LENZ & STAEHELIN

Insight

Sports Law Newsletter October 2012

Legal Disputes at the London 2012 Olympic Games

London 2012: another edition has been added to the prestigious list of summer Olympics. For two weeks – and nearly two more weeks for the Paralympics – athletes from all countries demonstrated their strength, speed and other skills before a worldwide audience. Millions of fans cheered, applauded and shed tears for their heroes. The media covered every single second of this global show, watching out for any hint of a record, and trying to catch the unexpected performance – or a glimpse of the royal family.

Those who ventured backstage, however, would have found a different kind of contest with lawyers delivering the punches and the courts awarding the scores. This darker, but no less fascinating, "game within the Games" forms the core of this new issue of the sports law newsletter.

Once again, the role of the CAS ad hoc Division has been paramount in shaping the legal scenery of these Olympic Games. An article addressing the time limits on the CAS ad hoc Division's jurisdiction shows the importance of early legal advice for athletes wishing to bring a dispute before the CAS.

The most frequent of these disputes relate to country qualification and the selection of the athletes who will stand in the spotlight. An analysis of some selected topics provides an insight into this broad field.

Some athletes who reach the Olympic stage may be expelled before realising their dreams. Several cases of exclusion from the Olympic Games are discussed in this issue, with their half-anecdotal, half-tragic plots.

Finally, even the athletes who get to perform before the crowds may end up being caught in a legal battle. An overview of the field-of-play cases decided in connection with the Olympics will cast some light on the current approach of CAS panels to this decades-old debate.

Recent developments in sports law have not been limited to the Olympic Games. In this newsletter you will also find the usual update, case law review and news in brief sections, with the latest news on affairs that made the headlines, such as the outcome of the FC Sion saga or the Matuzalem case.

Editors
Xavier Favre-Bulle
Marjolaine Viret

Contents

London 2012 Olympic Games

Time limit on jurisdiction of CAS ad hoc Division

Article 1 of the CAS Arbitration Rules for the Olympic Games ("CAS ad hoc Rules") provides that disputes may be brought before the CAS ad hoc Division only if such disputes arise during the Olympic Games or during a period of ten days preceding the opening ceremony of the Olympic Games.

This provision is of fundamental significance, since it marks the boundary between a case that can be brought before the CAS ad hoc Division and a case subject to the jurisdiction of the CAS panels under the general Code of Sports-Related Arbitration (CAS Code). Before each edition of the Olympics, issues arise regarding the jurisdiction of the CAS ad hoc Division where the CAS ad hoc Division is required to determine at what moment a dispute can be said to have "arisen" and whether the 10-day time limit has been complied with. London 2012 was no exception.

The Federación Española de Piragüismo v. International Canoe Federation matter (CAS OG 12/04)

In August 2011, the Federación Española de Piragüismo (FEP) submitted a request to the International Federation for Canoe Kayak (ICF) that the place given up by Slovakia in the K2 1000m race be assigned to the Spanish team of Javier Hernanz Agueria and Diego Cosgaya Noriega. Following refusal by the ICF, the FEP reiterated its demand on 8 June 2012.

On 6 July 2012, the FEP noticed that the place had been assigned to Russian athletes Ilya Medvedev and Anton Ryahov, and sent a request to the ICF claiming the place for its athletes. The FEP restated its demand again on 10 July 2012, but was denied on 11 July 2012. Two additional demands were sent on 12 and 18 July 2012, but the only reply was that the letter of 11 July 2012 was a final response.

An application was filed by the FEP to the CAS ad hoc Division on 28 July 2012, demanding the reassignment of the place in the K2 1000m competition in favour of the Spanish athletes.

The CAS ad hoc Division's interpretation of "dispute arising"

In order to determine whether it had jurisdiction, the CAS ad hoc Division had to decide if, in the case at hand, the dispute had arisen within the 10-day time period. The panel found that the facts indicated clearly that the dispute had arisen far earlier than this period. The first request in August 2011 – and at the latest the demand of 8 June 2012 –

had to be considered as the point at which the dispute "arose". None of these dates fell within the required period. The CAS nevertheless analysed the concept of "dispute arising" in the light of Article 49 of the CAS Code, which applies to ordinary appeal proceedings outside the Olympic Games period. This provision sets the start of the time limit for filing an appeal on the date the appealed decision is received. In this case, the ICF's decision was communicated on 11 July 2012. The panel used it as a starting point for the analysis of the "arising dispute", and still came to the same conclusion. Indeed, the FEP tried to argue that its last letter from 18 July 2012 had brought the claim within the time limit (the opening ceremony took place on 27 July 2012), but the CAS replied that it is not up to the athlete to decide when the issue arose, but rather "that the facts will be examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose". The panel found that the FEP had already identified the dispute when it sent its request on 6 July 2012, and received a final answer on 11 July 2012. None of these dates fall within the time period required by Article 1 of the CAS ad hoc Rules. The panel therefore refused jurisdiction over the dispute.

Towards a more restrictive approach on the scope of the ad hoc Division's jurisdiction?

This was not the only application during the London 2012 Olympic Games to be dismissed for lack of jurisdiction on the grounds that the dispute arose before the 10-day time limit laid down in Article 1 of the CAS ad hoc Rules. In the decisions *Denis Lynch v. Horse Sport Ireland Ltd. & The Olympic Council of Ireland* and *Ward v. IOC, AIBA & ANOC*, the CAS ad hoc Division also showed its willingness to restrict the scope of its jurisdiction to cases in close connection with the Olympic Games by favouring a very narrow interpretation of the notion of "arising dispute", based on a case-by-case assessment.

This approach appears rather restrictive compared to the previous edition of the Olympic Games. In Vancouver (CAS OG 10/02, *CBDG v. FIBT)*, the CAS ad hoc Division appeared to choose a more generous interpretation, affirming its jurisdiction on the sole basis that the date on which the appeal was filed was within the 10-day time limit, irrespective of the "factual" beginning of the dispute. This can probably be explained by the fact that the CAS ad hoc Division relied on the findings of the CAS ad hoc Division in Turin in the *Schuler v. Swiss Olympic* matter (CAS OG 06/002), but without having regard to the particulars of that case and the reasons which had led the arbitrators in Turin to rely on the filing of the appeal as the relevant point in time.

Qualification and selection disputes at the 2012 Olympic Games

The Olympic Games are often the pinnacle of an athlete's career. As before any new edition of the Olympics, a number of disputes revolving around participation in the London 2012 Olympic Games were filed before the CAS ordinary or ad hoc divisions. Below we focus on some issues of general interest, without reviewing the precise circumstances of each case.

Distinguishing country qualification from athlete selection

The Olympic Games are traditionally perceived in the first place as a competition among nations. Ultimately, however, the participants are individuals. Two types of dispute must therefore be distinguished: some disputes deal with the qualification of a particular country and the right of this country to be allocated a quota in a particular discipline. Other disputes concern the selection or nomination of the individual athletes who will actually be allowed to represent their country.

By way of illustration, in equestrian sports the qualification period for the 2012 Olympic Games triggered on the one hand CAS proceedings in which the Dominican Republic challenged the qualification of Brazil (the FEI's decision to qualify Brazil was confirmed by the CAS, but the reasons are still awaited), and no less than five selection cases involving riders against their national sports authorities on the other.

These difficulties arise in part from the interaction between the authority granted to international federations to adopt eligibility criteria in their sport and the exclusive right of each National Olympic Committee (NOC) to nominate the athletes it wishes to enter for its country, often based on recommendations by the national federations (Articles 26.1.5, 27.3 & 40 of the Olympic Charter). The qualification and selection systems are thus highly complex and vary depending on the country and discipline at stake.

Scope of review of the CAS panels

Under Article R57 of the CAS Code, "the Panel shall have full power to review the facts and the law". Article 16 of the ad hoc Arbitration Rules for the Olympic Games provides in a slightly more restrictive wording that "the Panel shall have full power to establish the facts on which the application is based". CAS panels have repeatedly affirmed their power to review a case *de novo* and have been reluctant to abide by clauses

in sports regulations purporting to restrict such power (see, for example, CAS 2008/A/1700 & 1710, *DRV v. FEI & Ahlmann,* 30 April 2009).

However, in two Australian selection disputes for the 2012 Olympic Games, the CAS panels accepted without discussion that they would restrict their review to the grounds of appeal listed in the applicable selection by-laws, i.e. breach of natural justice, error of law (CAS 2012/A/2837, *Beresford v. Equestrian Australia,* 12 July 2012), or bias or the obvious or self-evidently unreasonable/perverse character of the decision (CAS 2012/A/2828, *Graham v. Equestrian Australia,* 18 July 2012).

This reasoning should be welcomed from the perspective of international arbitration. The scope of an arbitral tribunal's intervention is limited by the parties' autonomy. Specific agreements between parties, including a clause in the applicable sports regulations, supersede the general provisions of the CAS arbitration rules. A refusal to feel bound by an explicit restriction on the taking of evidence appears difficult to sustain, if it is based on the position expressed by the CAS panel in the *DRV v. FEI & Ahlmann* matter that "national or international sports organisations may freely decide to accept or not to accept the arbitral jurisdiction of the CAS; however, when they do accept the CAS's jurisdiction they necessarily accept the application of the basic principles of the CAS Code, including the principle of a *de novo* review of the case" (Para. 66). A different question is whether such a restriction is valid, i.e. whether the athlete is granted a sufficiently effective judicial review, in particular from the perspective of the right of access to court guaranteed by Article 6 of the ECHR and by many national constitutions.

Borderline situations: non-selection for suspicion of doping

Most cases brought before CAS deal with the proper application of sporting criteria, such as performance and rankings. However, non-selection may also occasionally result from considerations related to the athlete's image and reputation. In the *Mullera v. RFEA* matter (CAS ad hoc Division OG 12/06), the CAS ad hoc Division had to decide on a national federation's refusal to select an athlete suspected of doping, while investigations were pending before its disciplinary bodies. The CAS ad hoc Division rejected the national federation's argument that the exclusion could be based on the "technical reasons" criterion in its selection rules. The CAS panel considered that the national federation had arbitrarily excluded the athlete, in violation of its own selection criteria.

Obiter, the panel noted that it did not rule out that a national federation may exclude an athlete for ethical reasons, such as a suspicion of doping, but that such possibility should be clearly provided for in its rules. It is questionable whether a clear legal basis in the applicable rules would be sufficient to make valid an exclusion from selection based on a mere suspicion. In line with other CAS awards, such as the landmark decision CAS 2007/A/1381, *RFEC & Valverde v. UCI* in 2007, there are strong reasons to characterise an exclusion of this type as a disciplinary sanction, which has to fulfill additional requirements of equal treatment, due process and proportionality.

The exclusion of athletes from the Olympic Games for violation of Olympic values

Since the rebirth of the Olympics in 1894, the IOC has stood for very strong values, ensuring that its competitions and events reflect the image of a clean sport where athletes forget their differences and give of their best. Apart from doping cases, which have sadly become an integral part of any large competition, the London 2012 Olympics saw some controversies where athletes were considered to have infringed Olympic values. The sports governing bodies were not afraid to show that they were ready to take strong measures to preserve the Olympic spirit.

Hazardous tweeting

As the two following illustrations show, athletes who wish to realise their Olympic dreams may be well-advised to handle social networks with caution.

Voula Papachristou is a Greek triple jumper selected to represent her country at the 2012 Olympics. She was thought to have a chance of a medal. On 25 July 2012, a few days prior to the opening ceremony, the athlete posted a racist joke on the social network platform Twitter. Reacting to reports of mosquitoes carrying the West Nile virus in Greece, she wrote that "with so many Africans in Greece, at least the West Nile mosquitoes will eat home made food". Despite some immediate apologies and an attempt to explain that the tweet was only a joke, Papachristou was expelled from the Greek delegation later that day and sent back home. The Greek National Olympic Committee stated that her comment had been contrary to the values and ideas of the Olympic movement.

Michel Morganella was a member of the Swiss football team at the 2012 Olympics. The team suffered a draw and a loss in the first two games of the tournament, nearly cutting off any hope of advancing to the next round. Shortly

after the end of the second game, a 2-1 loss against South Korea, Michel Morganella let his frustration out on Twitter by insulting the South Koreans. He said in the tweet that South Koreans "can go burn" and called them "a bunch of mongoloids". The player was expelled from the Olympics on the following day by Swiss Olympic for having violated the IOC Code of Ethics and the Swiss Olympic Charter.

Fierce battle for losing the match

In a different set of events, a significant controversy arose in the badminton tournament at the London 2012 Olympics. On 31 July 2012, Chinese pair Wang Xiaoli/Yu Yang, who were top seed in the tournament, went on to play South Korean pair Jung Kyung-eun/Kim Ha-na for what was the last game of the group round. Both pairs had already qualified for the next round, but top spots were still to be assigned. The winner of the match would finish in first place of the group stage and face another Chinese pair, seeded second in the tournament, in the next round. To avoid such scenario, the protagonists of this match-up both attempted to lose the game, which resulted in a "farce", as related in the media. Players purposely serving into the net, hitting long or wide, and using delaying tactics resulted in the intervention of the referee, who warned the players and threatened them with disqualification. The South Korean pair eventually won the game. Shortly thereafter, another confrontation between a Korean and an Indonesian pair turned out to be a repeat of the previous game, with both pairs trying to lose in order to avoid a difficult match-up in the next round.

On the following day, the Disciplinary Committee of the Badminton World Federation (BWF) disqualified the four pairs. They were accused of having breached Sections 4.5 ("Not using one's best effort to win a match") and 4.16

("Conducting oneself in a manner that is clearly abusive or detrimental to the sport") of the BWF's Players' Code of Conduct. The two Korean pairs appealed the decision before the BWF's Appeals Committee, but both appeals were dismissed. The scandal forced badminton star Yu Yang to retire, and resulted in a sanction of a two-year suspension on the four South Korean athletes by their national federation, subsequently commuted to six months. The two South Korean coaches were given a four-year ban.

The field judge knows best: restrictive review of field-of-play decisions confirmed by CAS panels

Given the importance of the stakes for the athletes, major sports events – and the qualifying competitions leading up to them – are a fertile ground for challenges of field-of-play decisions. A previous issue of this Sports Law Newsletter (see Sports Law Newsletter May 2011, p. 13) reported a landmark CAS award synthesising the somewhat erratic CAS case law on the scope of the field-of-play doctrine (CAS 2010/A/2090, *Finnish Ski Association & Saarinen v. FIS,* 7 February 2011). In short, the field-of-play doctrine provides that CAS panels exercise abstinence ("arbitral self-restraint") when reviewing decisions of field officials made during a competition and applying the "rules of the game". Due to the specificities of the matter, however, the Saarinen award did not include a decisive determination on the limits of such abstinence, i.e. the grounds which allow CAS panels to depart by way of exception from their self-restraint and examine the merits of the field-of-play decision.

Two CAS awards in connection with the 2012 Olympic Games bring some further clarification in this respect. The first award was made by an ordinary CAS panel during the qualification period for the Olympic Games. It involved a taekwondo athlete claiming that the judge had erroneously attributed a decisive point to his opponent in the last seconds of the match (CAS 2012/A/2731, *BOC, BTC & Ferreira Wenceslau v. WTF, COM, FMT & Villa Valadez,* 13 July 2012). The second decision was rendered by the CAS ad hoc Division in connection with the women's Olympic triathlon event (CAS OG 12/10, *Swedish NOC & Swedish Triathlon Federation v. ITU,* 11 August 2012). It was widely reported in the Swiss media, as the gold medal of the Swiss triathlete Nicola Spirig was at stake. The Swedish athlete who had finished second argued that the judge had incorrectly attributed the first place to the Swiss athlete by finding, based on the photo-finish images, that her torso had crossed the line first.

These two recent awards seem to support a "hands-off" approach, in line with CAS awards in the past which allowed for only extremely limited control of field-of-play decisions. This becomes apparent, in particular, with respect of the two following issues:

- Procedural rules covered by the field-of-play doctrine: both decisions confirm a CAS award which had attracted some criticism at the time (CAS 2008/A/1641, *NAOC v. IAAF & USOC,* 6 March 2009) by finding that the "immunity" of a field-of-play decision is not limited to the merits of this decision, but also extends the procedural aspects which led to the decision.
- Bad faith and arbitrariness: as opposed to some past CAS awards that included review for breach of procedural rights or legal errors, the two CAS panels held that their scope of review was limited to situations where bad faith or arbitrariness can be demonstrated. The terminology used in the past varies ("breach of duty", "malicious intent", etc.), but the underlying idea is that "there must be evidence of preference for, or prejudice against, a particular team or individual".

About

Xavier Favre-Bulle
Dr. iur., Attorney at Law, LL.M. (D.E.S)

Xavier Favre-Bulle is an arbitration partner in our Geneva office. His practice concentrates on dispute resolution, including arbitration both as counsel (in particular before the Court of Arbitration for Sport) and arbitrator, ADR and court litigation.

Contact
Telephone +41 58 450 70 00
xavier.favre-bulle@lenzstaehelin.com

Marjolaine Viret
Attorney at Law

Marjolaine Viret is an associate in our Geneva office. She is regularly involved in arbitration proceedings, both commercial and before the Court of Arbitration for Sport.

Contact
Telephone +41 58 450 70 00
marjolaine.viret@lenzstaehelin.com

Fabrice Benjamin
lic. iur., Paralegal

Fabrice Benjamin is a member of the arbitration team in our Geneva office.

Contact
Telephone +41 58 450 70 00
fabrice.benjamin@lenzstaehelin.com

Updates on Sports Law

Decision of the CAS in the Contador matter

CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC* / CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC*

(See May 2011 Newsletter, p. 17, and January 2012 Newsletter, pp. 7–9)

The eagerly awaited decision of the CAS in the Contador matter was finally rendered on 6 February 2012. According to the CAS panel's findings, Mr Contador was unable to prove, to the standard required, how the prohibited substance Clenbuterol had entered his system. The CAS panel dismissed Mr Contador's contention that it was more likely than not that the Clenbuterol originated from contaminated meat he had eaten.

As explained in previous editions of this Sports Law Newsletter, Mr Contador was required to show the origin of the substance and demonstrate his absence of fault and negligence in his case, by a balance of probability (Article 3.1 WADC, in connection with Articles 10.5.1 and 10.5.2 WADC). While the panel was satisfied that Mr Contador had eaten meat at the time in question, it found that there were no established facts that would elevate the possibility of meat contamination to a balance of probabilities, i.e. 51%. In reaching this conclusion, the panel considered that it was highly likely that the meat that Mr Contador had eaten came from a calf reared in Spain, and that the likelihood of a piece of meat from that country being contaminated by Clenbuterol was very low, as shown by the studies and statistics presented by the parties.

The panel then compared the athlete's explanations with two alternative scenarios submitted by the International Cyclist Union (UCI) and the World Anti-Doping Agency (WADA) as to how the Clenbuterol had entered Mr Contador's system – although under the WADA's system the appellants bear no burden to prove how this happened. After carefully weighing the respective scenarios, the panel concluded that the supplement food scenario was more likely than the meat contamination or blood transfusion scenarios. In reaching this conclusion, the panel took into account the fact that Mr Contador had taken supplements in considerable amounts, and that athletes have in the past tested positive due to contaminated food supplements containing Clenbuterol.

Accordingly, the panel sanctioned Mr Contador with a two-year period of ineligibility, the start of which was backdated to 25 January 2011. The panel refused to reduce the length of the ban because the precise contaminated supplement and the circumstances surrounding its ingestion remained unknown. Mr Contador was further disqualified from the 2010 Tour de France and stripped of his results in all the competitions in which he had participated after the starting date of the period of ineligibility.

Two aspects of the CAS panel's reasoning are worth mentioning. First, the panel considered that, where the athlete has exploited all possibilities at his disposal to demonstrate the origin of the substance and has put forward a credible explanation, the anti-doping organisation has a procedural duty to collaborate by presenting alternative scenarios and adducing evidence on the greater likelihood of these scenarios. This does not amount to a reversal of the burden of proof, which remains on the athlete. However, any failure of the anti-doping organisations to collaborate will be taken into account in the panel's assessment of the evidence when determining whether the athlete's scenario is the most likely on a balance of probability. Second, for the first time the CAS panel recognised the admissibility of a polygraph examination presented by the athlete to support his innocence. In the panel's view, the evidentiary value of such an examination must be part of the assessment of the evidence. This position is in line with the principle that no categories of means of proof are inadmissible as such, and that an arbitral tribunal has discretion in weighing the evidence, which is the rule both in international arbitration and under the WADA Code.

CAS panel lifts the ban imposed on Bin Hammam in the cash-for-votes scandals

CAS 2011/A/2625, *Mohamed Bin Hammam v. FIFA: corruption*

(See January 2012 Newsletter, p. 18)

During a meeting of the Caribbean Football Union ("CFU") held in May 2011, Mohamed Bin Hammam ("MBH") allegedly offered cash to CFU delegates in the context of his campaign for the FIFA presidency. This resulted in the opening of proceedings by FIFA against MBH and some of the CFU officials. In July 2011, the FIFA Ethics Committee banned MBH for life from taking part in any kind of football-related activity at national and international levels. This lifetime ban was confirmed in September 2011 by FIFA's Appeal Committee.

In November 2011, MBH appealed this decision before the CAS. On 19 July 2012, in the absence of sufficient evidence, the CAS annulled the decision rendered by FIFA's Appeal Committee and lifted the

life ban imposed on MBH. The CAS panel was satisfied that MBH had invited Mr Jack Warner ("JW"), who was at the time a member of the FIFA Executive Committee, to convene a meeting of CFU members within the framework of his FIFA presidential campaign. JW had arranged for each of the CFU members present to be offered a "personal gift". First he explained to the CFU members that the gift was from the CFU; subsequently he said that the gift was from MBH. The CAS panel emphasised that "no efforts were made to trace the source of the banknotes that were photographed, and recognises that it is possible to infer that the failure of MBH to carry out that relatively simple exercise in the course of these proceedings might be explained by the fact that it would have confirmed that he was the source". The CAS concluded that the evidence was insufficient in that it did not permit the majority of the panel to reach the standard of comfortable satisfaction in relation to the matters on which MBH was charged. It is a situation of "case not proven", the CAS considering that the FIFA investigation was not complete or comprehensive enough. In its conclusion, the CAS noted that FIFA was in the process of reforming its Ethics Committee and that, in the event that new evidence relating to the case was discovered, it would be possible to re-open the case in order to complete the factual background and establish if MBH has committed any violation of the FIFA Code of Ethics.

FIFA acknowledged with concern the findings of the CAS, but also noted that the CAS decision has not established the innocence of MBH. FIFA also took note of the decision by the Asian Football Confederation ("AFC") in July 2012 to open a disciplinary case against MBH and provisionally suspend him from taking part in any football activity. The chairman of the FIFA Disciplinary Committee extended this provisional suspension to worldwide level on 18 July 2012, one day before the CAS decision. Therefore, notwithstanding the CAS award, MBH will remain suspended until the AFC's case concludes. At FIFA level, all relevant files have been handed over to the new FIFA Ethics Committee, which started operating on 25 July 2012. This committee may decide, based on the reports and evidence presented to it, if any action needs to be taken against MBH.

New German Gambling Treaty in force

(See March 2010 Newsletter, pp. 5–6, and November 2010 Newsletter, pp. 9–10)

On 1 July 2012, the new German Gambling Treaty *(Glücksspielstaatsvertrag)* entered into force.

A revision of the German Gambling Treaty had become necessary after a decision by the European Court of Justice (ECJ) on 8 September 2010 in which the ECJ held that the German betting monopoly as established in the previous German Gambling Treaty was not in compliance with European law. The ECJ explained that the German betting monopoly constituted a restriction of the free movement of services and of the right of establishment.

Following this judgement, the German *Bundesländer* started to negotiate a revised Gambling Treaty. All *Bundesländer* except Schleswig-Holstein have fallen into line with the new Gambling Treaty. Schleswig-Holstein has decided to establish a more liberal gambling regime according to which online poker and casino games are permitted.

The new Gambling Treaty establishes some structural changes in the regulatory framework for gambling in Germany. While the state monopoly is confirmed in certain areas, sports betting will be partially liberalised through the allocation of twenty concessions to private companies. The ban on online casino and poker games is now explicitly based on the significant addiction potential of these forms of gambling and the increased risk they pose in terms of money laundering.

The new Gambling Treaty has been widely criticised by both the European Commission and the German Monopolies Commission. Prior to its entry into force, the *Bundesländer* had, on 7 December 2011, filed the draft Gambling Treaty with the European Commission.

On 20 March 2012, the European Commission issued a statement explaining, among other things, that the suitability and proportionality of the ban on online casino and poker games in terms of limiting the dangers of addiction and money laundering still need to be established.

Further, in an expert report published on 30 June 2012, the German Monopolies Commission (a permanent and independent body that advises the German federal government on competition policy) explained with regard to the new treaty that, in a social economy, the decisive question with respect of the regulation of the gambling industry must be whether regulatory restraints can limit the negative consequences of gambling, such as addiction to gambling or the manipulation of sports competitions. According to the Monopolies Commission, the creation of state monopolies for specific forms of gambling such as sports betting can no longer be justified by the necessity of combating gambling addiction. In the view of the Monopolies Commission the limitation to twenty concessions is therefore not a reliable means of limiting the risk of addiction, as it is still possible to gamble online with foreign betting providers. These statements are to some extent comparable with the content of the ECJ judgement of 8 September 2010. It therefore remains to be seen whether the new Gambling Treaty will again be challenged before the European authorities.

About

Miguel Oural
Attorney at Law, LL.M.

Miguel Oural is a litigation/arbitration partner in our Geneva and Lausanne offices. He is regularly involved in proceedings before the Court of Arbitration for Sport (especially in football matters).

Contact
Telephone +41 58 450 70 00
miguel.oural@lenzstaehelin.com

Maria Josefa Areán-Ulloa
Attorney at Law

María Josefa Areán-Ulloa is an associate in the Lausanne office. She regularly advises clients on domestic and international transactions relating to corporate and commercial matters. She also advises clients in sports and tax law.

Contact
Telephone +41 58 450 70 00
mj.arean@lenzstaehelin.com

Nicolas Bonassi
Attorney at Law

Nicolas Bonassi is an associate in the Zurich office of Lenz & Staehelin and focuses on competition law and related areas.

Contact
Telephone +41 58 450 80 00
nicolas.bonassi@lenzstaehelin.com

Edgardo Muñoz
Dr. iur., Attorney at Law, LL.M.

Edgardo Muñoz is an associate in our Geneva office. His practice includes commercial, investment and sports dispute resolution.

Contact
Telephone +41 58 450 70 00
edgardo.munoz@lenzstaehelin.com

Selected CAS Awards

Disciplinary authority over retired athletes: the Jan Ullrich case

CAS 2010/A/2082, *UCI v. Ullrich & Swiss Olympic,* 9 February 2012

Context: Proceedings against the former professional cyclist Jan Ullrich were brought by Swiss Antidoping (the national anti-doping organisation) before the Swiss Olympic Disciplinary Chamber for Doping Cases several years after Ullrich had formally withdrawn his membership in his national federation, Swiss Cycling. The Disciplinary Chamber found that it no longer had any disciplinary authority over the cyclist. Both Swiss Antidoping and the UCI appealed this decision in separate CAS proceedings, claiming that a lifetime ban should be imposed on Ullrich for a second offence, as he had been sanctioned by the German national federation before the WADA Code had been adopted. Unlike most doping cases before the CAS, this matter was an internal arbitration (as all parties were based in Switzerland), thus not subject to Chapter 12 of the Swiss Private International Law Act. In the first proceedings, the CAS panel found that it had no jurisdiction to rule on the appeal by Swiss Antidoping, in the absence of an arbitration clause between the parties (CAS 2010/A/2070, reported in Sports Law Newsletter January 2012, p. 12). The award reviewed below was rendered subsequently in the second proceedings (CAS 2010/A/2083).

Decision: Several objections regarding the manner in which the proceedings had been conducted by the sports authorities against Ullrich were either dismissed or considered immaterial by the CAS panel.

The crux of the matter, however, was to decide whether the sports bodies governing cycling had retained the authority to issue a disciplinary decision against Ullrich after his retirement. The Disciplinary Chamber had considered that this was not the case, in the absence of a provision perpetuating the disciplinary authority of Swiss Cycling against cyclists who terminated their membership. By contrast, the CAS panel relied directly on Ullrich's cycling licence and a provision of the UCI rules which provides that "licence holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while applying for or while holding a licence, even if proceedings are started or continue after they cease to hold a licence" (Para. 54). The CAS panel reached the conclusion that the UCI was entitled "to appeal and continue the proceedings" against Ullrich (Para. 56).

Regarding the scope of the appeal, the CAS panel held that it was entitled to make a decision on the merits, in spite of the fact that the proceedings before the Disciplinary Chamber had been limited to the issue of jurisdiction. The CAS panel considered that a violation of "Use or Attempted Use of a Prohibited Substance or Method" was sufficiently established, and imposed a two-year ineligibility period. The CAS panel refused

to consider the matter as a second offence, as the sanction had been imposed under the rules of the German national federation for conduct not prohibited under the UCI rules.

Comment: Given that Lenz & Staehelin represented the cyclist in this matter, it would appear inappropriate to comment extensively on the particulars of the case. However, this matter is a good starting point for a more general reflection on the current interaction between sports regulations and national laws.

One of the lessons that can be learned from the Ullrich case is the disparity between the tools offered by Swiss law of associations, and the way doping disputes are adjudicated nowadays on the basis of sports regulations and the CAS Code. From a strict legal viewpoint, the "appeal" proceedings before the CAS are merely a substitute, based on party autonomy, for the action under Article 75 of the Swiss Civil Code (CC), which gives each member of an association the right to challenge decisions of such association within 30 days before the courts. Article 75 CC is not adapted to the complex decision-making process that currently prevails in doping matters: neither the "delegation" of disciplinary investigations from international to national federations, the "outsourcing" of the hearing process to external entities nor the involvement of multiple parties were contemplated by the Swiss legislature.

This disparity results in elaborate attempts by CAS panels – and even by the Swiss Supreme Court – to fit the reality into the existing legal "boxes". This explains, for example, the CAS panel's argument in the Ullrich matter that the appeal lodged by the UCI "is not – strictly speaking – falling within the scope of application of Article 75 of the Swiss Civil Code" (Para. 46 & 60) to justify the atypical character of the legal solutions proposed. This also explains the hesitant approach of the Swiss Supreme Court, which in some decisions relies on legal constructions characterising CAS as an appeal body or an arbitration court of "second degree" from a functional viewpoint (4A_386/2010, Para. 6.1, quoted in CAS 2010/A/2083, Para. 60; 4A_558/2011, Para. 3; 4A_530/2011, Para. 3.3.2), while stressing in other decisions that, precisely, the CAS is not an appeal body, but intervenes as a judicial body of first instance, in replacement of the action before State courts under Article 75 CC (ATF 136 III 345, Para. 2.2.1).

No abuse of dominant position by UEFA in the FC Sion matter

CAS 2011/O/2574, *UEFA v. Olympique des Alpes SA/FC Sion*

Context: The legal battle between FC Sion and national (SFL), regional (UEFA) and international (FIFA) football authorities, which was triggered by the transfer of goalkeeper Essam El-Hadary, has already been featured in the Focus section of a previous Sports Newsletter (see January 2012, pp. 2–4). The CAS award of 15 December 2011 covers the aspect of this dispute relating to FC Sion's qualification for the Europa League 2011/12 and its subsequent exclusion from this competition by UEFA on 2 September 2011 on the grounds that it had fielded of ineligible players in the qualification games against Glasgow Celtic. On 13 September 2011, FC Sion sought and obtained an *ex parte* injunction from the Cantonal Court of Vaud ordering UEFA to reintegrate the football club into the Europa League, which was confirmed on 27 September 2011 by a decision on interim relief.

Decision: On 26 September 2011, UEFA filed a request for arbitration with CAS seeking – *inter alia* – a confirmation of its decision to exclude FC Sion from the Europa League and the lifting of the provisional measures ordered by the Cantonal Court of Vaud.

A major part of FC Sion's argument before the CAS panel was based on criticism of the CAS's independence and impartiality, notably because of its closed list of arbitrators and its links to and alleged financial dependency on UEFA and FIFA. As part of this, FC Sion requested the hearing of high-ranking officials including Joseph Blatter (FIFA President) and Gianni Infantino (UEFA Secretary General), as well as the production of numerous internal documents. The CAS panel relied, in particular, on the Swiss Supreme Court decision in the *Lazutina* matter (ATF 129 III 445), in which the Supreme Court had considered the CAS as sufficiently independent from the IOC to meet the requirements applicable to an arbitral tribunal. Since FIFA's contribution to the financing of the CAS is "by far less important" than that of the IOC at the time of that award, the same result must apply *a fortiori* to the "world of football". In support of the closed list of arbitrators, the CAS panel found that given the specific manner in which it resolves sports law disputes, the CAS is a kind of arbitration which falls within the scope of the exceptions in the IBA Guidelines allowing lists with a limited number of arbitrators.

The CAS panel confirmed that FC Sion was banned from registering new players in the summer transfer period of 2011/12 pursuant to the FIFA decision. FC Sion's substantive argument against its exclusion from the Europa League was based on Swiss antitrust law (Loi sur les cartels, "LCart"). The CAS panel confirmed that UEFA is an "undertaking" enjoying a "dominant position" on the relevant market of international football competitions in Europe. However, the fact that UEFA adopted the regulations governing the Europa League – in particular regarding the qualification of players – does not constitute an abuse of this dominant position, but rather allows for equal treatment of all clubs. The sanction of forfeiture for clubs fielding ineligible players is a proportionate sanction guaranteeing the proper functioning of the football competition.

The CAS panel therefore confirmed that FC Sion was not entitled to reintegration into the Europa League and declared that the provisional measures ordered by the Cantonal Court of Vaud "shall be lifted".

Comments: The award confirms that appellants have little to expect from arguments challenging the independence and impartiality of the CAS as an institution. The CAS panel devoted a relatively short section (four pages) of its otherwise long award to rejecting FC Sion's procedural objections and requests in that respect.

On the merits, the award confirms that there is certain potential for actions in sports matters based on Swiss antitrust law. However, the crux for the appellant will usually lie in establishing the abuse of dominant position and demonstrating the absence of reasons legitimising a restriction for the proper functioning of sport, or the disproportion of the means used.

As to the interaction between interim relief before State courts and dispute resolution before the CAS on the merits (addressed in Sports Law Newsletter January 2012, p. 2 et seq.), the award demonstrates the difficulties to reconcile national laws and the "international sports order" often promoted before CAS. The Cantonal Court of Vaud had found *prima facie* that UEFA was not legitimate to exclude FC Sion from the Europa League, as the qualification of the players had been ordered on interim relief by a civil court at the time, an order which the Court found to be binding on UEFA also. The CAS panel did not agree with these views, but considered instead that UEFA is not bound by a registration with the national federation if such registration has occurred on the basis of a court order. To reach this interpretation of the Europa League rules, the CAS panel relied on "sports criteria", i.e. the need "to establish uniform regulations applicable equally to all clubs". The CAS panel stated the "UEFA had justifiable reasons to consider the Players were ineligible", meaning that its Appeals Body decision was neither arbitrary nor contrary to Swiss antitrust law. Finally, the CAS panel even insisted that its conclusions would not have been different under the assumption that the players were qualified to play the qualification matches forfeited.

Selection of other CAS Awards

- CAS 2011/A/2414, *Zivile Balciunaite v. Lithuanian Athletics Federation & IAAF,* 30 March 2012: doping, procedural issues raised by the athlete concerning the conduct of sample testing, appeal dismissed.
- CAS 2011/A/2671, *UCI v. Alex Rasmussen & The National Olympic Committee and Sports Confederation of Denmark,* 4 July 2012: doping, the delayed notice of a whereabouts failure cannot invalidate the recording of a missed test, appeal partially upheld.
- CAS 2012/A/2807, *Khaled AbduUaziz Al Eid v. FEI, CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale,* 17 July 2012: sanctioning principles set out in Equine Anti-Doping Rules are not to be conflated with Equine Controlled Medication Rules, excessive sanction, appeal partially upheld.
- CAS 2012/A/2845, *Alexander Peternell v. South African Sports Confederation and Olympic Committee (SASCOC) & South African Equestrian Federation (SAEF),* 23 July 2012: selection criteria, no justification nor publication of the modification of a qualification deadline, athlete was dealt with in an arbitrary and manifestly unfair manner, appeal upheld.
- CAS 2011/A/2612, *Liao Hui v. International Weightlifting Federation (IWF),* 23 July 2012: doping, standard four-year ineligibility in IWF Anti-Doping Policy not in compliance with the WADA Code, no situation justifying a four-year ineligibility, appeal partially upheld.

Swiss Supreme Court Decisions

Challenges in sports matters declared groundless for lack of current interest

Swiss Supreme Court decisions: 4A_636/2011 dated 18 June 2012, *A. v. Federation X* and 4A_134/2012 dated 16 July 2012, *Olympique des Alpes SA (FC Sion) v. UEFA, Atlético de Madrid SAD, Stade Rennais Football Club, Celtic PLC* and *Unidense Calcio SpA*

In recent years the number of applications under Article 190 of the Swiss Private Law Act (SPILA) for setting aside CAS arbitral awards has increased exponentially. Even though the grounds for challenge are frequently multiple, not always thoroughly reasoned and sometimes even anecdotal, the Supreme Court usually considers these grounds with caution, addressing them (and, more often than not, dismissing them) with detailed reasons. In two recent decisions, however, the Swiss Supreme Court declared two applications "groundless" *(sans objet / gegenstandslos)* based on a lack of "current interest".

The factual backgrounds to the decisions

In the first Swiss Supreme Court decision (4A_636/2011), dated 18 June 2012, the Swiss Supreme Court was asked to deal with the doping sanction imposed on a minor karting driver who had tested positive for a prohibited substance during a kart race. The Anti-Doping Committee of the Fédération internationale de l'automobile (FIA) had disqualified the driver from the race, annulled all subsequent results and prizes and imposed a two-year period of ineligibility on him. The minor driver filed an appeal against this decision before the CAS. On 15 September 2011, the CAS panel confirmed that the minor was subject to the FIA anti-doping rules, but considered the case to be exceptional on account of his very young age and the level of competition concerned, and it reduced the suspension initially pronounced from two years to eighteen months, running retrospectively from 18 July 2010 to 18 January 2012 (see CAS 2010/A/2268, *I. v. FIA,* commented in the January 2012

Sports Law Newsletter, p. 12 et seq.). In October 2011, the driver challenged the CAS award before the Swiss Supreme Court. The appeal was limited to the ineligibility period. The Swiss Supreme Court declared the appeal groundless on 18 June 2012, based on a lack of current interest.

The second Swiss Supreme Court decision (4A_134/2011), dated 16 July 2012, concerns the legal battle between FC Sion and national (SFL), regional (UEFA) and international (FIFA) football authorities in relation to FC Sion's disqualification from the Europa League 2011/12 and its subsequent exclusion from this competition by UEFA on the grounds of having fielded ineligible players in the qualification games against Glasgow Celtic (for more detail regarding the facts of this case, please see the Focus section of the January 2012 Sports Law Newsletter, pp. 2–4, and p. 11 of the present Newsletter). The Supreme Court declared the appeal groundless for lack of current interest on the part of FC Sion.

The Swiss Supreme Court's reasoning

In both cases, the Swiss Supreme Court confirmed that, as a prerequisite for considering the merits of a case, the appellant must have an interest worthy of protection in having the challenged award set aside. An interest worthy of protection supposes that the admission of the challenge would be of practical use to the appellant, by removing harm of an economic, ideal, material or other nature caused by the decision appealed. The general rule is that the appellant's interest must be current, i.e. the interest must exist both when the appeal is filed and when the Supreme Court renders its decision. The Swiss Supreme Court recalled that there are exceptions to this general rule, in particular when the possibility exists that a similar situation may recur in the same or similar circumstances, when the nature of the case prevents a decision from being made before the case loses its relevance, or when the matter raises fundamental questions which create sufficient public interest to address the issues in dispute.

In the case of the karting driver, the Swiss Supreme Court considered that the ineligibility period had already expired at the time of its decision and that the driver had not established that he had participated in races which had subsequently been annulled. The Supreme Court noted that the driver still had current interest in invalidating the disqualification from the race in which he had tested positive, but that he had not challenged this disqualification.

In the case of the FC Sion, the inadmissibility was based on the fact that the 2011/12 Europa League season was already finished at the time of the Supreme Court decision. Considering that the football club would not be entitled to rejoin competition which had finished, the Swiss Supreme Court found that the club no longer had a current interest in obtaining a decision.

A restrictive approach to the requirement of current interest

In both cases, the Swiss Supreme Court applied the "current interest" principle very strictly. In earlier cases, the Supreme Court had taken a more indulgent position when examining when an appellant should be considered to have a practical and current interest. For example, in case 4A_604/2010 dated 11 April 2011, the Swiss Supreme Court considered that the standards which should be applied in examining the interest worthy of protection of an appellant to have an arbitral award set aside must not be restrictive.

The finding of a lack of current interest appears particularly questionable in doping cases. Decisions imposing a doping ban fundamentally affect the sportsperson's personal rights, including their image and professional reputation. The stigmatising effects linger, irrespective of whether the ineligibility has expired. In addition, ineligibility under the WADA Code regime entails consequences beyond its actual duration, such as the withdrawal of financial support, the requirements for reinstatement, and a subsequent violation will be characterised as a second offence triggering higher sanctions.

The exceptions to the requirement of current interest were not the object of a detailed assessment in either case. In the FC Sion matter, the Supreme Court merely noted that there was no indication that the situation which had led to the club's exclusion could repeat itself in the future. This argument resembles the attitude of the Supreme Court in case 4P.64/2001 dated 11 June 2001, where the Supreme Court considered that a football player whose disciplinary ban had expired no longer had a current interest and that the appellant had only raised grounds which were in close connection with the facts of the matter, so that it could not depart from the requirement of current interest. Nevertheless, in that 2001 decision, the Supreme Court at least assessed the merits of the appeal by way of an *obiter dictum*.

Challenges of doping-related bans and of disqualifications regularly arise in sports arbitration and thus also before the Swiss Supreme Court in appeals against CAS decisions. Therefore similar

situations regularly occur which could benefit from uniform solutions decided by the court at the highest level. Moreover, given the usual duration of appeal proceedings in sports matters due, in particular, to the different authorities involved, the nature of the case frequently does not allow for a decision before the case loses its direct relevance. In neither matter did the Supreme Court find it necessary to mention the grounds for challenge raised by the appellants. However, the FC Sion matter was a high profile matter which raised important questions regarding the interaction between sport authorities and State courts, while the FIA matter concerned nothing less than the admissibility of sanctioning minors for doping. Both cases were likely to raise issues of principle, so public interest in having a decision related to such topics was at the very least arguable.

From a practical viewpoint, a possible consequence of the Swiss Supreme Court's approach is that athletes with limited financial resources may no longer be willing to take the risk of challenging CAS awards, for fear that their ineligibility may end before the Swiss Supreme Court renders a decision. As the timing of the Supreme Court decision is also relevant to deciding on the current interest – and not only the filing of the appeal – appellants have no control over this time factor. This represents a significant impediment to a sportsperson's actual ability to defend his or her rights and seek the review of CAS awards by a State court. Sportspeople and clubs would be well advised to include in their appeal brief arguments demonstrating the general relevance of the issues raised whenever they anticipate that their practical interest might disappear before the end of the proceedings. The Supreme Court has shown little readiness to assess *ex officio* whether such issues exist. Another instrument at their disposal is to file a request for interim relief with their application to set aside before the Swiss Supreme Court, seeking a stay of the ban or other prohibitive measures in force against them. However, such a request must be thoroughly reasoned, and will only be granted in exceptional circumstances if the sportsperson can demonstrate an emergency situation, the risk of irreparable harm and a sufficient likelihood of success on the merits.

About

Maria Josefa Areán-Ulloa
Attorney at Law

María Josefa Areán-Ulloa is an associate in the Lausanne office. She regularly advises clients on domestic and international transactions relating to corporate and commercial matters. She also advises clients in sports and tax law.

Contact
Telephone +41 58 450 70 00
mj.arean@lenzstaehelin.com

Marjolaine Viret
Attorney at Law

Marjolaine Viret is an associate in our Geneva office. She is regularly involved in arbitration proceedings, both commercial and before the Court of Arbitration for Sport.

Contact
Telephone +41 58 450 70 00
marjolaine.viret@lenzstaehelin.com

Hikmat Maleh
lic.iur., LL.M.

Hikmat Maleh is a member of the litigation team in our Geneva office.

Contact
Telephone +41 58 450 70 00
hikmat.maleh@lenzstaehelin.com

Other Supreme Court decisions in sports-related matters

- Decision of 13 February 2012, *A. and B. v. AMA and Fédération flamande de tennis,* 4A_428/2011: appeal against CAS award, doping, Belgian tennis players challenging jurisdiction of the CAS, appeal dismissed.
- Decision of 8 March 2012, *International Ice Hockey Federation v. SCB Eishockey AG,* 4A_627/2011: appeal against CAS award, compensation to be paid to an ice hockey club for cancellation of the Champion's Hockey League, appeal upheld.
- Decision of 23 May 2012, *Serbischer Fussballverband v. M.,* 4A_654/2011: appeal against CAS award, compensation to be paid to a coach by a federation for immediate termination of contract without cause, appeal dismissed.
- Decision of 31 May 2012, *Club X. v. Club Y.,* 4A_682/2011: appeal against CAS award, percentage of transfer fee to be paid to the former club of the player by his new club in case of a subsequent transfer, appeal dismissed.
- Decision of 18 June 2012, *X. v. UCI, Comitato Olimpico Nazionale Italiano and Federazione Ciclistica Italiana,* 4A_488/2011: appeal against CAS award, doping, cyclist challenging disciplinary sanctions, appeal dismissed.

News in Brief

CAS award set aside for breach of substantive public policy

In a landmark decision in football dated 27 March 2012 (4A_558/2011, ATF 138 III 322), the Swiss Supreme Court set aside a CAS award for breach of substantive public policy under Article 190(2)(e) of the Swiss Private International Law Act (SPILA), for the first time since the entry into force of that act in 1989.

The court ruled that a decision by FIFA threatening a player with a ban from all professional football activities in the event that he not comply with a previous CAS award ordering him to pay damages to his former club runs counter to public policy. Such a threat constitutes a serious interference with the player's personal rights and ignores the mandatory limitations imposed by Article 27(2) of the Swiss Civil Code. The economic existence of the player was jeopardised without sufficient justification by an overriding interest of FIFA or its members.

For more details, see the Newsflash issued by Lenz & Staehelin in May 2012, which can be obtained through our website (www.lenzstaehelin.com/en/publications/client-memoranda-and-newsletters.html).

Swedish Competition Authority opens the Swedish Elite Ice Hockey League for players locked out from the NHL

Following the dispute between the National Hockey League (NHL) in the United States and Canada and the National Hockey League Players' Association (NHLPA), all members of the NHLPA – i.e. the players – were locked out from the NHL. The reason for this lockout was that the team owners and the players failed to agree on the players' share of the so-called hockey-related revenues. The owners had proposed a reduction of this share from 57% to 46%, which the players were not willing to accept.

Following this third lockout in the history of the NHL, many NHL players have prepared themselves to play for European teams. Soon after it became clear that such players would become available for ice hockey teams in Europe, the Swedish Elite League decided that its teams would only accept NHL players willing to sign deals for the duration of at least the entire season. This measure was essentially taken to protect Swedish players, and especially young prospects, from being driven out by the NHL players. This led to a *de facto* ban on locked out players, as these would normally only sign short-term contracts (the expectation being that the NHL and the NHLPA would finally come to an agreement and that the lockout would be lifted in the course of the season).

On 20 September 2012 the Swedish Competition Authority took an interim decision declaring this ban unlawful under Swedish competition law. According to this interim decision, the ice hockey teams must be considered as undertakings which, under the ban, no longer have the ability to act freely with regard to recruiting players. The Swedish Competition Authority considered that this constitutes anti-competitive cooperation, under both the Swedish Competition Act and Article 101 of the Treaty on the Functioning of the European Union. As a consequence of the decision, teams will be able to decide for themselves whether they want to recruit locked out NHL players or not.

The Swedish Competition Authority will further investigate the matter. The interim decision will remain in place until a final decision is taken. Non-compliance with the interim decision will be subject to a fine of SEK 20 million (around CHF 2.8 million).

Football League fixture lists accessible to copyright protection?

ECJ – Judgment of 1 March 2012 – Case C-604/10 – *Football Dataco Ltd et al. v. Yahoo! UK Ltd et al.*

Football Dataco Ltd and Others claimed among other things that they own, with respect to the English and Scottish football league fixture lists, a copyright pursuant to Article 3 of Directive 96/9/EC on the legal protection of databases. Yahoo and Others did not accept that such right exists in law, and argued that they are entitled to use the lists in the conduct of their business without having to pay financial compensation.

Following an order for reference from the Court of Appeal of England and Wales, the European Court of Justice (ECJ) issued a preliminary ruling according to which, in essence, a football league fixture list may qualify as a database which satisfies the conditions of eligibility for the copyright protection set out in Article 3(1) of Directive 96/9/EC, provided that the selection and arrangement of the data amount to an original expression of the creative freedom of its author.

The ECJ recalled that the copyright protection provided for by Directive 96/9/EC concerns the structure of the database, as opposed to its contents or the

elements constituting its contents. This analysis is confirmed by the purpose of Directive 96/9/EC, which is to stimulate the creation of data storage and processing systems in order to contribute to the development of information generated and processed annually in all sectors of activity, and not to protect the creation of materials capable of being collected in a database.

As a consequence, the intellectual effort and skill of creating the data are not relevant for that purpose. Also irrelevant is whether or not the selection or arrangement of the data includes the addition of important significance to that data. To sum up, the data itself is not protected; copyright only covers the structure of the database.

Moreover, the ECJ clarified that the significant labour and skill required for setting up a database cannot justify as such copyright protection if no originality is displayed in the selection or arrangement of the data which this database contains.

Finally, according to the ECJ, Directive 96/9/EC, subject to its transitional provisions, precludes national legislation which grants databases copyright protection under conditions which are different from those set out in Article 3(1) of said Directive.

First application of UEFA Financial Fair Play before CAS

CAS – Press release of 6 July 2012

The CAS recently confirmed the sanctions imposed by the UEFA Appeals Body against Besiktas JK for violation of the UEFA Club Licensing and Financial Fair Play Regulations, namely:

> Besiktas JK is excluded from the next two UEFA club competitions for which it qualifies in the next five seasons.
> The exclusion for the second competition is suspended for a probationary period of five years.
> Besiktas JK is fined EUR 200,000, of which EUR 100,000 is stayed for a probationary period of five years.

According to the press release issued by the CAS, Besiktas JK was responsible for overdue payables of several million euros in total related to transfer activities as well as salaries, social charges and taxes. The overdue payables already amounted to millions when the licence was granted.

Still according to the press release, this ruling confirms the previous CAS jurisprudence in relation to the UEFA Club Licensing and Financial Fair Play Regulations established in the case of the Hungarian club Györi ETO. In the same context, the Turkish Club Bursaspor KD successfully appealed before the CAS against a decision rendered by the UEFA Appeals Body. According to its press release of 22 June 2012, the CAS suspended the exclusion of the Club for a probationary period of three years.

The full awards in both matters are still awaited at the time of publishing this Newsletter.

Revision of the Concordat against Violence at Sports Events to implement stricter measures against hooliganism

Background

Shortly before the start of the UEFA European Football Championship (2008) held in Switzerland and Austria, the Swiss parliament decided an amendment to the Swiss Federal Internal Security Act (ISA) designed to provide a statutory basis for certain coercive measures aimed at preventing violence in the vicinity of sports events. The relevant statutory provisions were then transposed from the ISA into a treaty among all Swiss cantons (the Concordat against Violence at Sports Events, the "Concordat"). Pursuant to the Swiss Constitution, the power to regulate some of these coercive measures rests with the Swiss cantons (as opposed to the federal State). The coercive measures set forth in the Concordat encompass exclusion orders (e.g. with respect to the area surrounding the location of sports events), custody orders (limited to 24 hours), obligations to report to the police, and travel bans. The Swiss regulatory framework against hooliganism also provides for the creation of a database containing the names of violent sports fans (the so-called HOOGAN database). In a decision of 13 October 2010 (published in the Official Court Reporter under ATF 137 I 31), the Swiss Supreme Court confirmed that these coercive measures do not infringe on the set of fundamental rights encapsulated in the Swiss Constitution and in the European Convention on Human Rights.

New Concordat

The entry into force of the Concordat did not lead to a significant decrease in violence in Swiss football stadiums and ice hockey rinks. As a result, it was decided to strengthen certain provisions of the Concordat. For example, under the revised version of the Concordat, an exclusion order can now have a duration of up to three years (the maximum duration was one year under the initial version of the Concordat).

More importantly, the revised version of the Concordat provides that every sports event involving a football or ice

hockey club in the highest national division (football: Super League; ice hockey: National League) is now subject to an authorisation procedure at the cantonal level. This authorisation procedure is seen as a tool to force the organiser of the event to take the required safety measures. The conditions associated with the authorisation may include, among other things, (i) certain architectural and technical requirements (e.g. offering seating areas as opposed to standing areas, installation of video surveillance systems), (ii) the obligation to employ specific staff to ensure safety, (iii) the implementation of restrictions regarding the sale of tickets and alcoholic beverages and (iv) the duty to control access to the location of the event (at the actual location and in the public transport leading to the location). These access controls are aimed at ensuring that individuals flagged as violent sports fans in the HOOGAN database are precluded from taking public transport to the stadium or from entering the stadium. A model set of authorisations (and related conditions) will be established for events ranked as "high", "medium" and "low" risk.

Failure to comply with the conditions associated with an authorisation may prompt the relevant cantonal authority to impose additional restrictions on future events or to refuse to grant further authorisations altogether. Depending on the situation, the authority may also intervene in advance of the event if it appears that the conditions set forth in the authorisation will in all likelihood not be complied with.

As of September 2012, only two Swiss cantons have formally adhered to the revised version of the Concordat. The ratification process is still ongoing in the other Swiss cantons.

Stricter rules against doping abuse

The new Swiss Sports Act ("Loi fédérale sur l'encouragement du sport") entered into force on 1 October 2012. One core aspect of the revision is the adoption of stricter and more detailed provisions against doping abuse. The federal State is no longer limited to promoting "doping prevention" through education, information, advice and research. In a non-exhaustive list, the revised Swiss Sports Act includes the possibility for the federal authorities to take additional measures, in particular in the field of controls.

The main features of the revision include the following:

> More extensive powers granted to Swiss Antidoping (the national anti-doping agency), for example to confiscate and destroy doping substances and means, even outside and independently of criminal proceedings;
> Increased scrutiny and stricter criminal sanctions directed at athletes' entourage;
> Data exchange at national and international level, including between sports organisations and criminal authorities;
> Increased funding and financial support, allowing for more effective testing and establishing of athlete blood profiles.

About

Adrien Alberini
Dr. iur., Attorney at Law

Adrien Alberini is an associate in the Geneva office of Lenz & Staehelin and focuses on competition law and related areas.

Contact
Telephone +41 58 450 70 00
adrien.alberini@lenzstaehelin.com

Nicolas Bonassi
Attorney at Law

Nicolas Bonassi is an associate in the Zurich office of Lenz & Staehelin and focuses on competition law and related areas.

Contact
Telephone +41 58 450 80 00
nicolas.bonassi@lenzstaehelin.com

Philipp Fischer
Attorney at Law, LL.M.

Philipp Fischer is an associate in the Geneva office, where he primarily advises in banking, finance and capital market matters. His practice also includes domestic and international M&A transactions.

Contact
Telephone +41 58 450 70 00
philipp.fischer@lenzstaehelin.com

Rayan Houdrouge
Attorney at Law, LL.M.

Rayan Houdrouge is an associate in our Geneva office. He regularly advises corporate clients on compliance with competition law. His other main area of practice is employment and immigration law.

Contact
Telephone +41 58 450 70 00
rayan.houdrouge@lenzstaehelin.com

Fabrice Benjamin
lic. iur., Paralegal

Fabrice Benjamin is a member of the arbitration team in our Geneva office.

Contact
Telephone +41 58 450 70 00
fabrice.benjamin@lenzstaehelin.com

Geneva / Lausanne

Partners

Mark John Barmes	mark.barmes@lenzstaehelin.com
Xavier Favre-Bulle	xavier.favre-bulle@lenzstaehelin.com
Lucien Masmejan	lucien.masmejan@lenzstaehelin.com
Benoît Merkt	benoit.merkt@lenzstaehelin.com
Miguel Oural	miguel.oural@lenzstaehelin.com
François Rayroux	francois.rayroux@lenzstaehelin.com
Guy Vermeil	guy.vermeil@lenzstaehelin.com

Associates

Adrien Alberini	adrien.alberini@lenzstaehelin.com
Maria Josefa Areán-Ulloa	mj.arean@lenzstaehelin.com
Philipp Fischer	philipp.fischer@lenzstaehelin.com
Rayan Houdrouge	rayan.houdrouge@lenzstaehelin.com
Arnaud Martin	arnaud.martin@lenzstaehelin.com
Edgardo Muñoz	edgardo.munoz@lenzstaehelin.com
Sebastiano Nessi	sebastiano.nessi@lenzstaehelin.com
Rocco Rondi	rocco.rondi@lenzstaehelin.com
Marjolaine Viret	marjolaine.viret@lenzstaehelin.com

Zurich

Partners

Martin Burkhardt	martin.burkhardt@lenzstaehelin.com
Stephan Erni	stephan.erni@lenzstaehelin.com
Harold Frey	harold.frey@lenzstaehelin.com
Jürg Simon	juerg.simon@lenzstaehelin.com

Associates

Nicolas Bonassi	nicolas.bonassi@lenzstaehelin.com
Alexander Greter	alexander.greter@lenzstaehelin.com
Fadri Lenggenhager	fadri.lenggenhager@lenzstaehelin.com

Genève Zürich Lausanne
www.lenzstaehelin.com

Geneva
Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01

Zurich
Bleicherweg 58
CH-8027 Zürich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01

Lausanne
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01