

CAS DOPING JURISPRUDENCE: WHAT CAN WE LEARN?

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Ⓞ Disciplinary procedures; Drugs;
International arbitration; Penalties; Specimen tests;
Sportspersons; Strict liability

Introduction

At the commencement of the "Welcome Home" Games of the XXVIII Olympiad held at Athens in August of 2004, the World Anti-Doping Code ("WADA Code") made its first appearance. The WADA Code had been accepted by all summer Olympic sports, albeit only on the eve of the Games in the case of cycling. The winter sports and some other professional sports, such as football and tennis for example, have also adopted the regime. This article explores the procedure and jurisprudence of CAS and its evolving application to the provisions of the WADA Code.

The WADA Code harmonised the doping rules for all sports and countries who adopted it. It continues the use of strict liability² evolved in the jurisprudence of CAS³ without specifically mentioning it other than in the official comments.⁴ Strict liability in the context of doping control does

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2. Tarasti, *Legal Solutions in International Doping Cases* (SEP Editrice, Milan, 2000) discusses the concept as it evolved in the decisions of the IAAF Arbitration Panel until its termination in 2001 and the adoption of CAS.

3. See the commentary by Adam Lewis and Jonathon Taylor, *Sport: Law and Practice* (Butterworths, Chippenham, Great Britain, 2003), p.950 accompanying the discussion of *USA Shooting & Quigley v Union Internationale de Tir*, CAS 94/129. See also generally *A v FILA*, CAS 2001/A/317; *L v FINA*, CAS 95/142; *AC v FINA*, CAS 96/149; *Bernhard v ITU*, CAS 98/222; *Raducan v IOC*, CAS 0600/011 ("*Raducan*"); *C. v FINA*, CAS 95/141.

4. See comment under Art.2.1.1 of the WADA Code.

not raise the issue of assessment with respect to the application of sporting disciplinary sanctions.⁵ Strict liability is used exclusively to evaluate the evidence in a case to make a finding that a prohibited substance is contained in an athlete's specimen. The immediate consequences of such a finding results in a loss of the competition results at which the sample was obtained. The conclusion that an infraction occurred is not based on intent or the lack of it. That assessment is left to be analysed in the context of the active duty on the athlete to avoid doping and the assessment of the sanction to be applied for the infraction as opposed to the competition results at which the sample was taken.⁶

Procedural and evidentiary matters

Scope of appeals

Article R47 of the CAS Code of Sports-related Arbitration ("CAS Code") expressly provides that a CAS Panel may serve on appeal from the decision of a federation, association, sports-related body or an award rendered by CAS acting as a first instance tribunal. Article R57 provides that a CAS Appeal Panel shall have full power to review the facts and the law. The French-language version of Art.R57 provides for a slightly more complete explanation of that power. The unofficial literal translation of the French version provides that a CAS Panel shall review the facts and the law with full scope of examination.⁷ Consequently, CAS has had to elucidate the full scope of this power enjoyed by a CAS Panel acting in various appeals, alleging that the decision at first instance is the result of procedural defects or systemic unfairness. A well-entrenched principle has emerged in the jurisprudence: any case brought before an appeal panel is heard *de novo*. It is only recently that the meaning of such a phrase has been examined. In the past this has meant that the appeal panel is not limited to considerations of evidence adduced or arguments advanced at first instance.⁸ Consequently, any defect or procedural

5. Richard McLaren, "The sanctions in doping cases, the International Federations and CAS jurisprudence", in *CAS Seminars, Lausanne 6 & 7 Novembre 2001* (Lausanne: CAS, December 2002) 86.

6. An insightful article on the point has been written by Lauri Tarasti, "The Athlete's Liability for Doping" (2005) 30 *Bulletin of the International Council of Sport Science and Physical Education*, online: The International Council of Sport Science and Physical Education, <http://www.icsspe.org/>.

7. *French v ASC & CA*, CAS 2004/A/651 ("*French*"), Interlocutory Ruling #1.

8. As enunciated by Michael Beloff Q.C. in *N., J., Y., W. v FINA*, CAS 98/208 ("*N. et al. v FINA*"), as cited in *French*, *ibid.*, Interlocutory Award #2, at [11]. See also *P. v FEI*, CAS 98/184; *B. v FINA*, CAS 98/211; *H. v FIM*, CAS 2000/A/281.

error that may have occurred at first instance⁹ will be cured by an appeal hearing of CAS and the appeal panel is therefore not required to consider any such allegations.¹⁰ An early frequently cited case is *USA Shooting & Q. v UIT*¹¹ (“USA Shooting”). *USA Shooting* stands for the proposition that a CAS Panel is not required to consider any “due process” arguments on appeal because, even if the first instance decision was procedurally insufficient, the availability of full appeal to CAS cures any deficiency.¹²

In the more recent decision of *N., J., Y., W. v FINA*,¹³ four members of the Chinese Swim Team were suspended for two years by the Doping Panel of FINA for testing positive for triamterene. The four appellants alleged that FINA had denied them due process, discriminated against them and otherwise failed to consider the evidence appropriately.¹⁴ Citing Art.R57 of the CAS Code, the panel delineated that a CAS appeal hearing is a rehearing. Accordingly, the panel was

“not limited to consideration of the evidence that was adduced before FINA either at first instance or at the appellate stage, but had to consider all evidence, oral documentary and real, produced before it: nor could it be restricted in such consideration by the arguments advanced below”.¹⁵

As any defects in the FINA hearing would be fully cured by the CAS hearing, the panel found it unnecessary to consider the allegations against

9. Some examples of allegations of defects that athletes have advanced regarding first-instance decisions that were determined to be inapplicable to a CAS appeal award, have included: (1) the original panel was biased (*Boevski v IWF*, CAS 2004/A/607; *B. v FINA*, fn.8 above); (2) the wrong burden of proof was applied (*B. v FINA*, fn.8 above); (3) the athlete was not granted the right to be heard (*Boevski v IWF*, *ibid.*; *Annus v IOC*, CAS 2004/A/718; *Fazekas v IOC*, CAS 2004/A/17; *H. v FIM*, fn.8 above; *B. v ITU*, CAS 98/222; *USA Shooting & Q. v UIT*, CAS 94/129); (4) there was a lack of due process (*Boevski v IWF*, CAS 2004/A/607; *H. v FIM*, CAS 2000/A/281; *N. et al. v FINA*, fn.8 above); (5) the right to cross-examination was not provided (*S. v UCI & FCI*, CAS 2002/A/378); (6) the right to a fair hearing was not provided (*N. et al. v FINA*, fn.8 above; *H. v FIM*, fn.8 above; *USA Shooting & Q. v UIT*, *ibid.*; *Boevski v IWF*, *ibid.*); and (7) there was no distinction between the investigatory body and the disciplinary authority (*S. v UCI & FCI*, *ibid.*; *USA Shooting & Q. v UIT*, *ibid.*).

10. *Annus v IOC*, fn.9 above; *Fazekas v IOC*, fn.9 above; *S. v UCI & FCI*, fn.9 above; *A. v FILA*, CAS 2000/A/317; *L. v FILA*, CAS 2000/A/312; *L. v IOC*, CAS 2000/A/310; *H. v FIM*, fn.8 above; *S. v FINA*, CAS 2000/A/274; *B. v ITU*, fn.9 above; *B. v FINA*, fn.8 above; *N. et al. v FINA*, fn.8 above; *USA Shooting & Q. v UIT*, fn.9 above.

11. fn.9 above.

12. The impetus to treat accused competitors appropriately is provided by the reality that they will be less likely to appeal out of frustration if care is taken.

13. *N. et al. v FINA*, fn.8 above.

14. This was one allegation among many. For details of the other allegations please refer to the case.

15. *N. et al. v FINA*, fn.8 above, at [239].

FINA.¹⁶ The panel’s main focus was on the evidence appearing before it and any arguments as to FINA’s treatment of the evidence, although instructive, were irrelevant. Consequently, the

“virtue of an appeal system which allows for a full rehearing before an appellate body is that issues of fairness or otherwise of the hearing before the tribunal of first instance fade to the periphery”.¹⁷

Aside from the foregoing cases that discussed the concept of *de novo* early on in the CAS jurisprudence, it has recently resurfaced in the proceedings leading up to the hearing of the Mark French appeal case in Australia.¹⁸ French, a promising young Australian cyclist, had agreed to abide by both the Australian Sports Commission (“ASC”) Doping Policy and the Cycling Australia (“CA”) Anti-Doping Policy. A bucket of used syringes, needles and other paraphernalia had been found in a room assigned to French. At first instance¹⁹ CAS found that French had committed two infractions in contravention of the ASC Doping Policy and six infractions in contravention of the CA Anti-Doping Policy. French appealed and the respondents, ASC and CA, cross-appealed a portion of the award²⁰ and proposed to introduce evidence that had not been introduced at first instance.

In the first interlocutory ruling, the CAS Appeal Panel concluded that the CAS Code permitted the respondents to cross-appeal and were not limited to the subject-matter of the appellant’s appeal. Although the CAS Code does not explicitly provide for a cross-appeal, any hiatus can be filled by the reference in Art.R55 to counterclaims. Such an interpretation was arrived at by virtue of the panel’s power pursuant to Art.R57. The second interlocutory ruling determined the admissibility of the respondents’ proposed “new” evidence on cross-appeal. Accordingly, the applicable law of procedure of the arbitration was also at issue.²¹ The appeal panel found the meaning of “rehearing” was to be informed by the CAS Code and related jurisprudence.²² As an appeal under the CAS Code was by way of rehearing, in accordance with Art.R57 and previous jurisprudence, the panel

16. The panel stressed that its silence should not be taken as an endorsement as to the allegations and that it saw no reason to doubt the good faith of FINA; *ibid.*, at [247].

17. *ibid.* As cited in *Fazekas v IOC*, fn.9 above, and *B. v FINA*, fn.8 above.

18. *French*, fn.7 above.

19. ASC & CA v Mark French, CAS A2/2004.

20. More specifically, the respondents contested the dismissal at first instance of one of the doping offences alleged to have been committed by French in contravention of the CA Anti-Doping Policy.

21. Refer to the section “Federation choice of law” below.

22. For a more detailed discussion of the determination of this issue please refer to “Federation choice of law” below.

was not limited to consideration of the evidence adduced or arguments advanced at first instance. Rather, the panel was to "consider all evidence, oral, documentary and real, produced before it".²³ Therefore the concept of *de novo* was refined in the French rulings to conclude that fresh evidence may be adduced as of right in a rehearing under the CAS Code, either by way of appeal or cross-appeal, and that will include both the appellant and the respondent.²⁴

Whether the "new" evidence was available for use at first instance or discovered subsequently did not affect its admissibility, nor did the issue of whether it was to be called by the appellant or the respondents. The respondents' proposed evidence consisted of both lay evidence and scientific evidence, the former largely comprising statements from various cyclists, and the latter related to certain DNA matters associated with the bucket of syringes and other paraphernalia.²⁵ The lay evidence had been available for use during the CAS hearing at first instance,²⁶ but a decision had been taken not to call the evidence. The scientific evidence had been developed subsequent to the hearing at first instance and clearly could have been done in conjunction with it, but perhaps the cost of doing so was prohibitive. The appeal panel held that evidence available at the time of the first instance, as well as that only available at a later date, was admissible under the CAS Code in accordance with the nature of a rehearing under the CAS Code. In so ruling, the panel noted that no prejudice resulted because the proceedings were not prosecutorial in nature, but rather were strictly contractual.²⁷ Thus the concept of a *de novo* hearing on appeal was given some different dimensions as compared with what had been previously included in the notion as articulated in prior CAS jurisprudence.²⁸

Federation choice of law

Article R58 of the CAS Code provides that the panel shall decide the dispute according to the applicable regulations and "the rules of law chosen by the parties. . .". Although it is often clear what rules of

law the parties have chosen, in certain cases it may be less than clear.

The intention of the parties as to the choice of law was unambiguous in *Hipperdinger v ATP Tour Inc.*²⁹ Diego Hipperdinger, a professional tennis player, had been found by an ATP anti-doping tribunal at first instance to have tested positive for cocaine, and it imposed the maximum penalty available under the WADA Code, suspending the athlete for two years. In an effort to alleviate his altitude sickness, the athlete urged that he had unsuspectingly ingested cocaine when drinking herbal tea and chewing the tea's coca leaves. In determining the applicable rules, the panel cited Art.R58 of the CAS Code. The applicable rules were held to be the rules of the ATP Anti-Doping Program and, pursuant to s.3 of such rules, the parties had chosen the law of the state of Delaware and the federal laws of the United States. The standard consent form signed by the athlete had bound him to this choice of law.³⁰ The panel upheld the two-year suspension, but for reasons of fairness altered the start date of the period of ineligibility.

In *French*³¹ there was some debate as to the choice of law in the context of the CAS appeal panel determining the admissibility of evidence, on cross-appeal, that had not been adduced at the hearing of first instance. Accordingly, the applicable law of procedure of the arbitration was brought into question. The athlete urged that the CAS Code's silence on the issue necessitated the appeal panel to apply the law of Australia as to the admissibility of new evidence on an appeal by way of rehearing.³² The respondents argued that the contract between the parties provided that the CAS Code would govern the issue. In the second interlocutory ruling, the panel held that the CAS Code and its related jurisprudence are not silent on the issue. Not only does the CAS Code and its related jurisprudence inform the meaning of the word rehearing, the parties intended the use of the word in their agreement to be understood as such. In effect, the parties intended to bring into play or call up the appeal procedure contemplated under the CAS Code.³³ In accordance with the meaning of rehearing, pursuant to the CAS Code and related jurisprudence, the evidence was deemed admissible.

Pursuant to Art.R58 of the CAS Code, in the absence of a choice of applicable law by the parties, a CAS appeals panel has the discretion to apply the rules of law it deems appropriate, so long as the panel provides reasons for doing so.³⁴ In

23. *French*, fn.7 above, at [11], citing *N et. al v FINA*, fn.8 above.

24. *French*, *ibid.*, at [13] and [17]. For a case where the evidence on appeal is completely different from that heard at first instance see *Boevski v IWF*, fn.9 above.

25. *French*, *ibid.*, at [3]. The panel divided the evidence into two groups.

26. *French*, *ibid.*, Interlocutory Ruling #2 at [17] ("Interlocutory Ruling #2").

27. *French*, fn.7 above, at [13] and [17]. For an example of a case where the evidence at appeal is completely different from that at first instance see *Boevski v IWF*, fn.9 above.

28. For a discussion of the IAAF jurisdiction issue, refer below to "Sanctions: Exceptional circumstances to reduce the minimum sanction: Delegation of arbitrator's authority to the IF".

29. CAS 2004/A/690 ("*Hipperdinger*").

30. *Hipperdinger*, *ibid.*, at [39]-[41].

31. For a further discussion of the case, please refer above to "Scope of appeal".

32. *French*, fn.7 above, Interlocutory Ruling #2, at [7].

33. *ibid.*, at [12].

34. If there is a dispute regarding choice of law in a first instance CAS case, Art.R45 of the CAS Code applies. In

the case of Elmar Lichtenegger,³⁵ the parties had a substantial disagreement over the rules of law that were applicable to the case. Both Lichtenegger and his national federation, ÖLV, claimed Austrian law should apply, while the IAAF claimed that the law of Monaco should apply. The CAS Panel decided to apply principles of law common to the law of Austria and Monaco, in light of the relevant CAS jurisprudence and the principles developed in the jurisprudence.

Scientific evidence

The emergence of the new tests for EPO at the Salt Lake Winter Olympics and for blood doping by homologous blood transfusion at, and subsequent to, the Athens Summer Olympics have raised questions concerning the standard CAS will use to determine whether an analytical testing procedure of the scientific community is acceptable to establish the presence of a prohibited substance. The test for nandrolone, a long-familiar substance sometimes found in dietary supplements and produced by the body endogenously, has very recently been discovered in restricted circumstances to possibly give a false positive. In so doing, it raises the issue of what may be or should be done with prior cases dealing with nandrolone and also about the scientific validity of the testing.

New test

The constantly changing landscape in the battle against doping has sometimes necessitated a CAS panel to determine the validity and reliability of a new testing procedure. In such cases a complicated assessment of technical scientific evidence may be required. This is a challenge that CAS has demonstrated it is more than capable of meeting. The following cases illustrate the challenge involved in assessing the methodology of a new testing procedure in the determination of a doping offence.

A new scientific test, the direct urine test, had been developed and used at the 2002 Winter Olympic Games to detect darbepoetin, an analogue and mimetic of rEPO. The test was established for detecting the presence of rEPO, but had never been used to detect darbepoetin. The first athletes to be found guilty of a doping offence with the new test challenged its validity. Larissa Lazutina and Olga Danilova,³⁶ two Russian cross-country skiing

competitors, tested positive for darbepoetin.³⁷ Upon being sanctioned by both the IOC Executive Board and the FIS, the athletes appealed to CAS. The panel agreed to hear the athletes' appeals together and were to determine whether the new direct urine test was reliable.³⁸

The panel held that darbepoetin was a rEPO that provided performance-enhancing effects. Further, after hearing the expert testimony on behalf of all the parties, the panel held that the rEPO test was indeed reliable for detecting the presence of darbepoetin.³⁹ The expert testimony on behalf of Lazutina and Danilova failed to convince the panel otherwise. Consequently, it was held that each athlete had a prohibited substance in their body during their respective competitions. Upon appeal to the Swiss Federal Tribunal ("SFT"), the CAS decision was upheld.⁴⁰

A third cross-country skier, Johann Muehlegg,⁴¹ a former German athlete who had represented Spain at Salt Lake, also tested positive for darbepoetin and was sanctioned by the IOC Executive Board. The athlete appealed the decision to CAS and challenged the new test's reliability. The panel assessed the evidence and held that, as an analogue and mimetic of rEPO, darbepoetin was a prohibited substance.⁴² After a detailed assessment of the scientific evidence, the panel held that the new direct urine test was a valid method for its detection.

The panel stated that

"what must be established to the comfortable satisfaction of the Panel is that the testing procedure as carried out was in accordance

contrast to Art.R58, covering appeals cases, Art.R45 states that in the absence of a choice of law by the parties, Swiss law shall apply.

35. *IAAF v ÖLV & Elmar Lichtenegger*, CAS 2004/A/624 ("Lichtenegger").

36. *Lazutina v IOC*, CAS 2002/A/370; *Danilova v IOC*, CAS 2002/A/371; *Lazutina v FIS*, CAS 2002/A/397; and *Danilova v FIS*, CAS 2002/A/398.

37. The appeal of Lazutina against the FIS was as a result of positive test results at two FIS World Cup cross-country races on December 8, 2001 and December 14, 2001. It is for this reason that the two-year suspension imposed by the FIS was to commence on December 8, 2001. This FIS decision was awarded on June 3, 2002. This explains why Lazutina was still able to compete in the SLC Games even though she had tested positive in a test taken before her competitions in the SLC Games. The decision of the FIS meant that Lazutina would have been ineligible to compete in the Games had her case been processed in a timely fashion and that her result had to be invalidated for this reason as well as the doping offence committed at the Games.

38. Lazutina and Danilova each appealed the decision of the FIS council to suspend them for two years and the decision of the IOC Executive Board to disqualify them from the Games; see fn.36 above.

39. For a more detailed description of the methodology of the indirect blood test and the direct urine test see s.10 of the *Lazutina* or *Danilova* decisions, fn.36 above.

40. *Lazutina and Danilova v IOC*, 4P. 267/2002 (May 27, 2003). The SFT dismissed the athletes' argument that the CAS was not sufficiently independent from the IOC for the IOC to be a party to the proceedings.

41. *Muehlegg v IOC*, CAS 2002/A/374 ("Muehlegg"). He had skied for Germany in prior Games.

42. The similar issue of whether a substance was on the prohibited list was considered by the panels in *Baxter v IOC*, CAS 2002/A/376; *Rebagliati v IOC*, CAS O.G. 98/002; and *Korneev and Ghouliev v IOC*, CAS OG 96/003-004.

with the prevailing standards and practices of the scientific community".⁴³

As a leader in the development of such testing, the absence of IOC accreditation did not affect the Salt Lake lab's results. The protocol used by the lab was accurate and reliable. Muehlegg lost one medal, but the two gold medals he had won in earlier races were not part of the decision and became the subject of the appeal to CAS by Norway that is discussed below.⁴⁴

The introduction of a new test for the detection of blood transfusions was the subject of a first instance determination in the case of Tyler Hamilton.⁴⁵ As with the EPO cases the scientific analytical methodology leading to the conclusion of a doping infraction was challenged. Similarly, although the basic scientific methodology was a well-known and widely used analytical technique, known as flow cytometry, it had never been used before to sanction an athlete for the presence of transfused blood. The panel assessed the scientific merits of both the process of the flow cytometer test and the interpretation of testing findings. The panel was comfortably satisfied that there is an extremely low probability of a false positive result when using this new application of flow cytometry. Accordingly, it was held that Hamilton had committed the doping violation of homologous blood transfusion.

Test improvements or refinements

Just as CAS panels have had to assess new testing procedures, they also have had to assess testing improvements or refinements. The following cases illustrate examples of CAS evaluating the validity and reliability of an evolving testing procedure.

A threshold of 80 per cent basic area percentage ("BAP") criterion was originally established to protect against risks of false positives from the rEPO test. There is an overlap of EPO and rEPO.⁴⁶ However, new scientific evidence now shows that the risk of a false positive at the 80 per cent BAP threshold is much smaller than first thought.⁴⁷ In

USADA v Bergman,⁴⁸ CAS dealt directly with the issue of which criterion is to be used to establish the presence of rEPO in a sample. In April 2004, Bergman, an American cyclist, submitted an out-of-competition urine sample that returned BAP results of 79.5 per cent (A sample) and 79.4 per cent (B sample). USADA charged him with a doping violation, which Bergman appealed to CAS.

The panel at first instance held that the UCI anti-doping rules allowed USADA to prove the doping offence by any means and was not restricted to an 80 per cent BAP threshold. Further, the panel was comfortably satisfied that new scientific findings establish that a BAP lower than 80 per cent can still provide the assurance required to rule out a false positive. Criteria other than the BAP can be relied on when the BAP is below 80 per cent. Although not required, three other criteria were analysed⁴⁹ and provided additional evidence to support the panel's decision. The panel was comfortably satisfied that Bergman had committed a doping offence.

Although the *Bergman* decision establishes the position that a 80 per cent BAP is not the only criterion that can be used to determine a sample positive for rEPO, the WADA standard has established a uniform criterion to apply in all future testing procedures. This standard came into effect on January 1, 2005. The criterion was set forth in WADA Technical Document TD2004EPO, entitled *Harmonization of the Method for the Identification of Epoetin Alfa and Beta (EPO) and Darbepoietin Alfa (NESP) by IEF-Double Blotting and Chemiluminescent Detection*. The WADA standard sets forth three criteria that must be met in order to find a sample positive for rEPO.⁵⁰ Therefore future cases dealing with rEPO will refer to this uniform criterion as the measure to determine if a sample is positive for rEPO.

In certain circumstances, suspected athletes may request that improved testing procedures be carried out so that they might be exonerated. British alpine skier Alain Baxter⁵¹ won the bronze medal in the Men's Alpine Skiing Slalom Event at the Salt Lake City Winter Olympics. Baxter's urine sample tested positive for methamphetamine, a specified substance listed in the Olympic Movement Anti-Doping Code ("OMADC"). The infraction resulted in his disqualification and a suspension of three months. Methamphetamine has two isomers with opposite chemical "rotations". The levo isomer is usually referred to as levmetamphetamine, and is an approved over-the-counter decongestant in the

43. *Muehlegg*, fn.41 above, at [7.1.7].

44. Refer below to "Substantive matters: Loss of medals at an event where no specimen taken".

45. *USADA v Hamilton*, AAA No.30 190 00130 05 (2004) ("*Hamilton*"). The decision was at time of writing under appeal to CAS but no hearing or award had been held or issued.

46. The CAS cases of *UCI v Hamburger*, CAS 2001/A/343 ("*Hamburger*") and *Meier v Swiss Cycling*, CAS 2001/A/345 were the initial cases to deal with rEPO and accepted the 80 per cent BAP criterion as sufficiently reliable to establish the presence of rEPO. This standard has since been applied in other doping cases *IAAF v MAR and Boulami*, CAS 2003/A/452 ("*Boulami*") and *USADA v Sbeih*, AAA No.30 190 001100 03 ("*Sbeih*").

47. In *Hamburger*, fn.46 above, the risk of a false positive was determined to be 1:15,000 at an 80 per cent BAP. In *Boulami*, fn.46 above, the risk was revised to 1 in 3,161 and

in *Sbeih*, fn.46 above, the panel held that the risk was actually 1 in 500,000.

48. CAS 2004/O/679 ("*Bergman*").

49. Two-Band Ratio, the Band Location and the WADA Standard criteria.

50. *Bergman*, fn.48 above, at [5.1.6.5].

51. *Baxter v IOC*, CAS 2002/A/376 ("*Baxter*").

United States. The dextro isomer is usually referred to simply as methamphetamine, and is an illegal drug also known as "speed". The original doping control test did not distinguish between these two isomers.

Baxter did not dispute the results of the test, but claimed that the methamphetamine found in his sample was levmetamphetamine, an ingredient of a Vicks inhaler he had been using to treat congestion. He claimed that levmetamphetamine was not a prohibited substance, since the OMADC listing of methamphetamine was intended to refer only to the dextro isomer. Therefore Baxter requested that the IOC direct the accredited laboratory to perform an isomer separation analysis in order to establish that only the levo isomer was present in his system. This request was denied by the IOC, a decision which was at issue in Baxter's appeal to CAS.

The CAS panel held that the term methamphetamine in the OMADC rules encompassed both isomers.⁵² Further, the panel held that even if the term methamphetamine did not include levmetamphetamine, levmetamphetamine is included under the term amphetamines, which is listed under "Prohibited Classes of Substances" in the OMADC rules.⁵³ Therefore, even if Baxter only had levmetamphetamine in his system, he would still have committed a doping offence and would still have been subject to disqualification. The CAS Panel upheld Baxter's disqualification, and did not order that the isomer separation analysis be carried out.⁵⁴

Under the WADA Code levmetamphetamine is listed as a "specified substance" as opposed to a "prohibited substance". "Specified" substances are susceptible to unintentional doping violations owing to their inclusion in medicinal products, or they are unlikely to be successfully abused as doping agents. Under Art.10.3 of the WADA Code, if a specified substance is found in an athlete's sample and the athlete can establish that the use of the specified substance was not intended to improve sports performance, then the applicable sanction can be reduced. A first violation could result in, at minimum, a warning and reprimand. However, Art.10.3 does not affect any disqualification that would arise after testing positive for a "specified" substance. Therefore, under the WADA Code, Baxter would have still lost his medal. However, it is possible that he would have only received a reprimand as opposed to a three-month suspension. Another implication of the WADA Code is that it will be necessary for testing laboratories to distinguish between optical isomers of substances such as methamphetamine.

On May 13, 2005 WADA advised the WADA-accredited Lab Directors of a phenomenon known as "active urine" in respect of 19-norandrosterone, a metabolite of nandrolone that is an indicator of nandrolone ingestion. The laboratories were advised that the limit of 2ng/ml was not to be modified but that if a urine sample met certain specified conditions for "unstability" for very low concentrations of 19-norandrosterone and 19-noretiocholanolone it was to be further tested using a different testing technology. The reason for the direction was the discovery that active urine may form naturally occurring 19-nandrolone outside the human body under certain conditions. This is a proposition not previously known to analytical chemistry. The understanding of nandrolone testing has changed over the years. Originally, it was thought that nandrolone was not naturally produced; later, it was accepted that it was present in small quantities in men. Now it appears that nandrolone metabolites can form outside the body, in the sample itself, under certain conditions. The purpose of the directive was to inform the laboratories of this phenomenon and advise that two labs could perform an analysis that would, by identifying the nandrolone as endogenous or exogenous, identify if the substance was created by chemical reaction in the urine bottle or was otherwise administered.

This refinement in nandrolone testing for very low concentrations will resolve some unsolved problems with nandrolone over the years. However, it does leave unaddressed what to do with samples that have already been tested and cases closed on the basis of the prior analysis may now be cast into some doubt. Athletes who were never able to explain their positive analytical findings may wish to reopen their cases and attempt to have a stored sample retested using the new analytical technique. Such requests may cause interesting challenges that may end up at CAS.

Proving a doping offence with circumstantial evidence

Although doping offences are usually established by direct evidence, where a positive drug test will directly show that an athlete had a prohibited substance in their body, situations will arise where only circumstantial evidence points to the commission of a doping offence. CAS has confirmed that the body enforcing anti-doping rules bears the burden of proving that an athlete has committed a doping offence,⁵⁵ and it may be proven even where the evidence of a doping offence is circumstantial.⁵⁶

52. *ibid.*, at [3.20].

53. *ibid.*, at [3.25].

54. *ibid.*, at [3.32].

55. *Smith De Bruin v FINA*, TAS 98/211 at [10.1].

56. *ibid.*, at [12.18].

Where circumstantial evidence implicates an athlete in a doping offence, the body enforcing the anti-doping rules is not required to eliminate all possibilities other than commission of the offence by the athlete.⁵⁷ The applicable standard of proof that must be met is the comfortable satisfaction⁵⁸ of the court having in mind the seriousness of the allegation which is made.⁵⁹

Cases based on circumstantial evidence of a doping offence typically involve an apparent manipulation or contamination of a sample given by an athlete as part of doping control. The rules of most IFs and the WADA Code prohibit athletes from altering the integrity of a sample used for doping control. An athlete found to have manipulated or contaminated a sample has committed a doping offence regardless of whether use of banned substances actually occurred.⁶⁰ While laboratory testing may reveal sample manipulation or contamination, often there is only circumstantial evidence implicating the athlete who provided the sample. CAS has held that where the evidence suggests that a sample was altered while in the custody of the athlete to a high degree of probability, it falls to the suspected athlete to raise an explanation that will refute the circumstantial evidence.⁶¹ Suspected athletes have unsuccessfully raised the possibility that third parties have manipulated their samples, as to date no one has effectively presented examples of specific individuals who may have had the motive, opportunity and technical expertise to alter their samples. Suspected athletes have also unsuccessfully argued that the sealed containers used to store and transport doping samples could be opened undetectably, as convincing contrary evidence has consistently been presented in answer to these claims.⁶²

In the case of Michelle Smith de Bruin,⁶³ there was circumstantial evidence that the Irish swimmer had contaminated a urine sample with alcohol. Contrary to the athlete's contentions, the court held that there were no flaws in the chain of custody and no third party had contaminated the athlete's sample. An examination of the chain of custody provided no irregularities and the athlete offered no specific

theory as to a third-party contamination. Further, evidence suggested that the sample containers could not be opened undetectably, and even if this had been possible, it would not be sufficient to establish the athlete's third-party manipulation hypothesis. The substantial circumstantial evidence in the case sufficed to prove the case against Ms Smith de Bruin.

In the case of Galabin Boevski,⁶⁴ the lab results of a doping test on the Bulgarian weightlifting team revealed that three of the urine samples, purportedly from three different athletes, were identical. Further, DNA testing confirmed that the urine could not have come from any of the three athletes who had supposedly provided the samples. Boevski was one of three weightlifters suspended as a result. Only Boevski appealed to CAS. The court did not accept Boevski's challenge to the chain of custody of the sample, nor did they accept that the sample containers could have been opened undetectably. No evidence as to who may have manipulated the sample was provided, and the evidence was completely inconsistent with any possible sabotage. Although a doping control officer observed Boevski urinate into the collection container, the athlete was not examined for the presence of a weightlifter's device. Since Boevski had both motive and opportunity, the circumstantial evidence was sufficient to make the court comfortably satisfied that the sample was manipulated by the athlete himself or with his consent and approval.

Substantive matters

Non-analytical doping offences

The *Michele Collins* case⁶⁵ illustrates the difficulties of establishing a doping offence without the benefit of the principle of strict liability. This is the first decision at first instance that has dealt with the so-called "non-analytical positives"⁶⁶ that have arisen out of the Bay Area Laboratory Co-Operative ("BALCO") situation. The BALCO scandal resulted from a US Justice Department investigation into the laboratory. In September 2003, FBI agents searched

57. *ibid.*, at [12.2].

58. A burden of proof higher than the civil standard but lower than the criminal standard.

59. *Korneev and Ghouliev v IOC*, fn.42 above.

60. For example, FINA Doping Control 2002–2005 r.2.2 establishes that the use of a "Prohibited Method" constitutes an anti-doping rule violation as does IWF Anti-Doping Policy 2005–2008 r.2.2. The WADA Code 2005 Prohibited List establishes that "tampering, or attempting to tamper, in order to alter the integrity and validity of Samples collected in Doping Controls" is a prohibited method.

61. *Galabin Boevski v IWF*, CAS 2004/A/607, at [7.9.6] ("*Boevski*").

62. These arguments were raised in the cases of *De Bruin*, fn.55 above, and *Boevski*, fn.61 above.

63. *De Bruin*, fn.55 above.

64. *Boevski*, fn.61 above.

65. *USADA v Collins*, AAA No.30 190 00658 04 (2004). The case was appealed to CAS International but subsequently Collins agreed to drop the appeal and USADA reduced the sanction from eight years of ineligibility to four (United States Anti-Doping Agency, press release, "U.S. Track & Field Athlete Agrees to Four Year Suspension" (May 19, 2005), online: USADA www.usantidoping.org).

66. At the time of writing there were several other cases pending. The case of Tim Montgomery was scheduled to be heard in June 2005 and the case of Chryste Gains was scheduled for July 2005. The appeal of Mark French was also pending an award having been heard in May 2005 in Melbourne, Australia. That case, of course, does not arise out of BALCO but is in part a non-analytical positive case.

the premises and discovered that BALCO was distributing prohibited doping agents to athletes. The substances were either undetectable or difficult to detect in routine drug testing. The president of BALCO, Victor Conte, has been indicted along with other BALCO conspirators. Their cases were scheduled to go to trial in 2005.

Collins is a world-class American sprinter who won the 200m race at the 2003 World Indoor Championships. In May 2004, USADA advised her that it was investigating her for the use of banned substances and methods provided by BALCO. USADA charged her with violations of the IAAF anti-doping rules and sought a lifetime ban from competition. Collins's case was heard before a North American CAS panel, with American Arbitration Association ("AAA") qualifications. Since the alleged offence had occurred prior to March 1, 2004, the rules of IAAF's 2002 regulations formed the substantive law, and USADA was required to prove beyond a reasonable doubt that Collins used a prohibited substance or technique.⁶⁷ The arbitration panel concluded that USADA satisfied its burden of proof and found Collins guilty of a doping violation. Although Collins never tested positive for a prohibited substance, the evidence presented by USADA supported her use of banned substances and techniques. The evidence against Collins included emails between her and the president of BALCO, in which she admits to using some prohibited substances and techniques and that she never tested positive by an IOC accredited lab. It was proved that Collins used the designer steroid tetrahydrogestrinone ("THG"), a testosterone/epitestosterone cream and EPO. For these violations, the arbitration panel suspended Collins for a period of eight years.⁶⁸

The difficulty in proving these violations is that Collins never tested positive for a prohibited substance through a WADA-accredited lab. In typical doping cases, an athlete is found to have committed a doping offence when their urine or blood sample tests positive for a prohibited substance. The principle of strict liability means that a doping violation occurs when the banned substance is found in the athlete's body. *Collins* is the first BALCO case and one of the rare cases where a panel has found an athlete to have committed a doping infraction without testing positive. These

cases have been named "non-analytical positive" cases. In the *Collins* case, it appears that the evidence overwhelmingly proved her use of prohibited substances. Thus the panel was satisfied that her use of a prohibited substance was proved beyond a reasonable doubt by USADA. However, this will not be the case in every non-analytical positive. It may be very difficult on the party alleging the violation to prove the use of a prohibited substance without a positive test. These non-analytical positive charges are a new tool in the fight against doping but the challenge to prove the use of prohibited substances or techniques may limit the number of successful applications.

Prohibited methods

An athlete's use of a prohibited substance is the most common reason for a doping infraction. However, the WADA Code's definition of an anti-doping rule violation includes the use or attempted use of a prohibited method.⁶⁹ As described above,⁷⁰ the 2004 CAS case of *Galabin Boevski* is an indication that athletes are going to great lengths to avoid being detected by the anti-doping agencies. Boevski was found guilty of physically manipulating his urine sample, a doping violation under the IWF Anti-Doping Policy.

Failing, refusing to submit or evading a sample collection

Article 2.3 of the WADA Code provides an anti-doping rule violation has occurred if an athlete: (1) refuses to submit to sample collection; (2) fails without compelling justification to submit to sample collection; or (3) otherwise evades sample collection. The first two anti-doping rule violations are neither new nor novel. The comment on Art.2.3⁷¹ included in the WADA Code indicates that a "failure or refusal to submit to Sample collection after notification is prohibited in almost all existing anti-doping rules". Further, the comments provide that such conduct may be based on either "intentional or negligent conduct by the athlete". The third anti-doping rule concerning evading a sample collection is just a more generalised rule with respect to the first two specific rules. The comment on Art.2.3 included in the WADA Code indicates that such conduct would include an athlete "hiding from a Doping Control official who was attempting to conduct a test". Accordingly, this third anti-doping rule violation "contemplates intentional conduct by the Athlete".

67. The burden of proof has subsequently been changed to "comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made". The comfortable standard was adopted by the WADA in 2003, before the IAAF adopted it in 2004. This latter burden of proof originates from court decisions in Australia and other Commonwealth countries that created a standard of proof involving personal reputation of the athlete more stringent than balance of probability but less burdensome than beyond a reasonable doubt.

68. See fn.65 above.

69. WADA Code, Art.2.2.

70. Refer above to "Proving a doping offence with circumstantial evidence".

71. WADA Code, Art.2.3, Comment at 10.

Refusing

As aforementioned, the prohibition of “failing or refusing to submit to Sample collection after notification” is neither a new nor a novel concept. In fact, the comment on Art.2.3 included in the WADA Code acknowledges that such a prohibition can be found in almost all existing anti-doping rules. Consequently, although the following two cases were not decided pursuant to the WADA Code, they may prove instructive in so far as the applicable rules are similar. A brief discussion highlighting the similarities and differences between the case-specific rules and Art.2.3 of the WADA Code will follow each case.

The decision in *Ina v United States Anti-Doping Agency (USADA)*⁷² illustrates that an innocent refusal may still constitute an anti-doping rule violation. Kyoko Ina, an elite pair figure skater and member of the US Figure Skating Association, was randomly selected to provide a No Advance Notice Test by the USADA. The first attempt to test Ina was unsuccessful, and Ina was notified that USADA declared it a “missed test”. Subsequently, Ina provided USADA with daily faxes indicating both her daytime and evening activities. In accordance with Ina’s schedule, a doping control officer proceeded to Ina’s house at her estimated time of arrival at 22.30. Ina did not attempt to provide the sample, but instead chose to sign the Athlete Refusal Form despite a warning by the DCO of the potential consequences. Subsequently, on the third try, Ina provided a sample that tested negative. USADA proposed a four-year suspension to Ina, pursuant to s.5.2(b) of the International Skating Union Anti-Doping Code (“ISU Anti-Doping Code”).

Ina defended her refusal. First, she argued there were procedural defects, such as that the DCO’s identification had expired and there was no one at USADA at 23.00 to answer her questions. Secondly, Ina took issue with the appropriateness of a late-night unannounced test request at her home and the invasion of her privacy. Thirdly, the DCO made some confused and incorrect representations to Ina regarding specifics of the sanction. Lastly, Ina urged that the refusal and its circumstances were not absolute enough to warrant such a severe sanction.⁷³

Although the panel believed that Ina did not intend to evade anti-doping rules and acknowledged her exemplary prior record, the panel nonetheless held that Ina had committed a violation of the ISU Anti-Doping Code. The language of the Anti-Doping Code provided no latitude that would allow for a reduction in sanction or for an athlete to escape from its broad mandate.⁷⁴ Accordingly, the panel held that the “athlete’s intentions,

or other conduct and state of mind” were irrelevant. The “central fact” was that Ina had chosen to sign the Athlete Refusal Form.⁷⁵ In addressing Ina’s arguments, the panel stated that there was nothing inappropriate about the hour the DCO visited. All eligible athletes must surrender a certain amount of privacy and convenience.⁷⁶ In fact, Ina had been tested 11 months earlier at a similar time in the evening. Further, Ina’s daytime schedules were insufficient to allow her to be located, while her evening schedules were very specific. This was tantamount to an invitation to attend her home in the evening.⁷⁷ Although the DCO should not have discussed the sanctions with Ina, it was nonetheless irrelevant.⁷⁸

As Art.2.3 of the WADA Code provides that an athlete may escape from an otherwise anti-doping rule violation in the event of a “compelling justification”, the panel in *Ina* would probably have had to evaluate some of Ina’s arguments against this threshold. Nonetheless, Ina’s arguments as to the propriety of the late-night test visit would probably fail to comprise a compelling justification, for the same reasons that they were rejected by the panel as provided above. Similarly, as to Ina’s assertion that she was misled by the DCO, this type of argument has often failed;⁷⁹ athletes are assumed to know the rules to which they agree. At first glance Art.5.2(b) of the ISU Anti-Doping Code and Art.2.3 of the WADA Code appear similar in that intention is not required. However, one should be wary that although the WADA Code, Art.2.3 does not require intention, the Art.2.3 Comment indicates that the anti-doping rule violation for “failing or refusing” to sample requires either intention or negligence.⁸⁰ Consequently, the reasoning in *Ina* dismissing Ina’s intentions as irrelevant may prove less useful than it first appears; rather, whether Ina’s actions were negligent would have to be considered.

Another decision dealing with an athlete’s refusal to submit to sampling is *IAAF v QAAF & Al-Dosari*.⁸¹ The panel was to determine whether the athlete had committed a doping offence in accordance with IAAF Rules. Rule 56 provided the minimum sanction for “an athlete who fail[ed] or refus[ed] to submit to doping control after having been

75. *ibid.*, at [22].

76. *ibid.*, at [18].

77. *ibid.*, at [18].

78. *ibid.*, at [22].

79. For example, in *Fazekas v IOC*, fn.9 above, the panel held that the athlete “could not rely on any declaration, by whomsoever made, as to the sufficiency” of his urine sample. The athlete only provided 25ml of a required 75ml sample, arguing that he had not failed to provide a sample because a staff member had assured him that his partial sample of 25ml was sufficient.

80. “A violation of ‘refusing or failing to submit to Sample collection’ may be based on either intentional or negligent conduct . . .” (WADA Code, Art.2.3, Comment at 10).

81. CAS 2003/A/517 (“*Al-Dosari*”).

72. AAA No.30 190 00814 02 (“*Ina*”).

73. Ina’s arguments provided in *Ina*, *ibid.*, at [16].

74. *ibid.*, at [21].

requested to do so⁸² was two years' ineligibility.⁸³ Rashid Shafi Al-Dosari, a Qatari discus thrower, was selected for out-of-competition testing while at a training camp in Hungary. The DCO found Al-Dosari training at a gym. When asked if he was Al-Dosari, the athlete responded in English that he was. While the DCO proceeded to identify himself and open his folder to provide the appropriate documentation, Al-Dosari began to pack up his belongings. Again the DCO proceeded to show his identification but the athlete claimed that he did not speak English. A third time the DCO slowly described his purpose for being present, but Al-Dosari left the gym. The DCO had another athlete who had witnessed Al-Dosari's conduct sign a refusal form documenting the athlete's actions. Subsequently, the DCO and his assistant went to the athlete's hotel on two occasions, but were unable to find Al-Dosari. The athlete had not returned there yet, but instead had decided to walk around town. The DCO and his assistant signed and completed an unavailable/refusal form. The following day Al-Dosari left for Qatar. The IAAF informed the Qatar Association of Athletics Federation ("QAAF") that Al-Dosari had refused or failed to submit to doping control.⁸⁴ QAAF decided to ban the athlete for four months, despite the fact that r.60.2 of the applicable rules required a minimum of two years' ineligibility.⁸⁵ The IAAF appealed the decision to CAS when the QAAF refused to reconsider the minimal sanction it had chosen to impose.

Al-Dosari's account of the events often directly contradicted other witnesses and he submitted a myriad of excuses and contradictory statements. The panel assessed all of the evidence and the credibility of Al-Dosari to find that he was not truthful.⁸⁶ After the finding of fact, it was held that Al-Dosari had failed or refused to provide a sample. The athlete had therefore committed a doping offence pursuant to IAAF r.56.1.⁸⁷ The three necessary elements of the offence were proven. First, the athlete was notified that he was to provide a sample. Secondly, the athlete knew that he was to comply with the request. Thirdly, the athlete did not comply. As the QAAF had failed to apply the appropriate sanction, the panel held that Al-Dosari was to be ineligible for the minimum period of two years.⁸⁸

Although Art.2.3 of the WADA Code provides that an athlete may escape from an otherwise anti-doping rule violation in the event of a "compelling

justification", in the decision of *Al-Dosari* it is unlikely that the availability of this exception would have led to a different outcome. Rather than providing a justification for his actions, Al-Dosari's arguments attempted primarily to convince the panel of his account of the events.

Failing

The following two cases concern the application of Art.2.3 of the IOC Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004 (the "Athens Rules"). As Art.2.3 of the Athens Rules was not only virtually identical in wording to, but also based on, Art.2.3 of the WADA Code, these cases are particularly instructive.

After winning the gold medal in the men's discus throw event at the Olympic Games in Athens, Robert Fazekas⁸⁹ (from Hungary) was excluded from the Games and was refused the medal by the IOC Executive Board for "failing to submit to Sample collection". The athlete had reported to the doping control station of the Olympic Stadium upon request. After numerous attempts, he was only able to produce an insufficient amount of urine for sampling.⁹⁰ Fazekas refused to continue the sample collection at the polyclinic, claiming he did not feel well, and signed the Doping Control Official Record stating such. In the Doping Control Official Record Fazekas also acknowledged that the "partial sample may constitute an antidoping rule violation".

The panel held that Fazekas had provided no compelling justification for failing to submit to sample collection. Consequently, the appeal was dismissed and the IOC Executive Board's decision confirmed. In response to argument, the panel held that the presence of the two witnesses was not prohibited by any applicable rule, and therefore did not invalidate the procedure. Although the rules provided that an athlete's representative could accompany them to the doping control station, nowhere did the applicable rules provide that the athlete's representative could accompany them into the toilet.⁹¹ Further, Fazekas could not plead ignorance. He was aware of the rules by virtue of his entry into the Olympic Games and the repeated advising of those in attendance during his sample. Article 2.3 of the Athens Rules was common to all anti-doping codes. In light of the fact that it was undisputed that Fazekas failed to provide a proper sample, the panel determined that he also failed to provide any compelling justification to excuse himself. Although not conceding its truth the panel considered the athlete's evidence, alleging inappropriate behaviour of the sampling witnesses, to be completely irrelevant. Even if the allegations

82. IAAF r.56.1.

83. IAAF r.60.

84. *Al-Dosari*, fn.81 above, at [4.25].

85. *ibid.*, at [4.32].

86. *ibid.*, at [4.31].

87. Although it had not been necessary for the panel to characterise whether Al-Dosari had failed or refused to provide a sample, if required to do so, the panel would have held that he had refused (*Al-Dosari*, *ibid.*, at [5.3]).

88. *Al-Dosari*, *ibid.*, at [6.1]-[6.4].

89. *Fazekas v IOC*, fn.9 above, ("*Fazekas*").

90. 25ml was produced; 75ml is required for sampling.

91. *Fazekas*, fn.9 above, at [61]-[62].

had been true, it still did not excuse him from failing to continue the procedure at the Village Polyclinic.⁹² Fazekas was perfectly aware of the consequences of his decision not to go.⁹³

Evading

On August 22, 2004, Annus won the gold medal in the men's hammer throw finals at the Olympic Games in Athens. The same day the athlete provided a urine sample for doping control that returned negative. On August 24, 2004, despite plans to fly home to Hungary the next day, Annus left the Olympic Village to return home by car. The same day he left, an attempt was made to serve him with a Doping Control Notification. On August 25, 2004, following an IOC request for detailed "whereabouts information", the Hungarian Olympic Committee ("HOC") provided the addresses and contact information of Annus, his trainer and his manager. The next day, following a demand from the IOC, the HOC Chef de Mission informed the IOC for Annus that he could be met at his home in Hungary on August 26/27, 2004 between 23.00 and 01.00. Feeling intimidated by a massive crowd of fans and journalists, two DCOs decided not to collect a urine sample from the athlete at his home on August 26, 2004 at 23.00. Upon the DCOs' arrival the next morning, Annus was gone. An official notice for testing was delivered to the HOC Chef de Mission, received on behalf of Annus, requiring Annus report to the BUCSU police. Since Annus never reported for testing, the IOC Executive Board withdrew the athlete's medal and disqualified and excluded him from the 2004 Olympic Games. Annus appealed to CAS for an annulment of the IOC Executive Board's decision.⁹⁴

In affirming the sanctions imposed by the IOC, the panel held that Annus had "otherwise evaded Sample collection" and therefore committed an anti-doping violation pursuant to Art.2.3 of the Athens Rules. First, contrary to the athlete's assertions, the panel held that Annus had been aware of the BUCSU doping test deadline. The athlete's personal secretary had been notified of the BUCSU doping test, making it implausible that he would not have notified Annus.⁹⁵ Further, the media coverage regarding the events included the BUCSU doping test deadline. The athlete's testimony referring to the media frenzy, implicitly suggested that he had kept himself informed through the media.⁹⁶ The panel held that it was comfortably satisfied that Annus

had been aware of the BUCSU doping test. Secondly, the panel found that despite being well aware that he was being sought to give another sample as of August 24, 2004, Annus had managed to make himself unattainable for three days in a row.⁹⁷ Thirdly, in response to the athlete's submission that he was required to receive personal notification of his selection for sampling, the panel referred to Art.2.3 of the Athens Rules which provides that an anti-doping rule violation could occur where an athlete "otherwise evades Sample collection". The wording did not indicate that there be a notification, and consequently the panel was not required to assess the performance of the IOC in providing such notice of the BUCSU doping test.⁹⁸

Another, as yet unsettled, case of possible sample evasion occurred during the 2004 Olympic Games in Athens. One day prior to the opening ceremonies of the Olympic Games in Athens, Greek sprinters Kostadinis Kenteris and Ekaterini Thanou both failed to arrive at the Olympic Village for mandatory sample collection. Both claimed they did not receive notification of the testing until four hours after it was scheduled to have been done. Subsequently, the athletes were involved in an alleged motorcycle accident that required a four-day hospitalisation. One news report stated the athletes claimed that, upon discovering that they had missed their testing, they borrowed their coach's motorcycle to return to the Olympic Village.⁹⁹ Another report stated the Greek team's deputy chief claimed that, upon being informed they would be tested, the athletes were frightened and fled the Olympic Village without informing officials of their whereabouts. At a hearing before the IOC Disciplinary Panel, Kenteris and Thanou withdrew from the Athens Olympic Games and returned their accreditation. No further action was taken by the IOC in light of their withdrawal from the competition in the Games. A tribunal of the Greek Athletic Federation, SEGAS, cleared the athletes of any doping charges. It was determined that the athletes had not been informed of the missed doping tests.

After investigation, the IAAF does not accept the SEGAS decision and has concluded that the evidence indicates the athletes have committed doping violations pursuant to IAAF Rules.¹ The IAAF Doping Review Board has referred the matter to CAS for arbitration.² Currently Kenteris and Thanou have been charged by Greek authorities

92. *ibid.*, at [70].

93. *ibid.*, at [72].

94. *Annus v IOC*, fn.9 above ("*Annus*").

95. The secretary's reasons and statements were inconsistent with other witnesses and therefore discreditable. He also contradicted himself and, as one of the athlete's best friends, had motive to lie; *Annus, ibid.*, at [52].

96. *ibid.*, at [54].

97. *ibid.*, at [58].

98. *ibid.*, at [61].

99. "Greek sprinters 'panicked'", *Athens-Olympics 2004* (January 6, 2005), online: NEWS24.com, www.news24.com.

1. "Kostas Kenteris and Katerina Thanou charged by sport authority" (December 23, 2004), online: uksportnews.com.

2. Bob Ramsak, "Athletics: IAAF Refers Case of Greek Sprinters to CAS" (April 1, 2005), online: [Runners' and Triathlete's Web News, www.runnersweb.com](http://runnersweb.com).

with misdemeanour counts of obstructing doping tests and making false statements regarding a motorcycle accident. In connection with the case, the hospital where the athletes were treated after the motorcycle accident has seen seven doctors charged with making false statements.³ It will be interesting to see the outcome of these unprecedented events.

Loss of medals at an event where no specimen taken

On the last day of the Salt Lake Games Olga Danilova⁴ and Johann Muehlegg⁵ were excluded by the IOC Executive Board from the Games. Danilova was disqualified from the women's 30km classical cross-country skiing event with the forfeiture of the diploma obtained. Muehlegg was disqualified from the men's 50km classical cross-country skiing event with the forfeiture of the gold medal.⁶ Both athletes won medals in other events at the Games from which they had given urine samples but no action had been taken on the laboratory analytical results arising from the samples. Therefore the IOC Executive Board had taken no action to nullify these other race results or require the forfeiture of medals awarded.

Certain Norwegian cross-country skiing athletes and one Canadian athlete, together with their respective NOCs, made applications to CAS requesting that the IOC Executive Board strip other medals from the two skiers in events for which the analytical results from the laboratory had not been proceeded with. The result of such a decision would alter the standing and medal allocation for both the Canadian and Norwegian athletes. These appeals⁷ required the panel to decide two important issues. The first issue was the admissibility of the claims. The Norwegian Olympic Committee and Confederation of Sports ("NOCCS") and the Canadian Olympic Committee ("COC") were appealing IOC Executive Board decisions where neither they nor their athletes were a party in the proceedings.

In both appeals the panel held that the athletes' claims were admissible because the claims were primarily contractual in nature. Under Swiss civil procedure law, a claimant has standing to sue and a claim is admissible providing the party is invoking a substantive right of its own. The panel held that

the athletes were invoking a contractual right of their own in challenging the IOC Executive Board's decision. The CAS Panel explicitly stated that this decision does not imply that all competitors of sanctioned athletes will necessarily have standing to bring proceedings before CAS. Competitors who lack any chance of obtaining a medal or top ranking may not have sufficient interest to pursue a claim. The NOCs' claims were not admissible because they were not invoking a substantive right of their own under the Olympic Charter ("OC").

The second major issue to be decided by the panel was whether the IOC Executive Board incorrectly applied r.25.2.2.1 of the OC which provides that "in the case of exclusion [from the Olympic Games], any medals or diplomas obtained shall be returned to the IOC (Executive Board)". The IOC excluded Muehlegg and Danilova from the Games and withdrew their medals in the races where they tested positive but allowed the athletes to keep the medals they had won in other events.

The panel held that the

"fundamental Principles upon which the OC is based and the IOC's corresponding duty to fight doping and promote sports ethics, are irreconcilable with an interpretation of Rule 25.2.2.1 of the IOC which would allow an athlete excluded from Olympic Games for doping to retain any Olympic medals gained at such games".⁸

Therefore the exclusion of an athlete required the disqualification of the athlete from all the competitions in which he/she participated and forfeiture of all medals obtained. The CAS Panel remitted the cases to the IOC Executive Board in order to render a new decision in accordance with the awards of these appeals.

This is an extraordinary award for several reasons. The panel's decision to grant standing was unique to CAS proceedings. This decision broadens the scope of parties who can appeal a decision of the IOC Executive Board. However, it should be noted that Art.13.2.3 of the new WADA Code does limit the group of persons with standing to challenge a decision. Secondly, the panel's decision required the IOC Executive Board to issue a new decision with strict guidelines,⁹ amounting to the CAS Panel considering itself the IOC Executive Board and making the decision. Thus CAS awarded a private

3. "Greek sprinters on drug charges" (November 18, 2004), online: CNN International—World Sport, <http://edition.cnn.com>.

4. Refer to "Procedural and evidentiary matters: Scientific evidence: New test" above.

5. *ibid.*

6. Both athletes appealed and CAS dismissed the appeals in November 2002 (Danilova) and in January 2003 (Muehlegg). Olga Danilova then unsuccessfully appealed against the CAS award before the SFT.

7. *NOCCS & Other Claimants v IOC CAS 2002/O/372* and *COC & Scott v IOC CAS 2002/O/373* ("Scott").

8. Scott, *ibid.*, at [92].

9. The CAS Panel not only decided that IOC misapplied the Olympic Charter but it then set out the decision to be made by the IOC Executive Board. The matter was remitted to the IOC Executive Board for a decision in terms prescribed by the panel to be rendered before March 15, 2004. The IOC Executive Board issued a press release on February 28, 2004 indicating its compliance with the CAS decision by a unanimous decision of the Executive Board.

remedy for a public constitution issue. The future ramifications of this decision are difficult to foresee. It can certainly be said that the decision is a landmark case with likely broad-sweeping implications not only for the IOC but also IFs. The limits of the decision will undoubtedly be examined in the application of Russia, supported by Australia, to strip the gold medal of Tyler Hamilton¹⁰ in the time trial cycling race at Athens.¹¹

Retroactive loss of medals

The case of Jerome Young¹² illustrates the difficulties that can arise when a CAS decision may result in the retroactive loss of medals. Jerome Young was a member of the US 4 × 400 relay team that won a gold medal at the 2000 Sydney Olympics. Young did not run in the final, though he did run in preliminary and semi-final heats. In 1999 Young had tested positive for nandrolone and was suspended for two years by the USATF Doping Hearing Panel. However, Young appealed the decision to the USATF Doping Appeals Board. The Appeals Board exonerated Young owing to the fact that he had tested negative for nandrolone six days prior and six days subsequent to his positive test.¹³ The USATF did not report Young's positive test and the resulting hearings to the IAAF in order to comply with USATF's confidentiality policy. After the Sydney Olympics the IAAF learned that a US gold medal winner had tested positive for a banned substance prior to the Games and sought this information from the USATF. Only after a long struggle between the IAAF and USATF, including another CAS case, was Young's identity revealed to the IAAF. The IAAF then referred the matter to CAS, almost four years after the initial USATF Doping Appeals Board decision.

In this case, CAS was asked to stand in the place of the former IAAF Arbitration Panel, which would have heard the case had the IAAF been promptly notified of Young's doping offence. The IAAF Rules specified a six-month time-limit to refer matters to the IAAF Arbitration Panel, unless it was fair and reasonable to accept cases outside the time-limit. The CAS Panel held that the delay in referring the matter to arbitration was caused primarily by the USATF's non-disclosure of Young's identity, and therefore it was fair and reasonable to hear the case despite the delay.

The CAS Panel found that Young had indeed committed a doping offence, and that the USATF Doping Appeals Board had erred in exonerating

him. Therefore Young should not have been eligible to compete in the Sydney Olympic Games. Interestingly, the CAS Panel did not make any decision with respect to the medals won by the US 4 × 400 Olympic relay team. The panel did not consider that stripping the entire team of their medals was a necessary consequence of finding Young to have been ineligible, given the unusual circumstances of the case. The panel left the decision concerning the medals to the IAAF and the IOC.¹⁴

Sanctions

Proportionality—does the WADA Code eliminate it?

The principle of proportionality was written into the rules of some International Federations in the days when each sport wrote their own doping control procedures following as a guide, but without mandatory inclusion, the former IOC Medical Code. From this historical origin emerged a series of cases in the CAS jurisprudence¹⁵ which evolved a concept of proportionality as if it were a maxim of international law like the principle of *lex mitior*. This latter principle has been used in some cases to allow for the least severe sanction where changes are made to anti-doping rules altering the severity of sanctions after the provision of a sample but before the completion of the adjudication process.¹⁶ However,

14. Shortly after this CAS decision, the IAAF recommended that the entire relay team be stripped of their medals. However, the US Olympic Committee filed an appeal of this recommendation with CAS. At the time of delivering the paper the case had not been decided. It was subsequently determined in *USOC, J., P., T., H., & H v. IOC & IAAF*, CAS 2004/A/725 on July 20, 2005 that while Jerome Young lost his medal, the other three members of the relay team could keep their medals. See [2005] I.S.L.R. SLR 106–117. Shortly after the 2004 CAS decision in the *Young* case, he again tested positive for a banned substance, this time EPO, and was banned for life by the USADA. Alvin and Calvin Harrison, who were on the same Olympic relay team as Young, have also received suspensions for using banned substances in incidents relating to the BALCO case. An AAA/CAS Panel suspended Calvin Harrison for two years in *USADA v Calvin Harrison*, AAA No.30 190 00091 04. Alvin Harrison accepted a four-year suspension from USADA after admitting to using banned substances.

15. The principle of proportionality was first developed in two CAS decisions of 1996: *NWBA v IPC*, CAS 1995/122 and *C. v FINA*, CAS 1995/141. Both cases found that the penalty imposed must be in proportion with the circumstances of the present case. Other cases dealing with the principle of proportionality are: *P. et al. v FINA*, CAS 97/180; *Bouras v IFF*, CAS 98/214; *W. v FEI*, CAS 99/A/246; *David Meca-Medina & Igor Majcen v FINA*, CAS 2000/A/270; *Aanes v FILA*, CAS 2001/317; and *Leipold v FILA*, CAS 2000/A/312.

16. An example of this was the reduction in sanctions in the FINA Doping Control Rules. FINA used to have a four-year suspension for a first violation, but this was reduced to two years when it adopted the WADA Code. Therefore sanctions imposed, in cases still in the adjudicative process during the transition period, were in compliance with the

10. *Hamilton*, fn.45 above.

11. Court of Arbitration for Sport, news release, "Tyler Hamilton to file an appeal with the Court of Arbitration for Sport (CAS) against two-year ban" (June 1, 2005).

12. *IAAF v USATF & J. Young*, CAS 2004/A/628; [2005] I.S.L.R. SLR 1–13.

13. *ibid.*, at [18].

proportionality has only limited foundations in international law.

Although a review of CAS jurisprudence may reveal that the principle of proportionality has not been applied consistently in similar circumstances, a sense of disproportion between the stipulated sanction and an athlete's infraction guides the doctrine. Proportionality has focused on perceived fairness to the athlete based on the pretence that the sanction imposed is deemed excessive or unfair on its face. An example of the application of the doctrine of proportionality is the case of *Meca-Medina and Majcen v FINA*.¹⁷ Two swimmers, finishing first and second in a long-distance swimming event, tested positive for nandrolone. Both were suspended by FINA for four years. The amount of nandrolone in their systems was only slightly over the allowed limit, and both claimed that they had unknowingly ingested nandrolone by consuming uncastrated boar meat. The athletes' suspensions were upheld through an initial CAS award, but the publication of a scientific study suggesting uncastrated boar meat could lead to positive nandrolone tests led FINA and the athletes to agree to a second CAS hearing. The suspected athletes were unsuccessful in demonstrating to the requisite standard of proof that the nandrolone in their systems was derived from the consumption of the boar meat. However, despite this adverse finding, the CAS Panel applied the doctrine of proportionality to reduce the suspension of the athletes to two years. This decision was based primarily on the facts that a four-year ban is often equivalent to a life suspension, that many other international federations stipulated a two-year suspension for a first doping offence, and that the athletes had otherwise been of good behaviour. The panel also acknowledged that in deciding whether to reduce sanctions owing to proportionality problems, each case necessarily turns upon its own facts.

The adoption of the WADA Code raises the question of whether and how the principle of proportionality will continue to evolve. The doctrine of proportionality had previously been necessary to give the discretion now extended by the Code in rules of some sports that had no or inadequate discretion. However, the WADA Code now provides a mechanism for reducing or

eliminating sanctions if a suspected athlete can establish that he or she is not at fault, suggesting that the mechanism provided in the Code will be the sole means by which a sanction can be reduced.

The case of Elmar Lichtenegger¹⁸ demonstrates the application of the doctrine of proportionality in a situation just prior to the implementation of the WADA Code. Lichtenegger tested positive for nandrolone during the summer of 2003; a contaminated supplement was the source of his positive test. The national federation of athletics in Austria decided that exceptional circumstances existed and suspended him for a period of six months. The IAAF was not satisfied with the sanction and appealed the decision to CAS.

Lichtenegger's sample was taken prior to the acceptance of the WADA Code into the IAAF Anti-Doping Rules. The athlete asked the panel to apply the principle of *lex mitior* so that he might benefit from what he perceived to be more flexible rules under the WADA Code. However, since Art.24.5 of the WADA Code itself states that the Code is not to be applied retroactively, the panel determined that Lichtenegger's case should be decided based only on the IAAF's 2002/2003 Anti-Doping Rules. The 2002/2003 IAAF rules provided for strict implementation of a two-year minimum sanction in the case of a first doping offence, except in the case of "exceptional circumstances", which did not include contamination of nutritional supplements. The CAS Panel held that those Guidelines amounted to an extreme position which violated the principles of fairness and natural justice, the basis for the doctrine of proportionality that had been developed in CAS case law. The panel found that Lichtenegger's use of a nutritional supplement that had been described as free of the prohibited substance by an IOC/WADA accredited laboratory and his previous exemplary conduct to be mitigating factors that called for a reduction in the sanction imposed. Therefore the panel reduced Lichtenegger's sanction to 15 months from two years.

Interestingly, the panel in *Lichtenegger* suggested that the doctrine of proportionality was incorporated into the WADA Code, and this influenced its decision in the case. The subsequent case law involving WADA Code-based anti-doping rules suggests that the introduction of the WADA Code will eliminate the application of the doctrine of proportionality in future cases, except as provided for in the WADA Code itself. Importantly, though, the rules regarding reduction of sanctions under the WADA Code are strict, and the commentary to the relevant rules states they will only apply in truly exceptional circumstances, not in the vast majority of cases. Therefore it is possible that a case will arise where a CAS Panel is tempted to reduce a

new reduced sanction. The case of swimmer Kicker Vencill described below is such an example.

17. fn.15 (2nd ser.) above. *Meca-Medina and Majcen* appealed their case to the Commission of the European Communities, and further to the Court of First Instance of the European Communities (Fourth Chamber), claiming that their suspension was an infringement of EU rules against restrictions on provision of services and on competition. The court rejected these arguments since the doping sanctions imposed on the athletes were a result of anti-doping rules enacted to maintain fairness in sport, and these rules could not be characterised as a serious infringement of economic freedoms.

18. *Lichtenegger*, fn.35 above.

sanction based on the doctrine of proportionality, even though the circumstances may not meet the strict requirements imposed by the WADA Code. However, the case law to date has rejected any suggestion that the scheme for reducing sanctions in exceptional circumstances under the WADA Code is inadequate or that it remains subject to the doctrine of proportionality as it existed prior to the implementation of the Code.

In the case of Diego Hipperdinger,¹⁹ a Spanish tennis player, the CAS Panel held that the doctrine of proportionality that had developed in previous CAS case law had been based on the anti-doping rules of many different IFs, and that the situation had changed such that the doctrine of proportionality could not be applied in the same fashion as it had previously. Hipperdinger had tested positive for cocaine, but claimed that this positive test was a result of his consumption of tea made from coca leaves, and of coca leaves proper. He claimed that he did not know that the leaves were coca leaves, and he also claimed that he was not aware that consumption of coca leaves could yield a positive test for cocaine.

The applicable rules were the rules of the ATP Tennis Anti-Doping Program 2004, which were established on the basis of the WADA Code. According to the Panel, one of the main intentions of the WADA Code is to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports. Under the WADA Code, the only possibility of reducing a fixed sanction is through evidence of exceptional circumstances as provided for by Art.10.5. Article 10.5.1 provides for the elimination of a sanction in situations of "No Fault or Negligence," while Art.10.5.2 provides for the reduction of a sanction to no less than half the period of the fixed sanction in situations of "No Significant Fault or Negligence". Equivalent provisions are found in the Tennis Anti-Doping Program under Arts M.5.a and M.5.b, respectively. The panel held that if the existence of exceptional circumstances as defined by these provisions is denied, then the panel has no other choice but to apply the appropriate fixed sanction. The Anti-Doping Program Rules, based on the WADA Code, did not permit the panel to apply the doctrine of proportionality except in accordance with the Rules.²⁰ The panel found that Hipperdinger had not established either "No Fault or Negligence", or "No

Significant Fault or Negligence". In the result, the panel upheld Hipperdinger's two-year suspension, though it did adjust the start of his suspension to an earlier date.

In *Hipperdinger*, the panel cited with approval the decision of the Swiss Federal Supreme Court in *N. et al. v FINA*.²¹ As aforementioned, the case involved positive doping tests by four Chinese swimmers and was an appeal of a CAS award upholding the swimmers' suspensions. One of several claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substances found in the urine of the swimmers was very low, yet the suspension handed down could possibly end the swimmers' careers. The Swiss Federal Supreme Court held that under the applicable FINA anti-doping rules, the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances. Furthermore, the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The court found that the two-year suspensions in question were only a moderate restriction on the athletes, while the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes. In the result, the court ruled that the two-year suspensions handed down without an examination of proportionality did not constitute a violation of the general principles of Swiss law.

*Exceptional circumstances to reduce the minimum sanction*²²

The inadvertent stimulant cases like *Baxter*²³ and the over-the-counter medicine cases like *Raducan*²⁴ and *Edwards v IAAF and USATF*²⁵ cried out for some sort of relief from the rigid application of the strict liability principle. The supplement cases involving manufacturers' contamination or mislabelling of the contents of supplements highlighted the need to ameliorate the effects of strict liability in many cases. The WADA Code approved a new nomenclature and analysis of the concept of exceptional circumstances.

The WADA Code provides the Arbitration Panel with discretion to reduce the sanctions arising from a positive analytical result or prohibited method application when there is either no fault

19. *Hipperdinger*, fn.29 above.

20. The Independent Anti-Doping Tribunal of the International Tennis Federation applied similar reasoning in the matter of Jamie Burdekin in a decision released April 4, 2005; available at www.itftennis.com/shared/medialibrary/pdf/original/IO_7273_original.PDF. As in *Hipperdinger*, the tribunal held that the doctrine of proportionality would not be applied except as provided for in the anti-doping rules based on the WADA Code.

21. fn.8 (1st ser.) above.

22. WADA Code Art.10.5.

23. *Baxter*, fn.51 above.

24. *Raducan*, fn.3 (1st ser.) above.

25. CAS OG 04/003 ("*Edwards*").

or negligence; or no significant fault or negligence.²⁶ These are mandatory provisions of the WADA Code that must be adopted in the IF rules. In the no fault or negligence category the sanction may be wholly eliminated. In the alternative category the discretion is limited to reducing the sanction by a maximum of one half of what it would have otherwise been. Many people are of the view that this is the major contribution of the WADA Code. It has harmonised the sanctions across all sports. Of course, the degree to which that is subsequently borne out will depend on the interpretation and application of the WADA Code. The early indications are that many sports such as professional football are continuing to impose sanctions far below those called for in the doping rules. For example, Rio Ferdinand was suspended for eight months for missing a doping test and Adrian Mutu was suspended for seven months after testing positive for cocaine.

No fault or negligence²⁷

There has yet to be a case where no fault or negligence has been established by a suspected athlete. The section²⁸ contemplates that there has been no involvement of an athlete in committing a doping offence. Thus it would be appropriate to eliminate any sanction that might arise by strict liability when there is no culpability and no degree of fault on the athlete. It is not likely this category will ever see much use.

The CAS case of American swimmer Kicker Vencill²⁹ dealt with the principle of no fault or negligence. Vencill provided an out-of-competition urine sample at the request of USADA in June 2003. The results of the urine analysis revealed the presence of 19-norandrosterone at a concentration greater than the threshold of 2ng/ml. After the B sample confirmed the results in the A sample, a USADA Review Board ruled that Vencill had committed a doping offence and suspended him.

Upon discovering the source of the nandrolone was a contaminated supplement, the athlete argued that exceptional circumstances existed. To have his sanction eliminated he argued that the substance entered his system without any fault or negligence on his part. The panel looked at the definition of "no fault or negligence" which entails that the athlete establish

"that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method".

26. WADA Code, Art.10.5.2.

27. *ibid.*, Art.10.5.1.

28. *ibid.*, Art.10.5.1.

29. *Kicker Vencill v USADA*, TAS 2003/A/484.

In this case, the panel held that he did not exercise the slightest caution in the circumstances. He had been warned of the dangers of ingesting supplements and continued to use them. Exceptional circumstances of no fault or negligence could not be found in the case.

If the a sanction is eliminated owing to a finding of no fault or negligence, then there is a corresponding provision in the WADA Code that will eliminate the counting of the incident as a first offence so far as the calculation of later sanctions might arise.³⁰ This is an important provision because if this offence were to count as a first offence, a second offence could result in a lifetime suspension. Therefore the athlete is treated as a first time violator if he or she subsequently tests positive.

No significant fault or no significant negligence³¹

All the exceptional circumstances jurisprudence has arisen under this provision of the WADA Code. The test involves measuring the degree of culpability of the athlete with respect to the analytical positive result. If that degree is not significant then the CAS or first instance tribunals have the opportunity to reduce the sanction that would otherwise arise by strict liability.

The case of American sprinter Torri Edwards at the CAS in its Ad Hoc Division ("AHD") in Athens was the first IAAF case to deal with the issue of no significant fault or negligence.³² The doping offence took place almost four months before the Games. Torri Edwards, an athlete with a distinguished career in track and field,³³ tested positive for the stimulant nikethamide in April 2004 at an IAAF meet in Martinique. USADA charged her with a doping offence and suspended her for a period of two years. Edwards requested that her case be heard before a first instance North American CAS Panel. Edwards admitted that she had, by mistake, committed a doping offence, but argued that "exceptional circumstances" existed that should allow her to get a reduction or elimination of her sanction.³⁴ The North American CAS Panel concluded that exceptional circumstances might exist and referred the matter to

30. WADA Code, Art.10.5.1.

31. *ibid.*, Art.10.5.2.

32. *Edwards*, fn.25 (2nd ser.) above.

33. Edwards won a bronze medal as a member of the 4 x 100m relay team at the 2000 Sydney Games and was the 100m champion and 200m runner-up at the 2003 World Championships.

34. IAAF r.40.2 states that where there are exceptional circumstances such that the athlete bears no fault or negligence for the anti-doping rule violation, the period of ineligibility will be eliminated. IAAF r.40.3 states that where there are exceptional circumstances such that the athlete bears no significant fault or significant negligence for the anti-doping rule violation, the period of ineligibility may be reduced to no less than half the minimum period of ineligibility. A lifetime period of ineligibility cannot be reduced to less than eight years. All these provisions are in accordance with the source document, the WADA Code.

an IAAF Doping Review Board ("DRB").³⁵ The DRB held that the circumstances were not exceptional and ordered the North American CAS Panel to impose a two-year suspension,³⁶ which they did in a ruling dated August 10, 2004. Ms Edwards had qualified for the US Olympic Team and was training with them on a Mediterranean island when the first instance level decision was released. In a final effort to be eligible to compete at the 2004 Games, Edwards filed an appeal to CAS in Lausanne as she had a right to do under the USADA Protocol. In order to hear the case on an expedited basis it was agreed to have the appeal heard by the AHD sitting in Athens.

The source of the nikethamide was two glucose tablets ingested by Edwards that, unbeknownst to her and her physical therapist at the time, contained a prohibited stimulant.³⁷ The AHD Panel confirmed the IAAF DRB's determination that no "exceptional circumstances" existed in this case and her suspension was upheld. The athlete was negligent in not conducting further research before ingesting the product. IAAF Anti-Doping r.38.12 explicitly states that "it is each athlete's personal duty to ensure that no prohibited substance enter his body tissues or fluids". Not only did the packaging have the name "nikethamide" on it, but a leaflet inside the box warned athletes in the French language that the product contained an active principle that could result in a positive doping test.

Hipperdinger is one of the most recent cases to deal with the issue of whether exceptional circumstances were present to reduce or eliminate the sanction. Since the ATP anti-doping rules did not provide any guidance on the interpretation of its exceptional circumstance provisions, the panel referred to the source document, the WADA Code. The panel first determined that the appellant cannot be considered as bearing no fault or negligence. The athlete's lack of inquiry about what he was consuming was negligent and he could not satisfy the no significant fault or negligence provision to reduce his sanction. This case further shows that an athlete has a high hurdle to overcome if he or she wants to prove the existence of either category of exceptional circumstances.

35. IAAF Anti-Doping r.38.16. The IAAF has such a provision in order to oversee on a worldwide basis the use of the exceptional circumstances provision and thereby reduce or eliminate "home country decisions" favouring the nationals of the doping panel's nationality. An argument may exist that such provisions are not in accordance with the WADA Code. The facts in this case did not raise the issue.

36. IAAF Anti-Doping r.38.18.

37. Martinique (a department of France) may be the only country in the world where this substance is contained in an over-the-counter product.

Delegation of arbitrator's authority to the IF

The IAAF process for deciding if there are exceptional circumstances is presented in the Torri Edwards case. First, if the AAA/North American CAS Panel finds that exceptional circumstances may exist, it refers the case to the Doping Review Board ("DRB") of the IAAF. It is the DRB's responsibility to determine whether exceptional circumstances exist and to respond back to the appropriate Arbitration Panel. Then the AAA/CAS Panel issues a final award based on the DRB ruling. This process raises the questions of whether the AAA/CAS Panel's final award can be successfully appealed to CAS International, as attempted by Torri Edwards. Her CAS AHD case in Athens does not answer this question because the AHD Panel, like the panel at first instance, did not find that exceptional circumstances existed.

If a case is appealed to CAS, then the IAAF³⁸ tries to limit the CAS review to three basic areas. The first area is whether a factual basis existed for the DRB's determination. The second area is whether the determination reached was significantly inconsistent with the previous body of cases considered by the DRB, where the inconsistency cannot be justified by the facts of the case. The third area is whether the determination reached by the DRB was a determination that no reasonable review body could reach. The overall effect of these Rules is that the IAAF has full control over the question of exceptional circumstances.

As aforementioned,³⁹ a CAS Panel has "full power to review the facts and the law". This has been interpreted as a *de novo* hearing. Yet the IAAF appears to be attempting to fetter that rule by limiting the jurisdiction of CAS to conduct a full review of the facts and the law. Certainly the panel of first instance in the Torri Edwards case did not use the full power described in the Code, as it did not use its jurisdiction to determine the existence of exceptional circumstances.

Should a first instance panel grant such power to the DRB or a federation like the IAAF? The international federation is trying to regulate hometown decisions that favour national athletes. This has been a problem for the IAAF for many years.⁴⁰ Their rules are an attempt to have an expedited administrative procedure that would limit the likelihood of hometown decisions. It also makes IAAF's burden of managing worldwide doping somewhat less onerous. The legal issue is whether the mandatory provisions of the WADA Code can be altered to achieve the purpose of the

38. IAAF Anti-Doping r.60.27.

39. Refer to "Scope of appeal" above.

40. See the final report of the Independent International Review Commission on Doping Controls—USATF, Report 11 (July 2001); commission chaired by Professor Richard H. McLaren.

federation. This issue will undoubtedly arise in some future IAAF cases.

Even if the initial first instance part of the IAAF rules do remain in place, do the provisions of the IAAF limiting the CAS jurisdiction apply to CAS at the appeal level? The WADA Code is meant to be mandatory with the adoption of the exceptional circumstances provisions to ameliorate the harsh effects of the strict liability principle. It is a key cornerstone of the Code and its acceptability by federations in the quest for a compromise is the harmonisation objective that the WADA Code sets out to achieve. Do the IAAF rules eviscerate the compromise of the WADA Code to serve the legitimate ends of the IAAF?

Strict liability

The mandatory provision in Art.2 of the WADA Code, when read in conjunction with all the definitions, claims to have adopted the principle of strict liability⁴¹ that had emerged in the *lex sportiva* of the CAS, the forum of final recourse under the WADA Code.⁴² The rule states that the mere presence of a prohibited substance will be sufficient to cause the loss of any results arising at the competition where the specimen producing the analytical positive result was given. A doping offence is committed regardless of the quantity found in the sample or proof that the prohibited substance in fact had a performance-enhancing effect for the athlete.⁴³ The operation of this principle has been poignantly observed in the *Raducan* and *Baxter* cases.⁴⁴

The strict liability principle also applies with respect to the sanctions imposed aside from disqualification for a positive analytical result for a prohibited substance. The mandatory provision in Art.10.2 of the WADA Code states that the period of ineligibility for a first anti-doping violation is two years. A second violation will result in lifetime ineligibility. Recent appeal and AHD cases from CAS confirm the imposition of the standard two-year suspension for a first offence.⁴⁵

Although the WADA Code is very clear in terms of what sanctions should be imposed for a first

and second infraction, there is still considerable debate in the sporting community about rigidity in the application of these sanctions. It is the opinion of some that the automatic consequences of liability irrespective of the particular circumstances present in each case is too rigid, is unnecessary and will work injustice towards athletes. However, the WADA Code does allow for sanctions to be severed from liability. While a positive analytical result will always establish liability for a doping offence, sanctions can be completely eliminated through a finding of no fault or negligence, and sanctions can be halved by a finding of no significant fault or negligence. This should be the case as the strict liability principle goes no further than the finding of the offence and the elimination of the competition result. It is then a question of degree of responsibility to how much further the governing body will go in imposing sanctions beyond the event at which the test was taken.

Deliberate conduct

In the past, the anti-doping rules of certain sports federations distinguished between intentional and unintentional doping. Sanctions for intentional doping were more severe than those for unintentional doping. The main reason for the implementation of WADA Code was to standardise the sanctions across all sports. Under Art.10.2 of the WADA Code, unintentional or intentional doping requires a sanction of two years of ineligibility for a first offence and lifetime ineligibility for a second offence. However, certain sports federations have slightly varied the words used in the WADA Code to maintain their ability to impose a sanction more severe than two years. The case of Michele Collins described above is such an example. Under the 2004 IAAF anti-doping regulations a doping violation required a sanction for "a minimum of two years". Therefore the panel found that it had the power to impose a sanction of longer than two years if the circumstances warranted it.⁴⁶ For Collins, the panel held that a longer sanction was justified because the nature and extent of her doping were severe. Collins engaged in a pattern of doping using multiple prohibited substances over an extended period of time. Additionally, the panel considered the WADA Code provision dealing with covering up a doping violation. Article 10.4.2 requires a period of four years' ineligibility for anyone engaged in covering up doping. The panel felt that the BALCO scheme was an elaborate plan to hide the doping offences of its athletes. Finally, the panel considered how other athletes had been treated and referred to the two-year suspension of Kelli White, who admitted to her involvement with

41. See Comments section following Art.2.1 of the WADA Code.

42. WADA Code, Art.13.2.1.

43. It is important to note that certain prohibited substances must be present at a concentration greater than a certain threshold. Thresholds are in place for certain substances such as nandrolone because of the fact that the human body produces the substance in small quantities.

44. *Raducan*, fn.3 (1st ser.) above, and *Baxter*, fn.51 (1st ser.) above.

45. See *Munyasia v IOC*, CAS OG 04/004; *Edwards*, fn.25 (2nd ser.) above; *UK Athletics Ltd v Chambers* [2004] I.S.L.R. 7; *Muehlegg*, fn.41 (1st ser.) above; *Lazutina v IOC*, *Danilova v IOC*, *Lazutina v FIS*, and *Danilova v FIS*, fn.36 (1st ser.) above.

46. *Collins*, fn.65 above, at [5.3].

BALCO and agreed to co-operate. Also, the panel considered the four-year suspension of Alvin Harrison and Regina Jacobs, who admitted their guilt but did not agree to co-operate. After considering all these factors, the panel held that the circumstance warranted an eight-year suspension for Collins.⁴⁷

This case does raise the question whether a panel should move away from the two-year suspension for a first violation as stated in the WADA Code. Although the code does not distinguish between intentional and unintentional doping, there can be a debate about whether the drafting of the anti-doping rules of a sports federation should allow a panel to impose a sanction that is more severe than what is provided for in the WADA Code. The question whether a panel should have the power to increase the length of a suspension where circumstances warrant is similar to the question whether a panel should have the power to reduce a sanction and

make it more proportional to the circumstances of the violation.

Conclusion

The WADA Code has brought a greater number of cases to the CAS but that is likely a temporary result of its coming into force. The CAS jurisprudence reflects the changes that have been brought about by the WADA Code but the development of the jurisprudence does not seem to have been disrupted. Rather the WADA Code has stimulated an evolution which appears to have accommodated the harmonisation that the WADA Code has brought. No doubt once the principles are better understood and refined, the volume of arbitration will decline.

47. *ibid.*