Much stronger is the wording used in the so-called Cotonou agreement, which is a Partnership Agreement concluded between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. The idea behind this Partnership Agreement is a common commitment to work together towards the achievement of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy. The Union's policy is to make, through cooperation, a significant contribution to the economic, social and cultural development of the ACP States and to the greater well-being of their population.

The Cotonou Agreement also contains a non-discrimination clause with regard to nationality. Article 13(3) of the Cotonou Agreement provides:

> "The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal."

This formula "*shall be free from any discrimination*" is very strong and quite comparable to the wording used in the agreement applied in the *Kolpak* Case and as used in Article 39(2) of the EC Treaty. The provision furthermore has quite a large impact, given the sheer number of countries addressed by the Cotonou Agreement. These so-called ACP countries are:

African countries: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Brazzaville), Congo (Kinshasa), Cote d'ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe;

Caribbean countries: Antigua, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St.-Kitts & Nevis, St -Lucia, St.-Vincent, Suriname, Trinidad & Tobago;

Pacific countries: Cook Islands, East Timor, Federated State of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

This brings us to a final remark with regard to the limits of the discussion. The clauses of the association and cooperation agreements mentioned above which were used in *Kolpak* and *Simutenkov* provide protection against discrimination on the basis of nationality in the context of employment, working conditions and remuneration. The agreements generally do not provide for labour market access. The application of the non-discrimination clause is mostly conditional upon whether the person concerned is legally employed in the territory of the EU Member State concerned. Determining whether to grant labour market access and issue a residence or work permit is still the prerogative of the national - Member State - authorities. In other words, it can still be Member State policy to control the entry of workers, including professional football players. However, once legally entered and employed in the Member State concerned, the player has the rights conferred upon him by the non-discrimination clause contained in the association and cooperation agreement with his country of origin.

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The IAAF Arbitration Panel

The Heritage of Two Decades of Arbitration in Doping-Related Disputes

by Christoph Vedder*

1. Introduction

In summer 2001, the 43rd Congress of the International Association of Athletics Federations (IAAF) during its Edmonton session decided to discontinue its Arbitration Panel and to join the arbitral dispute settlement system provided by the Court of Arbitration for Sport (CAS). However, according to a transitory provision several cases still came before the Arbitration Panel in 2002 and 2003 while the very last dispute to be decided by it was referred to the Panel as late as in 2004.[1] Having been established in 1982, the Arbitration Panel operated since 1984 when the first list of arbitrators was composed. Now, we are able to look back on two decades of settlement of sport-related disputes by arbitration, in particular in doping matters, within the framework of a major International Federation. In August 2003 as a next step the 44th IAAF Congress in Paris amended the IAAF's constitutional rules on doping to bring them into line with the WADA Code. The overall result was a streamlining of the IAAF's anti-doping policy both in substance and procedure, in accordance with the general trend of international and inter-sports harmonisation.

Some 30 years ago, international sports and in particular major events such as the Olympic Games began to be confronted with legal issues. For example, disputes arose concerning admittance of participants into host countries, as was the case with the IOC-accredited representatives of Taiwan in the Olympic Games in Montreal in 1976. At that time, disputes mainly arose between sports-governing bodies and public authorities,[2] and individual athletes did not yet fight for their rights, as the case of Karl Schranz, the Austrian skier who was excluded from the Sapporo Winter Games in 1972, clearly demonstrates. Furthermore, doping was not yet a legal issue. However, in a legal opinion delivered in May 1977 it was strongly recommended that the IOC should establish a form of arbitration for the settlement of disputes arising from the running of Olympic Games.[3] The idea

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1 See below under IV.

2 Vedder, The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law, German Yearbook of International Law, vol. 27 (1984), p. 233, 234 *et. seq.*

3 Rudolf/Seidl-Hohenveldern/Simma, Pilot Study on the Improvement of the Juridical Status of the International Olympic Committee, submitted May 1977, p. 48, 62; not published.

behind this proposal was to have a group of personalities of the highest international reputation, e.g. Nobel Peace Prize winners, available for dispute resolution on location. Since the Olympic Games in Atlanta in 1996, the CAS provides an ad hoc Division for the resolution of disputes arising under the Olympic Charter during and ten days before each Olympic Games and Winter Games.

Today, national and international arbitration are an inseparable part of the institutional machinery which governs national and international sports. During its existence, the Arbitration Panel of the IAAF developed a considerable body of case law in doping-related disputes.

2. The Legal Basis

The Arbitration Panel was based on the IAAF Rules. The statute of IAAF, or "the Rules", consists of the "IAAF Constitution",[4] the anti-doping rules[5] and the technical rules.[6] Until 2001, the jurisdiction, the composition, the procedure and the powers of the Arbitration Panel were regulated in Rules 21 to 23 of the "Constitution", while substantive anti-doping rules could be found in Rules 55 to 61. However, the Panel also had jurisdiction to resolve any other disputes arising within the IAAF, including non-doping-related disciplinary matters.[7]

Apart from an amendment adopted in 1991, by which the legal basis of the Arbitration Panel and its jurisdiction were changed considerably, further amendments merely reflected factual developments or were intended as legal improvements. Except where indicated otherwise, the following refers to the IAAF Rules as they were in force in 2000.[8] The relevant Rules were implemented in more detail in the annually revised Procedural Guidelines for Doping Control (PGDC), both as regards substance and procedure.[9] The PGDC were adopted by the IAAF Doping Commission subject to the approval of the IAAF Council.[10]

2.1. The Formation and Composition of the Arbitration Panel

In 1982 the IAAF Congress during its session in Athens decided to establish an Arbitration Panel for the final resolution of disputes of any kind which might arise within the IAAF family. The members of the Arbitration Panel were first elected by the IAAF Congress in Los Angeles in 1984. The Panel began its judicial activity in 1985 with the case of *Renaldo Nehemiah and Willie Gault*. The timely coincidence with the formation of the CAS was not by chance.

Originally, the Arbitration Panel consisted of a list of 6 persons, which was expanded to 9 persons in 1999. All persons on the list were well-renowned lawyers who were committed to international sports law.[11] The first Chairman of the Panel, who held the position until 1997, was Judge Lauri Tarasti from Finland. As of 1997 until the cessation of the Panel the author of the present article served as Chairman. The members were elected for a four-year term of office and could be re-elected. The Chairman was elected and re-elected for a two-year term of office from among the Panel members.[12]

Candidates were proposed by the continental associations of national athletic federations and, after approval by the Council, elected by the Congress.[13] The Congress is the bi-annual convention of the national athletic federations which are members of the IAAF. The Congress has full powers and is the main organ of the IAAF. The Panel's overall composition thus reflected the worldwide membership of the IAAF. A few of the panel members were also CAS members.

The specific panels to hear cases were composed of two arbitrators who were appointed by rotation and the Chairman of the Arbitration Panel who presided over every panel, except when he was excluded based on the fact that he was a citizen of a country whose national federation was involved in the case before the Panel.[14] In such cases, the Chairman appointed a Senior Arbitrator to chair the panel.[15]

2.2. The Independence of the Arbitration Panel

As the members of the Arbitration Panel were elected by the Congress, which is a governing body of the IAAF, the Panel could not be said to be legally independent from the IAAF. The Panel was listed among the Committees established according to the IAAF Constitution, but it maintained a special status. However, it could not be considered as a truly independent arbitral body in relation to the IAAF, as may be concluded from the lessons learned with respect to the former position of the CAS in relation to the IOC.[16]

However, in practice the Arbitration Panel acted completely independently from the IAAF. After a case had been referred to arbitration, in a broad interpretation of Rule 23, paragraph 6, the Chairman alone handled the proceedings, including the appointment of the arbitrators, with only minor technical support from an officer of the IAAF headquarters especially assigned to him. In order to make use of the technical and logistical facilities the hearings took place at the premises of the IAAF in London and later in Monaco.[17] Experience has shown that the arbitrators themselves and thus the entire Panel not only considered itself completely independent vis-à-vis the IAAF, but that it also acted in complete independence and impartiality vis-à-vis the parties.

One possible negative point is that the athletes concerned were not given the right to appoint one arbitrator. This is explained by the fact that originally and basically, the Arbitration Panel was designed for dispute resolution amongst the member federations and the IAAF. Even doping-related disputes, according to the Rules, are conceived as disputes between the IAAF and a member federation. Thus, the arbitrators elected by the Congress, which is a body actually composed of representatives of the member federations, were really elected by the potential parties to disputes which might come before the Panel. However, the fact that the athletes concerned could not appoint an arbitrator was an inherent imperfection.

2.3. Jurisdiction of the Arbitration Panel

The Arbitration Panel's jurisdiction was regulated according to Rule 21. The Panel had original jurisdiction to hear all disputes between national athletic federations affiliated to the IAAF, or between national member federations and the IAAF Council or Congress.[18] Each national federation had to provide in its statutes that all disputes between the federation and an athlete,[19] or between an athlete under its jurisdiction and the IAAF would be submitted to arbitration. In the case of a dispute between an athlete and the IAAF, the IAAF Council could choose whether it would be submitted to the Arbitration Panel.[20] Cases could be referred to the Panel provided that the internal remedies available under the statutes of the national federation were exhausted.[21]

For doping-related matters, the jurisdiction of the Panel was specified in more detail in Rule 21, paragraph 3. Chiefly, the Arbitration Panel was competent to hear cases in two situations:

- if an athlete, despite the finding of a national federation's disciplinary tribunal that a prohibited substance was present, considered that the "doping control had been carried out in material breach" of the IAAF anti-doping rules,[22] or

4 Rules 1 to 54 of the IAAF Constitution, IAAF Official Handbook 2002/2003, Monaco 2002.
5 "Control of Drug Abuse", Rules 55 to 61.
6 Rules 101 to 299.
7 Rule 54.
8 IAAF Official Handbook 1998/1999, Monaco 1998.
9 Procedural Guidelines for Doping Control, 2000 Edition, Monaco 2000.
10 Rule 55, paragraph 10.
11 Rule 22, paragraph 3.
12 Rule 22, paragraph 5 subsection 2.
13 Rule 22, paragraph 2 and 3.
14 Rule 22, paragraph 7.
15 Rule 23, paragraph 6 (iii).
16 Swiss Federal Court, decision of 15 March 1993, *Gundel*, BGE 119, p. 271 *et seq.*; in this decision the Swiss Federal Court concluded that the CAS, in a case between an athlete and an International Federation, was to be regarded as an independent arbitral tribunal in the sense of the New York Convention (see footnote 41). However, the Court also noted that the CAS might not be sufficiently independent to be regarded as a true arbitral tribunal vis-à-vis the IOC; Vedder, The development of arbitration in sports law, in: Stinson (ed.), Supplement to the Proceedings of the International Athletic Foundation Symposium on Sports and Law, 1995, p. 33, 38 *et seq.*
17 One exception being the *Baumann* case where the hearing was held in Sydney on the eve of the Olympic Games because Baumann's participation in the Games was at stake.
18 Rule 21, paragraph 1.
19 For the resolution of these disputes an arbitration panel is to be established by the national federation, Rule 21, paragraph 2.
20 Rule 21, paragraph 2.
21 Rule 21, paragraph 5 (i).
22 Rule 21, paragraph 3 (i).

- if the IAAF believed that any national doping proceedings against an athlete had "reached an erroneous conclusion".[23]

In addition, there were four more grounds for submitting a dispute to the Arbitration Panel which are of less relevance here.[24]

The second ground mentioned above chiefly and typically arose if the competent body of a member federation exonerated an athlete from the charge of doping and the IAAF was of the opinion that according to IAAF Rules a doping offence had actually taken place, or if a doping offence was found, but a lesser sanction had been imposed than provided for under the IAAF Rules. The first ground arose when an athlete had been sanctioned by the competent body of a member federation, but the athlete believed that no doping offence had taken place. In both instances the Arbitration Panel had appellate jurisdiction and would hear the case *de novo*.[25]

The vast majority of cases were referred to the Arbitration Panel by the IAAF on the grounds of a Council decision for the purpose of reviewing decisions of member federations. Rule 21, paragraph 3 (ii), provided that such referrals constituted an appeal by the IAAF against decisions of a disciplinary tribunal or commission of a national federation acquitting an athlete, while the IAAF believed that a doping offence had actually taken place. There were only a few cases under Rule 21, paragraph 3 (i), where athletes appealed against national decisions, which declared them ineligible for a doping offence.

2.4. The Procedure before the Arbitration Panel

The IAAF Rules in Rule 23 and both the PGDC and the Arbitration Guidelines (AG)[26] did not contain many provisions concerning procedure. A case had to be referred to arbitration in a particular form accompanied by a statement in support of the referral. Upon receipt of the referral, the arbitrators were appointed and the dates for the statement in response as well as for reply and rejoinder and, if appropriate at that early stage, for the hearing were determined by the Chairman.

The hearings were scheduled for one day or, as of 1999, in many cases for two days. In some cases the hearings were suspended and later resumed. After the presentation of the opening statements ample opportunity was given for the examination and cross-examination of witnesses and expert witnesses and the bringing of legal and factual, mostly scientific, arguments. After the closing statements of the parties and the closing of the hearing the Panel started its deliberation. In the early days, the award which the Panel had reached would be drafted overnight and pronounced to the parties, who were still present, the next morning. This policy was changed as of 1999 when the cases became more complex. From then on the awards would be deliberated and drafted by the arbitrators present at the venue within the two or three days following the hearing. In very rare cases the arbitrators would leave the venue after having decided on a possible draft of the decision to continue their deliberations and finally agree by communication. In such cases, the Chairman communicated the awards to the parties in writing. According to Rule 23, paragraph 8, a two-week period was allowed for the pronouncement of the award. The Arbitration Panel never made use of the possibility not to reason its decision.[27]

The decisions of the Arbitration Panel were taken by majority and no dissenting or concurring opinions could be delivered.[28] As the hearings were conducted "in private"[29] the awards were not officially published.

Over time, the proceedings before the Arbitration Panel became highly extensive. In some cases, files of more than 2000 pages were submitted to the Panel, and hearings of two or three days were necessary. Lawyers and expert witnesses would contradict each other. Awards would take up to ten densely-lined pages, although this is still brief compared to many awards delivered by CAS panels.[30] This was simply a reflection of the growing complexity of international doping-related disputes. It also shows that in this respect there is no difference between proceedings in international sports arbitration and proceedings before regular courts.

2.5. The Effects of the Awards

As the proceedings before the Arbitration Panel were hearings *de novo*,[31] the awards contained a statement of facts and of the relevant rules which were applied, the statement of the reasons on which the decision was based, the findings of the Panel and the operative provisions of the judgment including an order for the payment of the costs.[32] The operative provisions first determined whether or not a doping offence was committed and, if so, the exact period of non-eligibility.

The awards of the Arbitration Panel had immediate effect which was understood to mean that the awards were final and binding.[33] The awards delivered by the Panel were generally accepted by the parties involved. In rare instances, however, decisions were challenged, for example, before American,[34] German[35] and Swiss courts.[36] Only in one of these cases was the decision of the Arbitration Panel not upheld in the last instance.[37] Surprisingly, American[38] and German Courts[39] have held that awards delivered by the Arbitration Panel fell within the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[40]

3. The Doping Offence

3.1. The Elements of Doping

Rules 55, paragraph 2, and 56, paragraph 1, and again Rule 60, paragraph 2, defined what constituted a "doping offence" under the IAAF's authority:

i "a prohibited substance is found to be present within an athlete's body tissues or fluids; or
ii an athlete uses or takes advantage of a prohibited technique, or
iii an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique." (...)
iv "the failure or refusal of an athlete to submit to doping control."

The term "prohibited substance" refers to substances listed in Schedule 1 to the PGDC.[41] In 2000, Part I of this schedule listed anabolic agents, in particular, anabolic steroids, amphetamines, cocaine, peptide hormones, and glucocorticosteroids and Part II listed stimulants and narcotic analgesics. "Chemically or pharmacologically related compounds and precursors" of anabolic steroids and some other classes of substances are also included, as are all metabolites of prohib-

23 Rule 21, paragraph 3 (ii).
24 Rule 21, paragraph 3 (iii) - (vi):
- where a national federation refused to allow the athlete a hearing in a doping case,
- where testing by another sporting body indicated the presence of a prohibited substance and the athlete considered that the decision of the body in question was "unsatisfactory",
- where a national federation or IAAF had determined that a doping offence other than the presence of a prohibited substance or the use of a prohibited technique took place and the athlete concerned considered that "an erroneous conclusion" had been reached,
- where an athlete had been found by the IAAF to have admitted a doping offence and the athlete denied having made such an admission.

25 See below under IV. 6.
26 IAAF Arbitration Guidelines, adopted by the Council in accordance with Rule 23, paragraph 1.
27 Rule 23, paragraph 8, subsection 2.
28 Rule 7, 1 AG: "minority opinion".
29 Rule 6, 3 AG.
30 The relative brevity of the awards was due to the fact that the decisions were deliberated and drafted immediately after the hearings at the location where they had taken place.
31 See below under IV. 6.
32 Generally the costs followed the event. The IAAF bore the costs of the arbitrators, Rule 8, 1. AG.
33 Rule 23, paragraph 8, subsection 3, and Rule 7. Guideline 3 AG: "shall have immediate effect".
34 *Reynolds*, see footnote 52, *Decker-Slaney*, see footnote 63.
35 *Krabbe*, see footnote 54, *Baumann*, see footnote 79.
36 *Gasser*, see footnote 51.
37 The Munich Regional Court awarded damages to *Katrin Krabbe* in the summer of 2001.
38 US District Court, Southern District of Indiana, Indianapolis Division, Decision of 5 November 1999, case no. IP-99-0502-C-D/F, *Mary Decker-Slaney* v. IAAF and USOC.
39 Stuttgart Regional Court, 17th Civil Chamber, Decision of 2 April 2002, case no. 17 O 611/00, *Dieter Baumann* v. IAAF.
40 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, German Federal Law Gazette 1961 II p. 121.
41 Rule 53, paragraph 3.

ited substances.[42] Prohibited techniques are listed non-exhaustively in Rule 55, paragraph 7 and Schedule 2 of the PGDC, including *inter alia* blood doping including EPO, blood plasma, expanding products and artificial oxygen carriers, as well as generally the use of substances or methods which alter the integrity and validity of urine samples.

For prohibited substances which can be produced by the body naturally, the distinction between endogenous production and exogenous administration, of which only the latter constitutes a doping offence, is made according to a rebuttable presumption based on the concentration or the ratio of the substance.[43] Originally, this rule exclusively applied to testosterone, but was later re-drafted for general application, thus codifying the case law of the Arbitration Panel.[44]

3.2. The Burden of Proof

According to Rule 55, paragraph 4, full responsibility is placed on the athletes that no prohibited substance enters the athlete's body tissues or fluids. However, in the course of the proceedings and in particular before the Arbitration Panel, the IAAF or the national federation concerned had the burden to prove "beyond reasonable doubt" that a doping offence had been committed.[45] With regard to the complex procedural requirements set out in the PGDC a special rule of evidence applies which provides that procedural departures shall not invalidate the finding that a prohibited substance was present in a sample or that a prohibited technique had been used "unless this departure was such as to cast real doubt on the reliability of such finding".[46]

4. Major Achievements

Some 39 cases were referred to arbitration by the Panel, four of which were later withdrawn. Only two cases were non-doping-related disputes. One of them concerned re-instatement as an amateur athlete after an interlude as a professional football player.[47] The other was a typical intra-federation statutory dispute concerning the validity of Council elections.[48] Illustrative of the Panel's evolving caseload is that in the first 15 years of its existence (until 1999) the Panel heard 15 cases (*Nehemiah* and *Gault,*[49] *Gasser,*[50] *Reynolds,*[51] *Breuer/Krabbe/Möller (Krabbe I),*[52] *Breuer /Derr/Krabbe (Krabbe II),*[53] *Ngugi,*[54] *Akpan,*[55] *de Bruin,*[56] *Braunskill,*[57] *Bevilacqua,*[58] *Capobianco,*[59] *lagar,*[60] Hirsbro,[61] *Decker-Slaney,*[62]and *Mitchell*[63]) while it heard or otherwise solved as many as 19 cases in only two years, namely in 2000, in the run-up to the Sydney Olympic Games, and in 2001 (*Jayasinghe,*[64] Varela,[65] Sanchez Cruz,[66] Election Case,[67] Sotomayor,[68] Ramos,[69] Adriano,[70] Ottey,[71] Melinte,[72] Walker,[73] Christie,[74] Cadogan,[75] Szekeres,[76] Dobos,[77] Baumann,[78] Mateescu,[79] Prandjeva,[80] Douglas,[81] and Soboll[82]).

Four more cases (*Lyons,*[83] *Menc,*[84] *de Jesus,*[85]and *Théodore*[86]) were decided in 2002 and 2003, under the transitory rule,[87] as by then it had been decided to dissolve the Arbitration Panel. The very last case was referred to the Arbitration Panel as late as in 2004 concerning *Jerome Young,*[88] an athlete who was allegedly involved in the *Balco* affair. The parties, however, later agreed to transfer the case to the CAS.[89]

Over the years, the IAAF Arbitration Panel accumulated a vast amount of legal and scientific expertise in doping cases. Due to the small number of IAAF arbitrators, each of them has thus had an opportunity to gain highly qualified expert knowledge. The Arbitration Panel established a consistent body of case law and clearly and coherently interpreted the doping-related rules in the IAAF Constitution and other relevant provisions, such as the anti-doping rules, the PGDC and the AG. The case law of the Arbitration Panel has been analysed in great detail, including the 15 cases which were decided until early 1999 by the first chairman of the Panel.[90]

In general, the Panel placed much emphasis both on the athlete's responsibility as to what entered his or her body, on the one hand, and on the rights of the athletes, such as fair trial and procedural justice, on the other. The Panel confirmed the definition of the doping offence as the presence of a prohibited substance. The Panel strictly upheld the two-year period of ineligibility; a subject on which certain

42 Rule 55, paragraph 6.

43 Introductory note to Schedule 1 to the PGDC, 2002 Edition: "Where a Prohibited Substance (...) is capable of being produced by the body naturally, a sample will be deemed to be positive for that substance, where the concentration of that substance or its metabolites and/or their ratios in the athlete's tissues or fluids so exceeds the range of values normally found in humans so as not to be consistent with normal endogenous production.
A sample may not be regarded as positive for a Prohibited Substance in any such case where the athlete proves by clear and convincing evidence that the concentration of the substance or its metabolites and/or their ratios in the athlete's body tissues or fluids is attributable to a pathological or physiological condition. (...)."

44 See below under IV. 4.

45 Rule 59, paragraph 5.

46 Rule 55, paragraph 11.

47 *Nehemiah and Gault*, see footnote 50.

48 Election Case, see footnote 68.

49 Decision of 25 June 1985, The Athletics Congress of the USA v. IAAF in the matter of *Renaldo Nehemiah* and *Willie Gault.*

50 Decision of 18 January 1988, Swiss Athletic Federation and Gasser v. IAAF in the matter of *Sandra Gasser.*

51 Decision of 11 May 1992, IAAF v. The Athletics Congress of the USA in the matter of *Harry Reynolds.*

52 Decision of 28 June 1992, IAAF v. German Athletic Federation in the matter of *Gritt Breuer, Katrin Krabbe, Silke Möller.*

53 Decision of 20 November 1993, IAAF v. German Athletic Federation in the matter of *Gritt Breuer, Manuela Derr, Katrin Krabbe.*

54 Decision of 5 November 1994, *John Ngugi* v. Kenian Amateur Athletic Association.

55 Decision of 10 April 1995, IAAF v. Athletic Federation of Nigeria in the matter of *Ime Akpan.*

56 Decision of 9 June 1995, IAAF v. Royal Dutch Athletic Federation in the matter of *Erik de Bruin.*

57 Decision of 25 May 1996, IAAF v. USA Track and Field in the matter of *Kevin Braunskill.*

58 Decision of 25 November 1996, IAAF v. Italian Athletic Federation in the matter of *Antonella Bevilacqua.*

59 Decision of 17 March 1997, IAAF v. Athletics Australia in the matter of *Dean Capobianco.*

60 Decision of June 1998, IAAF v. Romanian Athletic Federation in the matter of *Monika Iagar.*

61 Decision of 28 January 1999, *Claus Hirsbro* v. Danish Athletic Federation.

62 Decision of 25 June 1999, IAAF v. USA Track and Field in the matter of *Mary Decker-Slaney.*

63 Decision of 3 August 1999, IAAF v. USA Track and Field in the matter of *Dennis Mitchell.*

64 IAAF v. Amateur Athletic Association of Sri Lanka in the matter of *Susanthike Jayasinghe*, withdrawn after the hearing of 22 April 1999.

65 IAAF v. Royal Spanish Athletic Federation in the matter of *David Varela*, withdrawn before hearing on 14 December 1999.

66 Decision of 20 February 2000, *German Sanchez Cruz* v. Mexican Athletic Federation.

67 Decision of 21 February 2000, Kuwait Amateur Athletic Federation v. IAAF Congress.

68 Decision of 26 July 2000, IAAF v. Cuban Athletic Federation in the matter of *Xavier Sotomayor.*

69 Decision of 6 April 2001, a dispute referred to arbitration by virtue of a special Arbitration Agreement agreed between the IAAF, *Andre Luiz Ramos* and the Athletic Confederation of Brazil.

70 Decision of 1 August 2000, a dispute referred to arbitration by virtue of a special Arbitration Agreement between the IAAF, *Elisangela Adriano* and the Athletic Confederation of Brazil.

71 Decision of 3 July 2000, IAAF v. Jamaica Amateur Athletic Association in the matter of *Merlene Ottey.*

72 Decision of 15 July 2000, IAAF v. Romanian Athletic Federation in the matter of *Mihaela Melinte.*

73 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Douglas Walker.*

74 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Linford Christie.*

75 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Gary Cadogan.*

76 Decision of 7 September 2000, IAAF v. Hungarian Athletic Federation in the matter of *Judit Szekeres.*

77 Decision of 7 September 2000, IAAF v. Hungarian Athletic Federation in the matter of *Gabor Dobos.*

78 Decision of 18 September 2000, IAAF v. German Athletic Federation in the matter of *Dieter Baumann.*

79 IAAF v. Bulgarian Athletic Federation in the matter of *Rodia Mateescu*, withdrawn 18 June 2001.

80 IAAF v. Bulgarian Athletic Federation in the matter of *Iva Prandjeva,* withdrawn 18 June 2001.

81 Decision of 26 September 2001, IAAF v. Royal Dutch Athletic Union in the matter of *Troy Douglas.*

82 Decision of 26 September 2001, IAAF v. German Athletic Federation in the matter of *Carolin Soboll.*

83 Decision of 17 August 2002, *Robin Lyons* v. Athletic Canada.

84 Decision of 15 August 2002, *Miroslav Menc* v. Czech Athletic Federation.

85 Decision of 22 September 2002, *Luis Filipe de Jesus* v. Portugese Athletic Federation.

86 Decision of 23 July 2003, IAAF v. French Athletic Federation in the matter of *Olivier-Jean Théodore.*

87 Note 2 of the Transitional Provisions attached to Rule 21, Handbook 2002/2003.

88 IAAF v. USA Track and Field in the matter of *Jerome Young*, referral to arbitration of 18 February 2004.

89 According to Note 3 of the Transitional Provisions, attached to Rule 21, Handbook 2002/2003.

90 Tarasti, Legal Solutions in International Doping Cases. Awards by the IAAF Arbitration Panel 1985 - 1999, Cernusco 2000; a brief account of the Arbitration Panel's activity and of some of the major cases is given by Vedder (see footnote 17), p. 34 *et seq.*

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CAS panels have held a different view. Interpretations given by the Arbitration Panel in relation to naturally produced substances were occasionally even codified into the Rules.[91]

This essay cannot give a full account of the jurisprudence of the Arbitration Panel. Furthermore, it is not the role of an arbitrator to comment on awards rendered by a panel of which he was member. For this reason, only some general thoughts will be set out concerning the main results achieved in the case law, which might have an impact on future arbitral activities in doping-related disputes.

4.1. Doping Offence

The Arbitration Panel has always persistently adhered to the definition of the doping offence as provided in Rules 55, 56 and 60:[92] the mere presence of a prohibited substance in the body tissues or fluids of an athlete. According to this clear determination of what constitutes doping within the area of authority of the IAAF it is irrelevant whether or not the substance was ingested willingly, deliberately or negligently. This rule and its interpretation, however, do not make for strict liability.[93]

4.2. Prohibited Substances, Food Supplements

The Rules and the PGDC clearly defined what the term "prohibited substances" included,[94] namely the substances listed in the PGDC and their metabolites as well as - with regard to anabolic steroids and some other classes of substances - all chemically or pharmacologically related compounds. By virtue of this general clause a potentially wide range of substances which were not expressly listed at the time when the doping control was applied or which were not listed at all were still prohibited. The same was true for prohibited techniques as a result of the general clause of Rule 55, paragraph 7. The conclusion therefore has to be that the lists contained in the bye-laws are not exhaustive and that they could not be considered 'negative lists' in the sense that products or techniques which were not expressly listed were allowed.

This interpretation which was constantly upheld by the Arbitration Panel also applied to so-called food supplements or even food in general. Here, the definition of doping as the mere presence of a prohibited substance operates together with the responsibility of the athlete for what enters into his or her body. As will be further explained below,[95] the athletes have a responsibility to keep their bodies clean and free of prohibited substances. This means that athletes cannot simply eat and drink any food or beverage in the same way that non-athletes can. This is true in particular in regard to food supplements which may contain non-declared traces of prohibited substances, either deliberately or by contamination as it is known amongst the sports community.

4.3. Endogenously Produced Substances

On several occasions it was submitted to the Panel that dehydration, stress and other physical factors in combination or on their own were able to raise the concentrations of substances which are also or can also be produced naturally by the body to above the thresholds determined for these substances. This argument was mainly based on what is known as the Aberdeen Study by Professor Maugham and was intended to undermine the validity of the thresholds fixed for substances like testosterone.

Based on broad scientific evidence in literature and as presented by numerous expert witnesses in hearings before it, the Arbitration Panel came to the conclusion that the thresholds were scientifically reliable. They mirror the average concentrations of such substances found in large populations including a broad margin of safety. However, here again, it was not an application of strict liability but a shift of the burden of proof. If a prohibited substance was found in a concentration exceeding the threshold it was then a matter for the athlete to show by clear and convincing evidence that the concentration of the substance in question was attributable to a pathological or physiological condition[96] which would include situations of stress, dehydration, etc. None of the arguments submitted, including the Aberdeen Study, met this requirement.

4.4. Strict Liability, Burden of Proof

The Arbitration Panel was criticised in the media and by the parties' legal counsel for applying a "strict liability" rule which would deny the athletes the chance of raising a proper defence. It was suggested that, according to the Arbitration Panel, the simple finding of a prohibited substance was sufficient to determine that a doping offence had been committed without leaving any opportunity to rebut. However, this perception of the Arbitration Panel's approach is not correct, as the Panel in its consistent case law clearly followed a different line of reasoning.

It is true that in one of its earlier awards the Panel used the term "strict liability."[97] In the context of this decision the term is employed as a summary label for a sequence of arguments which follows the line of the Panel's general approach. In the given context, the use of the term "strict liability" expressly intended to convey that no willingness or negligence was necessary in order to establish a doping offence. The use of this term, however, could indeed lead to misunderstandings now that "strict liability" does not have the exact same meaning in different jurisdictions. When the term was used - as it only very seldom was - in later awards, the Panel intended by it to summarise a certain allocation of the burden of proof.[98]

According to IAAF Rules and bye-laws the Arbitration Panel applied a differentiated allocation of the burden of proof. As the doping offence is defined as the presence of a prohibited substance it is the obligation of the member federation and/or the IAAF which is charging an athlete with a doping offence to prove "beyond reasonable doubt" that a doping offence has been committed.[99] That means that the federation had to prove that a prohibited substance was found in the body tissues or fluids of the athlete concerned. This included proof concerning the reliability of the doping control, the chain of custody, the analysis in IOC-accredited laboratories and the results. Doubts concerning the readings of the analysis or the calculation of concentrations taking into account scientific factors such as specific density were assessed *in dubio pro reo.*[100]

The whole procedure, from the request to submit to a doping control to the management of the results, is regulated in detail by the PGDC and, as far as the analysis of the sample is concerned, by protocols agreed upon by the heads of IOC-accredited laboratories. Concerning these procedural requirements, which provide a very high standard, a special provision can be found concerning the burden of proof which establishes that any deviations from the procedural rules invalidate the finding, provided that this departure from the procedure set out in the PGDC is of such a nature as "to cast real doubts on the reliability" of the results.[101] The athlete and/or, in proceedings according to Rule 21, paragraph 3 (ii), the national federation must either prove this or, at least, cast sufficient doubt. Thus an opportunity exists to rebut the reliability of the findings of the sample, but here the burden of proof shifted to the respondent.

If the IAAF, in accordance with the requirements mentioned above, including the opportunity to rebut, proved the presence of a prohibited substance, this constituted *prima facie* evidence that a doping offence had actually taken place. The IAAF had at that point discharged its onus of proof. If the IAAF Rules had established strict liability in the sense that the presence of a prohibited substance by definition resulted in the finding of a doping offence, the dispute would have been settled at this point. However, IAAF Rules and bye-laws did not preclude the possibility to rebut the *prima facie* evidence.[102] The burden of proof was reversed and it was subsequently up to the

91 See below under IV. 4.
92 See above under III. 1
93 See below under IV. 4.
94 See above III. 1.
95 See below under IV. 4.
96 See footnote 44 and accompanying text.
97 *Capobianco* (1997), see footnote 60, recital 9; Tarasti (see footnote 91) analysed the term "strict liability" in the case law of the Arbitration Panel, p. 87.
98 *Walker* (2000), see footnote 74, recital 9 *et seq.*, 33; Tarasti (see footnote 91), p. 90, shares this view with regard to the early awards.
99 Rule 59, paragraph 5.
100 *Ottey* (2000), see footnote 72.
101 Rule 55, paragraph 11.
102 Tarasti (see footnote 91), p. 88.

athlete or the respondent national federation to show that, despite the *prima facie* evidence, a doping offence had not occurred.

The athlete had to meet different standards of evidence. With respect to procedural deficiencies, according to Rule 55, paragraph 11, the athlete only had to raise "real doubts". In cases where the threshold fixed for an endogenously produced substance had been exceeded the PGDC set forth that proof had to be provided "by clear and convincing evidence" that the measured concentration was above the threshold due to a pathological or physiological condition.[103] This is a clear example of a *prima facie* evidence situation. The finding that substance levels were above the threshold *prima facie* testifies to the presence of a prohibited substance. However, it is still possible to rebut this presumption under a reversed onus of proof.

Originally this opportunity to rebut in cases concerning above-threshold levels of substances was exclusively given in the case of the substance of testosterone.[104] Once in a case concerning nandrolone a sample was found to be above the generally recognised threshold, but the IAAF anti-doping rules at that time did not consider the possibility of the natural production of nandrolone. The Arbitration Panel in this case did not hesitate to apply the testosterone rule by analogy, arguing that the IAAF rules simply showed a gap with respect to substances other than testosterone which may be endogenously produced.[105] For the sake of legal certainty, this statement of the Arbitration Panel was later codified in the rules through an amendment to the PGDC. As of 2002, therefore, the rule allowing rebuttal applies generally to all substances which may be endogenously produced.[106]

The initial allocation of the burden of proof to the IAAF to provide evidence *prima facie* followed by an opportunity to rebut also served as a model to the Arbitration Panel in other situations which were not expressly considered by the applicable rules, such as the administration of a prohibited substance without the knowledge or against the will of the athlete, or sabotage. The Arbitration Panel tended to construe the Rules and PGDC in their entirety as allowing the rebuttal of the *prima facie* evidence of a doping offence. However, it was not sufficient if the rebuttal simply suggested that something out of the ordinary had occurred which would exclude a doping offence. Deviations from the normal course of events had to be proven by the athlete or the defending member federation. This was best done by "clear and convincing evidence" as laid down in Schedule 1 PGDC or at least by raising "real doubts" as laid down in Rule 55, paragraph 11. The Arbitration Panel did not consider it necessary to indicate which standard of proof had to be met.

In its judgments the Arbitration Panel advanced a particular interpretation of the IAAF anti-doping rules by stating that the Rules and bye-laws established a specific professional obligation and corresponding liability for athletes. The Rules reflect the IAAF's strict anti-doping policy as part of the ethics of sport. Compliance with these rules is a condition which athletes have to fulfil in order to practise their sport, as an amateur or a professional in the sphere of track and field. This high professional standard was converted into a clear legal obligation which is most obviously expressed by Rule 55, paragraph 4, which establishes that it is the

> "Athlete's duty to ensure that no substance enters his body tissues or fluids which is prohibited under these Rules. Athletes are warned that they are responsible for all or any substances detected in samples given by them."

The anti-doping rules, including those on sanctions, exclusively apply to a specific group of persons in limited circumstances and by voluntary agreement. This fundamentally distinguishes these rules from criminal law rules. But even under criminal law, the high professional standard described above would result in a high degree of care that athletes under the jurisdiction of the IAAF have to exercise. Non-compliance with this standard would qualify as negligence. Ultimately, however, the Arbitration Panel and some of the CAS panels, even though they applied a different approach, would in most if not all cases reach the same conclusion concerning the question of whether a doping offence had actually been committed.

4.5. Sanctions, Length of the Period of Ineligibility

As of 1991, a sanction of 4 years' ineligibility could be imposed for a first doping offence and a life ban for a second offence, with no margin of discretion.[107] In 1997, the relevant provision was amended and the sanctions from then on were a minimum of 2 years for a first offence and a life ban for a second offence. Under these Rules, the Arbitration Panel first generally imposed 4 years' and later 2 years' ineligibility. It should be mentioned, however, that the rules dealing with the commencement of the period and the calculation of the actual length of the period, which required taking into account periods of suspension undergone by the athlete, changed considerably over the years.

IAAF Rules did not allow the Panel to consider exceptional or mitigating circumstances which could reduce the period of ineligibility. However, the Arbitration Panel saw no reason to question this, as it was in line with the interpretation of the Rules as professional standards. In its judgments, however, the Panel consistently imposed the minimum sanction and made no use of the possibility of determining a longer period. In one case which the IAAF referred to the Arbitration Panel, the national federation had established a doping offence, but, having considered the circumstances of the case, had imposed only a few months' ineligibility.[108] The Arbitration Panel in this case also imposed the minimum two years.

However, according to IAAF Rules the Council has the power to consider "exceptional circumstances".[109] Upon application by the athlete and on the conditions laid down both in Rule 60, paragraph 8, and the PGDC, the Council may allow the athlete's re-instatement before the expiry of the period of ineligibility imposed by the Arbitration Panel. This was an exclusive competence of the Council and the Panel could only bring it to the parties' attention.

4.6. Procedural Issues

The Arbitration Panel attached the utmost importance to due process and fair trial during both the written and oral stages of the proceedings. As the Rules and PGDC were brief with respect to procedural issues, the Arbitration Panel let itself be guided by the general procedural principles applicable before courts and arbitral bodies as codified in the AAA Guidelines[110] or the principles applied in international commercial arbitration. At all stages of the proceedings ample opportunity was given to the parties, including the athlete, to submit their views and to present their witnesses and expert witnesses. On several occasions the Arbitration Panel summoned expert witnesses on its own behalf.[111]

Probably the most important procedural achievement to result from the Arbitration Panel's case law is that, from the mid-nineties, athletes began to be formally treated as independent parties to the dispute with full rights, even where under Rule 21, paragraph 3 (ii) in the majority of cases the member federation, not the athlete, was the respondent.

On several occasions it was suggested that in disputes under Rule 21, paragraph 3 (ii), where the IAAF appealed a decision of a body of a member federation, the Arbitration Panel was only competent to review the legality of the contested decision on the basis of the facts and evidence available before that body. The Panel has consistently rejected this argument. Instead, the Panel interpreted the Rules as providing for proceedings *de novo*. Thus, whenever the IAAF appealed against a national decision, the case would be heard taking into account all legal, factual and scientific aspects available at the time of the hearing.

103 Schedule 1 PGDC, see footnote 42.
104 Note to Schedule 1 Part I under (a) (I) PGDC, 2000 Edition.
105 *Ottey* (2000), see footnote 72, recital 15 and 16.
106 See footnote 44.
107 Rule 60, paragraph 2 (a).
108 *Thédore* (2003), see footnote 88.
109 Rule 60, paragraph 8 and PGDC.
110 International Arbitration Guidelines of the American Arbitration Association, http://www.adr.org/rules/international/international-rules/html
111 Rule 5 and 1 (b), (h) AG.

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.