the Convention, impartiality means the absence of prejudice or bias.¹⁷⁵ “An appearance of bias can arise if the decision-making body includes individuals who have previously been connected with the dispute to be decided upon, for example if they have participated in an anterior decision to make the charges or to refuse an application, or who have made a statement as to what the outcome should be. Any statements to the press should come from people who will not take part in the decision-making process.”¹⁷⁶ As invoked above¹⁷⁷, Engin Tuzcuoglu, the president of the TFF Board of Arbitration, is the lawyer who wrote the expert opinion in favor of Fenerbahce during the criminal proceedings of the corruption case. In addition, shortly before he became the president of the Board of Arbitration, he made statements implying that sanctions imposed on persons involved in the illegal activities should be kept at a minimal level.¹⁷⁸ Given these facts, it can be argued that Trabzonspor’s application may be successful on the ground of impartiality.

ii. Court of Arbitration for Sport

a. Possibility of appeal against the decision rendered by TFF Board of Arbitration

TFF Statutes¹⁷⁹ indicate that sole competent authority for sport disputes of national dimension is TFF.¹⁸⁰ FIFA is competent with regards to disputes of international dimension.¹⁸¹ Moreover, as per Article 64 of the TFF Statutes, the decisions taken by the independent and duly constituted TFF Board of Arbitration cannot be appealed before CAS.¹⁸² These rules are in line with the relevant articles¹⁸³ of the UEFA Statutes and the FIFA Statutes¹⁸⁴.

As a result, in principle, in accordance with the TFF Statutes, it is not possible to appeal to CAS against the decision taken by the TFF Board of Arbitration on the corruption affair, a dispute of national dimension. However, as expressed above¹⁸⁵, the impartiality of the Board is questionable. Moreover, the reasonableness of the decision is highly disputable. Therefore, it could be argued that as the decision was not taken by an independent and duly constituted arbitration tribunal, an appeal can be lodged at CAS.

b. Possibility of appeal to decisions rendered by UEFA / FIFA

It is possible to make a complaint to UEFA¹⁸⁶, respectively to FIFA¹⁸⁷, for a breach of their statutes, regulations, directives and or decisions.¹⁸⁸

Sadri Sener, the president of Trabzonspor, stated that the football club had already filed a complaint both to UEFA and to FIFA.¹⁸⁹ The outcome of these two procedures remains to be seen. Once all the instances before UEFA and FIFA are exhausted, the matter can also be taken to CAS.

IV. Conclusion¹⁹⁰

As demonstrated, the disciplinary proceedings before the TFF as well as UEFA’s conduct during the affair is rather unusual and mostly beyond the limits of understanding. At the end of the analysis of the facts and of the handling of the case by sports authorities three main questions, which are detailed below, arise.

Beyond any doubt, the UEFA firmly reprehends match-fixing, chicanery and the like. Fighting against this kind of conduct is certainly difficult, but it is one of the top priorities of the UEFA.¹⁹¹ It is therefore not surprising to note that Michel Platini stated, during the XXXVI Ordinary UEFA Congress organized in Istanbul, “Violence, match-fixing, illegal betting, doping, pressures and threats against players, flouting contracts, trafficking of young players, money laundering: these scourges exist. They exist in society and they exist in football. It is up to us to fight them, with the help of the public authorities, to which I renew my call today. So let us protect the players, let us protect the game, let us clean up football”.¹⁹² The first question is: Doesn’t the presence of individuals who have been qualified as a “criminal organization” by a Criminal Court endangers the “clean” image of football? The second question is: If the proven chicanery and incentive premiums activities are not concretely punished, how exactly the illegal behaviors surrounding the football world can be fought against? Isn’t this a way of encouraging this type of conduct?

During the TFF’s visit to the UEFA on March 2012, Servet Yardimci, TFF’s second vice-president, stated “[o]ne of our tasks will be to ensure that the clubs are financially sustainable going forward”.¹⁹³ Indeed, as emphasized by this article, the financial situation of the clubs, the sponsors and the broadcasting company is being carefully safeguarded by TFF. Accordingly, the third question is: to what price?

Unfortunately, these questions cannot be answered by the mere analyze of sports authorities statutes, regulations or any other legal document that can be applied to the case. They fall therefore beyond the scope of this article -and the limits of law- but within the very core of the sports world!

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¹⁷² Ibid.

¹⁷³ Section III A v.

¹⁷⁴ Other pertinent grounds will not be developed in this contribution.

¹⁷⁵ QC PANNICK D./MULCAHY J., The Human Rights Act 1998 and Sport in LEWIS A. / TAYLOR J., Sport: Law and Practice, 2nd Edition, Tottel Publishing, 2008, p. 527.

¹⁷⁶ LEWIS A. / TAYLOR J., Causes of Action that Form a Basis for a Challenge to the Actions of a Sports Governing Body in LEWIS A. / TAYLOR J., Sport:

Law and Practice, 2nd Edition, Tottel Publishing, 2008, p. 216.

¹⁷⁷ Section III A v.

¹⁷⁸ <http://www.hurriyet.com.tr/spor/futbol/20033380.asp>, (accessed on 14/09/2012).

¹⁷⁹ Türkiye Futbol Federasyonu Statüsü.

¹⁸⁰ Article 63 (3) of the TFF Statutes.

¹⁸¹ Ibid.

¹⁸² Article 64 (1) of the TFF Statutes.

¹⁸³ Article 60ff of the UEFA Statutes, Article 67 of the FIFA Statutes.

¹⁸⁴ Fifa Statutes, July 2012 edition.

¹⁸⁵ Section III A v and Section III D i.

¹⁸⁶ Article 27 of the UEFA Disciplinary Regulations.

¹⁸⁷ Article 70 § 2 of the FIFA Disciplinary Code.

¹⁸⁸ See Section III C.

¹⁸⁹ www.cumhuriyetspor.com.tr/trabzon-tffyi-insan-haklari-mahkemesine-sikayet-etti.html, (accessed on 02/11/2012).

¹⁹⁰ It is important to emphasize that some of the legal aspects have been left out in order to facilitate the summarization and the overall comprehension of the affair.

¹⁹¹ Paris et matches truqués, le fair-play c’est du passé?, conference given by Pierre Cornu, UEFA Chief Counsel - Integrity and Regulatory Affairs at date, on 22 September 2011, in Bern, Switzerland.

¹⁹² www.uefa.com/uefa/aboutuefa/organisation/president/news/newsid=1783522.html (accessed on 11/09/2012).

¹⁹³ www.uefa.com/uefa/aboutuefa/organisation/president/news/newsid=1763435.html (accessed on 09/09/2012).

When is the training period of a player completed before the age of 21?

By Frans de Weger*

Introduction

According to Paragraph one of the first Article of Annex 4 of the current Regulations on the Status and Transfer of Player (hereinafter: "RSTP"), a player's training takes place between the ages of 12 and 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In order to lay emphasis on the aforementioned basic principle of the said Article, in Paragraph two of the sixth Article of the RSTP, it is stated that inside the territory of the EU/EEA, the final season of training may occur before the season in which the player had his 21st birthday if it is established that the player completed his training before that time. In other words, according to the RSTP, training compensation will be payable until the end of the season in which the player reaches the age of 23, although the calculation of the amount will be based on the years between 12 and the age when it is established that the player actually completed his training period.

The Dispute Resolution Chamber of FIFA (hereinafter: "DRC") as well as the Court of Arbitration for Sport (hereinafter: "CAS"), as being the authoritative committees at international level in the world of professional football, provided the football world with several decisions regarding the question under what circumstances the training period of a player is completed. This article will contain an extensive survey of all relevant decisions of the DRC and the CAS related to this question. Firstly, the relevant decisions of the DRC will be discussed.¹ The most important decisions will be discussed in a chronological course of time as from the first published decision in 2004 until now. Since parties have the possibility to appeal against decisions of the DRC before the CAS, the decisions of the CAS will also be analyzed and the line with the CAS will also have the same structure as with the DRC.² Please do note that all relevant cases will be discussed, however this does not mean that all decisions will be brought to the attention since the DRC and the CAS do not publish all their cases. The cases to be handled do give us a clear survey of the point of view of the DRC and the CAS. Please note that each case will be concluded with final remarks (see the italicized text). In the final conclusion of this article all relevant criteria that can be derived from the jurisprudence of the said courts, in order to establish whether or not the training period of a player is completed, will be highlighted and enumerated.

This article is meant for anyone interested in this subject. Although this article has a scientific character since all cases before the DRC and the CAS will be discussed extensively, it must also be emphasized that it has great value for the daily practice of international professional football. Especially football clubs will be made more aware under what specific circumstances a training period of a player can be completed.

Decisions DRC

DRC 22 July 2004

In a decision of the DRC of 22 July 2004, the DRC took note of the

new club's defence according to which the player finished his actual training period by the time he had started the 2001/2002 season with his former club. The new club was of the opinion that a shorter education period had taken place as result of which the training period of the player was completed in the season before that of his 21st birthday.

The new club submitted that in the playing season 2000/2001, the player was fielded on a regular basis, i.e. 15 times, in the club's A-team, scoring 3 goals. At that time the player concerned had already spent many years as a professional player from an early age and could thus be considered to have been a particularly successful player.

The new club's arguments before the DRC in this respect were accepted by the Chamber. Without any further explanation, the DRC concluded in the matter at hand, that the 2001/2002 training period would not be taken into consideration for calculation purposes. This was translated by the DRC into a reduction of €90,000 over the total amount of €550,000, resulting in a final sum of €460,000 due.

This is the first published case in which the DRC decided that the training period was completed before the player's 21st birthday. It is noteworthy to mention that the DRC explicitly noted with respect to the entitlement of training compensation that it is irrelevant whether or not the player signed his first professional contract during his education period with the training club, as it was not mentioned in any of the FIFA circulars, rules or regulations, that a training club which has benefited from the services of an amateur player who turned professional, loses its right to receive training compensation. However, we do see in this case that the fact that the player had already signed a professional contract with the training club is of relevance with respect to the question whether or not the training period has been completed.

DRC 9 November 2004

In a decision of the DRC of 9 November 2004, the Chamber referred to the fact that in case it is evident that the player has terminated his training period before the age of 21, training compensation will only be due for the period before that time.³ The DRC explicitly noted that many clubs and players had erroneously invoked this provision, in cases where it cannot be said that a player had completed his training before the age of 21. The DRC wished to reiterate that it was the understanding of the legislator that such an exemption would only apply in cases of unusually talented young players, which are rarely encountered. This tends to be the case with young players, who at the age of 17 or 18 are globally known for their exceptional talents, who are regulars at the club and national level and who are frequently the focus of transfer arrangements to the world's top clubs. In such cases it would seem rather misplaced to discuss training compensation for these players, who at the age of 17 or 18 are considered absolute world class. The DRC decided that there were only a very few players with such an exceptional status that they had completed their training and would have gained all relevant experience before reaching the age of 21.

The DRC decided in this case that although the player could display considerable experience at first team level, the Chamber underlined that it is unquestionable that the player was still benefiting from instruction being offered and experience gained in performing for the club. The player only spent one year at the club, i.e., from the age of 18 to 19, and therefore the Chamber was of the opinion that the club was entitled to receive training compensation for the instruction received during this year. Finally, the club was entitled to receive training compensation in the amount of €60,000.

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regarding DRC Database, please visit: www.drcdatabase.com.

- 1 On the website of FIFA all published decisions of the DRC can be found, see: www.fifa.com.
- 2 On the website of CAS all published decisions of the CAS can be found, see: <http://www.tas-cas.org/>.
- 3 DRC 9 November 2004, no. 114556.

In this case the DRC stated that the training period of the player concerned was not completed before the age of 21. The DRC explicitly noted for the first time that the training period of a player will only be terminated before his age of 21 in case the player can be entitled as absolute world class and have gained exceptional status. In other words, it can be said and derived from this case that only in case of exceptional circumstances a training period of a player can be completed before the age of 21.

DRC 21 February 2006

In a decision of the DRC of 21 February 2006, the DRC first turned to the question as to whether training compensation was due to the claiming club for the period of time during which the player was transferred on a loan basis to another club.⁴ In that respect, the Chamber referred to the well-established jurisprudence of the DRC and the CAS, which had been confirmed by the CAS, according to which a club is only entitled to receive training compensation for the period of time during which a player has in fact been trained by the club claiming payment of such compensation. According to the DRC, this implied that no training compensation was due to the claiming club for the period during which the player was transferred on a loan basis.

With regards to the completion of the training, the DRC pointed out that the period of training to be taken into account would only be reduced if it was evident that the player had terminated his training period before the age of 21. The question was whether the player had completed his training with the claiming club already prior to his 21st birthday, i.e. at the beginning of the season 2000/2001. In this case the new club stated that the player had played in numerous matches, i.e. no fewer than 25, for the senior team of his former club during the last season 2000/2001. The DRC underlined however that, in any case, more than just one indication to the possible earlier termination of the training period of a player must exist in order to justify the application of the relevant exception. In this case, the DRC decided that it was not evident that the player concerned had terminated his training before the age of 21.

It needs to be noted that the DRC decided in this matter that the training period was not completed in this case before the season of 2000/2001, despite the fact that the player had already signed a professional contract with the claiming club in the season of 1999/2000. Therefore, we can derive from this case that this was (thus) not a decisive element. Further to this, the fact that the player played in numerous matches was also not decisive. It is quite remarkable that these two elements, a professional contract and the amount of matches (no fewer than 25), combined were not enough in order to establish that the training period was completed since these two elements were sufficient in the case of the DRC of 22 July 2004 (no. 74353), in which the player had the professional status and played in (only) 15 matches. Furthermore, for the first time, the DRC explicitly mentioned in the matter at hand that more than just one indication to the termination of the training period of a player must exist.

DRC 12 January 2007

In a decision of the DRC of 12 January 2007, the DRC acknowledged that the main argument of the new club was that the player in question was fielded on a regular basis for the first team of the former club since he was 19 years old. The DRC further acknowledged that the player concerned played for the first team 16 matches during the 2002/2003 season and that he was a professional player from September 2002 to July 2004. Furthermore, the DRC took note in this case of the fact that the player concerned played around 20 matches during the 2003/2004 season.⁵

The DRC emphasized (again), as it did in the earlier-mentioned case of 21 February 2006 (no. 26562) that, in any case, more than just one indication to the possible earlier termination of the training period of a player needs to exist in order to justify the application of the relevant

exception, so as for example the evidence that the player can be entitled as the most talented player who played at all ages at the highest level and in the national teams at all different ages or that the transfer involved imported significant amounts of money. In the case at hand, the DRC stated that it was the new club that had to carry the burden of proof.

The Chamber decided that it was not evident that the player concerned had actually terminated his training before reaching the age of 21. Therefore, the DRC concluded in this case that the claiming club was entitled to receive an amount of training compensation for the period of time as from September 2002 to July 2004 between the ages of 19 to 21 years, more specifically in total for 23 months.

Again it is interesting to note that the DRC decided that the training period of the player concerned was not completed, more specifically before the season 2002/2003, despite the fact that the player had (also in this case) already signed a professional contract, and further to this, had also played 16 respectively 20 matches on a structural basis during the seasons 2002/2003 and 2003/2004. Till so far we can conclude, as was already concluded in the previous case of 21 February 2006 (no. 26562), that these elements combined are thus not absolutely decisive in this respect in order to determine that the training period of a player is completed. In other words, the first and above-mentioned case of the DRC of 22 July 2004 (no. 74353) seems to stand (more and more) alone with regards to the question under what circumstances the training period of a player is completed before the age of 21 years. It can be said that the criteria in order to establish the termination of the training period seem to be sharpened more and more as the DRC seems to be more and more reluctant in order to determine that the training period of a player is completed before the age of 21.

DRC 13 June 2008

In a decision of the DRC of 13 June 2008, the new club stated in this matter that no training compensation was owed for the period from February 2005 onwards because the player in question was injured from February to June, and consequently did not take part in training or matches during these six months as well as the fact that the period from August 2005 to June 2006 could also not be taken into account either because the player took part in 24 T league matches, 2 Cup matches and 12 matches in the CAF Confederation Cup during the 2005/2006 season.⁶ Further to this, the new club stated before the DRC that the player concerned was evidently one of the team key players of the team.

The DRC first decided that injuries are part of football and that, irrespective of the fact that the player concerned was injured, the player stayed and was registered with his club (i.e. the claiming club in this case) and was doing his rehabilitation. In this sense, the DRC concluded that, even though the player was injured, this very period had to be considered as a period for which training compensation could be demanded.

With regards to the potential completion of the training, the DRC noted (again) that in order to consider the training period of a player to be terminated and completed, several factors had to be taken into account and the requirements for a player's training period to be considered terminated early, were very high. The DRC decided that the mere fact that the player, who had the professional status, took part in several matches of the league as well as in the Confederation Cup, did not indicate as such that the training period had terminated before the player turned 21. The DRC was of the opinion that the period from August 2005 to June 2006 had to be considered as a training period of the player. The DRC explicitly mentioned that some indications of the player being a talented "key player" were not enough to prove an early termination of the training of the player.

In view of the above, it can be concluded that the DRC seems to follow its earlier created jurisprudence with regards to this issue and decided in this case that the training period was not completed, (again) despite the fact that the player had the professional status and (again) despite the fact that the

⁴ DRC 21 February 2006, no. 26562.

⁶ DRC 13 June 2008, no. 681123.

⁵ DRC 12 January 2007, no. 17266.

player played a substantial amount of matches (among other 24 in the league). The DRC reiterated and stressed again that several factors have to be taken into account and emphasized that the requirements for a player's training period in order to be considered terminated, are very high. Based on the jurisprudence till so far, we can conclude that only under exceptional circumstances the training of a player is completed.

DRC 1 March 2012

In the case before the DRC of 1 March 2012, the DRC seems to be less reluctant, as opposed to its previous published cases, in order to establish that the training period of a player is completed.⁷ In this case, the player concerned was registered as a professional with a Belgian club, as from 2004 until 16 August 2007. Subsequently, the player was loaned by the Belgian club to a Dutch club as from 17 August 2007 until 7 July 2008. Finally, after the player was re-registered with the Belgian club on 8 July 2008, on 19 August 2008 the player signed a professional contract with a French club. The Dutch football club claimed training compensation from the French club. However, the French club was of the opinion that the training period of the player was already terminated as result of which no amount of training compensation was due and stated in this respect that the performances of the player concerned with the claiming Dutch club in the matter at hand in the first season 2007/2008 proved unequivocally that the player concerned was no longer a player in training.

The DRC considered that cases involving a possible early completion of a player's training period have to be assessed on a case-by-case basis, whereby all the circumstances and all the evidence produced have to be taken into consideration. Hence, several factors and indications have to be considered in order to assess and establish whether a particular player's training has indeed been completed before the season of his 21st birthday. The DRC reiterated and pointed out that the DRC and the CAS had both been very reluctant with regards to this issue and had adopted a strict approach in establishing that a player's training period is actually completed.

The DRC noted in this case that the player had already signed two employment contracts before joining the Dutch club, which would indicate that the Belgian club had already considered the player as a valuable and important player. Also, the DRC noted that the player had represented several Belgian national youth teams, which was another indication of the level of the player's training, skills and experience. Further to this, the DRC observed that the player had played a substantial amount of matches with the Dutch club, more specifically 37 matches, as well as that he was an important player for the said Dutch club, from the day he had joined the Dutch club, who, so the Chamber deemed, must have had at least the same playing and training level as the other members of the Dutch club's squad. Furthermore, the DRC pointed out that the Belgian club had loaned the player against compensation to the Dutch club, a club, which like the Belgian club, played at the highest professional level. In this respect, the DRC considered that the Belgian club had thus, not merely loaned the player to the Dutch club in order to gain personal and professional experience, but also wished to be compensated for the "loss" of its player, i.e. the Belgian club had already awarded a certain value to the services of the player concerned.

In view of the above, the DRC finally decided that while considering every single one of the relevant elements by itself would not necessarily lead to the conclusion that the player's training was completed, the DRC concurred that, in the specific matter at hand and taking all the above-mentioned elements combined, it could, in accordance with Article 6 Paragraph 2 of Annex of the RSTP, be established that the player concerned had indeed completed his training period before joining the Dutch club.

It is quite interesting to take note of the fact that the DRC did not make reference to the fact that the player only played 6 matches for the former club, i.e. the Belgian club in the matter at hand. In this case the DRC found it of the utmost importance, in order to establish that the training period was completed, which can be seen as a new criterion (since it was not mentioned in any of the earlier mentioned cases of the DRC), that the player played a substantial amount of matches with the Dutch club, not the Belgian club in this respect. Furthermore, it can be derived that the following elements were important in this case: the player had already signed two (!) employment contracts with the Belgian club, had represented several Belgian national youth teams during his stay with the Belgian club and as from the moment he joined the Dutch club, had the same playing and training level as the other members of the Dutch club's team. It can be concluded that the DRC more or less slightly seems to deviate from its earlier line (at least in this case). Not only because the DRC decided in the matter at hand that the training period of the player was completed (which does not happen quite often, as we have seen before), but merely because the DRC introduced a new element to be taken into consideration, i.e. the amount of matches with the 'new' club, in this matter the Dutch club (and thus not the former training club, i.e. the Belgian club). Apparently, this criterion can be of relevance. Although it is quite disputable whether or not the Chamber correctly decided that the training period of the player concerned was terminated (since it can be questioned whether or not the player was of 'absolute world class' and taken into account the fact that the player only played 6 matches with the Belgian club), it needs to be emphasized that it is of relevance that the player concerned signed (in this case) two professional contracts with the Belgian club and had represented several Belgian national youth teams during his previous stay with the Belgian club.

Decisions CAS

CAS 2003/O/527

In the case before the CAS between the football clubs Hamburger Sport-Verein and Odense Boldklub of 21 April 2004, the Danish football club Odense Boldklub claimed training compensation from the German football club Hamburger Sport-Verein.⁸

The player concerned was registered with Odense from 1991 to 30 June 2002, where he signed his first professional contract on 1 October 1996, at the age of 17. During season 1996-1997, the player played five games and during the season 1997-1998, he played 15 games with Odense. On 18 November 1998, the player signed a second professional contract with Odense, which expired on 30 June 2002. After the termination of this contract with Odense, the player concerned signed a professional contract which became effective as per 1 July 2002 with Hamburger Sport-Verein.

According to the CAS panel, the completion of the training period of an athlete has to be considered in view of FIFA Circular letter no. 801. In this Circular it was stated that it is a question of proof whether or not the training period is completed, which is at the burden of the club that is claiming this fact. A player who regularly performs for the club's A-team could be considered as having accomplished his training period. This may certainly signal that the formation of a player has been completed but there may be other indications hereto. The decision on this will have to be taken on a case-by-case basis, which principle, according to the further content of the mentioned Circular no. 801, will also apply to apprentice professionals or players under a scholarship.

The CAS Panel finally decided that the player had spent many years with Odense and was noticed for his good technical skills and speed. The CAS referred to the fact that the player had signed his first professional contract with Odense as well as that the player played five matches in the A-team during the season 1996-1997 and 15 matches in the A-team during the season 1997-1998. In view of this, the characteristics and the level of games of Odense's club at that time, the CAS found that the player's training started in 1991 (season 1991-1992), when he first registered with Odense and lasted 6 years, that is until the end of the season 1996-1997.

⁷ DRC 1 March 2012, no. 3121474.

⁸ CAS 2003/O/527, *Hamburger Sport-Verein e.V. v. Odense Boldklub*, 21 April

2004. See also FIFA Commentary, explanation Article 1, p. 112, footnote 149.

In this case, the CAS Panel decided that the training period of the player was terminated before the age of 21. More specifically, the season 1997-1998, in which the player played 15 games with the Danish club Odense, was not taken into account. In this case the player signed his first employment contract with the training (and claiming) club Odense and (only) played 5 matches for the latter in the latest season of his training period with the aforementioned club. In view of this, the CAS was of the opinion that these elements combined, thereby taken into account the circumstances and characteristics of the case, were enough to determine that the training period of the player concerned was actually terminated before the age of 21.

CAS 2004/A/594

In another case before the CAS of 1 March 2005, the Panel also decided that the player's training period was finished before the age of 21 years old.⁹ The player played for the Israeli club Hapoel since he was 12 years old. The player did not play for the A-team until the 1997-1998 season (and then occasionally and as a replacement). However, the player concerned was described by his training and claiming club, Hapoel Beer-Sheva F.C., as "the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages". In July 1997, Hapoel and the player entered into a contract of five years, and then the player was loaned from Hapoel to another Israeli club, Maccabi Haifa for the 1998-1999 and 1999-2000 seasons and then for the 2000-2001 and 2001-2002 season. On 24 June 2002, Real Racing Club de Santander S.A.D. informed Hapoel that Santander signed a contract with the player concerned.

In the DRC case, in which Hapoel claimed training compensation from Santander, the DRC decided that Santander had to pay an amount of €90,000.- to Hapoel. Hapoel however did not agree with this decision and appealed before the CAS.

In the CAS-case, the CAS referred to the earlier mentioned CAS-case of 21 April 2004 (CAS 2003/O/527), in which was stated that a player that regularly plays (i.e. 15 times during one season in this case) in the A-team of a club is to be deemed as having completed. In the current case, the CAS decided that there were several key factors which enhanced the ability to assess when the player's training had been completed. Firstly, there was Hapoel's argument which was accepted by the CAS that the player was the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages. Secondly, the contract concluded between Hapoel and the player described the player as "regular player for the club". Thirdly, the loan agreement between Hapoel and Maccabi Haifa involved significant sums of money. The loan of an athlete for hundreds of thousands of US dollars per annum, while not conclusive, tends to lend credence to the argument that the player was effectively trained and hence will be a regular player. Therefore, the CAS decided, in view of the aforementioned elements, that the player had completed his training period at the end of the 1996-1997 season.

As in the CAS-case of 2003/O/594, also in this case the CAS Panel decided that the training period was completed before the age of 21. It is quite interesting that the training period was completed despite the fact the player had not played any matches in the first team of the training club and the player only signed his first employment contract as from July 1997 (the end of the last training year that was taken into account by the CAS). The fact that the player had played at the highest level at all ages and that the player was described as a "regular player for the club" among other due to the substantial loan fee, were important aspects in this matter.

CAS 2004/A/696

In a case before CAS of 2 March 2005 between a Dutch club and a German club, a player was registered with the Dutch club from the sea-

son 1995/1996, through the season of 2002/2003, i.e. for seven sporting seasons, between the age of 14 and 21.¹⁰ As from the season of 1998/1999 up to and including the season 2002/2003, the player signed several employment contracts with the Dutch club. On 1 July 2003, an employment contract was concluded between the player and the German club.

In the DRC procedure, in which the Dutch club claimed training compensation from the German club, the DRC ordered the latter to pay the Dutch club an amount of €460,000.-, corresponding to almost five seasons. The German club however appealed before the CAS and stated before the CAS that training compensation was payable, however only when the player for the first time signed a contract as a professional.

During the CAS procedure, the German club held that the player's status changed from amateur to professional in the season 2000-2001 as the player was then fielded as professional player. The German club was of the opinion that only the training time from the last change of the player's status, but with the same club, should be taken into account. Therefore, training compensation was only payable for the season of 2000-2001 since the player finished his training period at the end of season 2000-2001. The Dutch club claimed that it was not correct, as accepted by the DRC, that the player in the season 2000-2001, was fielded on a regular basis (15 times), and scoring 3 goals. The correct information was that the player was fielded a total of 6 times, 3 of which as a basis player, of a total number of competition games of 34. Of these 3 times the player was substituted once. Only in the season 2001-2002 the player was fielded 15 times. These facts were not contradicted by the German club.

The Panel noted that the German club primarily had based its arguments on an interpretation of the FIFA RSTP, limiting the obligation to pay training compensation, with regard to a subsequent transfer, only for training times received after the last change of the player's status. However, the CAS did not subscribe this interpretation. As the Panel saw it, the education and training of the player was concluded by the end of the season of 2000/2001, in which the player was fielded 6 times, of which 3 times as a basis player. Therefore, the German club was ordered by the CAS Panel to pay training compensation in of €540,000.-, corresponding to 6 seasons in total.

In this case it was decided by the CAS that the training period of the player was - just as in the other earlier mentioned CAS-cases (CAS 2003/O/527 and CAS 2004/A/594) - completed. The CAS decided that the training period was completed at the end of the season in which the player played 6 matches, of which 3 times as a basis player.

The CAS still seems to be less reluctant, as compared to the DRC committees, in order to establish that the training period of a player is completed. In that respect, the amount of matches the player plays for his training club that suffices in order to complete the training period is quite lower than the amount of matches with the DRC. For example, in this case the training period of the player was completed at the end of the season in which the player only played 6 times for his training club, in the CAS-case of CAS 2003/O/527, the training period was completed at the end of the season in which the player only played 5 matches for his training club and in the CAS-case of 2004/A/594, the training period was even completed at the end of the season in which the player played 0 (!) matches for his training club. In other words, the DRC seems to require a higher amount of minimum matches the player must play with the training club. Please take further note of the fact that the player concerned signed several employment contracts with his training club, the Dutch club in this regard, which will obviously also be considered as an important element in order to establish that the training period of the player concerned was completed with the Dutch club.

CAS 2006/A/1029

The case before CAS of 2 October 2006 between Maccabi Haifa and Racing Club Santander, concerned an appeal against a FIFA-case, in which Maccabi Haifa claimed training compensation, which was rejected by the DRC.¹¹ The DRC based its decision on the earlier-mentioned

⁹ CAS 2004/A/594, Hapoel Beer-Sheva v. Real Racing Club de Santander S.A.D., 1 March 2005. See also FIFA Commentary, explanation Article 1, p. 112, footnote 149.

¹⁰ CAS 2004/A/696, 2 March 2005.

¹¹ CAS 2006/A/1029, Maccabi Haifa FC v. Real Racing Club Santander, 2 October 2006.

CAS-case of 1 March 2005 (CAS 2004/A/594), which facts apply to the specific matter at hand, in which was stated that the player's training period ended in the year 1997 when the player was 17 years old. Maccabi Haifa did not agree with the outcome and appealed against the decision before CAS.

The CAS Panel decided that according to CAS jurisprudence a player that regularly plays in the A-team of a club can be deemed as having completed his training. According to FIFA Circular Letter no. 801, the element which triggers the end of a player's training and/or education is a question of proof, whereby the burden of proof is on the club that is claiming this fact, i.e. Maccabi. According to the CAS Panel, in these matters, the decision must be taken on a case-by-case basis, with the understanding that several factors can be considered to determine the completion of the player's training, such as the reference to the player as being a regular player for the club. Further to this, the CAS Panel decided that the loan of a player for significant sums of money can indicate and strengthen the position of the new club that the player is effectively trained and will be established as a regular player.

In this specific matter, the CAS made a distinction between the training period and the development of the player. According to the CAS Panel, the training period was ruled and limited by FIFA with specific regulations and Circular Letters while the development of a player is not. The aim and spirit of the FIFA RSTP was to regulate the training and not the development of the player, according to the CAS. Therefore, the CAS decided that what needs to be established is the point of termination of the training period of the player and not the extent of the subsequent development of the player as a professional football player. Santander stated among other that during the season 1997-1998, the player took part in 25 matches of Hapoel. With regards to the same season, Santander further stated that the player, being 17 years old at that time, became the leader of the team. Finally, the CAS Panel decided that the player completed his training period at the age of 17 in the end of the 1996-1997 season, as result of which Maccabi Haifa was not entitled to receive any training compensation.

Also in this case it was decided by the CAS Panel that the training period of the player concerned was - just as was decided in the afore-mentioned CAS-cases (CAS 2003/O/527, CAS 2004/A/594 and 2004/A/696) - completed. As said, the facts and outcome with regards to the CAS-case CAS 2004/A/594 was the same. The CAS Panel in this case had the same view as the CAS Panel in the case CAS 2004/A/594 with regards to the completion of the training. The CAS Panel confirmed that the player's training period was completed before the end of the 1996-1997 season. Despite the fact that a significant loan fee was paid, reference was made to the player as being a regular player for the club and the player played at the highest level at all ages, the CAS Panel also (as the CAS Panel did in the case CAS 2004/A/594) did not give (much) weight to the fact that the player had not played any matches in the first team of the training club and the fact that the player only signed his first employment contract as from July 1997. Further to this, the CAS also made and brought a distinction between the training period and the development of a player.

Till so far, we can conclude that the CAS Panels are indeed more inclined to determine that the training period of a player is completed. This can be derived from the fact that the minimum amount of matches, as being one of the criteria, seems to be substantially lower than in the DRC-cases, and the fact that the player in the case of CAS 2004/A/594 and this case, only signed his first employment contract at the end of the training period and did not even play matches in the first team of the training club. Apparently, the height of the loan fee and the fact that the player played at the highest level at all ages, was sufficient for the termination of the training period.

CAS 2007/A/1320-1321

In a case before CAS between the Dutch club Feyenoord and the Brazilian club Flamengo of 26 November 2007, the CAS reiterated that the club that wishes to state that the training period of the player is finished bears the onus of proof that a player was completely trained.¹² The decision on whether and when the formation of a player has been completed has to be taken on a case-by-case basis, according to the CAS, taking in consideration all the circumstances and the evidence produced.

In this case the player was registered with Flamengo as an amateur player from January 1995 to September 2000. He signed his first employment contract with Flamengo valid from 1 October 2000 until 30 September 2002. On 19 July, the player and Flamengo signed an agreement extending the first professional contract until 31 January 2004 and on 5 February 2004, the player joined the Brazilian club Palmeiras, with which he entered into a labour agreement valid until 31 January 2004. After a mutual termination of the contract, the player was registered again with Flamengo as a professional and after his contract expired, the player joined the Dutch football club Feyenoord. On 30 August 2005, Flamengo initiated proceedings with the FIFA DRC and requested €637,500 as training compensation. The FIFA DRC ordered the club Feyenoord to pay a total amount of €67,500 to Flamengo.

On 5 July 2007, Feyenoord appealed against the FIFA-decision. Feyenoord was of the opinion that in view of the numerous matches played by the player in Flamengo's first team, his training and education was completed long before January 2005.

The CAS Panel observed that the player played 11 times with the U-20 team, which evidence only corroborated the fact that the player was involved in a national team competition with players who were under 20 years old. According to the CAS, such competition merely required the players to be under a certain age, not necessarily to be completely trained. The CAS Panel therefore decided that the mentioned facts did not give information about the completeness of the player's training education.

Further to this, the CAS stated that Feyenoord had not brought any new evidence before the CAS, besides written testimony of the player and his agent, who confirmed that the alleged number of matches played by the player with Flamengo was actually 80. At the hearing, Feyenoord alleged that it requested the CBF, the Brazilian Football Association, to confirm the number of official matches the player played with Flamengo and Palmeiras, but without any result. The CAS Panel did mention that it regretted that Feyenoord had not even presented fact witnesses, who for instance, had a direct knowledge of the player's evolution and expertise. In addition, according to the CAS, Feyenoord had not established the period during which the alleged 80 games were played. In this respect, the CAS explicitly decided that the number of matches played is not per itself necessarily decisive. The CAS stated that the player of a modest football team could be required to play on a regular basis although his formation is not finished, according to the standards of a better team. Similar differences can exist from a certain national championship to another. Finally, the CAS Panel referred to the fact that the player only played between 5 and 6 matches with Feyenoord. According to the CAS Panel, if the player was as good as alleged by Feyenoord, then why did he not play in all the games? Under these circumstances, the CAS finally held that Feyenoord had not demonstrated that the player's formation had to be considered as completed before his transfer to the Dutch club Feyenoord.

This case can be entitled as 'a stranger in the midst' among the CAS-cases regarding the subject of the "completion of the training period". As the CAS Panel in 2006/A/1029 considered that a player that regularly plays in the A-team of a club can be deemed as having completed his training period, the CAS Panel in this case changed its starting point by stating that the number of matches played is not per itself necessarily decisive. Although both Panels do not exclude other elements, the way this criterion of the amount of matches is formulated in the matter at hand gives rise to the suspicion that it is given less weight in order to determine whether or not the training period is completed. In this case the CAS takes up a position that is more

¹² CAS 2007/A/1320-1321, Feyenoord Rotterdam v. Clube de Regatas do Flamengo, 26 November 2006.

strict and in which it is much more reluctant in order to decide that the training period is completed. Although the outcome might still be defensible since it is possible that Feyenoord had indeed not been able to prove that the training period was completed, this decision does call up questions since the player still signed several contracts with his training club, it cannot be left unmentioned that Feyenoord explicitly stated that the player played 80 matches for the Brazilian clubs, and further takes into account the fact that the CAS Panel acknowledged that the player played 11 times with the U-20 team. Further to this, the CAS Panel seems to introduce and provide us with new elements such as the status of the training club and even the status of the national championship. Furthermore, the CAS Panel found it also of legal relevance, just as the DRC in the above-mentioned unpublished DRC-case of 1 March 2012, in order to establish that the training period was not completed, that the player did not play a substantial amount of matches with Feyenoord, the 'new' club in this regard. The player only played five or six matches, which gave rise to the suspicion and was an important signal for the CAS that the player's training period was not completed.

CAS 2008/A/1705

In a decision before the CAS between Grasshopper and Alianza of 18 June 2009, the CAS Panel referred to the case law of CAS (cf. CAS 2000/A/560, no 7.4.13; CAS 2004/A/594, no 7.2 *et seq.*) in which was decided that the period to be considered when establishing training compensation owed is the time during which a player was effectively trained by a club.¹³ According to CAS, this ruled out any time spent by a player at another club on a loan arrangement unless the loaning club can demonstrate that it bore the costs for the player's training during the duration of the loan. According to the RSTP, to what regulations the CAS referred to in this case, training compensation is due for training incurred up to the age of 21, unless it is evident that the player already terminated his training period before the age of 21.

In this case, a Peruvian player was registered with Club Alianza de Lima on 25 July 2000. On 21 November 2002, Alianza and the player signed an employment contract valid until 31 December 2006. The player regularly performed with the youth national team of Peru and was called up for the national A-team in August 2003. After the expiry of the employment contract with Alianza, in January 2007, the player signed an employment contract as a professional football player with the Swiss football club Grasshopper. Due to the fact that Grasshopper refused to pay training compensation to Alianza, the latter started a FIFA procedure, in which the FIFA DRC finally decided that Grasshopper had to pay training compensation to Alianza of €305,000.-. Grasshopper did not agree and appealed against the decision before the CAS.

During the CAS-procedure, Grasshopper maintained that the player completed his training before reaching the age of 21. Grasshopper supported this assertion by claiming that the player became a regular of Alianza's A-team in 2003 and that the player was recurrently summoned to play for the Peruvian senior national team.

The CAS reiterated that the burden of proof to demonstrate that the training was indeed concluded before the player reached the age of 21, more specifically in 2003, lies within the new club, i.e. Grasshopper. The Panel admitted the printouts presented by Grasshopper obtained from the internet given that Alianza did not invalidate these pieces of evidence with its own records. However, even though regular performance for a club's A-team can trigger the end of a player's training and constitutes the major indication of the completion of a player's training, this does not necessarily constitute the only and decisive factor for the completion of a player's training. According to the CAS, there are further factors that are generally taken into consideration such as the player's value at a club, reflected in the salary a player is paid, in the loan fee that is achieved for his services or in the value of the player's transfer, the player's public notoriety at national and international level, his

position at the club if established as a regular or even holding the captaincy, his regular inclusion in the national team and so forth (cf. CAS 2006/A/1029, p. 20 *et seq.*).

The CAS Panel was not satisfied that Grasshopper had overall proven the player concerned to be of such a talent that his training was indeed concluded before he reached the age of 21. The CAS Panel considered the evidence put forward by Grasshopper as being insufficient to establish such a level of aptitude to set aside the general norm applicable to the calculation of training compensation in this regard.

Gradually, we take note of the fact that also the CAS Panels become more reluctant to establish that the training period is completed. In the matter the hand, the CAS Panel decided, as it did in the case of CAS 2007/A/1320-1321, that the new club had not been able to prove that the training period had actually been completed, despite the fact that the player had concluded an employment contract with the training club, i.e. Alianza in this respect, and despite the fact that the player regularly performed with the youth national team of Peru and was called up for the national A-team in August 2003. Elements, such as the player's value at a club, reflected in the salary a player is paid, in the loan fee that is achieved for his services or in the value of the player's transfer, the player's public notoriety at national and international level, his position at the club if established as a regular or even holding the captaincy, his regular inclusion in the national team and so forth, are decisive, according to CAS, in order to establish whether or not the training period of a player is actually completed.

CAS 2011/A/2682

In the case between an Italian club and a Swedish club before CAS of 25 July 2012, the latter claimed training compensation for their former professional player, from the Italian club.¹⁴ With regards to the exact amount of training compensation, the appellant, the Italian club, stated that the player terminated his training before the age of 21. According to the Panel, it was therefore the Italian club that had the burden of proof to show that the player terminated his training before the age of 21.

Before the CAS Panel, the Italian club contended among other the fact that the player was fielded ten times in the A-team of the Swedish club, that he took part in four UEFA Cup games and that he was a member of the national youth team.

The CAS Panel referred to CAS jurisprudence (CAS 2003/A/527 and 2006/A/1029) in which was stated that a player that regularly plays in the A-team of a club is to be deemed as having completed his training. The CAS Panel decided that the season 2007, in which he played ten games in the A-team, was not enough to state that the training period was terminated. The season 2008, on the contrary, was considered as a turning point in the career of the player. In that season the player played in nineteen games (out of possible thirty) for the A-team. In the season 2009, the player's figures were similar although he even played two more games for the Swedish club's A-team in the Swedish national league. The Panel was conscious that the number of games played was only one factor, to be taken into consideration when assessing if a player had completed his training period, but deemed that this was an important and objective element which might be sufficient in the absence of other elements. The Panel was of the opinion that once the objective criteria were demonstrated, the burden of proof had to shift to the training club to prove that a player was not actually fully trained even though he was playing most of the games with the A-team. The training club however failed to prove this, according to the CAS. The CAS further emphasized that there was a difference between the training and the development of a player, as decided in CAS 2006/A/1029, and finally decided that the training period of the player concerned was completed after season 2007.

An interesting decision since the CAS is not as reluctant as it was in the former two cases (CAS 2007/A/1320-1321 and CAS 2008/A/1705), but again explicitly reiterates that the number of games played is only one factor, to be taken into consideration when assessing if a player has completed his train-

¹³ CAS 2008/A/1705, Grasshopper v. Alianza Lima, 18 June 2009.

¹⁴ CAS 2011/A/2682, 25 July 2012.

ing period (although it did stress that this element might be sufficient in the absence of other elements). Although the CAS decided that the training period was completed before the age of 21, we do see that the CAS Panel is stricter with regards to the exact amount of matches, stricter than CAS Panels in former cases (such as CAS 2003/O/527 and CAS 2004/A/594). In the matter at hand, the CAS Panel decided that the amount of matches in the season 2007, in which the player played ten games in the A-team, was not enough. However, in the 2008 season, in which the player played in nineteen games (out of possible thirty) for the A-team, the amount did suffice. Further, it draws the attraction that the CAS explicitly decided that in case a player is called up to take part in matches with the national youth team does not mean that he has terminated his training period since it can only show that the player was at that point of time among the best players of his age in the country concerned. Furthermore, the CAS Panel made reference again to the fact that there is a clear difference between the training period and the development of a player, as was also decided in CAS 2006/A/1029.

Conclusion

General

After analyzing DRC and CAS jurisprudence, one general conclusion can be drawn: both instances are reluctant in order to decide that the training period of a player is completed before the player reaches the age of 21. Please note in that respect that it is a well-known fact, as also confirmed in the above-mentioned decision of the DRC of 9 November 2004 (no. 114556), that many clubs have often erroneously invoked this provision (in order to validly claim that it is evident that the training period of the player is completed before his 21st birthday), in cases where it cannot be said that a player had finally completed his training before the age of 21. In this respect it is very important to be aware that the training period of a player needs to be distinguished from his development, as was stated in CAS 2006/A/1029 and CAS 2011/A/2682.

In the first published case (DRC 22 July 2004, no. 74353) the DRC decided that the training period of the player concerned was completed before his 21st birthday. In later cases (DRC 9 November 2004, no. 114556, DRC 21 February 2006, no. 26562, DRC 12 January 2007, no. 17266 and DRC 13 June 2008, no. 681123), we take note of the fact that the DRC is and becomes more reluctant in order to establish that the training period of a player is completed before the age of 21. The DRC decided in all these cases that the training period was not completed and further laid emphasis on the fact that several factors had to be taken into account to decide whether or not the training period is finished and that the requirements are very high. In the more recent of the DRC of 1 March 2012 (no. 3121474), the DRC is less reluctant again since the Chamber decided in that case that the training period of the player was completed, thereby taking into account all the elements (two employment contracts with the training club, a substantial number of matches with the 'new' club, and the representation of the player concerned with several Belgian national youth teams).

Whereas the DRC is quite reluctant, the CAS Panels seem to be more generous in order to decide that the training period of a player is completed before the age of 21. Especially, in the earlier cases (2003/O/527, 2004/A/696 and 2006/A/1029), the CAS Panels seem to be more generous towards the 'new' clubs since the CAS decided several times that the training period was completed as result of which 'new' clubs were not obliged to pay training compensation based on the total number of training years. In later cases (2007/A/1320-1321 and 2008/A/1705), the CAS Panels sharpened the criteria since the training periods in these cases were not finished before the age of 21 year due to the fact the 'new' clubs did not comply with their burden of proof that the training period was completed. However, in the most recent CAS case (2011/A/2682), the CAS seems to open the door again for the 'new' clubs that are addressed by claiming clubs to pay training compensation for the entire training period since it was decided that the training period was completed before 21.

In view of the above, it can be concluded that the DRC and the CAS have created their own jurisprudence related to this issue, but during the years both instances seem to be more like-minded. The outcome of

the cases is more crystallised and balanced due to the number of cases related to issues that concern the question whether or not the training period of the player is completed before the age of 21.

Notwithstanding the above and despite all inevitable divergent outcomes of the cases (and the different value that is awarded by the committees and Panels to the several criteria), a decision regarding this issue must always be taken on a case-by-case basis, with the understanding that several factors must be considered to determine the completion of the player's training (CAS 2003/O/527, 2006/A/1029 and 2008/A/1705). At any event, more than just one element to the possible earlier termination of the training period must exist in order to justify the application of the exception that the training period of a player is completed before the age of 21, according to several DRC committees (21 February 2006, no. 26562, 12 January 2007, no. 17266, 13 June 2008, no. 681123 and 1 March 2012, no. 3121474).

As said by the DRC itself in its case of 1 March 2012 (no. 3121474) it is possible that in case of considering every single one of the relevant elements by itself, this would not necessarily lead to the conclusion that the player's training was completed, however, taking several elements combined, it could be established that the player had indeed already completed his training period. As result thereof, it will always be difficult to compare the outcome of the cases and to find out what exact value the criteria has been given by the courts, although we do take note of the fact that the same criteria are brought to the attention over and over again. In other words, during the years we face the same criteria each time. Therefore, and in order for the clubs to be ascertained and to make a solid legal analysis of the case at hand (with regards to the question whether or not the training period is completed and thus to determine the exact amount of training compensation), it would be helpful to enumerate all the relevant criteria in order to determine whether or not the training is completed. The following criteria, derived from the jurisprudence, are of absolute relevance, whereby it must be noted (again) that it will always be the combination of the several elements that finally leads to the conclusion that the training period of a player is completed.

The criteria

• Number of matches

The most relevant criterion is the number of matches the player has played with his training club, since, according to the CAS Panels, the number of matches constitutes the major indication of the completion of a player's training period (CAS 2008/A/1705). This can also be derived from the recent CAS-case, as discussed above in this article (2011/A/2682), in which award the CAS Panel stressed that this element can be sufficient (even) in the absence of other elements in this regard.

Please do note that the number of matches the player has played for the training club will in principle be relevant, although this element was not taken into account by the DRC in its latest case of 1 March 2012 (no. 3121474). We further see in the same DRC-case that the Chamber also introduced a new element, as the CAS Panel also did in the case between Feyenoord and Flamengo (2007/A/1320-1321), namely the number of matches with the 'new' club (the 'new' club being in principle the club that is addressed by the training club to pay the entire amount of training compensation, although the Dutch club in the said DRC-case of 1 March 2012 (no. 3121474) was technically not the 'new' club since this was the French club). Therefore, we can conclude that in case a player does not play a sufficient number of matches for his 'new' club, the CAS Panel will be more inclined to decide that the training period is not finished (2007/A/1320-1321), whilst in case the player does play a lot of matches for his 'new' club, it is more likely that the DRC is more convinced that the training period is finished, as was decided in the DRC-case of 1 March 2012 (no. 3121474).

After analysing the DRC and CAS jurisprudence with regards to this first criterion, it further attracts the attention that the DRC does seem

to require a higher number of minimum matches the player must have played for his training club. A number of 25 (DRC 21 February 2006, no. 26562), 16 and 20 (DRC 212 February 2007, no. 17266) and 24 (DRC 13 June 2008, no. 681123) matches is not enough for the DRC committees, whilst a number of 5 (2003/O/527), 0 (2004/A/594), 6 (2004/A/696) and 10 (2011/A/2682) matches, played in the last training year, is enough in order for the respective CAS Panels to establish that the training period was completed before 21.

With regards to the exact number of matches, it is quite difficult to draw a conclusion since the committees have different views with regards to this aspect. However, it would be advisable, taken into consideration the latest decisions of the DRC and the CAS, that a player must have played a substantial number of matches (19 out of 30 matches was enough, following the Panel in CAS 2011/A/2682), whereby also the strength of the competition of the training and/or the 'new' club as well as the status of the training and/or 'new' club can be taken into account (CAS 2007/A/1320-1321).

It would be advisable that clubs are very specific with regards to this criterion. In that respect, it is important to provide the court with concrete details, such as whether or not the player started in the first eleven of the matches he played and whether or not he played the full ninety minutes or that he was substituted in any of the matches.

Please finally note that the number of matches is not only relevant with regards to, as mentioned above, the matches for the national competition, championship, the European championship, the player played for the training or the 'new' club, but it is also important to provide the courts with statistics with regards to matches for the national youth and adult teams. This has also been of great importance, as we have seen in DRC decisions (such as the DRC-case of 1 March 2012, no. 3121474), but also in several discussed CAS cases (2004/A/594 and 2006/A/1029). However, do take into consideration that in case a player is called up to take part in matches with the national youth team does not mean that he has terminated his training since it can only show that the player was at that point of time among the best players of his age in the country concerned (as was explicitly decided in the case 2011/A/2682).

• Professional contract

Further to this, the fact whether or not the player has already signed a professional contract with the training club is an important signal in order to establish that the training period can be completed before the age of 21. To put it simply, the more contracts the player concluded with his training club, the more chance that the DRC or the CAS will decide that the training period is completed (see the DRC-case of 1 March 2012 (no. 3121474), although it did not help Feyenoord against Palmeiras, whereby the player signed two contracts with his training club; 2007/A/1320-1321).

With regards to the professional contract, it is not only relevant whether or not the player signed a contract, but also the salary can be an important indication. In other words, the higher the salary of the player, the more likely it is that the DRC or the CAS decide that the training period of the player is completed since the height of the salary can indicate and show us the importance of the player for the club concerned.

• Miscellaneous criteria

Besides the number of matches and the fact whether or not the player signed a professional contract with his training club, several other criteria are relevant.

For example, in case there was a transfer or a loan fee, this amount can be important, as decided in the DRC-case of 1 March 2012 (no. 3121474), and other CAS cases, such as 2004/A/594, in which was decided that the loan of an athlete for hundreds of thousands of US dollars per annum, while not conclusive, tends to lend credence to the argument that the player was effectively trained (2006/A/1029 and 2008/A/1705).

Further to this, all other particularities with regards to the player can be of relevance, such as the age of the player, whether or not he was a captain, his position in the field, the number of goals he scored, and his relevance for the team.

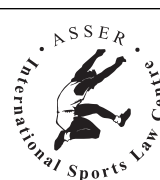
Final remarks

To summarize, and in order for a club to determine whether or not the training period of a player is completed, (at least) the following questions need to be answered:

- Did the player play numerous matches in the national competition, European championship, etc.) in the first team of his training and/or 'new' club? Did he start in the first eleven? Was he substituted or did he play the full 90 minutes in the played matches?
- What is the status of the training and/or 'new' club? A big or a modest club? What was the competition level of the training and/or 'new' club?
- Did the player play any matches for the national youth and/or adult team of his country? If so, how many matches did he play?
- Did the player sign any professional contract(s) with his training club and what was the salary the player concerned received in this respect?
- What was the amount of the transfer or the loan compensation in case there was respectively a loan or a transfer compensation?
- Are there any other relevant particularities regarding the player?; For example, how old is he? Was he captain? What is his position in the field? Did he score goals? Was he an important player for the team?

Finally, it needs to be noted that the burden of proof in order to demonstrate that the training period was indeed concluded before the player reached the age of 21, always lies with the 'new' club. In the mentioned case between before CAS of 2012 (CAS 2011/A/2682), the CAS also decided that once the criteria are demonstrated, the burden of proof shifts to the training club to prove that a player was not actually fully trained even though he was playing most of the games with the A-team.

Please note in this respect that it is of the utmost importance to prove with all available evidence that the training period is completed, such as prints from websites (which will be admitted as long as the counterparty does not invalidate these pieces of evidence with its own records; CAS 2008/A/1705; although, do take into consideration, that the DRC is quite reluctant in order to establish prints from internet pages as valid evidence; DRC 7 April 2011, no. 411330), statements of the national associations, experts, trainers and coaches, etc. Further to this, it is of the utmost importance that in case it is finally established that the training period of the player is completed, an amount of training compensation might still be due, however, only (and obviously) over the years the training period of the player was not completed.



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Striking down the “Osaka Rule” - An unnecessary departure

By Dr. Jan F. Orth, LL.M. (UT)*

The reasoning of the CAS in its decision, which strikes down the “Osaka Rule”, consists of 23 single-spaced pages and seems therefore to be well-substantiated. However, a critical review of the reasoning reveals remarkable shortcomings in the argumentation scheme of the competent CAS panel. The author reaches the result that the invalidation of this important anti-doping provision was not compelling at all.

I. Introduction

1. The sport politics background

The *International Olympic Committee (IOC)* itself was faced with more than a few doping incidents during *Olympic Games* in the past few decades. The public perception of this rising difficulty, even in Olympic sports, likely began with the 1988 Olympic scandal regarding the Canadian sprinter, *Ben Johnson*, who beat the American sprinter *Carl Lewis* in room final at the Olympics in *Seoul*. Johnson was subsequently convicted of the use of steroids, which led to his disqualification only three days later. Further incidents were to follow in the subsequent years regarding both the *Olympic Summer* and the *Olympic Winter Games*.

To confront former offenders and in so doing preventing potential future offenders from participating in the *Olympic Games*, the *IOC Executive Board* enacted - at long last - at its meeting in *Osaka (Japan)* the following rule which came to be known as the “Osaka Rule” on June 27 2008¹:

“The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

1. Any Person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committee and to all Organizing Committees for the Olympic Games.”

This article refers to this regulation as the “Osaka Rule”, “IOC Regulation” or “IOC Rule”.

2. Factual background of the case

The claimant in the case decided by the CAS is the *United States Olympic Committee (“USOC”)*, which is the *National Olympic Committee (NOC)* of the *United States*. It is responsible for the US Olympic teams. It is seated in *Colorado Springs*.² The *IOC* is the respondent in this case.³

After the *IOC* approving the Osaka Rule as stated above, it came into force in July 2008. However, no case is known where the Regulation had an impact on any athlete who applied to attend the *Winter Olympic Games* in *Vancouver* in February 2010. It seemed clear, however, that the *IOC Regulation* would have actually impacted a number of athletes around the globe for the *Olympic Games 2012* in *London*.⁴ Moreover, it came to the attention of the *World Anti-Doping Agency (WADA)* that the enactment of the regulation influenced doping adjudications since it came into effect: At least one case was shown, involving a US swimmer that tested positive for doping, in which the arbitration panel appeared to have fixed the suspension at exactly six months in order to avoid the application of the *IOC Regulation*.⁵

Subsequently, the applicability of the *IOC Regulation* was subject to arbitration in the *United States*. In the case of *Mr. LaShaun Merritt* - an American track and field athlete and 2008 *Beijing* double gold medalist - the *AAA Panel* found besides material mitigating circumstances, which allowed reducing the usual suspension, that “the *IOC Regulation* could not be used to prevent Mr. Merritt from competing in the 2012 Olympic Trials or from having his name submitted from entry to the Olympic Games.”⁶ In the case of *Ms. Jessica Hardy* - an American swimmer -, after a national arbitration panel sentenced her to a one-year suspension in shorting an usual minimum suspension of two years and declaring “that it would be manifestly unfair and a grossly disproportionate penalty for *Ms. Hardy* to be subject to the application of the *IOC Regulation*, which had come into effect only three (3) days prior to her positive drug sample”, the *CAS* upheld the suspension on appeal of *WADA* and subsequently of *Ms. Hardy*. Afterwards, however, the *IOC* declared that it would not apply the *IOC Regulation* to *Jessica Hardy*.⁷

The legal situation in the *Merritt* case particularly put the *USOC* into a dissoluble situation: On the one hand, the competent *AAA panel* had declared “that Mr. Merritt must be allowed to compete at the 2012 Olympic Trials and, if he qualified, the *USOC* must assign him to its Olympic Team.” On the other hand, it was clear that the *IOC* would not acknowledge a nomination of *Mr. Merritt* by the *USOC* due to the *Osaka rule*.⁸

Basically both parties made a commendable decision: They “recognized that there was considerable uncertainty facing the world’s aspiring Olympic athletes and their national Olympic committees because of the *IOC Regulation*. In recognition of these concerns and to their credit, in April 2011 the parties voluntarily entered into an Arbitration Agreement [...]”.⁹ The main objective of this arbitration agreement was to gain a binding decision of the *CAS* regarding the enforceability of the *IOC Regulation*.¹⁰

II. The decision of The Court of Arbitration for Sport

On October 4 2011, the competent *CAS Panel* rendered its decision in the arbitration case. It declared “[t]he *IOC Executive Board’s* June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in

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1 USOC v. IOC, CAS Arbitration Award of 10/4/2011, No. CAS 2011/O/2422, sec-

tion 2.2, available at <http://www.tas-cas.org/>. A closer look on the “Osaka Rule” and its background takes DANIEL GANDERT, THE BATTLE OVER THE OSAKA RULE, INTERNATIONAL SPORTS LAW JOURNAL, 2012:1-2, 109.

2 USOC v. IOC, supra, section 1.1.

3 USOC v. IOC, supra, section 1.2.

4 USOC v. IOC, supra, section 2.3.

5 USOC v. IOC, supra, footnote 3.

6 USOC v. IOC, supra, section 2.4.

7 USOC v. IOC, supra, section 2.5. For more background on these cases, especially the fact that the athletes may have exercised due diligence and may therefore seem “unduly punished”, see GANDERT, supra, p. 109, 113, 115.

8 USOC v. IOC, supra, section 2.6.

9 USOC v. IOC, supra, section 2.7.

10 USOC v. IOC, supra, section 2.9 - 2.10.

the next Olympic Games following the expiration of their suspension [...] invalid and unenforceable.” The *Panel* presented its reasoning in 23 single-spaced pages, which superficially looked like a well-substantiated opinion. After introducing the Parties (1.), the *Court* retells the Factual Background (2.), gives an overview on the Proceedings before itself (3.), states the Constitution of the *Panel* and the Hearing (4.) and the Jurisdiction of the CAS (5.), identifies the Applicable Law (6.), comes finally to the Substantive Arguments (7.) and ultimately to the Panel’s Findings on the Merits (8.). The last topic deals with the Costs (9.). The *Court* structured its “Findings on the Merits” - as a matter of course the most important section of the decision - like this: (i) Scope and Application of the IOC Regulation, (ii) Proper Characterization of the IOC Regulation as an eligibility rule or a sanction, (iii) Is the IOC Regulation consistent with the WADA Code and the OC?, (iv) Other Arguments raised by the USOC, (v) Conclusion.

As the factual background is presented in this article to the extent required for understanding the reasoning of the court, this analysis will particularly focus on the actual legal reasoning of the *Court* as presented under “8. The Panel’s Findings on the Merits”. As far as the “Substantive Arguments” are addressed, their objective will be presented directly in accordance with the legal analysis.

Essentially, the *Court* holds that the Osaka Rule imposes a sanction on the athlete and is not an eligibility rule¹¹. It further holds that the imposition of another sanction for the same doping offense is inconsistent with and contrary to the WADA code¹². As the inconsistency of a separate anti-doping sanction of the *IOC* as allegedly imposed by the Osaka Rule with the WADA code cannot be disputed (as the list of actual sanctions for doping offenses is clearly conclusive and the imposition of an actual additional sanction would violate the *ne bis in idem*-principle), this analysis shall focus on the findings of the *Court* that the Osaka Rule actually imposes an (additional) sanction on the athletes and does not enact an “eligibility rule” for participants of *Olympic Games*.

To justify this finding, the *Court* first defines the “Scope and Application of the IOC Regulation”¹³. After describing the impact of the regulation on certain athletes, it holds an interim result important for its argumentation scheme: “The effects of a suspension under the WADA Code that overlaps with an Olympic Games or the qualification for that Games and the application of the IOC Regulation are identical.”¹⁴ The *Panel* then stresses the necessity to “determine whether IOC Regulation is a sanction, as the USOC argues, or is an eligibility rule, as the IOC submits[.]” “[i]n order to assess some of [the USOC’s] arguments.”

This leads to the core of the decision: The paragraphs on the “Proper Characterization of the IOC Regulation as an eligibility rule or a sanction”¹⁵. Here the *Court* gives a surprising start: It states that a *CAS* Advisory Opinion¹⁶, requested by the *IOC*, concluded that the now disputed IOC Regulation was an eligibility rule. However, it is true that the proceedings leading to such an Advisory Opinion are not adversar-

ial and the now deciding *Panel* “was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs.”¹⁷

After briefly mentioning another confidential *CAS* Advisory Opinion, which reasons are said to be inapplicable in the current case¹⁸, the *Panel* points to other *CAS* jurisprudence¹⁹: “A *CAS* Panel noted in *RFEC & Alejandro Valverde v. UCI* (CAS 2007/O/1381 at paragraph 76)²⁰ [...] that a common point in qualifying (eligibility) rules is that they do not sanction undesirable behavior by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete.”²¹

From this prior *CAS* jurisprudence the *Panel* derives an important conclusion for its argumentation: “In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behavior on the part of the athlete. Such a rule, whose objective is to sanction the athlete’s prior behavior by barring participation in the event because of that behavior, imposes a sanction.” The *Panel* then refers to another opinion that addressed the issue of whether the *IOC* can refuse entry into the *Olympic Games*²². The *Court* in this case sums this decision up: “The *Panel* in *Prusis* said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense.”²³

After this introduction the *Panel* turns to the appropriate characterization of the IOC Regulation. It compares the language of the WADA Code on ineligibility (“the Athlete [...] is barred for a specified period of time from participating in any Competition”)²⁴ and of the IOC Regulation, which says that athlete “may not participate, in any capacity, in the next edition of the Olympic Games”²⁵ (emphasis by the *Panel*). From this the panel derives: “The essence of both rules is clearly disbarment from participation in an event or a number of events.”

In the next paragraph the *Panel* determines “that the Olympic Games come within the definition of Competition under the WADA Code”²⁶ - an unsurprising determination. It then draws its final interim holding: “Ineligibility is a sanction according to the provision of Article 10 of the WADA Code”²⁷, which reads:

“The period of Ineligibility imposed for a violation of Article 2.1 [Presence of Prohibited Substance or its Metabolites or Markers], Article 2.2 [Use or Attempted Use of Prohibited Substance or Prohibited Method] or Article 2.6 [Possession of Prohibited Substances and Prohibited Methods] shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Article 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
First violation: Two [2] years Ineligibility”²⁸

The *Panel* goes further: “The OC in Rule 44”²⁹ (which reads: “The World Anti-Doping Code is mandatory for the whole Olympic Movement”) “makes the WADA Code mandatory. Therefore, the *Panel* finds that a reading of the two documents together makes the IOC Regulation, insofar as it makes an athlete ineligible to participate in a Competition - i.e., the Olympic Games -[,] a sanction.”³⁰

The *Court* then grapples with the counterargument of the *IOC* that “the Regulation cannot be disciplinary in nature, because the *IOC* only has disciplinary jurisdiction and powers over Olympic athletes during the Olympic Games.”³¹ The *Panel* holds that: “As the discussion above demonstrates, the ineligibility caused by the IOC Regulation falls squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation is used to bar the participation of an athlete, the effect of the regulation is disqualification from the Olympics and would be undeniably disciplinary in nature. Furthermore, the athlete would certainly perceive such a disqualification as a sanction, much like a suspension under the WADA Code. Therefore, the *Panel* is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction.”³²

11 USOC v. IOC, supra, section 8.19.

12 USOC v. IOC, supra, section 8.26.

13 USOC v. IOC, supra, section 8.1 - 8.4.

14 USOC v. IOC, supra, section 8.4.

However, the *Court* admits in the following sentence, „[a] WADA Code suspension, of course, also has a broader effect as it bans participations in other competitions as well.”

15 USOC v. IOC, supra, section 8.7 - 8.19.

16 CAS Advisory Opinion of 6/11/2009, No. TAS 2009/C/1824, available at <http://www.tas-cas.org/>.

17 USOC v. IOC, supra, section 8.7.

18 USOC v. IOC, supra, section 8.8.

19 USOC v. IOC, supra, section 8.9.

20 This opinion was rendered in French only and is not available in English on the CAS website. It was, however, not

issued by a *Panel* but by a single arbitrator.

21 USOC v. IOC, supra, section 8.9.

22 PRUSIS & LATVIAN OLYMPIC COMMITTEE (LOC) V. IOC, CAS ad hoc Division (O.G. Salt Lake City) Arbitration Award of 2/5/2002, No. 02/001, available at <http://www.tas-cas.org/>.

23 USOC v. IOC, supra, section 8.10.

24 USOC v. IOC, supra, section 8.12.

25 Id.

26 USOC v. IOC, supra, section 8.13.

27 USOC v. IOC, supra, section 8.14.

28 USOC v. IOC, supra, section 6.9.

29 USOC v. IOC, supra, section 8.14.

30 USOC v. IOC, supra, section 8.14.

31 USOC v. IOC, supra, section 8.15.

32 USOC v. IOC, supra, section 8.15.

The *Panel* then determines that this finding holds, although athletes are not barred from other Competitions than the *Olympic Games* by the Osaka Rule³³. It then notes “that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition. Being prevented from participating in the Olympic Games, having already served a period of suspension, certainly has the effect of further penalizing the athlete and extending that suspension.”³⁴

The *Court* then comes to its final conclusion: “For all of the foregoing reasons, having regard to the objective and purpose of the IOC Regulation and to its scope and application, the Panel is of the view that the IOC Regulation is more properly characterized as a sanction of ineligibility for a major Competition, i.e. as a disciplinary measure taken because of a prior behavior, than as a pure condition of eligibility to compete in the Olympic Games. Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction.”³⁵

III. Critical Review

The reasoning of the *Panel* is poor and consists of certain and material weaknesses. The whole argumentation scheme is truly formalistic, has some inconsistencies and shows a remarkable lack of consideration of substantive distinctions between sanctions and eligibility rules.

Initially, to reach this conclusion, it is necessary to break down the argumentation chain of the *Panel* down to single argumentation steps, as the argumentation itself is not very stringent. Principally, the *Panel* argues in this order:

1. The Osaka Rule actually can bar athletes from participating in the *Olympic Games*, by declaring them ineligible (see section 8.4).
2. In the WADA Code ineligibility means that an athlete is barred from participating (see section 8.12).
3. The Osaka Rule uses a very similar language and therefore WADA Code eligibility and Osaka Rule have the same essence (id.).
4. According to Art. 10 of the WADA Code and its definitions “ineligibility” is a sanction (see section 8.13).
5. The WADA Code is mandatory under Olympic Charter Rule 10 and therefore the “reading of the two documents together” makes the Osaka Rule a sanction (see section 8.14).
6. Athletes perceive a disqualification under the Osaka Rule like a suspension under the WADA Code (see section 8.15).
7. The Osaka Rule has the nature and the inherent characteristics of a sanction (id.).

Preface.

Prior to the discussion of any of these argumentation steps in detail, it is further necessary to comment on some general and possibly *obiter dicta* remarks of the *Panel* regarding the distinction between sanctions and eligibility rules, which the *Panel* lays out in the very beginning of its reasoning but never truly applies to its argumentation scheme. These paragraphs (see sections 8.7 to 8.10) seem just to have the purpose to preface the actual findings and possibly to bias the reader in a certain direction.

There, the *Court's* assertion, that another panel in *Prusis*³⁶ said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense, is plainly wrong. The panel in *Prusis* held in section 15 of its opinion of an ad hoc-panel decision regarding access to the *Olympic Games* in *Salt Lake City*:

“In the absence of a clear provision in the Olympic Charter and in the Rules of the relevant International Federation entitling the IOC to intervene in the disciplinary proceedings taken by that International Federation, it is the Panel's opinion that an athlete has a legitimate expectation that, once he has completed the punishment imposed on him, he will be permitted to enter and participate in all competitions absent some new reason for refusing his entry. If it were other-

wise, there would be a real risk of double jeopardy, as this case has illustrated. As became clear from statements made by the IOC's representatives during the hearing, the effect of refusing Mr. Prusis entry was to impose a further sanction on him for the same offence. The Panel was told that it was the role of the IOC to ‘come to a certain common treatment between the different sports’ and that ‘three months compared to the normal two years or even life ban in some sports was not acceptable’.”³⁷

That, of course, reads rather differently than the rendition of the *Panel*. The *Panel* in *Prusis* describes obviously only a risk of double jeopardy. Moreover, the whole paragraph is presented under the prerequisite of the absence of an empowerment to the *IOC* to intervene in the disciplinary action of an International Federation. Such a provision may now be seen in the later enacted Osaka Rule. In addition: The court accepts this argumentation for its reasoning, although in *Prusis*, the will of the *IOC* to penalize the athletes comes openly to light here. This circumstance is in section 8.8 - among others - a reason to declare the confidential Advisory Opinion to be distinct from the current case. *Prusis* was clearly a completely different case: That double jeopardy is at risk, if the *IOC* tries to prolong an existing and elapsed suspension (which it deems insufficient) by denying an athlete to participate in the Olympic Games (and even argues that way!), is beyond any doubt.

The argumentative impact, which the *Panel* derives from that, for denying the Osaka Rule being an eligibility rule, is not convincing despite the fact that it is not clear where this argument is tied to in the *Panel's* argumentation scheme. It says that rules that bar athletes from participating due to prior undesirable behavior are in conflict with eligibility rules. This is inconsistent and a circular argument. Every sanction and eligibility can only tie on any “human behavior” - be it “desirable” or “undesirable”, be it conduct or forbearance. So an indisputable eligibility rule for a pole vaulter to have reached a minimum height of 7 m in an acknowledged competition clearly links to his desirable conduct (gaining the requested performance), and an equally undisputable eligibility rule for any Olympic competitor to sign an acknowledgement of the *Olympic Charter* and the subordinate competition regulations to his undesirable forbearance (failure to sign), or the eligibility rules for freshmen athletes in US colleges link to academic progress³⁸, which clearly only can result from the student's “behavior”. In stressing the terms of “undesirable behavior” the *Panel* misreads the ruling of the *Panel* in *Valverde*. As shown above, everything is linked to human behavior, meaning that the distinction that the *Panel* in *Valverde* actually makes is whether the prior “undesirable behavior” is sanctioned by the eligibility rule. That raises the question what the purpose and objective of the eligibility rule is and not the question whether the prior behavior was undesirable or not.

In addition, the *Court's* definition of an eligibility rule (“Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete.”), which it takes from the *Valverde* decision,³⁹ is too narrow. Eligibility rules can, in my opinion, be better described (in a manner that also extends beyond the realm of sports) as follows: “The sole purpose of eligibility rules and other contest regulations is to keep competition equitable, to maintain activities in proper perspective and to achieve a minimum standard of performance.” It must not be determined which definition is better or more correct, as the challenged *IOC* Regulation is an eligibility rule under either definition, as shown above.

Now, it is useful to consider the single argumentation steps in particular (the subsequent steps refer to the order of the arguments as listed above):

33 USOC v. IOC, *supra*, section 8.16.

34 USOC v. IOC, *supra*, section 8.17.

35 USOC v. IOC, *supra*, section 15.

36 For more factual background on the *Prusis* decision, see GANDERT, *supra*, p. 109.

37 PRUSIS & LATVIAN OLYMPIC COMMITTEE (LOC) V. IOC, *supra*, section 15.

38 WEILER ET AL., *supra*, p. 794.

39 See p. 6.

Step 1.

The finding that the Osaka Rule actually can bar athletes from participating in the *Olympic Games* is truly trivial. That is its purpose.

Steps 2 und 3.

Also the finding that “ineligibility” in the WADA Code means that an athlete is barred from participating is very basic. The same is true for the finding that the Osaka Rule uses a very similar language.

Out of this reasoning, the Panel forms one of its main arguments that “the essence of both rules is clearly disbarment from participation in event or a number of events.” This argument seems alarmingly hollow. The *Panel* derives its conclusion that a suspension under the WADA Code and ineligibility under the IOC Regulation have the same effect, from a comparison of the language. The *Panel* finds it remarkable that the wording is alike and emphasizes here the word “participate”. First, it must be noted that *Panel* puts a stress on the common verb, which is used by virtually everybody - either in legal or vernacular registers - to describe an athlete’s attendance in a competition. It is quite natural to use this language when a restraint of an athlete’s attendance is to be described. Then, with this emphasizing, the *Panel* completely neglects the rest of the language in both sentences, which demonstrate substantive differences. As a result, the conclusion of the *Panel* that “The essence of both rules is clearly disbarment from participation in an event or a number of events.” is clearly wrong. Only the “ineligibility” under the WADA Code, a suspension, means disbarment from a number of events. The IOC Rule disbars the athlete simply from a single event, namely the *Olympic Games*. And this is a material difference between the two disbarment regulations: A suspension bars the athletes from any competition during the suspension period, which makes it rather a sanction: The athlete is sanctioned for his/her misconduct - s/he may not participate in any sports event at all, because s/he did not respect the basic rules of fair conduct in Sports. The IOC Regulation bars the athlete from participation in the *Olympic Games* (once for a single specific event) only: This is rather an eligibility rule. The ineligibility for participation in the *Olympic Games* is tied to the potential risk stemming from a pre-convicted doping offender spoiling the *Olympic Games* and their Olympic ideals of fair play with their continued or recidivistic usage of performance enhancing drugs. The only mutual essence is disbarment.

However, it is highly remarkable the extent to which the language focused upon by *Panel* ignores the clear language of the WADA Code in this context. In Appendix One of the WADA Code (as quoted by the Panel in section 6.10) “ineligibility” is exactly defined as barring the athlete “for a specified period of time from participating in any **Competition** or other activity” (emphasize added). That means that the Panel makes its finding contrary to the explicit language of the WADA Code, which it itself invokes, and from comparing apples and oranges. It is surprising that the *Panel* does this in full self-awareness: As noted in footnote 14, the Court has well realized the material differences between the effects of the Osaka Rule and a WADA suspension in section 8.4 of its opinion. However, it is merely ignored in further argumentation.

Step 4.

It is indisputable that “ineligibility” is a sanction according to Art. 10 of the WADA Code and its definitions. It is notable, however, that “ineligibility” due to these definitions is a disbarment of an athlete from any event.

Step 5.

It cannot be doubted that the WADA Code is mandatory for the IOC after Rule 44 of the Olympic Charta adopted it. However, it remains completely unclear why “a reading of the two documents together” makes the Osaka Rule a sanction. This is a mere assertion of the *Panel* that is not founded upon any evidence whatsoever. As demonstrated,

the Osaka Rule does just not fall into the WADA Code meaning of “eligibility”, because it disbars the athletes only from the Olympic Games and not “from any event for a specific period of time”. And even if the WADA Code would, after its adoption, control the whole language of the IOC, its Olympic Charta and its by-laws to an extent that a so called “ineligibility” could then considered to be a sanction, it is still a widely recognized principle that the mere label of a matter does not determine its substantive contents or effect (*falsa demonstratio non nocet*). Decisive is the substantive background.

To find the Osaka Rule to be a sanction, it would have been the *Panel*’s duty to determine the substantive effect of and the intention standing behind the Osaka Rule. Regrettably there are no substantial findings in the *Court*’s opinion apart from truly apodictic assertions that do not find any support in the academic literature.

The discussed assertion of the *Court* does not receive any further justification by simply repeating it in section 8.15 of the opinion. As the above analysis has shown, however, the IOC Regulation does not fall “squarely” within the nature of sanctions provided by the WADA Code. At this point the *Panel* has not delivered any substantial analyses of the *nature* of the sanctions by the WADA Code at all. And as shown above, the IOC Regulation does not even fall within the language of the WADA Code sanctions due to its explicit definitions.

Step 6.

The next two steps are, according to the Panel, just confirmation of the finding that the Osaka Rule is truly a sanction. Again, the Panel is apodictic and its argumentation unsubstantiated.

In this paragraph the *Panel* focuses mainly on the perception of the effect of the application of the Osaka Rule by the athlete. But the perception of a measure cannot be decisive for its nature. The fact, that the athlete perceives the measure as a sanction, does not render the measure a sanction at all. If that were true for sanctions in general, we could, for example, decide that a prison sentence is not punishment, because the prisoner considers it unjust, or imagines that it is for his own protection.⁴⁰ Moreover, the fact that a few people enjoy being flogged, or are in the fortunate position of being able to easily afford a fine, does not mean that these measures are not punishment.⁴¹ In addition, following this idea, it would be virtually impossible for a state to enact other rules of behavior that are not punishing at all. Requirements like public permits (like building permissions or driver’s licenses) or any measure for the protection against threats to public safety are certainly perceived by the addressee as the infliction unwelcome (at least an unpleasant duty) and could thus be perceived as a “punishment”, although it is clearly not by definition.

Step 7.

In section 8.16, the *Panel* concludes: “Therefore, the Panel is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction.” This is surprising because the Panel has not identified a single “inherent characteristic” of sanction in its opinion at all, besides those mentioned in this section, namely their effects on and their perception by the addressee, plus the fact that this sanction is to be “undeniably disciplinary” [sic!]. The opinion therewith falls incredibly short on a discussion of the scholarly concepts developed towards this subject. Referring to the “undeniably disciplinary” character of the matter is - despite the alarming usage of the word “undeniably” - a circular argument: that is exactly what is to be shown. Moreover, referring to these “characteristics” of sanctions in the latter part of the opinion raise doubts on its consistency: The *Panel*’s main grounds for finding the Osaka Rule a sanction were language arguments and the “reading together” of the two “documents”.

The question remaining is: Has the Osaka Rule the nature and the inherent characteristics of a sanction? The answer to this question gives the ultimate determinant if the Osaka Rule is a sanction or something different.

⁴⁰ NIGEL WALKER, WHY PUNISH? 3 (1991).

⁴¹ WALKER, *supra*, p.1.

In this context the academic literature has identified certain universal features of punishment.⁴² Although its numbers vary among the different authors, a consistent scheme of general requirements remains with all sources. These are underlaid by a shared conception of punishment, regardless where or by whom they are imposed: Society (state), Christian church, schools, colleges, professional organizations, clubs, trade unions or armed forces. They may have different names, though, in the different areas of their application.⁴³ These features apply even and explicitly to sport sanctions.⁴⁴ According to *Walker*, these - his seven - features of punishment are as follows:

- “[a]. [Punishment] involves the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death. [...]”
- “[b]. The infliction is intentional and done for a reason. [...]”
- “[c]. Those who order it are regarded - by members of the society, organization, or family - as having the right to do so. [...]”
- “[d]. The occasion for the infliction is an action or omission which infringes a law, rule, or custom. [...]”
- “[e]. The person punished has played a voluntary part in the infringement, or at least his punishers believe or pretend to believe that he has done so. [...]”
- “[f]. The punisher’s reason for punishing is such as to offer a justification for doing so. It must not be mere sadism, for example. [...] A justification is called for because what is involved is the imposition of something unpleasant regardless of the wishes of the person on whom it is imposed (unlike dentistry, surgery, or penance, from which the sufferer would hope benefit).”
- “[g]. It is the belief or intention of the person who orders something to be done, and not the belief or intention of the person to whom it is done, that settles the question whether it is a punishment. [...]”⁴⁵

For the determination whether the IOC Regulation imposes a sanction or is an eligibility rule, it is necessary to analyze whether these features of punishment apply to the IOC Regulation, when it is applied.

- a. As already mentioned by the *Penal*, the Osaka Rule imposes **something unwelcome** to the athlete: He receives disbarment from one of the most prestigious competitions in global sports.
- b. This inflection is done **intentionally**, namely by the legal order of the IOC Rule, and for a **reason**. It is notable, however, at this point that this reason is not the initial doping offense, but to an established and incontestable suspension of certain severity due to a doping offense. This is a clearly distinct connecting factor.
- c. The third feature is questionable. Although it is beyond reasonable doubt that the ultimate prompting authority of the disbarment, the *IOC*, is deemed to **have the right** to regulate the participation of its own Games, the question is whether this consequence is “ordered” in the sense of the defined feature. “Ordering a punishment” necessarily implies an individualized decision of sanction rendered by a Judge, Court or Panel after some kind of investigative and recognitional proceedings. In contrast to this requirement, the IOC Rule orders its disbarment effect as an abstract-general legal proposition for anybody who complies with its prerequisites. Therefore, in the case of IOC Rule, there is no specific and individualized “punishment ordered”, its effect seems to be merely a general consequence.

⁴² WALKER, supra, p. 1-4; ANTHONY FLEW, THE JUSTIFICATION OF PUNISHMENT, *Philosophy*, 3 (1954), 291 ff. (reprinted in H.B. ACTON (ed.), THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS (1969)); JOEL FEINBERG, THE EXPRESSIVE FUNCTION OF PUNISHMENT, *The Monist*, 49: 397-423; HUGO ADAM BEDAU, FEINBERG’S THEORY OF PUNISHMENT, BUFFALO CRIMINAL LAW REVIEW, Vol. 5:103, 2001, p. 103; STANFORD ENCY-

CLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/punishment/> (viewed 4/30/2012) - under section “2. Theory of Punishment”, Headline “Justification of Punishment”.

⁴³ WALKER, supra, p. 1.

⁴⁴ WALKER, id.; FLEW, supra.

⁴⁵ WALKER, supra, p. 1-3.

⁴⁶ Bedau, p. 115.

⁴⁷ Olympic Charta, http://www.olympic.org/Documents/olympic_charter_en.pdf (last viewed 4/30/2012), p. 10.

- d. The requirement that the **occasion** for the infliction is to be a behavior which **infringes a law, rule** or alike, also shows that the IOC Regulation does not really fall within the punishment concepts. The IOC Rule simply does not tie to some infringing behavior (the actual doping offense), but links to a later constituted suspension due to the prior rule-infringing behavior. Thus, the IOC Regulation fulfills this prerequisite indirectly at best. Therewith this factor seems rather to be in line with a eligibility rule determination.
- e. The same arguments apply to the feature that the person to be punished has to play a **voluntary part** in the infringement. As just mentioned above, the IOC does not tie its rule to the specific infringing behavior that ultimately led to his suspension punishment. This underlines the tendency that the IOC Rule does not really fit into the common punishing scheme. However, professional athletes must be and will always be aware of the fact that a behavior contrary to common ethical standards in sport - doping - can lead to serious sanctions and further consequences likewise.
- f. This feature is not self-explanatory. *Feinberg* and *Bedau* found that one prime **justification** for punishment is that “proper punishments [...] express (often through their conventional symbolism) resentment, disapproval, condemnation or reprobation.”⁴⁶ According to this, the justification for a punishment is the community’s disapproval of the infringement of the community’s rule. This requirement is highly problematic for the Osaka Rule. Rather than condemning the athlete’s undesired behavior (this has already been done by the suspension rendered by the competent doping tribunal), the *IOC* invokes preventive reasons for disbarment a prior suspended athlete from the *Olympic Games* and thus confers no further, extra, or new condemnation of his prior unlawful behavior on the athlete. Beside this undoubted preventive intention of the *IOC*, the rule’s link not to a doping offense but to a subsequent sentencing decision is a forceful formal argument. Invoking the clearly preventive intention of the *IOC* there is this feature substantially missing as well in order to consider the effect of the Osaka Rule a sanction. One cannot find any further disapproval or condemnation in the act of disbarment the athlete from the *Olympic Games* by the *IOC*, when this disbarment does not render a (further) verdict against the athlete but rather expresses concerns of prevention.
- g. With this feature, one can make the most forceful argument against a consideration of the IOC Rule as a punishment. Decisive for the determination whether the action conferred to the athlete is a **punishment** is the **intention** of the “punisher”. It is my conviction that the *IOC* persuasively can show that its intention underlying the IOC rule is not to promote a further punishment on a doping offence, but to constitute an eligibility rule with an important and reasonable preventive effect for anti-doping policy reasons. The *Panel* itself holds the *Olympic Games* are “paramount” for every single athlete engaged into Olympic sports. And so are - at least - the intentions which (hopefully) still underlie the *Olympic Games*. According to the Olympic Charta one of the “Fundamental Principles of Olympism” is this - the first principle:

“Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.”⁴⁷

It is quite clear in this outlined environment that there is no space for doping or doping offenders. It is not only a right of the *IOC* to prevent its games from profanation with doping; it is obviously its finest duty. Doping in sports makes the underlying principle of a competition of sport capabilities a mockery because it takes away the basis for such a comparison: the artificially unenhanced and purely training-based physical capabilities of human beings. And, as a matter of course, doping is considered “cheating” and therefore clearly inconsistent with “universal fundamental ethical principles”.

Therefore, the protection of these basic values of sports and the Olympic Ideal is a legitimate interest of the *IOC*. Thus, the intention to prevent threats to these values by regulating admission to the Olympic Games by pre-convicted doping offenders, who are more likely to backslide

than non-offenders, clearly reflects a preventive and thus not a repressive - punishing - intent of the lawmakers.

Other Aspects.

The remarks of the Panel in section 8.17 are, in part, revealing. The Panel makes no effort to mask the “true intentions” for the outcome of its decision. In my opinion, the real, at least economic, reasons for declaring the Osaka Rule invalid and unenforceable can be found in this paragraph. While stating that participation in the *Olympic Games* is paramount for any athlete, “that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition”, and that disbarring the athlete from these Games after his/her “basic” suspension has elapsed, would mean to “extend his punishment”, the Panel again considers merely the perspective of the athlete. It has already been shown that this perspective is not decisive. It is of course true that disbarment from the *Olympic Games* means a considerable disadvantage to an athlete. Naturally, this disadvantage lies not only in the deprivation of the Olympic “athletic competition” but certainly in the “success” part of it: A successful participation in the Olympic Games is for most athletes, especially from fringe sports, the only way to gain the necessary public attention that might ultimately lead to monetary valuable endorsement deals and promotional activities. The athletes’ interests herewith protected by the Panel are manifest economic expectations.

In its final conclusion the Panel invokes “the objective and purpose” of the Osaka Rule and “its scope and application”. With - as shown - falling vastly short on the “objective and purpose” side of the argumentation the Panel’s result continues, as before, being apodictic. Finally, the assertion that the rule “operates as, and has the effect of, a disciplinary sanction” is once again not underlaid by sufficient arguments or merely based on the impermissible view of the athlete and his/her perception of the measure.

Conclusion (on sanction versus eligibility rule).

Thus, the conclusion is that the exclusion of an athlete from the *Olympic Games* based on the Osaka Rule does not impose a sanction on the athlete. It is not a repressive punishment that was determined by a tribunal in an individual case assessment. It is an abstract-general eligibility rule that bars athletes from participating in the *Olympic Games* for preventive reasons: It tries to minimize the risk of participation of doped athletes by barring those who have already been convicted on these offense, which raises the risk of reoffending in the specific athlete. Therefore, the Osaka Rule does not link to a certain doping offense record, but to an established and incontestable suspension of certain severity due to a doping offense.

Alleged violation of the *ne bis in idem*-principle.

The Osaka Rule, as an eligibility rule, does not infringe the basic principles of “*ne bis in idem*” or “double jeopardy”.

These principles basically guarantee the same range of rights against sentencing state action and differ in their labels only. “*Ne bis in idem*” - under European and German doctrine - prevents a criminal Court or tribunal to convict a person twice for the same offense⁴⁸, meaning for a specific set of circumstantial facts. This specific set of circumstantial facts is usually defined as the “whole historical event, which is usually

considered a single historical course of actions the separation of which would seem unnatural”⁴⁹. It is so protected by Art. 103 subsection 3 of the German Constitution (Grundgesetz):

“Nobody shall be punished multiple times for the same crime on the base of general criminal law.”⁵⁰

The same principle is in force by Art. 54 Schengen Agreement within the whole European Union at the supranational level, meaning that valid convictions and acquittals by other European States bar national courts from punishing an alleged offender for the same crime.

In the United States the principle of “double jeopardy” is provided in the Fifth Amendment to the *United States Constitution*:

“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[...].”

According to the jurisdiction of the *United States Supreme Court*, the Double Jeopardy Clause of the Constitution encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment.⁵¹

Before one turn to the question whether disbarment from the *Olympic Games* by the Osaka Rule due to a foregoing suspension may violate this principle, there remains the question why this principle is applicable to the relationship between the athlete and the different associations, which basically is nothing else than a contract subject to private law. Fundamentally, in either legislation, the constitutionally guaranteed rights are safeguards against undue state action, in this case criminal jurisdiction in particular. It is a bedrock principle of US constitutional law that was held ever since “The Civil Rights Cases” that “[c]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority [...]. The wrongful act of an individual [...] is simply a private wrong [...].”⁵² Also in the German constitutional theory the constitutently grounded so-called “basic” (or: “fundamental”) “rights” are historically and basically rights, which are mainly designed to protect individuals against state actions. However, this principal has been extremely expanded by the jurisdiction of the *German Federal Constitutional Court* (*Bundesverfassungsgericht*). In cases where similar protection is needed for individuals from mostly superior entities (regularly vastly exceeding the individual’s bargaining power) the “basic rights” of the German Constitution can be applied to private law relations and contracts under the doctrine of the “Third Party Effect”⁵³. German courts will regularly find under this doctrine the “*ne bis in idem*”-principle “indirectly applicable” in cases like this and give the principle effect in doing so.

The US American solution for this problem is not too far away from this approach. “It is asserted that [the] wide grant of jurisdiction of the [sport governing bodies] is an attempt to deprive the court[s] of [their] jurisdiction and that such a provision is contained in these agreements, rules, and uniform contract is contrary to public policy. No doubt the decision of any arbiter, umpire, engineer, or similar person endowed with the power to decide may not be use in an illegal manner, that is fraudulently, arbitrarily, without legal basis for the for the same or without any evidence to justify action.”⁵⁴ That essentially means that the Courts under the Common Law will engage in judicial review of arbiter decisions when a basic standard of legal protection is not met by the provided procedures and rules by the sport governing bodies. They would then either declare the challenged arbitration award void or just “read in” the missing basic principle as being agreed into “in good faith” (as a basic and immanent contractual duty) in the contractual relationship between the parties. That makes the principle of “double jeopardy” indirectly applicable under the Common Law as well, at least insofar as Common Law courts would declare void those sport sanctions, that obviously are disregarding the “double jeopardy” principle and would hereby virtually sentence an athlete twice for the same offense.

48 Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] March 31, 1987, 75 BVERFGE 1 (5).

49 Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], February 2, 1968, 23 BVERFGE 91 (102).

50 Beyond its mere language, the clause is constructed to also protect against double jeopardy in the case of an acquittal.

51 NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969).

52 “THE CIVIL RIGHTS CASES”, U.S. V. STANLEY ET. AL., 109 U.S. 3. The Station Action Dichotomy for protection under the 14th Am. was also explicitly

upheld by the US Supreme Court for the area of Sports Law, NCAA V. TARKANTIAN, 488 U.S. 179.

53 Eric Engle, Third Party Effect of Fundamental Rights (Drittwirkung), HANSE LAW REVIEW 5, 165 (2009). For applying fundamental rights in Sports Law to sanctioning decision of associations and clubs, see JAN F. ORTH, VEREINS- UND VERBANDSSTRAFEN AM BEISPIEL DES FUßBALLSPORTS 94 ff. (2008).

54 MILWAUKEE AM. ASS’N. V. LANDIS, 49 F.2d 298.

This principle, however, - in either legislation - does not encompass an absolute right not to subject a historic factual situation to different laws or consequences or to the assessment of different (government) bodies. Similarly, eligibility rules that are tied to a prior conviction (like disenfranchisement or disciplinary action for state officials) have never been successfully challenged⁵⁵ under either “double jeopardy” or “ne bis in idem” reasons. “Disenfranchisement” due to a prior criminal conviction is basically nothing else than imposing an eligibility rule for state elections.

From this outset, a lawful application of the Osaka Rule on an athlete with the effect that s/he is barred from the participation in the Olympic Games, does not violate the principle “ne bis in idem”. This subsequent effect is firstly not a punishment, and secondly constitutes an abstract-general ordered by another and independent body.

However, regarding the undeniable need of protection for individual athletes against superior sport associations, it is worth noting, that - as a matter of course - the athlete who is threatened with the additional effect of the Osaka Rule while the appropriate time of suspension is determined by the competent panel is not unprotected by the law. The Panel that determines the just punishment for the athlete’s doping offense has to take a likely disbaring effect of the Osaka Rule into account for its sentencing decision, namely considering it as a mitigation circumstances and use it in its usual proportionality weighing⁵⁶, where for instance the fact that an athlete exercised due diligence regarding his nutrition is clearly a mitigating factor that may lead to a length of a suspension which does not trigger the “Osaka Rule”.

IV. Conclusion

As shown above, the law did not compel a verdict rendering the Osaka Rule invalid and void. On the contrary, the analysis has shown material deficiencies of the reasoning of the *Panel* that reached this result. That is to some extent surprising, as the *Panel* itself claims that it “was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs.” Some of these “extensive arguments” seem to be missing and their disclosure of them in the opinion might have helped to make the reasoning more convincing and straightforward. However, after the foregoing analyses it can be doubted that these arguments could justify the same outcome for the main reasons shown above: The Osaka Rule does not impose an (additional) sanction on the athlete, because it is not a punishment. Neither meets it the WADA Code definition of

a sanction nor has it the typical features of a punishment. It does not violate the principle “ne bis in idem”. Instead, the Osaka Rule represents a permissible and powerful preventive measure to forestall the disturbing appearance of doping incidents during the *Olympic Games*.

However, the holding the Panel entered into was not surprising. From the policy background the decision of the *CAS* came down in a temporal connection and in a triad with the equally important decisions regarding the invalidity of territory exclusive broadcasting rights in the *European Union*⁵⁷ and player movements of the *FC Sion* disregarding *UEFA*’s corresponding restraints of player movements.⁵⁸

Beyond the complicated problems of the law that arose in all of these cases, these decision have a common theme: They prove a remarkable inclination of the *Court of Justice of the European Union*, of the *CAS* and of the Swiss Civil Courts not only to stress individual legal rights versus collective legal interests of the organized sports, but even to regularly give them priority. That leads to the more general question, if this “eternal balancing in sports law” (individual versus collective rights, that runs like a golden thread through all important contemporary sports law cases) is now and will be in the future at an angle that is in favor for the individual rights of the professional athletes, whose income and living - and that is one of the most important points - would be at stake when the collective rules are always applied as sought by the associations.

If this trend should prevail, that would be a material challenge for all sports associations around the world. Their regulations usually seek the objective of maintaining fairness and equality within their specific sport, and to diminish the influence of money on performance, winning and losing. An overemphasis of individual - and even individual monetary interests - will jeopardize this objective, regardless of how serious one is in individual cases. And this would be a threat to the basic principles of sports, a consequence that few others beyond the most highly paid athletes would desire.

⁵⁵ RICHARDSON V. RAMIREZ, 418 U.S. 24 (1974).

⁵⁶ See for proportionality weighing in doping cases GANDERT, *supra*, p. 112.

⁵⁷ E.C.J., Cases No. C-403/08 und C-492/08, 2011 SpuRt 245 („Murphy”).

⁵⁸ After in temporal connection with the CAS decision the Osaka Rule Swiss state

courts had found those restraints of player movements to be invalid, the CAS has now ultimately upheld their validity. See *UEFA V. OLYMPIQUE DES ALPES SA/FC SION*, CAS Arbitration Award of 1/31/2012, No. CAS 2011/O/2574, available at <http://www.tas-cas.org/>.

Announcement for website(s)

T.M.C. Asser Instituut intensifies collaboration with the University of Stirling

The T.M.C. Asser Instituut is proud to announce that staff at its International Sports Law Center will intensify collaboration with staff at the School of Law of the University of Stirling. Both organisations are internationally recognised for their pioneering initiatives and research activities in the area of International and European Sports Law. By actively seeking synergy in activities and acknowledging complementarity in the respective areas of intervention both organisations intend to further strengthen their individual and collective expertise and impact on the European and International ‘sports law’ world.

As per September 1, 2012 Dr. David McArdle, Senior Lecturer at the University of Stirling, will also become a senior member of the Asser International Sports Law Center. Interest is welcomed from other organisations keen to join and expand this inter-university network particularly in the area of tendering for relevant research projects, with the primary purpose of furthering the knowledge of International and European Sports Law.

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Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem

By Roy Levy*

1. INTRODUCTION

This case is a landmark decision of the Swiss Federal Tribunal¹. For the first time in history, an award of the Court of Arbitration for Sport ("CAS") was annulled by the Swiss Federal Tribunal because it violated 'fundamental principles of law', the so called 'substantive public policy' (Article 190 (2) (e) Private International Law Act ("PILA")). This marks the first time that a CAS award has been overruled based on substantive law and not procedural law.

2. FACTS

The case concerns the Brazilian footballer Francelino Matuzalem da Silva ("Matuzalem"), who (at the time of writing) plays for S.S. Lazio s.p.a., Rome ("Lazio"). In June 2004 he entered into an employment agreement with the Ukrainian football club FC Shakhtar Donetsk ("Shakhtar"). It was a fixed-term agreement for five years, effective 1 July 2004 until 1 July 2009. On 2 July 2007 (i.e. one day after the protected period ended), Matuzalem terminated his contract with immediate effect to play for the Spanish club Real Zaragoza SAD ("Zaragoza"). It is undisputed that he unilaterally and prematurely terminated the contract without just cause.

Shakhtar initiated proceedings with the FIFA Dispute Resolution Chamber ("FIFA DRC") which concluded that Shakhtar was entitled to the payment of EUR 6.8 M². This decision was appealed before the CAS by both parties. On 19 May 2009, CAS issued its decision whereby Matuzalem was ordered to pay to Shakhtar the amount of EUR 11,858,934, plus interest of 5% p.a. accruing from 5 July 2007³. Matuzalem and Real Zaragoza were held jointly and severally liable for the amount. This CAS award became known as the 'Matuzalem case' and many commentaries were written about it due to the fact that it was the first time that CAS, when calculating the claim for damages, took into consideration not only the residual value of a player, i.e. the total amount of wages outstanding under the fixed term contract (as had been applied in the *Webster* case⁴), but also the lost service of the value of Matuzalem, i.e. possible future income of the club with the player such as transfer opportunities. Many commentaries claimed that CAS used Matuzalem to make an example to the football world that contracts must be honored. The CAS panel argued that the purpose of Article 17 of the FIFA Regulations on the Status and Transfer of Players (which deals with the consequences of terminating a contract without just cause) is

*'[...] basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches by a club or by a player[...]'*⁵

The panel further stated that

'The deterrent effect of Article 17 FIFA Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met, and, in any event, the risk to have to pay a compensation for the damage caused by the breach or the

unjustified termination. In other words, both players and club are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of Art. 17 FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in para. 1 of said article that, based on the circumstances of the single case, the panel will consider appropriate to apply.'⁶

The Swiss Federal Tribunal upheld this decision in 2010⁷.

As neither Real Zaragoza nor Matuzalem were able to pay the amount of almost EUR 12 M., FIFA's Disciplinary Committee informed them on 14 July 2010 that (i) disciplinary proceedings would be initiated against them and that (ii) corresponding sanctions would be applied in accordance with Article 64 of the FIFA Disciplinary Code. On 31 August 2010 the FIFA Disciplinary Committee decided that:

'[...]

3. The player Matuzalem Francelino da Silva and the club Real Zaragoza SAD are granted a final period of grace of 90 days as from notification of this decision in which to settle their debt to the creditor.

4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player Matuzalem Francelino da Silva and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal decision having to be taken by the FIFA Disciplinary Committee. [...] Such ban will apply until the total outstanding amount has been fully paid. [...]

On 1 September 2010, Zaragoza transferred EUR 500,000 to Shakhtar. No further payment has been made by either Matuzalem or by Zaragoza.

Both Zaragoza and Matuzalem appealed to CAS. On 29 June 2011, CAS informed the parties that it dismissed both appeals and confirmed the decision of the FIFA Disciplinary Committee⁸. Matuzalem appealed against the CAS award to the Swiss Federal Tribunal.

In the mentioned landmark decision held on 27 March 2012, the Swiss Federal Tribunal annulled the CAS award, ruling that it violates fundamental principles of law (public policy). This is the first time that the Swiss Federal Tribunal has overruled a CAS award based on substantive public policy and not just procedural mistakes. Reason enough to have a better look at the decision and its implications.

3. WHY IS FIFA ALLOWED TO IMPOSE SANCTIONS ON PLAYERS?

The question of whether FIFA has the ability to impose disciplinary sanctions upon football clubs and players for failure to comply with CAS awards has been answered by the Swiss Federal Tribunal in the decision 4P.240/2006/len of 5 January 2007⁹. The Federal Tribunal affirmed FIFA's power to regulate its sport through suitable rules and decision-making processes. Sanctions issued by associations such as FIFA in conformity with its statutes and regulations are not in conflict with

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¹ Judgment of the Swiss Federal Tribunal 4A_558/2011 of 27 March 2012.

² DRC Decision of 2 November 2007.

³ CAS 2008/A/1519-1520.

⁴ CAS 2007/A/1298; 2007/A/1300.

⁵ CAS 2008/A/1519-1520, item 80.

⁶ CAS 2008/A/1519-1520, item 82.

⁷ Judgment of the Swiss Federal Tribunal 4A_320/2009 of 2 June 2010.

⁸ CAS 2010/A/2261 Real Zaragoza SAD v/ FIFA and CAS 2010/A/2263 Matuzalem Francelino da Silva v/ FIFA.

⁹ Appeal against the award CAS 2006/A/1008, Rayo Vallecano de Madrid SAD v/ FIFA.

the state monopoly to enforce monetary judgments. The Federal Tribunal has explicitly upheld such private enforcement systems by deciding that the imposition by FIFA of a sanction against one of its direct (national associations) and/or indirect members (such as football associations and players) for failure to comply with a CAS award or with a decision by one of the FIFA judicial bodies, was not inconsistent with public policy.

The Federal Tribunal confirmed that private associations (such as FIFA) may impose sanctions on their members in cases of violation of their membership obligations¹⁰. For this purpose, an association may set up rules and regulations which its members agree upon, in order to ensure the enforcement of its members' obligations. The consent given by the members is considered given voluntarily even if the dominant position of FIFA makes it impossible for a member to resign if it wants to participate at international matches. The Swiss Federal Tribunal argued that just as liquidated damages mutually agreed by two parties in a contract are valid, the same should apply to sanctions imposed by FIFA on its members.

4. THE DECISION OF THE SWISS FEDERAL TRIBUNAL

4.1 WHY DID THE SWISS FEDERAL TRIBUNAL ANNUL THE CAS AWARD?

The possibilities of annulling CAS awards are very limited. CAS awards may only be overruled by the Swiss Federal Tribunal if one of the following reasons can be maintained (Article 190 (2) PILA):

1. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
2. if the arbitral tribunal wrongly accepted or declined jurisdiction;
3. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
4. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
5. if the award is incompatible with public policy.

As one can see, reasons a) - d) relate exclusively to procedural mistakes and only e) allows the higher instance - to some extent - to verify the substance of the appealed decision. This is why appeals against CAS awards are rarely successful (prior to the Matuzalem ruling, only 6 appeals had been successful).

Public policy has both substantive and procedural contents¹¹. According to the Federal Tribunal the substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant

opinions in Switzerland should be the basis of any legal order. Among such principles are the rule of *pacta sunt servanda* (agreements must be kept), the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables¹². However this enumeration is not exhaustive¹³. A breach of public policy could therefore also be in case of a violation of Article 27 Swiss Civil Code¹⁴ which prohibits contracts which are excessively restrictive on one party¹⁵.

Another essential point which is often forgotten, is that the arbitral award under appeal is annulled only when its result, and not merely its reasons, contradicts public policy¹⁶. The Federal Tribunal has made it clear that even if an award is arbitrary or if it is evidently illicit or obviously based on wrong merits, it does not necessarily violate the principle of public policy unless fundamental legal principles are disrespected¹⁷.

Up to the Matuzalem case, the Swiss Federal Tribunal has uniformly rejected challenges to the merits of a CAS panel's decision. Although a CAS award may be challenged on the ground that it is incompatible with Swiss substantive public policy, no party has successfully asserted this argument in an appeal before the Federal Tribunal¹⁸. It declared that this defense '[m]ust be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.'¹⁹ It has ruled that '[e]ven the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.' In the case of *Gundel*, the Swiss Federal Tribunal stated that this standard is '[m]ore restrictive and narrower than the argument of arbitrariness.'²⁰ It held that doping rules prohibiting the use of substances that allegedly are not likely to affect a horse's racing performance do not violate public policy simply because '[t]he norms prescribed by the regulations [...] might be incompatible with certain statutory or legal provisions.'²¹

As a side note, procedural public policy applies to all fundamental procedural mistakes which do not fall under any of the categories a) - d)²². It was not argued that the case at hand would be in violation of procedural public policy.

4.2 WHAT WERE THE ARGUMENTS OF THE SWISS FEDERAL TRIBUNAL?

First, the Swiss Federal Tribunal stated that the personality of the human being requires as a fundamental legal value, the protection of the legal order. In Switzerland it is protected by the constitution through the guarantee of the right to personal freedom (Article 10 (2) Swiss Federal Constitution), which protects the elementary manifestations of the expression of personality²³. The free expression of personality is also guaranteed among other by the constitutional right to economic freedom, which contains, in particular, the right to choose a profession freely and to access and exercise an occupational activity freely (Article 27 (2) Swiss Federal Constitution)²⁴. The free expression of personality is not only protected against infringement by the state but also by private persons. Despite the freedom of contract, Article 27 of the Swiss Civil Code (private law) stipulates that a person may not enter into a contract which is excessively binding or which otherwise limits the person's freedom in an excessive manner. The principle contained in Article 27 (2) of the Swiss Civil Code belongs to the important generally recognized order of values which, according to dominant opinion in Switzerland, should be the basis of any legal order.

A contractual restriction of economic freedom is considered excessive within the meaning of Art. 27 (2) Swiss Civil Code when a person is subjected to another person's arbitrariness, gives up his economic freedom or limits it to such an extent that the foundations of his economic existence are jeopardized²⁵. However, public policy is not to be con-

10 Michael Riemer, *Sportrechts-Weltmacht Schweiz, Causa Sport*, 2004, p. 106.

11 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.1 p. 392; 128 III 191 at 4a p. 194; 126 III 249 at 3b p. 253 with references.

12 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.1; 128 III 191 at 6b p. 198 with references.

13 Judgment of the Swiss Federal Tribunal 4A_458/2009 of June 10, 2010 at 4.1.

14 Art. 27 (2) Swiss Civil Code: 'No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.'

15 Judgment of the Swiss Federal Tribunal 4A_458/2009 of June 10, 2010 at 4.4.3.2; 4A_320/2009 of June 2nd, 2010 at 4.4; 4P.12/2000 of June 14, 2000 E. 5b/aa with references.

16 Judgment of the Swiss Federal Tribunal 120 II 155 at 6a p. 167.

17 Judgment of the Swiss Federal Tribunal 121 III 333 at 3a; 116 II 634.

18 Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations; Pepperdine Dispute Resolution Law Journal*, Vol. 10: 1, 2009.

19 Judgment of the Swiss Federal Tribunal 5P.83/1999.

20 Judgment of the Swiss Federal Tribunal 119 II 271.

21 Judgment of the Swiss Federal Tribunal 4A_506/2007 (2008).

22 Judgment of the Swiss Federal Tribunal 4A_490/2009 *Atletico de Madrid vs. Sport Lisboa E Benfica - Futebol SAD*.

23 Judgment of the Swiss Federal Tribunal 134 I 209 at 2.3.1 p. 211; 133 I 110 at 5.2 119; all with references.

24 Judgment of the Swiss Federal Tribunal 136 I 1 at 5.1 p. 12; 128 I 19 at 4c/aa p. 29.

25 Judgment of the Swiss Federal Tribunal 123 III 337 at 5 p. 345 f. with references; see also judgement 4P.167/1997 of November 25, 1997 at 2a.

fused with mere illegality and whether there is a violation of public policy is assessed more restrictively than a breach of the prohibition of arbitrariness. A contractual commitment may be excessive to such an extent that it becomes contrary to public policy when it constitutes an obvious and grave violation of privacy²⁶.

The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons, e.g. associations²⁷. Sanctions imposed by a federation, which do not merely ensure the correct course of game (so called technical rules) are subject to judicial control according to case law²⁸. This particularly applies when sanctions imposed by a federation severely impact the personal right to economic development. In such a case, the Federal Tribunal has held that the right of an association to exclude its members is limited by their privacy rights²⁹. This corresponds to the view that was adopted in particular for sport federations³⁰. In such cases the right of the association to exclude a member is not only reviewed from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy³¹. These principles also apply to associations governed by Swiss law and headquartered in Switzerland which - like FIFA - regulate international sport. The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are only valid when the interests of the federation outweigh the infringement of privacy of the individual.

The Federal Tribunal stated that

'The sanction under dispute [...] contained in Article 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor, Matuzalem would be subject to a ban from all professional activities in connection with football until a claim in excess of €11 million with interest at 5% from the middle of 2007 (i.e. €550'000 yearly) is paid. This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee in breach and indirectly the interest of the sport federation to contractual compliance by football players. The infringement of Matuzalem's economic freedom would (in theory) be an appropriate threat to pay and to find the funds for the amount due. However, if Matuzalem rightly says that he cannot pay the whole amount anyway, it is questionable if the sanction is appropriate to achieve its direct purpose - namely the payment of the damages. Indeed the prohibition from continuing his previous economic and other activities will deprive Matuzalem from the possibility of achieving an income which would enable him to pay his debt. Yet the sanction of the Federation is not even necessary to enforce the damages awarded: Shakhtar can enforce the award by means of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 ("New York Convention"), as most states are parties to that treaty and in particular Italy, which is Matuzalem's present domicile. The sanction issued by the federation is also illegitimate to the extent that the interests which FIFA seeks to enforce in this way do not justify the severe infringement of Matuzalem's

*privacy. The abstract goal of enforcing compliance by football players with their duties to their employers is clearly of less weight than the occupational ban against the player, unlimited in time and worldwide for any activities in connection with football.*³²

The Federal Tribunal sums up its reasoning as follows:

*'The threat of an unlimited occupational ban based on Article 64 (4) of the FIFA Disciplinary Code constitutes an obvious and severe restriction in the player's privacy rights and disregards the fundamental limits of legal commitments as contained in Article 27 (2) CC. Should payment fail to take place, the award under appeal would lead not only to the player being subjected to his previous employer's arbitrariness but also to a restriction in his economic freedom of such severity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of FIFA or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy.'*³³

To summarize, the arguments of the Federal Tribunal why the CAS award was in violation of public policy, are the following:

- The sanction was subjected to Shakhtar's starting legal proceedings and therefore Matuzalem was dependent on Shakhtar's arbitrariness (see item 4 of the decision by FIFA DRC);
- The threat of a lifelong ban is in violation of Article 27 (2) CC;
- The sanction jeopardizes Matuzalem's economic freedom;
- There is no prevailing interest of FIFA or its members;
- The sanction is not necessary because the New York Convention allows enforcement of arbitral awards.

5. WHAT COULD BE THE IMPLICATIONS OF THIS DECISION?

5.1 IMPLICATION ON THE CASE AT HAND

The question is what is now going to happen to Matuzalem. The Swiss Federal Tribunal did not impose a different sanction or impose on CAS or FIFA what to do. It simply annulled the CAS decision with regard to Matuzalem's sanction. Does this mean that Matuzalem does not have to pay the damage compensation and will not be sanctioned at all?

What is undisputed is that Matuzalem still owes Shakhtar EUR 11,858,934, plus interest of 5% p.a. from the first proceedings. The question is, assuming that Matuzalem will not pay the outstanding amount, if FIFA may on its own impose another, less severe sanction on Matuzalem, or if Shakhtar has to initiate a new proceedings against Matuzalem³⁴. In the author's opinion, these proceedings were started by Shakhtar and have now been ended by a final decision of the Federal Tribunal. Therefore, these proceedings are closed and Shakhtar would have to lodge a new complaint with FIFA DRC.

It is questionable if having FIFA impose another (less severe) sanction on Matuzalem will bring the result Shakhtar is aiming at - the payment of the damages. Alternatively, Shakhtar could try to enforce the first CAS decision, which ordered Matuzalem to pay the above mentioned amount, by means of the New York Convention. The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought³⁵. Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon³⁶. The New York Convention has been ratified by 146 states, including Switzerland (seat of CAS), Italy (domicile of Matuzalem) and Spain (seat of Real Zaragoza). Thus, it should be possible for Shakhtar to start debt collection proceedings in order to enforce the CAS award in Italy and Spain³⁷ and to at least partially recover the debt.

26 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.2 p. 393; 4A_458/2009 of June 10, 2010 at 4.4.3.2; 4A_320/2009 of June 2, 2010 at 4.4; 4P12/2000 of June 14, 2000 at 5b/aa with references.
27 Eugen Bucher, *Berner Kommentar*, 3rd ed., 1993, item 18 to Article 27 CC, 104 II 6 at 2 p. 8 f.
28 Judgment of the Swiss Federal Tribunal 120 II 369 at 2 p. 370; 119 II 271 at 3c; 118 II 12 at 2 p. 15 ff.
29 Judgment of the Swiss Federal Tribunal 123 III 193 at 2c/bb and cc p. 197.
30 Judgment of the Swiss Federal Tribunal 123 III 193 E. 2c/bb p. 198 with references; see also 134 III 193 at 4.5 p. 200.
31 Judgment of the Swiss Federal Tribunal

123 III 193 at 2c/cc p. 198; see also 134 III 193 at 4.4.

32 Judgment of the Swiss Federal Tribunal 4A_558/2011 at 4.3.4.

33 Judgment of the Swiss Federal Tribunal 4A_558/2011 at 4.3.5.

34 At the end of May 2012, when this article was handed in, FIFA had not yet taken a decision in this matter.

35 Article I(i) New York Convention.

36 Article III New York Convention.

37 After having filed for bankruptcy in June 2011, Zaragoza announced on 10 May 2012 that it has emerged from bankruptcy and is no longer under court protection. It is possible that Zaragoza reached a deal with Shakhtar in the bankruptcy proceedings.

5.2 IMPLICATION ON OTHER CASES

A similar case to the one of Matuzalem is the *Mutu* case. Following his proven cocaine abuse, Chelsea Football Club terminated its contract with its Romanian player Adrian Mutu with immediate effect and claimed damages in the form of monetary compensation. Mutu was ordered by FIFA DRC to pay to Chelsea the amount of EUR 17,173,990 plus interest of 5% p.a. Both CAS and subsequently the Swiss Federal Tribunal upheld this decision³⁸. Assuming that Mutu is not going to pay this amount, and further to the recent Matuzalem decision, FIFA will probably not impose a ban on Mutu from any football-related activity until the amount is paid, given that it is very likely that the Matuzalem case will act as a precedent in cases of this nature. Considering the enormous amount to be paid by Mutu, an amount he will probably not be able to pay, it is again questionable if any ban on Mutu will force him to pay the damages. Nevertheless, FIFA will insist on imposing some kind of sanction on him (upon Chelsea's request) in order not to jeopardize the credibility of its sanctioning system.

Based on Article 64 of the FIFA Disciplinary Code and on the legal principle of *a maiore ad minus* (from larger to smaller), it should be possible for FIFA to impose a ban on a player which is limited in time or in territory. It could thus be possible to limit the ban to two years or to a defined territory, e.g. Europe³⁹. Probably FIFA will decide to apply the practice which is common in doping cases; to limit the ban in time. The question is whether the FIFA Disciplinary Code would also allow for a ban limited in the subject matter, e.g. to ban a player from playing professional football (but not to work as a football coach, as a president of a football club or from any other football related activity). In the author's opinion, based on the above mentioned principle of *a maiore ad minus* and based on the wording of the English, the German and the Spanish version of the FIFA Disciplinary Code, such a ban limited in the subject matter should be possible⁴⁰. Only the wording of the French version seems that the ban shall encompass *all* football related activities⁴¹. However, Article 143 (2) of the FIFA Disciplinary Code rules that in the event of any discrepancy between the four texts, the English version is authoritative. The question then is if Article 64 (4) may be read in relation with Article 22 of the FIFA Disciplinary Code. Article 22 which deals with ordinary sanctions (i.e. not sanctions due to a default in payment of a sanction) stipulates that '*A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other)*'. It is thus evident that Article 22 allows for a ban limited in the subject matter. However, one may argue that the purpose of Article 64 (4) is to force the player to pay the outstanding amount and not to (simply) punish him. A ban which is limited by any sort, would contravene its own purpose. In the author's opinion, Article 64 (4) must be read in conjunction with Article 22 and, thus, a ban may be limited in time, territory or even subject matter.

Another question one may ask is if the Matuzalem decision means that

all lifelong bans in sports are in violation of the public order as they infringe the personality rights of the player/athlete. In the author's opinion, the answer is clearly no. Lifelong bans to engage in any sports related activity have been imposed on persons found guilty of match fixing⁴² or sometimes doping (2ND offense⁴³). The Swiss Federal Tribunal made it very clear that one of the reasons why the CAS award in the Matuzalem case was in violation of public order was because there was no prevailing interest of FIFA or its members for the sanction. In other words, the Swiss Federal Tribunal compared the interests at stake. Doping and match fixing are typical examples where the proper functioning of a sport is at stake. While doping abuses the principle of 'May the best man win!', match fixing attacks the impartiality of a referee or the attitude which any sportsperson should have: the ambition to win and thus, the unpredictability of the outcome of a sports event. If these fundamental sporting principles are in danger, lifelong bans should - in severe cases - be possible sanctions to protect the integrity of the sport. On the other hand, in the Matuzalem case the sanction was imposed to enforce damages awarded as compensation, i.e. money, and was therefore in violation of public policy.

6. CONCLUSION / LESSONS TO BE LEARNED?

The Matuzalem case showed that the enormous compensation which the CAS may order footballers to pay to their former club for terminating their contract without just cause, are difficult to enforce by applying FIFA's sanctioning system⁴⁴. Thus, the purpose of the CAS, to ensure compliance with the principle of *pacta sunt servanda* by using these high compensation payments as deterrents for players to terminate their contract without just cause, is now jeopardized. Sanctions which cannot be enforced are no deterrents.

It is therefore time to reconsider (i) the joint and several liability of the player and the new club for the total compensation, and (ii) the sanctioning system in case of default.

Why should a player who is in negotiations with a new club for a transfer, whereby the new club cannot find an agreement with the former club, be liable for the loss of the transfer money, a compensation which was supposed to be paid by the new club? Would it not make more sense to allocate each compensation category to either the player or the new club, depending on who it has the stronger relation to. Only compensation categories which cannot be allocated to the player or the new club, shall be in the joint and several liability of both of them. This would result in the following liability allocations:

Remuneration due under the player's new contract:	Player
Lost transfer opportunity:	New club
Replacement costs:	Player
Non-amortized investment costs:	Player
Specificity of sports:	Player
Supplementary damages:	Player or new club

In the case of Matuzalem, according to this calculation, he would have to pay about EUR 2.5 M and Zaragoza would have to pay EUR 9.3 M.

The Matuzalem case also showed that the current sanctioning system for defaulting players under Article 64 of the FIFA Disciplinary Code is not always enforceable. Article 32 would allow FIFA to combine sanctions provided in Chapter I (General Part) and Chapter II (Special Part). This would allow FIFA to impose sanctions such as warnings, reprimands, fines, return of awards, cautions, expulsions, match suspensions, bans from dressing rooms and/or substitute bench, ban from entering a stadium and ban on taking part in any football-related activity (limited in territory, time and/or subject matter). Such a sanctioning system with much more levels of sanctions would be better tailored to the situation at hand.

38 CAS 2008/A/1644 *Adrian Mutu v/ Chelsea Football Club Limited* as of 31 July 2009; Decision of Swiss Federal Tribunal 4A_458/2009.

39 Article 64(4) FIFA Disciplinary Code (English edition): "A ban on any football-related activity may also be imposed against natural persons."

40 Article 64(4) FIFA Disciplinary Code (German edition): "Gegen natürliche Personen kann zudem ein Verbot jeglicher in Zusammenhang mit dem Fussball stehenden Tätigkeit ausgesprochen werden."

Article 64(4) FIFA Disciplinary Code (Spanish edition): "En el caso de personas físicas se puede aplicar además la prohibición de ejercer cualquier actividad relacionada con el fútbol."

41 Article 64(4) FIFA Disciplinary Code (French edition): "Une interdiction d'exercer de toute activité relative au football peut par ailleurs être prononcée contre toute personne physique."

42 Article 69 FIFA Disciplinary Code. CAS 2011/A/2490 *Daniel Köllerer vs. ATP et al.*; CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabraneć, Nikolce Zdraveski v/ UEFA*; CAS 2010/A/2172 *Mr Oleg Orlikhov v/ UEFA*.

43 See Article 10.7.1 of the World Anti-Doping Code 2009.

44 They may however be enforced by means of the New York Convention and the debt collection proceedings of the state, but in practice, it may be difficult to receive these high amounts from a player, even if he is well paid.

De facto unlimited prohibition to work as a football player as a violation of public policy

By Andrea Marco Steingruber*

INTRODUCTION

On March 27, 2012, the Swiss Federal Tribunal upheld an appeal of the football player Franceline da Silva Matuzalem ("Matuzalem") and annulled the relevant parts of the Court of Arbitration for Sport ("CAS") award of June 29, 2011, that confirmed the possibility that he could be banned from football activities if he would not pay damages to his former club FC Shakhtar Donetsk. In his appeal Matuzalem had argued that the CAS award was *de facto* leading to a prohibition of working as a football player worldwide and forever and therefore amounted to a violation of public policy.

This article first gives an overview of Fédération Internationale de Football Association ("FIFA") and the involved dispute resolution instances, then outlines the Matuzalem's saga, discusses public policy in general and according to Swiss law and finally considers the proceedings before the Swiss Federal Tribunal leading to the judgement of March 27, 2012.

1. The FIFA and the involved dispute resolution instances

1.1. The FIFA

The FIFA is an association governed by Swiss law, founded in 1904 and based in Zurich.¹ It has 208 member associations and its goal, enshrined in its Statutes, is the constant improvement of football. FIFA employs some 310 people from over 35 nations and is composed of a Congress (legislative body), Executive Committee (executive body), General Secretariat (administrative body) and committees (assisting the Executive Committee).²

With regard to the admission as a Member of FIFA, Article 10 of the FIFA Statutes (2011) provides that:

"1. Any Association which is responsible for organising and supervising football in its country may become a Member of FIFA. In this context, the expression "country" shall refer to an independent state recognised by the international community. Subject to par. 5 and par. 6 below, only one Association shall be recognised in each country.

...

4. The Association's legally valid statutes shall be enclosed with the application for membership and shall contain the following mandatory provisions:

...

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¹ See Article 1 of the FIFA Statutes (2011).

² <http://www.fifa.com/aboutfifa/federation/index.html>.

³ <http://www.fifa.com/aboutfifa/officialdocuments/doclists/disputeresolutionchamber.html>.

⁴ <http://www.fifa.com/aboutfifa/officialdocuments/doclists/decision.html>.

⁵ For the wording of Article 10(4)(c) of the FIFA Statutes (2011), see under 1.1.

⁶ Article 176 of the SPILA (Scope of application; seat of the arbitral tribunal)

¹ The provisions of this chapter shall apply to arbitral tribunals which have their seat in Switzerland, provided that, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

² The parties can exclude the application of this chapter and agree on the application of the third part of the Federal Code of Civil Procedure by making an explicit declaration in the arbitration agreement or in a later agreement.

c) to recognise the Court of Arbitration for Sport, as specified in these Statutes.
...

1.2. The dispute resolution instances involved in the Matuzalem's saga: an overview

1.2.1. FIFA's intern

The Dispute Resolution Chamber ("DRC") is FIFA's deciding body that provides "dispute resolution on the basis of equal representation of players and clubs and an independent chairman. The DRC adjudicates on a regular basis in the presence of a varying composition of members. In total, the DRC includes 10 player representatives and 10 club representatives whereas decisions are regularly passed in a composition of 5 (2 player representatives, 2 club representatives, 1 chairman). The DRC is competent for employment-related disputes between clubs and players that have an international dimension as well as for disputes between clubs related to Training Compensation and Solidarity Mechanism."³ The relevant decisions are published on FIFA.com.⁴ DRC proceedings are free of charge.

1.2.2. The Court of Arbitration for Sport (CAS)

According to Article 62(1) of the FIFA Statutes (2011), "FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents."

Moreover, Article 10(4)(c) of the FIFA Statutes (2011) provides that the Association's legally valid statutes shall be enclosed with the application for membership and shall contain as a mandatory provision the recognition of the Court of Arbitration for Sport, as specified in the FIFA Statutes themselves.⁵

According to Article 63(2) of the FIFA Statutes (2011) "recourse may only be made to CAS after all other internal channels have been exhausted."

1.2.3. The Swiss Federal Tribunal

The seat of the arbitral tribunal - Court of Arbitration for Sport - is in Lausanne, Switzerland. At the relevant times the appellant - Matuzalem - had his domicile outside Switzerland. As the parties did not rule out in writing the provisions of chapter 12 of the of the Swiss International Private Law Act ("SPILA"), they were applicable (Article 176(1) and (2) of the SPILA⁶).

Awards rendered by arbitral tribunals with their seat in Switzerland can only be challenged before the Swiss Federal Tribunal. Indeed Article 191 of the SPILA provides that "setting aside proceedings may only be brought before the Swiss Federal Tribunal and that the procedure is governed by Article 77 of the Federal Supreme Court Act ("FSCA") of 17 June 2005."

In the field of international arbitration a Civil law appeal is allowed pursuant to the requirements of Articles 190-192 of the SPILA (Article 77(1)(a) of the FSCA). In particular, Swiss law provides for only very limited options for setting aside arbitral proceedings rendered in Switzerland. In fact according to Article 190(2) of the SPILA:

"The award may only be set aside:

1. if the sole arbitrator was improperly appointed or if the arbitral tribunal was improperly constituted;
2. if the arbitral tribunal wrongly accepted or declined jurisdiction;
3. if the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide on one of the items of the claim;
4. if the principle of equal treatment of the parties or their right to be heard was violated;
5. if the award is incompatible with public policy.”

2. The Matuzalem's saga

2.1. Matuzalem's transfers which are relevant for the case

Matuzalem is a professional football player of Brazilian citizenship who currently plays with the football club SS Lazio Roma. Earlier stations were FC Shakhtar Donetsk and Real Zaragoza SAD.⁷

2.1.1. Employment contract with FC Shakhtar Donetsk and its termination

On June 26, 2004 Matuzalem entered into an employment contract with the Ukrainian football club FC Shakhtar Donetsk for the time from July 1, 2004 until July 1, 2009. On July 2, 2007 Matuzalem terminated his employment contract with FC Shakhtar Donetsk without notice yet not for just cause nor for sporting just cause.⁸

2.1.2. Employment contract with Real Zaragoza SAD

On July 19, 2007 Matuzalem then entered into a new employment contract with Real Zaragoza SAD and agreed to play with the Spanish club for the next three seasons until June 30, 2010. Earlier in a letter dated July 16, 2007 Real Zaragoza SAD undertook to hold Matuzalem harmless for any possible damage claims as a consequence of the premature termination of the contract.⁹

2.1.3. Transfer to SS Lazio Roma

At the end of the 2007/2008 season Real Zaragoza SAD descended into the second Spanish football league. Pursuant to a July 17, 2008 agreement Real Zaragoza SAD transferred Matuzalem temporarily for the 2008/2009 season to SS Lazio Roma.¹⁰ On July 22, 2008 Matuzalem accepted this temporary transfer and entered into an employment contract with the Italian club for the period between July 22, 2008 and June 20, 2011.¹¹

Although at the end of the 2008/2009 season Real Zaragoza SAD returned to the first league, on July 23, 2009 Real Zaragoza SAD agreed to the definitive transfer of Matuzalem to the SS Lazio Roma against payment of a transfer fee of €5.1 million.¹² On the same day the SS Lazio Roma entered into a new employment agreement with Matuzalem which substituted the July 22, 2008 contract and set a fixed contractual duration until June 30, 2014.¹³

2.2. The damages awarded FC Shakhtar Donetsk

2.2.1. Decision of the Dispute Resolution Chamber of FIFA

In a decision of November 2, 2007, the Dispute Resolution Chamber of FIFA awarded FC Shakhtar Donetsk damages as a consequence of the illicit termination of the contract in the amount of €6.8 million with interest at 5% from 30 days after the award.¹⁴

2.2.2. Award of the Court of Arbitration for Sport

On May 19, 2009 the Court of Arbitration for Sport (CAS) annulled the decision of November 2, 2007 in part and ordered Matuzalem and the football club Real Zaragoza SAD severally to pay €11'858'934 with interest at 5% from July 5, 2007.¹⁵

2.2.3. Judgement of the Swiss Federal Tribunal

A civil law appeal filed by Matuzalem and Real Zaragoza SAD against the CAS award of May 19, 2009 was rejected by the Swiss Federal Tribunal in a judgment of June 2, 2010¹⁶ to the extent that the matter was capable of appeal.¹⁷ However in this previous judgement the Swiss Federal Tribunal merely pointed out that Matuzalem's obligation to a five years employment contract - for the time from July 1, 2004 until July 1, 2009¹⁸ - was not illicit from the point of view of privacy protection and also that it could not be found that Matuzalem was bound too tightly simply because he would have to answer for the damages arising as a consequence of a breach of contract.¹⁹ On the other hand the judgment of June 2, 2010 did not decide the compatibility with public policy of disciplinary measures imposed by a federation in case of a failure to pay damages.²⁰

2.3. Non-compliance with the CAS award on damages

2.3.1. Proceedings before the Disciplinary Committee of FIFA

a. The institution of the proceeding

On July 14, 2010 the Deputy Secretary of the Disciplinary Committee of FIFA informed Matuzalem and Real Zaragoza SAD:

- a that disciplinary proceedings were commenced against them because they had not complied with the CAS award of May 19, 2009,
- b that the corresponding sanctions according to Article 64 of the FIFA Disciplinary Code (2009 edition) would be imposed and
- c that the case would be decided during the next meeting of the Disciplinary Committee.²¹

b. The relevant FIFA provisions

The FIFA Disciplinary Code applicable at the time (2009 edition) provided among other things for the following:

“Article 22 Ban on taking part in any football-related activity

A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other).

...

Section 8. Failure to respect decisions

Article 64 [only]

1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:*

- a) will be fined at least CHF 5,000 for failing to comply with a decision;*
- b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*

7 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, facts A.a and A.b. The Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, has been translated into English by the one of the leading Swiss law firm: ZPG Avocats, Geneva and Neuchâtel.

8 On sporting just cause, see Georgi Gradev, *Sporting Just Cause and the Relating Jurisprudence of FIFA and CAS*, ISLJ 2010/1-2, pp. 110 et seq.

9 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, fact A.b.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, fact A.c.

15 Ibid. For a commentary of this award, see Juan de Dios Crespo Pérez, *Matuzalem CAS Award Commentary*, ISLJ 2010/3-4, pp. 170 et seq. On the Matuzalem case, see also Frans M. de Weger, *Webster, Matuzalem, De Sanctis and the Future*, ISLJ 2011/3-4, pp. 170 et seq.

16 Judgment 4A_320/2009 of June 2nd, 2010 of the Swiss Federal Tribunal.

17 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, fact A.c.

18 See under 2.1.1.

19 Judgment 4A_320/2009 of June 2nd, 2010 of the Swiss Federal Tribunal, reason 4-4.

20 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4-2.

21 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, fact B.a.

c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.

2. If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.
3. If points are deducted, they shall be proportionate to the amount owed.
4. A ban on any football-related activity may also be imposed against natural persons. ...²²

c. The statements of defence of Real Zaragoza SAD and Matuzalem
On July 26, 2010 Real Zaragoza SAD advised the Disciplinary Committee that it was in serious financial difficulties which could lead to insolvency and bankruptcy; the requirements for a sanction according to Article 64 of the FIFA Disciplinary Code were not met as the club was attempting to settle the debt.²³

On August 20, 2010 Matuzalem sent to the Disciplinary Committee a copy of his letter of August 19, 2010 by which he had requested payment of the amount due to FC Shakhtar Donetsk by Real Zaragoza SAD and also of the statement by which Real Zaragoza SAD held him harmless on July 16, 2007.²⁴

d. The decision of the FIFA Disciplinary Committee
In a decision of August 31st, 2010 the Disciplinary Committee found Matuzalem and football club Real Zaragoza SAD guilty of breaching their obligations under the CAS award of May 19, 2009.²⁵ Furthermore the Disciplinary Committee ordered Matuzalem on the basis of Article 64 of the FIFA Disciplinary Code to pay a fine of CHF 30'000 severally with the club²⁶ and disposed a last time limit of 90 days to pay the amount due,²⁷ under penalty for Matuzalem of a prohibition of any activity in connexion with football without the necessity of any further decision by the Disciplinary Committee.²⁸

*"4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player Matuzalem Francelino da Silva and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal decisions having to be taken by the FIFA Disciplinary Committee. The association(s) concerned will be informed of the ban on taking part in any football-related activity. Such ban will apply until the total outstanding amount has been fully paid. ..."*²⁹

On September 1st, 2010 Real Zaragoza SAD paid €500'000 into an account opened in the name of the FC Shakhtar Donetsk. There were no further payments by either Real Zaragoza SAD or Matuzalem.³⁰

2.3.2. Appeal against the decision of the FIFA Disciplinary Committee and award of the Court of Arbitration for Sport

Matuzalem and Real Zaragoza SAD appealed the decision of the FIFA Disciplinary Committee of August 31, 2010 to the Court of Arbitration for Sport (CAS). In an award of June 29, 2011 the CAS rejected the appeal by Real Zaragoza SAD³¹ and Matuzalem³² and confirmed the decision of the Disciplinary Committee of FIFA of August 31, 2010.³³ The CAS rejected all other submissions³⁴ and disposed of the costs of the proceedings.³⁵

3. Public policy

3.1. In general

Public policy can be national, regional, international or transnational. The real issue is to determine the nature and content of public policy relevant to the arbitration process, because what may be a relevant public policy in one forum or system may not apply elsewhere.³⁶ Identifying the various public policies may sometimes be clear and evident, whereas in other cases it may be controversial.³⁷

While the existence and the content of national and regional³⁸ public policy may be identifiable, the existence of an international and transnational public policy is controversial as is its effect on international arbitration.³⁹

In the Matuzalem case the Swiss Federal Tribunal applied Swiss public policy,⁴⁰ as FIFA is an association governed by Swiss law.⁴¹

3.2. According to Swiss law

3.2.1. General

According to Article 190(2)(e) of the SPILA the award may be set aside if it "is incompatible with public policy." The provision ensures that the arbitral award complies with fundamental legal principles. It has been observed that in recent years, the Swiss Federal Tribunal has not been consistent in deciding whether the notion of public policy refers to Swiss or to universal principles.⁴²

For example, having previously referred to "the fundamental legal or moral principles that are recognised in all civilised countries",⁴³ the Swiss Federal Tribunal in 2006 defined public policy as "the essential and widely recognised values that should, according to the prevailing concepts in Switzerland, form the basis of every legal system".⁴⁴

This definition presupposes that the principles in question do not fundamentally differ between different countries within a common culture.⁴⁵ Arbitrariness ("Willkür") does not in itself constitute a violation of public policy.⁴⁶

22 Ibid.

23 Ibid.

24 Ibid. See under 2.1.2.

25 § 1 of the operative part of the decision of the FIFA Disciplinary Committee (ibid.). On the CAS award of May 19, 2009, see under 2.2.2.

26 § 2 of the operative part of the decision of the FIFA Disciplinary Committee (ibid.).

27 § 3 of the operative part of the decision of the FIFA Disciplinary Committee (ibid.).

28 § 4 of the operative part of the decision of the FIFA Disciplinary Committee (ibid.).

29 Ibid. Emphasis added.

30 Ibid.

31 § 1 of the CAS award of June 29, 2011 (Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, fact B.b).

32 § 2 of the CAS award of June 29, 2011 (ibid.).

33 § 3 of the CAS award of June 29, 2011 (ibid.).

34 § 4 of the CAS award of June 29, 2011 (ibid.).

35 §§ 5 and 6 of the CAS award of June 29, 2011 (ibid.).

36 JULIAN D.M. LEW, LOUKAS A. MISTELIS, STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, (2003), para. 17-33.

37 Ibid.

38 There is, for example, European (EC) public policy. See e.g. *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV (Netherlands)*,

Gerechtshof The Hague, 28 March 1996; *Hoge Raad*, 21 March 1997, 207 Ned Jur 1059 (1998) with note Sijnders, 1084. Also ECJ, 1 June 1999, C-126/97, *Eco Swiss Time Ltd v Benetton International NV*, 14(6) Mealey's IAR B-1(1999), XXIVa YBCA 629 (1999). It was found that Article 85 (now 81) EC Treaty is part of the public policy of the EC and therefore of each member state. See *ibid.*

39 Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, PIETER SANDERS (ED), ICCA CONGRESS SERIES NO 3, 258, pp. 312-317. See *ibid.*

40 See under 3.2. and 4.2.4.

41 See under 1.1.

42 Georg von Segesser, Dorothee Schramm,

Swiss Private International Law Act (Chapter 12: International Arbitration), 1989, in LOUKAS A. MISTELIS, CONCISE ARBITRATION, (2010), [hereinafter von Segesser/Schramm], p. 958, making reference to ATF 132 III 389, reason 2.2.2.

43 See ATF 128 III 234, reason 4c.

44 Von Segesser/Schramm, *supra* footnote 42, pp. 958 et seq., making reference to ATF 132 III 389, reason 2.2.3.

45 Ibid., making reference to ATF 132 III 389, reason 3.

46 Ibid., making reference to ATF 132 III 389, reason 2.2.2.

The term “public policy” encompasses procedural public policy and substantive public policy. When filing a motion to set aside an award on the grounds of public policy, the applicant must show in detail which legal principle was violated and how it was violated, and must demonstrate that the principle in question is part of public policy.⁴⁷ It must be established that the result of the decision, not the reasoning behind it, violates public policy.⁴⁸

Statistics show that in the time period between 1989 and 2009 not a single challenge out of the 142 challenges based on Article 190(2)(e) of the SPILA has been successful.⁴⁹ For this reason, while the public-policy defence is rather popular with parties and notoriously popular in legal writing, it is virtually toothless in Swiss appeal proceedings.⁵⁰ *The Matuzalem case has therefore to be seen as an exceptional one.*

3.2.2. Substantive public policy

In the literature the following overview of principles forming part of substantive public policy has been given:

1. “the principle of pacta sunt servanda, which is violated if the arbitral tribunal applies a contractual provision in contradiction of its own interpretation of it - if, for example, it imposes on a party a contractual obligation it has held to be invalid or if it denies the performance of a contractual obligation it has held to be valid. If the tribunal applies the wrong contractual provision or incorrectly construes or applies the contract, the principle is not violated (see, e.g., ATF 4P.206/2006 reason 4.1; ATF 4P.134/2006 reason 5.2);
2. the principle of good faith, including the concept of culpa in contrahendo, which is violated if the arbitral tribunal misconstrues the general application and concept of culpa in contrahendo - the Swiss Federal Tribunal cannot, however, examine whether the facts of a given case lead to a liability under culpa in contrahendo (see ATF 4P.88/2006 reason 4.2);
3. the prohibition against the abuse of rights (see ATF 120 II 155 reason 6a), including the prohibition against venire contra factum proprium (see ATF 4P.143/2001 reason 3c/aa);
4. the prohibition against discrimination (see ATF 4P.12/2000 reason 5a/aa);
5. the prohibition against expropriation without compensation (see ATF 4P.200/2001 reason 2b);
6. the protection of legally incapacitated persons (see, e.g., ATF 132 III 389 reason 2.2.1);
7. the right to terminate the contract for important reasons (see ATF 4P.172/1999 reason 5d);
8. the prohibition against bribery (see ATF 4P.208/2004 reason 6.1);
9. the prohibition against serious violations of personal rights (see ATF 4P.12/2000 reason 5b/aa).⁵¹

While the foregoing list is not exhaustive, the Swiss Federal Tribunal has stressed that the chances are extremely slight of having an award set aside for reasons of substantive public policy.⁵² With regard to sports arbitration, the Swiss Federal Tribunal has in particular held that neither the enforcement of disciplinary sanctions by a private association,⁵³

nor strict liability for doping with a shift in the burden of proof⁵⁴ violates public policy.⁵⁵

3.2.3. Procedural public policy

Procedural public policy contains guarantees that ensure, like the guarantees explicitly mentioned in Article 190(a) to (d) of the SPILA, an independent consideration of all the applications and allegations that the parties filed in accordance with the applicable procedural rules.⁵⁶

In the literature the following examples of principles forming part of procedural public policy have been made:

1. “the right to a fair procedure (see, e.g., ATF 4P.143/2001 reason 3a/aa);
2. the observance of the res judicata effect of previous awards (see, e.g., ATF 4P.98/2005 reason 5.1 with further references);
3. the requirement that the decision not contravene the reasoning behind the award (see ATF 4P.99/2000 reason 3b/aa); and
4. the independence and impartiality of experts appointed by the tribunal (see ATF 126 III 249 reason 3c).⁵⁷

Generally, procedural public policy is violated if a breach of fundamental procedural principles unacceptably contravenes the sense of justice.⁵⁸

It does not *per se* constitute a violation of procedural public policy if the arbitral tribunal wrongly evaluates the evidence or wrongly establishes the facts.⁵⁹ Neither does it *per se* violate procedural public policy if the arbitral tribunal applies the arbitration rules incorrectly or arbitrarily⁶⁰ or if it fails completely to apply a procedural provision,⁶¹ unless the violated provision is essential for ensuring the fairness of the proceedings, and is, therefore, part of public policy.⁶²

In the field of sport arbitration “it does not violate procedural public policy if the Court of Arbitration for Sport (CAS) deems an appeal withdrawn because the appellant did not pay the advance of costs within the time limit, provided that the CAS informed the appellant of this consequence beforehand.”⁶³

4. The proceedings before the Swiss Federal Tribunal

4.1. Matuzalem’s argumentation

Matuzalem (appellant) argued in his appeal before the Swiss Federal Tribunal that should the threat of ban on taking part in any football related activity imposed on him by the FIFA Disciplinary Committee⁶⁴ take effect, he would in fact be subject to a prohibition of working as a football player worldwide and forever, because he would not be in a position to pay to its previous employer FC Shakhtar Donetsk the damages of €11’858’934 with interest at 5% since July 5, 2007.⁶⁵ Matuzalem therefore considered that there was a grave violation of the freedom of profession guaranteed by Article 27(2)⁶⁶ of the Swiss Federal Constitution and in international treaties, as well as an excessive limitation of personal freedom as substantiated in Article 27⁶⁷ of the Swiss Civil Code.⁶⁸ This would amount to a violation of public policy.

47 Ibid., making reference e.g. to ATF 4P.23/2006, reason 4.3.

48 Ibid., making reference e.g. to ATF 4P.240/2006, reason 4.1, with further references.

49 Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland - An Updated Statistical Analysis*, 28 ASA Bulletin 1/2010, pp. 87 et seq.

50 Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland*, 25 ASA Bulletin 3/2017, p. 456.

51 Von Segesser/Schramm, *supra* footnote 42, p. 959.

52 Ibid., making reference to ATF 132 III 389, reason 2.1.

53 In the case at stake it was FIFA; ATF 4P.240/2006, reason 4.2.

54 See ATF 4P.105/2006, reason 8.

55 Von Segesser/Schramm, *supra* footnote 42, p. 960.

56 Ibid., making reference e.g. to ATF 4P.207/2002, reason 2.2.

57 Ibid.

58 Von Segesser/Schramm, *supra* footnote 42, pp. 960 et seq., making reference e.g. to ATF 4P.143/2001, reason 3a/aa.

59 Von Segesser/Schramm, *supra* footnote 42, p. 961, making reference e.g. to ATF 4P.48/2005, reason 3.4.2.1.

60 Ibid., making reference to ATF 4P.23/2006, reason 4.2.

61 Ibid., making reference to ATF 4P.280/2005, reason 2.2.1.

62 Ibid., making reference to ATF 4P.196/2003, reason 5.1.

63 Ibid., making reference to 4A_600/2008, reason 5.2.

64 On the proceedings before the Disciplinary Committee of FIFA, see under 2.3.1.

65 On the award on damages of the Court of Arbitration for Sport, see under 2.2.2.

66 Article 27 of the Swiss Federal Constitution (Economic freedom)
1. Economic freedom is guaranteed.

2. Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.

67 Article 27 of the Swiss Civil Code

B. Protection of legal personality

I. Against excessive restriction

1. No person may, wholly or in part, renounce his or her legal capacity or his or her capacity to act.

2. No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.

4.2. The judgement of the Swiss Federal Tribunal of March 27, 2012

4.2.1. *No res iudicata*

The Swiss Federal Tribunal already had decided a case involving Matuzalem in June 2010. However, the Swiss Federal Tribunal did not forestall in its previous judgment of June 2, 2010 the issue as to whether the threat of the imposition of disciplinary measures may be a grave violation of personality rights, which could lead to a violation of public policy by the award under appeal.⁶⁹ The Swiss Federal Tribunal in that judgement merely pointed out that Matuzalem's obligation to a five year employment contract was not illicit from the point of view of privacy protection and also that it could not be found that Matuzalem was bound too tightly simply because he would have to answer for the damages arising as a consequence of a breach of contract.⁷⁰ The judgment of June 2, 2010 therefore did not decide the compatibility with public policy of disciplinary measures imposed by a federation in case of a failure to pay damages.⁷¹

4.2.2. *Violation of the contractual obligations by Matuzalem*

The Swiss Federal Tribunal underlined that as a professional football player Matuzalem undoubtedly violated his contractual obligations towards the Ukrainian football club FC Shakhtar Donetsk and was therefore ordered to pay damages severally with the football club - Real Zaragoza SAD - which hired him at a time when his contract was still in force.⁷² However, the Swiss Federal Tribunal then turned to consider the scope and the adequacy of the threat of ban imposed on Matuzalem by the FIFA Disciplinary Committee in the case he would not pay damages.

4.2.3. *The ban on taking part in any football-related activity in accordance to Article 64 of the FIFA Disciplinary Code*

a. Scope of the ban

The Swiss Federal Tribunal observed that the Federation sanction under dispute, which the CAS based on Matuzalem being legally bound by the sanctions contained at Article 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor (FC Shakhtar Donetsk) Matuzalem should undergo a ban from all professional activities in connexion with football until a claim in excess of € 11 million with interest at 5% from the middle of 2007 (i.e. €550'000 yearly) is paid.⁷³ This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee in breach and indirectly the interest of the sport federation to contractual compliance by football players.⁷⁴ The infringement in Matuzalem's economic freedom would be suitable to promote the willingness to pay and to find the funds for the amount due.⁷⁵

b. Adequacy of the ban

The Swiss Federal Tribunal however underlined that if Matuzalem rightly sustains that he cannot pay the whole amount anyway, then the ade-

quacy of the sanction to achieve its direct purpose - namely the payment of the damages - is questionable.⁷⁶ Indeed the prohibition to continue his previous economic and other activities will deprive Matuzalem from the possibility to achieve an income in his traditional activity which would enable him to pay his debt.

Yet, as the Swiss Federal Tribunal observed, the sanction of the Federation is not necessary to enforce the damages awarded: Matuzalem's previous employer can avail itself of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 to enforce the award, as most states are parties to that treaty and in particular Italy, which is Matuzalem's present domicile.⁷⁷ Moreover, the sanction issued by the Federation is also illegitimate to the extent that the interests which the world football federation seeks to enforce in this way do not justify the grave infringement in Matuzalem's privacy. The abstract goal of enforcing compliance by football players with their duties to their employees is clearly of less weight as the occupational ban against Matuzalem, unlimited in time and worldwide for any activities in connexion with football.⁷⁸

4.2.4. *Violation of Article 27 of the Swiss Civil Code as a breach of public policy*

a. Protection of the personality of human being

The Swiss Federal Tribunal held that, as a fundamental legal value, the personality of the human being requires the protection of the legal order. In Switzerland it is protected constitutionally through the guarantee of the right to personal freedom (Article 10(2) of the Swiss Federal Constitution⁷⁹), which entails all liberties constituting the elementary manifestations of the unfolding of personality, in addition to the right to physical and mental integrity or to freedom of movement.⁸⁰ The free unfolding of personality is also guaranteed among other by the constitutional right to economic freedom, which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely (Article 27(2) of the Swiss Federal Constitution).⁸¹

The Swiss Federal Tribunal then underlined that the free unfolding of personality is not protected merely against infringement by the state but also by private persons (see Article 27(2) of the Swiss Civil Code⁸² which substantiates personal freedom in private law in Switzerland). It is generally recognized therein that a person may not legally pledge to relinquish his freedom entirely and that there are limits to the curtailment of one's freedom.⁸³ The principle anchored at Article 27(2) of the Swiss Civil Code belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.⁸⁴

b. An excessive contractual curtailment of economic freedom

A contractual curtailment of economic freedom is considered excessive within the meaning of Article 27(2) of the Swiss Civil Code according to Swiss concepts when the obligee is subjected to another person's arbitrariness, gives up his economic freedom or curtails it to such an extent that the foundations of his economic existence are jeopardized.⁸⁵ Whilst

68 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.2.

69 Ibid.

70 Judgment 4A_320/2009 of June 2nd, 2010 of the Swiss Federal Tribunal, reason 4.4.

71 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.2. Also see as to the comparable issue of contractual damages, judgment 4A_458/2009 of June 10, 2010, reason 4.4.8, in which the Swiss Federal Tribunal specifically left open the issue of the violation of public policy by a sanction issued by the competent FIFA body as a consequence of failure to pay.

72 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.4, making reference to Judgment 4A_320/2009 of June 2nd, 2010 of the Swiss Federal Tribunal.

73 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.4.

74 Ibid.

75 Ibid.

76 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.4.

77 Ibid.

78 Ibid.

79 Article 10 of the Swiss Federal Constitution (Right to life and to personal freedom) ...

2. Everyone has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement. ...

80 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.1, making reference to ATF 134 I 209, reason 2.3.1, p. 211; ATF 133 I 110, reason 5.2, p. 119.

81 Ibid., making reference to ATF 136 I 1, reason 5.1, p. 12; ATF 128 I 19, reason 4c/aa, p. 29. On the wording of Article 27(2) of the Swiss Federal Constitution, see *supra* footnote 66.

82 On the wording of Article 27(2) of the Swiss Civil Code, see *supra* footnote 67.

83 Ibid.

84 Ibid.

85 ATF 123 III 337, reason 5, pp. 345 et seq. with references; see also judgement 4P.167/1 997 of November 25, 1997, reason 2a.

public policy must not be identified with mere illegality⁸⁶ and its violation is to be assessed more restrictively than a breach of the prohibition of arbitrariness,⁸⁷ a commitment may be excessive to such an extent that it becomes contrary to public policy when it constitutes an obvious and grave violation of privacy⁸⁸

The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons.⁸⁹ Sanctions imposed by a federation, *which do not merely ensure the correct course of games*,⁹⁰ but actually encroach upon the legal interests of the person concerned, are subject to judicial control according to case law.⁹¹ This applies in particular when sanctions issued by a federation gravely impact the personal right to economic development; in such a case the Swiss Federal Tribunal has held that the freedom of an association to exclude its members is limited by their privacy right when it is the body of reference for the public in the profession or the economic branch concerned.⁹² This corresponds to the view that was adopted in particular for sport federations.⁹³ In such cases the right of the association to exclude a member is not reviewed merely from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy in order to assess whether some important reason is at hand.⁹⁴

According to the Swiss Federal Tribunal these principles also apply to associations governed by Swiss law and headquartered in Switzerland which - like FIFA - regulate international sport. The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are licit only when the interests of the federation justify the infringement of privacy.⁹⁵

c. An evident and grave violation of privacy is contrary to public policy

The threat of an unlimited occupational ban based on Article 64(4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in Matuzalem's privacy rights and disregards the fundamental lim-

its of legal commitments as embodied in Article 27(2) of the Swiss Civil Code.⁹⁶

Should payment fail to take place, the award under appeal would lead not only to Matuzalem being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of the world football federation or its members.⁹⁷

In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy (Article 190(2)(e) of the SPILA).⁹⁸

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86 BERNARD DUTOIT, DROIT INTERNATIONAL PRIVÉ SUISSE, 4. ed. 2005, no. 8 to Article 190 of the SPILA p. 678.

87 ATF 132 III 389, reason 2.2.2, p. 393.

88 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.2, making reference to the judgments 4A_458/2009 of June 10, 2010, reason 4.4.3.2; 4A_320/2009 of June 2nd, 2010, reason 4.4; and 4P.12/2000 of June 14, 2000, reason 5b/aa, with references; and to the legal doctrine.

89 Ibid., making reference to EUGEN BUCHER, BERNER KOMMENTAR, 3rd ed. (1993), no. 18 to Article 27 of the Swiss Civil Code; and ATF 104 II 6, reason 2, pp. 8 et seq.).

90 Emphasis added.

91 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.3, making reference to ATF 120 II 369, reason 2, p. 370; ATF 119 II 271, rea-

son 3c; ATF 118 II 12, reason 2, pp. 15 et seq.; ATF 108 II 15, reason 3, pp. 19 et seq.

92 Ibid., making reference to ATF 123 III 193, reason 2c/bb and cc, pp. 197 et seq.

93 Ibid., making reference to ATF 123 III 193, reason 2c/bb, p. 198 with references; see also ATF 134 III 193, reason 4.5, p. 200.

94 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.3, making reference to ATF 123 III 193, reason 2c/cc, pp. 198 et seq.; see also ATF 134 III 193, reason 4.4.

95 Ibid.

96 Judgment 4A_558/2011 of March 27, 2012 of the Swiss Federal Tribunal, reason 4.3.5. On the wording of Article 27(2) of the Swiss Civil Code, see *supra* footnote 67.

97 Ibid.

98 Ibid.

THE "MATUZALEM-AFFAIRE": ENDING OF THE SPORTING JUSTICE?

By Paolo Garraffa*

1. Introduction

With its decision of last March 2012¹ the Swiss Federal Supreme Court - First Civil Law Court, Judge Klett presiding - held unlawful a disciplinary sanction given by the FIFA Disciplinary Committee to the football player Francelino da Silva Matuzalem.

The sanction threatened the player with a lifetime ban if he failed to pay a damage claim (in the case concerned: compensation for breach of contract) to his former club and employer.

The judgment stated that an athlete could not be suspended for an indefinite period of time for a due compensation, as this situation represents 'a violation of (Swiss International) public policy'².

It is not the first time that the Swiss Federal Supreme Court pronounces on sporting matters, neither is it the first time the Swiss Court has annulled a CAS award³ (by grounding its decision on Swiss Public Policy⁴).

But the concerned judgment is most likely going to be one of the most discussed and revolutionary in terms of its possible future impact.

2. The case

Before examining the Swiss Federal Court's judgment, we need to briefly introduce the facts of the case.

On June 26, 2004 the Brazilian player Francelino da Silva Matuzalem signed an employment contract with the Ukrainian football club FC Shaktar Donetsk for a five year period (from July 1st 2004, until July 1st 2009).

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1 Judgment no. 4A_558/2011, of March 27, 2012, published on the website of the Swiss Federal Tribunal: www.bger.ch (also available in English);

2 See page 5 of the judgment;

3 For the very first time that Swiss Federal Supreme Court has annulled a CAS award, by grounding it on Swiss Public Policy (in the concerned case: on the 'res iudicata' principle), see judgment no. 4A_490/2009 (Club Atletico de Madrid

vs. Sporting Lisboa and FIFA) of April 13, 2010. For a short brief of the case, please refer to J.D.D. CRESPO-PEREZ, 'El Tribunal Federal Suizo anula un laudo del TAS basandose en el Orden Publico', on www.iusport.es (June 2010);

4 For a definition of Swiss Public Policy, we recall J. IBARROLA's definition, according to whom 'an arbitral award is contrary to Swiss public policy whenever it is in contradiction with essential and widely recognized principles, which - according to the values prevailing in Switzerland - should constitute the fundaments of any legal order' ('The Appeal against an award of the Court of Arbitration for Sport before the Swiss Federal Tribunal', lecture given on ISDE, January 2011);

On July 2nd 2007, the player terminated his contract with his former club without notice, neither for just cause⁵, nor for sporting just cause⁶, and signed (on July 19, 2007) another employment contract with the Spanish club Real Zaragoza SAD (hereinafter: Real Zaragoza) for the next three seasons.

In a letter dated July 16, 2007, Real Zaragoza undertook to hold the Appellant blameless for any possible damage claims as a consequence of the premature termination of the contract.

After an unfortunate season - concluding with the demotion of the club into the second division of the Spanish Football League ('La Liga') - Real Zaragoza signed an agreement transfer with the club SS Lazio SpA (hereinafter: SS Lazio) by which the player was temporarily transferred to the Italian club for the season 2008/2009 (the agreement was signed on July 17, 2008, and accepted by the player on July 22)⁷.

Nobody expected this to be the beginning of a great long 'judicial saga'.

With a decision of 2 November 2007, the FIFA Dispute Resolution Chamber (hereinafter: the DRC) awarded the club Shaktar Donetsk damages for compensation - as a consequence of the breach of the contract made by the player - in the amount of 6.8 million Euros⁸.

Following the appeal submitted by the parties, on May 19, 2009, the Court of Arbitration for Sport (CAS) partially annulled the decision of the DRC and ordered both the player and Real Zaragoza to pay 11,858,934 Euro as damages for compensation (with annual interest of 5% from July 5, 2007)⁹. Afterwards, on July 14, 2010 the Deputy Secretary of the FIFA Disciplinary Committee informed the appellant (player) and Real Zaragoza that: a) disciplinary proceedings were initiated against them as they had not complied with the CAS award of May 2009; b) the corresponding sanctions - according to the Art. 64 of the FIFA Disciplinary Code¹⁰ - would be imposed; c) the case would be decided during the next meeting of the Disciplinary Committee.

As soon as the warning was issued, the Spanish club notified - on July 26, 2010 - the FIFA Disciplinary Committee that it was going through serious financial difficulties ('which could lead to insolvency and bankruptcy') and the player sent the same Committee a copy of his letter (dated August 19, 2010) in which he requested the payment of the amount due to FC Shaktar Donetsk by Real Zaragoza, as well as a copy of the letter (dated July 16, 2007) by which Real Zaragoza undertook to hold him harmless for any possible damage claims as a consequence of the premature termination of the contract.

With a decision of August 31, 2010, the Disciplinary Committee found the player (appellant) and the club guilty of breaching their obligations¹¹ under the CAS award (rendered on May 19, 2009), and - on the basis of art. 64 of the FIFA Disciplinary Code - ordered the appellant to pay a fine of 30,000 CHF, and imposed a time limit of 90 days for paying the amount due, under penalty of a 'prohibition of any activity in connection with football without the necessity of any further decision by the Disciplinary Committee'¹².

The player and Real Zaragoza appealed the decision of the FIFA Disciplinary Committee before the Court of Arbitration for Sport, but the CAS - with award rendered on June 29, 2011 - rejected the appeal claimed by the parties, and confirmed the decision of FIFA DC (also by rejecting any other submission filled by the parties).

The only - and final - way for the player to solve his problems was to state an appeal before the Swiss Federal Supreme Court.

Against all odds - this was revealed to be successful.

With its decision of last March 2012 the Swiss Federal Supreme Court (First Civil Law Court), by stating that '*the matter was capable of appeal*'¹³, upheld the appeal forwarded by the parties and - by holding unlawful the disciplinary sanction given by FIFA, which threatened a lifetime ban for the player - set aside the CAS award of June 29, 2011.

3. The Laws and Regulations concerned

The main laws and regulations related to the concerned case can be split up into two categories: the FIFA Disciplinary Code¹⁴ (hereinafter: FDC) on one side; and the Swiss Federal Code on Private International Law¹⁵ (hereinafter: PILA) on the other side.

As the problem was to check the compatibility of FIFA Regulations with the Swiss system of Private International Law (and in particular: against the Swiss International Public Policy) we need to recall them briefly.

Bearing in mind that the FIFA Disciplinary Code applicable at the time was the 2009 Edition, the main regulations concerned are: 1) Art. 22 (Ban on taking part in any football related activity); 2) Art. 64, Section 8 (Failure to respect decisions).

In particular, art. 22 of FDC states that: '*A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other)*'.

Art. 64, Section 8, of FDC it states that: '*Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or in part, even though instructed to do so by any body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:*

1. *Will be fined at least of CHF 5,000 for failing to comply with a decision;*
2. *Will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
3. *(for clubs only) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.*

If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.

If points are deducted, they shall be proportionate to the amount owed.

A ban on any football-related activity may also be imposed against natural persons.

Any appeal against a decision passed in accordance with this article shall immediately be lodged with CAS'.

This last provision represents the critical point of the dispute, by also indicating the main and only legal ground for the enforceability of a decision rendered by a body, a committee or an instance of FIFA or CAS.

According to the FIFA Circular letter n. 1270 of July 21 2011 '*the range of application of art. 64 of the FDC concerning the enforcement of decisions rendered by the Court of Arbitration for Sport (CAS) is now exclusively limited to those cases that had previously been dealt with by a body or a committee of FIFA*'. Furthermore '*in order to extend the responsibility for enforcing decisions to the associations*', the Circular states that

5 see art. 14 of FIFA Regulations on the Status and Transfer of Players (hereinafter, FIFA RSTP), 2010 Edition, according to which: '*A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause*';

6 see art. 15, para.1, of FIFA RSTP (2010 Edition), according to which '*An established professional who has, in the course of the Season, appeared in less than 10% of the Official Matches in which his club has been involved may terminate his contract prematurely on the grounds of sporting just cause*';

7 the temporary transfer was changed as definitive on July 23, 2009, when the Spanish club agreed to transfer the player to the Italian club for the payment of a 5.1 million Euro transfer fee (although not the Spanish, neither the Italian club - neither the player - ever warned the Ukrainian club about it);

8 plus 5% annual interest from 30 days after the award was rendered;

9 in these terms, CAS 1518-1519-1520/A/2008, all awards available on the CAS website (www.tas-cas.org);

10 The FIFA Disciplinary Code - 2011 Edition - is available on FIFA's website to

the following URL:

<http://www.fifa.com/aboutfifa/organisation/footballgovernance/disciplinarycode.html> (English version);

11 According to art. 17, para. 2, of FIFA RSTP ('Consequences of Terminating a Contract Without Just Cause'): '*If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment*';

12 See at Para. 4 of the decision;

13 See page 8 of the judgment;

14 available on FIFA's website, to the following URL: <http://www.fifa.com/aboutfifa/organisation/footballgovernance/>

[disciplinarycode.html](http://www.fifa.com/aboutfifa/organisation/footballgovernance/disciplinarycode.html) (English version); as well as on www.figc.it/.../Codice%20disciplinare%20FIFA%202011%20 (Italian version);

15 available on-line on the following URLs: <http://www.admin.ch/ch/d/rs/291/index.html> (Italian version); or <http://www.admin.ch/ch/d/rs/291/index.html> (German version); or <http://www.admin.ch/ch/f/rs/291/index.html> (French version); <http://www.umbrecht.ch/pdf/SwissPIL.pdf> (English version);

*'the association of the deciding body shall bear the responsibility for enforcing any financial or non-financial decision that has been pronounced against a club by a court of arbitration within the relevant association or by a National Dispute Resolution Chamber (NDRC)', both of which must be duly recognized by FIFA.*¹⁶

The other provision is contained in Chapter 12 ('International Arbitration'), Art. 190 ('Finality. Appeal') of the Swiss PILA.

In particular, art. 190 of the Code, after stating (in para. 1) that *'The award shall be final when communicated'*, in the next paragraph states that *'It can be attacked only: a) if a sole arbitrator was designed irregularly or the arbitral tribunal was constituted irregularly; b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; d) if the quality of the parties or their right to be heard in an adversarial proceeding was not respected; e) if the award is incompatible with Swiss public policy'*.

It follows that the incompatibility with Swiss Public Policy represents one of the possible legal grounds by which an arbitral award can be appealed before the Swiss Federal Court.

4. The violation of Swiss Public Policy

The violation of Swiss Public Policy - in the meaning of art. 190, para. 2, lett. e) of PILA - has both substantive and procedural content.

The substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles *'and consequently becomes completely inconsistent with the important generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order'*¹⁷.

Among these principles the Swiss Supreme Court invariably lists: the rule of *'pacta sunt servanda'*, the prohibition against abuse of contractual or legal rights, the principle of good faith (*'bona fides'*), the prohibition of expropriation without compensation, the prohibition against discrimination, the protection of minors and other persons incapable of legal act¹⁸.

Bearing in mind that the list cited so far is not exhaustive, the issue as to whether the threat of the imposition of disciplinary measures may represent *'a grave violation of personality rights'*¹⁹ (which could lead consequently to a violation of public policy) seems to be particularly controversial.

The principle of prohibition against discrimination has recently been invoked several times by the athletes, even though the Swiss Federal Supreme Court has adopted a very narrow interpretation of it. It held that an act, a measure or a decision is discriminatory only if it *'unlawfully'* infringes the personality rights of a person by considering the athlete *'solely on the basis of his or her sex, race, health condition, sexual preference, religion, nationality or political opinions'*²⁰. For instance, the

Supreme Court has found that the so-called 'strict liability principle' and the imposition of doping sanctions are not contrary to public policy regardless of the effects of prohibited substances on athlete's performances²¹.

Back to the case concerned, on a precedent judgment²² the Swiss Federal Tribunal pointed out that the appellant's obligation to a five-year employment contract *'was not illicit from the point of view of the privacy protection'* and that *'it could not be found that the Appellant was bound too tightly, simply because he would have to answer for the damages arising as a consequence of breach of contract'*²³.

But the aforesaid judgment left unanswered the question related to the compatibility with public policy of disciplinary measures imposed by a sporting federation in case of a failure to pay damages (as a consequence for breach of contract).

What came into account in the concerned case was the Swiss Public Policy principles concerning labour law, as well as those related to personal and economic freedom.

5. The Swiss Labour Law, and the Personal and Economic Freedom Principles

Starting - in between the prefaces - with the not accidental reference to the prohibition of forced labour as a violation of Swiss Public Policy principles²⁴, the Swiss Federal Court focuses on the economic freedom and the personal freedom, according to Swiss law.

It recalls, in particular, art 27 of Swiss Federal Constitution (BV) regarding economic freedom, and art. 27 of Swiss Civil Code (ZGB) regarding personal freedom.

Title Two ('Fundamental Rights, Citizenship and Social Goals') of the Swiss Federal Constitution (BV)²⁵, states - in art. 27, para. 2 that *'economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity'*.

The Swiss Civil Code (ZGB)²⁶ - on art. 27, para. 2 - states that *'no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals'*.

In other words, the free unfolding of personality is guaranteed - amongst various principles - by the constitutional right to economic freedom, which includes (according to Swiss law) the right to choose a profession freely and the right to access and exercise an occupational activity freely.

What the concerned judgment meant to highlight is that there are limits to the curtailment of personal freedom, as a curtailment is being considered excessive *'when the obligee is subjected to another person's arbitrariness'*, so that *'he gives up his economic freedom or curtails it to such an extent that the foundations of his economic existence are jeopardized'*²⁷. As a consequence, all sanctions imposed by a Federation - which do not merely ensure the correct course of the games, but encroach upon the legal interests of the person concerned - are subject to judicial control (on a case by case analysis).

In such cases, the Court pointed out that *'the right of the association to exclude a member is not reviewed merely from the point of view of an abuse of rights, but also by balancing the interests involved'*²⁸.

6. The 'Balance of Interests' (and the Proportionality of Sanction's principle)

Another key-point of the concerned judgment is the reference to the 'balance of interests' principle.

By a brief reading of the ruling, it could be inferred that this principle is strictly linked to - and sometimes confused with - another principle: the 'adequacy of the sanction' (to achieve its direct purpose), or - to be more exact - 'the principle of proportionality'.

In particular, what comes into consideration is the interest of FIFA (as well as of every National Federation involved) to contractual compliance by football players with their duties to the clubs they signed for.

In the concerned judgment, this principle is considered *'questionable'* in the light of the following statements:

1. The Appellant *'rightly says that he cannot pay the whole amount anyway'*²⁹;
2. The sanction of the Federation is *'however not necessary to enforce the damages awarded'*, as *'the Appellant's previous employer can avail itself*

16 for a short, brief comment upon that, please refer to P. GARRAFFA, 'A small Circular, large changes (more power to FIFA, or more responsibility to the National Associations?)', on www.gius-tiziasportiva.it, no. 2, 2011 (on-line sports law review directed by prof. J. Tognon);

17 see page 6 of the decision;

18 see, amongst the many, decision no. 4A 17/2007, of June 8, 2007;

19 in these terms, page. 6 of the judgment;

20 See decision no. 4A 370/2007 of February 21, 2008;

21 See decision no. 4P 105/2006 of August 4, 2006;

22 Judgment no. 4A 320/2009 of June 2, 2010;

23 point 4.4. of the judgment;

24 by referring to decision no. 4A 370/2007 of February 21, 2008 (above);

25 approved on April 18, 1999 (available on-line on the following URLs):

www.admin.ch/ch/i/rs/1101.de.pdf (German version);

www.admin.ch/ch/i/rs/1101.fr.pdf (French version);

www.admin.ch/ch/i/rs/1101.it.pdf (Italian version);

www.admin.ch/ch/e/rs/1101.en.pdf (English version);

26 approved on December 10, 1907 (available on-line on the following URLs):

www.admin.ch/ch/e/rs/210.en.pdf (English version);

www.admin.ch/ch/i/rs/210/index.html (Italian version);

www.admin.ch/ch/d/st/210/index.html (German version);

www.admin.ch/ch/f/rs/210/index.html (French version);

27 see para. 4.3.2. of the judgment. To this extent, a legal commitment is considered 'excessive' when it becomes contrary to public policy, as when - for example - it represents a grave violation of privacy (see judgments n. 4A 320/2009; n. 4A 458/2009; n. 4P 12/2000, of Swiss Federal Tribunal, all of them recalled in between the same paragraph of the judgment);

28 see para. 4.3.3. of the judgment;

29 see para. 4.3.4. of the judgment (line 15);

of the New York Convention on the Recognition and the Enforcement of Arbitral Award of June 10, 1958³⁰;

3. The 'abstract goal of enforcing compliance by football players with their duties to their employees is clearly less weight' than the occupational ban, 'unlimited in time and worldwide'³¹.

Although many of the conclusions given by the Court could be shared, it must be observed that not all the statements developed by it in the judgment are fully convincing.

On the other hand, in some points the concerned decision gives the impression that many of the raised questions are left unanswered, or simply the deciding body jumped out of them.

The first of the three assertions - which considered the adequacy of the sanction's principle *questionable* in the light of fact that the appellant 'rightly says that he cannot pay the whole amount anyway' - is, indeed, 'questionable' in itself.

What if an athlete (whichever athlete) alleges - after breaching a contract, and receiving a condemnation (in an arbitral proceeding in which he was given the right to be heard and promote his own reasons and defenses) - that 'he cannot pay the whole amount anyway'?

In the author's view this may represent a way to avoid, or better, escape from the legal obligation to pay a condemnation as a result of the breach of contract.

Most of all, could it represent a valid legal argument to overcome one of the most important principles on sporting matters: the contractual stability?

Let us remind ourselves that the principle of contractual stability - provided for and regulated by Part. IV of FIFA RSTP ('Maintenance of Contractual Stability between Professionals and Clubs') - represents nothing less than the '*pacta sunt servanda*' principle in sporting matters (which is one of the most important Swiss Public Policy's substantial principles).

So what if an athlete breaches this principle without being sanctioned (as 'he cannot pay the whole amount anyway')?

Another argument put forward by the Swiss Federal Court refers to the possibility - for the previous employee - to use the New York Convention of 1958³² in order to enforce the damages awarded.

This argument might be more convincing.

The 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards', signed in New York on June 10 1958, attributes each contracting State the jurisdiction to recognize arbitral awards as binding and enforce them in accordance with the rules of the procedure of the territory where the award is relied upon (art. III of the Convention).

The judgment reiterates³³ that most States are parties to that Treaty ('and in particular Italy, which is the Appellant's present domicile') so that won't be - in theory - difficult for the Club awarded to enforce the award in the counterparty's present domicile.

Nobody wants to challenge the validity of this statement, but what practically comes into account is that - in sporting disputes (or, to use a more suitable expression, 'inside the football family') - art. 64 of FIFA Disciplinary Code is still representing the main and most effective instrument provided in order to enforce decisions rendered 'by a body a committee or an instance of FIFA or CAS'.

Whereas the range of application of this article has now been exclusively limited to those cases that had previously been dealt with by body

or a committee of FIFA³⁴, it is beyond doubt that art. 64 of FDC is the only article listed on sporting regulations to ensure its members the enforceability of the decisions rendered by the sporting justice bodies.

So while it is true that, to enforce any financial decision, the Club can avail the New York Convention to get its reasons, it is also true that - in order to comply with a decision (financial or non-financial) rendered by a body, a committee or an instance of FIFA or CAS - the system provided by the FIFA Disciplinary Code is still the most effective. Sporting sanctions (e.g. deduction of points, demotion to a lower division, transfer ban or a ban to any football-related activity) remain the most immediate and effective instruments to ensure compliance with the decisions rendered by any sporting justice body.

The third argument used by the board to ground its decision is the application of the 'balance of interests principle', in particular between the compliance of football players with their duties to their employees (on one side), and their economic freedom (on the other).

According to the Swiss Federal Constitution (BV) the economic freedom includes also 'the freedom to choose an occupation as well as the freedom to pursue a private economic activity' (so Art. 27, para. 2).

Amongst the sports law principles there is the principle of proportionality of the sanction (to the infringement of the rule)³⁵.

In these terms, its application in the concerned judgment seems to be correct.

But what might raise some objection is the assertion of the deciding body - according to whom, between the two principles, the first one is 'clearly of less weight'³⁶.

From an abstract point of view, this assertion may be shared, as it takes into account the assumption - widely recognized by the vast majority of labour legislations - about the worker as 'the weak party' of the employment relationship.

However, what might raise some doubts is the assumption in itself.

The occupational ban - provided by the Art. 64, para. 4, of FDC - unlimited in time and worldwide to any football-related activity may represent an infringement on the player's privacy. Yet this sanction - provided by the FIFA Disciplinary Code - whose effect was known in advance both by the professional player, and by the club, and by each Association was, to some extent, accepted by the parties.

In other words, what raises some perplexity is that this assertion - that in between the compliance of football players with their duties to their employees (on one side), and the economic freedom (on the other) the second outbalances the first one - was made by the board and not by the legislative sporting institutions (moreover, in all support of economic freedom).

Nobody wants to challenge the validity of the economic freedom principle, but its adoption could never affect the legal certainty of contractual relations (above all, the contractual stability's principle).

Let us remember that the Swiss Supreme Court has consistently held that an award will be set aside when it is incompatible with public policy, not just because of its reasons, but also because of the result to which it gives rise³⁷.

If this choice was maintained for any future case it might undermine the certainty of contractual relations, of the contractual stability (and the *pacta sunt servanda*'s principle first) and - what we think might be more dangerous - the end of sporting justice in itself and/or its effectiveness.

7. Conclusions

We have argued that the choice made by the panel seems to be questionable both on the merit, and in the form: such a choice needs to be made by all the parties involved on sporting matters indeed, legislator first.

The employment relationship, like any legal relationship, has to be balanced.

This balance should be founded between economic freedom on one side, but also legal protections on the other (in order to ensure a high degree of legal certainty as well).

The principle of economic freedom could never overturn the certainty of legal relations, moreover the '*pacta sunt servanda*' principle.

30 see para. 4.3.4. of the judgment (lines 19-21);

31 see para. 4.3.4. of the judgment (lines 25-26). Emphasis added by author;

32 available on-line on the following URL: www.uncitral.org/pdf/english/texts/arbitration/NY-conventionXXII_1_e.pdf (English version);

33 on para. 4.3.4 of the decision;

34 so FIFA Circular Letter no. 1270, of July 21, 2011 (available on FIFA's website on the following URL

www.fifa.com/mm/document/affederation/administration/01/48/53/98/circularno.1270-amendmentstotheifadisciplinarycode.pdf (English version);

35 see Art. 64, para. 3, of FDC which states that: 'If points are deducted, they shall be proportionate to the amount owed';

36 so para. 4.3.4 (final);

37 see decision no. 4A 42/2007, of 13 July 2007;

It is not new that *any kind of freedom* must be ruled within certain limits, in full respect to the principle of legality: otherwise it will lose its meaning and consistency.

Two minor aspects need to be further underlined.

First, in the judgment, it emerged that the Spanish club (Real Zaragoza) paid a first part of its debt to the Ukrainian Club (Shaktar Donetsk) into an account opened in the name of the second.

This raised the question in which way it should be considered.

Should it be considered like a 'recognition of a debt' (by the club and/or the player), or like a 'partial enforcement' to the other party, or like anything else (or nothing in particular)?

Which value, what meaning to give to this partial payment?

Second, the CAS did not take position on the proceeding (did not appear itself).

Of course, this must be interpreted as the CAS it's 'just' an arbitral body, so it cannot be expected - in principle - to make such a choice (neither that someone could request an intervention).

But to what extent will it continue to make this choice? To what extent will it remain 'neutral' in front of the - always increasing - number of appeal against its decisions before the Swiss Federal Supreme Court?

These are - we think - only some doubts coming out from this judgment, which most likely are going to give rise to much more debate.

The International Sports Law Journal

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THE FINALITY OF CAS AWARDS

By Tobias Glienke, LL.M

ABSTRACT

The CAS Code provides for '*final and binding*' awards. But the finality of international arbitral awards often depends more on the law of the seat than on the arbitration rules. This article explores how final CAS awards really are. It examines the grounds for appeal under the Swiss law on international arbitrations that applies to every CAS arbitration, gives an overview of all CAS awards that have been set aside by the Swiss Federal Supreme Court and discusses the possibility to waive the right to appeal.

1. INTRODUCTION

The Court of Arbitration for Sport (CAS) has enjoyed a remarkable story of success since its foundation in 1984. Today, it really has become what the former President of the IOC, *Juan Antonio Samaranch*, had in mind - the '*supreme court of world sport*'.¹ The Olympic Charter refers disputes to this court, and so do almost all international federations, National Olympic Committees and other sport bodies. Nowadays, the CAS is almost universally accepted as the highest court for all sports matters. One of the reasons for that success is the expectation to get a quick and final decision by experts. But no matter how fast the first decision is rendered, if the parties can appeal the arbitral award, the pro-

ceedings will be delayed and potentially decided by State judges that are anything but experts in sports law. To that end, Art. R59 of The Code of Sports-related Arbitration (CAS-Code) provides for '*final and binding*' awards. But the question is: how final is final?

This article will explore how final CAS awards really are and to which appeal procedures they are subject. Then, it will set out the different grounds of appeal before the Swiss Federal Tribunal and provide an overview of the case law in regard to challenges of CAS awards. Lastly, it shows the (rare) possibility to completely exclude any appeal under Swiss Law and point out why this is not advisable in most cases.

2. THE JURISDICTION OF THE CAS

Although it is called a '*Court*', the CAS is a private arbitral institution that derives its jurisdiction from an agreement of the parties. In theory, such an agreement can also be concluded after a dispute has arisen, in practice, however, this rarely happens.² Almost every one of the interlocking statutes that form the international body of sports organisations contains an agreement to exclude the jurisdiction of State courts in favour of CAS arbitration.³ The Olympic Charter and the FIFA Rules are only the two most prominent of numerous regulations of national and international sports governing bodies that refer their disputes exclusively to the CAS. Some of these international bodies refer all disputes directly to the CAS, others have their own dispute resolution bodies and only allow for an appeal to it.⁴ But ultimately, and that is what matters, all disputes end up at the Court of Arbitration for Sports to be finally decided. Today, it can be truly said that this institution has almost universal jurisdiction in sports matters and is globally embraced as the '*supreme court of world sport*'.

The reasons for this success are twofold: Firstly, it is of utmost importance for the international system of professional sports that the 'rules

1 Introduction by H.E. Kéba Mbaye, former President of ICAS/CAS, in: Mathieu Reeb, *Digest of CAS Awards III 2001 - 2003* (xiv).

2 For one of the very few examples where parties entered into an agreement to refer a dispute to CAS after it has arisen, see *USOC v IOC*, CAS 2011/O/2422.

3 E.g. The Olympic Charter Art. 61; FIFA Statutes Art. 66-68; ITF Articles of Association Art. 33; FINA Constitution Art. C 25.

4 Directly referred disputes will be decided in The Ordinary Arbitration Division, appeals will be handled by The Appeal Arbitration Division.

of the game' are the same - everywhere and for everybody. It is not enough to have uniform rules for a particular sport, e.g. that a football match lasts 90 minutes all over the world. A uniform legal standard is as necessary to ensure a fair and equitable competition.⁵ Whether or not to impose and enforce a doping sanction, for example, cannot depend on the location of the event where the positive sample was taken or on the nationality of the athlete. The only way to provide for such equality is to exclude State court jurisdiction and domestic law in the area of international sports and refer all disputes to one dispute resolution body that will apply the same rules in every case. Secondly, the general advantages that are brought forward for arbitration are equally true in the sports context. Parties choose arbitration because they expect a fast and final resolution of their dispute by experts. Athletes' professional careers are usually limited to a few years in which they can compete at the highest level and some of the biggest sport events, like the Olympic Games or the FIFA World Cup, only take place once every four years. If a dispute arises about whether or not an athlete who competed in the Olympic semi-finals is eligible to participate in the finals the next day, it has to be decided before the final run begins. A system that takes years to decide a dispute and that provides for several different appeal and revision procedures is inadequate to cater the needs of the sports community. The goal of a quick decision can only be achieved if awards are final and not subject to endless reviews by different appeal tribunals or courts. To this end, the CAS Code stipulates that awards shall be '*final and binding*'.⁶

3. THE SWISS ARBITRATION LAW

But even though the CAS is generally considered to be the '*supreme court of world sport*', one has to keep in mind that the proceedings are still '*only*' arbitrations. As a consequence, they are subject to the same rules as all other arbitral proceedings - to the *lex loci arbitri*, the underlying national law that governs the arbitration. Because of its sovereignty, every State has jurisdiction over whatever happens within its territory - including arbitrations. By choosing the arbitral seat, the parties submit themselves to the law of that country and make it the legal foundation of their proceedings.⁷ One of the most important functions of the *lex arbitri* is the possibility to empower local courts to set aside arbitral awards.⁸ No matter how expressly arbitral rules state that their awards shall be final and binding, these rules cannot override the mandatory laws of the seat if they provide for review by State courts.⁹

Unlike other arbitration rules, the CAS Code does not leave it to the parties to determine a seat, but stipulates that it always is in Lausanne.¹⁰ This contributes to the goal of harmonising decisions in order to achieve a level playing field in international sports because Swiss law is the *lex arbitri* of all CAS arbitrations.¹¹ That is also true for cases that are administered by the two decentralized offices in New York and Sydney. The New South Wales Court of Appeal confirmed this principle in *Raguz v Sullivan*¹² when it refused to entertain an action to set aside although both parties were Australian, the whole panel was composed of Australians and the hearing was held in Sydney, because it acknowledged that the arbitral seat was Lausanne. Even the arbitrations that are conducted by the CAS Ad-hoc panels at the Olympic Games have their juridical seat in Switzerland.¹³ Ultimately, although the CAS Rules pro-

vide for a '*final and binding*' award, the finality of every CAS award depends on Swiss arbitration law.

Switzerland has two different sets of arbitration rules, one for international and one for domestic proceedings. If at least one party was neither domiciled nor habitually resident in Switzerland at the time the arbitration agreement was concluded, the arbitration is deemed to be international and subject to the Federal Code on Private International Law 1987 (PIL).¹⁴ If both parties are domiciled in Switzerland, the rules on domestic arbitrations will apply. Until the Swiss Civil Procedure Code (CPC) entered into force in 2008, this differentiation was mandatory. Accordingly, the cantonal rules on domestic arbitrations had to be applied to the appeal proceedings in *Danilo Hondo v WADA*¹⁵ and bestowed on *Hondo* not only two instances of appeal - the Cantonal Court and the Swiss Federal Supreme Court - but also broader grounds for a request to annul the award. In order to avoid different legal standards in sports cases, Art. 353 CPC now allows parties to opt-out of the CPC and subject their arbitration to the PIL. The Ad-hoc Rules make use of this possibility, leading to the application of Chapter 12 PIL to all arbitrations under these rules.¹⁶ Although neither the CAS Code nor the CAS Standard Arbitration Clause does include such a choice yet, cases that fall under domestic arbitration rules are very rare in CAS proceedings. Due to the limited relevance of domestic arbitrations in CAS practice, this article will focus on the situation that the arbitration is governed by the PIL.

4. RECOURSE AGAINST ARBITRAL AWARDS

With party autonomy being the pivotal principle, few international arbitration laws are as liberal as the Swiss PIL. It is not based on the UNCITRAL Model Law and rather short in comparison, consisting of only 19 articles that just focus on the most important aspects. The award is regarded as final from the moment of its communication.¹⁷ An unsatisfied party has only one remedy and only one level of judicial review - the appeal to the Swiss Federal Supreme Court.¹⁸ The procedure is subject to Art. 77 of the Federal Supreme Court Act 2005 (SCA). A request for vacation of the award has to be lodged with the Court within 30 days from the notification of the Award.¹⁹ There is no hearing and generally only one round of submissions, both contributing to the expeditious treatment of the appeal and resulting in an average time of less than four months from filing of the challenge till the decision.²⁰ The Supreme Court cannot substitute the tribunal's decision by its own, it has to either dismiss the appeal or annul the award and refer the case back to the tribunal for reconsideration. Only in cases where a party contests the jurisdiction of the panel can the Supreme Court substitute the tribunal's decision by its own, thus ruling whether or not the tribunal has jurisdiction.²¹ In deciding the case, the Court is generally bound by the facts that were established in the arbitral award,²² while it is free in their interpretation and not bound by the tribunal's conclusions. Nevertheless, it usually invites the arbitral tribunal to comment on the challenge. It can only reassess the facts that were established by the tribunal if a permissible appeal under Art. 190 II PIL is directed against the factual findings or if, in exceptional cases, the consideration of new evidence is justified.²³

5 Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, (2009) 10 *Pepperdine Dispute Resolution Law Journal* 51 - 67 (64 - 67).

6 Art. R59 CAS Code.

7 Francis A. Mann, *Lex Facit Arbitrum*, reprinted in (1986) 2 *Arbitration International* 241 - 261 (248); Nigel Blackaby/Constantine Partasides/Alan Redfern/Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford 2009 [3.51]; William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, (1983) 32 *International and Comparative Law*

Quarterly 21 - 52 (23); Klaus Peter Berger, "Sitz des Schiedsgerichts" oder "Sitz des Schiedsverfahrens"? (1993) *Recht der internationalen Wirtschaft* 8 - 12 (10).

8 Cf. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. V (1) (e) provides that an arbitral award can be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

9 Jennifer Kirby, *Finality and Arbitral Rules: Saying An Award Is Final Does Not Necessarily Make It So*, (2012) 29 *Journal of International Arbitration* 119 - 128 (125).

10 Art. R28 CAS Code.

11 Cf. Mark Mangan, *The Court of Arbitration for Sport: Current Practice, Emerging Trends and Future Hurdles*, (2009) 25 *Arbitration International* 591 - 602 (593).

12 *Raguz v Sullivan* [2000] NSWCA 240.

13 Art. 7 of the Arbitration Rules For The Olympic Games (Ad-hoc Rules).

14 Art. 176 I PIL.

15 *Hondo* was living in Switzerland and WADA is a trust under Swiss law with its seat in Lausanne, see *Danilo Hondo v WADA*, 4P.148/2006 of 10 January 2007.

16 Art. 7 Ad-hoc Rules.

17 Art. 190 I PIL.

18 Art. 191 PIL.

19 Art. 100 I SCA.

20 Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland - An Updated Statistical Analysis*, (2010) 28 *ASA Bulletin* 82 - 100 (90 - 91).

21 BGE 117 II 94 of 9 April 1991; 4A_240/2009 of 16 December 2009.

22 Art. 77 II, 105 I SCA.

23 Cf. *Valverde v WADA*, 4A_234/2010 of 29 October 2010; Matthias Leemann, *Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator*, (2011) 29 *ASA Bulletin* 10 - 32 (19).



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- **November 2013** (date being determined; 2-day workshop) - Fall Sports Fraud Roundtable Workshop (Karen L. Jones, JD, MA, facilitating with expert speakers from the global sports law community)
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5. GROUNDS FOR REVIEW UNDER ART. 190 II PIL

The PIL clearly favours the goal of finality over procedural and material accuracy of arbitral awards. Swiss law does not provide for a review on the merits of the case, be it questions of facts or questions of law. This is the result of the parties' decision to exclude State jurisdiction and entrust a private tribunal with the task to adjudicate on their dispute. State courts only ensure that the proceedings are concluded in a proper way.²⁴ That is why arbitral awards can only be vacated on the very narrow grounds enumerated in Art. 190 II (a) - (e) PIL, namely if (a) a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; (b) the arbitral tribunal erroneously held that it had or did not have jurisdiction; (c) the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims; (d) the equality of the parties or their right to be heard in an adversarial proceeding was not respected; or (e) the award is incompatible with Swiss public policy. This restricted scope of judicial review, combined with the extremely conservative approach of the Swiss Federal Supreme Court and its reluctance to intervene in arbitral proceedings, results in slim chances to have an unfavourable award set aside: 93.5% of all challenges are dismissed.²⁵ And the odds do not seem to be better in sports-related arbitration. Numerous CAS awards have been appealed to the Supreme Court, but until today, only seven have been annulled. If that is a good thing or a bad lies in the eye of the beholder. But it definitely serves the finality of arbitral awards and makes sure that, in the vast majority of cases, parties get what they agreed to - a final decision by a private tribunal.

5.1 IRREGULAR CONSTITUTION OF THE PANEL

The first ground for challenge of an arbitral award is the irregular constitution of the tribunal. A panel is not constituted properly if the agreed appointment procedure was not respected or if one or more of the arbitrators are not independent. Art. 190 II a) PIL only covers the basic requirements in regard to independence and impartiality that are constitutionally protected and does not apply to specific standards that the CAS rules or a private agreement might dictate.²⁶ A prominent commentator described the Supreme Court's approach to challenges that invoke this provision as being '*ultra-restrictive*'.²⁷

The first hurdle parties have to clear if they want to challenge the panel's constitution before the Supreme Court is the procedural admissibility of their challenge. In general, a party who does not challenge an arbitrator immediately after it became aware of the facts that question his impartiality is considered to have waived its right to object.²⁸ It cannot just sit on the evidence and wait how the award turns out. The only exception is made if the ground for challenge is so grave that the party could not have validly forfeited its right to object.²⁹ Thus, the parties first have to make use of the challenge procedure provided for in the CAS Code.³⁰ A party has to file a complaint with the ICAS Board within seven days after it becomes aware of facts that give rise to doubts as to the impartiality of an arbitrator during the proceedings. If the ICAS dismisses the challenge, a party has to wait for the final award and appeal this decision. The Federal Supreme Court expects parties to actively verify the independence of arbitrators and held that parties who could have discovered relevant facts by exercising due care are barred from raising objections based on these facts in appeal proceedings.³¹ This includes adequate research in publicly available sources, especially the Internet. The only situations where a new challenge could lead to a successful appeal are therefore cases in which new facts are discovered after the

award is rendered that could not have been discovered before, even if due care had been exercised. When reviewing if a challenge had been wrongly dismissed, the Court will base its decisions on the facts that were available for the ICAS. Parties cannot rely on new facts that they were aware of at the time of the first objection.³²

In the rare event that these procedural standards are met and the Federal Supreme Court continues to investigate on the merits whether a challenge was wrongfully dismissed or if particular new facts give rise to objective doubts about an arbitrator's independence, it utilises the IBA Conflict Rules³³ as a guideline. It has noted that these rules are an '*invaluable tool*' that contributes to harmonisation of the standards that are applied in international arbitrations to rule on conflicts of interest.³⁴ The outcomes of such challenges depend on the specific facts of every single case. When it comes to challenges of CAS arbitrators, the Supreme Court recognizes that sports-related arbitration has particular features, like the closed list of arbitrators and the requirement of a legal as well as a sports background, that render it more likely for arbitrators to have had prior involvement in proceedings with the same parties, or to have performed other functions for one of these parties.³⁵ Nonetheless, it stressed that there is no reason to apply less stringent standards of independence in sports-related arbitration than in commercial arbitration.³⁶ That should go without saying but is nevertheless appreciated. Lower standards would only be of advantage to the federations or sports bodies that are more likely to be involved in multiple proceedings and, thus, might potentially gain benefits from appointing the same arbitrators all the time, while athletes will usually not be involved in more than one CAS proceedings during their career. Until now, the appraisal of the Supreme Court as being '*ultra-restrictive*' has proved true. None of the appeals based on an allegedly biased arbitrator was successful.

5.2 JURISDICTION WRONGLY ACCEPTED OR DECLINED

The second ground on which an award can be set aside under the PIL requires that the arbitral tribunal erroneously held that it had or did not have jurisdiction.³⁷ This grievance covers all cases of invalid arbitration agreements or misinterpretations of such agreements by the tribunal and, as all the other grounds for appeal, many petitioners have invoked this provision to attack unfavourable CAS awards. Only two of those appeals have been successful so far. In both cases, *Busch v WADA*³⁸ and *ASA v Thys*,³⁹ the Federal Supreme Court held that there was no valid agreement to arbitrate and thus no jurisdiction of CAS. In all other cases, appeals were dismissed.

The reason for this small rate of success is, again, the extremely liberal and arbitration-friendly approach of the PIL and the Federal Supreme Court. Art. 178 PIL only demands that an arbitration agreement be in text form and does not stipulate any further requirements as to its content. According to settled case law of the Federal Supreme Court, it is sufficient for a valid agreement if it demonstrates the will of the parties to exclude State courts and refer a particular existing or future dispute to a private arbitral tribunal.⁴⁰ The Federal Supreme Court will uphold pathological arbitration clauses, that is, clauses that are incomplete, unclear or even contradictory, as long as they demonstrate the clear will of the parties to have their dispute settled by a private panel. In doing so, it will not only interpret but also supplement the agreement to arbitrate.⁴¹ In *FC X v Y Sàrl*, for example, the following clause was upheld although neither FIFA nor UEFA were actually empowered under their internal rules to finally decide the dispute at hand:

'The competent instance in case of a dispute concerning this Agreement

²⁴ Stephan Netze, *Die Beschwerde gegen Schiedssprüche des CAS*, (2011) 1 Sport und Recht 2 - 7 (4).

²⁵ Felix Dasser, *supra* note 20 (85 - 86).

²⁶ Matthias Leemann, *supra* note 23 (15, 19).

²⁷ Pierre Lalive, *L'Article 190 al. 2 LDIP a-t-il une utilité?*, (2010) 28 ASA Bulletin 726 - 734 (726 - 727); Luca Beffa, *Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator - Is it time to change the approach?*, (2011) 29

ASA Bulletin 597 - 606 (597).

²⁸ Matthias Leemann, *supra* note 23 (12).

²⁹ Ibid.

³⁰ Art. R34 of the CAS Code.

³¹ *Biolley v Turkish Football Association*, 4A_506/2007 of 20 March 2008; *Ittihad Club of Saudi Arabia v Vitória SLA*, 4A_528/2007 of 4 April 2008; *Heiderscheid v Ribéry*, 4A_234/2008 of 14 August 2008.

³² Luca Beffa, *supra* note 27 (602).

³³ IBA Rules on Conflicts of Interest in

International Arbitration.

³⁴ *Biolley v Turkish Football Association*, 4A_506/2007 of 20 March 2008: "*instrument de travail précieux*".

³⁵ *Biolley v Turkish Football Association*, 4A_506/2007 of 20 March 2008; *Mutu v Chelsea*, 4A_458/2009 of 10 June 2010; *Valverde v INOC, WADA & ICU*, 4A_234/2010 of 29 October 2010; Luca Beffa, *supra* note 27 (599).

³⁶ *Biolley v Turkish Football Association*, 4A_506/2007 of 20 March 2008.

³⁷ Art. 190 II b) PIL.

³⁸ *Busch v WADA*, 4A_358/2009 of 6 November 2009.

³⁹ *ASA v Thys*, 4A_456/2009 of 3 May 2010.

⁴⁰ BGE 130 III 66; *ASA v Thys*, 4A_456/2009 of 3 May 2010 with further references; Tina Wüstemann/Manuel Arroyo, '*FIFA shall be the sole arbiter*' - a valid arbitration clause under Swiss law, (2010) 28 ASA Bulletin 392 - 405 (393).

⁴¹ *FC X v Y Sàrl*, 4A_246/2011 of 7 November 2011.

is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent⁴²

However, the Court found sufficient evidence for the will of the parties to refer their dispute to arbitration and consequently tried to find a solution that respected this decision. It concluded that the hypothetical will of the parties, had they known that neither FIFA nor UEFA would hear the case, was to arbitrate in Switzerland before a tribunal that is specialised in sports disputes. The logical outcome of these considerations was to supplement the clause in a way that would make out the CAS as the arbitral body of choice and thus to reject the appeal that argued for lack of jurisdiction.

The lenient criteria for validity of such agreements are even more softened in sports-related disputes. The Federal Supreme Court stressed that it will exercise a certain 'benevolence' in regard to the form requirements of Art. 178 PIL in order to advance efficient dispute resolution through specialised arbitral tribunals.⁴³ This generosity, it explains, will lead to the validity of arbitration clauses even if concluded by reference only.⁴⁴ In *Dodo v FIFA & WADA*, the Court found that a rule in the statutes of the Brazilian Football Federation, whereby the FIFA code has to be observed, constitutes a sufficient reference to the right of appeal to CAS, even though no such CAS jurisdiction is expressly mentioned in the Brazilian statute.⁴⁵

The principle that parties can enter into a valid arbitration agreement by mere reference was also acknowledged in *ASA v Thys* and *Busch v WADA*, but in both cases the Court disagreed with CAS and did not consider the specific document as a sufficient reference. In the case of *ASA v Thys*, it decided that a letter from the IAAF Anti-Doping Administrator to *Thys*, who did not have a right to appeal to CAS, saying 'I would remind you that the decision [...] will still be subject to an appeal to the Court of Arbitration for Sport' did not contain a will to enter into an obligation and, therefore, did not constitute an offer to arbitrate that *Thys* could have accepted. Rather, it was only an indication as to the legal remedies that were available in the view of the Anti-Doping Administrator.⁴⁶

Florian Busch, a German professional Ice Hockey player, was redeemed from a two-year doping ban imposed by CAS because the Federal Supreme Court did not interpret an arbitration clause, contained in the Player Entry Form for the International Ice Hockey Federation (IIHF) World Championships and relating to 'any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto' as a general reference to the IIHF statute and the arbitration clause therein. In signing a Player Entry Form, the Court argued, *Busch* could not reasonably have anticipated to accept jurisdiction for matters without any connection to the World Championships. However, the Court left open whether CAS jurisdiction could be established through any reference to an arbitration agreement in the statutes of the National Federation that the Player might have accepted (as it was the case in *Dodo v FIFA & WADA*), because WADA did not submit that such a reference would exist.

5.3 INFRA OR ULTRA PETITA

Another fault in the proceedings that the PIL considers as grave enough to annul an international arbitral award is if a tribunal exceeded its jurisdiction or if it failed to rule on one of the claims submitted to it. So far, no award has been found to be in violation of *infra* or *ultra petita*.

The principle of *infra petita* can be invoked in an annulment action if the CAS panel omitted to address and rule on one of the claims. In *Fenerbahçe v Appiah*, the Federal Supreme Court decided that it does not violate the principle of *infra petita* if the CAS rules that a player owes no damages and dismisses all further claims without specifically addressing a claim for unjust enrichment for salaries paid by the club.⁴⁷ In dismissing all further claims, according to the Court, the tribunal had also dealt with the claim for unjust enrichment. Consequently, it seems as if the panel can easily avoid a violation of this procedural guarantee by making sure to mention in the award that 'all other claims are dismissed'.

An award is only *ultra petita* if it grants more or something different than a party had asked for, e.g. if the tribunal bans an athlete who appealed his two-year doping sanction for three years although the doping agency only requested the initial decision to be confirmed. In contrast, this principle is not violated if the tribunal grants relief for different legal reasons than submitted by the parties as the freedom to rely on legal arguments is covered by *iura novit curia*.⁴⁸

5.4 VIOLATION OF EQUALITY OF THE PARTIES AND THE RIGHT TO BE HEARD

Turning to Art. 190 II d) PIL brings us to the most promising provision for an action to set aside a CAS award - at least according to the statistics. Three CAS decisions have been annulled over the years because they were found to violate the right to be heard.

The purpose of this provision is to make sure that the fundamental guarantees of due process are respected, but not to control if the arbitral tribunal did stick to the rules the parties agreed on, that is, the CAS Code.⁴⁹ The principle of equal treatment requires a tribunal to ensure that both parties have the same opportunities to present their case. The right to be heard covers the chance of each party to submit facts, adduce evidence and to set out its legal arguments. While the first procedural guarantee plays only an insignificant role in appeals against CAS awards, the latter has led to a very interesting array of jurisprudence and its scope is best explained by looking at these cases.

The most famous one probably is *Guillermo Cañas v ATP*, the first ever CAS award that has been annulled by the Swiss Federal Tribunal on 22 March 2007.⁵⁰ This case raised a few interesting questions, one of them being an alleged violation of the right to be heard. *Cañas*, a professional tennis player, had been tested positive to a prohibited substance after participating in an ATP⁵¹ Tour event in Acapulco. The ATP Anti-Doping Tribunal found him guilty of a doping infraction and imposed a two-year ban on him. *Cañas* appealed to CAS and mainly argued that, firstly, the substance had entered into his system without intention and, secondly, the decision was violating Delaware and other laws regarding restraint of trade. The award rendered by the Tribunal found that, in fact, the substance was not taken intentionally. The medication he got prescribed by the tournament doctor was meant for another player's coach and was delivered to *Cañas* by mistake. Accordingly, the tribunal made use of a provision that allowed reducing the ban in case of no significant fault and banned him for 15 months. *Cañas* then appealed this decision to the Federal Supreme Court because it contained no considerations about the alleged violation of Delaware law.

The Court followed this argument and vacated the award because it violated the right to be heard, as it did not provide a reasoned decision in regard to the twelve-page argument submitted by *Cañas*. The Supreme Court recalled that settled case law of the Federal Supreme Court does not require an international arbitral tribunal to provide written reasons for its award,⁵² but it does require it to deal with the relevant questions, at least briefly. Thus, the right to be heard is violated if the panel, by mistake or because of a misunderstanding, did not consider at all arguments or evidence submitted by a party if they are relevant for the case.⁵³ In the case at hand, the Court concluded that the tribunal did not seem to have considered the possible violation of Delaware law at all and thus set aside the award. The case was referred back to the CAS for further consideration. The tribunal reconsidered it, explained why the ban did not violate Delaware law and, again, imposed a 15-month ban on *Cañas*.

The second CAS award ever to be set aside also infringed upon this constitutional guarantee.⁵⁴ *José Ignacio Urquijo Goitia*, a FIFA licensed

42 *FC X v Y Sàrl*, 4A_246/2011 of 7 November 2011.

43 *FC X v Y Sàrl*, 4A_246/2011 of 7 November 2011.

44 *Cañas v ATP*, BGE 133 III 235 of 22 March 2007; *FC X v Y Sàrl*, 4A_246/2011 of 7 November 2011; *Busch v WADA*, 4A_358/2009 of 6 November 2009; *Dodo v FIFA & WADA*, 4A_460/2008 of 9 January 2009.

45 *Dodo v FIFA & WADA*, 4A_460/2008 of 9 January 2009.

46 *ASA v Thys*, 4A_456/2009 of 3 May 2010.

47 *Fenerbahçe v Appiah*, 4A_402/2010 of 17

February 2011.

48 Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sports*, (2010) 1 *Journal of International Dispute Settlement* 217 - 265 (246).

49 *Ibid.* (247).

50 *Cañas v ATP*, BGE 133 III 235 of 22 March 2007.

51 Association of Tennis Professionals (ATP), an association under Delaware law.

52 Cf. *Fenerbahçe v Appiah*, 4A_402/2010 of 17 February 2011.

53 *Cañas v ATP*, BGE 133 III 235 of 22 March 2007.

player agent, and professional football player *Liedson da Silva Muñiz* signed an agreement for representation of the player on the European market. After the player signed a new contract that was not arranged by the agent and refused to pay him a commission, the agent initiated proceedings at the FIFA Players' Status Committee and later appealed the decision to CAS. The CAS panel rejected the claim on the basis that he could not establish any involvement in the negotiations and that he could not rely on the exclusivity of the broker agreement because such a clause violated mandatory Swiss federal law. As a last resort, the agent appealed the award to the Swiss Federal Supreme Court, arguing that his right to be heard had been violated because the mandatory Swiss provision had never been mentioned during the proceedings and came as a surprise. The Court considered this argument and stated that, in general, the principle of *iura novit curia* prevails over the right to be heard when it comes to questions of law. The exception being cases where a party could not reasonably expect the court to apply a specific provision. That means a tribunal can base its decision on provisions that were not addressed by the parties as long as it does not come as a surprise. In the case at hand, the Swiss law that led to the declaration of the exclusivity clause as null and void was not applicable because the broker agreement between a Spanish agent and a Brazilian player did not have any whatsoever connection to Switzerland as required by this law. Thus, the Court concluded, although the parties had agreed on the application of Swiss law, the agent did not have to expect that the panel would base its decision on a law that was not applicable to the particular case. If the CAS wanted to apply this law, it should have at least mentioned it in order to allow the parties to bring forward their arguments in regard to this provision.

The latest award that was (partly) annulled by the Federal Supreme Court on the basis of Art. 190 II d) PIL involved several National Chess Federations and one company called Karpov 2010 Inc. that challenged Mr. *Ilyumzhinov's* nomination for president of the International Chess Federation (FIDE) before the CAS.⁵⁵ The tribunal invited the parties to submit their briefs in regard to costs until a certain deadline. However, before the deadline was over and without having received the submissions on costs, it rendered an award that dismissed the claims and ordered Claimants to pay FIDE CHF 35,000 as compensation for legal fees and other costs. FIDE appealed this cost order and argued that its right to be heard was violated. The Federal Supreme Court agreed. Although noting that there is no general need to allow parties to produce a separate cost submission, the Court held that if a tribunal invites parties to produce such submissions within a specific deadline, it creates the expectation that it will not issue its award before receiving these submissions. If it nevertheless does, it denies the parties the chance to submit their arguments in regard to costs and thus violates their right to be heard.

5.5 VIOLATION OF PUBLIC POLICY

The last ground available for an annulment action - and often invoked as a ground of last resort by dissatisfied parties - is the violation of public policy. Although it is the most popular ground for challenges since 2005 and second overall only to the right to be heard,⁵⁶ it took until April 2010 for the first award to be set aside on this ground.⁵⁷ The cases that have unsuccessfully argued a violation of public policy before the

Federal Supreme Court are manifold and it would go beyond the scope of this article to explore all of the decisions the Supreme Court did *not* consider as contravening the *ordre public*. It should suffice to stress again that the Supreme Court applies a very strict standard in regard to public policy violations and is very reluctant to review arbitral awards on the merits. Although Art. 190 II e) PIL is the only ground that allows for a review of the substance of an award,⁵⁸ the Supreme Court will not control whether a private tribunal has correctly interpreted the facts and applied the law. Even if an award is obviously arbitrary, that does not qualify as a reason for annulment under the PIL.⁵⁹ Furthermore, in evaluating whether or not the award contravenes public policy, the Court will only look at the result, not at its reasons.⁶⁰

The concept of public policy consists of two different parts, a procedural and a substantial one. Procedural public policy, in the Supreme Courts' words,

*'is violated when fundamental, commonly recognised principles are infringed, resulting in an intolerable contradiction with the sentiments of justice, to the effect that the decision appears incompatible with the values recognised in a State governed by the rule of law'. But, it explains, 'not every violation, even arbitrary, of a procedural rule constitutes a violation of procedural public policy [...]. Only the violation of a rule that is essential to ensure the fairness of proceedings can be taken into consideration.'*⁶¹

Such an essential rule is the principle of *res iudicata*: In *Atlético de Madrid v Sport Lisboa E Benfica*,⁶² the petitioner argued that the CAS had ignored the fact that the matter had already been decided. The Supreme Court followed this argument and, on 13 April 2010, for the first time set aside a CAS award for violation of procedural public policy. The facts of that case were as follows: *Dani*, a professional Portuguese football player, terminated his contract with Benfica for just cause and entered into a new contract with Atlético. Benfica subsequently requested at FIFA a training compensation under the then applicable rules and was awarded USD 2.5 million. Atlético appealed this decision of the FIFA Special Committee to the Zurich Commercial Court who declared FIFA's decision to be null and void because it found the FIFA Regulations for the Status and Transfer of Players to violate European and Swiss competition laws. At this time, the FIFA Rules did not provide for review of decisions by the CAS. That is why the Commercial Court was the right forum to file the appeal. Two years after its first request, Benfica, neither knowing of the decision by the Zurich court nor of the confirmation by FIFA that it would respect the decision in case of another claim, sought a new decision from FIFA. This request was rejected. As the new FIFA Rules now provided for an appeal to CAS, Benfica made use of it and brought the matter before a CAS tribunal. Although Atlético raised the defence of *res iudicata*, the CAS awarded Benfica a compensation of EUR 400,000. The Supreme Court held that the fact that Benfica could appeal the second FIFA decision to the CAS because the rules had changed did not affect the *res iudicata* effect of the judgement by the Zurich court because the dispute matter was exactly the same - a claim against Atlético for training compensation for *Dani* - and consequently set aside the CAS award.

It took only roughly two years until, in March 2012, the Federal Supreme Court, for the first time since the coming into force of the PIL, annulled an international arbitral award for contradiction of substantive public policy.⁶³ This judgement explained that, according to settled case law, the substantial part of public policy is violated when a decision

*'disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order. Among such principles are the rule of pacta sunt servanda, the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. However the enumeration is not exhaustive.'*⁶⁴

In the aforementioned case of *Mutu v Chelsea*,⁶⁵ the Court pointed out that a breach of public policy is conceivable in case of a violation of Art.

54 *Urquijo Goitia v da Silva Muñiz*, 4A_400/2008 of 9 February 2009.

55 *FIDE v Fédération Française des Echecs et al.*, 4A_600/2010 of 17 March 2011.

56 Felix Dasser, *supra* note 20 (87).

57 *Atlético de Madrid v Sport Lisboa E Benfica*, 4A_490/2009 of 13 April 2010.

58 Philipp Landolt, *Annulment of Swiss International Arbitration Awards for Incompatibility with Substantive Public Policy: First Annulment in over Twenty Years*, (2012) 27 *Mealey's International Arbitration Report* 1 - 5 (1); Stephan Netzele, *supra* note 24 (6).

59 BGE 117 II 604 of 5 November 1991; BGE 121 III 331 of 25 April 1995.

60 BGE 120 II 155.

61 *A & B v CIO & FIS*, 4P.267/2002 of 27 May 2003, translated in: Mathieu Reeb, *supra* note 1 (690).

62 *Atlético de Madrid v Sport Lisboa E Benfica*, 4A_490/2009 of 13 April 2010.

63 *Matuzalem v FIFA*, 4A_558/2011 of 27 March 2012; for a detailed analysis, see Philipp Landolt, *supra* note 58.

64 *Matuzalem v FIFA*, 4A_558/2011 of 27 March 2012, original in German, translation available at www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/ (visited 20 May 2012).

65 *Mutu v Chelsea*, 4A_458/2009 of 10 June 2010.

27 Swiss Civil Code (ZGB). It was exactly this provision that led to the annulment in March 2012. The Court held that a CAS award infringed upon the right to exercise an economic activity under Art. 27 ZGB.

Francelino da Silva Matuzalem, a Brazilian football player presently employed by SS Lazio Spa Rome, entered into an employment contract with FC Shakhtar Donetsk in 2004. Two years before the end of the contract period, in July 2007, *Matuzalem* terminated the contract without cause and entered into a new agreement with Real Saragossa SAD, who undertook to hold the Player harmless for any damage claims he might face for early termination of his contract with Shakhtar Donetsk. A dispute arose between the parties as to damages for termination of the contract. The FIFA decision in that matter was appealed to the CAS who ordered *Matuzalem* and Real Saragossa to jointly and severally pay EUR 11,858,934 plus 5% interest from 5 July 2007. One month after the Supreme Court had dismissed the action to set aside, FIFA informed *Matuzalem* and Real Saragossa that disciplinary proceedings were initiated against them for non-compliance with the CAS award. These proceedings resulted in a decision that found both in breach of their payment obligations and disposed a last time limit of 90 days for payment under penalty for *Matuzalem* of a prohibition of any football-related activity upon request by Shakhtar Donetsk until full payment was made. The Player refused to pay and referred to the indemnification agreement. Real Saragossa, however, paid only EUR 500,000 because it was in serious financial difficulties that could lead to insolvency. Both appealed this FIFA decision unsuccessfully to CAS, *Matuzalem* then brought an action to set aside the award invoking a violation of public policy.

The Federal Supreme Court held that the free unfolding of personality is a right that is constitutionally protected *inter alia* by the guarantee to economic freedom, which contains the right to choose, access and exercise a profession freely. Art. 27 ZGB recognises this right to free unfolding of personality and protects it against infringement by private persons as it limits the possibility of individuals to renounce their freedom entirely. This provision forbids contractual curtailments that are excessive, that is, obligations that jeopardize the foundations of one's economic freedom or subject one to another person's arbitrariness. The Court confirmed that these values form part of the *ordre public*, but noted that only an obvious and grave violation of this provision could result in a breach of public policy. As it found that Art. 27 ZGB also applies to FIFA's decision, it went on to examine whether the interests of the Federation could justify the grave infringement upon *Matuzalem's* right to free development of personality.

It declined such justification for three reasons: Firstly, the Supreme Court questioned the adequacy of the sanction to achieve its purpose, the payment of more than EUR 11 million. The unlimited prohibition from playing football would deprive *Matuzalem* of his only possibility to earn the money that Shakhtar Donetsk and FIFA wanted him to pay. Secondly, the sanction was unnecessary because the New York Convention allowed Shakhtar Donetsk to enforce the CAS award against *Matuzalem* who was living in Italy, a party to the Convention. Lastly, the Supreme Court found the abstract goal to enforce football players'

compliance with duties to their clubs as of less weight than the grave violation of a player's right to exercise his professional activity caused by the unlimited worldwide ban from football-related activities.

With this judgement, the Supreme Court has answered criticism that it would not sufficiently safeguard the compliance of international arbitral awards with public policy because Art. 190 II e) was just a dead letter.⁶⁶ But one must not mistake this decision for a change in the Court's restrictive approach. It made clear that the violation of substantive public policy will be a rare exception and it cannot be expected that this decision will lead to increased substantive review of arbitral awards. But, and that is comforting, it has demonstrated that it will intervene in cases of most flagrant breaches of '*generally recognized values*'.

6. REVISION

Besides the possibility to appeal a CAS award, Swiss law provides for another remedy called revision. This extraordinary remedy permits the reconsideration of judgements that have already become *res iudicata*, albeit on very limited grounds only. It is not expressly provided for in the PIL, but the Federal Supreme Court has decided that it applies to international arbitrations by analogy.⁶⁷ This is with exception of the procedural guarantees enlisted in Art. 121 SCA as these are already covered by Art. 190 II PIL.⁶⁸ The two only grounds that parties to an arbitration can rely upon to request revision of an award are those set out in Art. 123 SCA.⁶⁹ The first one covers cases where the decision '*has been influenced to the petitioner's detriment by a crime or a felony*'.⁷⁰ The second one applies if '*the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which he could not rely upon during the previous proceedings*'.⁷¹

The typical example for an award that was influenced to the petitioner's detriment by a crime is procedural fraud. It is not necessary that proceedings before a criminal court resulted in a conviction or that a crime or felony has been acknowledged by a criminal court. Art. 123 I SCA expressly states that the existence of a crime or felony can be established by other means if a criminal trial is not possible. If criminal proceedings have commenced, however, the petitioner has to wait for their end before he can file a request for revision.⁷² It should be noted that this provision is interpreted in a way that includes criminal proceedings conducted in foreign countries.⁷³ Furthermore, to successfully file a request for revision, the petitioner has to establish that the criminal offence has influenced the award to his detriment.

A party that wants to bring forward new evidence or rely on new facts to request revision can only do so if it discovered them after the end of the previous proceedings and if they already existed at that time. If a party becomes aware of new facts before the time limit for appeal has lapsed, it has to file an appeal and cannot request a revision.⁷⁴ Facts that came into existence after the end of the earlier proceedings are excluded, as the aim of revision is not to adapt a correct decision to a later change of facts, but to reconsider awards and base them on the correct factual circumstances that existed back then.⁷⁵ Also, the institute of revision is not meant to cure failures of parties in previous proceedings. Consequently, the Federal Supreme Court is reluctant to admit new evidence and held that a party can only rely on new facts if, even by exercising due diligence, it could not have discovered them before.⁷⁶ In addition, these facts are only admissible if they are relevant. That, by definition of the Supreme Court, means the decision ought to have been different, had the newly discovered facts already been available at the time the award was rendered.⁷⁷ In the rare case that a request for revision is granted, the Court will not itself decide on the merits but merely refer the case back to the tribunal for reconsideration.⁷⁸

7. WAIVER OF APPEAL

Swiss law on international arbitration provides for a rare feature that, to my knowledge, out of the popular venues for international arbitration only exists in Switzerland, Belgium, Sweden and, since May 2011, in France⁷⁹: The possibility of total exclusion of State court review. Art. 192 I PIL allows parties to completely or partially waive their right to appeal to the Federal Supreme Court if neither party is domiciled, habitually resident or has a place of business in Switzerland at the time the agreement is concluded.⁸⁰ Such waiver encompasses all grounds of appeal

66 Philipp Landolt, *supra* note 58 (4).

67 BGE 118 II 199 of 11 March 1992; BGE 134 III 286 of 14 May 2008; *Ittihad Club of Saudi Arabia v Vitória S/A*, 4A_528/2007 of 4 April 2008; *Heiderscheid v Ribéry*, 4A_234/2008 of 14 August 2008.

68 For a discussion of the question whether or not that also holds true for the ground of Art. 121 a) SCA, see Antonio Rigozzi, *supra* note 48 (257–258).

69 BGE 118 II 199 of 11 March 1992; Antonio Rigozzi, *supra* note 48 (256).

70 Art. 123 I SCA.

71 Art. 123 II a) SCA.

72 Antonio Rigozzi, *supra* note 48 (259).

73 Antonio Rigozzi/Elisabeth Leimbacher, *The Swiss Supreme Court Refits the Frigates*, (2010) 27 *Journal of International Arbitration* 307–316 (313).

74 Adrian Mutu v Chelsea 4A_458/2009.

75 Antonio Rigozzi, *supra* note 48 (260).

76 *Ittihad Club of Saudi Arabia v Vitória S/A*, 4A_528/2007 of 4 April 2008.

77 BGE 134 III 286 of 14 May 2008; *Ittihad Club of Saudi Arabia v Vitória S/A*, 4A_528/2007 of 4 April 2008.

78 BGE 134 III 286 of 14 May 2008; *Ittihad Club of Saudi Arabia v Vitória S/A*, 4A_528/2007 of 4 April 2008; *Heiderscheid v Ribéry*, 4A_234/2008 of 14 August 2008.

79 Art. 1717 IV Belgian Code Judiciaire; Art. 51 Swedish Arbitration Act; Art. 1522 French Code of Civil Procedure.

80 Nora Krausz, *Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR*, Article 6, (2011) 28 *Journal of International Arbitration* 137–162 (138).

under Art. 190 II PIL, including the right to challenge if a tribunal wrongly assumed jurisdiction.⁸¹ What remains highly controversial, though, and has not been decided by the Supreme Court yet, is whether or not such a waiver can include the right to request a revision.⁸² In *Heiderscheid v Ribéry*, the Federal Supreme Court has expressed its opinion by way of *obiter dictum*. It seems as if the Court would consider a valid waiver to also cover a request for revision in case new facts were discovered, at least if this revision is based on grounds that constitute grounds for appeal under Art. 192 I PIL.⁸³

However, the Court is generally reluctant to accept exclusion agreements as valid waivers. The benchmark was introduced in a decision of 1990 that required a clause under Art. 192 I PIL to clearly indicate the remedy that is to be excluded and to expressly waive it.⁸⁴ Although the Federal Supreme Court has clarified in subsequent decisions that a waiver must not explicitly refer to Art. 192 I PIL, the general requirements set out in 1990 still stand.⁸⁵ A reference to any institutional rules that mention a 'final' award is as insufficient as any arbitration clause that provides for a 'final' award or excludes access to State courts in general terms.⁸⁶ It took 16 years after the enactment of the PIL until the Supreme Court for the first time upheld such a waiver because the wording was clear enough.⁸⁷

Two years later, it had to deal with the aforementioned case of *Guillermo Cañas v ATP Tour*. Although the violation of the right to be heard was the reason for the Federal Supreme Court to set aside the award, the even more interesting aspect is the procedural hurdle it had to overcome to be able to do so - the waiver of appeal that *Cañas* and the ATP had agreed on. *Cañas* had signed a declaration titled 'Player's Consent and Agreement to ATP Official Rulebook' that, besides an agreement to arbitrate and an acknowledgement of the ATP Rulebook and the arbitration agreement therein, contained the following clause: 'The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable. I agree that I will not bring any claim, arbitration, lawsuit or litigation in any other court or tribunal.' In view of the Court, this wording satisfied all requirements for a valid waiver of appeal as set out in its benchmark decision from 1990.⁸⁸ But, and this is the really remarkable part of the decision, the Supreme Court ruled that the waiver could not be held against the athlete. How did the Court reach this conclusion? Firstly, it noted that in applying Art. 192 I PIL one has to look at the intention of this provision. The main reason for introducing the possibility to waive the right to appeal was to increase Switzerland's attractiveness as seat for international arbitrations by avoiding that an arbitral award is subject to two instances of control, the set aside proceedings at the seat and those in the State where enforcement is sought. Because every award is always subject to review in the place of enforcement under Art. V of the New York Convention, parties would always have a chance to have the award reviewed. The basic idea was not to exclude every control by State courts, as becomes obvious when taking into account that Art. 192 II PIL provides for such control if enforcement is sought in Switzerland despite a waiver of appeal. Hence, the Supreme Court concludes, the legislator intended Art. 192 I PIL to mainly apply to commercial arbitration awards that have to be enforced. It is unlikely that he thought of arbitral awards in the field of sports, even less so for disputes over doping bans, as these sanctions do not require

enforcement proceedings and, thus, are not subject to another review. That is why the possibility to waive the right to appeal does, in general, not fit to statutory sanctions in the world of sports. Secondly, the Court stressed that every agreement to waive the right to appeal has to be entered into on a voluntary basis. But in sports, unlike in a commercial setting, the parties are usually in a vertical instead of a horizontal relationship. Athletes lack the same bargaining power as the sports federations and do not have any other choice than to agree to their rules if they want to compete on a professional level.

As a result, an agreement to waive the right to appeal can generally not be held against an athlete, even if fulfils the formal requirements of Art. 192 I PIL. A valid waiver would require a degree of freedom of choice, for example the possibility to participate in organised events of that sports federation even if the waiver was not signed. By interpreting Art. 192 I PIL in this strict sense, the Supreme Court retains the possibility of judicial review as a 'counterbalance' for the 'benevolent' approach to the requirements for valid arbitration agreements in the field of sports disputes.

The jurisprudence of the Federal Supreme Court in regard to waivers of appeal in general, and the *Cañas* decision in particular, are to be welcomed. Waiving the only right to review is a serious step towards finality. It means that the award, no matter in which violation of due process or public policy it was rendered, will persist. But as much as finality of awards may be desirable, it is not at desirable all costs. If something went terribly wrong, the parties will usually be glad to have one last chance to 'rescue' their arbitration. The Swiss PIL already provides for a very arbitration friendly review system with only one instance of appeal that, on average, only needs four months to dispose of a challenge and that only grants very limited grounds for appeal with basically no review on the merits. In general, parties should therefore be careful to exclude their last remedy, especially if they are not familiar with Swiss law and the scope of such waiver. The strict approach of the Supreme Court in regard to the unambiguousness of the clause helps to avoid that parties unintentionally and frivolously do what they might later regret. If the parties are allowed to waive their only chance of review, one has to at least demand that they do so completely voluntarily. This is, as the Court has correctly stated, not the case in disputes between athletes and their federations. If an athlete wants to compete in his sport on a professional level, he has to agree to the federation's rules - the waiver of appeal is basically imposed on him. There is no reason why an athlete should voluntarily agree to have no means at all to remedy breaches of the most fundamental principles and guarantees of due process. Especially, when the potential future dispute may not only be contractual in nature, but when he is possibly charged with a doping offence and faces serious penalties. Hence, the Supreme Court was right to apply a different standard for athletes and decide that a waiver of appeal can generally not be held against them.

8. CONCLUSION

Although the CAS Code declares awards to be 'final and binding', every CAS award is ultimately subject to the appeal provisions of the Swiss Private International Law. The PIL provides for an arbitration friendly review system with very limited grounds for appeal and no review on the merits, except for alleged violations of substantial public policy. As a result, CAS awards can be generally considered as being final. In the 25 years since the CAS rendered its first award, only seven awards have been set aside by the Federal Supreme Court. Another step towards finality can be taken if parties make use of the possibility to waive their right to appeal. But as much as absolute finality of awards may be desirable, it is not desirable at all costs. Therefore, limited State court review in cases where something went terribly wrong is to be welcomed. And because of its extremely restrictive approach, it is only in such cases that the Swiss Federal Supreme Court will intervene.

81 4A_500/2007 of 6 March 2008; Nora Krausz, *Ibid.* (148).

82 For a detailed summary of the different positions, see Nora Krausz, *supra* note 80 (150 - 152 with further references).

83 *Heiderscheid v Ribéry*, 4A_234/2008 of 14 August 2008.

84 BGE 116 II 639 of 19 December 1990.

85 Cf. BGE 131 III 173 of 4 February 2005; *Cañas v ATP*, BGE 133 III 235 of 22 March 2007.

86 Nora Krausz, *supra* note 80 (147);

Domitille Baizeau, *Waiving the Right to Challenge an Arbitral Award in Switzerland: Caveats and Drafting Considerations for Foreign Parties*, (2005)

8 International Arbitration Law Review 69 - 77 (74).

87 BGE 131 III 173 of 4 February 2005.

88 BGE 116 II 639 of 19 December 1990.

The Applicability of the “United Nations Convention against Corruption” to the Area of Sports Corruption (match-fixing)

By Karen L. Jones, JD, MA*

The area of sports corruption is getting a lot of publicity today, and rightfully so. Almost daily, there are new reports of sports corruption. On-going investigation into incidences of sports corruption consumes hundreds if not thousands of law enforcement hours per incidence. With so much attention being given to the area of sports corruption, it is imperative that we have laws in place that provide appropriate remedy to this critical area of national and international law.

Recent debate around sports corruption, in particular in the area of match-fixing, has focused on the laws that are in place to properly address this problem. There is no single definition of match-fixing, however, in its most basic form, *match-fixing* is: The act of losing, or playing to a pre-determined result, in sports matches by illegally manipulating the results in your favour.¹

The European Commission report on *Match-Fixing in Sport: A Mapping of Criminal Law Provisions in EU 27*² clearly shows the discrepancy and deficit in how sports corruption in general or the crime of match-fixing specifically is addressed at a national level. Further, the report is explicit in pointing out the lack of uniformity in criminal provisions to address the problem of match-fixing.³

The problem of sports corruption and particularly match-fixing is one that has international impact. It is often noted that even when a match-fixing incident occurs within a particular country, the impact and even the direct involvement is international.⁴ Because of the international aspects of match-fixing, it is important to have means of addressing this problem at an international level. However, there is no specific international law that directly addresses the issue of match-fixing.

Within the realm of international law is the area of international norms and standards that are often created by international organizations such as the United Nations. In this regard, the United Nations created an international instrument to address corruption in the *United Nations Convention against Corruption*⁵, taking effect 14 December 2005.

As then Secretary General of the United Nations, Kofi Annan, states in the forward to the Convention:

“...It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the importance of core values such as honesty, respect for the rule of law, accountability and transparency in promoting development and making the world a better place for all.”⁶

This statement by Kofi Annan does not specify any particular type of corruption. Instead he more broadly refers to “the corrupt” suggesting

a broader application of this Convention. This statement also mirrors much of the public sentiment relative to “sports corruption” and the impacts on the integrity of the game. In a communication of 18 January 2011, the European Commission states: “Match-fixing violates the ethics and integrity of sport.” This shared recognition of corruption as not just an issue of law but an issue of values in addition to the goals of restoring trust and integrity is central to a fight against corruption in any form.

When confronted with issues of sports law or *lex sportiva*⁷ consideration is often given for the specificity of sport. In line with the declarations⁸ and case law relative to sports, the specifics of that activity may be taken into consideration for purposes of European Union law. This concept is important as sports corruption is often discussed in terms of its uniqueness relative to other types of corruption. In the present situation, when taking into consideration the issue of sports corruption or more specifically “match-fixing”, although the act of match-fixing itself is specific to sport and is primarily a criminal activity with economic enrichment as its purpose, there is no component of match-fixing that would require special consideration be given to the “sporting” aspect of the activity. Outside of the fact that “match-fixing” denotes the arena in which the corruption occurs - the manipulation of a game or match - the actual acts of corruption do not differ from those found in other areas of corruption (bribery, money laundering, conversion, etc.). As such, no special consideration need be given to application of “corruption” rules relative to sports corruption since the activity of sport, although unique to match-fixing, does not itself raise unique legal implications and therefore does not warrant a specific consideration in this context. Therefore, general corruption laws and policies can and should be applied to the area of sports corruption.

Since general anti-corruption measures can apply in the area of sports corruption, there are many available laws and policies that may be applicable at the national and international levels. At the international level, much of the work established in this area comes from the United Nations. The United Nations conventions are not compulsory on nations. Although strongly encouraged, the United Nations Convention against Corruption is considered optional for all the United Nations member states; however, they do create a binding agreement between the signatory countries. As a result of this binding obligation, this area of international law is often considered as part of the larger body of “hard law”. As of July 2012, there are 193 United Nations member states. These include a representative majority of countries across the world, including each of the populated continents. All countries that have signed the United Nations charter are member states of the United Nations and are therefore required to adhere to the requirements of the Convention against Corruption.⁹

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1 Although there is no single definition of *match-fixing* “playing to a pre-determined

result” and “illegal manipulation” can be found in most definitions. See *supra* Match-Fixing in Sports at 1.1 Putting Match-Fixing in Context.

2 European Commission, Match-Fixing in Sports: A Mapping of Criminal Law Provisions in EU 27 (March 2012).

3 Id at pp 12, 36, 44.

4 See Life ban for Sammut, UEFA.com, 2 December 2012, <http://www.uefa.com/uefa/footballfirst/matchorganisation/disciplinary/news/newsid=1901482.html#jprint>, Kevin Sammut, an international midfielder playing for Malta, was recently banned for life by UEFA's Appeals body for breaching their integrity and sports-

manship principles, specifically Article 5 of the UEFA disciplinary regulations, which involves attempting to manipulate a match. This ban came about as a result of match-fixing activities stemming from the Euro 2008 qualifying match between Norway and Malta; Six ICC Umpires accused of match-fixing, Australia Network News, 9 October 2012, the six umpires were filmed by India TV agreeing to take money for manipulating the outcome of the Twenty20 World Championships in Sri Lanka. <http://www.abc.net.au/news/2012-10-09/an-india-matchfixing-allegations/4302326>.

5 United Nations Convention against Corruption, United Nations Office on Drugs and Crime

6 Id at p. iii.

7 Primarily developed by the Court of Arbitration for Sport (CAS) and significant rulings from the European Court of Justice in sports related cases, or the laws that have been developed in many countries that recognize the “specificity of sport.”

8 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts-Declarations adopted by the Conference-Declaration on sport

Announcement

INTERPOL Global Academic Experts Meeting for Integrity in Sport

Dr. Ben Van Rompuy and Karen L Jones, JD MA were invited to speak at the INTERPOL Global Academic Experts Meeting for Integrity in Sport, which took place in Singapore 28-29 November 2012.

The Global Experts Meeting brought together international experts to identify ways in which academia can assist the INTERPOL Integrity in Sport Unit in developing and implementing educational lines of study and training modules. In 2011, INTERPOL entered into a historic ten year agreement with FIFA for the purpose of furthering education and training to combat match-fixing in football.



Dr. Ben Van Rompuy, Senior researcher International and European Sports Law, acted as a Plenary Session Presenter. He presented a paper entitled "Don't reinvent the wheel: what we can learn from experiences with compliance and ethics programs relating to other forms of corruption".

In current debates on the development of effective strategies to prevent match-fixing, little or no attention is given to the long-standing experience with ethics and compliance programs in various other compliance areas (e.g. the fight against bribery, corporate crime or cartels). Best practices in prevention and training strategies are typically examined in silos with little cross-fertilization. Yet there is much to learn from prevailing trends, issues and counter-measures. Ben discussed good and best practices from other compliance areas and offered practical recommendations for the detection and prevention of match-fixing and corruption in football.

Karen L Jones, JD MA, Researcher and Academic Programme Coordinator International and European Sports Law, was a Breakout Session Leader. She also presented a paper entitled "Confessions of a Governance Guru: Why Compliance Mechanisms alone as a means to Prevent Match-Fixing are not enough!".

Several sports-related entities have developed compliance type programs in an effort to prevent match-fixing in football. Although these programs incorporate some necessary compliance tools they do not address broader governance issues that have largely been missing from the sports corruption debate. A good governance structure supports relevant compliance initiatives, and also includes a cross-organizational structure, consistent regulation, clear roles and responsibilities, and a framework of accountability and transparency. In this paper, Karen articulates the need for a proper governance framework to support sports compliance initiatives, what such a framework might look like, risks associated with having (or not having) an established governance framework and recommendations on how to address those risks to further efforts to prevent match-fixing in the fight against sports corruption. She also discusses the practical application of two key compliance strategies - licensing and accreditation (certification) as a means of providing additional governance support in the area of match-fixing education.



The Convention against Corruption contains strong provisions that address the international aspects of corruption and requires countries to establish crimes and other offenses within their own national laws to properly cover the scope of acts that comprise the area of corruption.¹⁰ Further it provides guidelines and standards for countries to adopt that will help strengthen their national laws and provide more consistency across countries in how corruption is handled.¹¹ Perhaps this section of the Convention might be further clarified relative to sports corruption or match-fixing in particular to encourage countries to include the specific crime of match-fixing.¹² The comprehensiveness of this document helps to underscore the complexity of the area of corruption. All manner of corruption is covered under the Convention, going beyond documents that previously addressed this issue, and perhaps already incorporating would be match-fixers and all those involved in the scheme, regardless of specific mention of “match-fixing” *per se* as an offense.

This goal of consistency of laws and strengthening of national laws relative to corruption is one that is shared in the area of sports corruption. In part, what was uncovered in the recent European Commission report on Match-Fixing in Sport¹³ is a lack of consistency in national laws.¹⁴ And where national laws exist in the area of corruption or even match-fixing, the national laws do not go far enough to fully address or even at times support a charge of match-fixing.¹⁵ Further those involved in match-fixing are often part of a much larger network that spans into other countries and thus often beyond the reach of national laws.¹⁶

The benefit of the Convention against Corruption is that as a basis of United Nations membership, the member states have already agreed to cooperate with members internationally. This cooperation is reiterated in the Convention; in fact the Convention creates a binding agreement between members to provide legal assistance specifically in the area of “gathering and transferring evidence” for purposes of corruption investigation and prosecution.¹⁷

Although this United Nations Convention against Corruption does not specifically mention “sports” corruption or “match-fixing” this may not be necessary due to the breadth of the Convention, and because sport specificity does not uniquely impact the application of the provisions on the problem of sports corruption. Even though the environment of sports creates an interesting element to the area of corruption, as match-fixing is a form of corruption that is unique to sport, there may be little or no need to create an entirely separate area of corruption to deal with match-fixing especially when there are sufficient laws in place to address the broader comprehensive area of corruption.

As mentioned earlier, the United Nations Charter is not hard law. A binding agreement is created by the signing of the Convention, thus establishing a hard law affect and imposing contractual obligations on member states. However, there is no enforcement mechanism under the United Nations auspices relative to the corruption provisions outlined in the Convention. Nonetheless, there are other persuasive aspects to the Convention that can be useful in addressing sports corruption. The Convention against Corruption was created with the understanding that enforcement against a crime of corruption was not the main priority. The foremost focus must be on prevention of corruption. The Convention against Corruption supports this approach as an entire

chapter of the Convention focuses on prevention and preventative measures.¹⁸

Conclusion

Perhaps the biggest drawback in attempting to use the Convention for purposes of establishing consistent laws relative to sports corruption is that as with all United Nations conventions, they are not automatically mandatory on all nations. However, this aspect may be overcome by the fact that the provisions of the Convention are legally binding on all signatory parties. Therefore, it is up to the member countries whether or not they adopt them. However, as we continue to fight corruption, in sports and otherwise, we should consider using those documents that are currently in place as opposed to continuing to reinvent the wheel.

In addition to the United Nations conventions, there are other international documents that can provide sufficient guidance for establishing laws at the national level sufficient to support an international legal framework to combat corruption. However, it is still the national laws and legal system that must be in place to properly address corruption and provide sufficient basis for pursuing crimes relative to sports corruption.¹⁹ Although a legal basis for prosecution of sports corruption is critical to corruption enforcement, perhaps another lesson that can be taken from the United Nations convention is the strong emphasis on prevention.

It is clear from cases involving corruption and sports corruption specifically, that investigation and prosecution of such offenses is extremely time consuming; often taking 3-7 years for investigation alone. So regardless of the laws that are in place to address corruption, alternative means for fighting corruption must be considered. Although prevention is not enforcement, with appropriate and effective preventative measures in place, ideally enforcement regimes will become less necessary in the fight against corruption.

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(1997) OJ 340/136; The Nice Declaration (2001);

9 After ratification of the requisite number of signatory members, the United Nations Convention against Corruption became obligatory between the member nations and therefore part of the international body of “hard law”.

10 See, *Id* at Articles 14 - 25 (money laundering, embezzlement, misappropriation, diversion of property, trading in influence, abuse of functions, illicit enrichment, bribery, laundering of proceeds, concealment, obstruction of justice, participation and attempt, etc.)

11 *Id*.

12 Although the United Nations Convention against Corruption is comprehensive in its identification of areas of corruption, there is no specific mention of “sports” or “match-fixing”. Perhaps a change to the document to incorporate these terms might support the use of this Convention as a basis for addressing international sports corruption.

Nonetheless, even without this mention, the Convention can serve as a solid basis for addressing international sports corruption.

13 Match-Fixing in Sport (March 2012).

14 *Id* at supra.

15 *Id*.

16 *Id*.

17 United Nations Convention against Corruption, Chapter IV International Cooperation, pp. 30-41.

18 See United Nations Convention against Corruption, Chapter II Preventative measures, pp. 9-17.

19 See United Nations Convention against Transnational Organized Crimes (2000), this refers only to public corruption and therefore may not be fully applicable in relation to sports corruption; Council of Europe Criminal Law Convention on Corruption (1999) including the recommendation of 28 September 2011 for the promotion of integrity in sport against the manipulation of match results.



The Recent Updates about the FIFA Player Release Rule: the Creation of the “Club Protection Programme”

By **Francesco Taricone***

In the last edition of the International Sports Law Journal an article was published on the legitimacy of the so-called “FIFA Player Release Rule”.¹

Recently, there have been important developments which should be mentioned in order to evaluate how FIFA and Clubs are evolving their positions.

In the recent congress held in Budapest (May 2012),² FIFA approved the creation of a worldwide player insurance programme called “FIFA Club Protection Programme” on behalf of the member associations. Starting September 2012, “FIFA will insure all the players involved in all “A” National Team matches listed in the International match calendar worldwide”,³ planning a budget of USD 100 million.

More specifically, the FIFA circular clarifies that, “*if a player is injured due to an accident while on duty with his representative “A” team, the player’s club will be compensated for having to continue to pay the player’s fixed salary although the player is temporarily disabled and unable to perform footballing activities for his club.*”. The maximum amount refunded would be \$ 27,000 per day.

However, it is too early to consider if this programme would be THE answer.

First of all, the established daily limit could be easily surpassed in the case of an injury of a top player, leaving clubs partially uncovered.

Secondly, the programme only covers “*the entire release period for matches between two representative “A” teams played on dates listed on the FIFA international match calendar*”, leaving without protection a great number of fixtures (for example, some friendly or youth matches).

Thirdly, it should be accurately clarified who will decide whether the player’s injury is a direct consequence of his international activity or it is, for example, an old problem not fully solved by his club’s medical staff.

In this regard, the circular explains that “*players with injuries that already exist when a player joins his national team (...) are not covered for the part of the body concerned*”.

This position is not satisfactory at all. In fact, it is common that a previous injury could have repercussions in other parts of the body following other traumas or accidents. In addition, it would be hard to determine who would be in charge of deciding whether the player was already injured or if a previous injury could be considered fully recovered (with the risk of a new injury in case of wrong judgement).

Considering the high value of the compensation, an independent medical commission set up by a third party like the International Olympic Committee would be highly recommended.

In this view, FIFA enabled players “*who recover from an existing injury when already on representative team duty and thus no longer need medical treatment for that specific injury to be covered by the programme*”, but only for the 2014 FIFA World Cup, the FIFA Confederations Cup 2013,

Confederation final tournaments or the Olympic Men’s Football Tournament 2012. The extension of this specific protection to all the international fixtures would be warmly welcomed by Clubs.

However, there are still moments of tension between FIFA and Clubs.

Clubs, in fact, are still refusing to cover their players for International Fixtures. This happens both for friendlies not included in the International Calendar (as happened for the Egyptian club Zamalek)⁴ and for important tournaments like the recent London 2012 Olympic Games (some National Teams were refused the opportunity to have players by Clubs, such as Gabon⁵).

On the other hand, FIFA has warned players that they can receive a ban if they withdraw from National Teams due to an injury, following the recent case of Gareth Bale, who withdrew from Team GB men’s football Olympic squad while playing and scoring in the same period in a pre-season friendly for his team, Tottenham Hotspur.⁶

It is now curious to see if this scheme would result in a workable solution to fix all the contrasts between FIFA and clubs about this issue. According to FIFA secretary Jerome Valcke, “*through the club protection programme FIFA achieves a global harmonised solution on the insurance of players’ question to the benefit of confederations, member associations, players and clubs.*”⁷

The auspice is that the creation of this programme would lead to a greater degree of cooperation between all the stakeholders in the football arena, trying to minimise the legal conflict favouring the development of a coherent and workable system for the 21st century football.

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1 Taricone F., *The FIFA Player Release Rule - Critical Evaluation and Possible Legal Challenges*, The International Sports Law Journal, 2012, vol 1-2, pages 68-71.

2 FIFA Circular no. 1307, available online at <http://www.fifa.com/mm/document/affederation/administration/01/64/76/90/technicalbulletinmit-circulare.pdf> (last access: 22 August 2012).

3 <http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1608553/index.html> (last access: 22 August 2012).

4 For more details: <http://english.ahram.org.eg/NewsContent/6/52/50090/Sports/National-Teams/Zamalek-refuse-to-release-players-for-Egypt-friend.aspx> (last access: 22 August 2012).

5 For more details: <http://www.guardian.co.uk/football/2012/jul/24/fifa-olympics-dispute-gabon-players> (last access: 22 August 2012).

6 For more details: <http://www.guardian.co.uk/sport/2012/jul/25/london-2012-sepp-blatter-gareth-bale> (last access: 22 August 2012).

7 <http://www.sportbusiness.com/news/185607/fifa-signs-off-on-player-insurance-scheme> (last access: 22 August 2012).



Collaboration

Asser International Sports Law Centre and the International Sports Law Journal (ISLJ) are always interested in talking with universities, institutions and centers about potential collaboration opportunities. Please contact sportslaw.nl if you are interested in a possible collaboration or if you would like to engage the International Sports Law Centre in sports law consultancy work.

Violence in football - Brazilian experience

By **Maurício Ferrão Pereira Borges**¹

INTRODUCTION

The 2014 World Cup and 2016 Olympics in Brazil have triggered a push in the Brazilian sports market. Two mega sporting events happening two years apart it is a golden opportunity which justifies the enormous interest in the country. For this reason, we have been invited to talk about many aspects of sports law and business in Brazil. In one of these opportunities, during a travel to a South Korean city named Jeonju (near Seoul), where we held speeches at the seminar “*Tasks and Prospects of Tort Law*”, the idea of making a presentation at the University of Milan² about the violence in Brazilian stadiums came out.

The violence in football stadiums seems to be a serious problem not only in Europe but also in South America including Brazil. Beyond doubt, the phenomenon of football hooliganism is one of society's most intractable issues at the time. In truth, hooligan is a sports fan, who belongs to a fan club. However, he is involved in criminal activities, including violence against people and property, organized disorder on the streets and premeditated disorder inside and around football stadiums.

In Brazil there is a specific law called Fans' Bill of Rights Act (*Estatuto do Torcedor*), which provides sports and criminal penalties against violent sports fan. Despite that, claims about the success of recent preventive measures taken by the Brazilian police authorities are premature.

There are very strong indications that criminal organizations are operating inside the fan clubs. They adapt and change their strategies relocating their violent activities according to the security-related developments made by the authorities.

Over recent years, much has been written about violence in football, mainly about hooliganism as well the motivations and psychology behind violent behavior out of the field. The authorities have been done a lot to avoid violence between fans inside the stadiums. However, not many effective measures were adopted so far.

In this context, this paper must be of interest to all those who are involved in dealing with or studying sports law and other similar forms of criminal behavior in sport, such as delinquency and vandalism, and also those responsible for stadium safety and management.

I. Gangsters or Fans?

There is true that football hooliganism is an English phenomenon. This is not a fallacy. The hooliganism like we know in Europe is indeed a European reality. In Brazil we have a rough copy of that. There the phenomenon is quite different than elsewhere in the world. The ‘Brazilian hooligan’ is not a fan who becomes violent. He is a criminal who goes to a football stadium and do what he usually do i.e. criminal activities.

The Brazilian hooligan is not a criminal who turned into a fan. He is just a criminal who needs a group. In this regard, we ask ourselves: where would be better to a delinquent to commit criminal acts and remain

anonymous than in a football stadium, wearing a fan club's t-shirt, surrounded by thousands of people?

Violence and hooliganism in football is less a sport problem than a social problem. The reason of this social problem is quite simple and can be explained by the fact that many criminal gangs follow football clubs. Those gangs are built by people who call themselves ‘fans’. They are responsible for acts of extreme vandalism.

If they kill, they kill in name of a flag. If they kill, they kill because of their assassin instinct. These people are not football fans who cheer for a club. They just use the game, the sport, the football to be what they use to be: criminals, thieves, drug dealers, gangsters. Usually, these ‘fans’ do not wear the club's t-shirt. They belong to gangs dressed up as fan clubs and wear the t-shirt of their own crew. The circumstances of the growing violence in football indicate that many fans behave as delinquents because they are criminals, not fans.

II. Criminality Exploiting the Beautiful Game: Brazil Fighting Crime

Many opinions appoint the existing massive gap between rich and poor as the main factor to explain the high indices of criminality between Brazilian fans. It is not true. The gangsters-fans use the football to make money, a lot of money. As disclosed by the Brazilian press, some fan clubs (in Portuguese, “*torcidas organizadas*”), when managed as a *Mafia*, generate huge sums of money. It is a complex, fast developing and dirty subject.

Once making the stadium their business place where they sell drugs, fight etc., the gangster-fans make that parents do not want to take their children to stadiums anymore and also that some matches are played to almost empty seats.

Everybody knows the football clubs named SE Palmeiras and SC Corinthians. On March 25, 2012, a few hours before a game between these clubs for the regional football championship of São Paulo, fan clubs of both teams willfully met to fight against each other. Two people died during the quarrel. Police investigations found out hours later that the ‘appointment’ between the ‘fan clubs’ was premeditated made over the internet.

The criminals involved justify the violence saying that it is due to the football rivalry between these clubs. This is terrifying.

III. Brazil getting ready for the Sports Mega Events

It is well known that Brazil is getting ready for the 2014 FIFA World Cup. Expectations are high for (i) increased tourist revenue, (ii) heightened national excitement and (iii) hordes of international football fans visiting the land. But some of these people are bound with gangs which develop their criminal activities inside the fans. And, in this context, the bigger is the crowd around the stadium and involved with the event the better is for the gangs to do their vandalism and remain anonymous.

Some criminal organizations are politically motivated, such as terrorist organizations. Others are just gangs which may become enough disciplined for the purpose of monetary profit. This is the case in Brazilian football where organized crime has recently flourished. Knowing this, the Brazilian Criminal Intelligence Service discusses constantly new security measures against violent football fans.

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² This paper is based on a presentation

held at the *Corso di perfezionamento in Diritto Sportivo e Giustizia Sportiva* of the *Facoltà di Giurisprudenza dell'Università degli Studi di Milano* (Master in Sports Law and Sports Justice at the University of Milan/Italy) which is coordinated by Professor Lucio Colantuoni.

In order to prepare its state for the sports mega events, the government of Rio de Janeiro has hired the former New York City Mayor Rudolph Giuliani for advice on security issues ahead of the 2016 Olympics and the 2014 FIFA World Cup. The Brazilian state of Rio de Janeiro has long been plagued by drug-related violence, including a wave of violent murders. Most of Rio's *favelas* are controlled by highly organized and well armed drug gangs. Hiring Giuliani, the government of Rio de Janeiro aimed to avoid that the criminality stemming from the *favelas* spread its tentacles throughout the sport. The plans to fight crime in Rio have largely been modeled on Rudolph Giuliani's Zero Tolerance policy, which considerably reduced crime in New York City between 1994 and 2002.

The 2014 FIFA World Cup and the 2016 Olympic Games are great opportunities to restructure Rio as a city and the security of Brazilian sports events as well. For Giuliani, however, the Brazilian approach, if properly managed, will take probably six or seven years to reach a similar success of New Yorker's Zero Tolerance policy. Security measures to fight the crime and violence in sport certainly include (i) television surveillance inside and around the stadium, (ii) restricted pedestrian traffic flow, (iii) policing on horseback, (iv) security fences to keep fans from rushing the field and (v) security fences and security guards dividing fans of different teams and also keeping distance between them.

Indeed, many groupings of highly centralized 'fans' are run by criminals. They use fan clubs to consolidate power within the fans. Those 'fan clubs' are easily identifiable and characterized as being crazy fans who sing during the whole game. Raining or shining, they sing and scream. Unfortunately, the reason of this euphoria is not a pure love for the club or the game itself. The formula of this overstimulation is that the heads of criminal fan clubs are drug dealers and, therefore, most of its members watch the games stimulated by drugs.

However, the gangster-fans do not limit their activities to the stadiums. As a result, the combat against the criminality inside the stadiums has a collateral effect. The more the measures to curb violence and delinquency inside the stadiums increase, the more the gangster-fans organize themselves to exploit the sport to commit criminal acts outside the stadiums. So, the problem is more complex than it seems to be. In Brazil, most of football clubs are sports associations that, in accordance with the Brazilian Federal Constitution, are free to operate and organize themselves.³ *Ipsis litteris*, article 217 paragraph I of the Brazilian Federal Constitution provides the following:

'It is the duty of the State to foster the practice of formal and informal sports, as a right of each individual, with due regard for: 1 - the autonomy of the directing sports entities and associations, as to their organization and operation'.

Grounded on this constitutional provision, many football clubs changed their own articles of associations in order to give their associates more power, especially to elect the club's chairman. Although the Brazilian Federal Constitution was promulgated in 1988, the legal situation of football clubs in Brazil has changed just after January 11, 2003, when the new Brazilian Civil Code came into force. The article 59 of the Brazilian Civil Code gave the general meetings of the clubs exclusive power to (i) elect the officers of the association, (ii) approve its accounts, (iii) remove the officers and (iv) amend the articles of association.⁴

3 About this kind of autonomy in the Brazilian sports industry see my text *The Autonomy Case in Brazil* (2011), in ISLJ, v. 1-2, pp. 131-133.

4 See Maurício Ferrão Pereira Borges; Carlos Miguel Aidar, *Conflict of Norms in the Brazilian Legal System: Federal Constitution vs. Civil Code* (2011), *International Sports Law Review* Pandektis, v. 8: 3-4, pp. 294-300.

5 About the complex interaction of normative rules and its influence on the international football law see my German book

Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufssport. Unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die lex sportiva (2009), Peter Lang, p. 4 *et seq.*

6 Analyzing the interaction between sports and criminal law from a specific perspective see Maurício Ferrão Pereira Borges, *Sports Betting: Law and Policy* (2012), Springer/TMC Asser Press, pp. 253-263; and in ISLJ (2010), v. 3-4, pp. 134-137.

As a consequence of the new sports regulations, should the fans become associated to a club, they could acquire enough power to control the whole association. Of course, not only the fans realized that. Some criminal organizations have found a new field to develop their illegal business. The football was considered by them the newest growth sector which would facilitate them to provide a range of illegal services and goods, such as ticketing, e-commerce, selling of fan club's t-shirts, travel agency and, of course, drug trafficking. Because they control a huge number of potential voters, the heads of some criminal organizations dressed up as fan clubs are supported by representatives of some football clubs. In exchange for political support, they get tickets, supplies, bus and fly seats for free, and resell it overpriced to the members of the fan clubs they control.

In light of this, we can say that fighting the gangsters-fans in sport is something that must be fought in the legislative sphere as belonging not only to the sports law, but also to the criminal law. That is why criminality in sport has been treated alike in Brazilian Law.

IV. Fans' Bill of Rights Act ("*Estatuto do Torcedor*")

Sport is internally governed and subject to a complex interaction of normative rules, which comprise: (i) playing and administrative rules; (ii) unwritten conventions and values that have developed informally and, most importantly, (iii) state law. This approach attempts to show that sport has to pay due respect to mandatory national law, even more if the sport's internal regulatory structure is inconsistent or ineffective.⁵

The fan and fan clubs are subject of specific law in Brazil. These concepts are defined in the Law No. 10,671 of May 15, 2003, also known as Fans' Bill of Rights Act (*Estatuto do Torcedor*). The Fans' Bill of Rights Act has indeed a very broad concept of fan. Regarding its article 2, 'Sports fan is everybody who appreciates supports or is associated to a Brazilian sports entity and follows a certain sports discipline.' Legally, the burden of proof to dismiss that a person does not 'appreciates' or 'supports' a club belongs to the sports entity concerned.

Sports fan club, on the other hand, is a private entity which aims to support a sports club. Regular sports fan clubs have always to be able to provide the following information about its members: (i) full name; (ii) photo, (iii) name of parents; (iv) ID number; (v) day of birth; (vi) profession and (vii) full address. Should a sports fan club do not provide with the required information, all of its members are not allowed to watch the games of the club concerned.

Furthermore, any kind of fans activity, whether such be through violent fans' behavior or not, has recently been typified as a crime in Brazil. Law No. 12,299 of July 27, 2010 has amended the Fans' Bill of Rights Act imposing prison sentences of 1-2 years plus a fine for anyone who promotes riot, commits or incites violence, or invades restricted areas in sporting events (Article 41-B). The Fans' Bill of Rights Act also imposes prison sentences of 1-6 years plus a fine for anyone who (i) sells tickets for a sports event at prices higher than face value (Article 41-F) or (ii) supplies, misguides or facilitates the distribution of tickets for sales at prices higher than face value (Article 41-G).⁶

Should any person related to an sports event (police, club officials, local federation etc.) report to the referee responsible for the game concerned that there were acts of violence between fans before, during or after the match, so the referee has the duty to stop the match (if the violence is occurring during the game) and report this to the sports justice. In addition to the sports penalties which the club supported by the violent fan or fan club may suffer in consequence of the rioting, Brazil has now a legally framework to (i) prohibit violent people from access football matches or leaving the city when the club they 'appreciate, support or are associated to' plays out of home and (ii) put them temporarily in jail when their club host a game.

CONCLUSION

Apart of the criminal organizations inside the fan clubs, which is not a

sport but a criminal issue under Brazilian law, the violence in the sports stadiums is still highly problematic in Brazil. The coming up sports mega events will certainly help Brazil to find a better way to combat the violence between the fans. The adoption of more effective counter measures through the amendment of the Fans' Bill of Rights Act and the hiring of the former New York City Mayor Rudolph Giuliani for advice

on security issues ahead of the 2016 Olympics and the 2014 FIFA World Cup are good indications that the fans' violent behavior can be counting down in Brazil. Finally, we stress that the main goal of the pacification in football is to bring the peace to the football aiming getting back to the stadiums the families, women and children.

The International Sports Law Journal

JOHN TERRY'S CASE - AN OVERLAP OF CRIMINAL AND DISCIPLINARY PROCEEDINGS

By Jan Łukomski*

On July 13, 2012 English football player John Terry (Chelsea Football Club) was cleared of a racially aggravated public order offence. He was accused of using racially abusive and insulting words towards Queens Park Rangers' player Anton Ferdinand during a game between their teams on October 23, 2011. The Westminster Magistrates Court found that there was a reasonable doubt about Terry's guilt.¹ Subsequently, the only possible verdict could be one of not guilty. There was insufficient evidence of what Terry exactly said, in what context, and with what tone. After the verdict, an independent regulatory commission of the Football Association (FA) unsuspended its own disciplinary proceeding investigating whether Terry was guilty of misconduct based on the Rule E3 (2) of the FA Rules 2011-2012 (racially insulting words). On September 27, 2012 the independent commission decided on his guilt and suspended him from all domestic club football for four competitive matches and fined the sum of £220,000.²

Had the FA the right to make a decision inconsistent with the court's judgment? A criminal procedure, just as a civil procedure, is separate and different from a disciplinary procedure. They are independent of one another. Disciplinary sanctions are elements of wider contractual or social relations that exist between an athlete and a private sports association. The same offense, such as a racial insult, can be viewed as a breach of contract (i.e. the statute of the association or bylaw) as well as an infringement of law, e.g. a crime. For this reason, the disciplinary proceeding launched or unsuspended after the judgment of a court of law does not constitute a breach of one of the most fundamental legal principles - *ne bis in idem*. Moreover, the decisions made by disciplinary bodies may differ from court rulings. The general stance on lack of mutual dependence of disciplinary and criminal proceedings was expressed in British jurisprudence³

In the said case the court used, as it always does, the criminal procedure standard of proof "beyond reasonable doubt". It means that there was

no certain evidence that could prove Terry's guilt. The disciplinary body used a lower civil standard of proof that is "the balance of probability". It assessed the credibility of both parties and the probability of what might have been said. Furthermore, the disciplinary body acted in compliance with its policy on fighting racism⁴ as well as with its former decisions, e.g. in Luis Suarez's case.⁵ Katie Simmonds correctly points⁶ at the report "The British Horseracing Authority and Integrity in Horseracing" by Dame Elizabeth Neville QPM. It clearly states that the disciplinary proceedings should not be stayed until the end of criminal case.⁷

There is a growing awareness of the powers that sport governing bodies wield. If sports governing bodies make such a great effort to secure their autonomy in resolving internal issues, then it should be also strongly emphasised that their rule- and decision-making procedures should comply with the fundamental principles of natural justice and law. The latter would include an appropriate level of legal certainty. In the relevant case, John Terry could have had a legitimate expectation that the acquittal will have a decisive influence on the disciplinary proceeding, since it was suspended until the end of the criminal proceeding.

The next step that John Terry may take is to appeal to the Appeal Board. But what would happen, if it doesn't reverse the independent commission's decision?

According to section 3.2 of FA's Disciplinary Procedures "A decision of the Appeal Board shall be final and binding and there shall be no right of further Challenge, save for only in relation to appeals to CAS brought only by FIFA or WADA pursuant to the Doping Regulations".⁸ This precludes an appeal to higher instances of sporting judicial structures. This rule, however, cannot result in depriving an athlete of his right to appeal to the court of law. It would constitute a breach of Article 6 of European Convention on Human Rights, which guarantees a right to fair trial by

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1 Full text of the verdict: www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-john-terry.pdf
2 Full Written Reasons of the Independent Regulatory Commission: www.thefa.com/News/governance/2012/oct/-/media/22A83175745E44468105B57232F085B7.ashx
3 See the High Court Of Justice Queen's Bench Division Administrative Court judgment *Bhatt v General Medical Council* [2011] EWHC 783 (Admin) (01 April 2011), par. 53:
"(...) the purpose of disciplinary proceedings (regulation to maintain proper stan-

dards in the profession in the best interest of the public and the profession) is different from that served by the criminal courts; that the standard of proof is significantly different, such that there is no inconsistency between acquittal by a jury and a finding by a disciplinary panel that allegations are proved (as there might often have been at a time when the standard was the same); that evidence admissible before a disciplinary tribunal may differ in that different rules of evidence are likely to apply, and in part because judicial discretions may well be differently exercised (...) generally less strictly in the disciplinary context where at least the accused's liberty is not at stake.", available at: www.bailii.org/ew/cases/EWHC/Admin/2011/783.html

4 This policy is expressed in Chapter 1 (Article 3) "General provisions", which signifies its importance as one of the most fundamental principles of the football governing bodies.

5 Yet this case was not the subject of a criminal investigation.

6 K. Simmonds, *Disciplinary: John Terry case: criminal proceedings vs. FA sanctions*, World Sports Law Report, Volume: 10 Issue: 10 (October 2012).

7 "The second question is whether a disciplinary inquiry or disciplinary proceedings against a person can be commenced or continued in circumstances where that conduct may also amount to a criminal offence. The broad answer is that there is no rule of law that provides that merely because criminal proceedings are contemplated or have

begun (or indeed that civil proceedings are contemplated or have begun) private disciplinary proceedings must be stayed pending the outcome of those proceedings. On the contrary, the courts have held that there is a substantial public interest in such disciplinary proceedings continuing unhindered.", "The British Horseracing Authority and Integrity in Horseracing", An Independent Review, Dame Elizabeth Neville DBE QPM, 13th May 2008, p. 29, par. 8.22, www.britishhorseracing.com/images/inside_horseracing/media/Neville_Review_Exec_Summ_Recomm_May_08.pdf

8 The FA Rules: www.thefa.com/TheFA/-/media/Files/PDF/the-fa-2012-13/2012-13-rules/fa_rules-2012-13.ashx

an independent and impartial tribunal established by law in the determination of one's civil rights. At various occasions the European Court of Human Rights expressed the opinion that conferring the duty of adjudicating on disciplinary offences on professional disciplinary bodies does not infringe Article 6(1) of the Convention.⁹ Yet this condition

⁹ See ECHR rulings: *Albert and Le Compte v. Belgium*, 7299/75; 7496/76, Council of Europe: European Court of Human Rights, 28 January 1983, available at: <http://www.unhcr.org/refworld/docid/3ae6b6f510.html>; *Gautrin and others v.*

France, 38/1997/822/1025-1028, Council of Europe: European Court of Human Rights, 20 May 1998, available at: www.hrcr.org/safrica/administrative_justice/gautrin_france

is satisfied only when either the professional disciplinary bodies themselves comply with the requirements of that Article, or when they are subject to subsequent review by a judicial body that has full jurisdiction and provides the guarantees of Article 6 (1). To say the least, it is doubtful, if the said disciplinary commission fulfils the requirements of an independent and impartial tribunal established by law. Presupposing that suspension for a number of four games affects the labour rights of John Terry, it can be asserted that John Terry is entitled to go to the court of law and have the disciplinary judgment revised and potentially reversed.

The International Sports Law Journal

Image Rights Legislation in Guernsey Finally Published

By Professor Ian Blackshaw*

The Image Rights Legislation in Guernsey has been long in the gestation period but has now been published on 19 October, 2012. Subject to the Guernsey Legislature passing it into law in November, the new Legislation will be in force as of 3 December 2012.

The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 (the Ordinance), establishes a new form of intellectual property, previously unrecognised in a registrable form anywhere else in the world. Two key concepts are legally recognised: the “registered personality” and “images” which are associated with or registered against that registered personality.

The basic right is the registered personality. Personality refers to the personality of the following types of person or subject (referred to in the Ordinance as the “personnage”):

- natural or legal persons;
- a joint personality;
- a group; or
- a fictional character of a human or non-human.

A legal person may include, for example, the Disney Corporation, and Laurel & Hardy may qualify as joint personalities. In this connection, notice that the Ordinance also applies to joint and indeed individual personalities who are dead, which would include Elvis Presley (reputedly the richest person in the cemetery due to the application of so-called ‘post-mortem’ image rights in the US and the royalties that they generate after the death of the personality concerned), provided that the natural person was “in existence” within the period of 100 years prior to the date of filing of the application for registration of the personality.

An example of a human fictional character would be James Bond, and of a non-human fictional character would be Superman.

“Image rights” are defined in the Ordinance as “exclusive rights in the images associated with or registered against the registered personality”.

And “Image” is widely defined as follows:

- the name of a personage or any other name by which a personage is known (e.g. David Beckham or “Becks”);
- voice;
- signature;
- likeness;
- appearance;
- silhouette;
- feature;
- face;
- expressions (verbal or facial);
- gestures;
- mannerisms;
- any other distinctive characteristic or personal attribute of a personage; and/or
- photographs, illustrations, pictures, moving images, electronic or other representations of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of such an image.

The registration of a personality lasts for a period of ten years from the date of registration and may be renewed for further periods of ten years. Where a specific image has been registered against the registered personality, the registration of that image lasts for three years and may be renewed for further periods of three years.

A registered personality and the image rights in it are personal or movable property and, as such, may be transmissible by assignment, provided that the assignment is made in writing and signed by or on behalf of the registered proprietor.

There are also provisions requiring registration of certain transactions affecting registered personalities and image rights, which include assignments and the granting of licences.

The new Legislation is quite complex and contains other detailed provisions on such matters as who may be the registered proprietor, and further information and guidance on the scope of the Legislation and its effect may be obtained from Jason Romer, Managing Partner of the Guernsey Law Firm of Collas Crill (jason.romer@collascrill.com).

It will be interesting to see how the Legislation works out in practice when, as expected, it finally comes into force on 3 December, 2012.

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The European Court Of Justice Hands Down An Important Preliminary Ruling On The European Union Database Directive

By Ian Blackshaw

Introduction

On 1 March, 2012, the European Court of Justice (ECJ) handed down an important preliminary ruling on the meaning and effect of the European Union (EU) Database Directive of 1996 (96/9/EC) (Directive) on the legal protection of sports databases. This ruling has generally gone unnoticed, perhaps because it deals with an esoteric and sophisticated aspect of Copyright Law, which, in any case, is a highly technical subject.

The ECJ ruling was in response to a preliminary reference under Article 267 of the TFEU from the English Court of Appeal in the case of *Football Dataco Ltd et al v. Yahoo UK Ltd et al* (Case C-604/10-ECJ). The full Judgement of the Third Chamber of the ECJ can be accessed at <http://curia.europa.eu/juris/document>.

This case concerns English and Scottish Football League Fixture Lists, in which the plaintiffs claim they own copyright under the provisions of Article 3 of the Directive, whereas the defendants (all seven of them) claimed that such copyright does not exist in Law and, therefore, they are entitled to use these Lists for the purposes of their business without having to take a Licence from the plaintiffs and pay any corresponding royalties.

Article 3(1) of the Directive provides as follows:

“In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.”

For the purposes of the Directive, Article 1(2) defines a database as follows:

“... a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.”

Case C-604/10-ECJ

At first instance, the English High Court held that such copyright did exist in the plaintiffs’ database on the facts of this particular case, whereas, on appeal, the English Court of Appeal was not so sure and, therefore, referred the matter to the ECJ for a preliminary ruling on the following questions that arose to be determined in the case:

- 1 Whether the intellectual effort and skill of creating data should be excluded in connection with the application of art 3(1) Directive 96/9/EC; Whether the “selection or arrangement” of the contents, within the meaning of that provision, includes adding important significance to a pre-existing item of data, and; Whether the notion of “author’s own intellectual creation” within the meaning of that provision requires more than significant labour and skill from the author and, if so, what that additional requirement is.
- 2 Does the Directive preclude national rights in the nature of copyright in databases other than those provided for by article 3(1) Directive 96/9/EC?

In answer to the first question, the ECJ drew a distinction between originality in the structure of the database and originality of its contents (the data), holding that the former qualified for copyright protection, whilst the latter did not. This is in line with the general principle that, for copyright protection to exist in a literary, dramatic, musical or artistic ‘work’, there must be originality. In *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* ([1964] 1 WLR 273), the Court held that the word ‘original’ requires that the ‘work’ “should not be copied but should originate from the author.” In other words, to claim copyright protection,

an author must show that he has used his own skill and judgement to produce the ‘work’ in which copyright protection is claimed (*Interlego AG v. Tyco Industries Inc* [1998] RPC 343).

Also, the ECJ held that the resources deployed for the purpose of determining the time and identity of teams corresponding to each fixture of the leagues related to the creation of the data in question and were of no relevance in assessing eligibility for copyright protection in the database, in which the protection resides in the selection and arrangement of the data giving the database its structure. Accordingly, the intellectual effort and skill in creating the data were not relevant in determining eligibility for copyright protection. The notion of an author’s intellectual creation refers to the criterion of originality which is satisfied when, through the selection or arrangement of the data contained in a database, its author expresses his or her creative ability in an original manner by making free and creative choices and thus “stamps his personal touch” (para. 38 of the ECJ judgement). On the other hand, this criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom (para. 39, *ibid.*).

Furthermore, no criteria other than that of originality can be applied in order to determine the eligibility of a database for the copyright protection provided by the Directive (para. 40, *ibid.*). Thus, provided that the selection or arrangement of data is an original expression of creativity by the author, it is irrelevant whether or not the selection or arrangement includes “adding important significance” to that data (para. 41, *ibid.*). On the other hand, the fact that the setting up of the database required significant labour and skill of its author cannot as such justify copyright protection of it under the Directive, if that labour and skill does not express any originality in the selection or arrangement of that data (para. 42, *ibid.*). It is for the Court making the reference - in the present case, the English Court of Appeal - to determine whether the football fixture lists satisfy the above-mentioned criteria for copyright protection.

As regards the second question, the ECJ was of the opinion (see paras. 47-52, *ibid.*) that the Directive, according to its recitals 1-4, aims to remove the differences which existed between national legislation on the legal protection of databases, particularly regarding the scope and conditions of copyright protection which adversely affected the functioning of the internal market, the free movement of goods or services within the EU and the development of an information market therein. In that context, and as provided in recital 60, the Directive carries out a “harmonization of the criteria for determining whether a database is to be protected by copyright”. Accordingly, subject only to the transitional provision of Article 14(2), the Directive precludes national legislation which grants databases, as defined in Article 1(2) of the Directive, copyright protection under conditions which are different from that of originality as laid down in Article 3(1) of the Directive.

Conclusion

The ECJ has clarified that significant labour and skill exercised in setting up a database does not *per se* ground a claim for copyright protection of it unless there is originality in the selection or arrangement of the data contained in the database.

This is an important ruling for sports bodies and others that wish to protect legally and commercialise their databases, in which much time, effort and money has been invested, and thereby provide themselves with another useful marketing tool and stream of income to promote and popularise their sports.

Introduction to International and European Sports Law
Robert C R Siekmann 2012 TMC Asser Press The Hague The Netherlands Hard Back Pages 419 + XI ISBN 978-90-6704-852-1 price €139,05

This new Book by Prof Dr Robert Siekmann, who really needs no introduction, is a very welcome addition to the International Sports Law literature, for much of which sports lawyers and academics alike around the world have to thank Rob for his various initiatives and contributions, especially his pioneering editorship of 'The International Sports Law Journal' and various Books in the 'Asser International Sports Law Series' (of which the present Book is one of them) and his organisation of 'Round Tables' for the presentation and discussion of topical and controversial Sports Law issues, in his capacity as Founder and Director of the TMC Asser Instituut International Sports Law Centre in The Hague - the legal capital of the world.

The Book, although selective as its sub-title '*Capita Selecta*' suggests, covers a wide range of interesting topics, which include: the 'specificity' of sporting rules and regulations; the collective selling of TV rights (in this connection, it may be noted that the English FA Premier League have recently sold their live TV rights for the seasons 2013 -2016 for a record sum of £3bn!); other EU aspects; sports betting; sport and nationality; sport and politics (which are not supposed to mix!), particularly the fascinating and thorny subject of sporting boycotts; the universal and continuing problem of doping; and, of course, a great deal on the subject of the world's favourite and most lucrative sport, association football (soccer), including the social dialogue in the European Professional football sector, the legal issues raised by professional football transfers and the premature unilateral breach of players' contracts and how to compensate them (Webster, Matuzalem and De Sanctis cases) and fighting football hooliganism in Europe.

Ambush Marketing and the Mega-Event Monopoly
Andre M. Louw 2012 Tmc Asser Press The Hague The Netherlands Hardback Pages 761 + XII ISBN 978-90-6074-863-7 price €13.95

Opinion is divided amongst sports bodies and administrators and sports marketers and their advisers alike on whether 'Ambush Marketing', where a company or a commercial organisation claims unfairly an association with a sports event, which they do not have and for which they have not paid a penny, is clever marketing or plain theft, as claimed by the International Olympic Committee.

In such a case, the official sponsors do not get value for the considerable sums - often hundreds of millions of dollars - that they have expended on a particular sports sponsorship. It is argued that 'Ambush Marketing' not only adversely affects sponsors; it also dilutes the value of sports events; and, furthermore, causes confusion to consumers and fans.

Sports bodies and administrators - not surprisingly - take a dim view of this practice and argue that they need to take measures to protect their sponsors from what they regard as unfair marketing practices.

Once such measure is to put in place an extensive so-called 'brand protection programme' to fight 'Ambush Marketing' and the organising committee of the 2012 London Olympic Games ('LOCOG') established and enforced such a programme. In fact, the LOCOG 'Anti Ambush Marketing Programme' was a very detailed and all-embracing one, leaving very little room for manoeuvre, especially amongst small East End of London traders and shopkeepers in localities bordering the Olympic Park. So much so, that the Programme was widely criticised, especially by the advertising industry, who considered that the right of free commercial speech was being unjustifiably eroded, resulting in Dr Jacques Rogge, the President of the International Olympic Committee, calling for common sense and reasonableness to be applied by LOCOG in its execution!

From the sub-title to this Book, namely 'How Laws are Abused to

The Book also includes the full text of Rob Siekmann's Inaugural Lecture of 10 June, 2011 delivered in the capacity of his recent appointment as Professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam. This Lecture includes in an Annex an intriguing and erudite study of the origins of the terms '*Lex Sportiva*' (Sports Law proper) and '*Lex Ludica*' (Rules of the Game), which the Lecture itself examines in some detail with examples. The Lecture - not surprisingly - addresses the on-going question of whether there is such a thing as 'Sports Law' and concludes as follows:

"In summary, it can be concluded that: (1) *sports law* exists, (2) according to the 'sources theory' which in fact is presented in this address, it comprises a public and a private part, (3) it is proposed to name the public part '*lex sportiva*' (*sporting law*) and the private part '*lex ludica*' (*sportive law*), and (4) the 'hard core' of sports law is chiefly 'judge-made law': of the European Court of Justice (now: Court of Justice of the EU) as the public judge - at least from a European (EU) perspective, or court (regional), and of the Court of Arbitration for Sport as the private court (global).

Additionally, and from a different perspective, it can be argued that the Laws of the Game (the term is here used in a generic sense) are in fact the 'hard' core of sports law. They then are surrounded by the regulations of the sport governing bodies at the national, regional and global levels. Together they form the *lex ludica* (*sportive law*). In this circular model, the *lex ludica* is surrounded by the *lex sportiva* at the various levels."

There is plenty of food for thought in this Book for sports lawyers, academics and all others with an interest in sport and I have no hesitation whatsoever in commending this excellent Book to all of them and also congratulating its author on writing and publishing it.

So, read on!

Prof Dr Ian Blackshaw
International Sports Lawyer and Academic

Protect Commercial Rights to Major Sporting Events', it is evident which side of the argument Andre Louw, the author of this excellent and well-researched study, finds himself on.

Louw, the first person in South Africa to be awarded a Doctorate in Sports Law and the first person to undertake a comprehensive and critical review of the subject of this Book, is very much against elaborate legal measures being taken against 'Ambush Marketing' not only in the venues themselves, but also in the areas surrounding them (the Salt Lake City Winter Olympic Games arrangements were quite far-reaching in this respect). He argues his case very convincingly with many examples of recent 'Ambush Marketing' cases at major sporting events, including, of course, the 2010 FIFA World Cup in South Africa, in relation to which some 750 legal actions were taken against 'offenders'!

Perhaps the high water mark of these actions involved the so-called 'Bavaria Babes' ambush on behalf of a rival beer company, which, in the event and in line with common sense, were abandoned by FIFA, to limit the PR damage caused by them. Louw wryly sums up the brouhaha stirred up by this celebrated case in the following way:

"In this day and age.... it appears that the colour of one's dress could augur a lengthy jail term; one might be forced to exchange an orange mini-skirt for an orange prison jumpsuit because Budweiser happens to have a multimillion dollar contract with FIFA."

Whilst arguing strongly against excessive Anti 'Ambush Marketing' measures, Louw also recognises that, of course, the legitimate rights of sports event organisers and their sponsors need to be protected and taken into account. In his Conclusions, he observes:

"The clumsy and blatantly illegal classic ambush tactic of deceiving the public into believing that an 'ambusher' is an official sponsor justifies aggressive steps by event organisers to take legal action. I have nowhere in this Book denied the rights of event organisers to protect their property such as trademarks against such conduct. However, as we have seen, these organisers claim extremely wide protection from lawmakers to extend the scope of what they call the 'intrusion ambush',

namely marketing campaigns which simply grab the public's attention surrounding an event. Here the organisers are on much less solid ground. As shown, most legal systems provide no property right to the spectacle that is the sports mega-event. The organisers have no proprietary claim based on misappropriation (misappropriation of *what*, exactly?) and can, and I would submit, not raise the public good justification of protection of the consumer public against deception if one considers that the *sui generis* event legislation generally does not require such deception or an intention to deceive in order to criminalise or otherwise outlaw conduct of these 'ambushers'. We have also seen that such legislation does not require event organisers to prove harm in order for liability to follow for the 'ambusher'. This raises the question whether they can in fact prove such harm, even if not called upon to do so in terms of these special laws."

And he goes on to add perceptively:

"Yes, ambushing is by definition not good for sponsors (at least from the perspective of their having had to pay for certain privileges while others do not), but special laws require stronger justification than simply having been upstaged by clever marketers."

This is a very thought-provoking, information-packed and timely Book, particularly when one considers that many major multi-national corporate sponsors are tied up in multi-billion dollar deals with major international sports bodies until 2020 and need to know how far their investments can be legally protected; and it is one that I would unhesitatingly commend to all those involved in sports events organisation, management and promotion, as well as their legal and marketing professional advisers.

*Prof Dr Ian Blackshaw
International Sports Lawyer and Academic*

Sports Law

Michael Beloff Tim Kerr Marie Demetriou + Rupert Beloff Hardback
Second Edition 2012 Hart Publishing Oxford & Portland Oregon Pages
346 + XLIX ISBN: 978-1-84113-367-6 price: £ 95.00

This is the second updated and expanded edition of this Book, which first appeared in 1999, written by a team of English Barristers based in London.

As the authors acknowledge, during the last thirteen years, Sports Law has come of age and that "[f]ew now dispute the existence of sports law as a discrete branch of the law." And, that declaration, it may be noted, comes from the lead author, who is the current President of the British Association for Sport and Law, a body that has always denied the existence of Sports Law!

The Book is divided into the following main sections: The Nature of Sports Law; Framework of the Law Relating to Sport; Access to Sporting Competitions; Players' Rights; The Regulation of Play; The Commercial Exploitation of Sport; Disciplinary Proceedings in Sport; and The Resolution of Legal Disputes in Sport. This latter section includes a good account of the organisation and work of the Court of Arbitration for Sport (CAS) in its various forms, which, perhaps, is only to be expected as the lead author is a long-time member of the CAS!

Although a slim volume, the coverage of the Book is reasonably comprehensive: a case of '*multum in parvo*'.

However, your reviewer would have liked to have had a more in-depth coverage of the European Union aspects of Sports Law, where there have been considerable developments and significant nuances in EU Sports Law and Policy, in the last ten years or so, with a wide impact and importance that extend beyond Europe. Europe has always punched above its weight in the sporting world!

The second edition of this Book contains some new material on the influence of the Olympic Movement on the world of sport, which the authors describe as "paramount"; and also on Child Protection in Sport, which has become very important - not least, for example, in swimming - and is a sad reflection of our times.

The Law is generally stated as of 1 August, 2012.

The Book also includes a fairly comprehensive Bibliography; copious footnote references to other useful resources; and also one of the best Indexes that your reviewer has seen in quite some time!

All in all, given its selective coverage, this is a well-researched and well-written Book that should find a welcome place on the book shelves of Sports Lawyers and Sports Administrators and others with an interest in this rapidly developing field of Law.

Prof Dr Ian Blackshaw is an International Sports Lawyer, Author and Academic and an Honorary Fellow of the TMC Asser International Sports Law Centre, The Hague, The Netherlands

CONGRATULATIONS!

Professor Ian Blackshaw, Honorary Fellow of the TMC Asser International Sports Law Centre, has been awarded an Honorary Doctor of Laws Degree by Anglia Ruskin University, UK. The award was conferred on him by the Vice Chancellor, Professor Michael Thorne, at a Graduation Ceremony held by the University on 3 October, 2012. Professor Blackshaw has a long association with the University and, amongst other things, holds a Master's Degree in International Sports Law from the University; is a Board Member of the International Law Unit of the University; and regularly delivers Courses for the University on Alternative Commercial Dispute Resolution to postgraduate students pursuing an LLM in International and European Business Law.



Lunch & Learn

Lance Armstrong Case

February 6, 2013 - The Hague

The seemingly endless saga involving the dope-fuelled career of Lance Armstrong and its wider effect on competitive cycling continues to unfold. In light of the doping charges, sponsors dropping their endorsements, his cancer foundation removing him from its name, not to mention the broader implications and detrimental impact on the world of competitive cycling and the sports world in general. What happened? Will there be any residual effects on the WAD Code? Should the process for drug testing in sports be examined? Were the doping officials to be blamed? What are the lessons to be learned here?

Speaker: Herman Ram, CEO Anti-Doping Authority Netherlands, the National Anti-Doping Organization (NADO) for the Netherlands

Location: T.M.C. Asser Instituut. R.J. Schimmelpennincklaan 20-22, The Hague

Time: 11.30–13.30

Fee: regular € 25 / student € 15 - (Lunch included)

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The International Sports Law Journal

We are pleased to inform you that as of January 1, 2013, Springer in conjunction with T.M.C. Asser Press, will be the publisher of *The International Sports Law Journal*. In future the Journal will be available in print as well as electronically.

On the homepage of The International Sports Law Journal at www.springer.com you can read the most downloaded articles for free, sign up for our Table of Contents Alert, get to know the complete Editorial Board and find submission information.

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Asser International Sports Law Centre - "Virtual" Sports Fraud Workshop

Helping to identify solutions in the fight against Sports Fraud!

In the Spring 2012, Asser International Sports Law Center (AISLC) hosted a roundtable seminar to continue the dialogue on sports fraud (sports related - illegal betting, match-fixing, money laundering, etc.) in the European Union (EU). During this seminar we discussed key developments including a review of recent studies, legislation and activities aimed at addressing this issue.

In the Spring of 2013, we will host a Sports Fraud Roundtable Workshop, as a follow-up to the 2012 Spring seminar. Please check www.sportslaw.nl for more information on this important event.

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Originating from a series of roundtable sessions on the Bosman case in 1996, international sports law has developed into one of the main areas of research within the T.M.C. Asser Instituut. The research is interdisciplinary as well as comparative, covering all fields of law in which the Instituut specialises, i.e., private international law, public international law including the law of international organisations, international commercial arbitration and the law of the European Union.

Asser ISLC was officially launched on 1 January 2002 within the framework of the T.M.C. Asser Instituut for international law. The mission of the *Asser ISLC* is to provide a centre of excellence in particular by providing high quality research, services and products to the sporting world at large (sports ministries, international - intergovernmental - organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis.

The Centre's activities include:

- Fundamental research, Applied (contract) research, Consultancy
- Seminars and Conferences, Education and Training
- Library, Documentation/Information, and Publications (Sports law book series, and The ISLJ)

The *International Sports Law Journal* (ISLJ), the official journal of the Asser International Sports Law Centre, was started in 2000 with the main purpose of providing valuable legal commentary and informing those interested in sports and the law about legally relevant developments in the world of sport from a national and international perspective. Internationally, sports law is recognized as an emerging specialty area and the ISLJ is well known for providing important information to the international sports law community. The ISLJ is the only truly "international" sports law journal that experts, practitioners and academics rely on for providing interesting, necessary and valuable information regarding sports law related topics. The ISLJ has an international Editorial Board and is supported by an international Advisory Board of prominent sports lawyers representing all areas of sports law.

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ASSER International Sports Law Series

New Media and Sport *International Legal Aspects*

by

Katrien Lefever

With a Foreword by Prof. Dr. Stefaan Van den Bogaert, Professor of European Law, University of Leiden, The Netherlands

During the past decade, the media landscape and the coverage of sports events have changed fundamentally. Sports fans can consume the sports content of their choice, on the platform they prefer and at the time they want. Furthermore, thanks to electronic devices and Internet, content can now be created and distributed by every sports fan. As a result, it is argued that media regulation which traditionally contains rules safeguarding access to information and diversity would become redundant. Moreover, it is sometimes proposed to leave the regulation of the broadcasting market solely to competition law.

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Katrien Lefever is Senior Legal Researcher at IBBT, The Interdisciplinary Centre for Law and ICT (ICRI), KU Leuven, Belgium.

The book appears in the *ASSER International Sports Law Series*, under the editorship of Prof. Dr. **Robert Siekmann**, Dr. **Janwillem Soek** and **Marco van der Harst LL.M.**

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