THE RELEVANCE OF SWISS LAW IN DOPING DISPUTES

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I. INTRODUCTION

A. BACKGROUND

The publication of the first version of the World Anti-Doping Code (the "WADC") in 2003 marked a watershed in sports regulation. Prior to its creation, different sports had applied different rules and sometimes athletes from the same sport, but who competed under different flags were subject to different rules.

Stakeholders of sports rallied and, in 1999, decided that the antidote would be to create a body whose aim would be to promote and coordinate, at an international level, the fight against doping in all sports. The World Anti-Doping Agency ("WADA") thus came to be. One of its tasks was to prepare a universal anti-doping code; one that would harmonise the many different regulations and laws then in effect such that athletes in different sports and different countries would be treated equally[1]. WADA's efforts resulted in the creation of the WADC.

One of the unique aspects of the WADC is that it has been adopted, virtually wholesale, by every sport in the Olympic Movement and a significant number outside of the Olympic Movement.

[1] See paragraphs 13 and 14 of the Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes, Professor Gabrielle Kaufmann-Kohler and Antonio Rigozzi, November 2007.

B. LAW APPLICABLE IN DOPING DISPUTES

The potted history set out above is relevant in the context of this article because:

- a large number of the International Federations of sport that are signatories to the WADC are domiciled in Switzerland;

- most International Federations of sport, including those not domiciled in Switzerland, provide in their respective rules that appeals relating to doping disputes involving international-level athletes are to be resolved by the Court of Arbitration of Sport (the "CAS"), which is domiciled in Switzerland; and

- the WADC grants WADA a right to appeal first instance doping decisions of all signatory sports. WADA thus appears as a party in doping disputes before the CAS relatively frequently. WADA is a Swiss private law foundation with its seat in Lausanne, Switzerland.

Once a dispute has reached the CAS, the law applicable to the dispute is determined in accordance with Article R58 of the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (the "CAS Code"), which provides as follows:

> The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

Given that the domicile and/or place of incorporation of most International Federations is Switzerland, Swiss law is the law most often applicable to doping disputes resolved by the CAS. Remarkably, the CAS has on occasion applied Swiss law to doping disputes even where the applicable regulations expressly specified a different law. For instance, in CAS 2006/A/1025 Mariano Puerta v/ International Tennis Federation ("ITF"), the CAS chose to apply Swiss law despite the fact that the anti-doping rules of the ITF were expressly subject to English law, explaining that:

> 10.6. As most of the International Sports Federations have now resolved in their respective rules to refer sports related disputes to the Court of Arbitration for Sport, this appellate body is striving to achieve, despite differing governing laws of the Federations, a consistent and uniform application of the WADC throughout the world and for all sports disciplines. All of the case law developed by the CAS is based primarily on the rules issued by those federations. A large number of these federations are domiciled in Switzerland, thus enabling in the absence of a specific choice of law in their respective statutes the application of Swiss law.
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> 10.7. The WADA is itself a Swiss private law foundation with its seat in Lausanne, Switzerland. Its headquarters are located in Montréal, Canada. The rules of a Swiss private law entity should comply with Swiss law. If they do not do so, there is a risk that the Swiss Courts will declare them to be non-compliant. It was in order to ensure that the WADC did comply with Swiss law that WADA commissioned the

> legal opinions to which the Panel has referred. The principal concern of WADA was to ensure that the WADC complied with Swiss law in respect of proportionality.
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> 10.8. The Panel accepts that the ITF Programme provides that it is to be governed by and construed in accordance with English law, but that provision in the ITF Programme is expressly stated to be subject to the requirement to interpret the Programme "in a manner that is consistent with the applicable provisions of the Code [WADC]". The Panel interprets those provisions (Paragraphs S.1 and S.3 of the ITF Programme) as requiring it to construe the WADC in a manner which is consistent with Swiss law, as the law with which the WADC must comply. Construing the WADC in that way means that the WADC is not subject to the vagaries of myriad systems of law throughout the world, but is capable of a uniform and consistent construction wherever it is applied. Any other construction would negate, or, at the very least, seriously weaken, the purpose and objective of the WADA and its signatories.

Given that the WADC was conceived by a Swiss law entity, that the provisions of the WADC are guided by principles of Swiss law and that virtually all signatories to the WADC have in place a provision in their anti-doping rules which requires them to interpret those rules "in a manner that is consistent with the applicable provisions of the [WADC]", it is arguable that Swiss law would ultimately prevail over any other law, as it did in Puerta. The argument is likely to have some traction with CAS arbitrators, particularly given that the nature and existence of the WADC is premised on the principle of uniformity[2].

In summary, Swiss law inarguably has a significant role to play in the determination of doping disputes, particularly those ultimately resolved by the CAS.

II. APPLICABLE PRINCIPLES OF SWISS LAW

A. Introduction

Under Swiss association law, a sports federation is required to act in accordance with (1) mandatory provisions of association law; (2) the "general boundaries of the legal order" (Allgemeine Schranken der Rechtsordnung), in particular public policy, general mandatory law, bona mores, and protection of personality rights and (3) general principles of law, in particular equal treatment of members, good faith, prohibition of abuse of rights,[3] and due process in the decision-making process.[4] Of those legal concepts, this article is concerned in particular with the issue of personality rights and the relevance of such rights in the context of doping disputes.

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[2] The Introduction to the 2009 WADA Code emphasises that "*[t]he purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements",* while the commentary that accompanies that Introduction provides that:

> *[…] it is critical for purposes of harmonization that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations. These rules must be the same whether a hearing takes place before an International Federation, at the national level or before the Court of Arbitration for Sport […]*

[3] Henk Fenners, Der Ausschluss der Staatlichen Gerichtsbarkeit im Organisierten Sport, ¶¶ 111-13, see tab B1 of RRAB.

[4] Margareta Baddeley, L'Association sportive face au droit – Les limites de son autonomie, Bâle, 1994, p. 108, see tab B2 of RRAB.

B. Personality rights

While readers from civil law jurisdictions may be familiar with the concept of personality rights, readers from common law jurisdictions may be less so. In very basic terms, personality rights under Swiss law are the equivalent of human rights as applied to private persons[5]. The protection of personality rights under Swiss law is codified at Articles 27 and 28 of the Swiss Civil Code ("CC"):

> Art. 27 — Against excessive commitments
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> 1. No person can wholly or partially renounce his capacity to have rights and to effect legal transactions.
> 2. No person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality.
>
> Art. 28— Against infringements
>
> 1. Where anyone suffers an illicit infringement of his personality rights, he can apply to the judge for his protection against any person participating in such infringement.
> 2. An infringement is illicit, except when justified by the victim's consent, by an overriding private or public interest, or by the law.

To a common lawyer, the concept of personality rights is perhaps not entirely clear from a reading of Articles 27 and 28 of CC, but its meaning has fortunately been developed by the Swiss Supreme Court. Personality rights have been held to include the right to health, physical integrity, honor, professional standing, the right personal fulfillment through sporting activities and the right to economic freedom[6]. It is these latter two rights which are of most relevance to doping disputes. Common law practitioners will note the parallels between the right "to economic freedom" and the common law concept of restraint of trade. At EU level, the closest equivalent is the freedom of movement for workers.

Personality rights are particularly significant to doping disputes because Swiss law protects those rights against excessive restrictions or unjustified infringements[7]. It is generally accepted that the imposition on an athlete of a period of ineligibility for a doping offence is a restriction on an athlete's right to economic freedom and is therefore an infringement of his/her personality rights. At this juncture, the question then becomes whether the infringement is justified under Article 28(2) of CC.

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[5] JORG SCHMID, Personlichkeitsrecht und Sport, in: Privatrecht im Spannungsfeld zwischen gesellschaftlichem Wandel und ethischer Verantwort ung, Festschrift fur Heinz Hausheer zum 65. Geburtstag, Bern, 2002, p. 142.

[6] (1) 4A_558/2011, Judgment of 27 March 2012, First Civil Law Court; (2) Swiss Federal Supreme Court, Schafflutzel and Zollig v. Federation Suisse de courses de chevaux (FSC), 50.248/2006, Decision of 23 August 2007, ATF 134 Ill 193; (3) Paragraphs 30 and 48 of Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training during Their Period of Ineligibility with Swiss Law, including the General Principles of Proportionality and Equal Treatment, Dr Antonio Rigozzi, 9 July 2008.

[7] (1) Paragraph 4.3.2 of 4A_558/2011, Judgment of 27 March 2012, First Civil Law Court; (2) Paragraph 30 of Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training during Their Period of Ineligibility with Swiss Law, including the General Principles of Proportionality and Equal Treatment, Dr Antonio Rigozzi, 9 July 2008.

An infringement of personality rights is lawful under Swiss law only if, further to Article 28(2) of CC, the relevant sport governing body can establish that it is justified either by (1) the law; (2) the athlete's consent; or (3) the existence of an overriding public or private interest.

In the case of doping offences, neither the law nor consent can reasonably be used as justifications for the imposition of a sanction:

- Consent - Given the monopolistic position of International Federations, the issue of athlete consent is a delicate one in sports regulation, particularly where the relevant regulation provides for sanctions which have the potential to restrict an athlete's right to economic freedom. Can athletes really be said to freely consent to the imposition of a period of ineligibility for the commission of an anti-doping rule violation? The issue was highlighted by the Swiss Supreme Court in the case of Guillermo Cañas[8]:

> Sports competition is characterized by a highly hierarchical structure, as much on the international as on the national level. Vertically integrated, the relationships between athletes and organisations in charge of the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties. […]
>
> Aside from the (theoretical) case of a famous athlete who, due to his notoriety, would be in a position to dictate his requirements to the international federation in charge of the sport concerned, experience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation's requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the articles of association of the sports federation in question in which the arbitration clause was inserted, all the more so if the athlete in question is a professional athlete. Such an athlete will face the following alternative: to consent to arbitration or to practice his sport merely non-professionally. Put before the alternative of submitting to arbitral jurisdiction or else practice his sport just "in his own garden" and watch competition "on the television", any athlete wishing to engage in true competition or having to do so as his sport is his only source of income (financial or in kind, advertising income, etc) will in fact, nolens volens, have to opt for submitting to arbitral jurisdiction.
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> For these very reasons, the waiver of the right to bring setting aside proceedings, when it emanates from an athlete, will obviously not rest on a free will, as a general rule. The agreement arising out of an intention expressed in such circumstances and the intention expressed by the sports organisation concerned will therefore be tainted ab ovo by reason of the compulsory consent given by one of the parties.[9]
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> (Emphasis added and references omitted)

[8] ATF 133 III 235
[9] ATF 133 III 235 as translated in Swiss Int'l Arb. Rep 1 (2007) 67, 84-86,

The precarious position of the consent issue was recognised by the Swiss government in an explanatory report which accompanied proposed revisions to a Swiss Statute governing sport. In the report, the Swiss government explicitly pointed out that an express provision in the law allowing sports governing bodies to conduct anti-doping controls was necessary, given the doubtful nature of the athlete's consent in a situation in which refusing to provide consent would result in the exclusion of that athlete from the competition[10].

Anti-doping authorities should therefore be extremely wary of relying on "consent" as a justification for infringing the personality rights of an athlete since such "consent" is rarely granted from a position of equal bargaining power.

- Law - There is no legislation or statute under Swiss law that is capable of justifying an infringement of an athlete's personality rights as the result of a doping dispute between an athlete and a sports governing body[11].

Having ruled out the justification of a sanction by way of consent and law, the decisive factor is whether a sanction can be justified by an overriding private or public interest. Anti-doping authorities typically argue that the fight against doping is intended to maintain an equal playing field among competitors, to ensure the integrity of sport and to maintain the health of participants. By and large, it is likely that Swiss courts would consider these noble aims to be overriding private and public interests[12]. However, the fact that legitimate interests exist does not necessarily mean that a particular sanction will always be justified under Article 28(2) of CC. That assessment depends on the particular circumstances of a given case, and in particular whether the sanction proposed does not violate fundamental principles of Swiss law such as proportionality and the right to equal treatment.

C. Proportionality

Anti-doping tribunals are required to consider whether a proposed sanction is, in the circumstances of a given case, proportionate.

The principle of proportionality is well-established within most systems of law and plays an important role in the determination of sanctions applicable in doping matters. The principle pervades Swiss law, EU law and general principles of

[10] Feuille fédérale FF 2009 7401, 7450-7451: "Aujourd'hui, les contrôles antidopage relevant du sport de droit privé reposent sur une déclaration de consentement du sportif. Cette déclaration doit être librement consentie. Or, cette liberté n'est pas garantie, dans la mesure où le refus de donner son consentement peut entraîner l'exclusion de la manifestation ou la perte de la licence. Pour prévenir toute contestation, la nouvelle loi permet de réaliser des contrôles sans le consentement du sportif"

[11] See (1) Margareta Baddeley, Droits de la personnalité et arbitrage: le dilemme des sanctions sportives, in : Mélanges en l'honneur de Pierre Tercier, Geneva/Zurich/Basel, 2008, p. 711 (see tab C6 of RB); Jörg Schmid, Persönlichkeitsrecht und Sport, in: Privatrecht im Spannungsfeld zwischen gesellschaftlichem Wandel und ethischer Verantwortung, Festschrift für Heinz Hausheer zum 65. Geburtstag, Bern, 2002, p. 133; (2) paragraphs 51 and 52 of Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training during Their Period of Ineligibility with Swiss Law, including the General Principles of Proportionality and Equal Treatment, Dr Antonio Rigozzi, 9 July 2008.

[12] See ATF 134 III 193 cited at paragraphs 51 and 52 of Legal Opinion on the Conformity of the Exclusion of "Team Athletes" from Organized Training during Their Period of Ineligibility with Swiss Law, including the General Principles of Proportionality and Equal Treatment, Dr Antonio Rigozzi, 9 July 2008.

(sports) law. In the CAS Advisory Opinion CAS 2005/C/976 & 986 FIFA & WADA[13], the Panel observed (at paragraph 124):

> One of these general principles, which pervades Swiss jurisprudence and the Swiss legal system, and which is relevant in the context of this Opinion, is the principle of proportionality, a principle which has its roots in constitutional and administrative law.

The CAS has consistently measured sanctions imposed on athletes against the principle of proportionality both before the inception of the WADA Code and after:

- Pre-WADA Code - The anti-doping rules of many sports prior to the creation of the WADA Code mandated fixed sanctions without the possibility of reductions. The CAS nevertheless sometimes reduced these sanctions on the basis they were not proportionate.[14]

- Post-WADA Code - The WADA Code provides mechanisms by which the otherwise applicable sanction may be reduced or eliminated (i.e. Article 10.5 of the WADA Code). However, the CAS has made clear that the introduction of these mechanisms does not remove the obligation of disciplinary panels to measure the sanctions applied in any particular case against the principle of proportionality. In CAS 2005/A/830 Squizzato v. FINA[15], the CAS (at paragraph 10.24) held that:

  > Applying the above explained principle [of proportionality] was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athlete concerned, in particular his personality rights (see i.a. Aanes, v/FILA, CAS 2001/A/317). In the meantime substantial elements of the doctrine of proportionality have been implemented in the body of rules and regulations of many national and international sport federations – including the Respondent – by adopting the World Anti-Doping Code, which provides a mechanism for reducing or eliminating sanctions i.e. in cases of "no fault or negligence" or "no significant fault or negligence" on the part of the suspected athlete. However, the Panel holds that the mere adoption of the WADA Code (here FINA-Rule DC 10.5 being of interest) by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case.

Anti-doping tribunals therefore have an obligation, even in this WADA Code era, to continue examining whether the imposition of a particular sanction is proportionate in the circumstances of a particular case. The parameters within

[13] See Tab 47 of the EB
[14] see for example CAS 1996/56 Foschi v. FINA (see Tab 49 of the EB); CAS 2002/A/396 Baxter v. FIS (see tab 50 of the EB); CAS 2001/A/337 B. / FINA (see tab 51 of the EB).
[15] See Tab 52 of the EB

which the proportionality of a sanction falls to be measured were described by the CAS in CAS 2005/C/976 & 986 FIFA & WADA:

> 138. The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.
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> 139. A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim.
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> (Emphasis added)

Assuming that an anti-doping authority is able to establish a justifiable aim, the tribunal must then assess whether the sanction exceeds "that which is reasonably required in the search of the justifiable aim". If it does, then it is disproportionate and therefore unlawful. Whether or not a particular sanction is proportionate depends on the particular circumstances of the case at hand. The doctrine of proportionality is probably overused by lawyers representing athletes at the CAS, particularly since the WADA Code provides a number of mechanisms by which to reduce or eliminate an otherwise applicable sanction. However, one set of regulations is incapable of capturing every possible scenario that a doping case might throw up. That being so, proportionality continues to play an important role in the determination of doping disputes, as was evidenced in the CAS cases of Puerta[16] v the ITF and Igor Walilko v/ The FIA[17]. In fact, if anything, it is likely that the next few years will see a resurgence in its importance as:

- The 2015 version of the WADC is likely to allow for greater periods of ineligibility to be imposed for first offences. In doing so, the WADC will be stretching the limits of what may be considered proportionate;

- International Federations continue to conceive novel ways of punishing athletes. For instance, the International Cycling Union (the "UCI") already punishes anti-doping rule violations by imposing a financial sanction in addition to a period of ineligibility. Such additional sanctions arguably also stretch the limits of what may be considered proportionate. WADA itself appears to acknowledge the risk since Article 10.12 of the WADC provides that the imposition of such additional sanctions cannot be "considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under the Code", meaning that "if a hearing panel were to find in a case that the cumulative effect of the sanction applicable under the Code and a financial sanction provided in the rules of an Anti-Doping Organization would result in too harsh a consequence, then the Anti-Doping Organization's financial sanction, not the other Code sanctions (e.g., Ineligibility and loss of results), would give way" (Commentary to Article

[16] CAS 2006/A/1025 M. Puerta v/ The International Tennis Federation
[17] CAS 2010/A/2268 Igor Walilko v/ The Fédération Internationale de l'Automobile

10.12 of the WADA Code). It may well be that such an additional sanction is not wholly disproportionate in certain circumstances, but it is not difficult to imagine a scenario in which it would be.

D. The right to equal treatment

The right to equal treatment is an integral right, recognised not only in Switzerland, but also in almost all civilised systems of law. The nature of the WADC, which aims to harmonise anti-doping rules around the world, means that equal treatment should in fact be a corollary of the WADC. However, the right to equal treatment, as a defence, carries even greater significance than it once did, precisely because the WADC is intended to harmonise sanctions.

In practice it means, for instance, that if a signatory to the WADC were to impose in its rules sanctions which went further than prescribed by the WADC, an athlete subject to those sanctions could argue that his or her right to equal treatment, when compared to other athletes subject to lesser sanctions for the same offences, has been violated.

A stark example of the inequalities that can be caused by derogation from the WADC comes from the world of weightlifting. Following the release of the 2009 version of the WADC, the International Weightlifting Federation ("IWF") derogated from the WADC by doubling the standard sanction for a first doping offence from two years to four years. However, a number of national anti-doping organisations ("NADOs") responsible for the results management of doping violations committed in their respective territories refused to derogate from the WADC and imposed two-year bans on weightlifters that fell under their jurisdiction. The result was that weightlifters from those countries received lesser sanctions than weightlifters whose sanction is imposed directly by the IWF – in other words, the length of the sanction ultimately imposed on a weightlifter depended on his or her nationality or whether results management was conducted by the IWF or by a NADO.

Unfortunately the issue of equal treatment was never tested as the anti-doping rules of the IWF were ultimately found by the CAS not to be compliant with the WADC[18], following which the IWF chose to re-align its anti-doping rules with the provisions of the WADC. However, the case did highlight the potential importance of the right to equal treatment in this WADC-era. Its relevance is likely to be tested is future, particularly in cases in which sanctions are imposed in addition to those prescribed by the WADC.

[18] (1) See CAS 2011/A/2612 Liao Hui v International Weightlifting Federation; and (2) CAS 2011/A/2601 Chitchanok Pulsabsakul, Sukanya Srisurat, Boonatee Klakasikit v The International Weightlifting Federation.

III. Summary

Swiss law does, more often than not, play an important part in the determination of doping disputes. Governing bodies of sport must therefore not lose sight of the fact that Swiss law protects athletes from unlawful infringement of their personality rights. To that end, sanctions imposed on athletes can only be justified where they pursue an overriding public or private interest, are proportionate and do not lead to unequal treatment.

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