Marquette Sports Law Review

Volume 12
Issue 2 *Spring*

Article 7

2002

Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport

Frank Oschütz

INTERNATIONAL SPORTS LAW PERSPECTIVES

HARMONIZATION OF ANTI-DOPING CODE THROUGH ARBITRATION: THE CASE LAW OF THE COURT OF ARBITRATION FOR SPORT*

FRANK OSCHÜTZ**

INTRODUCTION

Doping affects the nature of sporting competition. It artificially amends the physical conditions of athletes who claim to evaluate their natural differences of performance against each other. Doping is an issue, which is able to change fair competition into a spectacle for the mere amusement of the spectator. The sporting world has decided to combat this development and to impose severe sanctions against athletes found with forbidden substances in their urine or blood. Where those sanctions are not accepted because the results were obtained in an undue manner or the athlete considers himself innocent, the parties will exchange legal arguments. This is where dispute settlement systems come into play. Alongside the well-known state courts exists another system of settlement: arbitration.

With the Court of Arbitration for Sport (CAS), the sporting world has a unique institution that provides support for the settlement of disputes relating to sport. Over the past seventeen years, and in more than three hundred cases, the CAS has developed a certain expertise in this field. It is the aim of this study to examine the jurisprudence of the CAS in doping cases in order to see whether there are certain principles the arbitrators follow.

After a short introduction to the history of the CAS and its Appeals arbitration procedure (Chapter I), this essay will examine, in particular, the structure of the doping offense in the light of its jurisprudence (Chapter II). The jurisprudence of the CAS in doping cases is already the subject of certain

* The author would like to thank Matthieu Reeb, Acting Secretary General of the CAS for his help.

** University of Nuremberg; L.L.M., Universities of Geneva and Lausanne, Switzerland. The author is attorney-at-law with KPMG Beiten Burkhardt, Munich, Germany.

articles.[1] However, while those articles are mainly based on the *Digest of CAS Awards*,[2] this study also includes decisions that were rendered after that edition of the Digest was prepared. Many of them are still unpublished.[3]

I. THE LEGAL FRAMEWORK FOR CAS DECISIONS

A. Origin and History of the CAS

The CAS was founded in 1983 following an initiative of the former International Olympic Committee (IOC) President, Juan Antonio Samaranch. The idea was to create a court with a jurisdiction specifically adapted to the needs of sport.[4] The CAS is a permanent arbitration institution having its seat in Lausanne, Switzerland. The arbitration cases are decided by a panel of one or three arbitrators following the Code for the CAS.[5] The arbitrators are chosen from a closed list, which today contains 186 persons.[6] The Code provides for special procedures for ordinary arbitration and appellate arbitration proceedings. The latter is specifically designed to serve the needs of an appeal against a decision of a federation or a club. This is the procedure which is applied in doping cases.

In 1994 the CAS was restructured and placed under the auspices of the International Council of Arbitration for Sport (ICAS), an independent foundation under Swiss law. The ICAS, inter alia, assures the financing of the CAS, maintains the list of arbitrators, and may amend the arbitration rules. The ICAS also decides challenges of arbitrators.[7] Its members are not allowed to serve as arbitrators or counsel in CAS arbitration.[8] Furthermore, in a decision in 1995, the ICAS created a special chamber responsible for the settlement of disputes arising during the Olympic Games.[9] This chamber was

1. Michael J. Beloff, *Drugs, Laws and Versapaks*, *in* DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES 39 (John O'Leary ed., 2001); Stephan Netzle, *Wie halt es das Internationale Sportschiedsgericht mit dem Doping?*, *in* DOPING: REALITAT UND RECHT 197 (Klaus Vieweg ed., 1998).

2. DIGEST OF CAS AWARDS 1986-1998 (Matthieu Reeb ed., 1998) [hereinafter CAS DIGEST].

3. Since the writing of this article some of these decisions have been reported in DIGEST OF CAS AWARDS II 1998-2000 (Matthieu Reeb ed., 2002) [hereinafter CAS DIGEST II].

4. For the history of the CAS, see CAS DIGEST, *supra* note 2, at xxiii.

5. COURT OF ARBITRATION FOR SPORT, CODE [hereinafter CODE], *available at* http://www.tas-cas.org.

6. *Id.* at art. S13.

7. *Id.* at art. R34.

8. *Id.* at art. S5.

9. Gabrielle Kaufman-Kohler, *Arbitration and the Games Or the First Experience of the Olympic Division of the Court of Arbitration for Sport*, 12 MEALEY'S INT'L ARB. REP., at A1 (Feb. 1997).

not only active during the Olympic Games in Atlanta,[10] Nagano[11] and Sydney,[12] but continued its work during the Olympic Games in Salt Lake City, as well. These chambers also dealt with a line of doping cases.

The independence of the CAS has been questioned before the Federal Tribunal of Switzerland. It has been upheld under the rules in force before 1994 and also under the rules in force after that date, at least for cases where the IOC is not a direct party.[13] The CAS is thus fully recognized as an arbitration court, with its jurisdiction excluding the jurisdiction of state courts.

B. Appellate Jurisdiction of the CAS

1. Arbitration agreement

The arbitration agreement forms the basis of each arbitration procedure. Here the parties agree to exclude state court jurisdiction in favor of the jurisdiction of an arbitration Panel. For the appellate arbitration proceedings, Article R47 of the Code provides that the arbitration agreement may be contained in the statutes or regulations of sports bodies.[14] Meanwhile, almost all[15] members of the Olympic movement included such a clause in their statutes. These provisions provide that an appeal against each decision (including doping) of the federation is subject to appeal before the CAS.

An interesting arbitration clause is contained in the International Cycling Union (UCI)[16] regulations. On the one hand, Article 113 of the UCI's Antidoping Examination Regulations (AER) provides that the UCI may refer a case to the CAS if a national federation fails to sanction a doping offense.[17] On the other hand, Article 112 gives the UCI the possibility of bringing an

---

10. Gabrielle Kaufmann-Kohler, *Atlanta et l'Arbitrage ou les Premieres Experiences de la Division Olympique de Tribunal Arbitral du Sport*, ASS'N SUISSE D'ARBITRAGE BULL. 433 (1996).

11. Gabrielle Kaufmann-Kohler, *Nagano et l'Arbitrage—ou Vers Une Justice de Proximite*, ASS'N SUISSE D'ARBITRAGE BULL. 311 (1998).

12. Dirk-Reiner Martens & Frank Oschutz, *Die Entscheidungen des TAS in Sydney*, 1 SPURT 4 (2001).

13. Schweizerisches Bundesgericht, BGE 119 II 271 (Switz. 1993); N. v. Federation Equestre Internationale, *in* CAS DIGEST, *supra* note 2, at 585; Schweizerisches Bundesgericht, BGE 5P.427.2000 (Switz. Dec. 4, 2000), *available at* www.bger.ch.

14. CODE, *supra* note 5, at art. R47.

15. The Federation Internationale de Football Association (FIFA) recently created its own arbitration court. FIFA STAT. Ch.13, art. 63 (July 2001).

16. The International Cycling Union will be referred to throughout this article as "UCI," which is the union's common acronym based on its French name.

17. INTERNATIONAL CYCLING UNION, PART XIV ANTIDOPING EXAMINATION REGULATIONS, art. 113 (July 2001), *available at* http://www.uci.ch/english/about/rules/ch14_dopage.pdf.

appeal against the decision of a national federation to the CAS.[18] In one case the CAS observed that these powers would place the UCI in a position of a "prosecutor" against the national federations. [19] The arbitrators wondered whether they could accept such an "appeal" under the existing rules. They decided to accept the case although they considered it more suitable that the UCI would make its own decision first, which could then be appealed to the CAS.[20]

Arbitration clauses may also be contained in individual agreements, which have been entered into before or after a dispute has arisen.[21] Examples of the former are participation forms for certain competitions[22] or license agreements between an athlete and a federation. An arbitration clause is also contained in the application form for the Olympic Games.[23]

2. Time limits and exhaustion of internal remedies

An appeal will only be admitted if the applicant has exhausted all internal remedies prior to the appeal.[24] This runs parallel with proceedings before state courts and follows the idea that the federation has reached a final decision only after all internal remedies against the decision of one of its organs have been exhausted. Usually the statutes of the federations provide a certain time limit to file the appeal before the CAS. If no such time limit is provided, the Code will fix a time limit of twenty-one days from the day of communication of the decision which is appealed.[25]

3. Procedure and award

According to Article R28 of the Code, the seat of each Arbitration Panel is in Lausanne.[26] Thus, the law governing the arbitration procedure (the so-

18. *Id.* at art. 112.

19. Int'l Cycling Union v. Jogert, No. 97/176, slip op. at 4 (Ct. Arb. Sport Aug. 28, 1998).

20. *Id.*

21. Int'l Basketball Fed'n v. W., No. 94/123 (CAS 1994), *in* CAS DIGEST, *supra* note 2, at 317, 318; Nat'l Wheelchair Basketball Ass'n v. International Paralympic Comm., No. 95/122 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 173, 175 [hereinafter *Nat'l Wheelchair*].

22. USA Shooting v. International Shooting Union, No. 94/129 (CAS 1993), *in* CAS DIGEST, *supra* note 2, at 187, 190.

23. INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER, ch. 5, § 5.1 at *36, *available at* http://multimedia.olympic.org/pdf/en_report_122.pdf.

24. CODE, *supra* note 5, at art. R47.

25. *Id.* at art. R49.

26. *Id.* at art. R28.

called *lex arbitri*) is Swiss Law.[27] The procedure before the Panels is divided into two steps. A written procedure with an exchange of documents[28] is, in almost all cases, followed by a hearing[29] where the Panel will examine witnesses and discuss the evidence with the parties. The Panel may also request the production of certain pieces of evidence.[30]

The applicable substantive law will be the law chosen by the parties or the law of the country where the federation, which issued the challenged decision, has its seat.[31] This provision ensures a stable legal framework for the decision of the federation and is predictable for all parties. In reaching a decision the Panels have full power to review the facts and the law. Thus, and unlike many state courts,[32] the Panels will not be restricted to a summary review of the decision. The CAS clarified its powers in one decision holding that the Panels may consider "all evidence, oral and written, produced before it. . . . In short, the hearing before the Panel constituted a hearing *de novo*, that is a rehearing of the merits of the case."[33] As a general rule, the CAS will apply the rules applicable at the time the offense was committed. However, the *lex mitior* principle obliges the Panel to apply the law as it stands at the time of the determination where it is more favourable to the appellant. This is a principle of criminal law that is common in a democratic society.[34] It is established, for example, in Article two, Paragraph two of the Swiss Penal Code and was also applied in CAS arbitration cases.[35] Referring to the "constant jurisprudence" of the CAS the *lex mitior* principle was also used to order a suspension on

27. LOI FEDERALE SUR LE DROIT INTERNATIONAL PRIVE, ch. 12, art. 176; *Champ d'Application; Siege du Tribunal Arbitral, available at* http://www.admin.ch/ch/f/rs/291/a176.html. This is also true for the ad hoc Panels at the Olympic Games. Kaufmann-Kohler, *supra* note 11, at 320.

28. CODE, *supra* note 5, at R51, R54.

29. *Id.* at arts. R57, R44.2.

30. *Id.* at arts. R57, R44.3.

31. *Id.* at art. R58. For the application of European Competition Law as mandatory law, see AEK Athens v. Union des Associations Europeenes de Football, No. 98/200 (CAS 1999), *in* YEARBOOK OF COMMERCIAL ARBITRATION XXV 393, 395-97 (2000).

32. For Swiss Law, see Anton Heini, *Die Gerichtliche Überprüfung von Vereinsstrafen, in* FREIHEIT UND VERANTWORTUNG IM RECHT 223 (Peter Forstmoser & Walter R. Schluep eds., 1982); For German Law, see [BGHZ] [Supreme Court] 128, 93 (F.R.G.).

33. B. v. Federation Internationale de Natation, No. 98/211 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 255, 257; Federacion Cubana de Levamiento de Pesas v. International Weightlifting Fed'n, No. 99/A/252, slip op. at 17 (Ct. Arb. Sport July 28, 2000).

34. Union Cycliste Internationale v. Comite National Olympique Italion, Advisory Opinion No. 94/128 (CAS 1995), *in* CAS DIGEST, *supra* note 2, at 495, 509.

35. A.C. v. Federation Internationale de Natation Amateur, No. 96/149 (CAS 1997), *in* CAS DIGEST, *supra* note 2, at 251, 260; Meca-Medina v. Federation Internationale de Natation Amateur, No. 99/A/234 & 99/A/235, slip op. at 13 (Ct. Arb. Sport Feb. 29, 2000).

probation.[36]

The Panels are generally not bound to follow earlier decisions or even to obey the rules of stare decisis. However, the Panels have also declared that they are disposed to follow earlier CAS decisions for reasons of comity and in order to strengthen legal predictability in international sports law.[37]

The award shall be rendered within a time limit of four months starting from the filing of the statement of appeal.[38] This time limit may be extended by the President of the Appeals Division upon a motivated request from the President of the Panel. Experience has shown that the Panels normally will try their best to render their decision within the time limits or will not exceed them by very much.

The CAS may also order provisional measures.[39] Before the Panel is constituted, the power to issue such orders lies with the President of the Division. Once the Panel is constituted then this power shifts to the Panel. According to the *Code*, this power will also exclude the competence of any state court to order such measures while an appeal is pending before the CAS.[40]

II. THE AWARDS CONCERNING DOPING CASES

A. Basic Ideas

1. Interests

The CAS addressed the doping issue for the first time two years after its creation. The second case brought before the CAS, a (non-binding) advisory opinion, dealt with the admissibility of a life ban.[41] Here, the arbitrators confirmed that every decision by a federation had to respect the principles of national and international law, and in particular the right to personality of the accused athlete, among other human rights.[42] Thus, the Panel ruled that an

36. Union Cycliste Internationale v. C., No. 2000/A/289 (CAS 2001), *in* CAS DIGEST II, *supra* note 3, at 424, 430-31.

37. *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 258-59; *Jogert*, No. 97/176, slip op. at 14.

38. CODE, *supra* note 5, at art. R59.

39. *Id.* at R37.

40. *Id.*

41. Int'l Olympic Comm., Advisory Opinion No. 86/02 (CAS 1986), *in* CAS COMPILATION 61 (1993).

42. *Id.*

athlete could be banned for life only if he committed a deliberate offense or manifestly contravened the spirit of fair play in another way. Furthermore, the substance found had to be on the doping list and the procedure must have been strictly respected.[43] The arbitrators considered themselves as having the task of insuring that the law, the basic principle of innocence, and that the correct application of the rules of the federation were respected.[44]

On the other hand, in various decisions, the CAS also emphasized the need for effective measures in the fight against doping. The arbitrators underlined that the high objectives and practical necessities of the fight against doping may justify the application of strict definitions and rules without exemptions. These objectives notably justified the strict liability rule so that the federation does not have to prove the guilty intent of the athlete. For these reasons (and until lately[45]) most of the Panels were not convinced that this standard was unreasonable or contrary to natural justice or constituted an unreasonable restraint of trade.[46]

It is between those two poles of reasoning—the protection of the rights of the accused athlete and the need for effective measures against doping to preserve the credibility of sport—that the jurisprudence of the CAS in doping cases needs to be considered. However, in one case, the CAS acknowledged that repressive measures is only one method in the fight against doping.[47] Federations should also assist athletes who are sometimes not only offenders but also victims. Federations may, for example, reward confessions with a considerable reduction of the sanction for a doping offense.[48]

2. Interpretation

From the outset the CAS made clear that the fight against doping may be conducted only within certain limits that are imposed by law. The CAS stressed that a federation may punish an athlete only on the basis of its rules in force at the time the offense had been committed. They may not invoke a practice that has no legal basis. The arbitrators emphasized that the rules have to emanate from duly authorized bodies and need to be adopted in

43. *Id.*

44. N. v. International Equestrian Fed'n, No. 91/156 (CAS 1992), *in* CAS COMPILATION 19 (1993).

45. Aanes v. Federation Internationale de Luttes Associees, No. 2001/A/317, slip op. at 15 (Ct. Arb. Sport July 9, 2001).

46. *USA Shooting*, *supra* note 22, at 194; Foschi v. Federation Internationale de Natation Amateure, No. 96/156, slip op. at 42 (Ct. Arb. Sport Oct. 6, 1997).

47. *Union Cycliste Internationale*, No. 2000/A/289, *supra* note 36, at 428.

48. *Id.* at 429.

constitutionally proper ways.[49] However, despite some general considerations, as yet the Panels have not controlled the validity of regulations of the federations under the state law applicable to the case.[50]

The CAS has also underlined that the arbitrators were not empowered to create a doping offense through its decisions.[51] Unable to find a legal basis for such a decision in the rules of the Federation, the CAS annulled a decision, which preliminarily suspended an athlete.[52] In another case brought before the ad hoc chamber at the Olympic Games in Nagano, a snowboarder tested positive for marijuana metabolites.[53] The Panel observed that marijuana was a prohibited substance under the Antidoping Code only if there was an agreement between the international federation and the IOC to that extent.[54] Since the evidence showed that such an agreement was missing, no doping offense could be established.[55]

This approach shows that the work of the arbitrators is clearly limited to an interpretation of the statutes in force. Any interpretation of such rules will always find its limit in their wording.[56] The conditions of doping offenses cannot be created by dispute settlement bodies. This task has to be left to the members of the respective federation. However, in one case the CAS Panel showed a quite different approach.[57] There was no definition of a doping offense in the rules of the federation. Nevertheless, the Panel found it sufficient that the introductory notes to the Medical Control Guide, which were prepared by the Chairman of the Medical board, mentioned that "the presence of the drug in the urine constitutes an offense, irrespective of the route of administration."[58] For the arbitrators this was a sufficiently clear regulation allowing the imposition of a suspension against the athlete. Bearing in mind the strict standards established in earlier cases, this decision is unique and rather surprising.

In addition to the pure existence of a legal basis, the CAS emphasized the

---

49. *USA Shooting*, *supra* note 22, at 197.

50. *See, e.g.*, L. v. Federation Internationale de Natation Amateur, No. 95/142 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 225, 238; *USA Shooting*, *supra* note 22, at 194.

51. *USA Shooting*, *supra* note 22, at 194.

52. M. v. Federation Italianne de Cyclisme, No. 97/169 (CAS 1997), *in* CAS DIGEST, *supra* note 2, at 539, 541.

53. Arbitration CAS ad hoc Division (O.G. Nagano 1998), 002, R. v. International Olympic Comm., award of 12 February, 1998, *in* CAS DIGEST, *supra* note 2, at 419.

54. *Id.*

55. *Id.* at 423.

56. *USA Shooting*, *supra* note 22, at 194.

57. *Nat'l Wheelchair*, *supra* note 21, at 178.

58. *Id.* (quoting Dr. Ridiwg, ICC Medical Chairman).

need for clarity of the rules in force. Athletes and officials should not be confronted with a thicket of mutually-qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.[59] This includes the duty of both the international and the national federation to keep those within their jurisdiction aware of the "precepts of the relevant code."[60] In one case the Panel ruled that due to the lack of clarity it would interpret the rules *contra stipulatorem.*[61] On the other hand, the arbitrators are likewise prepared to interpret the rules in a way "which seeks to discern the intention of the rule maker, and not to frustrate it."[62]

When considering whether the rules are sufficiently clear and unambiguous, the test to be applied is not whether a legally trained person would consider the rules as thus. Instead the arbitrators ask themselves whether an athlete who is subject to the rules and has no legal education or experience understands the rules clearly and unambiguously.[63] Consequently, the Panels have not hesitated to criticize poor drafting and a lack of clarity in the rules.[64]

The Panel will always examine the correct application of the rules in force. It will pay special attention to any additional requirements added to a pure strict liability regime. In one case, the doping definition required that the forbidden substance was taken "with the aim of attaining an increase in performance."[65] Here, the CAS annulled the sanction of an athlete because the federation was unable to provide evidence to that extent.[66] On the other hand, the Panels have constantly refused to take into account that a forbidden substance might not have had any performance enhancing effect. As a question of legal security, the arbitrators refused to examine this question where the Code of the federation did not expressly require a performance enhancing effect.[67] In another case, where the rules required a performance

59. *USA Shooting, supra* note 22, at 197.

60. *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 262.

61. *Aanes*, No. 2001/A/317, slip op. at 15.

62. *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 259.

63. *Foschi*, No. 96/156, slip op. at 52.

64. *USA Shooting, supra* note 22, at 196; *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 262; *Foschi*, No. 96/156, slip op. at 52; Leipold v. Federation Internationale des Luttes Associees, No. 2000/A/312, slip op. at 11 (Ct. Arb. Sport Oct. 22, 2001).

65. *USA Shooting, supra* note 22, at 194 (quoting Article 2 of the International Shooting Union (UIT) Anti-Doping Regulations).

66. *Id.*

67. F. v. Federation Equestre Internationale, No. 95/147 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 245, 249.

enhancing effect, the athlete failed to provide conclusive evidence that the substance (Ephedrine) did not have any performance enhancing effect (for a motorbike rider).[68]

3. Hierarchy of norms

The CAS has recognized that a national federation may be bound by the "regulations of an International Federation" as well as by "legislation of its [home] country."[69] In the case of contradictions, the national federation would at least be obliged to interpret and apply the statutory provisions in light of the principles of the Council of Europe Convention against doping (which is binding on the Member-State that has enacted anti-doping legislation).[70] In the case of a conflict between state legislation and the rules laid down by sport governing bodies (including the IOC), it is incumbent on the public authorities to refrain from taking "coercive measures [which hinder the] application of the rules in international sport."[71]

In a later opinion the CAS again underlined the plurality between national authorities and international sport governing bodies in the fight against doping.[72] The arbitrator confirmed the principles established earlier: The competencies in the fight against doping are shared between state authorities and sport organizations as evidenced in the Council of Europe's Anti-Doping Convention, signed on November 16, 1989, and the declaration of Lausanne (January 13, 1994),[73] where all major sports governing bodies agreed to coordinate their efforts.[74] He also emphasized again the need for uniform doping rules. However, in another decision, the Panel ruled that a binding decision on a national level, even if it was taken by a state authority, would not hinder the international federation in adopting its own sanction.[75] The arbitrators confirmed that this decision-making power was necessary in order to ensure equal treatment of all athletes in cases of doping offenses and to stop

68. H. v. Federation Internationale de Motocyclisme, No. 2000/A/281 (CAS 2000), *in* CAS DIGEST II, *supra* note 3, at 418.

69. Federation Francaise de Triathlon & International Triathlon Union, Advisory Opinion, No. 93/109 (CAS 1994), *in* CAS DIGEST, *supra* note 2, at 467, 473.

70. *Id.* at 475.

71. *Union Cycliste Internationale*, No. 94/128, *supra* note 34, at 508.

72. European Olympic Comms., Advisory Opinion No. 95/144 (CAS 1995), *in* CAS DIGEST, *supra* note 2, at 523.

73. Georg Englebrecht, *Adoption, Recognition and Harmonization of Doping Sanctions Between World Sports Organisations*, 4 INT'L SPORTS L.J. 3 (2000).

74. *European Olympic Comms.*, No. 95/144, *supra* note 72, at 526.

75. *Foschi*, No. 96/156, slip op. at 39; B. v. International Judo Fed'n, No. 98/214 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 308, 316.

the fight against doping from being hampered by a race to the lowest standards possible.[76]

B. The Doping Offense

Since the CAS is bound to apply the rules of the federations,[77] the interpretation of the doping offense will depend on the formula used in the respective statutory provisions. A harmonization on the basis of the Olympic Movement Anti-Doping Code has not yet been achieved. Thus, there can be no general CAS definition of the doping offense applied to all cases brought before it. Yet there are clear tendencies to interpret the doping regulations in a similar manner.

Before going into the details, one realizes, for example, that the arbitrators have so far tried to avoid addressing the issue of fault. Two concepts are at odds. On the one hand, there are Panels, which have stressed that the nature of a doping offense is one of pure strict liability, *i.e.* a liability without fault. Consequently, there is no need to address the issue of intent or negligence. Nevertheless, many Panels have felt the need to soften the harsh consequences of such a strict liability regime for athletes who acted neither intentionally nor negligently. The athletes should have the opportunity to escape their liability. Therefore, many Panels added a shift in the burden of proof to enable the athlete to show that he committed the offense without fault. By doing so, the intentional element that would normally not exist in a strict liability offense snuck in the back door. On the other hand, there are Panels, which use the legal presumption of guilt when a forbidden substance is found in the body of an athlete. Here the athlete has *per defintionem* the possibility (in most cases rather theoretical) to rebut the presumption of guilt by presenting evidence that he did not act intentionally or negligently. Consequently, those Panels would not apply the concept of strict liability. However, one may also perceive a certain degree of misunderstanding of those two different legal concepts.[78] As shown, there is a definite need to clarify the material concepts of strict liability, liability with a presumption of guilt, and the procedural concepts of the burden of proof and its reversal, as well as the idea of prima facie evidence.[79]

---

76. *International Judo Fed'n*, *supra* note 75, at 316-17.

77. CODE, *supra* note 5, at art. R58.

78. W. v. International Equestrian Fed'n, No. 92/86 (CAS 1993), *in* CAS DIGEST, *supra* note 2, at 161, 163.

79. *Aanes*, No. 2001/A/317, slip op. at 15.

1. The concept of strict liability

It was in one of the first doping cases examined by a CAS Panel where the arbitrators first qualified the provision in the International Equestrian Federation (FEI) laws providing for automatic disqualification from an event as being a case of "pure strict liability."[80] Thus, the mere fact of a positive doping result may justify the disqualification of the person responsible.[81] Also, the provisions of the IOC Anti-Doping Code were regarded as containing a strict liability offense.[82] The principle of strict liability was also addressed and clarified in a later decision which had to apply the Federation Internationale de Natation Amateur (FINA) rules. The Panel in this case gave a definition of the strict liability in doping cases:

> [U]nder the term "strict liability," one should understand a concept of liability similar to that of civil liability, without fault in tort, or comparable to product liability cases. . . . It does not raise the issue of guilt (or "the presumption of guilt") with respect to the applicability of disciplinary sanctions. The concept of "strict liability," as it has been used in doping cases, does not imply an intentional element. . . . There is no tie between sanction and intent.[83]

The Panel felt bound to apply the Rules as they stood and did not want to call into question their validity.[84] The CAS acknowledged that the application of the strict liability regime might create a certain degree of hardship or be perceived as unfair. In this respect the CAS has always emphasized the need for equal opportunities in sporting competition. As long as only a disqualification was at stake, the arbitrators have always felt prepared to apply the strict liability regime without any alteration.[85] The arbitrators have underlined that the interests of the other competitors will prevail over the interests of the single athlete found with a forbidden substance, since this is a

80. G. v. International Equestrian Fed'n, No. 91/53 (CAS 1992), *in* CAS DIGEST, *supra* note 2, 79, 87.

81. G. v. International Equestrian Fed'n, No. 92/63 (CAS 1992), *in* CAS DIGEST, *supra* note 2, at 115, 121; N. v. International Equestrian Fed'n, No. 92/73 (CAS 1992), *in* CAS DIGEST, *supra* note 2, at 153, 158; SJ. v. International Equestrian Fed'n, No. 92/71 (CAS 1992), *in* CAS DIGEST, *supra* note 2, at 135, 140.

82. *See, e.g.*, *International Olympic Comm.*, *supra* note 53, at 424.

83. *Federation Internationale de Natation Amateur*, No. 95/142, *supra* note 50, at 230-31.

84. C. v. Federation Internationale de Natation Amateur, No. 95/141 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 215, 219; B v. International Triathlon Union, No. 98/222 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 330, 336.

85. *Leipold*, No. 2000/A/312, slip op. at 28.

question of procedural fairness.[86] The idea of balancing the interests of an athlete found with a forbidden substance during a competition with the interests of the other participants competing without a forbidden substance was also addressed in later decisions.[87]

In another case the CAS added as an argument the need for effective measures in the fight against doping.[88] In this case a shooter tested positive after he had taken a medicine containing a forbidden substance, although a physician assured him that it did not. The Panel observed that a disqualification may be a harsh consequence for the athlete but the non-disqualification would be more unfair for the other athletes.[89] For these reasons the arbitrators stated:

> [T]he Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.[90]

In a line of awards the Panels also explained the necessity of a strict liability regime in respect to the additional sanctions. In the eyes of the arbitrators this strict rule was necessary notwithstanding a certain degree of hardship.[91] The Panels took note that a pure strict liability regime would not leave room for the athlete to provide exculpatory evidence, and thus did not distinguish between athletes who were doped deliberately, negligently, or without their knowledge.[92] It would exempt the athlete only in very limited circumstances:

> [I]t renders the question of guilt irrelevant and allows for exoneration only in very limited and usually exhaustively listed cases, such as

---

86. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220.

87. *Federation Equestre Internationale*, *supra* note 67, at 249; *Leipold*, No. 2000/A/312, slip op. at 28.

88. *USA Shooting*, *supra* note 22, at 187.

89. *Id.* at 193.

90. *Id.*

91. V. v. Federation Internationale de Natation Amateur, No. 95/141 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 271; Union Cycliste Internationale v. Moller, No. 99A/239, slip op. at 10 (Ct. Arb. Sport Apr. 14, 2000).

92. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220.

> "force majeure" or wrongful act of a third person.... [E]ven a successful proof by the athlete that there was no guilt on his side (i.e. no intention or negligence) *would not exempt him* from liability. This is, on one hand, a faithful transposition of the civil (tort) law concept of "strict liability" (as distinguished from a "presumed guilt"), and, on the other hand, also the only interpretation capable to ensure efficient fight against doping.[93]

In this respect the arbitrators held that the fight against doping would be made "practically impossible"[94] if the federation had to prove the intentional nature of the act.[95] The level of intent would thus only play a role in the question of the amount of the sanction.[96] Even the CAS considered that "[w]hether a severe sanction such as a two year ban may be imposed on an athlete without examining the issue of guilt and intent was not undisputed, particularly in view of art. 28 of the Swiss Civil Code (Personality rights)."[97] The arbitrators also remarked that a part of the doctrine required the application of the principle *nulla poena sine culpa* in relation to additional suspensions.[98] Despite these shy criticisms, the Panel adhered to the strict liability rule refusing to consider any element of fault.[99] One Panel was not convinced that the principle of strict liability would violate Swiss law, because a CAS award applying these principles had been upheld by the Swiss Federal Tribunal.[100] However, that Panel ignored the fact that the Swiss Federal Tribunal did not address the issue as to whether the arbitrators correctly applied Swiss law. They just had to consider whether the Arbitral award violated the "international *ordre public*".

The critics of this concept in legal literature are numerous.[101] The critics basically argue that as far as an additional sanction is concerned, the principle of sporting fairness is no longer a preponderant factor allowing liability

---

93. *International Triathlon Union*, *supra* note 84, at 336-37 (emphasis added).

94. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220.

95. *Leipold*, No. 2000/A/312, slip op. at 28.

96. N. v. Federation Internationale de Natation, No. 98/208 (CAS 1998), *in* CAS DIGEST II, *supra* note 3, at 234, 247-48; *International Triathlon Union*, *supra* note 84, at 337.

97. *Federation Internationale de Natation Amateur*, No. 95/142, *supra* note 50, at 231.

98. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220.

99. *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 24.

100. Schweizerisches Bundesgericht, BGE 5P.83, slip op. at 7 (Switz. Mar. 31, 1999).

101. Aaron N. Wise, *"Strict Liability" Drug Rules of Sports Governing Bodies: Are They Legal?*, DEFENSOR LEGIS 119 (1997); Margareta Baddeley, *Dopingsperren als Verbandssanktion aus Nationaler und Internationaler Sicht*, *in* DOPING—SANKTIONEN, BEWEISE, ANSPRÜCHE 9, 21 (Jochen Fritzweiler ed., 2000).

without fault.[102] The additional sanction is designed to punish the athlete for a violation of the respective rules by excluding him from competition. Since competitions are more or less the only activity of an average professional athlete, this exclusion should at least be accompanied by an appreciation of the subjective elements of each case. This is all the more true since the federations are monopolies in their fields of sport. These criticisms were partly followed by very recent CAS decisions. Here, for the first time, the arbitrators acknowledged that an additional sanction cannot be imposed without addressing the issue of guilt at the stage of the doping definition and not only at the amount of the sanction.[103]

2. The rebuttable presumption of guilt

In conclusion of the foregoing, one has to realize that the principle of strict liability cannot be justified if additional suspensions are at stake. That might have also been the reason why many Panels, although claiming to follow a strict liability rule, allowed the athlete to produce exculpatory evidence. To allow such evidence does not fit at all in the legal scheme of strict liability. It is more suitable for a doping definition, which involves the presumption of guilt.

i. The concept

Early CAS decisions already interpreted the FEI Regulations[104] to contain a system of legal presumptions with respect to the guilt of the accused athlete. One Panel, in a very early decision on doping, noted that:

> [W]here doping or the taking of prohibited substances is concerned, there is normally and generally in the sporting regulations of Federations an inversion of the burden of proof in the sense that, as soon as the presence of a prohibited substance is detected, there is the presumption of a voluntary act. It is then up to the athlete to produce evidence to the contrary. . . . [A positive test result] presumes negligence on the part of the person responsible . . . unless the person responsible clears himself from such presumption by proving that he had taken all the necessary precautions.[105]

In decisions following this and concerning the same FEI Anti-Doping

102. Wise, *supra* note 101, at 119.

103. *Aanes*, No. 2001/A/317, slip op. at 15; *Leipold*, No. 2000/A/312, slip op. at 13.

104. The FEI was the first international federation to include an arbitration clause in favour of CAS in its Statutes. CAS DIGEST, *supra* note 2, at xxv.

105. *International Equestrian Fed'n*, No. 91/53, *supra* note 80, at 87-88.

Regulations, the CAS Panels specified that the burden of proof, which is normally incumbent upon the person who is alleging the guilt of a third party, is reversed. For the person responsible to have a penalty imposed upon him, it is sufficient that the analysis performed reveals the presence of a prohibited substance. This was considered to be a simple legal presumption and not an irrebuttable presumption, thus a presumption, which may be overturned by evidence to the contrary. Although the FEI regulations did not mention the possibility of having the person responsible produce peremptory evidence, taking into account the seriousness of the measures which may be pronounced against the athlete in application of a general principle of law, "the person responsible has the right to clear himself through counter-evidence (proof that the presence of the prohibited substance is a result of an act of ill-will on the part of a third party or that the result of the analysis is wrong)."[106] Even if this approach still might seem harsh on a morally innocent athlete, it was considered as being necessary to ensure fairness towards all competitors and to protect their health and well being.[107]

Concerning the admissibility of the so-called "defenses"—that is to say arguments that may rebut the presumption of guilt—the arbitrators subsequently acknowledged that the wording of the doping provision often did not provide any possibility apart from showing a mistake in the identification process.[108] However, the Panels found that if a federation wants to allow no defenses at all, it had to express this in a manner that is absolutely crystal clear and unambiguous.[109] In all other cases the arbitrators felt prepared to interpret the relevant doping rules in the eyes of an athlete in order to establish to what extent a certain degree of flexibility could be allowed.[110] Only in one case did the Panel refuse to take into account any exculpatory evidence without further explanation or referral to the already well-established jurisprudence.[111] In relation to the FINA rules, the CAS found that there was also a legal presumption that the athlete is responsible for the presence of the banned substance and is therefore guilty. The burden of proof, which rests on FINA, was merely to establish that a banned substance had been properly identified in the competitor's urine. The swimmer then had the burden of disproving his

106. S. v. International Equestrian Fed'n, No. 91/56 (CAS 1992), *in* CAS DIGEST, *supra* note 2, at 93, 96; *see also International Equestrian Fed'n*, No. 92/73, *supra* note 81, at 157; *but see International Equestrian Fed'n*, No. 92/63, *supra* note 81, at 120.

107. *Foschi*, No. 96/156, slip op. at 41; *see also Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220.

108. *Foschi*, No. 96/156, slip op. at 47.

109. *USA Shooting*, *supra* note 22, at 187; *Foschi*, No. 96/156, slip op. at 50.

110. *Foschi*, No. 96/156, slip op. at 51.

111. *Jogert*, No. 97/176, slip op. at 20.

guilt.[112] This jurisprudence was later extended to the IOC Medical Code then in force.[113]

Finally, the aforementioned decision, which declared void the concept of liability without fault,[114] established the same system of a rebuttable presumption of guilt. In addition, the arbitrators contemplated whether even this system was too harsh for an athlete and whether it was necessary to consider that a positive test result could only provide prima facie evidence for a doping offense, thus leaving the burden of proof for the culpability of the athlete pro forma on the federation.[115] The Panel found it unnecessary to consider the latter concept since the practical results of both concepts would be more or less the same.

ii. The burden of proof

The presumption is a concept of material law. Here, the burden of proof lies with the party claiming a fact in his favor. An athlete arguing against his presumed guilt would have to prove his innocence. The same practical result can be achieved if, under procedural law, the burden of proof for one condition is shifted from one party to the other. There are also CAS decisions that, with regard to the guilt of the athlete, speak of a shift of the burden of proof rather than of a legal presumption.

The Panels clearly considered that the burden of proof for establishing the existence of a forbidden substance in an athlete's bodily fluids rests with the federation. To this extent, the presumption of innocence operated in favor of the athlete until the federation discharged that burden.[116] In one case, after comprehensive discussion, the CAS arrived at the conclusion that the federation had not only to prove the mere existence of a forbidden substance in the body of the athlete, but also its ingestion.[117] This should at least be valid if there was more than one scientific possibility as to how a certain level of a forbidden substance might have been created.[118] The arbitrators in this case did not demand the proof of a specific cause but rather the reasonable exclusion of all other possible causes.[119] This reasoning remained unique. In

112. *Foschi*, No. 96/156, slip op. at 40.

113. *International Judo Fed'n*, *supra* note 75, at 321.

114. *Aanes*, No. 2001/A/317, slip op. at 21.

115. *Id.*

116. *Federation Internationale de Natation Amateur*, No. 98/208, *supra* note 96, 247-48; *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 14.

117. *International Triathlon Union*, *supra* note 84, at 337.

118. *Id.* at 335.

119. *Id.* at 336-37.

a later decision, the CAS rejected the idea that the federation had to exclude all other possible sources of the forbidden substance.[120] Here, the arbitrators ruled that it was up to the athlete to prove an endogenous production of a certain substance as a valid excuse.[121]

This sharing of the burden of proof has also been used in a case where the substance found was not contained in the list of forbidden substances. The federation claimed that this substance should be treated as a stimulant, but it was unable to show the stimulant effects.[122] Consequently, the athlete had to be acquitted, since no forbidden substance had been found in his urine. The Panels recognized that it was almost impossible for a federation to offer proof of "intent or negligence on the basis of simple objective analys[is]"—the only piece of evidence it can produce to prove a doping offense.[123] Unlike public prosecutors, federations do not enjoy any rights of investigation. The Panels underlined that it was thus up to the athlete to demonstrate that he did not act intentionally or negligently.[124]

iii. The standard of care

There are very few cases where an athlete was able to rebut the presumption of guilt or successfully provided evidence that he acted without intent or negligence. The CAS has applied high standards for an appellant to show that he took all the necessary precautions to avoid a contamination with doping substances.[125] In the opinion of the CAS, an elite athlete must meet a standard of care that is above the ordinary man on the street or even the ordinary person practicing sport as a hobby.[126] As an example, one may look at the opinion of the CAS concerning the duties of a horse rider:

> From the moment that the person responsible knows that a treatment with prohibited substances is being administered to his horse, he must display all the diligence necessary.... Before the competition, he

120. *Union Cycliste Internationale*, No. 99/A/239, slip op. at 11.

121. *Id.*

122. Netzle, *supra* note 1, at 214; Kaufmann-Kohler, *supra* note 10, at 445-47.

123. *International Equestrian Fed'n*, No. 91/53, *supra* note 80, at 88.

124. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 221; *Foschi*, No. 96/156, slip op. at 41; *Aanes*, No. 2001/A/317, slip op. at 20; *Leipold*, No. 2000/A/312, slip op. at 28.

125. *International Equestrian Fed'n*, No. 92/63, *supra* note 81, at 122; *International Equestrian Fed'n*, No. 92/71, *supra* note 81, at 142; *International Equestrian Fed'n*, No. 92/73, *supra* note 81, at 158.

126. O'Shannessey v. Australian Olympic Comm., No. 99/A/248, slip op. at 13 (Ct. Arb. Sport Mar. 14, 2000).

> must also verify the state of his horse by testing to see that all the effects of the prohibited substances which had been administered in order to medically treat the horse have disappeared and will consequently no longer be able to influence the competition. If such is not the case the rider will, in other words, be obliged to refrain in taking part in the competition.[127]

In another case, where the forbidden substance came from an injection carried out by a doctor in a hospital where the athlete received medical treatment, the Panel observed:

> In view of the high sanctions placed upon the use of prohibited anabolic steroids, it is incumbent upon the athlete, not only in his own interests, but first and foremost in the interests of fair play in the sport of cycling, that he actively inquire with the physician administering the injection as to its content. In this regard, every athlete should have closely at hand a copy of the most current and governing List of the Categories of Doping Substances and Methods which he can place readily at the disposal of any physician whom he consults for advice and treatment.[128]

Even where the appellants provided a witness who testified to have contaminated the food of the athletes, the Panel did not accept this witness because the testimony showed certain inconsistencies. In addition, the explanations of the appellants did not seem to be very plausible either.[129]

The CAS has constantly rejected the argument of athletes that they acted in good faith and had no interest in taking forbidden substances. In relation to clean records and good behavior in the past, the Panel in one case observed that this could not lead to a discharge of the burden of proof, since those who use prohibited substances are, by definition, risk takers.[130] To admit these (normally unsubstantiated) allegations would render the fight against doping impossible, especially in cases where they are irrelevant in light of the other evidence and regulations in force.[131] The Panel also held that oral testimony

---

127. *International Equestrian Fed'n*, No. 92/71, *supra* note 81, at 142.

128. Union Cycliste Internationale v. Nielsen, No. 98/181, slip op. at 17 (Ct. Arb. Sport Nov. 26, 1998).

129. P. v. Federation Internationale de Natation Amateur, No. 97/180, slip op. at 21 (Ct. Arb. Sport Jan. 14, 1999).

130. *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 29; Arbitration CAS ad hoc Division (O.G. Sydney 2000), 006, Baumann v. International Olympic Comm., award of 22 September, 2000, *in* CAS AWARDS—SYDNEY 2000 65, 70 (Matthieu Reeb ed., 2000).

131. *International Equestrian Fed'n*, No. 92/86, *supra* note 80, at 164; Int'l Tennis Fed'n v. K., No. 98/223 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 345, 358-59.

as to innocence, however impressively given, could not outweigh scientific evidence as to guilt.[132] Furthermore, the arbitrators have rejected the argument that after the athlete tested positive no forbidden substances had been found in the food and vitamins taken by the athlete. The Panel observed that it was in the discretion of the athlete which products he would tender to be examined.[133]

The CAS has also ruled that athletes are presumed to have knowledge of information, which is in the public domain.[134] In this case, the athlete should have been warned by press releases issued by the IOC about the possible contamination of nutritional supplements. Since he failed to show that he had tested the nutritional supplement in question, he was unable to rebut the presumption of negligence on his part.

Finally, the Panel has also rejected the allegation that the forbidden substance was contained in meat which had been eaten prior to the competition.[135] Without any further evidence this possibility was considered as pure speculation. In another case where the appellants tried to produce evidence that they had eaten contaminated meat, the Panel was not convinced that even if they did so, the consumption could lead to the level of nandrolone metabolites found in the urine of the athletes.[136]

3. The standard of proof

The CAS Panels have also often addressed the standard of proof that has to be applied. This question was raised mainly with respect to the rebuttal of the presumption of guilt. As a first step the Panels have always stated that the federation has to offer full proof of the existence of a forbidden substance in the urine or the blood of the accused athlete. To this extent the federation has to show "beyond all reasonable doubt and to the satisfaction of law" that there was a case of administration of a forbidden substance.[137] The Panel in another case confirmed that the standard of proof that had to be met by the federation establishing a doping offense was high in that is was:

> less than criminal standard, but more than the ordinary civil standard. The Panel are [sic] content to adopt the test set out in *Korneev* . . .

---

132. *Federation Internationale de Natation Amateur*, No. 98/208 *supra* note 96, at 251-52; *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 29; *Baumann*, *supra* note 130, at 70.

133. *Foschi*, No. 96/156, slip op. at 57.

134. *Aanes*, No. 2001/A/317, slip op. at 23.

135. *Foschi*, No. 96/156, slip op. at 57.

136. *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 27.

137. *International Equestrian Fed'n*, No. 91/156, *supra* note 44, at 18.

> [that] "*ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.*" To adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association. . . .[138]

Additionally, the Panel rejected the appellants' claim that the sporting regulator is still obliged to eliminate all other possibilities.[139] In a later decision the Panel held:

> The situation in "quasi-penal" procedures, such as doping in sport, should, on the other hand, be looked at differently, among other reasons also due to the principle "*in dubio pro reo*", i.e. the benefit of doubt, which itself is an emanation of one of the most important legal presumptions, the presumption of innocence, deeply enshrined in the general principles of law and justice. This principle has the effect that in criminal and similar proceedings, the two parties do not bear equal burden of proof: while the accusing party must prove the alleged facts with certainty, it is sufficient for the accused to establish reasons for doubt.[140]

This decision remained unique. The Swiss Federal Tribunal had already ruled that Anti-Doping sanctions were of a civil and not of a criminal law nature. Thus, the Panels should not apply standards of criminal law. The court affirmed that:

> the duty of proof and assessment of evidence [are] problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as the presumption of innocence, the principle *in dubio pro reo* and the corresponding safeguards in the [European Convention of Human Rights].[141]

In relation to the second step, the reversal of the burden of proof in respect of the mens rea (intent or negligence), the Panel in one case of this kind left

---

138. *Federation Internationale de Natation Amateur*, No. 98/208, *supra* note 96, at 247 (citing Korneev & Gouliev v. International Olympic Comm., CAS Arb. Ad hoc Division O.G. Atlanta (1998)); *Federation Internationale de Natation Amateur*, No. 98/211, *supra* note 33, at 271; *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 14; *Aanes*, No. 2001/A/317, slip op. at 27.

139. *Federation Internationale de Natation Amateur*, No. 98/208, *supra* note 96, at 246; *Federation Internationale de Natation Amateur*, No. 98/211, *supra* note 33, at 273.

140. *International Triathlon Union*, *supra* note 84, at 341.

141. Schweizerisches Bundesgericht, BGE 119 II 271 (Switz. 1993); *see also* Schweizerisches Bundesgericht, 1999 BGE 5P.83 (Switz. Mar. 31, 1999). The CAS later explicitly rejected the idea that it had to apply criminal standard in reviewing the decisions. *Aanes*, No. 2001/A/317, slip op. at 18; *Leipold*, No. 2000/A/312, slip op. at 27.

the question undecided as to "[w]hether the burden of proof which lies upon the competitor can be discharged on the balance of probabilities or on the same standard of proof as lies with the regulatory body initially. . . ."[142] In an earlier decision the CAS had expressed the view that it was not sufficient for the athlete to provide evidence that her trainer had given her the forbidden substance without her knowledge (in this case this witness statement also had been modified on several occasions).[143] The Panel argued that it was "vital that such athlete provide counter-evidence which allows it to be established with near certainty that he has not committed a fault. In this respect, simple inferences . . . could not be sufficient."[144] Finally one Panel explained that under the FINA Code an athlete needs to meet:

> in our view a less stringent standard than the ordinary common law criminal standard of "beyond all reasonable doubts" but a more stringent one than the ordinary common law civil standard "on the balance of probability." The perceptible purpose is to prevent a competitor from simply (and sufficiently) asserting ignorance of how such substance got into his/her body.[145]

On the other hand, the CAS considered it to be sufficient if an accused athlete was able to cast doubt on the reliability of the test result by showing the abstract possibility of a manipulation of the urine samples. In the case at hand the bottles with urine could have been opened without detection. The arbitrators observed that "doubt exists or[,] which must be to the benefit of the appellant."[146] In this regard it has to be observed that this "defense" is, in fact, raised against the reliability of a piece of evidence and does not prove that there was no fault on the side of the athlete.[147] The arbitrators also held that if they were confronted with a purely theoretical and highly improbable hypothesis, the least of the requirements they might ask for were in relation to the production of circumstantial evidence, which would constitute an indication of such a theory.[148] Consequently, the Panels did not accept an allegation of sabotage if the athlete was unable to provide evidence to this

142. *Federation Internationale de Natation Amateur*, No. 98/208, *supra* note 96, at 249.

143. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 223.

144. *Id.*

145. *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 16; *see also* Meca-Medina v. Federation Internationale de Natation, No. 2000/A/270 (Ct. Arb. Sport May 23, 2001).

146. *International Equestrian Fed'n*, No. 91/56, *supra* note 106, at 97.

147. However, even a very recent decision established that the athlete may rebut the presumption of a doping offense (not the presumption of guilt) by showing that the laboratory result was flawed due to procedural defects. *Leipold*, No. 2000/A/312, slip op. at 28.

148. S. v. International Equestrian Fed'n, No. 92/74 (CAS 1993), *in* CAS COMPILATION 1993 60 (1993).

extent.[149] The arbitrators seemed to demand a hypothesis that would point the finger at some other (concrete) person, whether identified or not.[150] In a later case the arbitrators rejected testimony in which the witness declared to have spiked a cake which was eaten by the athlete. The Panel considered that the circumstances of this testimony and certain inconsistencies in it considerably diminished its value.[151]

C. Sanctions

In the area of the sanctions, the Panels have shown a great deal of flexibility. The Panels assume the same powers as the competent organ of the respective federation.[152] Relying mostly on the principle of proportionality,[153] the arbitrators have tried to adapt the length of each suspension to the particularities of each case, taking into account the circumstances of the doping offense as well as the personality and behavior of the athlete. Within the framework of the federation's rules the CAS has distinguished two different types of sanctions that could be imposed in the case of a doping offense: a disqualification and an additional sanction, which in most cases involves a suspension from the participation in certain competitions.

1. Disqualification

In relation to a positive sample in connection with a competition, the Panels have constantly considered the disqualification of the athlete as being mandatory in view of the other athletes.[154] The CAS has denied the possibility of taking into account the special circumstances of the case or any consideration of proportionality. One case involved a disqualification of a basketball team because one of the players tested positive. The applicable rules were considered to be clear and unequivocal.[155] Consequently, the Panel, although recognizing that even the federation did not apply its rules consistently, applied a close textual analysis. The arbitrators held that it was for the governing body only to determine whether it would follow a flexible

149. *Foschi*, No. 96/156, slip op. at 57.

150. *Federation Internationale de Natation Amateur*, No. 98/211, *supra* note 33, at 266.

151. *Federation Internationale de Natation Amateur*, No. 97/180, slip op. at 23.

152. *Aanes*, 2001/A/317, slip op. at 24.

153. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 223; *Aanes*, 2001/A/317, slip op. at 24.

154. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 220; *Leipold*, 2000/A/312, slip op. at 28.

155. *Nat'l Wheelchair*, *supra* note 21, at 184.

approach regarding the disqualification of a team. Since the system of penalties "did not reach a level where it must be characterised as unfair or unreasonable[,]" the CAS could neither annul nor disregard the clear wording of the rules in force.[156]

On the other hand, the arbitrators lifted a disqualification, which was based on the results of an out-of-competition test prior to the competition.[157] The arbitrators observed that the Anti-Doping Code providing for disqualification was only applicable for tests carried out in relation to a competition. Since the additional suspension following the positive test result started only after the competition, there was no legal basis for the disqualification.[158] The arbitrators in this case realized that it might be shocking that an athlete who tested positive a few days prior to a competition could keep his medals.[159] But they underlined that it would be arbitrary to deduce from the test result *prior* the competition to an advantage for the athlete *during* the competition itself.

In another case the Panel had special regard to the circumstances in which the competition was carried out. The case involved a motorbike rider who tested positive.[160] The Panel observed that a racing day consisted of two independent races where the results were counted independently.[161] Since the athlete tested positive only after the second race, the arbitrators were not prepared to disqualify him also from the first race.[162] Since it was possible that the athlete had applied the forbidden substance between the two races, the Panel held that a doping offense could not be established with respect to the first race.[163]

2. Additional sanctions

If the rules also provide for additional sanctions, these sanctions are generally considered as being mandatory. However, the Panels have applied a flexible approach as to the amount of the sanction. In fixing the amount of the additional sanction, the CAS Panels have always taken the subjective elements of the case into consideration. In an advisory opinion the CAS stated that the

156. *Id.* at 185.

157. B. v. International Judo Fed'n, No. 99/A/230 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 369, 375.

158. *Id.*

159. *Id.* at 374-75.

160. *Federation Internationale de Motocyclisme*, *supra* note 68, at 411.

161. *Id.*

162. *Id.* at 421.

163. *Id.*

Council of Europe Convention against Doping, as well as the International Olympic Charter against Doping in Sport, allowed the Panel to take into account all the special circumstances of each case in order to adapt the sanction.[164] However, it was mostly for the athlete to show why the maximum sanction should not be imposed.[165]

There are only a few other awards where the arbitrators felt themselves bound by the strict rules that did not allow for a devaluation.[166] In one case the arbitrator showed a certain hesitation as to whether he was a competent substitute for the federation's appreciation of the facts with his own.[167] In addition, the arbitrator expressed his view that the federation might have been in a better position to impose an appropriate sanction in the light of the given circumstances. Due to this the CAS could intervene in a sanction "only if the rules adopted... are contrary to the general principles of law, if their application is arbitrary, or if the sanction provided by the rules can be deemed excessive or unfair on their face."[168]

This decision disregarded the competencies of CAS Panels. Due to Article 57 of the Code they are empowered to hear each case de novo and thus enjoy the same powers as the federation.[169] Thus, in the event that a suspension appears disproportionately severe, the Panel has a general discretion to reduce this sanction.[170] Even a four-year suspension for a first doping offense where the concentration of the forbidden substance was only slightly above the cut-off level was at first not considered as being disproportionate.[171] However, this decision was subsequently changed to a two-year ban by the application of proportionality considerations.[172]

On various further occasions the Panels have stressed that a flexible system of disciplinary sanctions in doping cases should be preferred, in order to appreciate the circumstance of each doping case.[173] Even in cases where

---

164. *Federation Francaise de Triathlon*, *supra* note 69, at 471.

165. *Federation Internationale de Natation Amateur*, No. 98/208, *supra* note 96, at 253.

166. *Id.*; *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 20; S. v. Federation Internationale de Natation Amateur, No. 2000/A/274, slip op. at 37 (Ct. Arb. Sport Oct. 19, 2000).

167. Dionne v. United States Bobsled & Skeleton Fed'n, No. 98/189, slip op. at 5 (Ct. Arb. Sport Feb. 10, 1998).

168. Federazione Italiana Nuoto v. Federation Internationale de Natation Amateur, No. 96/157 (CAS 1997), *in* CAS DIGEST, *supra* note 2, at 351, 358-59 (discussing disciplinary sanctions for unfair behavior).

169. CODE, *supra* note 5, at art. R57.

170. *Leipold*, No. 2000/A/312, slip op. at 13.

171. *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 30.

172. *Meca-Medina*, No. 2000/A/270, slip op. at 27.

173. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 223.

the Code reflected a system of fixed penalties the CAS Panels have tried to introduce a certain amount of flexibility.[174] In one case the Panel found that the federation itself did not strictly apply its system of fixed sanctions.[175] Thus, the arbitrators felt empowered to introduce this flexibility in their appreciation of the facts:

> It is the Panel opinion that, if . . . a lower degree of guilt or no fault at all can be proved by the athlete, sports federations may (for legal reasons) have to introduce some flexibility in their sanctions taking into consideration the offender's level of guilt. Although this may be burdensome for the federation it may be necessary in order to treat the athletes involved justly.[176]

Finally, the Panel in one later case stressed that it was not disputed that the CAS had the power to vary the sanctions in doping cases.[177] Thus, the general principle that a penalty must not be disproportionate to the fault or guilt of the accused must also be observed in all doping cases, more or less without having regard to the statutes that may provide only fixed terms.[178] Thus, in most of the cases the Panels are willing to consider the circumstances and the known facts of the case in determining the amount of the sanction.[179] The conduct and the behavior of the athlete prior to the positive test will always play an important role.[180] Also, the fact that the substance found in the body of the athlete did not have a performance enhancing effect is taken into consideration.[181]

In a very early decision the arbitrators took into account that an athlete administered a traditional medication that did not mention the fact that it contained a prohibited substance.[182] Furthermore, there was the admission by

---

174. *Foschi*, 96/156, slip op. at 48.

175. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 223.

176. *Foschi*, No. 96/156, slip op. 49.

177. V. v. Federation Internationale de Natation Amateur, No. 96/150 (CAS 1996), *in* CAS DIGEST, *supra* note 2, at 265, 273.

178. *Foschi*, No. 96/156, slip op. at 48. "The issue of proportionality of the penalty could therefore only arise, from the restricted standpoint of incompatibility with public policy, if the arbitration award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behaviour penalized." *Meca-Medina*, Nos. 99/A/234 & 99/A/235, slip op. at 30 (quoting an unreported decision of the Schweizerisches Bundesgericht, BGE 5P.83 (Switz. Mar. 31, 1999).

179. *Foschi*, No. 96/156, slip op. at 58; *Meca-Medina*, No. 2000/A/270, slip op. at 27.

180. *Federation Internationale de Natation Amateur*, No. 95/141, *supra* note 84, at 223; *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 260; *Foschi*, No. 96/156, slip op. at 61.

181. *Foschi*, No. 96/156, slip op. at 62.

182. *International Equestrian Fed'n*, No. 92/73, *supra* note 81, at 159.

the athlete of the administration of the substance during the hearing, which acted in his favor.[183] In one case the Panel established a doping offense but lifted the sanction completely in view of the special circumstances of the case.[184] In some cases the Panels have also felt prepared to grant a probation where the rules provided for probation. The CAS observed that it should not interfere with the authority of the sports governing bodies as to the conditions of such a probation.[185] Thus, the CAS must respect that a probation could only be given for a maximum of half of the sanction imposed.[186] However, in an earlier case the arbitrators used their power under the UCI rules to grant a probation using their own discretion.[187] Even if the rules did not expressly provide for a suspension on probation, the adaptation of the sanction to the circumstances of each case may sometimes allow the imposition of such a probation.[188]

CONCLUSION

The foregoing study has shown that the CAS forms an integral part of the world-wide fight against doping. It can provide effective protection for the rights of the accused athlete and is able to ensure that the fight against doping will be upheld unremittingly. During recent years the CAS has developed quite an impressive body of decisions in this area dealing with all kinds of problems. The CAS offers a unique possibility of international decision making. Its jurisdiction in doping cases overcomes the traditional multiplication of legal disputes before the state courts of various jurisdictions. This ensures a certain degree of legal security for both the federation and the athlete concerned.

However, there is still room for improvement. As shown, sometimes one can identify a certain degree of misunderstanding of the legal concepts. This uncertainty is resolved sporadically by some decisions, which will hopefully be followed in the future. These differences are, on the one hand, due to the fact that the arbitrators are limited to the interpretation of existing rules. Here, the call for harmonic criteria touches the legal borders of the CAS jurisdiction.

---

183. *Id.*

184. *Federation Internationale de Natation Amateur*, No. 96/149, *supra* note 35, at 260 (where the athlete did not mention a medication, which was allowed under the rules in force, on the doping control form).

185. *Union Cycliste Internationale*, No. 2000/A/289, *supra* note 36, at 428-29.

186. *Id.*

187. Union Cycliste Internationale v. M., No. 98/212 (CAS 1999), *in* CAS DIGEST II, *supra* note 3, at 274, 282.

188. *Federation Francaise de Triathlon*, *supra* note 69, at 475.

On the other hand, one should clearly consider that the different legal cultures of the arbitrators may also cause certain differences as to the understanding of the legal concepts. The clash between legal cultures is one of the features of international arbitration and helps to ensure a certain degree of flexibility in its decisions.

For these reasons one should be careful with harsh dogmatic criticism from a purely academic standpoint. However, the ongoing interpretation of doping definitions which contain only a strict liability rule has been rightly criticized with respect to the rights of the accused athlete. Under Swiss law[189] the legal literature is unanimous in that a strict liability rule would be contrary to Articles 20 and 27 of the Swiss Civil Code. Jurisprudence of the Swiss state courts is still lacking and unlikely to arise. Swiss tribunals will only control decisions of the CAS as to whether they violate the international *ordre public*. This standard of review does not allow for detailed control of whether the standards of the Swiss Civil Code are followed. That is why the CAS itself may draw a clear line.

The rebuttable presumption of guilt is a legal solution that ensures the respect of the rights of the athlete without making an efficient fight against doping impossible. This concept has, in fact, been followed by most of the Panels in the past too. Recent decisions of the CAS[190] show that the arbitrators are also finally taking the criticism of academics into account. Although the arbitrators in two of the three cases claim to follow a strict liability approach, they are in fact arguing with the terms of the presumption of guilt. According to these three decision the federation has to establish the presence of a prohibited substance in the body of an athlete or, in other words, the objective elements of the doping offense.[191] It is then for the athlete to establish that the presence of such a substance was not due to any intentional or negligent act on his part.[192] Where the athlete fails, the Panel enjoys the discretion to adjust the sanction to a just and equitable level.[193] The near future will show whether the work of the CAS will follow this pragmatic approach.

---

189. Swiss law is applicable in most of the cases because the federation has its seat in Switzerland. CODE, *supra* note 5, at art. R.58.

190. *Aanes*, No. 2001/A/317; L. v. Federation Internationale de Luttes Associees, No. 2000/A/310 (Ct. Arb. Sport Oct. 22, 2001); *Leipold*, No. 2000/A/312, slip op. at 28.

191. *Federation Internationale de Luttes Associees*, No. 2000/A/310, slip op. at 27.

192. *Leipold*, No. 2000/A/312, slip op. at 13.

193. *Federation Internationale de Luttes Associees*, No. 2000/A/310, slip op. at 28.