ANADO Legal Note # 3 June 17, 2008

RECENT CAS DECISIONS OF INTEREST

Since the beginning of 2008 there have been a number of interesting decisions from the Court of Arbitration for Sport on anti-doping matters. Several deal with the weak response of national federations to adverse analytical findings.

WADA v. NSAM, Cheah, Ng & Masitah, CAS 2007/A/1395, March 31, 2008

Three shooters had adverse analytical findings for beta-blockers, in this case a "specified substance," at a national competition. The national federation and the international federation determined a one year period of ineligibility due to "no significant fault or negligence." The athletes asserted they consumed unwrapped chocolates offered by their coach which must have contained the prohibited substance.

While the CAS authority over the mater was uncertain under the applicable sport rules, WADA's appeal and pleadings, and the national federation's engagement of WADA on the merits of the case without objection to CAS jurisdiction, constituted a valid agreement to arbitrate.

The CAS panel determined a two year period of ineligibility. While the case involved a "specified substance," there was no evidence to support an assertion of no intention to enhance performance. The athletes failed exercise "the greatest vigilance" or the "utmost caution." They did not show that eating unwrapped chocolates without further inquiry was not negligent, even if offered by a coach.

Query what disciplinary proceedings were taken by the national federation against the coach.

CONI and WADA v. Petacchi, CAS 2007/A/1362 & 1393, May 5, 2008

The cyclist had an adverse analytical finding for salbutamol above 1000ng/ml after winning the eleventh stage of the 2007 Giro d'Italia. The cyclist had a TUE for salbutamol (for up to three 200 mcg doses per day) but admitted to taking more than the prescribed dose because of the extreme heat and humidity the day of the stage. The national disciplinary commissioner determined no anti-doping rule violation. The National Olympic Committee and WADA appealed.

CAS concluded that the athlete failed to show that the concentration above 1000ng/ml was "the consequence of the therapeutic use of inhaled salbutamol." The panel confirmed his disqualification and imposed one year of ineligibility. The panel found that the athlete took an excess dosage not with the intention to enhance his performance but, as an asthmatic, to deal with the conditions of the day. Therefore, the athlete bore "no significant fault or negligence."

***FINA v. CBDA and Gusmao*, CAS 2007/A/1373, May 9, 2008**

The national federation refused to act on laboratory findings for dilute and partially degraded samples indicating an elevated T/E ratio. FINA did not take the matter to its Doping Panel; rather, it appealed to CAS.

The CAS panel ruled it had no jurisdiction to consider the FINA appeal. There had been no hearing for the athlete and no assertion of an anti-doping rule violation. The national federation had not made a "decision." FINA had failed to exhaust its internal remedies of bringing the matter before its own tribunal. Acting as an appellate body, CAS had no jurisdiction to adjudicate the matter.

***Gibilisco v. CONI*, CAS 2007/A/1426, May 9, 2008**

The athlete was subject to criminal investigation for doping. He had an association with a doctor involved in doping. But he denied using prohibited substances and none were every found in his possession. Ultimately the criminal proceedings were terminated. In the meantime, and based on information generated by the criminal investigation, he was found by his national federation to have "attempted use" of prohibited substances and sanctioned to two years ineligibility.

The athlete's appeal was successful. There was insufficient evidence to prove attempted doping. At most, the evidence suggested that the athlete was merely gathering information about doping. While the facts cast the athlete in a questionable light (especially his continuing association with a "tainted" doctor), they did not amount to conclusive evidence of an "attempt" as defined by the *World Anti-Doping Code* ("purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.").

***Pistorius v. IAAF*, CAS 2008/A/1480, May 16, 2008**

While not involving an anti-doping violation, the case is nonetheless interesting in its approach to the unique circumstances of an athlete seeking to participate in elite able-bodied sport. It has application to the eventual consideration of individual cases of gene doping.

The IAAF rule in question proscribes "assistance" being the "[u]se of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device." That rule can be likened to the *Prohibited List* treatment of gene doping: "The non-therapeutic use of cells, genes, genetic elements, or of the modulation of gene expression, having the capacity to enhance athletic performance, is prohibited." For each, a case-by-case evaluation of the athlete is required to determine a breach of the rule.

The panel in *Pistorius* suggests that the focus of such an inquiry into individual circumstances cannot be narrow but must whether there is "an overall net advantage" to using the technology, whether mechanical or genetic. Disadvantages and advantages must be considered (as well as the issue of whether the use is "therapeutic"). This suggests that suspected cases of gene doping will require detailed and extensive (and expensive) investigation.

Furthermore, in *Pistorius* the IAAF could not even meet the low standard of proof of a mere "balance of probabilities" that his prostheses gave him a mechanical advantage. The *World Anti-Doping Code* requires the higher "comfortable satisfaction" standard to prove gene doping, suggesting anti-doping organizations will find proving gene doping a considerable challenge.

***Adams v. Canadian Centre for Ethics in Sport*, CAS 2007/A/1312, May 16, 2008**

The athlete won the men's wheelchair division of the Ottawa National Capital Marathon. The national Doping Tribunal determined the athlete committed an anti-doping rule violation by the presence of cocaine metabolites in his sample, disqualified him from the event and imposed a two year period of ineligibility. CAS upheld the violation and confirmed the disqualification and loss of event result, but eliminated the period of ineligibility for "no fault or negligence."

The case concerned the use of a catheter. The athlete consumed cocaine involuntarily. He used his catheter to urinate which unknown to him contaminated the catheter with cocaine metabolites. He used the same catheter about a week later in the course of an in-competition test. This resulted in an adverse analytical finding. CAS found the involuntary consumption to be an extraordinary circumstance through no fault or negligence of the athlete.

However, neither the Doping Tribunal nor CAS accepted the athlete's argument that the involuntary "use" of cocaine was out-of-competition and therefore should not give rise to an in-competition anti-doping rule violation. The violation here was not "use" of a prohibited substance out-of-competition but rather "presence" of a prohibited substance in an in-competition sample. The violations are independent of each other. Neither the Doping Tribunal nor CAS accepted the athlete's argument that catheters are "sample collection equipment" that must be provided by the anti-doping organization. Athletes may use their own catheters. But to avoid possible sample manipulation or contamination, the better practice is for the athlete to use a sealed, sterile catheter if needed to pass urine for doping control.

***Ganaha v. Japan Professional Football League*, CAS 2008/A/1452, May 26, 2008**

The athlete was given an intravenous infusion of vitamin B1 and saline fluid by his team doctor. The doctor applied for a TUE after the fact. The League subsequently concluded that the infusion was not an acute and legitimate medical treatment and suspended the

athlete for six league games, even before receiving full medical information from the team doctor. The athlete appealed.

The wording of the 2007 *Prohibited List* applied: "Intravenous infusions are prohibited, except as legitimate medical treatment." The panel held that while the opinion of the treating doctor carries much weight as to the medical need for an intravenous transfusion, it is not determinative. However, the panel came to no conclusion on the legitimacy of the infusion in the case.

Instead, the panel found that the League had not fully implemented the *World Anti-Doping Code*, including its authority to sanction for anti-doping rule violations. Nor had the League taken adequate steps to determine what is legitimate medical treatment. Therefore, the athlete should not have been sanctioned in this case. In any event, the athlete's reliance on the team doctor was without any fault did not deserve any sanction. Costs were awarded against the League.

***Gatlin v. IAAF, USADA and USATF*, CAS, June 8, 2008**

In a media release, CAS announced the panel's decision to reject the athlete's appeal and confirm the four year period of ineligibility (with an adjustment of the starting date of ineligibility). The full award is to be issued in the future.

Joseph de Pencier
Ottawa, Canada
June 17, 2008