Challenges for CAS decisions following the adoption of the new WADA Code 2009*

Prof. Dr Jens Adolphsen

*** The original version in German of this article is published in: Bernasconi/Rigozzi (editors), Sport Governance, Football Disputes, Doping and CAS Arbitration: CAS & FSA/SAV Conference, Lausanne 2008, Editions Weblaw, Bern 2009.**

I. Introduction

This article focuses on the requirements that future decisions of the CAS will have to meet due to changes of the WADA Code 2009. The main change - compared the first and the 2009 versions WADA Code - is that the initial harmonization is now being relaxed through elements of more flexibility. This article will be centred on this change. However, it first deals with a few rather technical questions, which the CAS will have to ask itself after any release of a new version of the WADA Code.

II. No direct application of the new WADA Code

The Code constitutes a set of rules of a private foundation *(Stiftung)* under Swiss law. As a set of rules falling under private law, it cannot therefore claim any direct applicability[1]. In other words: The WADA Code does not simply apply, it is agreed. Neither the original declaration of the first version at the World Conference on Doping in Sport in March 2003 in Copenhagen[2] nor the acclamation at the 2007 Conference in Madrid[3] can change this fact.

The parallel signature and ratification of the UNESCO Convention against Doping in Sport on 19 October 2005[4], giving effect to the Code, also does not alter the fact that the WADA Code lacks direct effect. Athletes are bound by the statutes of

1. Jens Adolphsen, Umsetzung des Welt Anti-Doping Code in Deutschland, in: Vieweg (ed.), Perspektiven des Sportrechts 2005, p. 81; see also Comment to introduction of part one of the Code (amended version): *"By their participation in sport, Athletes are bound by the competitive rules of their sport. In the same manner, Athletes and Athlete Support Personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Each Signatory, however, shall take the necessary steps to ensure that all Athletes and Athlete Support Personnel within its authority are bound by the relevant Anti-Doping Organization's anti-doping rules"*.

2. http://www.wada-ama.org/rtecontent/document/code_v3.pdf (last viewed on 13.08.09).

3. http://www.wada-ama.org/rtecontent/document/WADA_Code_2007_3.0.pdf (last viewed on 13.08.08).

4. http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html (last viewed on 13.08.09).

their federation, whether they be the statutes of the international or the national federation, but never directly by the WADA Code itself. Even so, the rules of the international federations and those of the WADA Code can, of course, be identically worded. However, this does not change the fact that the substantive binding nature in fact ensues solely from the rules.

The CAS has resolutely stood firm on this in its decisions in recent years. It has always only taken the relevant rules into account and in only rare cases has it referred to the WADA Code to help with its interpretation because the relevant rules of the international association contained the term *"no significant fault"* without defining this any further[5]. Using the WADA Code to help with interpretation if the analogously drafted international rules do not govern certain issues does not breach the principle that the WADA Code itself is not directly applicable. In such cases the Code only serves to help with interpreting the rules of the association and so does not acquire direct effect.

The classification of the WADA Code as "*non self-executing*" has further consequences also in connection with the introduction of the new WADA Code 2009.

1. Although mentioned in Art. 25 of the WADA Code, there is no so-called "*Effective Date*". The date of 1 January 2009 was initially a request made of the signatories to bring their rules and regulations in line with the new WADA Code by that date.

   At the same time the term "*Effective Date*" probably indicates that the signatories should not bring rules and regulations amended beforehand into force until then.

   However, if individual signatories fail to comply with their obligation to bring their rules and regulations in line with the WADA Code by the stipulated date, the CAS remains mandatorily obliged to continue to apply the outdated rules and regulations, which do not comply with the WADA Code, after 1 January 2009.

   As an arbitration court, the CAS is bound by the contractual terms agreed between the parties. The fact that one party has failed to meet an external obligation, cannot cause the new rules and regulations to be anticipated.

   However, the parties are at liberty to agree that different contractual terms apply to a certain event or in connection with a dispute before the CAS; thus they can also agree to apply the WADA Code or its essential terms as a basis.

   It would therefore have been possible to agree the new WADA Code as binding for the Olympic Games in Peking because as regards this the IOC is in a position to organise the legal relationship accordingly on the basis of the registration form. The German IOC Vice-President made a comment to this effect in Madrid in 2007[6]. The *ad hoc division* of CAS could thus have been forced to adjudicate on this basis. It was a good decision that the IOC restrained. The Olympic Games take place on the basis of the rules of the international sports associations, who have each implemented the WADA Code very differently. Some have adopted separate rules, which largely correspond to the WADA Code[7]. Others, however, have integrated the Code into their existing rules. Not much imagination is required to picture the confusion in the event that the regulations of the IOC conflict with those of the international sports associations.

2. Due to the absence of direct applicability, the provisions on the new crown witness rules also did not apply before they had been effectively adopted by the association's rules. Corresponding applications for the sanction to be reduced up to 1/3 had therefore be dismissed as unfounded.

3. In the past, the fact that the WADA Code has not applied directly has, quite rightly, meant that the CAS has refused to act upon any appeal by WADA if the rules of the associations do not provide for such an appeal.

   Both the old and the new WADA Code provide in Art. 13.2.3 that WADA has the right to appeal to CAS. In the final analysis, this right to appeal is a procedural way of safeguarding the harmonization that has taken place. The purpose of the right to appeal is to ensure that the federations and associations enforce the WADA Code uniformly. Art. R47 of the Procedural Rules of the CAS provide:

   > "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body*

5. CAS 2007/A/1364.

6. http://www.dosb.de/de/leistungssport/anti-doping/news/detail/news/neuer_wada_code_verabschiedet_bach_die_neue_flexibilitaet_erlaubt_haerter_zu_bestrafen/608/nb/4/cHash/b0ba072a1a (last viewed on 14.08.08).

7. See the rules of the FEI under www.horsesport.org. or of the ISU under www.isu.org.

so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statues or regulations of the said sports-related body".

The CAS has therefore, quite rightly, dismissed an appeal by WADA in a case where an international federation had failed to meet its obligation to incorporate a rule corresponding to Art. 13.2.3 WADA Code in its rules[8]. Although the panel expressly regretted this decision, it did thereby strictly abide by the fact that the WADA Code cannot have any direct effect and that the rules must therefore be accordingly amended in this regard.

4. The new WADA Code provides in numerous Articles that personnel surrounding the athlete (Athlete Support Personnel) are also to be bound by anti-doping rules (Art. 20.3.3; 20.3.5; 20.3.9; 20.4.5; 20.5.6; 20.6.4; 20.6.5; 21.2). A question which the CAS will have to answer first and foremost is whether an arbitration agreement giving rise to the jurisdiction of the CAS even exists with such personnel (Art. R27 CAS Code). However, this question will often be lumped together with the question of being bound by the rules. The statutes of the international federations usually contain an arbitration clause, which provides that the CAS has jurisdiction as an appeal instance.

If an international federation imposes a sanction on the Support Personnel and one of these persons is of the opinion that he/she is not bound by the rules and there is no arbitration agreement, that person can file a suit with the state courts. However, it will probably also be held admissible for that person to turn to the CAS so that an ex post arbitration agreement can establish and assert that the person is not bound by the rules of the international federation for lack of any contractual relationship with the international federation.

Disputes on the jurisdiction to decide jurisdiction are therefore also conceivable.

The CAS will in future have to examine in depth whether the rules of the federations really cover Support Personnel. The WADA Code itself cannot do this; it only establishes an obligation to extend corresponding rules on the Support Personnel.

8. CAS 2006/A/1190.

III. Transitional provisions

A. Tempus regit actum

Already in its advisory opinion of 26 April 2005[9] the CAS made it clear that there is a problem in identifying the relevant substantive legal rule because the anti-doping rules were amended in relatively quick succession. In this advisory opinion the panel initially confirmed the principle of *tempus regit actum* ("*principle of no retroactivity*") and pointed out that, in order to determine an anti-doping rule violation, it is necessary to ascertain the legal situation at the time of the alleged violation.

The revised WADA Code includes this principle in Art. 25.2, which reads:

"*Non-Retroactive Unless Principle of Lex Mitior Applies*
With respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the tribunal hearing the case determines the principle of lex mitior appropriately applies under the circumstances of the case".

At the same time, connected with this is the statement that even if an international federation has not meet its obligation to amend its rules by 1 January 2009, then of course the old rules remain in force and the CAS is itself therefore bound by said old rules as the basis between the parties upon which it is to make its decision. The result is that anti-doping rule violations, which occur after 1 January 2009, can therefore still be treated according to the old law. The fact that the decision by the CAS was not rendered until after 1 January 2009 was in principle irrelevant in the case of an anti-doping rule violation that had occured before 1 January 2009. Here too, the old law applied.

B. Adjustment of sanctions which have been imposed

Art. 25.3 provides for a retroactive application in the event that an anti-doping rule violation has been decided according to the old law, the decision was rendered prior to the Effective Date and the athlete is still serving the period of ineligibility after the Effective Date. In that case the athlete or any other person could apply to the anti-doping rule organization

9. CAS 2005/C/841 CONI.

which had results management responsibility for a reduction in the sanction according to the criteria of the new WADA Code. Such an application was only possible in cases where the period of ineligibility had not yet expired.

Strangely, such a possibility of reduction with recourse to the new WADA Code was provided only in the case that both the anti-doping rule violation and the federation's decision were before the Effective Date of 1 January 2009. However, this rule is probably based on a misinterpretation of the term "*Effective Date*", so it is to consider it expedient to also allow such a possibility of reduction if the decision was rendered according to the principle of *tempus regit actum* on the basis of the old law but after 1 January 2009. Ultimately, what is decisive is that there is a period of ineligibility after the Effective Date, which may be subject to reduction on the basis of the anticipatorily applicable new Code.

C. Lex mitior

The CAS has at least considered applying the principle of *lex mitior* in various awards.

However, WADA's drafting group deliberately decided not to expressly regulate the principle of *lex mitior*. It is merely mentioned in Art. 25.2 as a possibility of making an exception to the principle of *tempus regit actum*.

The possibilities of applying this principle in arbitration cases appear to be extremely limited: First, this is a principle of criminal law, which in the present case is not only a formal distinction.

Unlike private rules for doping-related disputes, criminal law always applies directly in the relevant state territory. However, as explained above, the WADA Code does not have direct effect. There is therefore in fact no "*less severe law that already applies*". Recourse to an applicable less severe law can, under no circumstances, lead to a direct application of the WADA Code. This contradicts its legal nature.

It was of course possible that the international federation had already amended its own rules to bring them in line with the new WADA Code after an anti-doping rule violation had been committed. Due to the *tempus regit actum* rule the old law initially remained the basis for the legal relationship with the athlete. This could therefore be a case for having recourse to an applicable less severe law. If, however, as suggested, one applies Art. 25.3 here, recourse to the *lex mitior* principle is not necessary.

In an arbitral award made in 2005[10] the panel considered applying the *lex mitior* principle because the applicable rules did not provide for any possibility of mitigating a standard sanction of 2 years. The panel considered applying the possibilities of mitigation provided under Art. 10.5.2 *(no significant fault or negligence)*. Better the principle of proportionality should have been applied here; the rules contained a lacuna, which had to be filled by interpretation on the basis of a standard that is particular to sport's law. However, this is not the application of the *lex mitior* principle.

As an arbitration court, the CAS will usually be bound by the contractual terms agreed between the parties, which excludes recourse to other rules. However, the parties are free to mutually declare their agreement to the application of less severe rules as a basis for the arbitration decision.

IV. The impact of mandatory law

The changes made under the new WADA Code had encountered a dynamic judicial environment. There are to be mentioned the decision by the ECJ in the case *Meca/Medina* and *Majcen* and the *Canas* judgment by the Swiss Federal Tribunal *(Schweizerisches Bundesgericht)*. Both judgments and the substantive changes to the new WADA Code ought to have a considerable impact on the future decisions of the CAS.

In the *Meca-Medina* and *Majcen* case the ECJ[11] decided, contrary to the court of first instance[12], that the doping rules of federations had to be measured against the standard of European cartel law. At first, that may seem to be a logical continuation of ECJ case-law. For German lawyers, the application of cartel law to review the sanctions of a federation is not anything unusual because under national law too claims are often based on cartel law[13]. The case may be different for Switzerland because in Switzerland the right of personality is given utmost importance[14]. Finally, one could also think that it is not so much the nature of the basis of the claim that is important, so long as courts apply a reasonably appropriate standard for review. Internationally, however, the application carries a completely different potential for conflict, which the ECJ did not even begin to recognize.

10. CAS 2004/A/787 = SpuRt 2005, 205, 207.

11. ECJ; judgment of 18.7.2006 - C-519/04 P.

12. ECJ, judgment of 30.9.2004 – case T-313/02. *Meja-Medina and Majcen/Commission* = SpuRt 2005, 20 (Schroeder 23); Orth, causa sport 2004, 195.

13. Jens Adolphsen *"Internationale Dopingstrafen"* [International Doping Sanctions], pp. 156 *et seq.*

14. For a comparison of laws see Jens Adolphsen, "*Internationale Dopingstrafen*" [International Doping Sanctions], pp. 124 *et seq.*

In his case before the Swiss Federal Tribunal *(Schweizerisches Bundesgericht) Guillermo Canas* objected to the failure to consider either US-Delaware law or the US-American Sherman Act and EC cartel law. In the end, the Swiss Federal Tribunal allowed the action for annulment solely because of the failure to apply US-Delaware law. By failing to consider the law of Delaware it considered that the right to a fair hearing had been denied (Art. 190(2) (d) Switzerland's Federal Code on Private International Law *(IPRG)*).

From the point of view of the conflict of laws it was simple to substantiate the need to apply the law of the state of Delaware in the present case because the parties had agreed this law as the basis for the legal relationship.

The question of the extent to which the CAS will in future be obliged to also review the non-compatibility of certain sanctions with cartel law as mandatory international law (so-called *Eingriffsnormen*, *loi de police,* mandatory law, definition in Article 9(1) Rome I-Regulation[15]*)* is a much more complex question.

It is probably by no means completely fanciful that athletes will in future object that, for example, an increase in the sanction for a first violation to four years (Art. 10.6), the continuing lack of flexibility in Art. 10.5.2 and possibly also the status during a period of ineligibility (Art. 10.10), are disproportionate and incompatible with cartel law. The standard is therefore not only Swiss law, whether that be the Swiss Civil Code *(ZGB)* or the Constitution or even the European Convention on Human Rights, but also cartel law.

In order to assess the future significance of mandatory law in arbitration proceedings before the CAS, a distinction must be made between European and national cartel law. In addition one must distinguish between the extent to which there is a duty to apply mandatory law and the extent to which there is a duty only to consider allegedly applicable mandatory law.

A. The mandatory application of European cartel law by the CAS

When analysing this one must take into account the fact that the CAS has its seat in Switzerland and not in a member state of the EU. It is therefore irrelevant that in 1999 the European Court of Justice emphasized the duty of the member states' state courts, with whom an application is filed to annul an arbitral award, to allow the action for annulment if they consider that the arbitral award conflicts with EC cartel law (Art. 81 Treaty Establishing the European Community)[16]. An obligation on the part of international arbitration courts, which have their place of arbitration in an EU member state, to apply the rules of EC cartel law was rightly inferred from this judgment. However, this only applies to arbitration courts in an EU member state, not to arbitration courts in Switzerland.

However, Articles 81 and 82 of the Treaty Establishing the European Community (after the Lisbon Treaty Article 101 and 102 Treaty on the Functioning of the European Union) have extraterritorial effect. The Swiss Federal Tribunal *(Schweizerisches Bundesgericht)* therefore held in 1992 already that an arbitration court, which had its seat in Switzerland, had an obligation to review EC competition law. In the specific case the parties had agreed that Belgian law was to govern their legal relationship[17].

The basis for binding the arbitration court by European cartel law was ultimately the agreement to the substantive law of an EU member state (Treaty Establishing the European Community as a *partie integrante* (integral part) of Belgian law). The prevailing opinion in Switzerland is that the remission under the conflict of law rules to the substantive law of a member state of the EU includes the mandatory law of said law. The background to this is the *"Schuldstatutstheorie" (Theory whereby the governing law basically also includes the mandatory laws of the foreign law)* and Art. 13 Switzerland's Federal Code on Private International Law *(IPRG)*[18].

If therefore international federations and athletes have agreed the law of a member state or if an objective connecting factor, especially due to the federation having its seat in a member state, means that the law of a member state applies, the CAS would also have to apply European cartel law.

B. The application of national cartel law by the CAS

The comments made so far have only concerned the application of European cartel law when the law of an EU member state applies.

The *Canas* case, in which an objection was raised about the failure to take into account the United States Antitrust Sherman Acts, i.e. the application of

15. Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable on contractual obligations, OJ L 177 4/07/2008, p. 6-16.

16. EuGHE [judgments of the ECJ] 1999 I-3079, 3094 (margin no. 41).

17. BGE [Decisions of the Swiss Federal Tribunal] 118 II 193.

18. Anton Schnyder, *Anwendung ausländischer Eingriffsnormen durch Schiedsgerichte* [The Application of Foreign Mandatory Laws by Arbitration Courts] RabelsZ 59 (1995), 293, 299.

national cartel law, is a clear illustration of the future problem.

1. Effects doctrine

Numerous states would like their national cartel law to apply whenever the domestic market is noticeably affected. This doctrine known as the «effects doctrine» originated in the USA[19]. Numerous countries have followed this example: Thus, German law contains a corresponding provision in Paragraph 130(2) German Act against Restraints of Competition *(GWB)*, Swiss cartel law contains a corresponding provision in Art. 2(2) Swiss Cartel Act *(KG)*. The Austrian Cartel Act *(Kartellgesetz)* likewise provides in Paragraph 6(1) that it must also be applied to foreign facts if they have an effect on the domestic market.

This domestic effect is the decisive factor for triggering the claim that national cartel law applies. Suspensions imposed by international sports federations have a noticeable effect on the domestic market if an athlete can no longer appear on the market as a provider of sporting performances in the sports market due to the suspension.

The unusual aspect about the application of national cartel law is that it applies irrespective of any choice of law by the parties, so it overrides the law that is otherwise applicable.

2. Obligation of the CAS to apply mandatory law

The change to the WADA Code could therefore in future quite possibly lead to athletes increasingly objecting to a breach of European or their own national cartel law because the corresponding market is affected if said athletes are excluded from practising their sport due to suspensions.

However, for the CAS it does not necessarily follow from the interest in applying national cartel law extraterritorially that this law will also be applied in the arbitration case contrary to any choice of law.

As has been seen, there is an obligation to apply supranational EU competition law only if the parties have chosen the law of an EU member state. Otherwise, there is a risk that the Swiss Federal Tribunal *(Bundesgericht)* will quash the arbitral award. This probably ensues from Art. 190(2) (b) Switzerland's Federal Code on Private International Law *(IPRG)*[20]. On the other hand, the application of Art. 190(2) (e) is probably excluded because the Swiss Federal Tribunal *(Bundesgericht)* later decided that the provisions of not every set of rules governing competition belong to essential, largely recognized system of values, which according to the prevailing opinion in Switzerland, should form the basis of every legal system[21].

An agreement on the law of an EU member state is, however, less common than EU cartel law not applying because the majority of sports federations have their seat in Switzerland and so there is a corresponding agreement of Swiss law.

There is likewise an obligation to apply national cartel law if the parties have chosen the law of an EU member state.

In addition, for civil tortious claims (omission, removal, damages, satisfaction and accounting for profits), Art. 137 Switzerland's Federal Code on Private International Law *(IPRG)* creates the obligation to apply the law of the state, on whose market the injured party has been directly affected by the obstruction to competition due to the suspension. However, it is disputed whether Art. 137 Switzerland's Federal Code on Private International Law *(IPRG)* also applies to arbitration courts (and the extent to which it overrides the otherwise applicable law.[22] If one assumes that CAS has to apply this law even contrary to a choice of law then foreign athletes could assert claims for damages before the CAS based on national cartel law.

C. The possibility of the CAS to apply mandatory law

Apart from these obligations to apply extraterritorially applicable cartel law, there is another possibility under Swiss law of applying said law.

19. US vs. Aluminium Co. of America (Alco), 148 F.2d.416, 443 (2d CIR. 1945).

20. BGE [Decisions of the Swiss Federal Tribunal] 118 II 193, comments on this by Anton Schnyder, *"Pflicht schweizerischer Schiedsgerichte zur Prüfung der Anwendbarkeit von Eingriffsnormen, insbesondere des EG-Wettbewerbsrechts"* [Obligation of Swiss Arbitration Courts to Review the Application of Mandatory Provisions, particularly of EC Competition Law], IPRax 1994, 465; Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 289, 655.

21. BGE [Decisions of the Swiss Federal Tribunal] 132 III 389; for comments on the different scope of review of the provisions for quashing an award see Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 289, 655.

22. Frank Vischer, Zürcher Kommntar, Art. 137 IPRG margin no. 14; agreeing with him Dasser/Drolshammer, Basler Kommentar, Art. 137 IPRG margin no. 23, which refer to the fact that a comparable schism exists in EC competition law. There the unlawfulness follows from EC competition law, whereas the liability arising therefrom derives from national law. As regards the latter schism see also Denis Esseiva, *"Die Anwendung des EG-Kartellrechts durch den schweizerischen Richter aufgrund des Artikels 137 IPRG"* [The Application of EC Cartel Law by Swiss Judges due to Article 137 Switzerland's Federal Code on Private International Law *(IPRG)*]. ZVglRWiss 94 (1995), 80, 103 *et seq.*. On this question see Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 292.

Art. 19 Switzerland's Federal Code on Private International Law *(IPRG)*[23] opens up a possibility of applying foreign national cartel law.

Under Art. 19(1) Switzerland's Federal Code on Private International Law *(IPRG)* a mandatory provision of a law other than that otherwise designated by Switzerland's Federal Code on Private International Law *(IPRG) may* be taken into account instead of the law that is otherwise designated by Switzerland's Federal Code on Private International Law *(IPRG)* if, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require and if the circumstances of the case are closely connected with that law.

In deciding whether such a provision is to be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law (Art. 19(2) Switzerland's Federal Code on Private International Law *(IPRG).*

These are evidently extremely complex conflict of law questions which statute resolves only in part and only in a vague and rudimentary manner. The ECJ obviously did not take these questions into account when it elevated cartel law to be the standard in international doping-related litigation.

It is therefore extremely difficult to say whether a particular cartel law has to be applied mandatorily in proceedings before the CAS; this partly also depends on the assessment of the respective panel.

An easier decision is the decision that corresponding pleadings in proceedings before the CAS should be considered. On the basis of the decision delivered by the Swiss Federal Tribunal *(Bundesgericht)* in the *Canas* case, if the party so pleads the CAS will in any event have to consider the underlying arguments.

In this regard it will be simple to draft in future a kind of template covering the question of the applicability of EC cartel law to be inserted into the decision.

However, this is probably more difficult for the consideration of national cartel law. In this regard the arbitration court must at least be required to deal with these questions. "*Hesitant indications*", as given by the Swiss Federal Tribunal *(Bundesgericht)* regarding its consideration of US Delaware law, are not sufficient. Furthermore, it is also sensible, even if not mandatory according to the decision by the Swiss Federal Tribunal *(Bundesgericht)*, to generally do this in the reasons for the arbitral award. Although it is correct that as regards this a superficial review would be sufficient, this should by no means satisfy the CAS's expectation that its case law be of a high-quality in terms of content.

The CAS may well therefore in future be faced with rather demanding questions concerning conflict of law rules and the application of national cartel law.

V. More flexibility regarding the penalty

A main focus of the changes made to the WADA Code is on more flexibility in the penalty. In the past this was achieved by partly departing from the harmonization trend in the first version of the WADA Code.

The discussion about the need to make the penalty more flexible must be seen in the light of the application of the doctrine of proportionality in the athlete's legal relations to the federation and in arbitration proceedings before the CAS.

The possibilities of reduction, which already existed under the old WADA Code, and which are also contained in the new WADA Code, are one way of expressing the doctrine of proportionality.

However, in the past it was often problematic whether - in certain cases where the WADA Code did not provide for a further reduction - contrary to the wording of the WADA Code and the corresponding rules of the international federation, a further reduction of the penalty should be possible by applying the doctrine of proportionality enshrined in the national law.

In order to solve this problem one first has to ask what task an arbitration court like the CAS has. At first, i.e. in the 1990s, the CAS usually considered itself bound by the provisions of the federation; the legal validity of the provisions was not reviewed[24].

Fortunately, the CAS has, in recent years, found a course that it has the right and duty to review the lawfulness of the agreed federation rules. This must be agreed with. The applicable national law takes precedence over the terms of the agreement; it forms the standard for reviewing the legal validity of the federation's rules. An arbitration court is obliged to review whether the agreed rules are compatible with a national law. The standard for this review is the law that applies to the legal relationship between the parties due to the parties' choice of law. In many

23. See Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 292; Vischer, RabelsZ 53 (1989), 438, 447 *et seq.*

24. Authorities Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 618.

cases this is Swiss law, the application of which is also in the end often helped by the CAS Code [25].

In various decisions the CAS has made clear its reservations about the system of the WADA Code that has existed to date.

Only in one case, the *Puerta* case[26] did the CAS fix a penalty contrary to the WADA Code. As regards this, after extensive considerations regarding the proportionality, the panel found that every sanction must be proportionate. If the sanction that would really have to be imposed according to the WADA Code is disproportionate, the question arises whether it is lawful under the regime of the WADA Code to impose a less severe penalty. Since, according to the old Code a period of ineligibility of eight years was to be imposed in the case of a repeated doping offence despite the athlete having twice been at fault only very slightly (as regards the change in the amended Code, see Art. 10.7), the CAS reduced the penalty to two years contrary to the provisions of the WADA Code.

The panel similarly had to deal with the doctrine of proportionality in the *Squizzato* case[27].

An Italian swimmer who was a minor (17 years of age) used an ointment containing anabolic steroids to treat a skin disease on her little toe. Her mother had obtained it, unaware of its composition, and the athlete applied it.

Here too the CAS considered that the athlete's fault was not significant and asked whether the minimal penalty of one year, which was to be imposed in this case, was compatible with the doctrine of proportionality. The panel applied Swiss law. The CAS held that the minor athlete was at fault, so it was not possible to completely eliminate a period of ineligibility (Art. 10.5.1. WADA Code 2004). In the context of Art. 10.5.2 WADA Code 2004 the panel wondered whether, if there has been no significant fault, the period of ineligibility may in actual fact be reduced to only one-half in every conceivable case. However, the panel left open the question of whether the wording of the WADA Code really prohibits further reducing the sanction and imposed a suspension of one year. However, this was done expressly with a feeling of "*unease*" and "*not without hesitation*".

25. Art. R58 CAS Code: *"Law Applicable: The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

26. CAS 2006/A/1025 *Mariano Puerta v. ITF*, Causa sport 2006, 365.

27. CAS/A/830 *G. Squizzato v. FINA*, SpuRt 2006, 30.

The comments made in this award about the legal nature of the WADA Code are important and succeed. The fact that the rules of a federation are derived from the WADA Code does not alter the legal nature of said rules; they are still federation rules, which cannot *a priori* replace either directly or indirectly fundamental legal principles such as the doctrine of proportionality for every conceivable case.

In the end it was these openly stated reservations, which - despite the legal opinions to the contrary - called for more flexibility.

The new WADA Code therefore now contains the category of specified substances in Art. 4.2.2, although it was already known under the old Code.

> *"Specified Substances*
> *All Prohibited Substances, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the Prohibited List, shall be "Specified Substances" for purposes of the application of Article 10 (Sanctions on Individuals). Prohibited Methods shall not be Specified Substances".*

The category of specified substances is necessary solely as the basis for applying Art. 10. According to the comment to Art. 10.4, the distinction between specified and non-specified *substances* is made according to whether there is a greater likelihood that the presence of said substances has nothing to do with doping purposes[28]. Specified and non-specified substances are expressly not distinguished according to whether they are better or worse suited for the purposes of doping. For non-specified substances, i.e. the anabolic agents, hormones set out in Art. 4.2.2 and those stimulants so identified on the List, the one and only possibility of reduction that remains is the possibility under Art. 10.5 of the new WADA Code.

A. Possibilities of reduction in the case of specified substances

In the case of *specified substances* there is now the possibility of reduction under Art. 10.4. According to this, the penalty to be imposed for a first violation is at a minimum, a reprimand and a period of ineligibility of between nil and two years. As in the case of the rule that still exists under Art. 10.5.1, a reduction to nil is, in that case, therefore certainly conceivable.

28. Comment to Article 10.4: "*Specified Substances as now defined in Article 10.4 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.*"

For this the athlete must first establish how the substance entered his or her body or came into his or her possession, the standard of proof here being "*on a balance of probability*".

In addition the athlete must establish to the comfortable satisfaction of the hearing body that in taking said substance he or she did not intend to enhance his or her performance. The provision therefore covers the negligent or intentional taking of a substance, but under no circumstances the taking of a substance for doping purposes.

The appropriate period of ineligibility is then to be fixed depending on the degree of fault. In order to prove that there was no intention to enhance his or her performance, the athlete must plead objective circumstances that might lead the panel to be satisfied thereof. As regards this, the comment mentions the nature of the substance, the timing of its ingestion, the open, not concealed, use of the substance and a medical prescription, which substantiates that the substance was not prescribed for any sport-related reason[29]. Ultimately, the point is to prove - by objective circumstances - the absence of any intent to enhance the athlete's performance. The comment assumes that the greater the potential of the substance for enhancing performance, the higher this burden of proof is.

B. Reduction in the case of non-specified substances

As regards this, it is initially clear that in the case of non-specified substances both possibilities of reduction under Art. 10.5 are possibilities, but not Art. 10.4. The athlete can therefore still claim that he or she bears "*no fault*" or "*no negligence*" (Art. 10.5.1) with the consequence that here too a reduction to nil is possible.

If, on the other hand, the athlete claims "*no significant fault or negligence*" then all the problems, which the old version of the WADA Code posed for non-specified substances, continue to exist. The suspension can at most be reduced to one year.

In certain isolated cases the doctrine of proportionality can still not take full effect, so it is not possible to impose a sanction that is proportionate to the degree of fault.

A mere reference that the substances concerned here are non-specified substances, i.e. anabolic agents, hormones and stimulants, is not appropriate for disregarding the doctrine of proportionality in these cases. As stated in the comments to the Code themselves, specified and non-specified substances are not in principle distinguished according to whether they are appropriate for doping purposes. The only criterion that is decisive for classifying substances as specified substances is that there is a greater likelihood that the presence of said substances can be credibly explained by the argument that they were not used in order to enhance performance[30].

In the end therefore, the only criterion that decides whether the penalty to be imposed depends on fault or, in extreme cases, is irrespective of fault is whether the substance is classified as a specified or as a non specified substance. This is not convincable. One therefore wonders why the drafting group did not realise the original plans and include all prohibited substances as so-called "*specified substances*", or why the category of "*specified substances*" was not dispensed with altogether and why a provision allowing greater flexibility analogous to Art. 10.4 was not included for all substances.

Maybe in the case of today's non specified substances the proof that there was no intention to enhance performance would then fail. However, there is at least a possibility that the athlete does meet the burden of proof and that therefore the sanction can be reduced to a period approaching nil. In future therefore it will again become necessary in extreme cases to apply the doctrine of proportionality directly.

The reasons that were stated for maintaining 10.5.2. and the one year lower limit, were first and foremost reasons of general prevention that follow from the entire system. However, since there is now a possibility of a reduction to nil for specified substances, whether taken intentionally or negligently, this argument no longer cuts ice. In other words, the insertion of Art. 10.4 for specified substances will in future mean even more that a reduction under 10.5.2 will also be considered for non-specified substances contrary to the wording of the WADA Code.

As the CAS panel stated in the Danilo Hondo case,[31] it is the CAS's duty to in any event find an application, whether a sanction not complies only with the rules adopted by the sports organization but also with the fundamental principles of the legal system, in this case Swiss law.

29. Comment to Article 10.4: "*Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Substance; and a contemporaneous medical records file substantiating the non-sport-related prescription for the Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.*"

30. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.

31. SpuRt 2006, 71.

The principle of the proportionality of the sanctions is part of these fundamental principles and it is the arbitration court's duty to observe these taking into account the special circumstances of the case concerned.

C. Possibility of reduction in the case of specified substances pursuant to Art. 10.5

According to the comment, if specified substances have been proven the possibility of reduction under Art. 10.5.2 should not be applied in cases where Art. 10.4 already applies because Art. 10.4. already takes into consideration the degree of fault for the purposes of establishing the applicable period of ineligibility [32].

This comment can probably be understood to mean that Art. 10.5.2 is only not applied in cases where the period of ineligibility has been reduced under Art. 10.4 depending on the degree of fault.

If, on the other hand, a specified substance has been established and the athlete does not succeed in satisfying a panel that he or she did not intend to enhance his or her performance because, for example, the athlete fails to meet the standard of proof of "*comfortable satisfaction*", Art. 10.5 can be applied.

VI. Summary

The reform of the WADA Code and the insertion of flexibility at the expense of harmonization have been carried out only half-heartedly. Whether the category of "*specified substances*" is necessary at all is extremely doubtful. It is not really apparent why one does not apply Art. 10.4 for all substances and ultimately takes the nature of the substance into consideration in the evidentiary proceedings instead of excluding certain substances from the outset from the application of the flexibility rule.

Here WADA was obviously worried that the federations might abuse the flexibility allowed. However, in order to prevent this the procedural safeguard, that is leave to appeal to the CAS against decisions by the federations, would alone have sufficed. An additional substantive safeguard does not appear necessary.

Ultimately, all of the questions posed in the past remain; the scope of their application is of course reduced, but they are not resolved. It is therefore probably only a matter of time until the CAS again has to deal with a case in which the athlete claims that he or she bears "*no significant fault or negligence*" and the CAS considers that it is prevented from imposing a fault-based penalty on the basis of the new WADA Code due to the threshold of one year.

It is therefore necessary to help the state doctrine of proportionality to override and, contrary to the wording of the WADA Code, to impose penalties that fall below the lower limit of Art. 10.5.2.

32. "*Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.*"