income is consequently being raised. A revision of the salary restrictive order was launched at the beginning of the CSL, which exerted impact on the total amount of a clubs salary instead of on the personal income of a player. The CFA state that the total amount of salary and bonus for all the players shall not exceed 55% of the total profits of the club. 55% is believed to be the demarcation between profit and deficit, from the observation of the CFA on the overall conditions and the average data of most foreign professional football clubs.

Salary restrictive order has been positively received by more and more clubs in recent years and the income of a professional player has been dramatically decreased to the range of 300,000 to 1,000,000. Another CFA document of salary restriction was issued in 2006 that the annual income of a player shall not exceed 1,000,000.

When observed from the viewpoint of Antimonopoly Law, some arguments may be raised from the CFA's making and revisions of salary restrictive order.

Firstly, restriction is necessary on player's salary. The CSL is possibly "crashed" if the salary constantly soars until beyond the limitation of the clubs. The author believes that reasonable restriction on unacceptable high salaries is constructive for financial mechanism of the clubs and healthy competitions and future development of the CSL.

Secondly, restriction on amount of the player's personal income is against Antimonopoly Law, while restriction on total amount of the club salary may pass the censor. Since personal income is a reflection of the value of the player, the CFA's restriction on personal income without any objective foundations is a violation of the player's interest as well as a restriction to competition for valuable players between clubs. It is an example of "fixed price" agreement in article 13 of Antimonopoly Law. Good intention as it may have, it cannot be exempted according to article 15 of Antimonopoly Law, for it has great negative influence and better alternatives exist. The author believes that restrictions on the total amount of club salary, which bears much resemblance to the "salary cap" system in American professional sports, is one of the better alternatives. It is a standard that is directly connected with the management of the club so as to encourage clubs to take reasonable measures; on the other hand, its influence on the players' income is indirect so that it can be exempted.

Thirdly, salary restrictive order may pass the censor of the Antimonopoly Law if it determines the bottom line of the player's salary. As a matter of fact, many players are suffering from the dramatic salary decrease. The monthly salary of a younger player or a substitute is around 2,000-3,000, the lowest 1,500 or even less (pre-tax). The bonus for the players unable to appear in a match is highly limited (around 500) even when the club wins. In that case, the annual income for these players is under 20,000. Short career life and indispensable injuries undermine the future of most Chinese professional football players. Therefore, the author believes that the bottom line salary would be a positive policy, which would protect the player's interest and steady the operation of the CPFL. It would not be a restriction to competition since its positive effect outweighs its restriction.

Conclusion

Since the CPFL has undoubtedly become an economic industry, it should be operated in the pattern of economic industry and managed in accordance with the substance of economic industry and should go by the legal norms of competition law. From the analysis of the disputes and issues concerning club relocation, sales of broadcasting rights, multiple ownership of clubs and player transfer, etc., it can be found that it is absolutely necessary to regulate the various monopolies in the CPFL by Antimonopoly Law. The league governors especially the CFA must practically revise various restrictive measures if it wants to pass the censorship of Antimonopoly Law. However, it should be noted that since the CFA is endowed with the exclusive legal power by Sports Law to be in charge of the organization of national football leagues, Antimonopoly Law alone cannot avoid the abuse in the administration mechanism of the CPFL in a fundamental way.

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The Need for WADA to Address Confidentiality Leaks in Drug Testing in Olympic Sports - The Ian Thorpe Situation

by **John T.Wendt***

Introduction

Ian Thorpe is one of the greatest swimmers of all-time. He has won more international championship medals than any other Australian swimmer in history, including five gold medals in two Olympic Games. Thorpe has also been one of the leading opponents of doping. He was a founding athlete-member of the World Anti-Doping Association's (WADA) "Athlete's Passport" Program and was one of the first to provide blood samples to be frozen for future testing in accordance with WADA's new testing procedures (World Anti-Doping Code Annual Report, 2002). But, that reputation was tarnished when someone leaked confidential information to Damien Ressiot, a journalist for the French newspaper, *L'Equipe*, who accused Thorpe of committing a doping offense. For Ian Thorpe, there were two volatile issues – first, the truth of the allegations, and second the breach of confidentiality of his personal records.

Confidentiality is at the heart of any drug testing program. Names should not be revealed, unless it is firmly and legally established that a doping offense has been committed. A breach of confidentiality and media leaks undermine the entire system. It is essential that there is confidentiality throughout the whole process until there is a finding that an individual has in fact committed a doping offense. This comment looks at the breach of confidentiality of Ian Thorpe's records, and the need for WADA to act to remedy the problem.

Thorpe's Accomplishments

Thorpe has broken more than 22 World Records. At the Olympic Games in Sydney in 2000 he was a three time gold medalist and two time silver medalist. At the 2004 Olympic Games in Athens he was a two time gold medalist, silver medalist and bronze medalist. He is the only swimmer in history to successfully defend the 400 Meter Freestyle at the World and Olympic Championships

In three world championships from 1998 to 2003 he won 11 gold medals, one silver and one bronze medal. When he was 18 he became the first swimmer to win six gold medals at a single world championship. He established four new world records, including the 200 Meter, 400 Meter and 800 Meter Freestyles, making him one of three men in history to hold world records over three distances simultaneously. Perhaps his most famous accomplishment occurred at the 2004 Olympic Games in Athens in the 200 Freestyle when he defeated defending Olympic champion Peter van den Hoogenband of the Netherlands, Australian teammate Grant Hackett, and Michael Phelps, considered by many as the most successful swimmer in history.

* John T. Wendt serves as a member of the International Court of Arbitration for Sport, the American Arbitration Association and the LPGA Special Arbitration Panel. He has published extensively in the field of sports law, teaches Sports Law, and is a member of the Ethics and Business Law Department in the Opus College of Business at the University of St. Thomas. He can be reached at jtwendt@stthomas.edu.

After concluding his swimming career he established *Ian Thorpe's Fountain for Youth,* a non-profit charitable organization "empowering children through education and improving their health and wellbeing" (Ian Thorpe's Fountain for Youth, 2007). He is also an Athlete Ambassador for *Right to Play*, an international humanitarian organization that uses sport and play programs to improve health, develop life skills, and foster peace for children and communities in some of the most disadvantaged areas of the world (Right to Play, 2010).

Thorpe as an Anti-Doping Crusader

Over an elite career that has spanned more than a decade, Thorpe was tested hundreds of times but never failed a drug test. Thorpe has also been an outspoken critic of doping in swimming often criticizing organizers for not doing enough in anti-doping. In 2001 Thorpe said, "As a clean athlete, from an outside point of view I don't think it looks good for this sport…I don't think there's a deterrent that's strong enough within the sport that is going to allow all athletes an equal opportunity to be able to race against each other" (New York Times, 2001a). Thorpe criticized Federation Internationale de Natation (FINA), the international governing body of swimming, for its reluctance to implement tighter doping tests saying, "With FINA, a lot of the different things that have happened disappoint me…One is the lack of tests that they've done and the way the tests are done. As a clean athlete, from an outside point of view I don't think it looks good for this sport" (Passa, 2001).

In a 2004 interview with Fox Australia Thorpe said, "For anyone to think that they're swimming at a clean Olympic Games, they'd be naïve…Of course I've swum against athletes that have been on drugs…" (Scott, 2004). FINA was furious at Thorpe and in a press release said, "FINA, the swimming world governing body, acknowledged with regret the statements made by the great swimming champion Ian Thorpe (AUS) and his intention to bring the sport of swimming into disrepute" (Federation Internationale de Natation, 2004). Cornel Marculesco, FINA executive director, put it more bluntly encouraging Thorpe to be quiet, "He [Thorpe] should respect the position of the scientific people…The swimmers should swim" (New York Times, 2001a).

Ressiot and *L'Equipe*

Damien Ressoit is a journalist for the French newspaper *L'Equipe* and is no stranger to controversy. He is the author of several articles on doping including those that claimed that there was proof that Lance Armstrong took EPO to win the 1999 Tour de France (Cyclingnews.com, 2005). He is also the author of "Le mensonge Armstrong" ("The Armstrong Lie") and "La vérité sur Armstrong" ("The Truth on (sic) Armstrong") (Cyclisme-dopage.com, 2005). Ressiot is also no stranger to publishing leaked information and breaches of confidentiality. In 1999 the international governing body of cycling, Union Cycliste Internationale (UCI) condemned Ressiot's and *L'Equipe's* story on alleged doping allegations from the 1999 Tour de France saying that the "UCI confirms its commitment to investigate how and why confidential information was disclosed to members of the news media. In particular, we deplore the fact that the long-established and entrenched confidentiality principle could be violated in such a flagrant way, without any respect for fair play and the rider's privacy" (Kröner, 2005). Ressiot was also formally placed under investigation by a Versailles Court of Appeal for "helping to violate the confidentiality of a judicial investigation" into the use of banned drugs by the Cofidis cycling team (Reporters without Borders, 2006).

On March 30, 2007 *L'Equipe* published an article by Ressoit claiming that Thorpe's May 2006 sample showed unusually high testosterone values and the presence of a luteinizing hormone. Both would be violations of the World Anti-Doping Code. The newspaper went on to state that the Australian Sport Anti-Doping Authority (ASADA) was aware of Thorpe's test results, but chose to ignore them (Ressiot, 2007). Without mentioning any names, FINA issued a statement that there was an investigation into a possible violation by an Australian athlete. Though Thorpe was not explicitly named, everyone knew that it was he to whom FINA was referring.

Reactions to the Leak and Accusation

Not surprisingly, Thorpe was deeply stung by the news. "I was in complete shock, I didn't know what to do, how to react and you know, I think I sat in my room, you know, kind of physically shaking… It is gut-wrenching. It really is" (Lohn, 2007). The problem for any athlete, especially an elite athlete, is that just an accusation alone, whether true or not, can immediately cause serious damage to the athlete's image and reputation. Thorpe commented about his reputation, "It is already tarnished…It is as simple as that. Quite simply because of this leak that has happened" (Lohn, 2007).

Thorpe also specifically talked about the legal issues involved in the leak saying:

> The obligations of confidentiality that are owed to me under the WADA Code are meant to protect the reputations of innocent people from being damaged by media speculation while the routine results management processes are being undertaken. I have been deprived of this protection by the deliberate act of the person who leaked this information (FoxSports, 2007).

Australian swimming officials were also incensed and demanded an explanation for the leak. Glenn Tasker, Swimming Australia's Chief Executive expressed support for Thorpe, said, "Somebody has leaked the information and (Thorpe's) privacy has been grossly invaded…" (Linden, 2007). Tasker was appalled that information was leaked to Ressiot and *L'Equipe* saying, "I think it behoves (sic) organizations involved ... to find out how this was leaked…I think we should have a head on a platter. We should know who it is and there should be some punishment" (The Standard, 2007).

Tasker said that Thorpe had not been given the chance to confront his accusers, "The penalties are very, very strong in the doping code, but athletes have to have the opportunity, to be able to face their accusers…Ian has not had the B-sample tested and he certainly hasn't been accused of anything, although the French article (in *L'Equipe* newspaper) certainly has implied he is guilty" (Foxsports.com.au, 2007b). Finally, Tasker stressed the long term implications is not just for Thorpe alone, but for all athletes, "If it is Ian Thorpe then somebody has leaked this information and his privacy has been invaded and it's not good for that athlete or any athlete around the world" (Shanahan, 2007). Alan Thompson, Australia's head swimming coach, echoed Tasker's remarks, "There needs to be an investigation to find out how it happened, why it happened and actions put in place to reaffirm to the athletes that they have complete privacy and confidentiality in all testing" (The Standard, 2007).

Jacco Verhaeren, Dutch head coach, was disappointed that Thorpe's outstanding career could be tainted by allegations that could have no basis in fact, "This is damaging somebody's career without any reason and I think that's the worst about it…It is shocking it is happening in this way…The media should be very careful with this kind of information... I think there are people to investigate these kinds of things and I think we should first listen to these people before damaging somebody who is an exceptional sportsman and to me a very honest guy and to me he is not under suspicion" (Fairfax-Digital, 2007)

For Ian Thorpe, as for all other elite athletes again there are two issues. The first issue deals with the truth of the allegation, but the second issue deals with the breach of confidentiality. That breach of confidentiality undermines the integrity of the entire anti-doping system. Perhaps Glenn Tasker put it best, "The first issue is extremely important to Ian, but the side-issue is extremely important to everyone else - athletes like Libby Lenton and Grant Hackett and Aaron Peirsol and Natalie Coughlin - because they have to have faith in the system" (Jeffrey, 2007a).

WADA and Confidentiality

Since the beginnings of the modern anti-doping period confidentiality has been at the core of the anti-doping movement. In the European Commission "Harmonization of Methods and Measurements in the Fight Against Doping Final Report" the original IOC Medical Commission insisted that, "complete transparency shall be assured in

all activities to fight doping, *except for preserving the confidentiality necessary to protect the fundamental rights of athletes*." (emphasis added) (HARDOP Final Report, 1999). That confidentiality must last throughout the entire investigative and judicial processes.

The World Anti-Doping Agency condemned the serious breach of confidentiality in Thorpe's case. David Howman, WADA executive director said, "We did not have a name, and if we did we would never have given it to anyone, let alone a journalist" (Jeffrey, 2007b). In a press release WADA went on to say, "WADA is especially shocked that the name of an athlete was apparently given to the media while no adverse analytical finding has been determined at this point…Only when this process is completed and if an adverse analytical finding is then made, will WADA be informed of an athlete's name" (CNN.com, 2007). WADA criticized FINA for its handling of the situation saying, "WADA expects FINA and the Australian Sport Anti-Doping Authority (ASADA) will deal responsibly with the matter. The apparent provision of an athlete's name to the media when it should have been kept confidential is unacceptable" (Reuters, 2007). Richard Pound, then head of WADA, said "[I]t's a very important policy issue that the names not be out there and bandied around, particularly if it turns out there is no doping case…If we come to the conclusion that the wrong result has been achieved, we would get involved" (Mangall, 2007).

The need for privacy and confidentiality on drug testing throughout the process is essential. Weston has pointed out that, "The accusation alone converts the admired athlete into an apparent pariah. The years an athlete spends focused on training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name…"(Weston, 2009). This point cannot be stressed enough - to preserve the reputations of innocent athletes, there must be complete privacy and confidentiality throughout the process. Only after the process is completed can there be a public disclosure. In Ian Thorpe's case, there was never a hearing by an anti-doping agency, yet someone leaked Thorpe's confidential medical records to Ressiot, and *L'Equipe* published them claiming that there was a doping offense.

Thorpe and Ressiot

Thorpe vowed to hunt down the leak and considered legal action. Ressiot said that Thorpe was wasting his time, "He has to concentrate mostly on his defence (sic) if he has a clear conscience…Because he will never find the source of the leaks" (Bourke, 2007). Ressiot also denied any wrongdoing and deflected any blame on to ASADA saying, "If ASADA had respected procedures, he [Thorpe] would have been informed of the problem posed by his sample taken in May 2006 and he would not have discovered it in my paper…I am not responsible therefore for this negligence" (Bourke, 2007).

But, there were also questions about the timing of the release of the story which came just after Thorpe retired and at the 2007 FINA World Championships in Melbourne, where Thorpe was being feted. Ressiot stated that the report came out during the Championships because that was when the investigation was concluded. However, he went on to say, "Besides, the leaders of the swimming world treated me in a rather uncivilized manner…" (LEN Magazine, 2007).

Pierre Lafontaine, Canadian head coach, expressed his disgust at the *L'Equipe* report, "I find it astonishing that it's done at this time…I just think it's ridiculous …why is it done in the middle of this meet when we are in the middle of a celebration of swimming all around the world…I can only tell you that (Thorpe) has been a great ambassador for sports all around the world…" (Shanahan, 2007). Pete Geyer, editor of Cyclingfans.com commented on Ressiot's and *L'Equipe's* motives saying, "The goal is getting the *L'Equipe* brand out there as it seeks to expand beyond France…The objective is not to inform the public, much less to educate it, but rather to increase *L'Equipe*'s influence, and profits, beyond France" (Bourke, 2007).

FINA, ASADA and Thorpe

Australia has been a leader in the fight against doping and was one of the first signatories to the World Anti-Doping Code. ASADA chairperson Richard Ings said, "At this point there is no suggestion that an athlete has committed an anti-doping rule violation...Media reports that an athlete has failed a drug test are simply incorrect" (IOL.co.za, 2007a). On August 31, 2007, the Australian Sports Anti-Doping Authority (ASADA) said that it had closed its examination of a sample provided by Thorpe on May 29, 2006. ASADA said that they had sought expert medical and scientific opinions from not only the Australian Sports Drug Medical Advisory Committee, but also the ANZAC Research Institute and the WADA accredited laboratories in Sydney and Montreal. ASADA stated that all were "unanimous in their opinion that the evidence available does not indicate the use of performance enhancing substances by the athlete" (Lord, 2007). Based on ASADA's report, FINA also closed its examination of the Thorpe affair.

David Flaskas, Thorpe's manager said, "We were also pleased that ASADA consulted independent experts from internationally respected organizations (sic) and they were unanimous in their opinion that there was no evidence of the use of performance enhancing substances by Ian Thorpe. We always believed this would be the outcome and Ian's reputation as a fair competitor would be affirmed" (World News Australia, 2007). Thorpe said, "My reputation as a fair competitor in swimming is the thing I value most… I have always been, and remain, a strong supporter of anti-doping testing. I firmly believe drugs have no place in sport…" (Ian Thorpe's Fountain for Youth, 2007). Tony O'Reilly, Thorpe's attorney stressed:

> While we stand by the testing process, I'd like to remind people the routine results management process should have been confidential. Ian was denied his right to confidentiality due to an information leak. This breach of confidentiality jeopardizes (sic) the integrity of the entire testing code. Ian still regards this information as private and confidential and he has only agreed to disclose the outcome of what is a confidential process because of the intense media interest that the breach has provoked (Ian Thorpe's Fountain for Youth, 2007).

Thorpe's doping allegations were addressed, but his reputation was still tarnished.

Thorpe Sues Ressiot and *L'Equipe*

Thorpe decided to sue Ressiot and *L'Equipe* for defamation and a claim for infringement of privacy in the New South Wales Supreme Court. Through legal action there could be a chance to recoup damages for the injuries committed to Thorpe's reputation. Thorpe, the anti-doping crusader, found himself now linked with the very people he attacked through the years. "Never will it be completely clean now, it's as simple as that. Whatever happens, and you can have concrete evidence there that proves that, but people will still question. That is one of the saddest things. My accomplishments in this sport have been, in people's eyes, they are starting to become diminished and questioned" (IOL.co.za, 2007b)

Thorpe went on to explain that impact that the allegations had on him, his career and on his legacy:

> People say to me, "Most people think that you didn't do it". But Google it, look it up. Whatever website you go on to and it will have something along the lines of "accused of taking drugs at this point"…That will remain in history. For me in my career and how I feel in my about sport, that's not acceptable...No matter how many baths that you take, a little bit of it (the mud) will stay…I know in Australia the vast majority of people believed me and know that I wouldn't do something like that, but around the world, it may be a different story. I want to make sure that this doesn't happen again (The Daily Telegraph, 2008).

However, in the end the legal system could not provide Thorpe with a proper remedy. On September 28, 2009, even though none of the defendants appeared or even filed a response, Thorpe dropped his lawsuit. Thorpe's manager David Flaskas said, "I think it definitely has been (frustrating) for Ian. It is an expensive process and at some point in time you have to make the call…Ian feels he has been vindi-

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cated and that it is time for him to move on and let it go. This has dragged on over two years and how long do you keep going?" (Guardian.co.uk, 2009). Thorpe's solicitor Tony O'Reilly explained, "In these circumstances Ian has decided not to pursue the proceedings as he sees little point in obtaining a verdict in the absence of Mr. Ressiot and the publisher of *L'Equipe*" (HeraldSun.com.au, 2009).

Reforms and Need for Confidentiality

Over 100 years ago in their groundbreaking article arguing for a right to privacy, Samuel D. Warren, Jr., and Louis Brandeis said, "The press is overstepping in every direction the obvious bounds of propriety and decency…Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery ..." (Warren and Brandeis, 1890). Warren and Brandeis were referring to newspapers. Since those days there has been an exponential explosion in different media forms and communication channels. Peck (2006) has pointed out that professional athletes face unrelenting scrutiny from all avenues. Storm (2007) argued that "most athletes never receive full confidentiality due to their popularity" and "that the media regularly leaks confidential drug test results" (Storm, p. 29)

Ressiot and *L'Equipe* overstepped their bounds by publishing this gossip. Ressiot and *L'Equipe* overstepped their bounds by publishing this gossip. It is an invasion of an athlete's privacy. When the Code was designed it needed the support of all stakeholders, who insisted on confidentiality. It is the cornerstone of the World Anti-Doping Program. The provisions of the World Anti-Doping Code are designed to protect all athletes, including their reputations, from media gossip. Numerous commentators have discussed the need for a journalism shield and the protection of sources. However, Thorpe's case is not dealing with protection of sources. It deals with leaking confidential information. A more analogous case would be with Troy Ellerman, an attorney who once represented the founder of the Bay Area Laboratory Co-Operative (BALCO) in a steroid scandal. Ellerman admitted in court that he provided journalists, Mark Fainaru-Wada and Lance Williams with transcripts of confidential grand jury testimony. Ellerman pled guilty to two counts of contempt of court for leaking the transcripts, making a false declaration and obstruction of justice (Egelko, 2007). Ellerman was sentenced to 30 months in prison and was required by the court to make ten presentations to law students to dissuade them from violating the rules of court (Brown, 2007). The distinguishing difference between the BALCO case and Ian Thorpe's is that WADA does not have direct power to issue a contempt of court order.

In 2002 the United States government began an investigation into BALCO, suspected of giving steroids to major league baseball players. Major League Baseball and the Major League Baseball Players Association (MLBPA) had entered into an agreement for drug testing of all major league players. "The players were assured that the results would remain anonymous and confidential; the purpose of the testing was solely to determine whether more than five percent of players tested positive, in which case there would be additional testing in future seasons" (United States v. Comprehensive Drugs Testing, 2009, p. 993). The collection of specimens and record storage was done by Comprehensive Drug Testing, Inc. Federal investigators seized those test results as part of the BALCO investigation. The Ninth Circuit Court of Appeals found that the seizure was illegal and found that "the Players Association is aggrieved by the seizure as the removal of the specimens and documents breaches its negotiated agreement for confidentiality, violates its members' privacy interests and interferes with the operation of its business." (United States v. Comprehensive Drugs Testing, 2009, p. 1002). The court went on to stress, "The risk to the players associated with disclosure, and with that the ability of the Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high" (p. 1003).

Dealing with the leak of "The List" of names in *Comprehensive Drug Testing*, New York Times Michael Schmidt reporter credited his sources as "lawyers with knowledge of the results" and that the "lawyers spoke anonymously because the testing information was under seal by a court order" (Schmidt, 2009). In a response to the New York Times articles, Donald Fehr, then Executive Director of the MLBPA stated that, "The leaking of information under a court seal is a crime" (Fehr, 2009). Kobritz (2009) reiterated that divulging information under court seal is a crime and used the analogy of discredited attorney Troy Ellerman. Kobritz also castigated the attorneys who leaked the names to the New York Times saying:

> Forget The List. The list I want to see is the one with the names of all the lawyers who are spilling their guts to the *Times*, violating their oath of office (lawyers are officers of the court), breaking the law, and selling out the honest and law-abiding members of their profession. I want to see that list published in *The New York Times*. And I want to see the people on that list get what they deserve (Kobritz, 2009).

Kobritz went even further saying that Schmidt was "guilty as his sources" (Kobritz, 2009).

Murray Chass was a reporter for the New York Times and winner of the J.G. Taylor Spink Award which honors baseball writers "for meritorious contributions to baseball writing" (National Baseball Hall of Fame, 2010). Chass talked about Schmidt crossing the line:

> In 39 years at the Times, I collected and published a significant amount of information that people didn't want to have disclosed. But I don't recall any instance where my acquisition of the information crossed a line. There was also a valid reason for getting the information. I'm not sure getting the 2003 names is valid. Why are the newspaper and the reporter so eager to get the names? The answer is easy to arrive at. Schmidt and the Times are pursuing a prurient pastime. The name of its game is beating the Times' competitors to the names, not uncovering some nefarious practice that cries out for sunlight. (Chass, 2009).

Chass talked about why Schmidt wanted to disclose the names. Schmidt himself said, "I think there's a lot of curiosity... I started to realize that there was an interest out there, that people really wanted to know what was on this list. There was a certain amount of intrigue about it" (Chass, 2009). As Chass pointed out, "that doesn't give anyone the right to show disdain for and flout the law just to satisfy someone's curiosity" (Chass, 2009).

Changes to the World Anti-Doping Code

There have been recent revisions and improvements to the World Anti-Doping Code. Under Article 14, "Confidentiality and Reporting" WADA included a new Section 14.1.5 "Confidentiality" which now states:

> The recipient organizations shall not disclose this information beyond those persons with a need to know (which would include the appropriate personnel at the applicable National Olympic Committee, National Federation, and team in a *Team* Sports) until the *Anti-Doping Organization* with results management responsibility has made public disclosure or has failed to make public disclosure as required in Article 14.2 below (World Anti-Doping Code, 2009)

In the Comment to Section 14.1.5 WADA also placed responsibility on each anti-doping organization to provide "in its own anti-doping rules, procedures for the protection of confidential information and for investigating and disciplining improper disclosure of confidential information by any employee or agent of the Anti-Doping Organization" As a result of the Thorpe case WADA also revised Section 14.2 dealing with "Public Disclosure" which now states that the identity of an athlete can be disclosed only after notice has been provided to the athlete. In Ian Thorpe's case the disclosure occurred before Thorpe was notified.

Finally WADA added Section 14.2.3 which states:

> In any case where it is determined, after a hearing or appeal, that the *Athlete* or other *Person* did not commit an anti-doping rule violation, the decision may be disclosed publicly only with the consent of the *Athlete* or other *Person* who is the subject of the decision. The

> *Anti-Doping Organization* with results management responsibility shall use reasonable efforts to obtain such consent, and if consent is obtained, shall publicly disclose the decision in its entirety or insuch (sic) redacted form as the *Athlete* or other *Person* may approve. (emphasis added) (World Anti-Doping Code, 2009)

Again, this is at least a start at protecting the rights and reputation of athletes. But, it needs to go further. Connolly (2006) has pointed out that, "Those in charge of anti-doping efforts must be careful to follow their own rules if they want others to trust in the legitimacy of the system they orchestrate. The accusations levied at seven-time Tour de France champion Lance Armstrong during August 2005 are an example of how anti-doping authorities can sometimes unethically exceed their boundaries" (p. 196).

Conclusion

Ian Thorpe is an Australian citizen. On a national level Australia has strong privacy laws and ASADA is also subject to the strict provisions of the *Privacy Act* (ASADA, 2007). Any ASADA official who leaks confidential information faces not only civil penalties, but also criminal penalties including possible jail time. Finally, Australia and the Australian Law Reform Commission have recently released their *Review of Secrecy Laws* calling for stricter privacy regulations (Australian Law Reform Commission, 2009). But, it was too little and too late for Thorpe. The legal system let him down. But, as Alan Thompson, Australia's head swimming coach said, there is a need for action "to reaffirm to the athletes that they have complete privacy and confidentiality in all testing" (The Standard, 2007). And as Glen Tasker, Australia's swimming executive said, all elite athletes "have to have faith in the system" (Jeffrey, 2007a).

That leaves it to WADA. Already "[A]t the request of its stakeholders, WADA developed an International Standard for the Protection of Privacy and Personal Information (Data Protection Standard), which went into effect on January 1, 2009" (World Anti-Doping Agency, 2009). The 2009 revisions and International Standard leave disciplinary actions for improper disclosure to anti-doping organizations. But that does not do enough. WADA needs to tighten their security procedures even more. In revisions to the 2009 World Anti-Doping Code, WADA has extended sanctions beyond athletes to include athlete support personnel. In a similar vein, WADA can create an Anti-Doping Rule Violation to deal with violations to protection of privacy.

Athletes have obligations and responsibilities under the Code. WADA and Anti-Doping Organizations also have corresponding responsibilities to the athletes. The key duty is confidentiality. The confidentiality leak happened within the WADA testing system. WADA has the power to create sanctions for any sports official found to have leaked the information. It needs to do so. If not, the whole integrity of the testing process and the international anti-doping system is jeopardized.

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Sports Arbitration: Determination of the Applicable Regulations and Rules of Law and their Interpretation

by **Andrea Marco Steingruber***

A discussion and comparison with commercial arbitration focusing on the Fédération Internationale de Football Association ("FIFA") and on recent cases of termination of football players' employment contracts without just cause[1] decided in appeal arbitration proceedings.

I. Introduction

Sport is characterised by its particular rules[2] and by what has also been perceived as the *lex sportiva*.[3] Therefore, unsurprisingly, arbitration has been seen as the privileged dispute resolution method in the field of sport even though the Swiss Federal Tribunal has held that rules issued by private associations[4] could neither be characterised as "law" nor recognised as *"lex sportiva transnationalis".*[5]

Sports arbitration presents distinctive features when compared to commercial arbitration.[6] These are mainly attributable to the structural organisation of sport, but also to the role of the Court of Arbitration for Sport ("CAS") in appeal arbitration proceedings, *i.e.* in cases of appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement, provides for an appeal to the CAS.

This article will, by focusing on the Fédération Internationale de Football Association ("FIFA") and on recent cases of termination of football players' employment contracts without just cause, discuss how the federation's structure of FIFA - an association in accordance to Swiss law - and the CAS Code influence the determination of the applicable regulations and rules of law and their interpretation in appeal arbitration proceedings.

The article begins with a brief description of the structural organisation of sport in general and of football in particular (Section II). Then the FIFA Regulations on the Status and Transfer of Players ("FIFA Status Regulations") are considered (Section III), followed by an overview of the dispute resolution instances involved in termination of employment contracts without just cause cases in football (Section IV). The main part of the article is devoted to a discussion about the determination of the applicable regulations and rules of law by CAS Panels (Section V) and about the law applicable to the merits in cases regarding the termination of football players' employment contracts without just cause (Section VI). The article will then analyse the interpretation of Article 17 of the FIFA Regulations on the Status and Transfer of Players by considering how features of sport affect interpretation of regulations (Section VII). Finally, conclusions are drawn (Section VIII).

* PhD, Queen Mary University of London, School of International Arbitration, Attorney-at-Law, Berne, Switzerland. The author can be reached at amsteingruber@hotmail.com.

1 See Article 17 of the FIFA Regulations on the Status and Transfer of Players. The cases in question are the following:
- CAS 2007/A/1298, Wigan Athletic FC v/ Heart of Midlothian; CAS 2007/A/1299, Heart of Midlothian v/ Webster & Wigan Athletic FC; CAS 2007/A/1300, Webster v/ Heart of Midlothian, award of 30 January 2008 ("*Webster*"). On the *Webster* case see Ian Blackshaw, *The CAS Appeal Decision in the Andrew Webster Case*; Frans de Weger, *The Webster Case: Justified Panic as there is after Bosman?*; Janwillem Soek, *The Prize for Freedom of Movement: The Webster Case*, THE INTERNATIONAL SPORTS LAW JOURNAL, (2008/1-2), pp. 14-28.
- CAS 2007/A/1359, FC Pyunik Yerevan v/ E., AFC Rapid Bucaresti & FIFA, award of 26 May 2008 ("*Pyunik Yerevan*").
- CAS 2008/A/1453, Elkin Soto Jaramillo & FSV Mainz 05 v/ CD Once Caldas & FIFA and CAS 2008/A/1469, CD Once Caldas v/ FSV Mainz 05 & Elkin Soto Jaramillo, award of 10 July 2008 ("*Soto*").
- CAS 2008/A/1517 Ionikos FC v. C., award of 23 February 2009 ("*Ionikos 1*").
- CAS 2008/A/1518 Ionikos FC v/ L., award of 23 February 2009 ("*Ionikos 2*").
- CAS 2008/A/1519, FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; CAS 2008/A/1520, Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA, award of 19 May 2009 ("*Francelino da Silva*").
- CAS 2008/A/1644 Adrian Mutu v/ Chelsea Football Club Limited, award of 31 July 2009 ("*Mutu*").

Further CAS awards in the article are cited without abbreviation.

2 See, *e.g.* the eligibility rules for participating in sport competitions or the rules in the field of doping. However, there are also further rules. For an overview, see in particular Antonio Rigozzi, L'arbitrage International en Matière de Sport, (2005), [hereinafter Rigozzi], paras 31 *et seq.* On the distinction between *"Spielregel"* ("game rules" - not considered to be subject to judicial review) and *"Rechtsregel"* ("legal rules" - considered to be subject to judicial review), see in particular Max Kummer, Spielregel und Rechtsregel, (1973); for a more recent article see, *e.g.* Urs Scherrer, *Spielregel und Rechtsregel - Bestandesaufnahme und Ausblick*,, Causa Sport 2/2008, pp. 181 *et seq.*

3 See, *e.g.* Gérald Simon, *L'arbitrage des conflits sportifs*, 1995 Rev Arb. 185, [hereinafter Simon, *Arbitrage*], p. 190. See also