5. At the End: an Outlook

After 20 years of operation, the Arbitration Panel has become history. Amongst the International Federations, the IAAF, governing a core Olympic sport, was a forerunner in sports arbitration, in particular where doping-related matters were concerned. The IAAF has now, by virtue of Rule 15,[112] established the CAS as its appellate jurisdiction,[113] both in non-doping and in doping-related disputes which may arise in the field of operation of the IAAF. According to Rule 15, paragraph 2, CAS panels shall apply IAAF rules and bye-laws.[114] The IAAF is also a member of the WADA, but maintains its own anti-doping law and procedure within the framework of the WADA Code. Thus, the interpretation of the relevant Rules and Guidelines as developed by the Arbitration Panel will continue to be valid *mutatis mutandis*.

112 IAAF Constitution as in force from November 2003, IAAF (ed.), Constitution, Monaco 2003.

113 Rule S 12 (b) and Rules R 47 et seq. of the CAS Code of Sports-Related Arbitration.

114 The reference to "the Articles of this Constitution" is to be interpreted as including the whole of relevant IAAF law.

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The Ad Hoc Division of the Court of Arbitration for Sport at the Athens 2004 Olympic Games - An Overview

by Domenico Di Pietro*

1. Introduction

An increasing number of disputes between athletes, sports clubs and sport federations, at both domestic and international level, is settled through the dispute resolution mechanism provided by the Court of Arbitration for Sport (CAS) in Lausanne which has just celebrated its 20th anniversary.[1]

As is well known, CAS operates a so-called ad hoc division during the Olympic Games which is in charge of any disputes arising out of or connected to the Games. The ad hoc division was first set up on the occasion of the Olympic Games in Atlanta. The jurisdiction of the ad hoc division over the disputes arising out of or in connection to the Olympic Games is grounded on Rule 74 of the Olympic Charter.

Even though hearings are normally held at the place of the Olympic Games, the legal seat of the ad hoc division and its arbitration panels remains Lausanne, Switzerland. As a result, the arbitrations administered by the ad hoc division are subject to Chapter 12 of the Swiss Act on Private International Law. As far as the governing law of the disputes administered by the ad hoc division is concerned, Article 17 of the CAS ad hoc Rules states that the relevant arbitration panels must decide the dispute "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.[2]

The nature of the disputes entertained by the ad hoc division is much broader than commonly thought. It ranges from issues of athletes eligibility to the violation of anti-doping regulations. Contrary to popular belief, the doping disputes are not the majority of the cases administered by the ad hoc division. Indeed, an increasing number of arbitrations are commenced to challenge the selection of athletes or to reverse the ruling of referees. This is perhaps the consequence of the changing nature of sport. Many athletes these days spend most of their life training to achieve a result - which may or may not arrive - in an increasingly competitive environment. Winning a major international sport competition, furthermore, has also achieved some economic significance which was simply unthinkable a few years ago. The result of these combined factors is that an increasing number of competitors and sport bodies sometimes view the ad hoc division of CAS as an opportunity to revive their chances to play a role at the Olympic Games. The actual number of cases entertained by CAS at the Olympics is misleading in this respect. The complaints that eventually become an action before the ad hoc division of CAS are simply the tip of the iceberg. Arguably, if it were not for the increasing number of sports law specialist lawyers assisting athletes and federations at the Olympic Games - who carefully advise against bringing groundless actions - the number of complaints before the ad hoc division would be much higher. The ad hoc division in Athens, on its part, did not fail to firmly remind litigants that there are some areas and aspects of sport - such as field of play decisions - which should be kept within the field of play sphere and should not become the object of legal analysis before an arbitration panel.

Some of the cases entertained by the ad hoc division in Athens during the 2004 Olympic Games are briefly summarised below.

2. The Cases

CAS OG 04/001
Russian Olympic Committee v. Fédération Equestre Internationale (FEI)

Pursuant to the waiver by the National Olympic Committees of Finland and Israel of their places in the Olympic Dressage Competitions, the riders from those two countries were replaced by the FEI with second riders from Australia and France. On 9 August 2004, the Russian Equestrian Federation applied to the FEI to reserve a position in the Olympic Dressage Individual Competitions for the Russian rider Alexandra Korelova. The FEI replied to the Russian Equestrian Federation rejecting the request. The Russian Olympic Committee appealed against that decision. The CAS Panel in charge of the dispute had to go through a lengthy and complicated analysis of the relevant FEI Regulations for Equestrian Events at the Athens 2004 Olympic Games.

Of interest on a general point of law the Panel's dictum according to which:

> *...the interpretation of the FEI Regulations, as indeed of the rules of any sporting body, is a question of law.*

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1 See in general on the history, jurisdiction and case law of CAS: Reeb, *Digest of CAS Awards 1986-1998*, 1998; Reeb, *Digest of CAS Awards 1998-2000*, 2000: Reeb, *Digest of CAS Awards 2001-2003,* 2004; McLaren. *Doping Sanctions: What Penalty?,* ISLR 2002 (2); Kaufmann-Kohler, *Arbitration at the Olympics*, 2001; Paulsson, *Arbitration of International Sports Disputes,* Arbitration International, Vol. 9 No. 4 (1993), p. 359; Samuel and Gearhart, *Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport*, Journal of International Arbitration, Vol. 6 No. 4 (1989), p. 39.

2 On the application of international law in sport disputes see Di Pietro, *Principles of International Law in the Case Law of CAS,* ISLR, 2004.

With specific reference to the implementation of the FEI Rules the Panel observed:

> *While it is always necessary to seek a purposive and contextual construction of such rules so as to discern their true intent and effect, a body cannot impose by discussion or decision after the coming into force of the rules, a meaning which they do not otherwise bear. The Panel must add that while in practice the FEI (or any other body in similar circumstances) must form an initial view as to the meaning of its rules, it is the Panel which is vested with the function of finally determining that meaning, subject only to any recourse (if any) to the Swiss Federal Tribunal.*

In the Panel's view the FEI had made an error, albeit in good faith, in allocating second places to Australia and France in that order rather than to Russia. The Panel required FEI to provide it with a new order of merit of eligible athletes re-drafted on the basis of the interpretation of the FEI Rules ruled by the Panel itself. Such list included the Russian rider that had been excluded at first. For these reasons the Panel ordered that the Russian Olympic Committee be allocated the disputed second place.

CAS OG 04/003
Torri Edwards v. International Association of Athletics Federations (IAAF) and USA Track and Field (USATF)
On 24 April 2004, Ms Edwards produced a urine sample for doping control at an IAAF event in Martinique. The sample contained nikethamide which is a stimulant included in section 1 of the IAAF List of Prohibited Substances and Methods. The nikethamide had been ingested through two glucose tablets given to Ms Edwards by her physical therapist. The tablets were labelled "coramine glucose". Of interest in the case was the fact that glucose is normally sold without addition of any other elements. Only in a few countries, namely France and former French colonies, it appears to be sold in a composition containing nikethamide. The label on the package purchased by the therapist, however, clearly indicated, even though in French, that the product contained nikethamide.

The US Anti-Doping Agency ("USADA") charged Ms Edwards with an anti-doping violation and asked that she be suspended for two years. Ms Edwards requested that her case be arbitrated by the American Arbitration Association Panel ("AAA"). Ms Edwards admitted that she had committed a doping offence but argued that the existence of exceptional circumstances pursuant to the IAAF Rules (Rule 38.12 et seq) should lead to the elimination or, at least, the reduction of the sanction. The AAA Panel rendered a final award imposing a two-year ban. Ms Edwards appealed such decision before the ad hoc division of CAS on, inter alia, the following grounds:

i the sanction imposed on Ms Edwards was overtly wrong and violated every principle of fairness in sport. It was indeed argued that the same sanction had been applied in the past to athletes who had openly admitted to have deliberately taken illegal substances for several years and with the clear intention to cheat;
ii the IAAF's new fixed sanction ran counter to CAS precedents holding that punishment should be a function of the athlete's culpability;
iii the application of the newly promulgated IAAF rules was inequitable given that not all Olympic athletes were currently subject to the same sanction for the same type of doping offence.

The CAS Panel observed that the IAAF Rules set out that exceptional circumstances provisions apply where there is (a) no fault or no negligence or (b) no significant fault of significant negligence. In the first instance the exceptional circumstances would justify an elimination of the period of ineligibility while in the second instance they would justify a reduction of that period. The Panel expressly commented on Ms Edward's honesty, integrity and character and recognised that she had not sought to "cheat" in any way. The Panel, however, had to find that there was a clear case of negligence on the part of the athlete. In this respect the Panel observed that the leaflet contained in the package purchased by the therapist even went so far as to include a warning to athletes that the product can result in a positive test in the case of anti-doping control. Therefore Ms Edwards and her physical therapist were clearly negligent as they failed to inquire or ascertain if the product contained a prohibited substance. The negligence of the athlete could not amount to the extraordinary circumstances referred by the IAAF Rules and therefore the appeal had to fail.

The Panel furthermore disagreed with Ms Edwards's argument that the appealed decision was significantly inconsistent with the previous body of cases concerning the non-culpable assumptions of banned substances.

With regard to the length of the sanction imposed on MS Edwards, the CAS Panel found that the two-year sanction had to be imposed as a result of the IAAF's adoption of the WADA Code. With specific reference to uniformity in the application of sanctions among different sports, the Panel observed that, in the fight against doping in sport, such inequity was justified and that federations should be supported in their adoption of the WADA Code.

No matter how regrettable it must have been to reach that conclusion, the relevant rules did not leave much leeway to the Panel. There is no argument which can justify a lenient approach to doping offences. However, it may be possible to argue whether different sanctions should be applied where it is clearly established that the athlete did not intend to cheat and that the assumption of banned substances was the result of a genuine and isolated negligent conduct.

CAS OG 04/004
David Munyasia v. International Olympic Committee (IOC)
On 6 August 2004 Mr Munyasia, a member of the Kenyan Olympic Boxing Team provided a urine sample for a doping control. The World Anti-Doping Agency ("WADA") reported that there were adverse analytical findings. The IOC set up a Disciplinary Commission which found that Munyasia had a concentration of cathine that exceeded the permitted threshold and, therefore, there was a doping offence pursuant to Article 2.1 of IOC Anti-Doping Rules. The Disciplinary Committee recommended that the Executive Board exclude Mr Munyasia from the Olympics and withdraw accreditation. The decision of the IOC made by it Executive Board on 10 August 2004 to exclude Munyasia from the Olympic Games and withdraw his Olympic accreditation was appealed.

Mr Munyasia grounded his appeal on the argument that the banned substance was present in his system either by mistake or unknowingly. A possible explanation for the presence of such substance in his body might have been the antibiotics that he had taken as a result of a boil on his left thigh. Mr Munyasia also requested that the sample be subject to an independent analysis and a deferral of the decision until such analysis had been completed.

The Panel upheld the decision of the IOC Executive Board to exclude Mr Munyasia from the Olympic Games and remove his accreditation. The Panel found that a doping offence had been clearly established and, in the absence of circumstances which could excuse such violation, the appeal should fail. With regard to Mr Munyasia's request for justification of the doping offence, the Panel observed that, in accordance with the relevant rules, it is the personal duty of the athlete to ensure that no prohibited substances enter his or her body.

The Panel also refused the request for deferral explaining that its role was to confirm or reverse the decision of the IOC Executive Board and such a request regarding further analysis as well as its implications was outside the scope of the Panel's jurisdiction.

CAS OG 04/005
David Calder and Christopher Jarvis v. Federation Internationale des Societes d'Aviron (FISA)
The two Canadian rowers Mr Calder and Mr Jarvis came unintentionally into contact with a rival teams' (South African) oar blades during the Olympics' semi final race. As a result they were excluded from the race by the Umpire. The Umpire's decision was then upheld

by the FISA Board of Jury. The FISA Executive Committee - in order to alleviate the disappointment of the two rowers who had been tipped as one of the most likely teams to reach the final and considering that the unfortunate incident had taken place only a few meters from the finishing line - overturned this decision and allowed Mr Calder and Mr Jarvis to participate in the B Final. The two rowers appealed this decision before CAS. They observed that the situation was an extreme case presenting special circumstances such as the fact that (i) the incident had taken place very close to the finishing line, (ii) the South African team had sent a letter stating that they would raise no objections if the two Canadian rowers were allowed to participate to the A Final, and (iii) that it was technically and physically possible - and indeed not unheard of - to add an extra team to those already qualified to the A Final. They pointed out that such special circumstances had been indeed ascertained by the Committee which, as a result, entered them into the B Final. What they contested of the Committee's decision was that the special circumstances should have led to their entry into the A final and not merely into the B final.

It is worth pointing out that Mr Calder and Mr Jarvis did not contest any field of play decision as the existence of a racing infraction was not challenged. They instead challenged the use of discretion exercised by an administrative body such as the Committee. This point seems to have led the Panel to accept jurisdiction on the case even though the award was silent on the issue.

The CAS Panel observed that the Committee had overturned the Board of the Jury's decision to exclude the Applicants by declaring that they were eligible to participate in the B Final in the exercise of their discretion. The Panel, however, found that the exercise by the Committee of the discretionary power was not objectionable. The Committee's decision had both corrected the sporting disadvantage caused by the infraction to the South African pair and adopted a lenient approach when imposing a penalty to take into account its unintentional nature. The appeal was, as a result, dismissed.

CAS OG 04/006
Australian Olympic Committee ("AOC")) v. International Olympic Committee ("IOC")and International Canoe Federation ("ICF")
On 8 July 2004, the AOC lodged entry forms with the Organising Committee of the Olympic Games for Chantal Meek, Amanda Rankin, Kate Barclay and Lisa Odenhof into the Women's K4 500m.

Following the erroneous reallocation of unused quota places by the ICF in respect of the Women's Kayak Flatwater racing event, the AOC appealed to CAS.

In the meanwhile, the AOC submitted entry forms to ATHOC for Chantal Meek and Amanda Rankin in the Women's K2 500m. It also conditionally entered Lyndsay Fogarty and Paula Harvey in that same event. Their accreditation was confirmed by the IOC.

Later, the ICF conceded that it "erroneously did not allocate the K2 quota Women places to the NOC of Australia." After negotiations with the IOC, the NOC of Australia was allocated two more quota places in K2 Women Flatwater Racing competition to the places which add already been allocated. As a result of this settlement, the AOC withdrew its appeal to CAS and nominated Susan Tegg and Paula Harvey to compete in the Women's K2 500m. It also nominated Amanda Rankin to compete in the Women's K1 500m.

At a later stage, the AOC submitted an entry form providing for Amanda Rankin to compete in the Women's K1 500m and Paula Harvey and Susan Tegg to compete in the Women's K2 500m. It also withdrew the entry for Amanda Rankin and Chantal Meek for the Women's K2 500m.

The ICF rejected the entry form regarding Amanda Rankin's right to compete in the Women's K1 500m because it had been submitted after the entry deadline. The AOC appealed the ICF's decision before CAS on the following grounds.

i The IOC alone has the decision on entries. Amanda Rankin was entered as an athlete participant in the Games in the Women's K4 500m. She was so entered prior to the deadline.
ii Under the Participation Criteria the AOC has the right to enter Amanda Rankin in the Women's K1 500m as, inter alia:
   a) the K1 500m was in the same Women's kayak Flatwater racing category as the K4 500m;
   b) Amanda Rankin's participation in the K1 500m was within the total number of qualified women's athletes.
iii The IOC and the ICF were precluded from rejecting the entry form on the basis that it was out of time with respect with Amanda Rankin whilst at the same time accepting and acting on that same entry form in respect of Paula Harvey and Susan Tegg.

The IOC and the ICF's entered similar defensive counter-arguments according to which they had acted properly because (i) it was important that athletes and national federations know the entries in each racing competition so that they may plan accordingly; (ii) after each national federation submitted its entries on or before 21 July 2004, the number of entrants for each race was known by all competitors; (iii) neither the main entry form nor the conditional entry form submitted by the AOC indicated an intention to have a competitor in the Women's K1 500m event; (iv) the AOC did not indicate on the conditional form that, if the two additional athletes were accepted for the Women's K2 500m event, Amanda Rankin would instead compete in the Women's K1 500m event.

The CAS Panel after a thorough analysis of the relevant provisions noted that under the circumstances:

> *...we would have been inclined to dismiss the appeal in the light of the considerations emphasised by both IOC and ICF as to the importance of respecting clear and well publicized entry time limits. Nothing we say should be interpreted as undervaluing the role that such limits play in international sport.*

However, there was an additional complicating factor which the Panel had to take account of. This was the legitimate inference from the sequence of events that - had the ICF, as it admitted, not erroneously refused two additional K2 quota places to the AOC prior to their change of mind - Amanda Rankin would have been entered for the K4 and K1 events. She was only contingently entered for the K2 event on the basis that two additional K2 quota places continued not to be allocated to AOC. Once the two K2 quota places were allocated, she was withdrawn from the K2, and entered in the K1.

In the Panel's view the ICF was estopped by its own original admitted error from relying on the late entry for K1 as a ground for rejecting it, since the entry which the ICF had rejected was the necessary consequence of that error. Accordingly, the Panel allowed the appeal and directed that the IOC and the ICF accept the entry of the AOC to enable Amanda Rankin to participate in the women's K1 500m.

CAS OG 04/007
Comite' National Olympique et Sportif Francais (CNOF), British Olympic Association (BOA) and United States Olympic Committee (USOC) v Federation Equestre Internationale (FEI) and National Olympic Committee for Germany
This arbitration was an appeal against the decision taken by the Appeal Committee of the FEI which had set aside the Ground Jury ruling on 18 August 2004 that a time penalty be imposed on the German equestrian athlete, Bettina Hoy, for failing to complete a jumping event within the required time limit. According to Article 551 of the FEI's Rules for Eventing the Ground Jury "is ultimately responsible for the jumping of the event and for settling all problems that may arise during its jurisdiction."

In the competition which gave rise to this dispute each rider had 90 seconds to complete the jumping course. The time was recorded using both a computerised timing device and a stadium clock. A bell was rung to signal the round and the rider then had 45 seconds to cross the start line. The computerised timing device started from the earlier of (i) 45 seconds coming to an end or (ii) the rider crossing the start line. A stadium clock was simultaneously started by a member of the Ground Jury but this clock could be stopped and re-started as and when this was needed.

In the present matter, Ms Hoy was engaged in competing in the

first round of show jumping. The bell rang and the 45-second countdown commenced. She increased the pace of her horse to a canter and crossed the start line, thereby automatically triggering the computerised timing device. As she approached the first jump she turned her horse away and made a wide circle which brought her once again behind the start line. She then proceeded to cross the start line a second time. Immediately before she did so, the stadium clock was apparently reset to zero and indicated her time from the moment of her second crossing of the start line. The computerised timing device, however, continued to measure her time from the moment of the first crossing. This had the effect that, although the stadium clock indicated that she had completed the course in less than the allotted 90 seconds, her actual time as recorded by the computerised timing device was some 12,61 seconds slower, namely 102,61 seconds. After lengthy deliberations, the Ground Jury ruled that Ms Hoy should be penalised with 13 time penalties.

The effect of the Ground Jury ruling was that, in the individual competition, Leslie Law of Great Britain won the gold medal, Kimberly Severson of the United States won the silver and Ms Funnell of Great Britain won the bronze. In the team competition France won the gold medal, Great Britain won the silver and the United States won the bronze. This prompted Ms Hoy and the NOCG to appeal to the FEI's Appeal Committee. The Appeal Committee found to have jurisdiction on the complaint since, in its view, this case was one of interpretation of the FEI Rules and not an attempt to second guess the Ground Jury's decision which would have been in breach of the so-called field of play rule. The Committee concluded that the countdown had been restarted resulting in a clear injustice to the rider concerned. The Committee therefore removed the time penalties. As a result of the Appeal Committee's decision, Ms Hoy was awarded the gold medal in the individual competition while the German team received the gold medal in the team competition. Leslie Law and Kimberly Severson were downgraded to silver and bronze in the individual competition and France and Great Britain to silver and bronze in the team competition. Ms Funnell and the United States lost their bronze medals.

The decision of the Committee was appealed before the ad hoc division of CAS before which the Appellants argued that the Appeal Committee had erred in holding that the appeal brought before it by Ms Hoy and the NOCG involved a question of interpretation of rules. No rule had been cited in their report and no interpretation took place. The issue was clearly one of fact and was therefore not appealable. The FEI, on the other hand, submitted that the Appeal Committee had correctly held that the issue was one of interpretation rather than fact. It was not in issue that Ms Hoy had crossed the start line twice. What was in issue was whether the time measured by the computerised timing device should be accepted or not. Accordingly, the FEI concluded that the Appeal Committee had correctly upheld the appeal on the grounds of fairness to Ms Hoy, who had clearly been misled by the resetting of the stadium clock at the time of her second crossing of the start line.

According to the CAS Panel it was clear that the Ground Jury ruling was of a purely factual nature and therefore fell within the exclusive jurisdiction of the Ground Jury itself. The arguments of the FEI and the NOCG to the contrary were therefore dismissed. Although the Appeal Committee had been unanimous that it was a matter of interpretation, the CAS Panel objected that this assumption alone (in the absence of any explicit reference to rules) could not be accepted. As the Ground Jury decision could not be challenged, the Appeal Committee's decision had to be annulled. The Ground Jury's decision fell clearly within the so-called "field of play", an area on which neither the Appeal Committee nor the CAS should affirm jurisdiction except in cases of bad faith or malice.

CAS OG 04/008
Comité National Olympique et Sportif Français ("CNOSF") v. International Canoe Federation ("ICF") and International Olympic Committee ("IOC")

This arbitration arose out of the refusal of the ICF to reallocate two quota places to the CNOSF, on the eve of the competition in the Men's C2 1000.

As early as 26 May 2004 the CNOSF advised the ICF that if it was the recipient of reallocated quota places it would use them all in the light of the competitiveness of the French boats. Between 13 July and 21 July 2004, the ICF re-allocated approximately 20 unused quota places and, by that means, filled all 246 places available. The ICF however carried out this activity without following its own re-allocation rules set out in its Participation Criteria. The reallocated positions included two French male paddlers who were subsequently entered in both the Men's C2 500m and C2 1000m races.

On 26 July 2004, The French Canoe Kayak Federation ("FFCK") - which was not entitled to any places via the route of qualification - wrote to the ICF raising some questions about ICF's reallocations. Neither the FFCK nor the CNOSF, however, formally challenged the ICF's allocations.

On 10 August 2004, the FFCK again wrote to the ICF and stated that the ICF had not followed its own qualification system for Athens Olympic Games. The ICF and the FFCK subsequently agreed on the allocation of a newly opened quota position for a French woman kayak competitor.

At a later stage, the FFCK learned that three Chinese paddlers and one Romanian paddler would not be competing. As a result, four quota slots would not be used. The FFCK therefore asked that Messrs Leleuch and Barbey be added and that they be substituted for the French male paddlers then entered in the Men's C2 1000m event. However, no action was taken by the ICF in response to that request. Later, the FFCK wrote to ICF asking that Messrs Leleuch and Barbey be allocated two of the unused quota places and placed in the Men's C2 1000m event. On 22 August 2004, a Jury of the ICF considered the FFCK's request to add Messrs Leleuch and Barbey and rejected it. Later that day, that decision was appealed before the ad hoc division of CAS.

The CNOSF's main ground for appeal was that ICF was obliged to fill the four unused quota if the number of athletes position allocated did not reach 246 places. The ICF Olympic Qualification Rule on the point required that "Every accredited athlete must compete in an event at the Olympic Games, unless in exceptional circumstances approved by ICF. It is not possible to enter an athlete in the Olympic Games only as a substitute." The ICF, according to the CNOSF's argument, had not strictly followed the reallocation rule, and the French team of Messrs Leleuch and Barbey should have been considered during the third round of quota distribution for additional places.

The ICF replied to the appeal submitting - amongst other things - that (i) only the IOC could authorise the addition of the two late entries, (ii) there was no obligation on the ICF to allocate the four places that had become available and (iii) even if places were available France would not have been the automatic beneficiary of them since it would not be equitable to favour France just because CNOSF had two competitors in Athens available to take advantage of the two unused places.

In the Panel's view and contrary to the position of the ICF, it was compulsory for the ICF to reallocate such positions if the number of 246 had not been reached.

The Panel, however, also questioned the timing of the complaint filed by the CNOSF with regard to the ICF's allocation activity. The Panel noted that the CNOSF had the option of pressing its cause by appeal to the appropriate authorities, including ultimately CAS, in order to enforce its asserted rights but did not do so until very late. The Panel refrained from saying anything to deter sensible negotiation of sporting disputes. However, it did not fail to observe that there comes a time when a choice has to be made by the aggrieved party as to how that grievance should be redressed. In the Panel's view it was in all the circumstances of the case far too late for CNOSF to retrace its steps and to take the path of litigation at that stage.

With regard to the CNOSF's reliance on the unused quota places, the Panel stated that CNOSF's claim in that respect was no better than that of any other country. The mere fact that the CNOSF had

been astute enough to give advance warning of its desire to make use of any places that might become available, and had paddlers ready to perform, should not gain it an advantage..

CAS OG 04/009
Hellenic Olympic Committee ("HOC") and Nikolaos Kaklamanakis v. International Sailing Federation ("ISAF")
This arbitration dealt with an appeal against three decisions of the Protest Committee to abandon Race 1 of the Men's Windsurfer Mistral held on 15 August 2004 as well as against one decision of the Protest Committee to deny the request of Mr Kaklamanakis for redress in respect of the hearing of the protests.

At the beginning of the above mentioned race, instructions for the number of times to sail the course were posted on the bow of the committee boat. An electronic display also showed the wind direction. At the team leaders' meeting, on the morning of 15 August 2004, the organizing committee made an announcement that the finishing flags would only be raised when the race leader was rounding the last mark and was then heading for the finish. Thirty-five minutes into the race, Mr Kaklamanakis was leading the race and rounded mark 3, the last mark. He saw the flags raised and headed for what he assumed to be the finish line. When Mr Kaklamanakis crossed this finish line, the Race Committee boat made the finishing sound signal and the spectators and press cheered. His finishing time was forty-one minutes. Mr Kaklamanakis was then immediately intercepted by a press boat, forcing him to tack and stop and the press started to ask him questions. After finishing the race, three sailors protested about what had happened and requested the race be abandoned. After a three hour protest hearing, the Protest Committee ruled that the race be abandoned and be re-sailed on a later date. On the following day, 16 August 2004, Mr Kaklamanakis presented a protest for redress but the Protest Committee concluded that such request was in fact a request to reopen the hearing of cases already discussed and therefore was dismissed. The re-race of the Men's Windsurf Mistral was held on 17 August 2004.

The CAS Panel after asserting its jurisdiction on the case noted that Rule 70.4 of the Racing Rules provided that a decision of an international jury properly constituted as the Protest Committee could not be appealed. According to the Panel, this provision must be read in conjunction with Rule 70.1. according to which, if the right of appeal has not been denied under Rule 70.4 (which the Panel found to be the case), then only appeals of rules interpretation should be permitted. Consequently, appeals of fact should not be allowed. As a result, the Panel found that Protest Committee decision could not be appealed.

Of interest in this case, amongst other things, was the obiter rendered by the Panel according to which CAS has full jurisdiction to overrule the Rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process.

The Panel also entertained the question as to the right of the parties to attend and be allowed to be accompanied at hearings of Protest Committees. On this issue the Panel concluded that any decision to deny the attendance of third parties or consultants was within the exclusive jurisdiction of the Chair of the Protest Committee.

CAS OG 04/010
Mr Yang Tae Young v International Gymnastics Federation (FIG) and United States Olympic Committee (USOC)
On the penultimate day of the Games Mr Yang, a gymnast for the Republic of Korea, lodged an application with the ad hoc division of CAS complaining about a marking error made on 18 August 2004 during the Men's Individual Gymnastics Artistic All-round Event Final. While the ad hoc Panel was ready to hear the application, most of the parties were not in a position to proceed. Accordingly, and in compliance with Article 20 of the CAS ad hoc Rules, the Panel referred the dispute to arbitration under the ordinary CAS Rules. As a result, this dispute was not finally settled in Athens by an ad hoc division Panel.

As mentioned above, the dispute arose out of a marking error which took place during a gymnastics competition and specifically in relation to Mr Yang's performance on the parallel bars. The scoring in this competition was a combination of start values - based on the degree of difficulty - and execution. There were two teams of judges. One determined the start value while the other dealt with the execution scores (these are called A Jury and B Jury respectively). The scores were posted on electronic score boards immediately after the routine had finished.

Mr Yang was given a start value of 9.9 instead of 10. The reason for the error was that the A Jury misidentified a movement in the performance. Mr Yang asserted (and the FIG originally concurred) that in the absence of that misidentification Yang would have received the gold medal and not the bronze. Mr Yang's complaint, however, was not raised until after the competition had ended since Mr Yang's coach had not seen the results board due to both poor visibility of the scoring board from his position and because he was busy preparing for the next round. Nonetheless, Mr Yang challenged, with no success, the results through the internal routes and eventually filed an appeal with CAS.

The CAS Panel observed in its decision that there was a mechanism in place for dealing with judging errors. But there seemed to be a lack of familiarity with how it actually worked in practice. In any event, the Panel said that it was clear that any appeal must be dealt with during and not after a competition. This interpretation was consistent with a natural expectation that the identity of the winner should be known at the end of a competition (even though exceptions to this principle do exist).

The Panel entertained in details the issue as to what extent courts (including CAS) could interfere with field of play decisions. An absolute policy to refuse to interfere was argued as having a defensible purpose and policy. However, the Panel went on to point out that sports law does not have a policy of abstention if there is fraud, bad faith or corruption. With specific reference to the case at hand, however, the Panel's view was that (i) the subject matter of the appeal was not justifiable and (ii) the protest was made too late and not in conformity with the relevant rules. The Panel considered that an error identified with the benefit of hindsight should not be a ground for reversing the competition. Indeed, the Panel stressed in this regard the importance of finality and said that rough justice may be all that sport can tolerate. The appeal was therefore dismissed.

3. Conclusions

As we have observed above the cases administered by the ad hoc division of CAS at the Athens 2004 Olympic Games showed an increase in the challenges to refereeing decisions which were either wrong or perceived to be unfair. Even though only a few complaints were eventually formalised into actual CAS proceedings many more were about to reach that stage. A regrettable element of the Olympic Games was obviously the presence of doping violations. The stringent regulations aimed at eradicating this terrible plague as well as the diligent enforcement of such regulations by CAS are to be praised and supported. It has been observed in this respect that, perhaps, the fight against doping should differentiate between sanctions to be imposed on deliberate cheating and sanctions to be imposed where the violation is the result of mere and genuine negligence. The objective difficulty in ascertaining the nature of the offence that such differentiation would be likely to give rise to is however a problem that may stop any future policy in that direction at least as long as doping remains such a malicious and unfortunately widespread enemy of sport and health.

Despite the presence of such difficult issues that the Olympic Movement will have to tackle in the future, one of the many positive notes in Athens, together with the excellent organisation of the Games, was that - once again since the creation of the ad hoc division - the Court of Arbitration for Sport has not failed to provide the Olympic Games with highly professional and perfectly organised service for the fast and effective protection of the rule of law in sport disputes.