The CAS Ad Hoc Division at the XX Olympic Winter Games in Turin

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Introduction

Almost ten years after the first Ad hoc division (AHD) of the Court of Arbitration for Sport (CAS) was set up for the Games of the XXVI Olympiad in Atlanta (1996), the CAS organised another AHD for the XX Olympic Winter Games in Turin (2006)[1]. The mission of this sixth edition of the "Olympic"[2] AHD was to resolve all legal disputes arising "on the occasion of or in connection with the Olympic Games"[3], for a period of ten days preceding the Opening Ceremony (31 January 2006) and until the closing of the Games (26 February 2006)[4].

During the said period the AHD received 10 applications that could be entertained, which led to seven final awards[5] and - for the first time - a consent award[6]. Also, a case was closed before the CAS President or a Panel decided on an application for interim measures[7]. The number of cases and awards should not be compared with previous AHD for Winter Olympic Games[8] without keeping in mind the fact that the CAS and CAS AHD's consistent jurisprudence on legal issues that gave rise to numerous cases in the past (e.g. judicial control of field of play rules) now practically impedes the filing of applications concerning such disputes.

The purpose of this article is a) to present briefly the cases' factual background and b) to approach a variety of procedural and substantial issues, with which the CAS AHD in Turin has enriched and evolved the jurisprudence delivered to it by previous CAS AHD editions.

1. Summary of cases

1.1 CAS OG 06/001 [WADA v/ USADA, USBSF & Lund]

The World Anti-doping Agency filed an application against the decision of the United States Anti-doping Agency to give a public warning to the US skeleton runner Zachary Lund and to disqualify him from the 2005 World Cup event in Calgary, Canada. The WADA requested a two-year suspension be imposed, starting from the CAS ruling, as a consequence of Mr Lund's testing positive to the substance *finasteride* (masking agent) on 10 November 2005. The CAS AHD Panel partially upheld the appeal and set aside the decision made by USADA. The Panel was satisfied that Mr Lund bore no *significant* fault or negligence regarding his - admitted - doping violation and therefore sanctioned him with a one-year period of ineligibility, starting on the date of the positive doping test. As a result, Mr Lund, was disallowed from participating in the Olympic Winter Games.

1.2 CAS OG 06/002 [Schuler v/ Swiss Olympic Association]9

The Swiss snowboarder Ms Andrea Schuler contested before the CAS AHD the decision made by the Swiss Olympic Association (NOC for Switzerland) not to select her for the Olympic Games (women's half pipe event). The athlete submitted that she had met the criteria set forth by both the Swiss Olympic and the Swiss ski federation; thus, her non-selection was arbitrary. The Panel dismissed Ms Schuler's application considering that the respondent exercised its discretion in a reasonable, fair and non-discriminatory manner and in accordance with the rules.

1.3 CAS JO 06/003 [Azzimani v/ Comité National Olympique Marocain]

The Sole Arbitrator appointed by the CAS AHD President to decide this case dismissed the application filed by the Moroccan ski athlete Mr Samir Azzimani against the decision of his NOC not to enter him in the XX Olympic Winter Games. Since Mr Azzimani and another Moroccan athlete faced health problems, the CNOM decided to withdraw from the Olympics. Mr Azzimani considered his non-selection a breach of the Olympic Charter; according to his submissions, the selection criteria, the principle of non-discrimination and his (human) right to practice sport were violated. The respondent submitted only a series of medical reports regarding the applicants' recent injury, on which the decision appealed from was based. The CAS AHD Sole Arbitrator decided not to hold a hearing and dismissed the application observing that CAS cannot deal with the question if an athlete can or not enforce his NOC to enter him/her in the Olympics[10]. The Panel also noted that there was no violation of the Olympic Charter and that the athlete was still in a recovery period after a shoulder dislocation.

1.4 CAS OG 06/004 [Deutscher Skiverband & Sachenbacher-Stehle v/ FIS]

The German Ski Federation and the German cross-country skier Ms Evi Sachenbacher-Stehle filed an application in order to cancel the "Notification of Start Prohibition" issued by the International Ski Federation (FIS). Following a blood screening/testing on 9 February 2006 that showed a level of *haemoglobin* above the maximum tolerated values, Ms Sachenbacher-Stehle was obliged by the FIS not to start any competitions for five consecutive days. As a result, the athlete would be forced to miss her first Olympic Games event on 12 February 2006. The athlete further asked the Panel to declare that the levels of haemoglobin were naturally elevated and had no connection with any haematological disease. The Panel refused to make a medical expert's judgment and dismissed the application; moreover, it was convinced that the athlete did not have a naturally high level of haemoglobin.

1.5 CAS OG 06/005 & 06/007 [Abernathy v/ FIL]

Ms Anne Abernathy, a 52 year old athlete also known as "Grandma Luge", was heading to a unique record of participating in the Winter Olympics for a sixth time. Ms Abernathy, the only athlete to represent the Virgin Islands in the Turin 2006 Winter Olympics, suffered

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1 The Tribunal was presided over by Judge R.S. Pathak (India) and Mr Robert Briner (Switzerland); it was composed of nine arbitrators selected by the ICAS from the CAS list of arbitrators: Mr Massimo Coccia (Italy), Mr Kaj Hobér (Sweden), Mr Malcolm Holmes (Australia), Prof. Akira Kotera (Japan), Mr Peter Leaver (United Kingdom), Mr Dirk-Reiner Martens (Germany), Prof. Richard McLaren (Canada), Mr Hans Nater (Switzerland), Mrs Maidie Oliveau (USA). The CAS Office was headed by its Secretary General, Mr Matthieu Reeb. For a detailed comment on the structure of the CAS AHD and especially on the "closed" list of arbitrators selected by the ICAS Board, see Rigozzi A., *L'arbitrage international en matière de sport*, Helbing & Lichtenhahn, Basle 2005, pp.301-308.

2 The ICAS has also created Ad hoc divisions that were either seated at the city of the sporting event (e.g. Commonwealth Games: Kuala Lumpur-1998, Manchester-2002, Melbourne-2006) or on-demand (European Football Championships-2000 & 2004, FIFA World Cup-2006, Paralympics -2000 & 2004).

3 Olympic Charter (ed. 2004), Rule 61.

4 CAS Arbitration Rules for the Olympic Games ("the Ad hoc Rules").

5 CAS OG 06/001, 06/002, 06/003, 06/004, 06/006, 06/008, 06/010.

6 Settling the dispute arising out of two applications: CAS OG 06/005 & 06/007.

7 The respondent (IOC) accepted the applicant's request for a stay of execution of its decision.

8 Nagano 1998: 6 awards; Salt Lake City 2002: 7 awards.

9 See also in: *CaS* 2/2006, p.215 et seq.

10 See also CAS OG 02/003 [Bassani-Antivari v/ IOC], *CAS Awards - Salt Lake City 2002 & Athens 2004*, p.29 et seq.

an injury (wrist fracture) during an official training on 12 February 2006 and was transferred to the hospital. Subsequently and after having missed the official weigh-in, the International Luge Federation (FIL) applied its rules and did not include her in the race list. "Grandma Luge" and Virgin Islands were thereby not to be considered as participants in the XX Olympic Winter Games. The athlete challenged this decision by filing two applications with the CAS, the second following unsuccessful deliberations with the FIL.

The CAS AHD Panel appointed to hear the case invited the parties during the hearing to reach an amicable solution. After a one-hour break, the terms of the final settlement were supported by the Panel and included in a consent award, by which the FIL was directed to write to the IOC in order to request that the name of Ms Abernathy be included in the *results* list of the women's luge event without a start number but with the notation DNS (did not start). The parties also agreed that the - challenged - decisions of the Race Director and the Jury during the Women's luge event were correct.

1.6 CAS OG 06/006 [Canadian Olympic Committee v/ ISU]
The Canadian Olympic Committee (COC) filed an application with the CAS AHD on 16 February 2006, the day after the A-Final of the ladies' short track speed skating. The COC requested the CAS to order the International Skating Union (ISU) to instruct its referee to review the race's videotape. The COC was seeking determination of whether a "kicking out" infraction was committed by the winner of the race, Ms Evgenia Radanova, a Bulgarian skater. Possible disqualification of Ms Radanova would result in Canadian athletes advancing to the second (Ms Anouk Leblanc-Noucher) and third (Ms Kalyna Roberge) place respectively. For this reason the COC accompanied its application with a request for extremely urgent preliminary relief, i.e. the postponement of the medal ceremony. In addition, the applicant requested a declaratory judgment on the issue of a suggested conflict between provisions contained in the ISU rules, while it submitted that the head referee (although he did not refuse to receive a protest) "discouraged" the Canadian team leader to file a protest against his own discretional decision not to view the instant digital replay. The President of the CAS AHD within a very short time-limit[11] and without hearing the respondent's views dismissed the application for preliminary relief, because the celebration of the medal ceremony would not irreparably harm[12] the Applicant's interests. The Panel denied the application since a) the applicants never filed a written protest according to the ISU rules or alleged the referee for exercising his discretion in bad faith, and b) there was no reviewable decision for the Panel to consider.

1.7 CAS OG 06/008 [Dal Balcon v/ CONI & Federazione Italiana Sport Invernali]
The Italian snowboarder Ms Isabella Dal Balcon challenged the decision made by the Italian Olympic Committee (Comitato Olimpico Nazionale Italiano - CONI), not to select her for the women's parallel giant slalom event of the Turin 2006 Winter Olympics. Ms Dal Balcon's submission was that she had met the criteria orally announced to her by the Italian team coach, that no written selection criteria were ever provided to her and that a late change in the criteria had led to her non-selection. She asked the Panel to set aside the decision and to include her in the Italian snowboard team to take part in the Winter Olympics' parallel giant slalom event. The respondents, CONI and the Italian Winter Sports Federation (Federazione Italiana Sport Invernali - FISI) put forward that FISI and CONI accepted *per se* the proposal by FISI's Technical Direction (DA Snowboard) and that the rules were amended two days before the end of the selection period in order to avoid unfair application of the original criteria due to - *inter alia* - athletes' injuries.

The CAS AHD Panel upheld the appeal considering the late amendment of the criteria to be arbitrary and annulled the challenged decision. Given the fact that the Panel was provided by the respondents with detailed scoreboards showing the selection standings after applying the original and the amended criteria respectively and, since the Olympic Games' tight schedule made a referral of the case to CONI and FISI practically impossible, the Panel ordered the respondents a) to place Ms Dal Balcon in the Olympic Team of Italy, b) to determine the other members of the female snowboard team.

1.8 CAS OG 06/009 [B. v/ IOC]
As explained above, the present case did not lead to a final award. In fact, the procedure before the CAS AHD was brought to an end at a very early stage, even before a CAS AHD Panel was constituted, since the main purpose of the application, i.e. the stay of execution of a disciplinary sanction, was voluntarily accepted by the IOC upon notification by the CAS. In view of the fact that an appeal based on the same factual background is pending today before the regular CAS procedure (Appeals Division), the writer would preferably not enter into details. From a scientific point of view also, the evaluation of this case should better await the outcome of the appeal.

1.9 CAS OG 06/010 [Australian Olympic Committee v/ FIBT]
The FIBT Rules provided the North American Challenge Cup (22 January 2006) to be a qualification criterion for the Olympic Winter Games: the first two teams would qualify for the Olympics. The Brazilian team ranked first whereas the Australian third. Almost two weeks after the race, on 14 February 2006, the Brazilian Olympic Committee announced that Mr Dos Santos, a member of its 4-man bobsleigh team, had tested positive in an out-of-competition control that took place on 9 January 2006. The athlete, although not provisionally suspended, was sent back to Brazil by his own NOC and was replaced. He also exercised his right to have the B sample opened and tested.

Following these incidents, the Australian Olympic Committee (AOC) filed an application to the CAS AHD asking for an order to declare the Brazilian 4-man team ineligible to compete in the Olympic Winter Games and to declare instead the Australian 4-man bobsleigh team eligible to compete in the same Games. The Panel held that the process following an adverse analytical finding had not been yet completed and therefore no anti-doping violation had been found at that time. Consequently, there was no need to address the issue of a suggested *lacuna* in the respondent's (International Bobsleigh and Skeleton Federation - FIBT) rules and the appeal was denied.

2. Analysis

2.1 Procedure
The procedures before the CAS AHD in Turin were not as common as one could have expected before the CAS Court Office opened its doors in late January. The sense that, as a result of previous CAS AHD awards, the Federations and the IOC had become more careful in drafting their rules, respecting the principle of due process and decision-making[13], together with the consistent CAS jurisprudence on results cases[14] did not seem to leave so much space for novelties.

Nonetheless, the CAS AHD division set up a number of records in the AHD's history, namely the first case to be decided by a Sole Arbitrator, the first case to be decided without holding a hearing, and the first appeal filed by WADA.

11 The application was filed at 2:26pm. In view of the medal ceremony scheduled to take place later that afternoon, it was not possible for the President of the CAS AHD to constitute a Panel immediately. Therefore, the President issued a Procedural Order on an application for extremely urgent preliminary relief at 5:30pm.

12 See article 14 para.2 of the Ad hoc Rules.

13 This may be considered the most valuable contribution of a Tribunal within the society (in this case: sporting event) in which it was created and operates. The same could be seen as a consequence of CAS's "corrective jurisprudence" (Nafziger J., 'Lex Sportiva", *ISLJ* 2004/1-2, p.4) over IF's decisions, or in other words be described as "la crainte du juge est le commencement de la sageusse" (see the relevant - anonymous - quote in Martens D.-R./Oschütz F., "Die Entscheidungen des TAS in Athen", *SpuRt* 2005/2, p.59).

14 See Beloff M., "The CAS Ad hoc division at the games of the XXVIII Olympiad in Athens", *ISLR* 2005, p.9. Also, Vieweg K., "Fairness and sports rules: a contribution to the problem of "field of play" rules", in: Panagiotopoulos D. (ed.), *Sports Law: Implementation and the Olympic Games* (10th IASL Congress - Athens 25-27.11.2004), p.208 et seq.

A look at the most interesting points of this CAS AHD's jurisprudence, following the steps of a - more or less - usual procedure before the CAS AHD:

a) *Application*: "The application shall include a copy of the decision being challenged, where applicable"[15]. The Panel in OG 06/010 having to deal with an appeal against the decision of FIBT *not* to act to disqualify the Brazilian Bobsleigh team held that *"4.1 [...] the application is admissible as the CAS Ad hoc Rules specify the decision is to be attached, if applicable, which was not the case here."*. Of course, this does not mean that a first instance decision is not at all necessary. The CAS AHD in fact exercises only one of the four functions[16] of the Court of Arbitration for Sport: the appeals arbitration procedure[17]. Therefore, the CAS AHD cannot operate in any other way but as a second-instance body, as the Panel implied in the case OG 06/006: *"43. [...] the Referee's decision was not protested in accordance with the [ISU] Regulations. It follows there is no reviewable decision for the Panel to consider."*

b) *Sole Arbitrator*: "In the event that it appears appropriate under the circumstances, the President of the ad hoc Division may, in his discretion, appoint a sole arbitrator"[18]. The President of the CAS AHD exercised such discretion upon constituting the Panel to hear the case OG 06/003. The Ad hoc Rules do not specify which "circumstances" are to be taken into consideration by the President when deciding to appoint one or three arbitrators. Article 50 para.1 of the Code of Sports-related Arbitration (CAS Code) indicates that a sole arbitrator is to be appointed when "the President of the [Appeals] Division considers that the matter is an emergency". Given that the case OG 06/003 was decided only few hours before the opening ceremony of the Winter Olympics and that the dispute was of a rather uncomplicated character, it is apparent that the CAS AHD President did not deviate from the criteria of the CAS Code.

c) *Hearing*: The award in the case OG 06/003 will be referred to in the future as the first not to follow a hearing. Applying a newly inserted amendment to the Ad hoc Rules ("If it considers to be sufficiently informed, the Panel may decide not to hold a hearing and to render an award immediately"[19]) the sole arbitrator issued his decision[20] without calling the parties to a hearing. The parties had produced all relevant documentation, while the sole arbitrator informed them of his decision to apply the said provision. The fact that applicant and respondent resided far from Turin (in France and Morocco, respectively) should also be taken into account.
Like in previous CAS AHDs the cases in Turin involved other persons than the applicant(s) and the respondent(s). The notions of "interested party" and "observer" where once more utilized, albeit always with the approval of the initial parties to the dispute. The "interested parties" are usually persons likely to be affected by the outcome of the proceedings e.g. in a selection case, the athletes already selected that may be removed from the Olympic team if the appeal is upheld. The participation or representation of these interested parties to the proceedings is invaluable for the purposes of the CAS AHD, since they have the chance to be heard and are subsequently bound by the award. In cases like the OG 06/008, decided only some hours before the official training sessions or the race itself would commence, no real supporter of either justice or sport (or both) would like to experience a new *Pérez*21 story, i.e. a sequence of arbitration proceedings on the basis of the same facts. Apart from the "interested parties"[22], the status of "observer" was awarded in several cases[23] of general interest to the IOC, i.e. the institution responsible for the organisation of the Olympics, and in one case to WADA[24] that was co-responsible for the limits of haemoglobin prescribed in FIS Rules. No applicant or respondent in any of the above cases did contest the presence and participation of interested parties and observers.

d) *Award*: The CAS AHD awards usually uphold, modify or set aside a decision rendered by an IF, an NOC, an OCOG or the IOC. In the case OG 06/005 & 06/007 the Panel took the initiative to invite the parties to reach an amicable settlement. The parties, that had already failed to reach an agreement before the CAS AHD hearing, this time determined the terms of their settlement in less than an hour. This precedent, apart from underlining the efficiency of the CAS AHD as a body that successfully applies alternative dispute resolution in sport, can prove to be more than useful in the future, when applied - like in Turin - adequately[25].

Since the procedure before the CAS AHD is free, the awards are rendered without costs[26]. Free access to the Court's jurisdiction was encouraged not only by supplying any interested individual through the website or the Court Office[27] with standard application forms, but also through organising a special list of *pro bono* lawyers, in cooperation with local bar associations. Like in Sydney, a number of local (Italian) attorneys were willing to offer their legal services - without receiving any remuneration - to parties involved in at least three arbitration proceedings before the CAS AHD.

Finally, CAS Panels in Turin made also extensive[28] use of the discretion provided to them by the Ad hoc Rules[29] to communicate the operative part of the award prior to the reasons. This alternative appeared to be the only choice in cases where the hearing ended after midnight and the circumstances obliged a decision by the morning after, like in case OG 06/002. There is no doubt that the said provision allows a Panel to render well reasoned and detailed decisions that have nothing to envy of regular CAS awards. Therefore, although the procedure before the CAS AHD remains fast and flexible, almost tailor-made, the quality of the awards delivered from highly experienced CAS arbitrators contributes not only to CAS AHD jurisprudence, but also to regular CAS jurisprudence, as will be shown below.

2.2 Legal Issues

2.2.1 Jurisdiction

A number of CAS AHD Panels had dealt with the issue of the jurisdiction of the CAS AHD before the beginning of the Turin 2006 Winter Olympics[30]. The jurisdiction of the CAS AHD over an NOC[31], an IF[32] or even an NF[33] is mainly based on their participation

15 Article 10 para.2 of the Ad hoc Rules.

16 See Reeb M., "The role and functions of the Court of Arbitration for Sport (CAS)", *ISLJ* 2002/2, p.24.

17 Limited as well by Rule 61 of the Olympic Charter (Olympic-related cases) and Article 1 of the Ad hoc Rules (timeframe).

18 Article 11 para.2 of the Ad hoc Rules.

19 Article 15 (c) para.3 of the Ad hoc Rules.

20 In French; only the third award in French out of a total number of 51 awards rendered by six editions of CAS AHD for the Olympic Games. See also CAS OG 96/006, Mendy v/ AIBA, *Digest of CAS Awards I,* p.409; CAS OG 2000/004, COC & Kibunde v/ AIBA, *Digest of CAS Awards II*, p.617 et seq. It should also be noted that both procedures that have - until now - involved a French federation [CAS OG 2000/014 (FFG v/ SOCOG)] and the French NOC [CAS OG 04/008 (CNOSF v/ ISF & IOC)] were conducted in English, language used to draft the respective awards as well.

21 The question whether Mr Angel Pérez, a former Cuban citizen, could participate for the United States in the kayak competition of the Sydney 2000 Olympic Games gave rise to three different arbitrations and respective awards delivered by the CAS AHD. See CAS OG 2000/001, 2000/005 and 2000/009 in: *Digest of CAS Awards II*, pp.595, 625 and 651.

22 Case (Interested Party): OG 06/001 (FIBT), OG 06/002 (Swiss-Ski), OG 06/006 (IOC, Bulgarian O.C.), OG 06/008 (Posch, Ranigler, Boccaccini, Trettel), OG 06/010 (Brazilian Bobsleigh Association, Brazilian O.C.)

23 Cases OG 06/004, OG 06/005 & 06/007, OG 06/010.

24 Independent Observer Program of WADA, in the case OG 06/004.

25 Although the CAS AHD resolves disputes through arbitration, where the parties are *in principio* the ones to determine the course of their case, two main arguments may be raised concerning settlements before the CAS AHD: a) the CAS code does not provide for conciliation in the appeals arbitration procedure, but only in the "Special provisions applicable to the ordinary arbitration procedure" (Art. R42); b) the disciplinary (particularly doping) cases are excluded from the cases that may be submitted to CAS mediation (Art. 1 of mediation rules). See Cane Ou., "The CAS Mediation Rules" in: Blackshaw I./Siekmann R./Soek J. (eds.), *The Court of Arbitration for Sport 1984 - 2004*, TMC Asser Press, The Hague 2006, p.195: *"[...] The CAS submits such disputes to the appeals arbitration procedure, given the need to have a position of principle rather than a negotiated solution for these issues"*.

26 Article 22 of the Ad hoc Rules.

27 See OG 06/009.

28 In cases OG 06/002, 06/004, 06/006, 06/008, 06/010. Reasons followed usually later the same day or the day after.

29 Article 19 para.2.

30 See McLaren R., "Introducing the Court of Arbitration for Sport: the Ad hoc division for the Olympic Games", *Marquette*

in the Olympic Games and their obligation to apply the Olympic Charter, as associations recognized by the IOC. Another necessary requirement for every last instance body, i.e. the exhaustion of internal legal remedies, had also been in the spotlight in a couple of cases[34]: the respondent has the right not to raise (or to raise it and subsequently to abandon[35]) such question, obviously in favour of a faster solution of the dispute which is already brought before the CAS AHD. Also, the question whether the earlier text of article 1 of the Ad hoc Rules[36] required in any case a *validly enclosed* entry form by the applicant, had been answered in the affirmative[37], restricting temporarily[38] the selection cases to reach the CAS AHD.

The CAS AHD in Turin very early faced a new challenge: to interpret the time-limit set in article 1 of the Ad hoc Rules: "[...] for the resolution by arbitration of any disputes [...] insofar as they arise during the Olympic Games *or during a period of ten days preceding the Opening Ceremony of the Olympic Games*"(emphasis added). The question was the following: In case a decision is issued *before* the CAS AHD jurisdiction starts but the appeal challenging such decision is filed (within the time limit of the appeal and) *after* the period of CAS AHD jurisdiction has started, does the CAS AHD have jurisdiction to hear the case? When exactly does a dispute arise?

In the case OG 06/001 the Panel said:

> *"[2.6] The Panel, therefore, has to decide whether the dispute arose within the period of 10 days preceding 10 February 200639. WADA received the FIBT files sometime after 23 January 200640. Then it considered the file, and having done so, made this appeal on 2 February 2006. The appeal was well within the period permitted for appeal by the USADA Protocol, and the 21 days permitted by Art. 13.5 of the FIBT Doping Control Regulations.*
> *[2.7] It was open to WADA to decide not to appeal, if it so wished. However, in the Panel's opinion, it would not be possible to say that, on the facts of the present case, a dispute had arisen until WADA had decided to appeal and notified its decision to do so. That notification was given within the 10 days preceding the Opening Ceremony".*

The same opinion was followed also by the Panel in the case OG 06/002: *"[3.13] It was open to Ms Schuler to accept the Swiss Olympic's determination or decide to appeal. Accordingly, in the Panel's opinion, it would not be possible to say that a dispute had arisen until Ms Schuler had decided to appeal and had filed notice of her appeal. That notice was given within the 10 days preceding the Opening Ceremony, and, also, well within the 21 days permitted for a regular appeal to the CAS Appeals Division."*

Obviously, a dispute arises when the party affected by a decision chooses to challenge it. And the Panels in both the above cases had no other indication of the applicant's choice to challenge the first instance decision than the application/appeal itself, filed well within the CAS AHD period of jurisdiction. From a clearly theoretical point of view, the CAS AHD jurisdiction could now be expanded to decisions[41] rendered 31 (or more)[42] days before the Opening Ceremony of the Olympic Games.

2.2.2 Doping

Like in the previous edition of CAS AHD in Athens, disputes following an adverse analytical finding were not the majority[43]. Despite that, each one of the three doping cases raised and interesting issue.

a) Rare as it may be after the introduction of the WADA Code in 2003[44], the Panel in case OG 06/001 considered that the athlete bears no significant fault or negligence and imposed a reduced (one-year) period of ineligibility. The Panel said: *"[4.11] The burden on the athlete to establish No Fault or Negligence is placed extremely high... [4.14] In these circumstances, the Panel concludes that Mr Lund, on his own admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility. The Panel arrives at this decision with a heavy heart as it means that Mr Lund will miss the XX Olympic Winter Games. The Panel found Mr Lund to be an honest athlete, who was open and frank about his failures. WADA did not suggest otherwise. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organisations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organization until his positive test in late 2005.*

4.16 The Panel finds this failure both surprising and disturbing, and is left with the uneasy feeling that Mr Lund was badly served by the anti-doping organisations.

4.17 However, for the reasons already given, he cannot escape all liability. Art. 10.2 of the FIBT Doping Control Regulations and the WADA Code enable a Panel to take the "totality of the circumstances" into account in deciding whether there has been No Significant Fault or Negligence. The Panel finds that Mr Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduces the period of ineligibility from two years to one year."

b) Furthermore, in two awards rendered by the CAS AHD in Turin the Court denied to enter into examining and deciding purely medical issues. In case OG 06/004 the Panel said: *"[4.11] The relief requested presupposes that we find the Athlete to have a high naturally elevated level of Hb. [...] Far be it for this Panel to substitute its views to those of the experts who have declined to grant the dispensation to this Athlete for a naturally high elevated level of Hb over the past 3 years. We are being asked to make a medical expert's judgement through the guise of canceling a Notification of Start Prohibition. It is not for this Panel to perform an evaluation similar to that contemplated by the FIS B.4.8, which would apply for the duration of the Olympic Games."*

Also, regarding the matter if a substance should be - or not - on the prohibited list, the Panel in the case OG 06/001 followed the (regular) CAS jurisprudence[45]: "*[4.7] It was submitted on behalf of Mr Lund that the Panel should decide whether Finasteride should have been on the Prohibited List at all. The Panel declined to enter into that debate. [4.8] If International Federations or antidoping organisations are unhappy with the contents of the Prohibited List, they must persuade WADA to*

S.L.R. 12/1 (Fall 2001), p.524 et seq. A landmark decision on this topic was issued by the New South Wales Court of Appeal on 1 September 2000 [Raguz v/ Sullivan & ORS]; see the judgement as well as the memorandum drafted by the President of the Ad hoc Division in Sydney in: Kaufmahn - Kohler G., *Arbitration at the Olympics*, Kluwer Law International, The Hague 2001, pp.41-78.

31 CAS OG 2000/002 [Samoa NOC v/ IWF], *Digest of CAS Awards II*, p.604.

32 CAS OG 2000/006 [Baumann v/ IOC, German O.C. & IAAF], *Digest of CAS Awards II*, p.637.

33 CAS OG 2000/014 [FFG v/ SOCOG], *Digest of CAS Awards II*, p.685. NFs accept CAS AHD jurisdiction through their membership to an IF which itself is subject to CAS AHD jurisdiction.

34 CAS OG 02/004 [Canadian O.A. v/ ISU], *CAS Awards - Salt Lake City 2002 & Athens 2004*, p.41.

35 CAS OG 2000/012 [Neykova v/ FISA & IOC], *Digest of CAS Awards II*, p.676.

36 "[...] for the resolution by arbitration of any disputes covered by Rule 74 of the Olympic Charter and by the arbitration clause inserted in the entry form for the Olympic Games, insofar as [...]" (emphasis added)

37 CAS OG 02/003 [Bassani-Antivari v/ IOC] and CAS OG 02/005 [Billington v/ ISU], *CAS Awards - Salt Lake City 2002 & Athens 2004*, pp.34-35 and pp.50-52 respectively. See Leaver P., "The CAS Ad hoc division at the Salt Lake City Winter Olympic Games 2002", *ISLR* 2002, pp.48-49.

38 Article 1 of the Ad hoc Rules, as adopted by the ICAS in New Delhi, on 14 October 2003, now reads: "[...] for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as [...]".

39 The date that the Opening Ceremony of the XX Olympic Winter Games in Turin took place.

40 The decision was made on 22 January 2006.

41 Especially concerning selection disputes.

42 10 days (article 1 of the Ad hoc Rules) plus the 21-days (or more, depending to each NOC's/IF's etc. rules) time limit for a regular appeal to the CAS appeals division.

43 See Di Pietro D., "The Ad hoc division of the Court of Arbitration for Sport at the Athens 2004 Olympic Games", *ISLJ* 2005/3-4, p.23.

44 See Niggli O./Sieveking J., "Éléments choisis de jurisprudence rendue en application du Code mondial antidopage", Jusletter 20. Februar 2006, http://www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4573&Language=1&Print=1>

45 CAS 2005/A/921 [FINA v/ Kreuzmann & German Swimming Federation].

change the list. It is not within the jurisdiction of this CAS Panel to make that decision."

c) Finally, the Panel in case OG 06/010 distinguished between an adverse analytical finding and a doping offence. Only the second could possibly give rise to a selection dispute, forcing the Panel to interpret the FIBT Rules and conclude on the consequences of a personal doping offence on the team's results. The Panel said: *"An adverse analytical finding is simply a report by the Anti-Doping laboratory that a sample is positive for a prohibited substance. Thereafter, the applicable Anti-Doping regulations (FIBT Regulations in this case) provide for an extensive process, including the athlete's rights: to ask for a B sample test, be present at the testing of the B sample, and to have a hearing to contest the adverse analytical finding. Only after that process has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found. [...] No decision that Dos Santos committed an antidoping rule violation has been rendered by any authority. The adverse analytical finding announced by the BOC in apparent disregard for Rule 14.14 of the FIBT Regulations that prohibit such public disclosure is not a decision pursuant to Article 13 of the FIBT Regulations which may be appealed to CAS. [...] The Application fails at the outset and therefore there is no need to interpret the meaning of Article 11 of the FIBT Regulations with respect to the effect that his doping infraction would have had on the "team" of which Dos Santos was a part at the Challenge Cup."*

2.2.3 Selection and Qualification

While the main sources of disputes for regular CAS are now doping and football, the CAS AHD usually deals with doping and selection cases. This second pillar of CAS AHD jurisprudence attracted most attention than any other during the Turin Winter Olympics. This is due to the simple fact that the CAS AHD - *inter alia* - entertained the (eventually successful) appeal of Ms Isabella Dal Balcon, an Italian snowboarder who contested her non selection to the Italian Olympic team (case OG 06/008). The legal impact of the award in the said case may not prove to be equivalent to its social impact[46], caused by the fact that the Italian snowboard team had to be reconstituted one day before the official training sessions would start. But again, this is a question that cannot be safely answered before the next edition of CAS AHD in Beijing.

Although two *prima facie* similar selection cases (OG 06/002 and OG 06/008) did not have the same result (Ms Schuler failed in her appeal while Ms Dal Balcon succeeded) the CAS AHD in Turin maintained a consistent approach to this type of disputes. Firstly, both Panels recognized their authority to control the application of purely objective selection criteria. Secondly, given the fact that the selection process may in some cases involve subjective criteria as well, like the trend of performance[47], the Panel in the Schuler case declined to control such subjective evaluation, unless it was made in bad faith or in a discriminatory manner: *"As said, given that Ms Schuler had to be compared with some male snowboarders, internal trials would have been of no avail. [...] The Panel is of the opinion that the language of the Snowboard Selection Guidelines [...] requires the assessment of the World Cup results not simply as objective criteria but assessed in relation to the performance trend towards the end of the selection period. This indicates a clear subjective evaluation. [...] In the Panel's view, unless selection rules set forth completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgment of the persons who select the athletes. [...] The Applicant does not claim that the Respondent acted in bad faith or in a discriminatory manner, so any arbitrariness is excluded."*

Adopting the same point of view, the Panel in the case OG 06/003 dismissed the appeal of the Moroccan athlete Mr Samir Assimani against the decision of his NF and NOC not to inscribe him (or any other athlete) to the Olympic Games. The Panel said: *"[14.] Selon la jurisprudence constante de la Chambre ad hoc du Tribunal Arbitral du Sport (TAS), il n'appartient pas au TAS de trancher la question de savoir si un/une athlète a le droit de forcer son CNO à l'inscrire aux Jeux Olympiques (voir CAS OG 02/003 Bassani-Antivari v/IOC). [15.] Sans entrer dans les détails, le Panel constate que le Demandeur n'a pas soumis des faits ni des indices démontrant que le Comité National Olympique Marocain avait violé la Charte Olympique. Tout au contraire, le Défendeur a expliqué de façon convaincante qu'il y avait des raisons de santé valables pour fonder sa décision de refus d'inscrire le Demandeur pour les XXèmes Jeux Olympiques d'Hiver de Turín 2006 [...] 16. Ainsi, il apparaît que la décision du Comité National Olympique Marocain du 6 février 2006 n'est point frappée d'arbitraire".*

On the other hand, arbitrariness was not excluded in the Dal Balcon case, where the (initial) criteria set forth by the competent federation and national Olympic committee were completely objective: results obtained as from 14 October 2005 in World Cup competitions, an escalating coefficient to be applied to the three races prior to the Games and also any podium result obtained to be taken into account (the October 2005 criteria). Since there were no podium results for any athlete, the results in all five World Cup competitions would be of crucial importance for the athletes. Albeit that, a new criterion created by CONI and FISI was communicated orally to the team members the day prior to the final competition: the *two best results* obtained by each athlete in the Parallel Giant Slalom races in the World Cup would be used for the final classification and the selection of the Olympic team (the 2-best rule). The Panel said: *"The October 2005 criteria clearly state that the selection criteria should be as objective as possible. A statement of principle this Panel agrees with as did the Panel in the Schuler v/Swiss Olympic Association CAS OG 06/002 [...] The October 2005 criteria have no provisions regarding how to use the selection criteria when an athlete is injured or does not race because the coach substitutes another athlete. To resolve this dilemma the 2-best rule was announced the day prior to the final race to all present at the meeting of athletes. That rule was not communicated to the Applicant who was not present at the meeting. It was, of course, unknown to all the athletes until it was formulated two days before the competition and announced to all present the day prior to the final competition."*

And the Panel concluded: *"The 2-best rule is a radical alteration to the original criteria. It came too late in the selection process to be fair particularly as it was not announced in a complete fashion and communicated to the Applicant. Therefore, the Panel finds the 2-best rule to be arbitrary and it would be unfair and unreasonable in all the circumstances to apply it."*

As already mentioned, the Panel stressed that, contrary to the Schuler case, the competent Italian NF (FISI) used no discretion in the final selection: *"FISI accepted the direction of DA Snowboard albeit on the changed criteria that this Panel has found to be arbitrary and unfair and therefore to be disregarded [...] The Panel in Schuler declined to intervene in the legitimate exercise of discretion by the national federation. There was no discretion used in this case."*

Conclusion

The experience of three Summer Olympics and another three Winter Olympics of the CAS AHD has rewarded the Court with priceless know-how. In addition, the average of almost nine cases per Olympiad shows that the CAS AHD is now a *conditio sine qua non* for the successful organisation of the major sporting event in the world. Every two years the CAS attempts to succeed in its own "triathlon" (fair - fast - free), which, above all, requires a unique balance between the speed of the procedures (24h) and the quality of the justice served (fairness in sport). The CAS AHD in Turin was another example of flexible procedures, always at the disposal of the Olympic Movement, and consistent jurisprudence. The road to Beijing is now open for legal debates[48] on how the role of the CAS AHD can evolve in its second decade of life. In the author's opinion, given the high stakes that the participation in the Olympics entails, the selection / qualification disputes will be the nucleus of the CAS AHD jurisprudence in the near future.

46 If the participation to the Olympics is every athlete's dream, then the participation to the Olympics that take place in the athlete's own country is an once-in-a-lifetime experience.

47 In German: "Formkurve", see OG 06/002, p.8 [5.9].

48 See Tucker G./Rigozzi A./Wenying W./Morgan R., "Sports Arbitration for the 2008 Beijing Olympic Games", in: Blackshaw I./Siekmann R./Soek J. (eds.), *The Court of Arbitration for Sport 1984 - 2004*, *op.cit*, pp.160-179.

Legal Aspects of the Representation of Football Players in Brazil

by **Luiz Roberto Martins Castro***

Introduction

Firstly, before going into the sporting question and, more specifically, the regulations governing football players' agents in more detail, it is important to bring to the attention of the reader who is unfamiliar with the Brazilian political regime that Brazil is a federal democratic state under rule of law.

According to the terms of its Federal Constitution, promulgated in 1988, Brazil is formed by an indissoluble union of autonomous political collectivities. The form of government adopted by the Brazilian state is the federal system, with the federation consisting of a union of autonomous regional collectivities that the doctrine calls federated States (the name adopted in our Federal Constitution), Member-States or, simply, States, the most frequently-used term.[1] Currently, Brazil comprises 27 (twenty seven) States and 1 (one) Federal District (our Federal capital, Brasilia).

As a result of the federative regime adopted by our Constitution, each State possesses legislative powers for a number of specific matters. In addition to the States, as is the case in other countries, the municipalities also possess legislative powers; however, and here Brazil differs from the vast majority of other countries in the world, the municipalities have their own legislative council that is autonomous and independent from the mayor. Therefore, whether at national, state or municipal level, the legislative power is autonomous and independent from the government.

Under the terms of Article 24, subsection IX of the Constitution, the right to legislate on sport is concurrent between the Federation and the States, with the municipalities having no legislative powers on sporting matters and only having the right to supplement federal or state legislation where applicable.

When there is concurrent legislative matter between the Federation and the States, the powers of the former are limited to establishing general rules, in other words it is the Federation's responsibility to set out the basic legislation and the States' responsibility to supplement it.

In Brazil, therefore, the Federation is responsible for the legislative regulations governing the activity of footballers' agents, while each State may legislate on the matter in a supplementary fashion. Currently, at least up to the date of writing of this work[2], we have only federal norms governing the matter.

Brazilian Sporting Structure

As a result of the political division described above, the Brazilian sporting structure differs somewhat from other sporting structures throughout the world, and mainly from those of European countries. Whereas in Europe, sporting clubs and societies join together in national federations[3] which, in turn, join International Federations, in Brazil, due to its being a federative state, clubs[4] group themselves together in regional federations[5], (restricted to the geographical boundaries of each State and Federal District), which in turn combine to form National Confederations[6]. This is why Brazilian national sporting bodies joining International Sports Federations are known as Confederations and not Federations as is the case elsewhere in the world[7].

Thanks to this association, international sporting rules that are to be applied in Brazil are sent to the Confederations, who also have the responsibility for enforcing them.

The legal basis for the assimilation and immediate receptivity of international sporting norms is article 1, paragraph 1 of the Pelé Law[8], which determines that: "Formal sporting activity is regulated by national and international norms and by each sport's rules of play, accepted by the respective national sports governing bodies."

The Brazilian body affiliated to FIFA is the Brazilian Football Confederation (Confederação Brasileira de Futebol - CBF), to whom norms issued by FIFA are sent and with whom the responsibility lies for representing FIFA throughout Brazil with regard to any international football-related regulations.

The CBF receives FIFA's orders, obligatorily passing them on to the State Federations which, in turn, pass them on to their affiliated clubs. Thus, FIFA's international laws regulating the activities of footballers' agents are received in Brazil by the CBF, which then passes them on to the other bodies that it governs without any option for queries.

It is also worthy of note that, taking into account the existence of the State Federations, and since they are responsible for forming the National Confederations, the right of vote in elections for national sporting directors belongs to the regional federations and not to the clubs disputing the national championships, which in many instances results in serious conflicts in sports politics.[9]

Representation of Footballers - the Brazilian Reality

It is well known that Brazil is one of the world's greatest producers of quality footballers, which is why a huge number of Brazilian players are transferred every year to overseas teams.[10]

As a result of these transfers, the business of representing footballers

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1 Silva, José Afonso da *in* Curso de Direito Constitucional Positivo, Editora RT, São Paulo, 6th Edition, São Paulo, 1990, pages 88,89.

2 July 2006

3 Examples: Deutscher Fussball-Bund, Koninkijke Nederlandse Voetbal Bond, Federação Portuguesa de Futebol, Federazione Italiana Giuoco Calcio, Fédération Française de Football, Real Federación Española de Fútbol.

4 Legally named "Entidades de Prática Desportiva". [Sports clubs]

5 Legally named "Entidades Regionais de Administração do Desporto". [Regional Sports Governing Bodies]

6 Legally named "Entidades Nacionais de Administração do Desporto". [National Sports Governing Bodies]

7 Examples: Confederação Brasileira de Futebol, Confederação Brasileira de Vôlei, Confederação Brasileira de Basquete.

8 The Brazilian federal law regulating the general norms governing sport, promulgated on the 24th of March 1998, when Mr Edson Arantes do Nascimento (known universally as Pelé) was Minister for Sport, and for which reason the law bears his name.

9 To learn more about the structure of sport in Brazil, see Álvaro Melo Filho - "*O Novo Estatuto da CBF no contexto Jus-Desportivo*" *in Revista Brasileira de Direito Desportivo, vol 07-* jan/jun 2005, Editora IBDD/IOB, São Paulo, pp 9 - 30.

has become extremely lucrative and attractive in Brazil, to such an extent, indeed, that even without any intake of new agents by the CBF in 2005 and 2006, Brazil has 121 (one hundred and twenty one) agents mentioned on the FIFA website. Brazil is the fourth country in the world with the largest number of agents; only Italy, England and Germany have more.

These agents are identical all over the world, regardless of their nationality, and must obligatorily adhere to FIFA's rules of conduct and income limits. They are subject to any penalties imposed either by FIFA or by the National Federation that issued their licence and may also, in the event of a dispute with other agents or clubs, seek intervention by FIFA, the National Federation or CAS/TAS. In other words, they belong to the "International Football System".

Since Brazil is a country of continental dimensions[11] and since football is played in practically all of its 5,560 municipalities[12], the 121 agents licensed to practice there are insufficient in number to meet the demand and volume of work generated by the country's professional and amateur players.

This is why we have an anomalous juridical figure in Brazil, a different kind of agent known as the "Footballer's Manager".

The Footballer's Manager is usually someone with fewer qualifications, or an ex-player, who doesn't normally meet the financial and technical criteria necessary to become a CBF agent[13].

However, as a result of his contacts with players and coaches, the manager often approaches young players who, for any number of reasons (social, educational, financial or cultural) end up being attracted by the promise of a placement or transfer to a club.

At this point it should be noted that two distinct situations may arise; firstly, that the manager is honest and, secondly, that he is not.[14]

Assuming that the manager is honest, he will ask the player for a document authorising him to act on his behalf. With this document in his possession, the manager will then set about finding a club in which to "place" the player he is representing. If he really does have good contacts, then he may well find a club for the young player, negotiating a salary for him that will vary in accordance with his footballing skills.

If the player is really good, the manager may be able to negotiate a good salary for him with the club, or even a share for the player in future negotiations for another club.

In these cases, the manager usually receives 10% (ten percent) of the player's salary and a percentage of any future transfer fees which the player may receive. The amount that the manager may receive from a future sale will depend very much upon the deal negotiated between manager, club and player but usually, allowing that the manager is honest, the sale will be negotiated in the first instance with the player and the manager's commission will generally be paid by the club rather than by the player.

In many cases, until such time as the manager finds a club for the young player, he will pay somewhere to provide board and lodging for him. The managers call this "investment". Such acts help to further increase trust and enhance the personal relationship between player and manager.

It is extremely commonplace for there to be partnership agreements between managers and CBF agents. Frequently, when a manager "discovers" a more talented player, or if one of "his" players is becoming highly successful, they tend to seek out CBF agents to offer a partnership deal.

Under this partnership, it is the agent's responsibility to try to arrange for the player to play in an overseas or top Brazilian team and in these instances the manager and agent usually sign a contract setting out the specific manner in which the income resulting from a future transfer deal will be split.

We will now analyse the situation in which the manager is dishonest or is not acting in the player's best interests.

In these cases, the manager also asks for a document to be drawn up giving him authority to act on the player's behalf but he usually does so without defining any time limit, or specifies an extremely lengthy period of time or, worse, stipulates that 50% (fifty percent) or more of the player's income is to revert to the manager.

As if this were not enough, whilst negotiating the player's deal with the team, he frequently omits to advise the player of important matters such as his participation in a future transfer, the amount of taxation that will be levied on his salary and, in many cases, the existence of a partnership with the club in the percentage of income received in the event of a transfer overseas or to a top Brazilian team. In such cases, when the player is transferred he doesn't even receive a fee for the transfer or, if he does, it will be much less than the manager is receiving or was specified in the contract.

At this point, we would highlight some real-life cases of managers not acting in the best interests of the players:

1. A deal was made for a Brazilian player to play in a Japanese team. When the player arrived at his new club he was asked if he had received the transfer fee of 1,000,000 (one million) US dollars. He informed the club that he hadn't, that his manager had given him only 500,000 (five hundred thousand) US dollars. The representatives of the Japanese team then showed him the receipt for the original amount, which his manager had signed. When questioned, the manager said that the Japanese were lying and that he didn't know what he was signing. Under the contract between manager and player, the former was entitled to 10% (ten percent) of the player's total income. Shortly afterwards, the manager bought a new house.
2. A footballer playing in Italy asked his manager to invest part of his savings in property on the Brazilian coast and to this effect he granted the manager power of attorney so that he could acquire the property on the player's behalf. At the same time, he gave the manager his bank details and PIN number. A year later, on his return to Brazil, he tried to contact his manager with a view to visiting the properties, but was unable to find him. Several days later he discovered that the manager had bought six properties over the last year, but all in his own name rather than the player's.
3. An internationally renowned Brazilian footballer currently playing in Spain had a contract with his manager whereby 70% (seventy percent) of the player's income reverted to the manager. Luckily, the player managed to legally rescind the contract and signed with a CBF agent instead.
4. As a final example we would mention a problem which frequently arises in the relationship between ingenuous players and unscrupulous managers. It is commonplace for a manager to succeed in arranging a trial for a player in a Middle-Eastern or Eastern-European country, subsequently abandoning him there with no money and no return flight ticket to Brazil, in the event that the trial is unsuccessful.

In addition to these examples, it is extremely common for managers to sign representation contracts with their players for lengthy periods, such as 4 or 5 years.

10

Year	Number of footballers transferred overseas
2006	400
2005	804
2004	857
2003	858
2002	665
Total	3.584

Source www.cbfnews.com.br - updated to 06/07/2006

11 Brazil covers a total area of 8,514,215 m2

12 Source http://www.ibge.gov.br/brasil_em_sintese/default.htm

13 Whereas a CBF Agent has been licensed by the CBF and FIFA, having passed the exam, paid for his agent's licence and taken out professional insurance, the Manager is not licensed, either because he failed the exam or because he did not have sufficient financial resources to pay the exam enrolment fee (approximately 450 US dollars), issue of the licence (approximately 2,300 US dollars) and insurance.

14 There are no exact numbers or statistics as to how many footballer's managers exist in Brazil, not to mention a list as to how many are honest or dishonest, but there is a tendency to believe that over 70% act unethically, benefiting greatly from the ingenuity and/or ignorance of players and their parents in the case of minors (under-18s).

Brazilian Legislation applicable to Footballers' Agents/Managers

In Brazil, with the exception of a single paragraph in the "Pelé Law", there is no specific legislation governing the activity of Agents or Managers. This lack of specific legislation means that under law the applicable legislation governing the relationship between player and manager/agent is the normal legislation, which in this case are the terms set out in the Civil Code ("Código Civil") and the Consumer Defence Code ("Código de Defesa do Consumidor").

A) The Pelé Law

Incredible as it may seem, this one specific law is contrary to the terms of FIFA's statutes for footballers' agents.

Article 28, paragraph seven of the Pelé Law stipulates that the maximum duration for public or private sports representation agreements and the use of professional athletes' images is one year, whereas the FIFA regulations say two years.[15]

Therefore, whenever we are approached by Agents on this matter, we suggest that they sign contracts with the players they represent for periods of one year for domestic transfers and for two years for international transfers, thereby avoiding any possible queries as to the validity of the duration of the representation period.

B) The Civil Code

The Civil Code is applicable in the present matter, since it is unquestionable that the agent/manager is representing the player by proxy.[16] The main points relating to proxies in the Civil Code are: (a) the performing of acts or the administration of interests on behalf of another; (b) the service may be free or remunerated; (c) it may be general or specific; and (d) the proxy is responsible for the acts he performs.

Briefly, according to the Civil Code, the proxy's (agent's/manager's) obligations are: (a) to be diligent in the performance of the acts entrusted to him; (b) compensate for any damage that he may cause; and (c) be accountable to the grantor.

In turn, and, again, briefly, the grantor's (player's) obligations are: (a) to comply with the obligations contracted by the proxy, as long as they lie within the limits of the terms of the power of attorney; and (b) pay the appropriate remuneration.

As may be verified, most of the real-life situations mentioned above could be resolved under civil law. However, two problems arise here, one legal, which is proving the irregularity of the acts performed and two, the players' ingenuity.

In the vast majority of cases the players either have no knowledge of their rights (only rarely does a player consult with a lawyer) or they prefer to believe in the word of their representative - "after all, he was the one who helped out right from the very start of their footballing career".

When we analyse the terms and obligations resulting from the granting of power of attorney we can clearly see why FIFA places lawyers and agents on the same footing, since the representation of his client's interests by means of power of attorney is inherent to a lawyer's professional activity.

C) The Consumer Defence Code

The applicability of the Consumer Defence Code arises from the fact that in carrying out their professional activity, the agent/manager is providing a service and therefore, under the terms of article 2[17] of the aforementioned legal diploma such a relationship must be considered as being a consumer relationship.

When the Consumer Defence Code is applied to relationships between players and managers/agents, much of the harm caused to players by unscrupulous agents/managers can be remedied, since this law protects the consumer from abusive practices by suppliers.

The main rights safeguarded by the Code are: (a) the right to be fully informed about the product or service provided; (b) the modification of contractual clauses which establish disproportionate payments or their review where subsequent facts result in their becoming an excessive burden; (c) payment of patrimonial and non-patrimonial damages; (d) protection against practices and clauses that are abusive or are imposed along with the supply of products or services; and (e) reverse onus of proof.

As may be seen, the Consumer Defence Code is a vital instrument in the player-manager/agent relationship, as it practically remedies the lack of civil legislation by placing the burden of proof back on the agent/manager and goes even further by annulling any imposed or abusive clauses in the contract signed by the player and his agent/manager.

D) Conclusion

As may be seen, the Brazilian legislation is well set out and covers all the problems that may arise from the legal relationship between the player and his agent/manager. However, very few disputes are taken before the Brazilian courts, whether as a result of ignorance on the part of the players or because of the false-friendship existing between the two.

Arbitration Chamber for the Resolution of CBF Agents' Disputes

With a view to: (a) avoiding the involvement of the Judiciary in matters relating to its members and subordinates; (b) taking into account the large number of agents; and (c) in order to avoid having to resort routinely to FIFA, the CBF, with FIFA's authorisation, instituted an Arbitration Chamber to resolve disputes involving CBF agents and which covers disagreements in situations of agents versus agents, agents versus clubs and agents versus players.

Only licensed CBF agents may take their disputes before the Arbitration Chamber. Therefore, managers, players' relatives and lawyers, even when the latter two have equivalent agent status as per article 1 of FIFA's Statutes for Players' Agents, may not seek the assistance of this tribunal in the resolution of their problems and must, instead, resolve their disputes through the normal legal system.

All cases taken before the Arbitration Chamber are dealt with impartially or in accordance with FIFA's established norms. The arbitration procedure is governed by confidentiality unless both parties agree differently.

It is not known exactly how many cases have already been settled by the Chamber, but it is certainly not less than 20 in its four years of existence.

Statement

At this point in time, and with a view to corroborating all that has been said above, we are including in the present study a statement drawn up by the author for a CBF agent who was in dispute with another CBF agent regarding the validity/legality of a player's contract.

The dispute in question was taken before the CBF's Arbitration Chamber, which found in favour of the CBF agent who requested this statement and there is no doubt that the Chamber's findings were based largely on the said statement, a copy of which follows.

For reasons of confidentiality, the names of the parties and the player involved in the dispute have been omitted.

"Dear Sir,

1. As discussed at the last meeting, we have analysed the contract in question and considered how it could be legally rescinded without the player being required to pay any compensation to his ex-agent, as well as safeguarding the interests of the former in the present case.
2. The delay in submitting the present statement was due to the time taken by FIFA to reply to a number of questions. Their informal reply was only received today.

Contractual Situation

3. In the first instance, we must point out that, legally, the contract is

15 This paragraph was not included in the original text of the law; it was added by Law 10.672 of the 15th of May 2003, which became known as the "Football Moralisation Law".

16 Articles 653 to 691 of the Brazilian Civil Code

17 "A consumer is any natural person or legal entity that acquires or uses a product or service in the capacity of end-user"

still in force and the player is still obliged to give his ex-agent a sum equivalent to 10% (ten percent) of the amount he receives in accordance with his contract of employment.

4 This means that the first step should be to notify the ex-agent (either through the notary's office or judicially) that the player does not intend to continue being represented by him, thereby putting a stop to the need to make the said payments.

5. According to the information you provided, the player has not so far undertaken any such formal act. Nevertheless, before adopting such an attitude, we must carefully consider the risks which may arise from so doing.

Rescission of Contract

6. Under Brazilian law, any contract may be terminated at any time if both parties are in mutual agreement, or rescinded by means of a compensatory payment to the injured party.
7. In both instances a document proving the termination of the contract is required; a rescission document in the case of an amicable termination or a court order in the event that the matter was settled in a court of law.
8. As we have reason to believe that the ex-agent does not intend to settle the dispute extra-judicially, we will deal directly with the legal questions.
9. In this specific case, the only risk facing the player is a compensatory payment to his ex-agent. The problem lies in determining the amount of this payment, since the contract does not expressly mention the amount, only that:

   "On pain of the payment including not only the amounts due but also all expenses, costs etc. that XXXXXX may have incurred whilst negotiating matters in the player's interest, in addition to compensation for loss and damages."

10. In the event of legal proceedings, the amount to be paid for loss and damages will be decided by the judge and in our experience it is not possible at this time to foresee what that amount might be. We would take the opportunity to point out that in view of the huge number of cases currently ongoing in the courts, these proceedings would take around five to seven years, if an agreement cannot be reached.
11. We would point out that this matter should only be taken to court if the ex-agent so wishes. We would not recommend that you propose such action as it is not in your interests bearing in mind that it is the player who is seeking to rescind the contract.

Legal Aspects which may uphold the rescission of contract without implying payment of compensation

12. Under our law, the only options for rescinding a contract without compensatory payment are:
    a) Irregularity in the contract;
    b) Culpability of the ex-agent

Irregularity in the Contract

15. As explained briefly on the phone, the contract itself contains a number of small irregularities which may be addressed under law and it is precisely on this point that we are undertaking a more detailed study.
16. Basically, there are two points which we may address; firstly, the legality of the automatic renewal of the contract and, secondly, the fact that the contract was signed by a legal entity.

a) Automatic Renewal

17. Bearing in mind that the representation contract is a contract for the provision of services, it must comply with the terms of the Consumer Defence Code, which includes a number of regulations prohibiting the inclusion of abusive clauses.
18. Having analysed the contract, we can legally uphold that this automatic renewal clause is abusive, therefore it is not valid and the contract is automatically rescinded as we are now within the renewed period. The contract, therefore, is no longer valid.
19. Such an understanding arises from the fact that there are a number of legal precedents annulling automatic renewal clauses when the express agreement of one of the parties has been omitted, as is the case in this instance.
20. We have also taken into account the fact that when the contract was signed the player was a minor (age 17) and was, therefore, represented by his parents. On the contrary, when the contract was due for renewal, he had reached majority and should, therefore, have signed the new contract himself. The old contract could not simply be extended because at the time of renewal the signees no longer had authority to act in this capacity.
21. Another important factor is that a law was published on the 15th of May 2003 determining that:

    "Public or private powers of attorney related to sports representations and the use of professional athletes' images may not be granted for periods of more than one year."

22. Thus, even taking into account the fact that the contract was signed prior to the publication of the law, we could argue that the validity of the renewal is limited to a duration of one year, in which case the contract would end on the 27th of January 2004.
23. In addition to these legal points, we would also highlight the fact that under article 12, paragraph 2 of FIFA's Agents' Regulations,

    "the contract will be limited to a two-year duration but may be renewed *if expressly requested in writing by the parties. It may not be tacitly extended.*" (our underlining)

24. Therefore, *according to FIFA regulations, the automatic renewal clause in the contract is invalid. The renewal must be expressed by signing a new contract in these terms.*

b) Contract signed by a legal entity

25. According to the terms of the FIFA regulations governing the activity of footballers' agents, *all contracts must be signed by natural persons,* although the sums to be paid as a result of such a contract may be received by legal entities, but we reiterate, the contract must obligatorily have two natural persons as parties, the agent and the player, and not the firm of one of the parties, as is the case in this instance.

Competent Jurisdiction to Settle the Dispute

27. We would point out that for the contract to be declared null and void a court of law must make such a decision. Our understanding that the contract is null and void is insufficient without a court ruling to this effect.
28. In the event that legal proceedings are required, the plaintiff should be the player and the lawsuit should be filed in his city of residence as required by the terms of the Consumer Defence Code.
29. If legal proceedings to annul the contract are not considered necessary then the correct procedure for settling the question is to go through the CBF's Arbitration Chamber.
30. We would make it clear that having queried the matter with FIFA the present dispute should be dealt with by the CBF, since there are no longer FIFA agents, only agents from the National Federations. FIFA would only become involved if the agents involved in the dispute were from different countries.
31. In addition to the facts already mentioned, it may be possible to bring to the CBF's attention the fact that the player's ex-agent is to receive a direct payment in the case of future transfer fees, which directly contravenes FIFA's regulations governing Footballers' Agents.
32. There would be no problem if the agreement had been signed by the player, but since the contract is with the club, the ex-agent is clearly in a situation where there is a conflict of interest. This is disallowed and subject to punishment by FIFA and/or the CBF, possibly even resulting in the *ex-agent's licence being revoked.*
33. With nothing further to add for the time being, we are at your disposal to provide any further clarification that may be required."

The 'Independent European Sport Review': A Critical Overview

by **Samuli Miettinen***

In 2005 the UK Presidency of the European Union initiated a review of European football with a mandate 'to produce a report, independent of the Football Authorities, but commissioned by UEFA, on how the European football authorities, EU institutions and member states can best implement the Nice declaration on European and national level[s].'[1] This illustrates two prominent features of the Review: its strong emphasis on the interests of UEFA as the collective interests of stakeholders and the focus of the report on football, rather than sport in general. The 'Terms of Reference have been drafted in consultation with UEFA and... led by UEFA....' It might seem unfair to generalise the Review as commissioned by UEFA, written by UEFA about UEFA since the sports ministers of some of the EU Member States were 'part of the governance of the report'[2] and a public consultation process was undertaken prior to publication. However, in particular consumers and the greater public whose interests the EC Treaty principles seek to safeguard did not feature prominently within the reasoning of the final document despite having been invited to take part in the consultation process. It should be recalled that although some representatives of the Commission are thanked for their interest in the Review,[3] its terms of reference were set by the institutionally distinct Presidency of the European Union rather than the Commission as the guardian of the Treaties.

Sport and Economic Activity

The UEFA-commissioned Review is founded in part on an exploration of the 'specificity of sport' thesis, according to which that sports governing body embodies features that render its otherwise controversial internal market behaviour justifiable. It will be recalled that there is a developed legal distinction between sport as economic activity and that which is not economic. Where no appreciable economic impact occurs, actions do not fall foul of internal market fundamental freedoms. Provisions that restrict trade must be proportional, that is, limited to measures that are necessary to achieve recognized non-market objectives. Competition law employs similar thresholds of economic relevance. Thus, where there is no appreciable economic impact, the specificity of sport not only makes policy sense but is already a legal reality. Rules that are not directly linked to explicit economic objectives in so far as they do not entail a direct transfer of financial benefit may nevertheless serve implicit economic purposes. Anti-doping rules are permissible not because as a feature of sport they enjoy general exemption, but because the internal market rules prohibit economic considerations within which the doping rules as 'purely sporting interest[s]' are not considered to fall.[4] The Helsinki Report recognised that on the whole, fundamental freedoms do not conflict with regulatory measures of sports associations because the sports associations' measures are objectively justifiable, non-discriminatory, necessary and proportional as required for other fundamentally non-economically driven objectives under the market freedoms.[5]

The 2000 Nice Declaration on sport, a non-legally binding Presidency Conclusion, sought to remedy the lack of a general European competence to regulate sport. Whilst necessarily recognising the primacy of Community legislation, it noted the sporting organisations' autonomy to '...organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams....'[6] The Declaration stated '...that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport...'[7] and that the social functions of sport somehow '...provide the basis for the recognition of their [exclusive] competence in organizing competitions'.[8] The declaration also implored sports governing bodies to '...continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy.'[9] It will be recalled that the Declaration was unable to alter the Treaty rules which before and after the declaration treated economic activity associated with sport just as any other economic activity and sports bodies as analogous to public authorities bound by the Treaty. In this respect, although demonstrating some political will[10] to recognise specific aspects of sport, it was unable to clarify, validate or deny the legal status of those sporting practices whose compatibility with the Treaty is not beyond dispute.

Unhappy with the current state of the legal regimes applicable to European football, the UK Presidency established in 2005 an initiative to review the rules applicable to European football, and in particular its governing bodies. The Terms of Reference of the then 'Independent European *Football Report*'[11] set for consideration seven broad bases for some of the current legal concerns related to sport:

1. In the context of the European model of sport, '[t]o make recommendations for how the EU institutions, member states and football authorities can improve and support the central role of the football authorities *independently to govern all aspects of the sport*...'[12]
2. 'For the football authorities to have effective arrangements to oversee the identity and integrity of the person... owning/controlling/managing clubs' in order to ensure fair competition and ostensibly to 'develop effective arrangements to prevent money laundering... and to prevent unsuitable owners... being involved in the game'[13]
3. To facilitate collusion between sports organisations in setting salary caps for players' wages,[14] fixing market shares,[15] and building links between amateur and professional sports.[16]
4. To scrutinise the role of agents and establish greater club control over players.[17]
5. To acknowledge '...the validity of European football's efforts to increase revenues...' by price-fixing through central marketing and its justification on the basis of the redistributive effects between otherwise unequal clubs[18]
6. To require the EU and Member States in addition to the football

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1 'UK Presidency Initiative on European Football - Context and Terms of Reference' p.3.
2 *Ibid.*
3 Independent European Sport Review at p. 4.
4 See for example Case C-519/04 P, *Meca-Medina* judgment of 18 July 2006, not yet reported, paragraphs 25-27 and 32.
5 Communication from the Commission on the Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework, 10. December 1999 COM (1999) 644 and /2.
6 Nice Declaration on the specific characteristics of sport and its social functions in Europe, 2000 paragraph 7.
7 Nice Declaration paragraph 8.
8 Nice Declaration paragraph 9.
9 Nice Declaration paragraph 10.
10 Insufficient, it will be recalled, for its formal adoption into the Treaty itself.
11 Terms of Reference, p. 3. Emphasis added. Original title of the Review in the Terms of Reference at p. 3.
12 Terms of Reference, p. 3. Emphasis added.
13 Terms of Reference, p. 4.
14 'To re-examine the feasibility of salary caps' in the context of 'ways to enhance... prudential operation within budgets...'. Terms of Reference p. 4 section 3.
15 '...to help achieve an appropriate level of competitive balance'. *Ibid.*
16 'To examine way to support and encourage the education and training of young players at clubs within the local community'. *Ibid.*
17 '... effective and transparent arrangements to oversee the activities of agents in respect of their dealings with clubs and players'; 'To develop... a... system of player registration and movement at European and national levels, *recognising... stability of and respect for contracts*. Emphasis added. Terms of Reference p. 5, section 4.
18 *Ibid.*