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Sports Law @ Arbitration

Current Legal Issues in International Sports Disputes

Questioning the rule-makers?

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Doping – beyond the Russians...



Guerrero v. FIFA
«drinking Tea with coca leaves»

Alizé Cornet v. ITF
«The buzzer wasn't working»

Third-Party Ownership in European Soccer



CAS Award-Arbitration

State Court proceedings

Validity of the regulations?

Validity of the sanction?

Gender Classification



D. Chand v. IAAF
C. Semenya v. IAAF

Validity of the Regulations?

Discrimination?
Classification?
Justification?...

Doping –
beyond the
Russians...

Third-Party
Ownership in
European Soccer

Gender
Classification

Questioning the Rule-Makers?

1 v. IAAF
IAAF

on?
tion?
cation?...

Paolo Guerrero v. FIFA / WADA v. FIFA & P. Guerrero

- 10/5/2017** In-competition test (Peru v Argentina, Qualifier Rounds of the 2018 FIFA WC Russia)
Presence of the cocaine metabolite BZE
Cocaine: non-specified stimulant prohibited in-competition (S6 2017 WADA List)
- 12/8/2017** FIFA Disciplinary Committee (1st Instance) – One-year Suspension
- 12/12/2017** FIFA Appeal Committee (2nd Instance) – 6-month Suspension
- 1/29/2018** Guerrero appeals to the Court of Arbitration for Sport (CAS)
Request: No suspension!
- 2/19/2018** WADA appeals to the Court of Arbitration for Sport (consolidated proceedings)
Request: 24-month suspension!
- 5/03/2018** Hearing held in Lausanne, Switzerland
- 5/14/2018** CAS issued its operative part of the Award:
14-month suspension!

Paolo Guerrero v. FIFA / WADA v. FIFA & P. Guerrero

Guerrero's arguments

- BZE result of his ingestion of tea containing coca leaves in the Visitor's Room (Swisshotel Lima Peru, 2 days before the match against Argentina) – OUT OF COMPETITION
- Assumption that the food / drinks would be compliant with protocols
- No fault or Negligence (NFN)

FIFA's arguments

- Guerrero had established (balance of probability) the source and how the violation occurred.
- He bears No Significant Fault or Negligence
- If a minimum period of ineligibility is imposed (12 months): violation of proportionality
Only 6 months should be imposed

WADA's arguments

- Guerrero presented no concrete evidence that the tea contained the prohibited BZE
- Source: was it an anis tea? Coca anis tea? Or a pure coca-tea served by mistake?
- Even if he is found to meet the burden for source – sanction should be at the higher end of the prescribed spectrum –
- No basis for reduction for proportionality
- ☐ 24 months should be imposed

Paolo Guerrero v. FIFA / WADA v. FIFA & P. Guerrero

FIFA ADR Art. 19.1

- 4 year ineligibility unless non intentional use
- Non-specified substances (BZE): non intentional if Out-Of-Competition / Unrelated to sport performance
- Further reduction possible (Art. 21-22) if No Fault / Negligence (NFN) or NSFN

Source?

- Athlete must establish the source – standard: balance of probabilities
- Insufficient to deny deliberate ingestion / innocent explanation for its presence!
- If two competing explanations, the Panel may opt for a third (not obliged to follow one of two)
- Source: tea consumed in the Peruvian team's Visitors room at the Swisshotel in Lima

Fault?

- NSFN: Guerrero did not inspect the label
- Did not do what he could have done
- NFN only in the most exceptional circumstances
- Cilic jurisprudence for assessing the degree of fault
- 14 months imposed

Paolo Guerrero v. FIFA / WADA v. FIFA & P. Guerrero

- Proportionality?**
- Clean record
 - out of competition / no intent to enhance performance...
 - BZE derives from a plant ≠ it is not a medication / supplement
 - Circumstances of the case: Captain of his national team, deprived of the possibility to captain his team in the World Cup (first time qualified since 1982)

- No power of The Panel!**
- Panel cannot ignore the classification of the substances under the WADA List!
 - Reduced sanction already taken into consideration when imposing the sanction
 - Panel lacks the discretion under the WADA Code to reduce the sanction even further (legal certainty)

Paolo Guerrero v. FIFA / WADA v. FIFA & P. Guerrero

CAS on the proportionality of doping sanctions:

- Panel cannot ignore the classification of the substances under the WADA List!
- Reduced sanction already taken into consideration when imposing the sanction (12-24 months)
- Lack of discretion under the WADA Code (legal certainty)

International Tennis Federation v. Alizé Cornet



SR/Adhocsport/12/2018

**PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS FEDERATION UNDER
THE TENNIS ANTI-DOPING PROGRAMME**

BETWEEN:

International Tennis Federation (ITF)

Anti-Doping Organisation

and

Ms Alizé Cornet

Respondent

DECISION OF THE INDEPENDENT TRIBUNAL

P Article 1.12 makes it each player's 'sole responsibility':

- a. to 'acquaint him/herself, and to ensure that each Person from whom he/she takes advice (including medical personnel) is acquainted, with all of the requirements of the Programme';
- b. to 'know what constitutes an Anti-Doping Rule Violation under this Programme and what substances and methods are prohibited'; and
- c. to 'be available for Sample collection at all times upon request'.

The TADP Rules

- International Testing Pool
- Whereabouts on a quarterly basis
- Available for testing (1.4 ISTI)

TADP Article 4.5 ('Additional Obligations on Players Included in the International Registered Testing Pool') states (at Article 4.5.2):

"A Player who is included in the International Registered Testing Pool is required:

- (a) to advise the ITF [...] of his/her whereabouts on a quarterly basis, in the manner set out in Article I.3 of the International Standard for Testing and Investigations; and
- (b) to be available for Testing at such whereabouts, in accordance with Article I.4 of the International Standard for Testing and Investigations."

1. **Each day during the following quarter – specific 60-min time slot**
2. **Between 5 am – 11 pm**
3. **Sufficient info to enable the DCO to**
 - **identify the location**
 - **gain access**
 - **find the Athlete**

3 missed tests within 12 months: ADR violation!

Article I.4.3 states:

An Athlete may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:

- a. that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;
- b. that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;
- c. that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;
- d. that Article I.4.2 [requiring that a player be advised of an unsuccessful attempt to test him/her before another attempt is made] does not apply or (if it applies) was complied with; and
- e. that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles I.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot, and (ii) to update his/her most recent Whereabouts Filing to give notice of a different

International Standard for Testing & Investigations (ISTI)

- When is there a missed test?
 - Notice
 - DCO attempted to test the Athlete doing what was reasonable to locate the athlete, short of giving any advance notice of the test!
 - Athlete's failure was at least negligent!
-

3 missed tests

- ITF refers the file to the Independent Review Board (TADP Art. 4.5.6)
- If there is a case, a charge is brought (Art. 7.7)

International Tennis Federation v. Alizé Cornet

11.3.2016

DCO (Ms Rossetti) was instructed to test the Player on 6 occasions in 2016-17

First Missed Test 3 times were successful – 3 unsuccessful

Ms Cornet's apartment in Cannes, private apartment with four separate buildings

No lobby / no consierge / intercom system with buzzers & names for each apartment

Ms Cornet had left earlier to the airport for a competition

7/27/2017

- Le Canet (her parents' house) – gated community – front gate was shut - intercom

2nd Missed Test

- A woman (her mother) answered and said Ms Cornet had left early to the airport..

- DCO called Ms Cornet and informed her of the 2nd missed test

10/24/2017

- DCO arrives in the Cannes apartment at 8 am.

3rd Missed Test

- Presses the buzzer of her apartment – no answer

- Stays outside (in her car) and waits for 60 minutes – controlling every 15 minutes

- She calls Ms Cornet at 8h57 but no answer... 3rd Missed Test

International Tennis Federation v. Alizé Cornet

Third missed Test? Cornet Argument

The buzzer of the intercom was out of order

She was at the apartment that day with her room mate (witness)

She had just returned from a tournament and thought her father had fixed the buzzer

The Panel

1.4.3: the DCO must do what is reasonable in the circumstances to try to locate the Athlete, short of giving notice of the test

Has the DCO

Relevant jurisprudence of the CAS and other tribunals

Met the burden?

Evidence & cross-examination

Efforts of the DCO to locate the athlete?

Should the DCO had tried to enter the building through other tenants?

«These persons seemed busy and I didn't want to disturb them»

our everyday lives of pressing intercom buzzers and getting no response because the buzzer was malfunctioning, whether temporarily or otherwise. The DCO could not hear the buzzer ring. So the DCO must surely reasonably contemplate the *possibility* that the buzzer might not be working.

Conclusion of the Panel (majority)

74. Nor do we regard it as sufficient that on previous visits to the Cannes apartment Ms Rossetti found the buzzer to be in working order. Firstly, merely because a buzzer was functioning on certain occasions in the past (and not making any audible sound) does not lead to an assumption that when it made no audible sound on the day in question it was functioning then. Secondly, the issue is whether, in accordance with the Protocol, the DCO took reasonable steps. As ITF pointed out, and following *Gemmell*⁴, '[t]he reasonableness of the actions of the DCO were to be assessed objectively, without reference to the particular situation of [the Athlete]' and this objective assessment must apply to both parties; thus the DCO should nevertheless follow the steps referred to at Art 12.4 of the Protocol and as provided for in ISTI Art 1.4.3(c).

- 1. Not satisfied that the DCO did what was reasonable in the circumstances to try and locate the athlete**
- 2. 3rd missed test (24 October) annulled**
- 3. No charge !**

75. What is striking is that three separate witnesses have given unchallenged evidence that during the 60 minute period they left the apartment building, each knew Ms Cornet, and each would have given access to the building to the DCO if she had approached them. One of those three was actually Ms Cornet's flatmate, who had in fact previously met Ms Rossetti (although apparently Ms Rossetti did not recognise him) through previous tests, and would obviously have sorted the matter if approached.

RFC Seraing v. FIFA – what are the TPOs in football?

The ownership of a player's economic rights by third-party sources.

The third-party—which can be an agent, an agency, a company (...) "takes ownership of all or part of the financial rights to a player".

When a footballer is sold, the TPO can benefit from transfer fees and contract negotiations fees.

Practice widely used in football in South America, particularly in countries such as Brazil and Argentina

Banned by FIFA since 2015

RFC Seraing v. FIFA – Third-Party Ownership Regulations

2016 FIFA sanctioned RFC Seraing for violating Art. 18ter of the FIFA Regulations (prohibition of Third Party Ownership (TPO) agreements).
FIFA issues sanction (ban of 4 transfer seasons and a fine)
Appeal to the CAS (ban of 3 transfer seasons and a fine)

2017 Appeal to the Swiss Federal Tribunal
Confirmation of the CAS Award, of the legality of CAS as an institution and its independence from FIFA

Belgian Courts RFC Seraing, Doyen Sports Investments Ltd and other parties filed a claim before the Belgian State Courts against FIFA, UEFA, the Belgian Football Association (URBSFA) and others seeking to authorize Third-Party Ownership (TPO) agreements.

B.b.b.a. X. _____ invokes a number of rights guaranteed by the Treaty on the Functioning of the EU (TFEU). The provisions invoked are applicable to FIFA's regulatory activity. First, regarding the free movement of capital (Art. 63 TFEU), is it true that the Art.18bis and 18ter RSTP establish restrictions on capital movements from, to or between the EU Member States. However, such restrictions do not necessarily constitute obstacles prohibited by the Treaty, as long as they pursue a legitimate objective, they are appropriate to achieve such objective and they do not go beyond what is necessary in order to achieve said objective. These conditions are fulfilled in this case. Safeguarding the regularity of sports competitions, the balance between clubs and the uncertainty of results, preventing conflicts of interest and protecting the image and ethics of football are all legitimate objectives. In this respect, however, the PTO practice creates many risks: risks associated with the opacity of investors, who are beyond the control of the football regulatory bodies and can freely and without any control dispose of their investments; risks to endanger the professional freedom and the rights of players because the investor may influence the transfer of players in a speculative interest; risk of conflicts of interest, even match-fixing or match-manipulation, since the same investor can have TPOs in several clubs of the same competition; ethical risks, since the objective pursued has a speculative financial interest, unrelated to sporting- or even moral considerations. These measures do not prohibit clubs to use certain sources of financing to recruit players, but only certain financing schemes which give the investor the power to influence the independence and policy of a club. For that matter, they respect the principle of proportionality.

The TPO prohibition and EU law

- Restrictions in the free movement of capital
- Admissible if they pursue a legitimate objective
- Regularity of sports competitions
- Prevent conflicts of interest
- Protect the image of football
- Transparency in investments

CAS / Swiss Federal Tribunal: TPO Ban seems proportionate and in accordance with European law!
CAS is an arbitral institution independent of FIFA

58 Jurisdiction of CAS

1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.
2. Recourse may only be made to CAS after all other internal channels have been exhausted.
3. CAS, however, does not deal with appeals arising from:
 - (a) violations of the Laws of the Game;
 - (b) suspensions of up to four matches or up to three months (with the exception of doping decisions);
 - (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an association or confederation may be made.

Gender Classification – Dutee Chand v. IAAF

Dutee Chand

Gold Medalist, women's 200 m sprint / 400 m sprint relay Asian Junior TF Championships
19 years old (at that time)

IAAF Regulations governing Eligibility of Females with Hyperandrogenism to compete to Women's Competition – restrictions on the eligibility when high levels of testosterone

Athlete's Arguments

IAAF Regulations discriminate unlawfully against female athletes with Hyperandrogenism
IAAF Regulations are based on the flawed assumption about the relationship between testosterone & athletic performance
They are an unauthorized form of doping control

The Panel Considered

Expert scientific evidence

Factual accounts of the evolution of the IAAF Regulations

The experiences of female athletes who were subjected to their "gender testing"

Philosophical arguments about the meaning of fairness in sport.

On 31 August 2014, the AFI delivered a letter to the Athlete (which was dated 29 August 2014) informing her that she was provisionally suspended from participating in any athletics events with immediate effect (the “Decision Letter”). The Decision Letter stated:

Madam

Based on your medical reports received from Sports Authority of India and a copy of the same has already been handed over to you by SAI in person, you are hereby provisionally stopped from participation in any Competition in athletics with immediate effect.

To be eligible for participation, you are further advised to follow the annexed IAAF guidelines (Copy enclosed).

Yours sincerely

(C.K. Valson)

Secretary, AFI

The Issues

- Do the IAAF Regulations:
- discriminate impermissibly against certain female athletes based on
- a natural physical characteristic
- and / or sex?
- Should the Regulations be declared invalid for lack of scientific evidence?
- They constitute an unauthorised anti-doping sanction?

Burden and standard of proof: Balance of probabilities

Athlete to prove that the IAAF are discriminatory

Once a prima facie case is established, IAAF to establish that the discriminating measure is justified

Dutee Chand v IAAF

Discrimination **Discriminatory IAAF Regulations**

- Apply only to female athletes
- Place restrictions on the eligibility of certain athletes to compete based on a natural characteristic – prima facie discriminatory /against the IOC Charter & IAAF Constitution

- ## **Scientific basis?**
- Relationship between testosterone & athletic performance
 - Lean Body Mass contributes to strength & sports performance

IAAF Regulations

- ### **Justified for a Legitimate**
- IAAF must prove that the Regulations are a reasonable & necessary response to a legitimate need

- ### **Sporting objective?**
- Division of athletes into male and female / gender testing not appropriate / sex of a person is a matter of law / IAAF Regs only apply to females
 - Testosterone is a key causative factor in the increased LBM in males
 - Increased LBM confers a competitive advantage (10-12% towards female athletes)

Dutee Chand v IAAF – The Panel's findings

The Panel found that:

IAAF failed to provide sufficient scientific evidence about the quantitative relationship between enhanced testosterone levels and improved athletic performance!

Anti-doping sanction?

- IAAF Regulations are eligibility regulations and not anti-doping regulations!

IAAF Regulations

- IAAF Regulations are suspended for 24 months (interim award)

2 years later....

- New evidence filed by IAAF, appeal withdrawn & IAAF Regulations did not come to effect but....



(b) **Restricted Events** are 400m races, 400m hurdles races, 800m races, 1500m races, one mile races, and all other Track Events over distances between 400m and one mile (inclusive), whether run alone or as part of a relay event or a Combined Event.

2.3 To be eligible to compete in the female classification in a Restricted Event at an International Competition, or to set a World Record in a competition that is not an International Competition, a Relevant Athlete must meet each of the following conditions (the **Eligibility Conditions**):

- (a) she must be recognised at law⁷ either as female or as intersex (or equivalent);
- (b) she must reduce her blood testosterone level to below five (5) nmol/L⁸ for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and
- (c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to maintain eligibility to compete in the female classification in Restricted Events at International Competitions (or to set a World Record in a Restricted Event at a competition that is not an International Competition).

(a) **A Relevant Athlete** is an athlete who meets each of the following three criteria:

(i) she has one of the following DSDs:

(A) 5 α -reductase type 2 deficiency;

(B) partial androgen insensitivity syndrome (PAIS);

(C) 17 β -hydroxysteroid dehydrogenase type 3 (17 β -HSD3) deficiency;

(D) congenital adrenal hyperplasia;

(E) 3 β -hydroxysteroid dehydrogenase deficiency;

(F) ovotesticular DSD; or

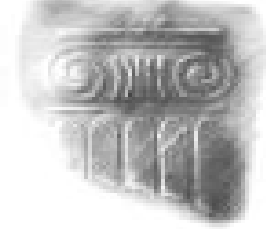
(G) any other genetic disorder involving disordered gonadal steroidogenesis;⁴
and

(ii) as a result, she has circulating testosterone levels in blood of five (5) nmol/L or above;⁵ and

(iii) she has sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.⁶

Capture Plein écran

(b) **Restricted Events** are 400m races, 400m hurdles races, 800m races, 1500m races, one mile races, and all other Track Events over distances between 400m and one mile (inclusive), whether run alone or as part of a relay event or a Combined Event.



MEDIA RELEASE

ATHLETICS

CASTER SEMENYA CHALLENGES THE IAAF ELIGIBILITY REGULATIONS FOR FEMALE CLASSIFICATION AT THE COURT OF ARBITRATION FOR SPORT (CAS)

Lausanne, 19 June 2018 – The Court of Arbitration for Sport (CAS) has registered a request for arbitration filed by Caster Semenya against the International Association of Athletics Federations (IAAF) against the “IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)” that are due to come into effect on 1 November 2018.

Caster Semenya seeks a ruling from CAS to declare such regulations unlawful and to prevent them from being brought into force.

An arbitration procedure has been opened.



Doping (ADR) cases: can the Panel decide more / less based on proportionality?

Doping (whereabouts) cases: meaning of «reasonable efforts» to locate the athlete

Sport Federations: where are the limits in drafting / applying their rules?

Legality of the regulations and challenges brought before CAS, SFT, State Courts...

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Current Legal Issues in International Sports Disputes

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Thank You!