Las resoluciones de la Agencia Española de Protección de la Salud en el Deporte no agotan la vía administrativa, por lo que cabe recurso de alzada impropio ante el Tribunal Administrativo del Deporte. Esta es otra de las novedades de la L. O. 3/2013, aunque no esté referida directamente al ámbito del dopaje. En efecto, la creación del Tribunal Administrativo del Deporte ha supuesto la supresión del Comité Español de Disciplina Deportiva y de la Junta de Garantías Electorales, organismos ambos enraizados en el sistema deportivo español. Los recursos administrativos especiales ante el citado Tribunal pueden interponerse en el plazo de treinta días, que entiendo hábiles, desde el siguiente a la notificación de la resolución. Se trata de un recurso de alzada impropio que será tramitado conforme a lo dispuesto en la Ley 30/1992, de 26 de noviembre, de régimen jurídico de las administraciones públicas y del procedimiento administrativo común, para el recurso de alzada. Existe la obligación de resolver los recursos en el plazo de tres meses desde la fecha de entrada del escrito de iniciación. Transcurrido el citado plazo, el interesado puede entender desestimado el recurso[26]. Las resoluciones del Tribunal Administrativo del Deporte agotan la vía administrativa. Quiero resaltar que ha desaparecido el curioso, y controvertido, sistema "arbitral" instaurado por el artículo 29.1 de la L. O. 7/2006 que pretendía dar celeridad al proceso sancionador en la vía administrativa.

Contra las resoluciones del Tribunal Administrativo del Deporte cabe recurso ante la jurisdicción contencioso-administrativa. Conforme a la disposición adicional cuarta de la L. O. 3/2013, en su apartado 2, las referencias al Comité Español de Disciplina Deportiva se entenderán hechas al Tribunal Administrativo del Deporte, por lo que a falta de disposición expresa entiendo que serán recurribles ante los juzgados centrales de lo contencioso-administrativo en aplicación del artículo 9.1 de la Ley 29/1998, de 13 de julio, de la Jurisdicción Contencioso-Administrativa. El recurso contencioso-administrativo se tramitará en única instancia y por el procedimiento abreviado previsto en el artículo 78 de la citada Ley 29/1998.

Como ya he indicado anteriormente, los deportistas calificados oficialmente como de nivel internacional quedan al margen de las funciones disciplinarias ejercidas por la Agencia Española de Protección de la Salud en el Deporte y, en consecuencia, también de la revisión del Tribunal Administrativo del Deporte. Las sanciones impuestas por la organización federativa carecen de la condición de resoluciones administrativas, por lo que podrán ser recurridas ante el Tribunal Arbitral del Deporte (TAS).

26 Artículo 40 de la L. O. 3/2013.

4. Antidoping and the Court of Arbitration for Sport: Where we're at and where we're going

Antonio Rigozzi

Brianna Quinn

Introductory Remarks

Anti-doping has seen no shortage of discussion this past year, with the implementation of a revised Code from the World Antidoping Agency (WADA)[1] and various high profile cases and "scandals" across all sports[2].

Such scandals have in the past led to sweeping reforms in anti-doping. In fact, WADA itself was established in 1999 as a direct response to the highly publicised "Festina affair"[3]. This "Tour of Shame" involved revelations of widespread doping during the Tour de France, following which the First World Conference on Doping in Sport was held in Switzerland in 1999. The outcome was the Lausanne Declaration on Doping in Sport[4].

The Lausanne Declaration codified the wishes of various governments, sports federations and athletes to establish an independent, international anti-doping agency. The agency would be tasked with implementing an "Olympic Movement Antidoping Code" and establishing universal sanctions for violations discovered in both "in-competition" and "out-of-competition" controls[5].

1 The current WADA Code 2015 (as well as its prior 2003 and 2009 versions) is available on the WADA website at <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code>.

2 The most recent scandal (in August 2015) involved a whistle-blower leaking IAAF data collected from 12,000 blood tests from 5,000 athletes (see, for example <http://www.bbc.com/sport/0/athletics/33749208>). 2015 also saw the publication of the Cycling Independent Reform Commission (CIRC) Report, an initiative from the UCI to investigate the history of doping in the sport of cycling. The detailed findings made by the CIRC are available at: <http://www.uci.ch/mm/Document/News/CleanSport/16/87/99/CIRCReport2015_Neutral.pdf>.

3 See <https://www.wada-ama.org/en/who-we-are>. See also Rosen, D. M.. *Dope: A history of performance enhancement in sports from the nineteenth century to today.* Westport, Conn (2008) Praeger at page 100: *"When the Festina scandal struck, professional cycling was second only to soccer in terms of the sport's popularity in Europe. The impact of the Festina scandal can be felt to this day, in the developments that came as a result of the sporting world's reaction to what happened"*.

4 18 February 1999, GR-C(99)5. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=402791>. For a comprehensive history of the development of anti-doping regulations and WADA, see Rigozzi, A. *L'arbitrage international en matière de sport* Basel (2005) Helbing & Lichtenhahn at pages 63-69.

5 *Ibid.* Articles 2, 3 and 4.

Following consultation with key stakeholders, in 2004 the World Antidoping Code (**WADA Code**) entered into force, including the following important provision:

> *In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.*[6]

Whilst CAS had been hearing anti-doping proceedings since its inception in 1984[7], the WADA Code sought to provide a certain level of harmonisation in the sanctions imposed on athletes for anti-doping rule violations. The extent of such harmony is often debated[8], however there is no doubt that there are certain key concepts regularly discussed by CAS arbitration panels in anti-doping proceedings.[9]

Indeed, according to recent statistics published by the CAS, anti-doping proceedings accounted for 47% of all appeals procedures until 2014[10]. Based on the total number of appeals procedures, this means that approximately 1388 doping cases have been filed at the CAS over the years[11]. Whilst football disputes account for the majority of CAS appeals proceedings in general[12], anti-doping disputes typically involve all manner of sports, from athletics and cycling to motor, air and water sports and equestrian[13].

6 See Article 13.2.1 of the 2004 WADA Code.

7 See McLaren, R "A New Order: Athlete's Rights and the Court of Arbitration at the Olympic Games" (1998) 7 *Olympika: The International Journal of Olympic Studies* at page 5. For a history of the CAS see <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>.

8 See for example, Segan, J. *Does the Court of Arbitration for Sport need a grand chamber,* 15 January 2014: *"[i]t is therefore perfectly open to one CAS Panel to depart from the decision of an earlier Panel, on a point of law. There is no particular constraint on a CAS Panel from doing so, and they regularly do. As a result, there are now a whole series of important issues in the "*lex ludica*" which are the subject of diverging strands of CAS case law, which can never be authoritatively resolved".* Article available at: <http://www.lawinsport.com/articles/item/does-the-court-of-arbitration-for-sport-need-a-grand-chamber>.

9 See Rigozzi, A. *L'arbitrage international en matière de sport* at pages 648-651.

10 See Mavromati, D. / Reeb, M. *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Kluwer Law International, (2015) at page 401-402.

11 *Ibid.* The precise number of anti-doping proceedings which have resulted in arbitral awards is unknown as many of the awards are yet to be published by the CAS.

12 *Ibid.* The CAS statistics provide only for a breakdown of sports in appeals procedures generally, so it is difficult to determine the precise breakdown of different sports in CAS proceedings involving anti-doping.

13 The full list of WADA signatories (by sport and country) can be found at: <https://www.wada-ama.org/en/what-we-do/the-code/code-signatories>.

Against this background, the purpose of this contribution is to consider some of the key concepts regularly discussed in CAS awards[14] and to provide readers with an introduction to some of the more important features of the WADA Code and to the types of evidence typically seen in anti-doping proceedings. Given the sweeping reforms that have taken place in anti-doping this year, the contribution will also (where possible and relevant) consider new developments in the WADA Code as well as how its interpretation could be influenced by CAS jurisprudence to date[15].

I. THE APPLICABLE RULES AND THE RELEVANCE OF SWISS LAW

Prior to discussing specific concepts in the WADA Code, it is worth briefly setting out some of the applicable rules for CAS anti-doping proceedings, which are invariably influenced by Swiss law. Indeed, the latter pervades many elements of CAS arbitrations as a result of: (i) the seat of all CAS arbitrations being Lausanne, Switzerland[16]; and (ii) the fact that the majority of International Federations and WADA itself are domiciled in Switzerland[17].

14 As to the concept of CAS "jurisprudence", it has been stated that: *"CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging "lex sportiva". Since CAS jurisprudence is largely based on a variety of sports regulations, the parties' reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations"* (see CAS 2002/O/373 *COC & Scott v IOC* at page 18). However the "precedential" or binding nature of an earlier CAS award has been regularly discussed, with most Panels seemingly accepting that: *"although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect"* (see CAS 2008/A/1545 *Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v/ IOC* at page 22).

15 For further information on the changes to the WADA Code in 2015, see the following comprehensive articles on same: Rigozzi, Haas, Wisnosky and Viret, *Breaking down the process for determining a basic sanction under the 2015 World Antidoping Code*, Int Sports Law J (2015) 15:3-48 (available at <http://ssrn.com/abstract=2631425>); Rigozzi, Viret and Wisnosky, *Does the World Antidoping Code Revision Live up to its Promises?*, Jusletter 11 November 2013 (available at: <http://www.lk-k.com/data/document/rigozzi-viret-wisnosky-wadc-revision-11-november-2013.pdf>) Rigozzi, Viret and Wisnosky, *Latest Changes to the 2015 WADA Code - Fairer, Smarter, Clearer... and not quite Finished,* Jusletter 20 January 2014 (available at <http://www.lk-k.com/data/document/rigozzi-viret-wisnosky-latest-changes-the-2015-wada-code-jusletter-20-january-2014.pdf>).

16 See Article R28 of the CAS Code and "International Sports Arbitration: Why does Swiss Law Matter?" in: Rigozzi/Sprumont/Hafner (eds), *Citius, Altius, Fortius - Mélanges en l'honneur de Denis Oswald*, Basel 2012, at pages 444-45.

17 See Valloni and Pachmann, *Sports Law in Switzerland*, (2011) Kluwer Law International, Netherlands at pages 65-76.

As a result, with the exception of rare cases in which all the parties to the arbitration are domiciled in Switzerland[18], CAS arbitrations are governed by Chapter 12 of the Swiss Private International Law Act (**PILA**). Importantly, Article 182 of Chapter 12 of the PILA provides that "the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure" and that, "[i]f the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration", keeping in mind that "[r]egardless of the procedure chosen, the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings"[19].

This means that, in effect, cases before the CAS are conducted according to the provisions of the CAS Code of Sports-related Arbitration (**CAS Code**). Within the CAS Code, Article R58 then expressly provides for sports regulations to be the "Law Applicable to the merits"[20], which means that in practice many issues will be determined according to the specific rules in the relevant sports regulations.

When it comes to anti-doping, the WADA Code is not directly applicable to the proceedings[21], but rather the "law applicable to the merits" will be the version of the WADA Code that has been adopted by the relevant international

18 See for instance CAS 2010/A/2083 *UCI v/ Jan Ullrich & Swiss Olympic* at para. 27.

19 The PILA is available in English at <https://www.swissarbitration.org/sa/download/IPRG_english.pdf>.

20 Article R58 of the CAS Code states: *"[t]he Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate"*.

21 See CAS 2011/A/2612 *Liao Hui v. International Weightlifting Federation (IWF)* at para. 98 where the Panel confirmed prior CAS jurisprudence on this point: *"Hence, the WADC is – even if the relevant international federation is a signatory to the WADC – not a document that by its very nature is directly applicable between said federation and its affiliated athletes. This finding is in line with constant CAS jurisprudence. In CAS 2008/A/1718-1724 (para. 61) the Panel held – inter alia: 'The Parties submitted, each of them for different reasons, that the WADC should be applied by the Panel. The Panel refers first to the clear wording of the WADC 2003 and 2009, notably under the first paragraph of the Introduction chapter where it is mentioned that international federations are "responsible for adopting, implement or enforcing anti-doping rules within their authority (...)". There are numerous CAS cases on the question of the direct applicability of the WADC [references omitted]. The Panel considers that it follows from this wording of the WADC that it does not claim to be directly applicable to athletes". Furthermore, it follows that the associations have autonomy to regulate their internal matters – subject to mandatory provisions of law – at their discretion. By issuing its anti-doping rules the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply unless there was a specific reference in the IAAF Rules."'*

federation.[22] With that said, such rules are based on the WADA Code[23], which provides specific and mandatory rules relating to the burden of proof (Section II) and standard of proof (Section III) in anti-doping proceedings, as well as the evidence upon which the respective parties can rely (Section IV).

Finally, anti-doping proceedings are also inevitably shaped by the application of mandatory laws as commonly noted in CAS proceedings:

> *Furthermore, it follows that the associations have autonomy to regulate their internal matters – subject to mandatory provisions of law – at their discretion. By issuing its anti-doping rules the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply unless there was a specific reference in the IAAF Rules*[24].

II. The Burden of Proof in Antidoping Proceedings

A. General Provisions

One of the most important notions in anti-doping proceedings is that of the burden of proof, which has been described by the CAS as follows:

> *Despite the notion of "burden of proof" being tied to the taking of evidence, the predominant scholarly opinion is that – in international cases – burden of proof is governed by the lex causae, i.e. by the law applicable to the merits of the dispute and not by the law applicable to the procedure.*

22 For example, the Union Cycliste Internationale (**UCI**) (see: <http://www.uci.ch/inside-uci/rules-and-regulations/regulations/>), the International Association of Athletics Federations (**IAAF**) (see: <http://www.iaaf.org/about-iaaf/documents/anti-doping>); the Fédération Internationale de Football Association (**FIFA**) (see: <http://resources.fifa.com/mm/document/affederation/administration/02/49/28/61/circularno.1458-fifaanti-dopingregulations_neutral.pdf>); and the Fédération Internationale de Natacion (**FINA**) (see: <http://www.fina.org/H2O/docs/rules/2015/FINA_DC_rules.pdf>).

23 The Introduction to the Code states that *"All provisions of the Code are mandatory in substance and must be followed as applicable by each Antidoping Organization and Athlete or other Person. The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules to be adopted by each Antidoping Organization. While some provisions of the Code must be incorporated without substantive change by each Antidoping Organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each Antidoping Organization or establish requirements that must be followed by each Antidoping Organization but need not be repeated in its own anti-doping rules"*. Those rules which must be implemented without substantive change are set out in Article 23.2. of the WADA Code.

24 For example, see CAS 2011/A/2612 *Liao Hui v. International Weightlifting Federation (IWF)* at para. 98 (citing CAS 2008/A/1718-1724 at para. 61).

> *Therefore, the first question to be determined is which is the applicable law to the merits, other than the [cycling] Regulations, to which the Panel can turn for any necessary clarifications concerning the content of the "burden of proof".*
>
> *[...]*
>
> *Under Swiss law, the "burden of proof" is regulated by Art. 8 of the Swiss Civil Code (hereinafter referred to as "CC"), which, by stipulating which party carries such burden, determines the consequences of the lack of evidence, i.e. the consequences of a relevant fact remaining unproven.*
>
> *Indeed, Art. 8 CC stipulates that, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal*[25].

With respect to anti-doping proceedings under the WADA Code, Article 3.1 expressly provides as an initial and fundamental rule that:

> *[t]he Antidoping Organization shall have the burden of establishing that an anti-doping rule violation has occurred.*[26]

Importantly, as set out in the WADA Code and confirmed in numerous CAS cases, an anti-doping rule violation is "committed ... without regard to an Athlete's Fault" and it is "not necessary that intent, fault, negligence or knowing use" be demonstrated[27]. This concept is often referred to as "strict liability",

25 CAS 2011/A/2384 *UCI v. Alberto Contador Velasco & RFEC and* CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC* at para. 245-249 (references omitted). Another CAS Panel has framed the question as follows: *"According to the general rules and principles of law, facts pleaded have to be proved by those who plead them [...] This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based"* (CAS 2007/A/1380 *MKE Ankaragücü Spor Kulubu v. S.* at para. 25).

26 This provision has remained unchanged between the 2009 and 2015 WADA Code.

27 See Article 2.1.1 of the WADA Code and the Comment thereto. See also CAS 2009/A/1768 *Hansen v Fédération Equestre Internationale (FEI)* at para. 13: *"Finally it is immaterial that in the particular circumstances it cannot be shown that the substance did affect [the athlete's performance]. It is another aspect of the strict liability rule that the sports' governing body will not have to establish such matters; and it will not avail the sportsman [...] to show that it had no such effect. The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels. See in particular CAS 2005/A/829 Ludger Beerbaum v/ FEI para 12.19: 'to construe the proviso as allowing the FEIJC*

and brings with it an obligation of the relevant anti-doping organisation to ensure that it has conducted itself (and its tests) in accordance with the relevant regulations and WADA standards[28].

Article 3.1 of the WADA Code then goes on to note that other articles of the Code impose the burden on the athlete[29] to "rebut a presumption" or "establish specified facts or circumstances"[30].

Thus, whilst the fundamental starting point to any anti-doping proceedings is that the anti-doping agency is required to establish the relevant violation, the athlete must also establish certain facts in defending himself or herself. Notable examples of the latter include:

a) **Article 2.10** (a new addition to the WADA Code) requires an athlete to establish that his or her "prohibited association" with a person who has been criminally convicted or professionally disciplined for doping was "not in a professional or sport related capacity".[31] The application of this provision is likely to provide for interesting CAS jurisprudence, in particular in terms of the evidence required to demonstrate (and, on the part of the anti-doping organisation to rebut) the purpose of an athlete's association with designated persons.

b) **Article 3.2.2** provides for a rebuttable presumption that anti-doping laboratories have conducted sample analysis and custodial

(or the CAS) to allow an appeal against disqualification on the grounds that it was proven that there was neither intent to gain competitive advantage nor success in so doing would be contrary to those principles. 'See also Baxter v IOC CAS 2002/A/376 para 3.29: 'The disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels'".

28 See for example CAS 2014/A/3487 *Veronica Campbell-Brown v. JAAA & IAAF* at para. 147: *"The Panel accepts there is considerable force in the proposition that, in order to justify imposing a regime of strict liability against athletes for breaches of anti-doping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards of testing"*.

29 Throughout this chapter, any reference to an athlete in the context of the WADA Code includes both the concept of an Athlete and another Person (as defined in Appendix 1 to the WADA Code).

30 See Section II.B below for examples of facts for which the athlete has the burden of proof.

31 Article 2.10 of the 2015 WADA Code aims at limiting the possibility for athletes' entourages encouraging and/or assisting doping. However, in view of the potentially wide scope of the provision an opportunity is provided to the athlete to prove that his or her "prohibited association" was unrelated to sport. This is essentially a recognition of the fact that in some circumstances it would be impossible (or at least over-burdensome) to prohibit athletes from association with such persons - for example other members of a team, physicians and friends and family. See Rigozzi, Viret and Wisnosky, *Does the World Antidoping Code Revision Live up to its Promises?* at pages 15-17.

procedures in accordance with the applicable regulations. The burden of proof is on the athlete to establish that a departure from these regulations occurred and that such departure could "reasonably" have caused the positive test.[32] In the event that an athlete does rebut this presumption, the burden of proof shifts back to the anti-doping organisation to establish that the departure in question did not in fact cause the positive test[33].

c) Interestingly, the new **Article 3.2.1** (an addition to the 2015 WADA Code) provides for a further, also rebuttable, presumption that analytical methods and decision limits approved by WADA are scientifically valid. Once again, the athlete may rebut this presumption, however there are certain requirements that must be met, including that WADA be notified of the challenge and the basis of the challenge[34].

32 This provision was previously Article 3.2.1 of the 2009 Code. The only material change to the provision is the extension of the presumption in favour of WADA accredited laboratories to also encompass "other laboratories approved by WADA". Article 3.2.3 provides for similar presumptions and allocations of the burden of proof for "departure[s] from another International Standard or other anti-doping rule or policy".

33 The interpretation of Article 3.2.1 was considered in detail in the recent proceedings CAS 2014/A/3487 *Veronica Campbell-Brown v. JAAA & IAAF* where the Panel noted (inter alia) that: *"As a preliminary point, the Panel notes that it will be relatively rare for an IST departure itself to directly cause an adverse analytical finding. Instead, it appears that the rule is primarily intended to address situations where an IST departure creates an opportunity for an intervening act (for example, of accidental contamination or deliberate sabotage) to compromise the integrity of the athlete's sample. [... C]ertain IST departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing process to such an extent that it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred. [... T]he Panel considers that Rule 33.3(b) requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible. The Panel considers that this interpretation - which does not set the bar for a shift in the burden of proof to an unduly high threshold - strikes an appropriate balance between the rights of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST [...] The mandatory IST are designed to eliminate the possibility of contamination affecting the outcome of anti-doping tests. To ensure that anti-doping bodies strictly adhere to those standards, and to ensure that athletes are not unfairly prejudiced if they failed to do so, IAAF Rule 33.3(b) must be interpreted in such a way as to shift the burden of proof onto the anti-doping organisation whenever a departure from an IST gives rise to a material - as opposed to merely theoretical - possibility of sample contamination"* (at para. 142-165).

34 Notably, at WADA's request a CAS Panel faced with a challenge "shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge". WADA shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in any such proceeding (see Article 3.2.1).

B. THE SANCTIONING PROCESS AND THE BURDEN OF PROOF

In addition to these general provisions, there is now a (somewhat complicated) process to determine the basic sanction of an athlete under the 2015 WADA Code[35].

Under the 2009 Code, for violations of the presence or use of a prohibited substance or method, the basic sanction was a two year period of ineligibility. Athletes held the burden of proof to establish that they were entitled to a reduction of that sanction, and anti-doping organisations held the burden of proof to establish that there were aggravating circumstances present that would justify an increase in the basic sanction.

The 2015 WADA Code offers a more complex solution, with a four-year basic sanction if the violation was intentional (as newly defined in Article 10.2.3), and a two-year basic sanction if the violation was not intentional. As to the respective burdens of proof imposed on the athlete and the anti-doping organisation, Article 10.2 provides as follows:

d) If the case does not involve a Specified Substance (i.e. it involves what is considered to be a more inherently doping-related substance or method)[36], the athlete must prove that the violation was not intentional in order for a standard period of ineligibility of two years to apply. If the athlete fails to establish this, a four year period of ineligibility will apply.

e) If the case does involve a Specified Substance, a two year period of ineligibility will apply unless the anti-doping organisation can prove that the relevant violation was intentional. If the anti-doping organisation succeeds in proving this, a four year period of ineligibility will apply.

Article 10.2 of the WADA Code also provides for certain presumptions when it comes to the concept of "intention". For example: (i) the use of a

35 For a comprehensive discussion of the sanctioning process under the 2015 WADA Code see: Rigozzi, Haas, Wisnosky and Viret, *Breaking down the process for determining a basic sanction under the 2015 World Antidoping Code*, Int Sports Law J (2015) 15:3-48 (available at <http://ssrn.com/abstract=2631425>).

36 As to Specified Substances vs Prohibited Substances, the comment to Article 4.2.2 of the WADA Code provides that *"Specified Substances [...] should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance"*.

Specified Substance which is only prohibited in-competition[37] will be rebuttably presumed not to be "intentional" if the athlete can establish that it was used out-of-competition[38]; and (ii) the use of a non-Specified Substance which is only prohibited in-competition "shall not be considered intentional"[39] if the athlete can establish both that it was used out-of-competition and in a context unrelated to sport performance.

Article 10.3 deals with ineligibility for other anti-doping rule violations and, by way of example, provides for the following burdens on athletes:

a) For evading, refusing or failing to submit to sample collection and for tampering, a four year period of ineligibility will apply unless the athlete can establish that the offence was not intentional. If the athlete succeeds in establishing this, a standard two year period of ineligibility will apply.

b) For whereabouts failures[40] the standard period of ineligibility is two years, however this may be reduced to one year if the athlete can prove a low degree of fault. This reduction is not available where a "pattern of last minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing". Whilst the burden is not expressly set out in relation to the latter, it is assumed that the anti-doping organisation will be required to prove such pattern.

C. REDUCTION OF A SANCTION AND THE BURDEN OF PROOF

In both the 2009 and 2015 WADA Code, once the basic sanction is determined the next step is to evaluate whether there are any available grounds to reduce (or in the 2009 Code to increase) the sanction. Whilst marked changes have been made to the sanctioning process, the 2015 Code is consistent with the 2009 version of the WADA Code insofar as Articles 10.4 and 10.5 provide

37 "In-competition" testing is defined as *"the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition"* (see Appendix 1 to the WADA Code). Appendix 1 also provides that International Federations or event ruling bodies may provide for a different definition of In-Competition, one example being FINA which differentiates between Competitions and Events in its definition of In-Competition (see <http://www.fina.org/H2O/docs/rules/2015/FINA_DC_rules.pdf>).

38 "Out-of-competition" is defined as "[a]ny period which is not In-Competition.

39 Notably, Article 10.2.3 does not explicitly refer to a "rebuttable presumption" in this instance, however it is assumed that this was simply an error in drafting rather than the intentional exclusion of the anti-doping organisation's ability to rebut the athlete's "intention".

40 Whereabouts failures include a combination of three missed tests and/or filing failures within a twelve month period (see Article 2.4).

for an opportunity to receive a reduction to the standard period of ineligibility based on the athlete's degree of fault.[41]

To do so, the burden is on the athlete to establish (inter alia) the following key elements:[42]

a) How the Prohibited Substance entered his or her system (unless the athlete is a minor);[43]

b) That:

   a. The Athlete bears no fault or negligence (Article 10.4); or

   b. The Athlete bears no significant fault or negligence (Articles 10.5.1.1 and 10.5.2); or

   c. That the Prohibited Substance[44] came from a Contaminated Product[45] and that the athlete bears no significant fault or negligence.

41 The 2009 WADA Code also provided for an opportunity for the anti-doping organisation to increase the period of ineligibility where "aggravating circumstances" were present (see Article 10.6 2009 WADA Code). In light of the increase to the basic sanction, this has been removed from the 2015 WADA Code.

42 See further Section III.B (final paragraph) below for other instances in which the burden of proof is imposed on the athlete.

43 See the definitions to "No Fault or Negligence" and "No Significant Fault or Negligence" in Appendix 1 to the WADA Code. The policy justifications for this burden have been discussed in the recent case of CAS 2014/A/3615 *WADA v. Lauris Daiders, Janis Daiders & FIM* at para. 47-50 as follows: *"Articles 10.5.1and10.5.2 of the FIM AD, as modelled in the WADC, addressed the burden of proof, providing that it is for the athlete charged with a doping offence to establish how a prohibited substance entered his or her body. That is the ordinary and natural meaning of the words set out in these Articles, as confirmed by well-established previous CAS case law [references omitted]. That meaning is supported by the context in which those words appear. The discharge of the athlete's burden is a condition precedent to the person charged being able to obtain the elimination or reduction of the standard sanction for a first offence: he or she must establish an absence of fault or negligence, or of significant fault or negligence. It is a necessary (but not exhaustive) first stage in a two-stage process: unless that burden is discharged, the second stage (establishing the absence of fault or negligence or of significant fault or negligence) will not be satisfied. There is a significant difference in terms of the degree of fault or negligence between a situation in which, on the one hand, the prohibited substance was found in a supplement taken on the recommendation of a trusted and experienced sports doctor or, on the other hand, in a supplement taken without any such recommendation or on the advice of a casual acquaintance who lacked relevant qualifications. It is for the person charged to satisfy the adjudicating authority where, along a spectrum, his own situation falls. This then enables the adjudicatory body to determine whether and to what extent the standard sanction might be modified. This approach is supported by relevant considerations of policy. The person charged needs to be able to know what food, supplement, drink or medicine he has taken or, as the case may be the circumstances in which it could have, without his knowledge, been administered to him. The FIM or WADA will generally not have such knowledge. It is this disparity between the parties in terms of access to relevant information which justifies the imposition of the burden of proof on the person charged rather than on the person charging".*

44 Whether specified or non-specified.

45 Defined as a *"product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search".*

Notably, the 2015 WADA Code no longer contains the (much debated) version of Article 10.4 which existed in the 2009 Code and required an athlete to prove both the source of the substance and that it was not "intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance."[46] With that said, and as set out above, the 2015 Code now contains a new concept of "intent" which is incorporated throughout the Code and may bring with it new challenges of interpretation.

III. THE STANDARD OF PROOF IN ANTIDOPING PROCEEDINGS

Once the burden of proof (i.e. the allocation of risk) has been determined, it is necessary to consider the standard according to which the relevant party must prove the particular facts at issue. This concept is known as the "standard of proof".

There is no rule in the PILA, nor in the CAS Code, which defines the applicable standard of proof for CAS arbitrations. Accordingly, two different scenarios can arise at CAS – cases which involve an express standard imposed by the relevant sports federation (or in the case of anti-doping, by WADA)[47], and cases in which no such express standard of proof is specified.

By way of introduction, the traditional standards of proof in legal proceedings are:

a) the "balance of probabilities" (that is, the standard typically applied in civil law matters); and

b) "beyond reasonable doubt" (that is, the standard applied in criminal law matters)[48].

46 The provision applied specifically in relation to specified substances. For a comprehensive discussion of the jurisprudence relating to the application of this provision see Rigozzi/Quinn, *Inadvertent Doping and the CAS, Part I, Review of CAS jurisprudence on the interpretation of Article 10.4 of the Current WADA Code*, LawinSport, November 2013, available at: <http://www.lawinsport.com/articles/anti-doping/item/inadvertent-doping-and-the-cas-part-i-review-of-cas-jurisprudence-on-the-interpretation-of-article-10-4-of-the-current-wada-code> and Rigozzi/Quinn, *Inadvertent Doping and the CAS, Part II, The relevance of a "credible non-doping explanation" in the application of Article 10.4 of the WADA Code*, LawinSport, November 2013, available at: <http://www.lawinsport.com/articles/anti-doping/item/inadvertent-doping-and-the-cas-part-ii-the-relevance-of-a-credible-non-doping-explanation-in-the-application-of-article-10-4-wada-code>.

47 Consistent jurisprudence has upheld the validity of a sports-governing body choosing to impose its own concept of the applicable standard of proof with two relatively recent decisions reinforcing this notion: CAS 2011/A/2625 *Mohamed Bin Hammam v. FIFA* at para. 150-155 and CAS 2011/A/2490 *Daniel Köllerer v. Association of Tennis Professionals, Women's Tennis Association, International Tennis Federation & Grand Slam Committee* at para. 82-85.

48 Although it has been consistently debated, the direct application of the criminal standard of "beyond reasonable doubt" has been held to be inappropriate in the context of sports arbitration (with particular reference to doping offences). See, for example, CAS 2009/A/1912 & 1913 *P. & DESG v. ISU* at para. 124. See also CAS 2014/ A/3630 *Dirk de Ridder v. ISAF* at para. 114.

Additional standards have been formulated in sports arbitration, the most relevant in terms of anti-doping proceedings being that of "comfortable satisfaction" which is typically expressed as falling somewhere between the above two standards[49]. The concept of comfortable satisfaction was in fact a creation of CAS jurisprudence[50] which has now been expressly defined in the WADA Code.

A. COMFORTABLE SATISFACTION

As noted, the concept of "comfortable satisfaction" was developed by the CAS prior to the implementation of the WADA Code, and is now routinely employed in disciplinary proceedings (the most prevalent examples being doping and corruption cases)[51].

The standard has been redefined in the WADA Code as follows:

> *The standard of proof shall be whether the Antidoping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt*[52].

In view of the serious repercussions of being found guilty of a disciplinary violation, CAS panels have emphasised the importance of keeping in mind the

49 Other formulations of the standard of proof in sports arbitration include: (i) "Personal conviction", which is most akin to comfortable satisfaction and found in Art 97 of the FIFA Disciplinary Code; and (ii) "Preponderance of the evidence", which is akin to the balance of probabilities and featured in Section G.3(a) of the Uniform Tennis Anti-Corruption Program.

50 See CAS OG 1996/003 *Korneev & Ghouliev v IOC* at page 17: *"In our view an appropriate expression of the standard of proof required is that the ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made"*.

51 See for example CAS 2009/A/1912 & 1913 *P. & DESG v. ISU* at para. 124: *"The 'comfortable satisfaction' test is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the WADA Code (see e.g. TAS 2002/A/403-408 UCI c. Pantani & FCI, CAS 98/208 N v. FINA, CAS OG/96/004 K & G. v. IOC)"*.

52 The Comment to Article 3.1 also states that this standard "is comparable to the standard which is applied in most countries to cases involving professional misconduct". Notably, as early as 1996 it was suggested that because anti-doping rule violations are "strict liability" offences a higher degree of satisfaction than might otherwise be appropriate may be necessary: see CAS OG 1996/003 *Korneev & Ghouliev v IOC* at page 18.

"seriousness of the allegation which is made"[53]. The standard – and the evidence required to meet it – has been clarified by CAS as follows[54]:

> *...the standard of proof does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather, the more serious the charge, the more cogent the evidence must be in support.*[55]

> *...the more serious the allegation being considered the greater is the degree of evidence which is required to achieve the requisite degree of comfortable satisfaction necessary to establish the commission of the offence".*[56]

Thus, it is clear that the use of this standard in anti-doping proceedings, as well as its interpretation by CAS, offers somewhat of a safeguard to the accused athlete by requiring the satisfaction of the offence to a higher standard than that typically used in civil proceedings.

Whilst the WADA Code does not expressly identify all facts which must be proven to a panel's comfortable satisfaction, the general requirement in Article 3.1 (i.e. that "the Antidoping Organisation must establish the existence of an anti-doping rule violation to the comfortable satisfaction of the relevant panel") permeates all elements of anti-doping proceedings[57].

Notably, the 2015 Code does not expressly provide for a particular standard of proof in relation to the requirement for an Antidoping Organisation to prove intent (i.e. in order to determine the standard sanction as per Article 10.2). That said, it is submitted that CAS will require the Antidoping Organisation to meet

53 See for example CAS 2014/A/3625 *Sivasspor Kulübü v. UEFA* at para. 132 (citing CAS 2005/A/908 and CAS 2009/1920).

54 WADA itself also included in the 2009 WADA Code a statement to the effect that: "*...the greater the potential performance-enhancing effect of the substance, the higher the burden to prove lack of an intent to enhance sport performance*" (see comment to Art. 10.4 of the 2009 WADA Code). Whilst this provision no longer exists, it remains to be seen whether future CAS panels will apply similar reasoning when considering the concept of "intent" in the 2015 WADA Code.

55 CAS 2014/A/3630 *Dirk de Ridder v. International Sailing Federation (ISAF)* at para. 115.

56 See CAS OG 1996/003 *Korneev & Ghouliev v IOC* at page 18.

57 For example, the new Article 3.2.1 in the 2015 WADA Code (dealing with the scientific validity of analytical methods or decision limits) does not expressly set out the standards of proof for the respective parties in the proceedings. In line with the general principle that the Antidoping Organisation is required to prove an offence to the standard of comfortable satisfaction, it is submitted that comfortable satisfaction is also required for an Antidoping Organisation (or indeed WADA) to establish the reliability of the relevant analytical method or decision limit. This is supported by the discussion in CAS 2011/A/2566 *Andrus Veerpalu v. International Ski Federation* (which was in fact the case which led to the insertion of Article 3.2.1 in the 2015 WADA Code) at para. 95: "*this Panel holds that the Respondent bears the burden of proving to the Panel's comfortable satisfaction that the Test is reliable, including that it is scientifically sound. This is in line with previous CAS jurisprudence, namely that "[m]ethods for the detection of prohibited substances need to be validated. Only methods which are scientifically 'fit for purpose' can be applied to analyze samples in the fight against doping*" (referring to CAS 2010/A/2296).

its burden to the standard of comfortable satisfaction bearing in mind: (i) the general requirement for the Antidoping Organisation to prove offences to this standard; and (ii) the fact that CAS has imposed such standard in the past for comparable situations (e.g. the requirement for an Antidoping Organisation to prove aggravating circumstances under the – now abolished – Article 10.6 of the 2009 WADA Code).[58]

B. THE BALANCE OF PROBABILITIES

The other standard of proof routinely employed in anti-doping cases is that of the "balance of probabilities". This standard has developed over the years from a requirement that the accused prove that its version of the facts are more likely than not to have occurred, to a complex standard which may require the cooperation of both parties in discharging the burden of proof.

The standard is not defined in the WADA Code, however practitioners can consult various CAS decisions to determine both the traditional concept and particular points to bear in mind for more complicated cases.

The "balance of probabilities" has historically been considered to require that a hearing panel be satisfied that there is a 51% chance of a relevant scenario having occurred. As stated in the *Gasquet*[59] decision:

> *...it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof [...] In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability, simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.*[60]

58 See CAS 2012/A/2773 *IAAF v. SEGAS and Ms. Irini Kokkinariou.* See also Rigozzi, Haas, Wisnosky and Viret, *Breaking down the process for determining a basic sanction under the 2015 World Antidoping Code*, Int Sports Law J (2015) 15:3-48 (available at <http://ssrn.com/abstract=2631425>).

59 *CAS 2009/A/1930 WADA & ITF v. Gasquet.*

60 At para. 5.9. See also *CAS 2008/A/1515 WADA v Swiss Olympic Association and Simon Daubney* (at page 23) where the Panel stated that the "*[...] athlete has the burden of persuading the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the positive testing*". See also CAS 2011/A/2384 *UCI v. Alberto Contador Velasco & RFEC and* CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC;* and CAS 2013/A/3112 World Antidoping Agency v. Lada Chernova & Russian Antidoping Agency (and the cases cited therein).

Contrary to the 2009 WADA Code, the 2015 version now provides for a catch all provision in Article 3.1 that states:

> *Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*[61]

Thus, for example, an athlete will be required to prove, on the balance of probabilities that: (i) a departure from a relevant standard or other rule occurred which could reasonably have caused the positive test (Articles 3.2.2 and 3.2.3), noting that a recent panel has provided further instruction on the level of satisfaction a panel requires in such cases[62]; (ii) the possession of a Prohibited Substance or Method was consistent with a Therapeutic Use Exemption or other acceptable justification[63]; (iii) the athlete's prohibited association with a person was not in a professional or sport related capacity[64]; (iv) the source of the substance in the athlete's system[65]; (v) the lack of a doping-related intent in consuming a Prohibited (non-Specified) substance[66] or in failing to submit to sample collection[67]; (vi) the fact that a Prohibited Substance was used out-of-competition and in a context unrelated to sport performance[68]; (vii) the

61 Notably, the removal of Article 10.4 (and the Comment to same) means that there is now no longer an express statement in the WADA Code to the effect that "the Athlete may establish how the Specified Substance entered the body by a balance of probability". With that said, the sole instances in the 2009 WADA Code that required an athlete to prove a fact to the standard of "comfortable satisfaction" (Article 10.4 and Article 10.6) have also been removed, thus allowing the general and catch-all provision in Article 3.1 to be sufficient to cover all instances where the burden of proof is imposed on the athlete.

62 Notably, and as stated above (see footnote 57), the new Article 3.2.1 in the 2015 WADA Code (dealing with the scientific validity of analytical methods or decision limits) does not expressly set out the standards of proof for the respective parties in the proceedings. That said, it is expected that in light of the general requirement for an athlete to "rebut a presumption" that an athlete will need to do so only on the balance of probabilities.

63 See Article 2.6.

64 See Article 2.10.

65 See the definitions to "No Fault or Negligence" and "No Significant Fault or Negligence" in Appendix 1 to the WADA Code.

66 See Article 10.2.1.1.

67 See Article 10.3.1.

68 See Article 10.2.3. Notably, as concerns Specified Substances the athlete shall only be required to establish that the substance was used out-of-competition, whereas for non-Specified Substances the athlete will be required to establish both elements (i.e. out-of-competition and in a context unrelated to sports performance).

existence of a contaminated product[69]; and (viii) the athlete bears No Fault or Negligence[70] or No Significant Fault or Negligence[71].

C. "BEWEISNOTSTAND" OR "EVIDENCE CALAMITY"

The standard of proof was considered in great detail in the *Contador* decision, where the Panel acknowledged that it may require special application in so-called instances of *beweisnotstand* or "evidence calamity"[72]. Such situations arise when a party faces serious difficulty in discharging his or her burden of proof because the information required to prove the fact is not in the athlete's control, or involves proof of a "negative fact" (e.g. that an athlete did not use a prohibited substance)[73].

In its assessment of the relevant standards and burdens of proof, the *Contador* panel clarified that in such cases principles of procedural fairness demand that the opposing party who contests an explanation must "*substantiate and explain in detail why it considers that the facts submitted by the other party are wrong*"[74]. The Panel noted that while there is no re-allocation of the burden of proof, such cases will result in a "duty of cooperation" of the contesting party[75].

A subsequent CAS panel also has considered this concept, however noted that:

> *Nonetheless the Panel reminds itself that the Respondent has no burden to discharge. It can take its stand on the position that the Appellant's evidence does not meet the threshold of balance of probabilities. The Appellant placed reliance on a passage in Contador cited above at para 7.2(4). The Panel does not read that passage as in any sense contradicting the allocation of burden in Article 10.4 of the Rules. It acknowledges that there are circumstances in which notwithstanding that the legal burden is placed upon a party, an evidential burden may be placed upon the other party. However, the circumstances of the present case do not fall within such a category, and the Panel does not see any reason to depart from the usual allocation of the burden of proof.*[76]

69 See Article 10.5.1.2.

70 See Article 10.4. This includes proving acts of sabotage as per the Comment to Article 10.4.

71 See Article 10.5.

72 CAS 2011/A/2384 *UCI v. Alberto Contador Velasco & RFEC and* CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC* at para. 254.

73 *Ibid* at para. 254 and 261.

74 *Ibid* at para. 255.

75 *Ibid* at para. 256.

76 See CAS 2012/A/2767 *Nadir Bin Hendi v. UIM* at para. 16.17. See also CAS 2014/A/3615 *WADA v. Lauris Daiders, Janis Daiders & FIM* at para. 52-53.

It appears that the application of this principle will be undertaken by CAS panels on a case by case basis.

IV. The Admissibility and Evaluation of Evidence

Following on from the concepts of the burdens and standards of proof are the essential questions of the admissibility and evaluation of evidence. Indeed, regardless of the applicable standard or burden, a party must prove its case with: (i) admissible; and (ii) convincing evidence. CAS panels have, in the context of anti-doping proceedings, considered many interesting questions on the admissibility of – and weight to be placed on – certain types of evidence.[77]

Furthermore, the WADA Code itself contains specific provisions as to the admissibility of evidence, for example by providing that the presence of a Prohibited Substance may only be established by sample analysis performed by a WADA-approved laboratory.[78] With respect to all other "facts related to [anti-]doping rule violations [these] may be established by any reliable means, including admissions".[79]

In view of the many interesting precedents on this topics, the following sections shall consider the admissibility and evaluation of forms of evidence typically submitted by the anti-doping organisation (Section A) and the athlete (Section B) as well as briefly noting certain issues with document production in anti-doping proceedings.

A. Evidence of the Antidoping Organisation

As far as the Antidoping Organisation is concerned, it may establish a violation based on:

> *the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample... or conclusions drawn from the profile of a series of the Athlete's blood or urine samples, such as data from the Athlete Biological Passport.*[80]

77 As we have previously noted, there is no rule in the CAS Code to define what may, or may not, be admitted in terms of evidence. Arbitral panels are granted considerable discretion in admitting evidence and are not bound by the rules of evidence that are applicable before (Swiss) civil or criminal courts. See Rigozzi/Quinn, "Evidentiary Issues Before CAS", in M. Bernasconi (ed.) *International Sports Law and Jurisprudence of the CAS*, Bern 2014, at page 39.

78 See Articles 2.1, 3.2 and 6 of the WADA Code and the International Standard for Laboratories.

79 See Article 3.2 of the WADA Code.

80 See Comment to Article 3.2 WADA Code. The express reference in this provision to the "Athlete Biological Passport" was added in the 2015 edition of the WADA Code.

Interestingly, the recent revisions to the WADA Code (and its related regulations and standards)[81] have focused not only on strengthening sanctions but also on the role of investigations and the use of intelligence in anti-doping proceedings. In that respect, it can be expected that (as with the high profile proceedings against Lance Armstrong[82] and the Australian football players[83]) more and more cases will involve so-called "non-analytical evidence":

> *The current Code makes clear that anti-doping rule violations can be proved by any reliable means. This includes both analytical and non-analytical evidence obtained through investigations. Many of the most high-profile successes in the fight against doping have been based largely on evidence obtained either by Antidoping Organizations or the civil authorities through the investigations process.*[84]

Whilst WADA is of course correct that non-analytical evidence obtained through investigations could be "reliable", it is clear that questions of the admissibility and weight of such evidence will need to be determined on a case by case basis.

Issues that have arisen with "non-analytical" cases in the past (both in the context of doping and corruption proceedings) relate to: (i) establishing a violation on the basis of biological samples where no positive anti-doping test has been returned; (ii) protected witnesses; and (iii) the admissibility of illegally obtained evidence.

81 For a discussion of the changes to the general approach to doping and standards/other rules of WADA see: <https://wada-main-prod.s3.amazonaws.com/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf> as well as Rigozzi, Viret and Wisnosky, *Does the World Antidoping Code Revision Live up to its Promises?*, Jusletter 11 November 2013 (available at: <http://www.lk-k.com/data/document/rigozzi-viret-wisnosky-wadc-revision-11-november-2013.pdf>) Rigozzi, Viret and Wisnosky, *Latest Changes to the 2015 WADA Code - Fairer, Smarter, Clearer... and not quite Finished*, Jusletter 20 January 2014 (available at <http://www.lk-k.com/data/document/rigozzi-viret-wisnosky-latest-changes-the-2015-wada-code-jusletter-20-january-2014.pdf>).

82 USADA's Reasoned Decision is available at: <http://cyclinginvestigation.usada.org/>.

83 Otherwise referred to as the Essendon supplements controversy, this case involves allegations of the use of a prohibited substance against a number of players of the Essendon football club. Whilst the first instance anti-doping tribunal returned a not-guilty verdict, WADA has appealed the case to CAS and the hearing shall take place in November 2015: see <http://www.tas-cas.org/en/general-information/news-detail/article/australian-football-hearing-in-the-arbitration-procedure-between-wada-34-current-and-former-players-of-essendon-fc-the-afl-and-asada.html>.

84 See <https://wada-main-prod.s3.amazonaws.com/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf>.

1. CASES INVOLVING ATHLETES' BIOLOGICAL DATA (BUT NO POSITIVE TEST)

As is clear from the number of cases based on the Athlete Biological Passport (**ABP**) in recent years, non-analytical cases are most certainly on the rise. This development is not new, however, and as far back as 2005, the American Arbitration Association was already dealing with the BALCO case. By way of example, the BALCO-related case of Michelle Collins involved incriminating emails, elevated haematocrit levels (indirectly confirming the use of EPO) and a pattern of testosterone levels which indirectly confirmed the use of synthetic testosterone[85].

In 2008 another "non-analytical" case involved seven Russian track and field athletes, who were held to have manipulated their urine samples after DNA evidence demonstrated that their in-competition and out-of-competition samples could not have come from the same person[86]. In considering the reliability of the relevant DNA evidence the Panel stated that:

> *The Panel accepts the expert evidence of Dr Castella that the method of DNA analysis was a common and well established one, that the results were clear and reliable, that no DNA diversion could have taken place, and that since a genetic file belongs to only one person it cannot be falsified. The Panel is thus of the view that DNA analysis is a reliable evidentiary means to establish an anti-doping rule violation such as the use of a prohibited substance or method or the tampering or attempted tampering with doping controls. The Panel finds that the natural, if not irresistible inference, is that the Athletes have somehow arranged to have the urine of third persons used in their out of competition testing.*
>
> *However, the Panel notes that, although many courts around the world routinely base criminal convictions on DNA evidence, some courts have warned in criminal cases that DNA evidence should not be relied upon as a complete substitute for proof beyond reasonable doubt. The court should consider the DNA evidence in combination with all the other evidence in the case: see e.g. R v GK (2001) 53 NSWLR 317, 323 per Mason P (New South Wales Court of Appeal, Australia).*
>
> *The Panel observes that such comments have no application where, as here, the standard of proof is not that of beyond reasonable doubt. Nevertheless it is prudent, especially since the allegations are of a most serious kind, to consider first, any relevant circumstantial evidence to see whether, in combination with the DNA evidence, it supports the initial assessment that anti-doping violations occurred and, secondly, to consider the quality-control and chain of custody questions which might affect the probative value of the DNA results.*[87]

85 See, for example, the AAA decision concerning Michelle Collins (available at: <http://www.usada.org/wp-content/uploads/AAA-CAS-Decision-Collins.pdf>) where it was stated that *"Collins has never had a single drug test found to be positive doping violation, but USADA's charges are based, in part, on all of the blood and urine tests at IOC-accredited laboratories that she has had in recent years. USADA also relies upon documents seized by the U.S. government from BALCO that have been provided to USADA; statements made by BALCO officials; documents obtained by other law enforcement means; and other documents about Michelle Collins"* (at para. 1.2).

86 CAS 2008/A/1718 *IAAF v. All Russia Athletic Federation & Olga Yegorova*; CAS 2008/A/1719 *IAAF v. All Russia Athletic Federation &Svetlana Cherkasova*; CAS 2008/A/1720 *IAAF v. All Russia Athletic Federation & Yuliya Fomenko*; CAS 2008/A/1721 *IAAF v. All Russia Athletic Federation & Gulfiya Khanafeyeva*; CAS 2008/A/1722 *IAAF v. All Russia Athletic Federation & Tatyana Tomashova*; CAS 2008/A/1723 *IAAF v. All Russia Athletic Federation & Yelena Soboleva*; and CAS 2008/A/1724 *IAAF v. All Russia Athletic Federation & Daria Pishchalnikova.*

The Panel went on to consider such circumstantial evidence (including expert evidence that several of the athletes had "*blood profiles indicative of the long term use of rh-EPO or other forms of blood doping [which provides] a motive for tampering with the out of competition samples, namely a need to disguise the use of prohibited substances*"[88]) and ultimately held that the athletes had committed anti-doping rule violations.

Other notable examples of the use of DNA evidence in the ambit of a wider, circumstantial case include CAS 2010/A/2083 *UCI v. Jan Ullrich & Swiss Olympic*[89] and CAS 2009/A/1879 *Alejandro Valverde v. Comitato Olimpico Nazionale Italiano*[90].

As noted above, recent years have also seen a significant rise in the number of proceedings brought on the basis of an athlete's ABP. The ABP is, in effect, a

87 *Ibid* at para. 179-181. The Panel also noted at para. 195 that while the laboratory which conducted the DNA analysis could not benefit from the presumption of proper procedures (as with WADA-accredited laboratories), this did not in and of itself render the analysis unreliable. The Panel accepted the reliability of the DNA testing procedures on the basis that the laboratory *"acts in criminal cases for the Swiss confederation ... is ISO 7025 accredited, and ... the offices within the LGF know very well the measures to be taken in order to avoid any DNA contamination"*.

88 *Ibid* at para. 184.

89 *"In summary, the documentary evidence presented by the UCI shows that (1) Dr. Fuentes was engaged in the provision of doping services to athletes, (2) Ullrich travelled in the vicinity of Dr. Fuentes' operations on multiple occasions, and evidence in Dr. Fuentes' possession suggested that Ullrich was in personal contact with him on certain of those occasions, (3) Ullrich paid Dr. Fuentes very substantial sums of money for services that have not been particularised, and (4) a DNA analysis has confirmed that Ullrich's genetic profile matches blood bags that appear to have been for doping purposes found in the possession of Dr. Fuentes. The evidence has been obtained from multiple sources and is internally consistent despite differences in its provenance. The evidence is probative and directly related to the question of whether an antidoping violation has occurred"* at para. 65.

90 Which involved a comprehensive discussion on the admissibility and evaluation of evidence by CAS Panels at pages 18-38.

compilation of an athlete's biological markers which is then used to establish a biological profile for each individual athlete[91]. As noted by WADA, the passport must be distinguished from traditional anti-doping analyses (both blood and urine) which are used to identify the presence of a particular prohibited substance in an athlete's system. Instead, the "*fundamental principle of the [ABP] is to monitor selected biological variables over time that indirectly reveal the effects of doping rather than attempting to detect the doping substance or method itself*"[92].

In light of the somewhat revolutionary nature of the ABP, the associated evidentiary issues debated in the literature and CAS proceedings are numerous and well beyond the scope of the present article. Suffice to say that, along with DNA and other circumstantial evidence, anti-doping organisations are developing sophisticated methods to identify and prosecute violations.

It is also notable that non-analytical tools such as investigations, cooperation with governments, police and customs and, indeed, the use of biological markers to indirectly identify doping are now often used by anti-doping organisations to target test athletes. Thus, the traditional and the contemporary methods are being employed simultaneously in an attempt to catch up to athletes who had previously appeared to be one step ahead of the scientific advances.

2. PROTECTED WITNESSES

When it comes to investigations, one issue that routinely hinders anti--doping organisations is the unwillingness of witnesses to speak out against those who have doped.

In recent years, CAS Panels have been required to determine whether a party can rely on the testimony of an anonymous or protected witness in a case[93]. The cases decided so far have indicated a certain trend, namely that

91 The ABP originally featured only a "haematological" module, which sought to identify prohibited substances and methods aimed at the manipulation of blood (for example EPO and blood transfusions). In 2014 the "steroidal" module was introduced, which is used to detect the use of exogenous steroids. For further information see: <https://www.wada-ama.org/en/media/news/2014-09/the-steroidal-module-creating-a-stronger-athlete-biological-passport>.

92 See <https://www.wada-ama.org/en/what-we-do/science-medical/athlete-biological-passport>.

93 For a discussion of the treatment of protected witnesses in both criminal and disciplinary proceedings see Morgan, M. *The Role of Arbitration in dealing with Sporting Fraud issues*, available at <http://www.morgansl.com/pdfs/131023SportingFraudArticleConference.pdf>.

CAS Panels will be less inclined to allow protected witnesses in anti-doping proceedings than in proceedings concerning corruption[94].

One rationale for this is the higher likelihood that the safety of a witness in a match-fixing case (where criminal elements are often involved) would be compromised. A further rationale is the fact that the coercive investigatory powers of the relevant governing bodies are limited in match-fixing cases[95] particularly when compared to anti-doping proceedings. Indeed, the anti-doping authorities impose as a precondition of participation that athletes provide both bodily samples both in- and out-of-competition as well as detailed whereabouts information[96]. Furthermore, following the advent of the ABP programme, the authorities have the complete physiological profiles of the athletes at their disposal. Finally, as a result of agreements between doping authorities, as well as these organisations and relevant government authorities (e.g. customs), there is a wide range of shared data available to anti-doping organisations in conducting their investigations[97].

In that light, it is understandable that CAS panels would be hesitant to accept the evidence of protected witnesses in anti-doping proceedings unless certain conditions are met.

In the *Contador* proceedings, the relevant Panel noted that the issue of anonymous witnesses is linked to the right to a fair trial under the ECHR, in particular, the right of a person to "examine or have examined witnesses testifying against him or her"[98]. The Panel stated that:

> *Admitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information*

94 See for example the differing approaches taken in the *Pobeda* decision CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA* (at para. 44, 55, and 72-75) and the *Contador* decision CAS 2011/A/2384 *UCI v. Alberto Contador Velasco & RFEC and* CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC.* Note, however that the Panel refused to hear protected witnesses in the corruption proceedings in CAS 2010/A/2267, 2278, 2279, 2280, 2281 *Football Club "Metalist" et al v. FFU.*

95 See, for example, CAS 2010/A/2172 *Mr Oleg Oriekhov v. UEFA* at para. 54.

96 See Art. 2.3 of the WADC which classes "*refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection*" as a violation; and Art. 2.4 which imposes a penalty on athletes who fail to make themselves available for out of competition testing three times within an eighteen-month period - including by failing to file whereabouts information and missing tests.

97 For one example see the sources from which UK Antidoping collects information at: <http://www.ukad.org.uk/what-we-do/intelligence/>.

98 *Contador* at para. 172 (referring to Article 6.1 EHCR and noting that said article was applicable both in criminal and civil proceedings).

> *to have in hand when testing his/her credibility. Furthermore, it is a right of each party to assist in the taking of evidence and to be able to ask the witness questions.*[99]

The Panel further noted that a mere abstract danger to the personality rights and personal safety of a witness was insufficient to allow for anonymity:

> *[...] there must be a concrete or at least a likely danger in relation to the protected interests of the person concerned. Furthermore, the measure ordered by the tribunal must be adequate and proportionate in relation to all interests concerned. The more detrimental the measure is to the procedural rights of a party the more concrete the threat to the protected interests of the witness must be.*[100]

In the *Contador* proceedings, the Panel was unconvinced that the interests of the relevant witness were threatened to an extent that could justify his protection, in particular given the extent to which this would curtail the procedural rights of Mr. Contador. The Panel considered relevant ECHR and Swiss case law and noted that the requirements to allow protected witnesses must be strict:

> *Referring to ECHR case law (the Doorson, van Mechelen and Krasniki cases), the Swiss Federal Tribunal considered that the use of protected Witnesses, although admissible, must be subject to strict conditions: the witness shall motivate his/her request to remain anonymous in a convincing manner; and the court must have the possibility to see the witness. In such cases, the right to a fair trial must be ensured through other means, namely a cross-examination through "audiovisual protection" and an in-depth verification of the identity and the reputation of the anonymous witness by the court. Finally, the Swiss Federal Tribunal stressed that the ECHR and its own jurisprudence impose that the decision is not "solely or to a decisive extent" based on an anonymous witness statement. Again referring to the ECHR jurisprudence, the Swiss Federal Tribunal concludes that (i) the witness must be concretely facing a risk of retaliations by the party he/she is testifying against if his/her identity was known; (ii) the witness must be questioned by the court itself which must check his/her identity and the reliability of his/her statements; and (iii) the witness must be cross-examined through an "audiovisual protection system".*[101]

99 *Contador* at para. 175-176.

100 *Contador* at para. 180.

101 *Contador* at para. 181-182.

3. ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

Finally, CAS Panels hearing disciplinary cases have also been required to consider the admissibility of illegally obtained evidence. In view of the new focus on investigations in anti-doping proceedings, it can reasonably be expected that this issue may arise more commonly in future.

The admissibility of such evidence has been considered on a number of occasions including in the anti-doping proceedings in the *Valverde* decision, where it was stated that the:

> *internal Swiss legal order does not set forth a general principle according to which illicit evidence would be generally inadmissible in civil proceedings before State courts. On the contrary and according to the long-standing jurisprudence of the Federal Tribunal, whether the evidence is admissible or inadmissible depends on the evaluation of various aspects and legal interests. For example, the nature of the infringement, the interest in getting at the truth, the evidentiary difficulties for the interested party, the behaviour of the victim, the parties' legitimate interests and the possibility to obtain the (same) evidence in a lawful manner are relevant in this context [...] The above described principles are only a feeble source of inspiration for arbitral tribunals. [...] In particular, the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal [...] As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognised in a State governed by the rule of law".*[102]

This decision has since been followed in a number of corruption cases[103] and the admissibility of illegally obtained evidence in certain conditions was ultimately confirmed by the Swiss Federal Tribunal[104] in an appeal concerning CAS corruption proceedings[105]. In arriving at its decision, the Swiss Federal Tribunal noted that:

> *The Appellant rightly refrains from arguing that illegally obtained evidence would be excluded in all cases according to the Swiss view; the*

102 CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI*

103 See, for example, CAS 2011/A/2425 *Ahongalu Fusimalohi v/ FIFA;*

104 See *4A_362/2013* and *4A_448/2013* of 27 March 2014.

105 The CAS case related to the admissibility of an illegally obtained video recording: see CAS 2010/A/2267, 2278, 2279, 2280, 2281 Football Club "Metalist" et al v. FFU.

interests at hand must instead be balanced; they are, on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence.[106]

B. EVIDENCE OF THE ATHLETE OR OTHER PERSON

When it comes to athletes, the question is what may be used as corroborating evidence for their defence – for example, whether it is possible for an athlete to rely on a hair test or polygraph.

The traditional approach of CAS panels to the admissibility of polygraph evidence was that the results of such test were inadmissible as per se evidence under Swiss law, and that the declarations of the athlete would be taken into consideration as "mere personal statements, with no additional evidentiary value whatsoever"[107].

More recent panels have re-examined this question, and held that polygraph evidence is in fact admissible provided that it is "reliable" (i.e. that it meets the test set out in Article 3.2 of the WADA Code).[108] Pursuant to such jurisprudence, polygraph evidence may now be admissible in CAS proceedings provided that the relevant test is conducted in a professional manner; by an experienced examiner; according to the best professional standard; and supported by empirical evidence.[109] With that said, the *Contador* panel also expressly stated that:

> *...the Panel considers that the results of the polygraph add some force to M Contador's declaration of innocence but do not, by nature, trump other elements of evidence.*[110]

Following the *Contador* decision polygraph evidence has been considered on (at least) two occasions with different results. In CAS 2013/A/3170 the Panel noted that the athlete in question "*told the Panel he did not use cocaine*

106 Decision *4A_362/2013* (references omitted). The English translation of *4A_362/2013* is available at <http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%20 2014%204A%20362%202013.pdf>.

107 CAS 2008/A/1515 *WADA v Swiss Olympic & Daubney* at para. 119. See also *TAS 99/A/246 Ward v. FEI* at para. 4-9 and *CAS 96/156 Foschi v FINA,* at para. 14.1.1.

108 See CAS 2011/A/2384 *UCI v. Alberto Contador Velasco & RFEC and* CAS 2011/A/2386 *WADA v. Alberto Contador Velasco & RFEC* at para. 389-395. In admitting the evidence, the Panel highlighted that the previous instances in which polygraph evidence had been excluded in CAS arbitrations had involved proceedings prior to the implementation of the WADC (thus prior to the express statement therein that facts may be established by any reliable means).

109 *Ibid.*

110 *Ibid* at 394.

on the day of the test and that, indeed, he has never used the substance. The expert polygraph evidence before the Panel is of some value to conclude that the Athlete is telling the truth"[111]. Whereas in CAS 2014/A/3487, the Panel held that in light of the evidence on behalf of the Antidoping Organisation there was no need to consider the "admissibility or reliability" of the polygraph evidence. The Panel stated that:

> *...while noting that previous CAS cases have considered this issue (see, for example, UCI and WADA v Contador and RFEC, 2011/A/2384 & 2386; WADA v. Swiss Olympic Association & Daubney, CAS 2008/A/1515) the Panel expresses no view as to the probative value of this testimony or the written report.*[112]

As to the use of hair tests in anti-doping proceedings, according to Article 5.2.4.4 of the International Standard for Laboratories (January 2015):

> *[a]ny testing results obtained from hair, nails, oral fluid or other biological material shall not be used to counter Adverse Analytical Findings or Atypical Findings from urine.*[113]

It is therefore clear that, in principle, an Antidoping Organisation could object to an athlete's attempt to rely on such "biological matrices" to entirely invalidate a positive urine test. However, given that Article 3.2 of the WADC allows any "reliable means" of proving facts, it is still clearly possible to admit such facts as support for any facet of the athlete's case aside from the absence of a positive urine test. The question will then be the weight to be placed on such evidence and the conclusions to be drawn from same.

By way of example, the Panel in the *Gasquet* decision was required to consider whether there was any evidence that the athlete had deliberately ingested the amount of cocaine that was detected in the relevant sample. In deciding in favour of the athlete, the Panel gave significant weight to the fact that:

> *The Player's hair test has shown that the Player has never, as far as the hair test may go back in time including the time of the Miami*

111 CAS 2013/A/3170 *Omar Andres Pinzon Garcia v. Federacion Colombiana de Natacion* at para. 79.

112 CAS 2014/A/3487 *Veronica Campbell-Brown v. The Jamaica Athletics Administrative Association (JAAA) & The International Association of Athletics Federations (IAAF)* at para. 119.

113 A hair test analysis was in fact submitted by the athlete in the pre-WADA Code case of TAS 99/A/234 *David Meca-Medina v/FINA* TAS 99/A/235 *Igor Majcen v/FINA*. It was noted by the Panel that the relevant expert: "*... concluded on the basis of hair testing [...] that there was no evidence of Nandrolone doping by either appellant prior to or after the competition. However, these tests are not definitive; nor did they deal with the Appellants' situation as at the time of the world championships. The question is what the tests showed in relation to the competition. It is no (and no necessary) part of FINA's case that either Appellant was an habitual doper*" (see footnote 19 (para. 5.1).

tournament, consumed any cocaine at an amount above 10 mg. It is thus considered by the Panel as established that the Player is certainly not a regular user of the substance in question.[114]

To the contrary, in CAS 2012/A/2760, the Panel held that:

Ultimately, the First Respondent argues that the hair analysis carried out in January 2012 would clearly demonstrate that her ingestion of the prohibited substance would have been unique or prove only subtherapeutic intakes. Without putting it under scrutiny, the Panel considers that this question might [...] potentially play a role as to know whether such substance was ingested to enhance performance or not, a factor to be taken into account under Art. 295 UCI ADR. Considering, however, that this provision does not apply in the present case [...] this argument bears no role [...]. The First Respondent has to be reminded of the fact that clenbuterol is a prohibited substance which is not submitted to any quantitative threshold according to Art. 21.1.3 ADR. Accordingly, its mere presence in one's system suffices to constitute an anti-doping rule violation, and the question to know whether its intake aimed at enhancing the athlete's performance or not is irrelevant. The First Respondent's arguments thus have to be disregarded.[115]

As is clear from the above, whilst both hair tests and polygraphs may be admissible in CAS proceedings, the ultimate questions will be: (i) are they reliable?; and (ii) what do they establish?

It is important to recall that under Swiss law arbitral tribunals have considerable discretion in terms of their evaluation of evidence[116]. Thus, in practice the key question to bear in mind when submitting any piece of evidence is whether it is capable of convincing an arbitrator to the relevant standard and, importantly, whether there is any danger that any element of such evidence could in fact go against the relevant party's case:

The free assessment of the evidence implies that the arbitral tribunal may decide the evidentiary weight of each piece of evidence in the arbitration file, whichever party may have offered the evidence in question and regardless of the purpose for which it did so. The necessary consequence is that each party in an arbitral procedure is deemed to know from the beginning that the arbitrators will exercise their power to freely assess all the evidence adduced and consequently that, as the case may be, they may draw from an exhibit produced by a party some consequences diametrically opposed to the purpose given to this evidence or even to the scope both parties would agree to give it.[117]

C. THE ANTIDOPING ORGANISATION AND THE ATHLETE: DOCUMENT PRODUCTION

Document production is quite a sensitive issue in anti-doping proceedings in light of the balancing exercise between the athlete's desire to fully understand the charges against him, and the anti-doping organisations' desire to protect information which, if it became public knowledge, could harm the fight against doping.

According to Article R44.3(1) of the CAS Code, a party may request the Panel to order the other party to submit documents in its custody or under its control.[118] The party seeking such an order must demonstrate that the documents in question are likely to exist and are relevant to the case[119].

Given the nature of the requested order and its relevance for further submissions and procedures, CAS usually deals with such requests on a preliminary basis[120]. In this regard document production can (be used to) slow a procedure down since the party requesting the disclosure can request that it not be required to file its final submissions until a decision has been taken regarding the production of documents.[121] However, in other cases the Panel may decide that the matter of document production will only be decided upon at the actual hearing[122].

---

114 See CAS 2009/A/1926 *ITF v. Gasquet*; CAS 2009/A/1930 *WADA v. ITF & Gasquet* at para. 5.12.

115 See CAS 2012/A/2760 *UCI v. Jana Horakova & CCF* at para. 5.32. Given the new emphasis on intention in sanctioning athletes under the 2015 WADA Code, it remains to be seen whether such arguments will again be raised by athletes.

116 Failing any specific provision agreed by the parties, the deciding body is essentially free in its evaluation of evidence. This is referred to as "libre appreciation des preuves" or the "free assessment of the evidence" which is accepted as a "cornerstone of arbitration" in Swiss law (see ATF 4A_214/2013 at para. 4.3.1, English translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/5%20aout%202013%204A%20214%202013.pdf>) Moreover, the Panel's assessment of the evidence will not be reviewed by the Supreme Court in an action to set aside the award (Supreme Court decision 4A_584/2009 of 18 March 2010, para 3.3, ASA Bulletin 2011, 426, at 431 and 4A_539/2008 of 19 February 2009 consid. 4.2.2).

117 See 4A_214/2013 at para. 4.3.1, English translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/5%20aout%202013%204A%20214%20 2013.pdf>.

118 Article R44.3(1) first sentence. See for example: CAS 2007/A/1359, *FC Pyunik Yerevan v. E, AFC Rapid Bucaresti & FIFA*, Award of 26 May 2008, p. 8. As an "evidentiary measure", document production should be requested by a party with reference to Articles R51 and R55.

119 See Article R44.3(1) second sentence.

120 See for example CAS 2010/A/2185, *Alberto Blanco v. United States Antidoping Agency (USADA)* at para. 5.9.

121 See for example CAS 2011/A/2566, *Andrus Veerpalu v. International Ski Federation* at para. 35; CAS 2011/A/2474 *Antonio Urso & Marino Ercolani Casadei v. IOC* at para. 18.

122 See for example CAS 2002/O/372, *NOCCS & other Claimants v/IOC* at para. 23.

Many document production cases concern an Athlete seeking the scientific documents that the anti-doping organisation has used to establish the relevant analytical procedure. Whilst the requirements of: (i) likelihood of existence; and (ii) relevance, are generally unproblematic in these cases, an athlete must also convince the Panel that the aforementioned balancing exercise between the athlete's and anti-doping organisation's interests tips in their favour. A good option in this regard is a non-disclosure agreement. Indeed, the guarantee of confidentiality lessens the interest of the anti-doping organisations in not producing the requested documents. Such promise could also lead to the production of documents based on an agreement between the parties, therefore no longer requiring an order from a Panel[123].

In other cases, it is the anti-doping organisation that is seeking the production of documents. For instance, in a case involving the IOC the relevant athlete was requested to produce "*documents evidencing difficulties experienced by the athlete in providing full urine samples in the doping controls undertaken by the relevant sporting bodies during his career*"[124]. Such request was eventually granted.

After obtaining the document production order, there are still many issues that arise in relation to the execution of such order. CAS has developed a number of ways to deal with a failure to produce or insufficient production. Firstly, there is the possibility that a Panel can lower the applicable standard of proof or even shift the burden of proof in a particular case if the documents are not produced. For instance, in a case concerning a failure of production by a WADA accredited laboratory, the Panel ruled that "*in consequence of the Laboratory's refusal the Panel holds that it cannot place the Appellants at a procedural disadvantage in bearing their burden of proof, where the evidence requested is critical to their defence and the laboratory remains in exclusive control of its disclosure*"[125]. And secondly CAS can, in some cases, contact the international sports federation to assist with the execution of these orders[126].

In any event, all requests for document production have to be analysed on a case by case basis. Every requested document has to be relevant to the case and it is unlikely that an order will be made for documents which would damage

123 See for example CAS 2010/A/2185, *Alberto Blanco v. United States Antidoping Agency (USADA)* at para. 5.16(b); CAS 2005/A/884, *Tyler Hamilton v. USADA & UCI* at para. 9.

124 See CAS 2004/A/714, *Robert Fazekas v. IOC* at para. 36.

125 See CAS 2009/A/1752, *Vadim Devyatovskiy v/ IOC* CAS 2009/A/1753 *Ivan Tsikhan v/ IOC* at para. 5.162.

126 See CAS 2013/A/3170, *Omar Andres Pinzon Garcia v. Federacion Colombiana de Natacion* at para. 19-20.

the battle against doping more than it favours the athlete's interests or harm the athlete's right to privacy more than it favours the battle against doping.

V. CONCLUDING REMARKS

From the above analysis it is clear that the WADA Code has, in effect, crystallised the CAS jurisprudence rendered over the years in anti-doping proceedings. With that said, it is also clear that CAS jurisprudence will continue to interpret and clarify the provisions contained in the WADA Code.

In view of this, it is reasonable to conclude that CAS and anti-doping rules are inextricably related, and perhaps even that anti-doping arbitration has become a new and independent field of law. Indeed, the existence of specialised and academic work in the field of anti-doping law is a clear indication of this trend.[127]

It is certainly safe to say that any athlete – or indeed federation – faced with anti-doping proceedings should seek specialist advice to ensure that the myriad of concepts developed by CAS and WADA are adequately dealt with. In particular, the implementation of the 2015 WADA Code is guaranteed to bring with it new challenges of interpretation and the first CAS decisions are likely to be instrumental in this regard.

127 See, for example, Viret, M *Evidence in Anti- Doping at the Intersection of Science and Law* (to be published by T.M.C. Asser Press in 2015) and the ongoing work of the World Antidoping Commentary Project at the University of Neuchatel. Funded in full by a grant from the Swiss National Science Fund, the goal of the latter is to create the world's first fully comprehensive resource for anti-doping practitioners (see <http://wadc-commentary.com/abouttheproject/ for further information>).

Editora Quartier Latin do Brasil

Empresa Brasileira, fundada em 20 de novembro de 2001
Rua General Flores, 508
Bom Retiro - São Paulo
CEP 01129-010
Telefone: (11) 3222-2423
Email: quartierlatin@globo.com

Leonardo Andreotti Paulo de Oliveira
Luís Geraldo Sant'Ana Lanfredi
Coordenadores

Justiça Desportiva

Perspectivas do Sistema Disciplinar Nacional, Internacional e no Direito Comparado

Editora Quartier Latin do Brasil
São Paulo, outono 2018
quartierlatin@quartierlatin.art.br
www.quartierlatin.art.br