

**LEGAL OPINION**

**ON THE CONFORMITY OF THE EXCLUSION OF 'TEAM ATHLETES' FROM  
ORGANIZED TRAINING DURING THEIR PERIOD OF INELIGIBILITY  
WITH SWISS LAW, INCLUDING THE GENERAL PRINCIPLES OF  
PROPORTIONALITY AND EQUAL TREATMENT**

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## **I. PRELIMINARY COMMENTS**

### **1. QUALIFICATIONS OF THE AUTHOR OF THIS OPINION**

1. I, Dr. Antonio Rigozzi, am a lecturer in law at the University of Neuchâtel, Switzerland, where I teach international arbitration and sports law, including legal issues related to doping. I regularly lecture at various universities and international conferences on international sports arbitration.
2. I am also a practicing attorney-at-law admitted to the bar of Geneva, Switzerland, and a partner in the law firm of LÉVY KAUFMANN-KOHLER. My practice focuses on sports law and international arbitration. I regularly represent athletes and sports governing bodies in sports disputes, in particular in doping cases.
3. I am the Chairman of the Arbitral Tribunal of Swiss Athletics and act as arbitrator in sports related cases.
4. I am also the author of a number of publications in the area of sports law, including a book entitled "*L'arbitrage international en matière de sport*" ("International Arbitration of Sports Disputes"), published in 2005. A copy of my resume, including a list of my publications is attached as Annex A.

### **2. INDEPENDENCE AND DISCLAIMER**

5. I have already prepared two opinions on behalf of the World Anti-Doping Agency ("WADA"):
  - (i) On 26 February 2003, together with Professor Gabrielle Kaufmann-Kohler and Professor Giorgio Malinverni – who is now a Judge at the European Court of Human Rights – I provided a "Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law" (the "First Opinion").<sup>1</sup>

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<sup>1</sup> The First Opinion is available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>. An updated version has also been published under RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, in: *International Sports Law Review* 2003, pp. 39 et seq.

- (ii) On 13 November 2007, together with Professor Gabrielle Kaufmann-Kohler, I have provided a “Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes” (the “Second Opinion”).<sup>2</sup>

6. I am independent from WADA and have never represented WADA in any legal proceedings.

7. I do not express any views with respect to any relevant factual elements which may not have been brought to my attention.

**3. THE QUESTION POSED, THE DOCUMENT(S) REVIEWED, AND THE ISSUES ADDRESSED**

8. I have been asked to opine on the question whether, as a matter of Swiss law, it is admissible to exclude athletes competing in team sports (in opposition to individual sports) from organized training during their period of ineligibility.

9. For the purposes of this opinion, I have been provided with the following documents:

- (i) A copy of the current World Anti-Doping Code, adopted in 2003 and in force since 1<sup>st</sup> January 2004 (the “2003 Code”);
- (ii) A copy of the (revised) World Anti-Doping Code, as adopted at the Madrid World Conference on Doping in Sports of 15-17 November 2007, and due to enter into force on 1<sup>st</sup> January 2009 (the “2009 Code”);
- (iii) A copy of a legal opinion by Dr. Urs Scherrer and Mr. Christian Jenny dated 16 March 2008 “on the admissibility of excluding a football player from training with his club while serving a doping suspension” (the “SCHERRER/JENNY Opinion”), which is attached as Annex B.

10. As for the structure of the present opinion, I will first introduce the main concepts of the WADA anti-doping rules and the relevant provisions of Swiss law in order to examine the interaction between those two sets of rules (Part II), and then set forth my analysis and answer to the question posed (Part III).

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<sup>2</sup> The Second Opinion is available at: [www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377](http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377).

## II. THE INTERACTION BETWEEN ANTI-DOPING RULES AND THE RELEVANT PROVISIONS OF SWISS LAW

### 1. THE WORLD ANTI-DOPING AGENCY (WADA) AND THE WORLD ANTI-DOPING CODE (WADA CODE)

11. WADA was established in 1999 with the specific aim of promoting and coordinating, at the international level, the fight against doping in sports. Although it is headquartered in Montréal, Canada, WADA is a Swiss private law foundation governed by art. 80 et seq. of the Swiss Civil Code ("CC").
12. As a fundamental part of its mission, WADA was entrusted with the drafting of a universal code on anti-doping, with a view to harmonizing the many rules and laws then in effect around the world and ensuring, in particular, that all athletes are treated equally by sports bodies and governments with respect to anti-doping issues.

#### 1.2 The Adoption and the Implementation of the WADA Code

13. Following extensive consultations and repeated drafting exercises, the World Anti-Doping Code (the "WADA Code" or "the Code") was adopted by the World Conference held in Copenhagen in March 2003 and entered into force on 1<sup>st</sup> January 2004.
14. The WADA Code is the core document providing the international framework for harmonized anti-doping policies, rules, and regulations within sports organizations<sup>3</sup> and among public authorities. Following the adoption of the Code, the anti-doping rules of sports organizations around the world were revised so as to be brought in line with its provisions.
15. Along with the sporting movement, governments have committed to implement the WADA Code through the International Convention against Doping in Sport, elaborated and unanimously adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 19 October 2005 (the "UNESCO Convention").<sup>4</sup> The UNESCO Convention entered into force on 1<sup>st</sup> February 2007. Pursuant to Article 3(a) of the Convention "*the States Parties undertake [...] to adopt*

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<sup>3</sup> In this opinion, I will use the generic term "sports organizations" to refer to anti-doping authorities or sports governing bodies which are either Signatories of the WADA Code (as defined in its Article 23) or their subordinated entities, such as national federations and clubs.

<sup>4</sup> Available at: <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf>

*appropriate measures at the national and international levels which are consistent with the principles of the [WADA] Code”.*

16. Thus, as a result of the adoption and implementation of the WADA Code, it can be said that the international sports community is governed by a uniform set of anti-doping rules, reaffirmed and supported at the intergovernmental level by the UNESCO Convention.

### 1.3 The Rationale of the WADA Code

17. According to its Introduction, the Code's fundamental rationale is that of preserving “what is intrinsically valuable about sport”. In more concrete terms, the rationale underpinning anti-doping rules, including the WADA Code, is generally recognized to be four-fold.<sup>5</sup>

- *To ensure a level playing field.* This is, arguably, the most important rationale of anti-doping rules, and has been generally recognized as such by the courts.<sup>6</sup>
- *To protect athletes' health.* This is considered to be the most “traditional” policy rationale for anti-doping regulation.<sup>7</sup>
- *To preserve the social (and economic) standing of sport.* It is a fact of life that when an athlete is found guilty of a doping offence, the other competitors<sup>8</sup> and the entire sport are affected in their social and financial status.<sup>9</sup>

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<sup>5</sup> See First Opinion, *cit. supra* Fn. 1, para. 26-34, with references.

<sup>6</sup> In the words of the Ontario Court of Justice in the *Ben Johnson* case, anti-doping rules are “necessary to protect the right of the athlete, including Mr. Johnson, to fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist”, *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para 29. See also *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, SpuRt 1996, p. 133, 134 with respect to the necessity of out-of-competition tests.

<sup>7</sup> As noted in the First Opinion, the legitimacy of this rationale is increasingly criticized by legal commentators (RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, in ISLR 2003, *cit. supra* Fn. 1, p. 42). However, the importance of protecting the health of athletes has been expressly recognized in several court decisions. To quote the Ontario Court again, “it is necessary to protect Mr. Johnson for the sake of his own health from the effects of consistently using prohibited substances” *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para 29.

<sup>8</sup> EDWARD GRAYSON, GREGORY IOANNIDIS, *Drugs, Health and Sporting Values*, in: *Sport: Socio-Legal Perspectives*, London-Sydney, 2001, p. 253.

<sup>9</sup> The High Court of Munich in the *Kathrin Krabbe* case agreed that there is a “need to ensure a clean sport without pharmacological manipulations, and the damaging effect of offences like those at hand on the image of the sport - OLG Munich *Krabbe v. IAAF et. al.*, Decision of 28 March 1996, SpuRt 1996, p. 133, 135 (loose translation from the German original).

- *To preserve the athletes' status as role models.* It is a basic premise of anti-doping regulation that sportsmen and women, in particular the most successful ones, are highly visible public persons who enjoy a very special status in society, as role models for the younger generations.<sup>10</sup>

18. As demonstrated by the adoption of the Code and the UNESCO Convention, there is widespread consensus among private sports organizations and public authorities that only strict and universally harmonized anti-doping regulations can effectively secure these fundamental goals.

#### **1.4 The Main Features of the WADA Code**

19. The WADA Code consists of two basic elements: (i) a catalogue of doping offences (called anti-doping rule violations); and (ii) a series of sanctions to be imposed upon the athletes found to have committed such offences. The most common doping offence is the presence of a prohibited substance in an athlete's body (i.e., a substance set out on the so-called "Prohibited List"). The classic sanction for doping is the imposition of a suspension for a period of time (called "Ineligibility Period"). The usual suspension for a first offence is a two years ineligibility period that can be eliminated only in case of "absence of fault" and reduced only if the prohibited substance at stake qualifies as a "specified substance" and/or in case of "non-significant fault".

#### **1.5 Status During Ineligibility**

20. The provision governing the athletes' Status During Ineligibility has been slightly revised in the 2009 WADA Code to clarify that a suspended athlete will not be allowed to participate in organized training during his or her period of ineligibility irrespective of whether he or she competes in so called individual sports ('individual athletes') or in a Team Sports ('team athletes').<sup>11</sup>

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<sup>10</sup> The Ontario Court of Justice specifically recognized this policy rationale in the Ben Johnson case: "The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated [and, referring to the Dubin Inquiry, that] [w]hen role models in sport, or in any other endeavor, are seen to cheat and prosper, then it is natural that young people will learn to do the same" (*Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201).

<sup>11</sup> Appendix I to the WADA Codes defines Team Sport as a "sport in which the substitution of players is permitted during a Competition" (i.e., during a "single race, match, game or singular athletic contest", Individual Sport being "[a]ny sport that is not a Team Sport").

**a. Under the 2003 WADA Code**

21. Article 10.9 of the WADA Code defines the athletes' status during ineligibility as follows:

No Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory or, Signatory's member organization (emphasis added).

22. The Comment to Article 10.9 in the 2003 WADA Code makes it clear that this provision had to be interpreted broadly: ineligibility is not limited to competitions and it extends to all forms of organized sporting activity, including organized practice or training, the only allowed practice of sports being that of a recreational nature:

The rules of some Anti-Doping Organizations only ban an Athlete from "competing" during a period of Ineligibility [...]. This Article adopts the position [...] that an Athlete who is made ineligible for doping should not participate in any capacity in an authorised Event or activity during the Ineligibility period. This would preclude, for example, practicing with a national team, or acting as a coach or sport official [...] This Article would not prohibit the Person from participating in sport on a purely recreational level. (emphasis added)

23. The Comment to Article 10.2 of the 2003 Code (Imposition of Ineligibility for Prohibited Substances and Prohibited Methods), whilst explicitly acknowledging the different impact that the imposition of a period of ineligibility may have on 'individual' and 'team athletes', precisely because of the inability of the latter to participate in team practice, clearly emphasizes the overriding need for harmonized sanctions:

[...] Arguments against requiring harmonization of sanctions are based on differences between sports including for example the following [...]: in individual sports, the Athlete is better able to maintain competitive skills through solitary practice during Disqualification than in other sports where practice as part of a team is more important. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the

source of jurisdictional conflicts between International Federations and National Anti-doping Organizations. (emphasis added)<sup>12</sup>

24. Accordingly, it has been WADA's position that under Article 10.9 of the 2003 Code, athletes serving a suspension were not to participate in *any* organized team or club activity, including training.

**b. Under the 2009 WADA Code**

25. This has been explicitly confirmed during the recent revision of the WADA Code. Indeed, the new version of Article 10.9 (now Article 10.10 of the 2009 WADA Code) adds the following wording to the original text:

10.10.1 Prohibition Against Participation During Ineligibility

No Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory or, Signatory's member organization or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international or national level Event organization (emphasis added).

26. The new Comment to Article 10.10.1 of the 2009 Code reads as follows:

For example, an ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation [...]

27. In Olympic sports, including 'team sports', clubs are members of the national and international federation. Hence, it is clear that the WADA Code, in its 2003 wording and *a fortiori* in its new version, prevents a suspended athlete from training with his or her club during his or her period of ineligibility.
28. It has been submitted, in particular in the SCHERRER/JENNY Opinion, that the prohibition of training with a club during the period of ineligibility is inadmissible as a matter of Swiss law, namely with respect to the protection of personality rights (2), as well as the general principles of proportionality and equal treatment (3) and that, accordingly, any

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<sup>12</sup> The text of this Comment has remained unchanged in the 2007 Code. Article 10, together with the Comment accompanying it, is explicitly included in the provisions to be implemented by Signatories without substantive changes pursuant to Article 23.2.2 of the Code.

award enforcing Article 10.9 of the Code would have to be set aside for inconsistency with public policy (4). In the next sections, I will examine, in turn, each of these arguments in the light of Swiss law.<sup>13</sup>

## 2. PROTECTION OF PERSONALITY RIGHTS

29. Traditionally, suspended athletes have attempted to challenge their suspension before the courts and/or the CAS by claiming *inter alia* that the sanction violates their fundamental rights. Irrespective of any horizontal application of human rights standards in sports matters (i.e. application between an athlete and a private association, such as a sports federation), under Swiss law, athletes are afforded a similar protection by private law.<sup>14</sup> In the words of a commentator, in Swiss law "personality rights constitute in fact the application of human rights among private persons".<sup>15</sup>
30. The term "personality rights" (*Persönlichkeitsrechte; droits de la personnalité; diritti della personalità*) refers to those essential and fundamental rights of an individual which are intrinsic to his or her very being and physical existence, such as, for instance, the right to life, to physical integrity, to profess a religion or to exercise the trade or profession of one's choice.<sup>16</sup> Swiss law recognizes the pre-eminence of these rights and protects them against excessive restrictions or unjustified infringements.

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<sup>13</sup> As already indicated in my previous opinions, Swiss law is pivotal in anti-doping disputes because the vast majority of the international federations that have implemented the WADA Code (and will implement the 2007 Code), including FIFA, are incorporated in Switzerland. According to Article 13.2.1 of the WADA Code, all disputes between one of these federations and international-level athletes, or any dispute arising from competition in an international event "may be appealed exclusively to CAS in accordance with the provisions applicable before such court [i.e. the CAS Code]". Article R58 of the CAS Code provides that disputes shall be decided according to the applicable regulations and the rules of law chosen by the parties or, absent such a choice, "according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled [...]". As a consequence, disputes before the CAS are often governed by Swiss law (see Second Opinion, *cit. supra* Fn 2, p. 19 with references).

<sup>14</sup> See Second Opinion, *cit. supra* Fn 2, p. 18 *et seq.*

<sup>15</sup> JÖRG SCHMID, *Persönlichkeitsrecht und Sport*, in: *Privatrecht im Spannungsfeld zwischen gesellschaftlichem Wandel und ethischer Verantwortung*, Festschrift für Heinz Hausheer zum 65. Geburtstag, Bern, 2002, p. 142 (loose translation from the original text in German).

<sup>16</sup> Commentators generally distinguish between three main groups of personality rights: physical, affective and social (see for instance ANDREAS BUCHER, *Personnes physiques et protection de la personnalité*, Basel, 1999, p. 109, n° 465). In sports and doping matters, as we will see below, those rights which pertain to the social (and economic) sphere, such as the right to exercise one's chosen profession and the related right to personal economic fulfilment, are of particular relevance.

31. Under the heading “Protection of personality rights”, Articles 27 and 28 CC read as follows:

**Art. 27 – Against excessive commitments**

1. No person can wholly or partially renounce his capacity to have rights and to effect legal transactions.
2. No person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality.

**Art. 28 – Against infringements**

1. Where anyone suffers an illicit infringement of his personality rights, he can apply to the judge for his protection against any person participating in such infringement.
2. An infringement is illicit, except when justified by the victim's consent, by an overriding private or public interest, or by the law.<sup>17</sup>

32. While Article 27 CC aims at preventing a person from losing all of his or her freedom of decision because of his or her *own actions* (2.1), Article 28 CC aims at protecting a person against any *actual* infringement of his or her personality rights *by a third party* (2.2).<sup>18</sup>

**2.1 Protection from excessive commitments (Article 27(2) CC)**

33. Article 27(2) CC prevents a person from alienating his or her liberty (of decision) in the future.<sup>19</sup> Hence, Article 27(2) CC comes into play only when a person has freely entered into a commitment/agreement. The commitment/agreement is considered as such, in an abstract way, irrespective of any concrete application. If the judge comes to the conclusion that such commitment/agreement alienates or restricts a person's liberty (of decision) to an unacceptable extent, the commitment/agreement will be declared null and void.
34. The question arises then, whether an agreement to be sanctioned for a doping offence with a suspension from competitions and organized sport activities (including team or club training) is excessive within the meaning of Article 27(2) CC?

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<sup>17</sup> Translation by IVY WILLIAMS, *The Swiss Civil Code: English Version*, Zurich/St. Gallen, 2000, p. 7-8.

<sup>18</sup> See for instance PETER TUOR/BERNHARD SCHNYDER/JÖRG SCHMID, *Das Schweizerische Zivilgesetzbuch*, Zurich/Basel/Geneva, 2002, p. 96 and p.100.

<sup>19</sup> BUCHER, *cit. supra* Fn. 16, p. 102, n° 429; REGINA AEBI-MUELLER – ZGB 27 – in: Marc AMSTUTZ et al. (Eds) *Handkommentar zum Schweizer Privatrecht*, Zurich, 2007, p. 42, n° 6.

35. It has been submitted that the imposition of a period of ineligibility excluding a 'team athlete' from organized training would in and of itself constitute an excessive commitment:

According to current legal doctrine and practice it is a question of unlawful or immoral or excessive commitment whenever a person's financial freedom of movement is halted or restricted in such a way that he can no longer adequately make use of his freedom of movement: this is the case if he is prevented from carrying out the occupation for which he has trained, in other words from developing and using the skills he has acquired to the extent that his financial existence is jeopardised (cf federal law decision ATF 50 II 486).

(SCHERRER/JENNY Opinion, p. 3)

36. Irrespective of whether a decision of 1924<sup>20</sup> can be considered as illustrating "current legal doctrine and practice", in my opinion the foregoing statement does not accurately address the case of an athlete suspended for a doping offence, as will be shown below.
37. A commitment can be excessive within the meaning of Article 27(2) CC either because of its duration (a) or because of its very object and scope (b).<sup>21</sup>

**a. Excessive Duration?**

38. Commitments for an unlimited duration are in principle not admissible under Article 27(2) CC, since they entirely deprive a person of his or her freedom of decision. Whether the duration of a commitment is excessive within the meaning of Article 27(2) CC depends on the intensity of the specific commitment or its object.<sup>22</sup> A commitment to suffer continuing or repeated restrictions to one's personality rights must have a shorter duration than a commitment to a restriction that is circumscribed in time and of a foreseeable duration.<sup>23</sup>
39. The duration of an athlete's commitment to accept the imposition of an ineligibility period in the event of a proven anti-doping rule violation will depend on how long he or she chooses to participate in competitions and sports activities which are subject to

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<sup>20</sup> Swiss Federal Supreme Court, *Axelrod v. Vereinigte Zürcher Molkereien AG*, Decision of 17 November 1924, ATF 50 II 481.

<sup>21</sup> See for instance BUCHER, *cit. supra* Fn. 16, p. 103.

<sup>22</sup> TUOR/SCHNYDER/SCHMID, *cit. supra* Fn. 18, p. 99.

<sup>23</sup> Swiss Federal Supreme Court, *Brewery X. AG v. F. AG*, Decision of 21 June 1988, ATF 114 II 159, 161.

anti-doping regulations. Such a commitment entails a possible restriction of his or her liberty (the imposition of an ineligibility period) which will depend on his or her own behavior or actions (the committing of a doping offence) and will be of a fixed and foreseeable duration (e.g. two years as a rule for a first offence). Therefore, such commitment is not excessive within the meaning of Article 27 CC in terms of its duration.<sup>24</sup>

**b. Excessive Object or Scope?**

40. Of course, the imposition of an ineligibility period is a harsh penalty, entailing severe financial and social consequences for professional athletes. However, contrary to what has been suggested in the SCHERRER/JENNY Opinion, this does not mean that the imposition of a period of ineligibility necessarily violates Art. 27(2) CC.
41. Indeed, such a sanction was provided for in the WADA Code precisely because of its deterrent effect. Although an agreement to be sanctioned for a doping offence with a suspension from all organized sports activities represents a serious and potentially harmful commitment for an athlete, it cannot be assimilated, for instance, with an agreement directly putting one's financial existence at risk (the case that was argued, unsuccessfully, in ATF 50 II 486<sup>25</sup>), or arbitrarily leaving the transfer of a player to the complete discretion of his club (ATF 102 II 211, 218-220<sup>26</sup>).

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<sup>24</sup> Whether or not under the circumstances of a specific case, the implementation of such a commitment could lead to an excessive result is a different question, which will be addressed below with respect to Article 28 CC (see below 2.2).

<sup>25</sup> Referred to above, Fn 20.

<sup>26</sup> Swiss Federal Supreme Court, *Servette Football Club v. Perroud*, decision of 15 June 1976, ATF 102 II 211. In this case, the Swiss Football Association's rules making the transfer of a National League player dependent upon the voluntary issuance of a "release letter" (*lettre de sortie*) by his current club to the new club were deemed to be in breach of Article 27(2) CC. Such rules would allow a club to deprive a player of his means of subsistence by effectively banning him from the professional practice of football for up to two years. Specifically, the Court found that these rules excessively restricted the player's freedom to exercise his chosen profession, since irrespective of the player's behavior and actions, the club employing him was left free to impose its own conditions upon his transfer, and even to make such transfer impossible for a period of time by refusing to issue a release letter. In other words, the conclusion of an employment contract meant that the player's freedom of decision and determination with respect to the development of his own career was entirely transferred to the benefit of the club.

42. After all, athletes remain entirely free to avoid the imposition of such sanction by deciding to avoid any form of doping.<sup>27</sup> Accordingly, I fail to see how it could be even argued that the imposition of a doping sanction violates Art. 27(2) CC.
43. From this point of view, the fact that the suspension includes a prohibition of organized training does not make any difference. That forms part of the sanction envisaged in the agreement/commitment the athlete entered into by adhering to a sports organization or taking part in a sports competition governed by anti-doping rules.

**c. Conclusion**

44. In conclusion, it is my opinion that the imposition of a two years period of ineligibility including organized training does not violate with Article 27 CC since it is not in and of itself excessive, either in duration or in scope (or a combination of those aspects<sup>28</sup>).

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45. The SCHERRER/JENNY Opinion further argues that the proportionality of sanctions should also be examined in connection with Article 27 CC, concluding that a disproportionate sanction would ultimately give rise to a breach of this provision.
46. However, in my opinion, the analysis to be effected when assessing the validity of a commitment in the light of Article 27 CC (in this case, a commitment to submit to the applicable sanctions in the event of a doping offence) is essentially of an abstract nature. A breach of Article 27 CC will be established only where the commitment a person entered into constitutes, in and of itself, an excessive restriction of his or her future freedom of decision.
47. By contrast, the assessment of the proportionality of a sanction rests on the analysis of the particular facts and circumstances of a case. This analysis, including a weighing of the different interests at stake, can only be effected once an anti-doping rule violation is found to have been committed. Accordingly, proportionality will be discussed in the next section, where the conditions for a sanction to be admissible with regard to the

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<sup>27</sup> See TUOR/SCHNYDER/SCHMID, *cit. supra* Fn. 18, p. 99: "In the foreground of Article 27(2) is a person's liberty of decision" (loose translation from the German original).

<sup>28</sup> As envisaged by the Swiss Federal Supreme Court in *Servette Football Club v. Perroud*, Decision of 15 June 1976, ATF 102 II 211, 218.

protection afforded against infringements of personality rights by third parties are examined.

## **2.2 Protection against infringements of personality rights by third parties (Article 28 CC)**

48. In a recent decision, the Swiss Federal Supreme Court has evoked a number of personality rights within the meaning of Article 28 CC which are of particular relevance in the context of high-level sports and doping disputes, i.e., the right to health, physical integrity, honor, professional standing, the right to pursue a sporting activity and, with respect to professional sports practice, the right to economic development and fulfilment through such practice.<sup>29</sup>
49. It is undisputed under Swiss law that the imposition by a sports organization of an ineligibility period for a doping offence constitutes a restriction of an athlete's "right of economic liberty" and "right to personal fulfillment through sporting activities", and is thus an infringement of his or her personality rights.<sup>30</sup>
50. According to Article 28 CC, an infringement of an individual's personality rights is presumed to be illicit. However, this illicit character is lifted if the infringement is justified pursuant to Article 28(2) CC, that is, "by the victim's consent, by an overriding private or public interest, or by the law".<sup>31</sup>

### **a. Legal or Statutory Provision**

51. The term "law" as used in Article 28(2) CC is understood to refer to a statute or specific legal provision. Under Swiss law there is no legal provision that could justify an infringement of the athletes' personality rights in doping disputes between an athlete

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<sup>29</sup> Swiss Federal Supreme Court, *Schafflützel and Zöllig v. Fédération Suisse de courses de chevaux (FSC)*, 5C.248/2006, Decision of 23 August 2007, ATF 134 III 193, 200, commented by MARJOLAINE VIRET/XAVIER FAVRE-BULLE, *L'intérêt de la lutte contre le dopage confirmé par le Tribunal fédéral*, in: Jusletter of 19 May 2008.

<sup>30</sup> See for instance MARGARETA BADDELEY, *Le sportif, sujet ou objet?*, *Revue de droit suisse* 1996, p. 182. See also Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA* (5P.83/1999), Decision of 31 March 1999, CAS Digest II p. 767, 772. Here, the personality right at issue was that of "freedom of movement".

<sup>31</sup> In the words of a recent landmark CAS award, this means that: "In the event of an infringement of the right of an individual's economic liberty or his right to personal fulfillment through sporting activities, the conditions set at Article 28 al. 2 of the Swiss Civil Code are applicable. Such infringement must be based either on the person's consent, [sic] by a private or public interest or the law." (CAS 2006/A/1025 *Puerta v. ITF*, § 11.7.15, reported in *International Sports Law Review* 2006, pp. 149-174).

and a sports governing body.<sup>32</sup> The UNESCO Convention, which is in force in Switzerland since 12 October 2008, commits States to align their legislation with the Code, but is unlikely to be considered as being "self-executing".<sup>33</sup>

52. While it is doubtful that the WADA Code together with the UNESCO Convention constitute a sufficient statutory justification within the meaning of Article 28(2) CC, these instruments represent in my opinion a clear indication of State support for the implementation of effective and harmonized disciplinary sanctions in the fight against doping.

**b. Consent**

53. According to Article 28(2) CC, an infringement to the athletes' personality is licit if it is justified by the athletes' consent.
54. It is traditionally accepted under Swiss law that the consent by athletes to the disciplinary rules set out in the Code can be held to be reasoned and freely given, as part of the athletes' own decision to enter the world of professional sports and/or competition<sup>34</sup>

It suffices to hold that by participating to the disputed competition and by submitting himself to the [sports governing body's] rules, the [athletes] did at least implicitly accept these rules, which they knew. By doing so, they consented to a possible infringement to their personality rights due to the strict application of said rules.<sup>35</sup>

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<sup>32</sup> MARGARETA BADDELEY, *Droits de la personnalité et arbitrage: le dilemme des sanctions sportives*, in : Mélanges en l'honneur de Pierre Tercier, Geneva/Zurich/Basel, 2008, p. 711 ; SCHMID, *cit. supra* Fn. 15, p. 133. For a summary and analysis of the Swiss legal framework with respect to doping, see for instance FRANÇOIS VOUILLOZ, *Le droit suisse du dopage*, and MATTHIAS KAMBER, *Die UNESCO Konvention gegen Doping als Chance für die zukünftige Dopingbekämpfung in der Schweiz?*, both published in : Jusletter of 20 February 2006, as well as the editorial note JURIUS, *Dopingmissbrauch effizienter bekämpfen* in : Jusletter of 13 August 2007.

<sup>33</sup> See articles 3 to 5 of the Convention and the Statement issued by the Swiss Government in September 2007, when it submitted the text of the Convention to Parliament for approval: *Message concernant la Convention internationale contre le dopage dans le sport du 5 septembre 2007* (FF 2007 6133), available at [www.admin.ch/ch/fff/2007/6133.pdf](http://www.admin.ch/ch/fff/2007/6133.pdf), para 1.4.

<sup>34</sup> CLAUDE ROUILLER, *Le contrôle de la conformité des sanctions prévues par le Code mondial antidopage avec les principes généraux du droit suisse autonome*, in: Jusletter of 20 February 2006, at para 93; THOMAS BÜTLER, *Der Persönlichkeitsschutz des Vereinsmitgliedes*, Basel 1986, p. 78 *et seq.*

<sup>35</sup> Decision of the High Court of the Canton of Vaud of 10 mai 2006, *Fédération suisse des courses des chevaux (FSC) v. Shafflützel and Zöllig*, para 5 e), p. 12, unreported (free translation from the French original).

55. That said, a justification based on such consent may be subject to attack in certain circumstances. First of all, the consent can constitute an excessive commitment within the meaning of Article 27(2) CC. In the present case, this possibility is ruled out for the reasons explained in the previous sections.<sup>36</sup> Secondly, and most importantly, because of the monopolistic position of the different sports governing bodies, one can argue that athletes have no choice but to accept the applicable sports regulations, including sanctions.<sup>37</sup> Indeed, the rationale in favor of the unenforceability of an athlete's consent in such circumstances was set out in the recent *Cañas* decision of the Swiss Federal Supreme Court in the following terms:

Experience shows that, most of the time, athletes do not have a great deal of power over their federation and have to adhere to its wishes [including accepting regulations] whether they like it or not.<sup>38</sup>

56. Based on this consideration, the Swiss Federal Supreme Court in *Cañas* denied the validity of the waiver to appeal CAS awards contained in sports regulations. The Supreme Court made clear that the same rationale could not be applied to deny the validity of the arbitration agreement contained in such regulations. It is thus unclear whether the Supreme Court is prepared to refer to the athlete's lack of choice also with respect to Article 28(2) CC. Indeed, in its latest decision specifically relating to doping, the Supreme Court has chosen to leave the question of the enforceability of such consent open.<sup>39</sup>

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<sup>36</sup> See above section 2.2, in particular ¶¶ II.2.138 *et seq.*

<sup>37</sup> See for instance HEINZ HAUSHEER/REGINA AEBI-MÜLLER, *Sanktionen gegen Sportler – Voraussetzungen und Rahmenbedingungen, unter besonderer Berücksichtigung der Doping-Problematik*, RSJB 2001, p. 355; SCHMID, *cit. supra* Fn. 15, p. 140.

<sup>38</sup> Swiss Federal Supreme Court, *X. [Guillermo Cañas] v. ATP Tour [& TAS]*, 4P.172/2006, Decision of 22 March 2007, ATF 133 III 235, 243; also reported in Bull. ASA 2007, p. 592 and commented in *Gazette du Palais, Les Cahiers de l'arbitrage 2007/2*, p. 35 (note Pinna), in *Causa Sport 2007*, p. 145 (note Baddeley), and in *SpuRt 2007*, p. 113 (note Oschütz [p. 177]). More recently, on the other hand, the Supreme Court has underscored – albeit *obiter* – the voluntary character of a member's submission to a sports federation's rules, in spite of the federation's dominant position (Swiss Federal Supreme Court, *X. v. Fédération Internationale de Football Association (FIFA) [& TAS]*, Decision of 5 January 2007, 4P.240/2006, at para 4, reported in: ASA Bull. 2007, p. 381); CHRISTOPH GASSER/EVA SCHWEIZER, *Case Comment*, *International Sports Law Review* 2007, p. 29-30.

<sup>39</sup> Swiss Federal Supreme Court, *Schafflützel*, ATF 134 III 193, *cit. supra* Fn. 29.

57. Hence, the justification of a sanction by way of consent being subject to caution under Swiss law as it currently stands, the decisive factor is whether the sanction may be justified by an overriding private or public interest.<sup>40</sup>

**c. Overriding Private or Public Interest**

58. As seen above, the importance, urgency and legitimacy of the fight against doping in sports, as well as the correlated need for harmonized and effective anti-doping regulation are generally recognized by private sports organizations and public authorities.

59. With respect to the limits of the protection afforded to athletes' personality rights under Article 28 CC, the fight against doping may thus be held to constitute both a private and a public interest.

60. As private bodies, WADA and the international and national sports organizations implementing the Code's provisions primarily pursue their private interest (i.e. that of eradicating doping from sport, thus re-establishing a level playing field and preserving the social and economic standing of sports) by applying harmonized anti-doping rules and sanctions.

61. However, the private interest of sports organizations, not to mention that of all the athletes who choose to compete without doping, runs parallel to the general interest of the public and the State of ensuring that sports be and remain doping-free, in furtherance of the fundamental ethical and social values associated with sporting activities, such as fair competition and education, and so as to protect public health.<sup>41</sup> The UNESCO Convention has been adopted with a view to providing States with the means to pursue this public interest, both at the national and international level.

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<sup>40</sup> From this point of view, I disagree with the Advisory Opinion rendered by a CAS Panel according to which consent is unenforceable only if it is excessive (its object is excessive) pursuant to Article 27 CC, i.e. if it "is *evidently and grossly disproportionate* in comparison with the proved rule violation and if it is considered as a *violation of fundamental justice and fairness*" (CAS 2005/C/976 & 986, *FIFA & WADA*, Advisory Opinion of 21 April 2006 at 140-143, references omitted). It is submitted, however, that in substance that approach should not lead to substantially different results than the application of the balance of interests test set forth in the following paragraphs.

<sup>41</sup> Similar views by HANS MICHAEL RIEMER, *Dopingkontrollen beim Training und im Privatleben von Sportlern*, *Causa Sport* 2008, p. 127 at para 2.1.4 referring to "*existentiellen Interessen*".

62. Under Swiss law, in order to justify an infringement of an athlete's personality rights, the private and/or public interest of the body imposing a sanction for a doping violation is to be weighed by the judge against the athlete's own interests (*pesée des intérêts, Interessenabwägung*), including his or her right to economic liberty and fulfillment through the practice of professional sports.<sup>42</sup> Article 28(2) CC requires the private and/or public interest to be of such importance as to override the athlete's interest in the protection of his or her personality rights.<sup>43</sup>
63. The Swiss Federal Supreme Court has recently found that the fight against doping does indeed constitute an overriding public interest within the meaning of Article 28(2) CC, thus justifying an infringement of athletes' personality rights through the imposition of sanctions.<sup>44</sup>

**4.6.2** With respect to the overriding public interest which would justify the infringement [of personality rights], the analysis to be effected requires a weighing of the interests at stake, namely, on the one hand, the interest of the victim not to suffer an infringement of his personality rights, and, on the other hand, that of the perpetrator to achieve a certain objective [...]

**4.6.3.2.2** One can only agree that [anti-doping] regulations such as the ones under consideration in this case are justified by an overriding public interest. Indeed, the fight against doping aims at maintaining an equal playing field among competitors, to ensure the fairness of competitions [...], to fight against the use of dangerous substances, to keep the practice of sports clean and to preserve its educational function for young people. These objectives are unanimously recognized by sports organizations and public authorities [citations omitted]. [...]

In view of the above, the infringement of the appellants' personality rights is justified by an overriding public interest and is therefore not illicit within the meaning of Article 28(2) CC.

(ATF 134 III 193, 201-204 *passim*)<sup>45</sup>

64. I can see no reason why such a prevailing interest should not apply also with respect to the suspension of 'team athletes'. The imposition of a suspension of a 'team athlete' including participation in organized training is thus justified by a prevailing interest.

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<sup>42</sup> BUCHER, *cit. supra* Fn. 16, p. 124, n° 534. See for instance Swiss Federal Supreme Court, *Schafflützel, cit. supra* Fn. 29, ATF 134 III 193, 200-203.

<sup>43</sup> AEBI-MÜLLER, *cit. supra* Fn. 19, p. 49, n° 32; BADDELEY, *cit. supra* Fn. 32, p. 712.

<sup>44</sup> Swiss Federal Supreme Court, *Schafflützel, cit. supra* Fn. 29, ATF 134 III 193, 204.

<sup>45</sup> Free translation from the French original.

#### **d. Conclusion**

65. Hence, it is my conclusion that the infringements of the 'team athletes' personality rights that arise from such a suspension are lawful, provided of course that fundamental procedural and substantive principles of law are complied with.
66. Indeed, according to commentators, an overriding private or public interest cannot in itself be held to justify any infringement of an individual's personality rights resulting from a disciplinary sanction; such an infringement is lawful only if it does comply with fundamental principles of due process (2.3) and fundamental principles of law (2.4).<sup>46</sup>

### **2.3 Due process**

67. The expression "due process" is used in this opinion to indicate that under Swiss law, the imposition of a period of ineligibility is only admissible if it is founded on a clear regulatory basis (a) and is issued at the outcome of fair trial (b).

#### **a. Compliance with the principle of legality**

68. According to Swiss commentators, sanctions are only admissible under Swiss law if they are founded on a clear regulatory basis (the so called *base statutaire*).<sup>47</sup>
69. As seen above, the text of the Code provides a clear and predictable basis with respect to the status of athletes during ineligibility, in particular as amended following its revision in 2007. Article 10.10 of the 2009 Code, which is to be adopted without substantive changes by the Code Signatories,<sup>48</sup> now unequivocally states that suspended athletes are not allowed to train with their team or club during the ineligibility period.
70. Thus, it is clear that a suspension excluding 'team athletes' from training in accordance with the Code would comply with the principle of legality.

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<sup>46</sup> See for instance SCHMID, *cit. supra* Fn. 15, pp. 141-143.

<sup>47</sup> See in particular the references in BADDELEY, *cit. supra* Fn. 32, p. 713, Fn.33.

<sup>48</sup> See Article 23.2.2 of the 2007 WADA Code.

### **b. Fair Trial**

71. According to Swiss commentators, an overriding interest can justify the sanctioning of an athlete only if such sanction is imposed after a fair trial (*Verfahrensfairnessgebot*).<sup>49</sup>
72. Articles 8 and 13 of the WADA Code impose on Signatories an obligation to ensure that a fair hearing process is guaranteed to persons who are asserted to have committed an anti-doping rule violation.
73. Thus, in principle, decisions imposing a period of ineligibility in accordance with the Code also comply with the requirement of fair proceedings.<sup>50</sup>

## **2.4 Fundamental Principles of Law**

74. Turning from procedure to substance, it is generally acknowledged that the main fundamental principles of law that must be abided by when imposing a sanction on an athlete are (a) proportionality and (b) equal treatment.<sup>51</sup>

### **a. Proportionality**

75. According to Swiss commentators, an overriding private or public interest cannot in itself be held to justify an infringement of an individual's personality rights, such as a disciplinary sanction, if it is disproportionate with respect to the objective to be attained and the offence committed.<sup>52</sup>
76. The weighing of interests performed by the judge under Article 28(2) CC (see above ¶ 62) consists in an application of one aspect of the general principle of proportionality.<sup>53</sup> In sports law, proportionality is regarded as the decisive test for the

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<sup>49</sup> See in particular the references in SCHMID, *cit. supra* Fn. 15, p. 141, Fn. 79.

<sup>50</sup> Should the fairness of a sports organization's proceedings leading to a sanction be questioned by an international-level athlete, an opportunity to cure this vice is available at CAS level (see for instance CAS 94/129 *USA Shooting & Quigley v. UIT*, CAS Digest I, p. 87). In case the fairness of CAS proceedings relating to a doping sanction is disputed, the award may be challenged before the Swiss Federal Supreme Court in accordance with Article 190 al. 2 of the Swiss Private International Law Act.

<sup>51</sup> RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, in ISLR 2003, *cit. supra* Fn. 1, p. 44 and p. 50.

<sup>52</sup> See for instance HAUSHEER/AEBI-MULLER, *cit. supra* Fn. 37, pp. 356-357

<sup>53</sup> See for instance HENK FENNERS, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport*, Zurich/Basel/Genf, 2006, p. 85.

admissibility of disciplinary restrictions of personality rights.<sup>54</sup> Accordingly, a separate section is devoted here to the bearing of this fundamental principle on the issue under discussion.

77. The objective pursued by the private and public bodies involved in the regulatory fight against doping is that of devising and implementing effective rules, with the ultimate goal of eliminating doping from sports. In order to be effective, anti-doping rules must not only be strict but also harmonized, both across sports and at the national and international level.
78. The imposition of a two-year ban for a first violation of anti-doping rules has been generally regarded as proportionate under Swiss law by the Swiss Federal Supreme Court.<sup>55</sup>
79. The relevant test in this respect requires that the sanction at issue be both suitable and necessary to attain its stated objective, and, as seen above, that a reasonable balance is struck between the various interests at stake.<sup>56</sup>
80. The risk of a long suspension from all organized sporting activities is obviously a serious deterrent for a professional athlete, and can therefore be considered as a suitable measure for the purpose of effectively sanctioning and discouraging doping offences.<sup>57</sup>
81. The requirement of necessity is also satisfied as it is generally acknowledged that there is no alternative measure to a suspension which would be apt to attain the same objective (effectiveness), whilst being less intrusive on the personality rights of athletes.<sup>58</sup>
82. In this respect, it has been submitted that excluding 'team athletes' from organized training is a disproportionate sanction, because a ban from competitions only would be,

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<sup>54</sup> RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, in ISLR 2003, *cit. supra* Fn. 1, pp. 50-51. See also Second Opinion, p. 42 *et seq.* and RIEMER *cit. supra* Fn.41, p. 127.

<sup>55</sup> Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA*, 5P.83/1999, Decision of 31 March 1999, *cit. supra* Fn. 30; HAUSHEER/AEBI-MULLER, *cit. supra* Fn. 37, p. 372.

<sup>56</sup> HAUSHEER/AEBI-MULLER, *cit. supra* Fn. 37, p. 356.

<sup>57</sup> See for instance RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, in ISLR 2003, *cit. supra* Fn.1, p. 61-62.

<sup>58</sup> *Ibid.*, p. 62.

in itself, "*sufficient to achieve the preventative and repressive effect that is necessary for the fight against doping*" (SCHERRER/JENNY Opinion, p. 4).

83. I am not convinced by this unsubstantiated view. Suffice it to say that a mere ban from competition would allow the (most talented) players to remain under contract (thus making considerable amounts of money) and to continue training with a club while suspended. It is my opinion that such a possibility could seriously undermine the effectiveness of the fight against doping in team sports.
84. Moreover, as a matter of common sense, it bears noting that it is quite frequent that football players are excluded from competition for an entire season, just because their coach prefers another player in the squad. Under these circumstances, if ineligibility for doping were to be limited to competition, its impact would be practically nil for certain players.
85. It has also been submitted that extending the ineligibility of players for doping beyond competition would be disproportionate on the ground that:

footballers in particular (team athletes) find it extremely difficult, if not impossible, to maintain their performance level without continual training in a team setting. The lack of training with colleagues of equal ability inevitably leads to a decline in performance level and can ultimately make it impossible for a footballer to continue his professional career after the ban has expired.

(SCHERRER/JENNY Opinion, p. 4)

86. In my opinion, this argument is also unconvincing.
87. First of all, as a matter of principle, distinctions based on circumstances such as the fact that a team athlete is likely to suffer greater damage than an individual athlete due to his or her inability to train with the team during the suspension period cannot be upheld without jeopardizing the effectiveness of the entire anti-doping regulatory system.<sup>59</sup>
88. Indeed, using the argument of proportionality to introduce considerations based, as in the case at hand, on the nature of the sport concerned would run counter to another

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<sup>59</sup> For a similar line of reasoning concerning the issue of strict liability and the no-threshold rule for most prohibited substances (i.e. the validity of a disciplinary system based on liability regardless of the actual effect on performance of the substance found in an athlete's sample), see Swiss Federal Supreme Court, *Schafflützel*, *cit. supra* Fn. 29, ATF 134 III 193, 203.

fundamental principle which, under Swiss law, is equally relevant to the protection of personality rights, namely, the principle of equal treatment.<sup>60</sup>

89. In any event, the possible greater relative damage suffered by a team athlete serving a suspension for an anti-doping rule violation is part and parcel of the sanction provided for by the rules and does not, as such, render the sanction disproportionate.
90. In view of the above, it is submitted that on balance,<sup>61</sup> any effective difference in the impact of a suspension (which would be difficult to measure) for team athletes is insufficient to justify a change to the current rules based on the principle of proportionality. To the contrary, such a change would in turn result in even more serious instances of unequal treatment, not only by comparison with non-team athletes, but also among team athletes themselves, as will be shown below.

**b. (Un)equal Treatment**

91. The SCHERRER/JENNY Opinion submits that preventing ‘team athletes’ from participating in organized training while serving a period of ineligibility would amount to a breach of the principle of equal treatment:

"[...] an individual athlete is able to immediately return to high performance level in competition after serving a suspension, as during said period he is able to maintain the skills specific to his profession outside a club setting.

A footballer who is barred from training with his club during a suspension suffers a marked decline in his performance level and upon the expiry of the ban must recover it – which requires great effort – before he can start playing again (provided he is able to rediscover his original performance level at all). In reality, a ban on a footballer (or team athlete) last longer than a ban on an individual athlete [...].

(SCHERRER/JENNY Opinion, p. 5)

92. While, at first sight, one could be sympathetic with this opinion, a closer analysis shows that it cannot be followed.
93. First of all, as explicitly recognized in the SCHERRER/JENNY Opinion itself, the principle of equal treatment only requires that the same breach “*should basically receive*

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<sup>60</sup> For a more detailed discussion of the tension between the principle of proportionality and the requirements of harmonization, taking into account the principle of equal treatment, see the First Opinion, *cit. supra* Fn. 1, para. 175 *et seq.* See also ROUILLER, *cit. supra* Fn. 34, para. 92.

<sup>61</sup> On the discretion of the deciding bodies, see RIEMER *cit. supra* Fn.41, p. 127.

*identical sanctions*" (emphasis added). Indeed, slight differences are inevitable. In the present case, one could argue that the difference of treatment in the effect of a suspension between 'team athletes' and 'individual athletes' is not significant enough to amount to a violation of the principle of equal treatment. One could be reinforced in that conclusion by the following elements:

- (i) In some sports, as for instance cycling, the very distinction between 'team athlete' and 'individual athlete' makes little or no sense. Indeed, while cycling is an individual sport, team strategy plays a pivotal role during the races. Cyclists train most of the time on an individual basis although they are members (and employees) of a team.
- (ii) In various individual sports, individual training is almost impossible for practical reasons, the best example being ski-jumping.
- (iii) In various individual sports training alone does not allow athletes to maintain their level of skills, the obvious examples being all dual sports, such as fencing, tennis or combat sports, where skills and competence can only be maintained through competition with equal or stronger opponents.

94. These examples point to the main flaw in the (un)equal treatment argument developed in the SCHERRER/JENNY Opinion, namely that harmonization necessarily implies some level of unequal treatment. As already mentioned, this is explicitly acknowledged in the Comments of the WADA Code (see above ¶ 1.523).

95. The Code is thus based on the premise that the need for harmonization is paramount and must prevail over the risk of some level of unequal treatment both among athletes and different sports. As already indicated in the First Opinion, this is a sound position, particularly given the importance of protecting the public image of sports: the imposition of different sanctions for similar offences has a very negative impact on the perception of the consistency and fairness of the anti-doping policy. Faced with inconsistent sanctions, both the athletes and the public will lose confidence in anti-doping policies and procedures<sup>62</sup>. It is my opinion that allowing a team athlete to continue training with their club while serving a period of ineligibility for doping will, as put by one of the most

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<sup>62</sup> First Opinion, *cit. supra* Fn. 1, para. 177.

prominent anti-doping experts, "*fuel the suspicion that anti-doping efforts are at best half-hearted and at worst purely cosmetic*".<sup>63</sup>

96. But there is more. If, contrary to the correct interpretation of the Code's provisions, 'team athletes' such as footballers were allowed to train with their clubs during a suspension for doping, this would in effect open the door to even more serious instances of unequal treatment.
97. It is beyond doubt that the "solution" contemplated in the SCHERRER/JENNY Opinion would actually discriminate against 'individual athletes'. It is my opinion that such discrimination is much more significant than the unequal treatment allegedly deriving from the additional time that 'team athletes' may need to reacquire team skills after ineligibility.
98. Moreover, the "solution" contemplated in the SCHERRER/JENNY Opinion would also lead to unacceptable discriminations *among* 'team athletes', such as football players. Since it is generally accepted that a suspension for doping constitutes a valid ground for terminating the employment contract without notice<sup>64</sup>, clubs would be in a position to discriminate between players who are "worth" training during the ineligibility period, and those who are not.<sup>65</sup> A club would most certainly have an interest in keeping the most talented players under contract in order to have them train with the team during the period of ineligibility. That would increase the level and quality of training for the club (the club and the other players would benefit from the skills of a talented player during the training) and allow the club to secure the player at the end of the period of ineligibility (most probably at favorable conditions). There is no need to be an expert in football matters to imagine that clubs would not hesitate to terminate less talented players in order to get rid of their contracts so as to be able to hire other players instead.

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<sup>63</sup> BARRIE HOULIHAN, *Dying to Win: Doping in Sport and the Development of Anti-Doping Policy*, Strasbourg, 2001, pp. 190-191.

<sup>64</sup> LUCIEN VALLONI, *Dopingfälle – Auswirkungen auf den Arbeitsvertrag* in: Sport und Recht, ARTER/BADDELEY (Eds.), Bern, 2007, p. 219; PIERMARCO ZEN-RUFFINEN, *Droit du Sport*, Zurich/Basel/Geneva, 2002, p. 215, n° 633.

<sup>65</sup> As an aside, it bears noting that FIFA's contention that a national court might "oblige [a club (as an employer)] to allow the footballer to attend training" (see SCHERRER/JENNY Opinion, pp. 5-6) is clearly at odds with the above mentioned principle that a suspension for doping allows the club to terminate the player's contract.

99. To sum up, I firmly believe that in spite of the inevitable differences in the impact of a suspension from training between 'individual' and 'team athletes' (but also and more generally between different sports), the requirements of regulatory harmonization should prevail, meaning that the status of suspended athletes should be the same, whatever the sport. Pursuing different "solutions" would not only imperil the system put in place by the Code, but also create new opportunities for discriminatory practices, as shown above.

### 3. THE ARGUMENT OF PUBLIC POLICY

100. Finally, the SCHERRER/JENNY Opinion submits that a CAS award enforcing Article 10.9 (now 10.10) of the Code<sup>66</sup> to the effect that a suspended 'team athlete' is also excluded from training with his or her team or club, would be contrary to Article 27 CC and thus also to public policy within the meaning of article 190(2) *lit. e* of the Swiss Private International Law Act (PILA). Accordingly, such an award would be liable to be set aside by the Swiss Federal Supreme Court.

101. In light of my conclusion that a commitment to be suspended from both competition and team training for a doping offence, in accordance with the Code, is not contrary to Article 27 CC, the public policy argumentation developed in the SCHERRER/JENNY Opinion becomes moot. Moreover, as already mentioned (*see above* ¶ 63), the Swiss Federal Supreme Court maintained that to the extent that sanctions for doping offences infringe the personality rights of athletes, such infringement is generally justified by the overriding interests of the sports community in its fight against doping. Thus, the implementation by the CAS of the specific disciplinary system, including suspensions, put in place by sports organizations to pursue this objective cannot in itself be held to amount to a breach of public policy.

102. In any event, in view of the current definition of the concept of public policy (*ordre public; ordine pubblico*) adopted by the Swiss Federal Supreme Court, I fail to see how an award banning a football player from competition *and* organized training could amount to a violation of public policy.

103. Indeed, the Swiss Federal Supreme Court construes the notion of public policy very narrowly in the context of setting aside proceedings against arbitration awards. Only

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<sup>66</sup> Or Article 10.10 of the 2007 Code.

breaches of the most fundamental principles of *international* procedural or substantive public policy are regarded as constituting a ground upon which an award can be set aside under Article 190(2) *lit. e* PILA.<sup>67</sup> This provision is understood to refer to those legal and moral principles which, according to conceptions prevailing in Switzerland, are of the utmost importance and should constitute the foundations of any legal system.<sup>68</sup> According to the Supreme Court's case law, infringements of personality rights such as sanctions imposed by sports organizations for doping offences do not come within the ambit of this provision.<sup>69</sup>

104. The same approach has been adopted by the Supreme Court with respect to *domestic* arbitration awards, in the context of setting aside proceedings under Article 36 of the Intercantonal Arbitration Convention of 1969 (the "Concordat")<sup>70</sup>. Pursuant to Article 36f of the Concordat an award can be set aside if its result is arbitrary. In the well known Hondo Case, the Swiss Federal Supreme Court held that although the notion of *arbitrariness* as a ground for setting aside an award under article 36 CA is more encompassing than that of *ordre public* within article 190(2) *lit. e* PILA, it does not extend to the protection of personality rights in the context of doping sanctions, provided again that fundamental principles of law are complied with.<sup>71</sup>
105. I am reinforced in my opinion by the recent *Schlafflützel* decision. In this case, a federation's decision sanctioning a doping offence, which had been confirmed/reinstated by a Cantonal Court's judgment, was submitted to the Supreme Court's scrutiny for a full fledged review in the context of appeal proceedings brought against that judgment. Thus, the Supreme Court's scope for review of the federation's

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<sup>67</sup> See for instance ELLIOTT GEISINGER/VIVIANE FROSSARD, *Challenge and Revision of the Award* in: KAUFMANN-KOHLER/STUCKI (Eds.) *International Arbitration in Switzerland*, The Hague, 2004, p. 149 *et seq.*; ANTONIO RIGOZZI, *L'arbitrage international en matière de sport*, Basel, 2005, p. 697 *et seq.*

<sup>68</sup> See Swiss Federal Supreme Court, *X SpA v Y Srl [ & ICC Tribunal]*, 4P.278/2005, Decision of 8 March 2006, ATF 132 III 389, 395, reported in ASA Bull. 2006, p. 521.

<sup>69</sup> Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA*, 5P.83/1999, Decision of 31 March 1999, *cit. supra* Fn. 30, p. 778 *et seq.* See also ROUILLER, *cit. supra* Fn. 34, para. 118 *et seq.* and BADDELEY, *cit. supra* Fn. 32, pp. 719-720 referring to *X v Y. and Fédération Française d'Equitation; Emirates International Endurance Racing, the Organising Committee of the FEI Endurance World Championship 2005; FEI*, 4P.105/2006, of 4 August 2006, reported in ASA Bull. 2007, p. 105.

<sup>70</sup> In CAS proceedings, the Concordat can come into play when both the athlete challenging a sanction and the sports organization imposing the sanction have their domicile or habitual residence in Switzerland.

<sup>71</sup> See Swiss Federal Supreme Court, *X. [Danilo Hondo] v WADA, UCI, Swiss Cycling Federation and Swiss Olympic Association*, 4P.148/2006, Decision of 10 January 2007, reported in ASA Bull. 2007, p. 569.

decision was much wider than the very narrow limits imposed by setting aside proceedings brought against CAS awards under Article 190(2) PILA. As already mentioned, the Supreme Court upheld the sanction.

106. Given this clear line of cases and in light of my previous developments, I fail to see how one could argue that the Swiss Federal Supreme Court would be likely to set aside an award enforcing a suspension from organized training.

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### III. GENERAL CONCLUSION AND ANSWER TO THE QUESTION POSED

107. The conclusion reached in the present opinion may be summarized as follows:

- (i) The provision of a period of ineligibility preventing 'team athletes' from participating in organized training does not constitute an excessive commitment within the meaning of Article 27 CC.
- (ii) The imposition of a period of ineligibility preventing 'team athletes' from participating in organized training does not constitute an illicit infringement of 'team athletes' personality rights within the meaning of Article 28 CC, in particular because it does not infringe the fundamental principles of proportionality and equal treatment.

108. Hence, the answer to the question posed is that the exclusion of 'team athletes' from organized training during their period of ineligibility is compatible with Swiss law.

Made in Geneva on 9 July 2008



Dr. Antonio Rigozzi