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However, the control of doping as well as commercialisation and professionalisation have altered the situation. The earnings of professional athletes have become so considerable that in each case the sanction for a doping offence can have a major impact on the athlete's career and profession, with his economic losses amounting to a very substantial sum of money. This was recently demonstrated by the judgement of the Landgericht Munich I in which more than 600,000 Euro was awarded.1

Moreover sanctions in doping cases may make commercial contracts void and therefore extend its impact beyond the world of sport.² This illustrates the need for a legally acceptable definition of doping and the importance of questions of proof, for in many cases the career of an athlete depends on these findings.

II. The Definition of Doping

There is no common legal definition of the term "doping" for all sports. Furthermore there are no binding legal criteria for such a definition. Rather the content of a "doping" offence is defined by the sports organisations in their own individual manner. Therefore, the definition of doping generally varies between international sports organisations.³ As a consequence of the hierarchical structure⁴ of sports organisations, these definitions of doping are transferred from international to national sports organisations, which are obliged to incorporate these definitions in their own systems of rules and regulations.

Nevertheless, the doping rules and regulations of the IOC, the Olympic Movement Anti-Doping Code, which came into force in the year 2000, have gradually become a "quasi-standard" for doping rules and regulations and for the definition of doping.⁵ This is due to the fact that the IOC has put considerable pressure on international sports organisations to adopt their standard of doping rules as a condition for participation in the Olympic Games.⁶ As a result of this, many international sports organisations have now incorporated the rules and regulations of the Olympic Movement Anti-Doping Code.

The Olympic Movement Anti-Doping Code demonstrates the two principle ways in which doping can be legally defined: (1) an abstract definition or (2) the so-called "pragmatic" definition with a list of

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** KPMG BEITEN BURKHARDT, Munich, Germany

1 Landgericht München I, judgement of 27 June 2001 B 7HK O 16591/94 (not yet published), see in detail as to the Krabbe cases K. Vieweg, Doping and the Krabbe Cases, the Legal Review of Sports Decisions in Germany, in: Proceedings of the 7th International Congress of the

International Association of Sports Law (in print)

- 2 L. Tarasti, Legal Solutions in International Doping Cases. Awards by the IAAF Arbitration Panel 1985-1999, Mailand 2001, p. 35.
- 3 G. Engelbrecht, Adoption, Recognition and Harmonization of Doping Sanctions between World Sport Organisations. The International Sports Law Journal 2000, p. 3 et seq.; C. Prokop, Die Grenzen der Dopingverbote, Baden-Baden 2000, p. 93.
- 4 Cf. K. Vieweg, Normsetzung und -anwendung deutscher und internationaler Verbände, Berlin 1990, p. 38 et seq., p. 61 et seq.; I. Hannamann, Kartellverbot und

prohibited substances. Both definitions are used in Article 2 of the Olympic Movement Anti-Doping Code, which reads as follows:

- 1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their per-
- 2. the presence in the athlete's body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited Method.²

However, an abstract definition of doping leaves open the question as to where doping begins. Without any further criteria, this question is considered almost unanswerable. Therefore, such an abstract definition must be regarded as being insufficiently precise and therefore consequently - not legally binding.⁷ In this respect, the goals of the fight against doping are to be taken into account. These are the avoidance of deception, the protection of the health of the athlete and the protection of sporting fairness⁸. Predominant and legally acceptable is the more pragmatic definition of doping based on a list of prohibited substances.

Judges have then to rely upon the list of forbidden substances set up by sports organisations, e.g. the IAAF or, in most cases, the IOC. Such lists of forbidden substances only include examples of substances of the prohibited classes. It has been calculated how many substances the lists would have to contain to show not only examples, but rather the whole list of known substances. Such an enumerative list would, for narcotics, anabolic agents and diuretics alone, include about 130 to 170 substances; the number of forbidden stimulants would increase from around 43 to at least 290, perhaps even to as many as 526 substances.9

For this reason and in order to take into account the rapid development of medicine, the last point in the list of prohibited substances is an open definition of doping with the term "... and related substances".¹⁰ The term is defined in Chapter I Article 1 of the Olympic Movement Anti-Doping Code: "Related substance means any substance having pharmacological action and/or chemical structure similar to a Prohibited Substance or any other substance referred to in this code." However, without the help of a specialist, an athlete cannot know these substances. Therefore, this wide addition to the otherwise enumerative list of forbidden substances is in conflict with the principle of certainty. Accordingly, an athlete must always be able to differentiate between permissible and banned substances. This obviously is not the case if such a judgement can only be made by a highly skilled expert. It is therefore questionable as to whether this defini-

Verhaltenskoordinationen im Sport, Berlin 2001, p. 54 et seq. and as to the problems of restraint of competition p. 269 et seq., p. 378 et seq.

- 5 C. Krähe, Beweislastprobleme im internationalen Sport - am Beispiel des Olympic Movement Anti-Doping-Codes, in: J. Fritzweiler (Ed.): Doping Sanktionen, Beweise, Ansprüche, München 2000, p. 40.
- 6 T. Bach, Lausanner Erklärung zum Doping und ihre Folgen. In: V. Röhricht / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 75.
- 7 U. Haas, Aktuelle Entwicklungen in der Dopingbekämpfung, Zeitschrift für Sport und Recht (SpuRt) 2000, p. 6.
- 8 K. Vieweg, Divergence and Harmony in

Sports Law - The Example of Anti-Doping Rules and Regulations, in: D.C. Umbach / D. Vedder (Ed.), Sportgerichtsbarkeit und Sanktionen, Heidelberg 2001, p. 93 (p. 95 et seq.). In respect of the latter aim cf. CAS 2001/A/317, p. 17.

- 9 R. K. Müller / J. Grosse / D. Thieme / R. Preiss, Banned Agents and Related Compounds - How Many?, in: W. Schänzer / H. Geyer / A. Gotzmann / U. Mareck-Engelke (Ed.): Recent Advances in Doping Analysis (7), Köln 1999, p. 14 et seq.
- 10 K. Vieweg, Grundinformationen zur Dopingproblematik, in: K. Vieweg (Ed.): Doping - Realität und Recht, Berlin 1998, p. 24.

tion of doping is sufficiently precise to withstand legal challenge; its validity is increasingly being questioned. The list of the prohibited substances should therefore be as complete as possible to avoid legal problems.

III. The Proof of a Doping Offence

1. Strict Liability?

The sanction for a doping offence within sport is not a criminal punishment in the sense of criminal law. It is a disciplinary sanction within sport, normally under private law. However, some states have made doping a criminal offence by legislation.¹¹ Within sport, in contrast, it is disputed whether the principles of criminal law, especially the principle of "in dubio pro reo" and "nulla poena sine culpa", are applicable.¹² Therefore the burden of proof, i.e. the risk of not succeeding before court when the facts are not proved, is very important.

The burden of proof in a doping case in sport generally lies with the sports organisation - the accusing party. It has to provide proof of the doping offence and of culpability. Normally, there is no evidence other than the finding of the prohibited substance in the athlete's sample. This is strong evidence of a doping offence and is, except in the few cases where a confession or witness evidence is available, the only possibility of efficient doping control.

The approach that treats the objective finding of a forbidden substance in the body fluids of an athlete as grounds for a sanction for a doping offence has been - somewhat misleadingly - labelled "strict liability". In law, the term "strict liability" is usually understood as liability without intent or negligence. It implies no intentional element; there is no tie between the sanction and intent. In doping cases, "strict liability" means that the sanction is an inevitable consequence once the doping offence has been established, irrespective of culpability.

This is generally accepted for the *disqualification* of the athlete. For example, Article 3.3 of the Olympic Movement Anti-Doping Code states that "any case of doping during a competition automatically leads to invalidation of the result obtained, with all its consequences, including forfeit of any medals and prizes." This is deemed necessary to protect "clean" athletes who take part in the competition; disqualification is therefore considered as nothing more than the removal of illegally acquired advantages in the competition.¹³ The Court of Arbitration for Sport (CAS) has consequently stated that "the system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in

11 For example Belgium, Sweden, Greece and Italy.

- 12 In the affirmative M. Buchberger, Die Überprüfbarkeit sportverbandsrechtlicher Entscheidungen durch die ordentliche Gerichtsbarkeit, Berlin 1999, p. 68 ff.; G. Petri, Die Unschuldsvermutung im Verbandsstrafverfahren, in: K. Bepler (Ed.): Sportler, Arbeit und Statuten, Berlin 2000, p. 239 (p. 264 et seq.); to the contrary L. Tarasti, Legal Solutions in International Doping Cases, p. 65; C. Krähe, Beweislastprobleme bei Doping im internationalen Sport B am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 42; CAS 2001/A/317 p. 18.
- 13 T. Bach, Lausanner Erklärung zum Doping und ihre Folgen (Fn. 6), p. 73.
- 14 CAS 95/141; cf. L. Tarasti, Legal Solutions in International Doping Cases, p. 85; M. Reeb, Die CAS-Rechtsprechung in Doping-Fällen, in: V. Röhricht / K. Vieweg (Ed.): Doping-
- Forum, Stuttgart et al 2000, p. 64. 15 CAS 2001/A/317, p. 17. This is the postition under Swiss law (cf. for example M. Baddeley, L'association sportive face au droit. Basel/Frankfurt am Main 1993.

Council of Europe's Anti-Doping Convention, A German Court of Appeal in the Baumann case also held that liability without fault was incompatible with the rights of the athlete and German law, cf. Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000 13W29/00, Zeitschrift für Sport und Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1120; K. Vieweg, Doping and the Krabbe Cases, the Legal Review of Sports Decisions in Germany, in: Proceedings of the 7th International Congress of the International Association of Sports Law (in print).

p. 243) and in accordance with the

- 16C. Krähe, Beweislastprobleme bei Doping im internationalen Sport. - am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 51.
- 17 Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000
 13W29/00, Zeitschrift für Sport und Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1120; Rechtsausschuss des DLV, SpuRt 1994, p. 66; cf. also CAS 2001/A/317, p. 19.
 18 M. Reeb, Die CAS-Rechtsprechung in

the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of culpability. The result of the event has indeed been objectively influenced and, consequently, the intention of the athlete is irrelevant".¹⁴

However, if further sanctions like a *fine* or a *ban* are to be imposed, the principle of strict liability is, from a legal point of view, no longer applicable.¹⁵ Such further sanctions can only be imposed in the case of culpability (intention or negligence) and must take into account the individual extent of fault in order to accord with generally accepted principles of law.¹⁶ An automatic sanction would be disproportionate and, at least in German law, unconstitutional.¹⁷ According to prevailing legal opinion and that of the CAS, sanctions can therefore only be imposed if the athlete is found liable in cases of intent or negligence.¹⁸

One must bear in mind that for sanctions like a fine or a ban, strict liability is not applicable; accordingly, fault must be proven. In practice many difficulties arise. The athletes often claim they cannot find any explanation for their testing positive. They especially point out the possibilities of influence by food additives, manipulation of the samples, mistakes in the analysis or the undue influence of third persons (doctors, coaches). Most of these alleged facts can hardly be proven. Bearing in mind that the sports association in many cases bears the burden of proof concerning athletes testing positive, a ban or fine could not be validly imposed. To avoid the aforementioned problems in those presumed doping cases, the so-called principle of "prima-facie" proof (Anscheinsbeweis) is applied in Germany.¹⁹

2. Prima-facie Proof of Doping

The intentional element is proven by using the so-called principle of "prima-facie" proof, which, due to the fact that it is proportionate, is constitutional. With respect to the principle of proportionality²⁰, it is necessary to weigh up the interests of the athlete, in particular his right of personality, against those of the federation.²¹

Prima-facie proof^{22} allows culpable behaviour or a cause of a finding to be proved in an indirect manner by using presumptions based on experience. For this, a typical cause of action must exist. In other words, facts must exist which can be regarded as the *typical result* of a certain behaviour.

In doping, this can be phrased as follows: An athlete in whose body fluids a forbidden substance has been found has, according to experience, administered or used the substance and has done so in a culpa-

Doping-Fällen (Fn. 14), p. 65. F. Oschütz, Der Beitrag des TAS zur Dopingbekämpfung, in: K. Vieweg (Ed.): Spektrum des Sportrechts (in print); F. Oschütz, The Jurisprudence of the CAS in Doping Cases, The International Sports Law Journal 2001, p. 22 et seq. 19 Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000 13W29/00, Zeitschrift für Sport und Parcht (enuPel) 2001, p. 159 (p. 162) see

- Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1121. 20 Cf. in general to the principle of proportionality K. Vieweg, Blut und/oder Urin rur Dopingkontrolle. Schartdorf 1996
- zur Dopingkontrolle, Schorndorf 1996, p. 89 (p. 112 et seq.). 21 M. Baddeley, L'association sportive face
- au droit, p. 239.22 Cf. for details Zöller/Greger,
- ZivilprozeBordnung, Köln 2001, vor § 284 Rn. 29.; G. Baumgärtel, Beweislastpraxis im Privatrecht, München u.a. 1998, p. 186. For primafacie proof under Swiss law cf. O. Vogel, Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz, Bern 1999, p. 264 et seq.; W. J. Habscheid, Schweizerisches Zivilprozessund Gerichtsorganisationsrecht, Basel

1990, p. 387 et seq. The basic principle of the prima-facie proof is used by both the IAAF arbitration panel and the CAS, although the terminology used is often slightly different, e.g. "shifting the burden of proof to the athlete after a positive finding", this giving the presumption of negligence by the athlete. Cf. L. Tarasti, Legal Solutions in International Doping Cases, p. 96. The IOC also follows this principle of a rebuttable presumption, cf. T. Haug / C. Paul, Diskussionsbericht zum Doping-Forum, in: V. Röhricht / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 144 and specifically for prima-facie proof p. 150; also W. Walker, in: K Vieweg (Ed.): Doping - Realität und Recht, Berlin 1998, p. 144 et seq., and M. Baddeley, Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht, in: J. Fritzweiler (Ed.): Doping. Sanktionen, Beweise, Ansprüche, Sport, München 2000, p. 22, and CAS 99/A/234 Meca-Medina/Majcen v. FINA, p. 18. Slightly different cf. U. Steiner, Doping aus verfassungsrechtlicher Sicht, in: V. Röhricht / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 135 et seq.

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Office address: Kantoorgebouw Statenhof Reaal 5H Leiderdorp The Netherlands ble way, in other words, with intent or due to negligence. By proving the existence of this fact, the behaviour that may have caused it is therefore also proven. The prima-facie proof therefore consists of a double presumption: Firstly the presumption of the use or application of the substance, and secondly that of a culpable element.²³

Nevertheless, the prima-facie proof is ultimately only a mere *pre-sumption*.²⁴ The athlete can defend himself and rebut the presumption by providing evidence that the finding of the substance may be due to a reason other than the application of the substance. He may, for example, state that the substance has entered his body as a contaminated food like, for example, meat. The rules for rebutting the presumption of the prima-facie proof are, however, very strict. The mere claim or assertion of another possible reason for the finding of the substance is not enough. Facts must instead be presented and proved which support the theory that not the typical, but rather an alternative cause of action has credibly taken place.²⁵

As it is very difficult for the athlete to present such credible facts, the rebuttal of the presumption has seldom succeeded. Therefore, the liability of the athlete is not a "total" liability. However, once a positive doping sample has been produced, the strict rules of defence will make it very difficult for the athlete to exonerate himself.

3. Contamination with Forbidden Substances and the Question of Cutoff Limits

This leads to the important question of contamination with forbidden substances.

The finding of a forbidden substance, even in very low concentrations, is treated as grounds for prima-facie proof of culpability for their application. Their presence in the athlete's body is, on the basis of experience, typically caused by such an application. Nowadays it is also known that, for example, nutritional supplements may contain traces of forbidden substances which are not declared on the product label. As a consequence, the use of such supplements is itself considered as negligent behaviour, as the athlete has the duty to be very careful with whatever substances he consumes. Therefore, even if only traces of a forbidden substance are found, the athlete is treated in the same way as if he had applied large doses of the forbidden substance, which had already left his body by the time the sample was taken. Only by proving that it was indeed a contamination and not leftover traces of a doping offence can the athlete exonerate himself. This strict treatment is often justified by the so-called "floodgate argument", which claims that if an easier excuse were possible, it would be impossible to fight doping efficiently.²⁶ However, such strict rules on behaviour can only be imposed if the athlete is indeed able to avoid the sources of contamination, which is possible with nutritional supplements as there is no need for their consumption.

The situation is only different, however, when a forbidden substance is known to be present in *everyday food* or the *natural environment* of an athlete, or even produced by the body of the athlete itself.²⁷ In such cases, it is not easy for the athlete to avoid such sub-

23 Cf. C. Krähe, Beweislastprobleme bei Doping im internationalen Sport. - am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 45; CAS 98/222 Bernhard v. ITU, p. 12.

- 24As to the differences between prima-facie proof ("Anscheinsbeweis") and legal presumption cf. G. Lüke / P. Wax (Ed.): Münchener Kommentar zur Zivilprozeßordnung, München 2000, § 286 Rn. 51 et seq (prima-facie), § 292 Rn. 3 et seq. (presumption) and Rn. 26 et seq.; H.J. Musielak (Ed.): Kommentar zur Zivilprozeßordnung, München 2000, § 286 Rn. 23 et seq. (prima-facie), § 292 Rn. 1 et seq. (presumption).
- 25 CAS 99/A/234 Meca-Medina/Majcen v. FINA, p. 16.
- 26 CAS 95/141, C. v. FINA, CAS Digest p.

215, 220; cf. also CAS 2001/A/317, p. 20.

- 27 Consequently, nutritional supplements are not included in the definition of the natural environment or everyday food.
 28 CAS 98/222 Bernhard v. ITU, p. 14.
- 29 C. Paul, Der Nandrolon-Grenzwert aus naturwissenschaftlich-medizinischer und rechtlicher Sicht, in: K. Vieweg (Ed.): Spektrum des Sportrechts (in print).
- 30 The doping rules have to be interpreted restrictively (teleologically) in this respect, as their aim is to prevent illegal manipulation, but not to punish an ath-
- lete for a low random concentration of a substance; cf. CAS 99/A/234, p. 14. 31 T. Friedmann / J. Koss, Gene Transfer
- and Athletics B An Impending Problem, Molecular Therapy 2001, Vol. 3, No. 6,

stances, their presence therefore does not constitute proof of negligent behaviour. Moreover, regardless of questions of culpability, the finding of a substance in such a low concentration is, in many cases, not even sufficient proof that a doping offence has occurred at all. Such concentrations are not the "typical" result of a doping offence, because it is equally possible that they result from natural sources, such as everyday food, the environment or the body.²⁸

Such a doping sample must not be declared positive. For this reason *cut-off limits*²⁹ have to be established on a sound scientific basis.³⁰ Only when a concentration of a forbidden substance above such "normal" concentrations is found, is there sufficient proof that it is not merely a random presence, allowing the presumption that it was caused by illegal drug use.

As a consequence, cut-off limits which take into account such "normal" values of the forbidden substances have to be determined. In particular, due to biological variability, problems may arise where substances produced naturally by the human body are concerned, thus leaving a certain gap for the athlete to evade doping sanctions.

Therefore, *direct methods* of identifying forbidden substances like the isotope mass spectrometry for anabolic agents seem preferable as they provide conclusive proof that the substance must have been taken artificially without the problem of proving that it is not inside the concentration range that may normally be reached.

4. "Undetectable" Doping and Medical Monitoring

Taking into account reports to gene doping³¹ and doping with hormones³², it may well be that in the not too far away future some highly sophisticated methods for doping may develop which, with the current analytical techniques, would be undetectable.

As no trace of a forbidden substance would be detectable, it may well become increasingly important to identify "indirect" sources of proof, like typical changes in certain body values as a consequence of doping. The approach of the steroid profile³³ may be taken as an example.

If such indirect indicators cannot supply sufficient proof for a doping offence, another approach could be to impose "health rules" in combination with medical monitoring. This is for example done by the International Cycling Union (UCI).³⁴ Another example is the upper limits of haemoglobin and haematocrit in blood used by some international federations.³⁵

Concentrations of body values above such limits are not sufficient to prove a doping offence. They are not typically reached by doping alone, but can also likely be due to intense training or, for example, training in high altitude.³⁶

Therefore, if an athlete has a higher value, this is not considered a doping offence. However, as a consequence, the athlete is still not allowed to compete; he is prohibited from taking part in the competition for medical reasons because of a possible dangerous condition of the body.³⁷ This would primarily safeguard the health of the athlete, but it also ensures equal competition between the athletes.

Medical Monitoring³⁸ may provide at least an indirect method to

p. 819 et seq.; cf. also Süddeutsche Zeitung, 1 August 2000, p. 36, Frankfurter Allgemeine Zeitung, 5 April 2001, p. 39.

- 32 J. Segura et al., Recent Progress in the Detection of the Administration of Natural Hormones, Journal of Toxicology - Toxin Reviews 1999, p. 125 et seq.; V. P. Uralets / P. A. Gillette, Overthe-Counter Anabolic Steroids 4-Androsten-3,17-dione; 4-Androsten-3ß,17-ß-diol, and 19-Nor-4-androsten-3,17-dione, in: W. Schänzer / H. Geyer / A. Gotzmann / U. Mareck-Engelke (Ed.): Recent Advances in Doping Analysis (6), Köln 1998, p. 148.
- 33 M. Donike, Longterm influence of anabolic steroid misuse on the steroid profile, in: M. Donike / H. Geyer / M. Kraft

/ S. Rauth (Ed.): Proceedings of the 11th Workshop on Dope Analysis, Köln 1993, p. 108 et seq.

- 34 UCI Cycling Regulations, Part XIII Sporting Safety and Conditions, Rule 13.1.006, 13.1.013, 13.1.014.
- 35 International Cycling Union (UCI), International Union for Modern Pentathlon (UIPM), International Biathlon Union (IBU).
- 36L. Tarasti, Legal Solutions in
- International Doping Cases 2001, p. 49; cf. also M. Kamber / P. Mullis / M. Saugy, EPO - vom Medikament zur perfekten Wunderwaffe im Sport, Neue Zürcher Zeitung 2000, p. 37.
- 37 Rule 13.1.008, 13.1.011 UCI Cycling Regulations.

combat doping in sport. Until better detection methods are found, this approach, in addition to the current doping control system, may be an adequate and legally acceptable way to fight against doping.

IV. Conclusions

As previously explained, there is no common legal definition of the term doping. Doping can either be defined in an abstract manner or in a pragmatic way, the latter predominant. According to this pragmatic definition, the mere presence of a forbidden substance in an athlete's body constitutes a doping offence and can lead to the disqualification of the athlete. On the other hand, in relation to sanctions, in particular bans, proof of culpability is necessary. The burden of proof of the offence lies with the accusing party, i.e. the sports organisation, which is made easier due to the principle of "primafacie" proof. Nevertheless the athlete can defend himself by providing evidence that the finding of the substance was due to a reason other than the application of the substance. This is relevant with regard to substances which are produced naturally by the human body. For these substances, cut-off limits have to be established to separate the permitted natural state of the body from the forbidden manipulation. In relation to sanctions, the athlete has to rebut the presumption that the finding of the substance in the body was due to intention or negligence on the part of the athlete. However it is very difficult to present credible facts to negate negligence and for this reason the rebuttal of the presumption has seldom succeeded.

> <u>e international Sports</u> Law Journal

38 Cf. also G. Wagner, Eine einfache Möglichkeit zur anreizgesteuerten Dopingbekämpfung im Hochleistungssport, in: K. Vieweg (Ed.): Doping B Realität und Recht, Berlin 1998, p. 391 (395 et seq.).

The Olympic Movement Anti-Doping Code

The Shepherd's Courage

by Janwillem Soek¹ and Emile Vrijman²

1. Introduction

Lausanne, 2nd August 1999

As you know, following the agreement which the Olympic family reached at the meeting on 27th November 1998, the draft Olympic Movement Medical Code was adopted under the title "Olympic Movement Anti-doping Code" at the World Conference on Doping in Sport in Lausanne on 2nd, 3rd and 4th February 1999. This was a major event, as it means that all the constituents of the Olympic Movement now have a common instrument with which to combat doping in sport. This Code will come into force on 1st January 2000. In the meantime, I remain,

Yours faithfully,

Juan Antonio SAMARANCH Marqués de Samaranch ³

Whith the appearance in 1995 of the Medical Code the International Olympic Committee (IOC) for the first time united its hitherto fragmented doping regulations in one comprehensive document. In addition to banning the use of prohibited (classes of) substances and providing directions and guidelines for carrying out doping controls, the IOC Medical Code further strictly banned the trafficking of prohibited (classes of) substances, provided further instructions with respect to the accreditation and practices of the so-called "*IOC accredited doping control laboratories*"

- 1 Janwillem Soek, T.M.C. Asser Institute.
- 2 Emile Vrijman, Lamsma Veldstra & Lobé
- attorneys at law, Rotterdam. 3 www.nodoping.org/pos-anti-dop_code-e

the working group. The working group should, among others, put forward proposals concerning: 10. the definition of doping and 20. a system of sanctions providing for a range of 'penalties' flexible enough to allow each IF to find what they need therein, these penalties being better adapted to the different infractions'. The chairman's name is usually preceded in IOC documents - including those he writes himself - by the epithet 'Judge'. Wherever Mbaye's name is mentioned below, please note that Judge Mbave is intended. and, in case of violation of its provisions, established sanctions for both athletes and their entourage.

Because of its' comprehensive character, the IOC Medical Code has been the focal point over the past years in the debate within the international sports community concerning the harmonisation of anti-doping rules and regulations. Not surprisingly and not widely publicized, one of the first tangible results of the "*World Conference on Doping in Sport*" which took place in early 1999, turned out to be a revised Medical Code, the so-called "*Olympic Movement Anti-Doping Code*".

2. A comparison

When compared to the Medical Code (MC), the structure of the Olympic Movement Anti-Doping Code (ADC) has essentially remained the same. Some elements of the MC however, have been assigned a new place in the scheme of things within the ADC, while other elements, such as "gender verification", have not returned at all. In several provisions within the ADC, reference is being made to the competence, objectives and tasks of the so-called "World Anti-Doping Agency (WADA)". These references are of a transitory character as WADA's competence, objectives and tasks had not yet been established clearly at the time of adoption of the ADC. Apparently, the IOC did not find it necessary to await the outcome of the deliberations concerning WADA before proceeding to adopt the ADC.

Apart from the aforementioned differences in structure and layout, the ADC also provides definitions, as well as descriptions, of several concepts and procedures markedly different from those applied in the past. This review intends to examine and comment on the most salient differences between both the MC and the ADC against the background of the harmonization and asses their consequences. First and foremost, the definition of doping, including its approach of the liability issue, as well as the sanctions ⁴ attached to it, will be discussed, after which attention will be paid to certain selected new elements of the doping control procedure, as well as the position of the doping control laboratories therein.

2.1. The description of the doping offence

2.1.1. The definition of doping

According to the MC, "*doping*" is understood to mean the use of prohibited (classes of) substances and methods capable of enhancing an

⁴ On the internet site that was especially created for the international doping conference of February 1999 there also appeared - among the various documents that were contributed to the conference some documents authored by Mr Mbaye, chairman of the working group on the legal and political aspects of doping. In his introduction of 30 September 1998 he formulated the specific tasks of