

General principles of CAS case law in doping issues

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For more than ten years, the Court of Arbitration for Sport (CAS) has been dealing with many doping-related cases. In act, during this period, the majority of the cases brought before the CAS have been about doping. Today, however, the situation has changed somewhat: while the number of pending doping-related cases remains approximately the same, the proportion of these compared to other cases has decreased to less than 50 %.

This article is an overview of some decisions pronounced by panels of the CAS in relation to doping matters only. The following principles developed by the CAS during recent years form the starting point of a specific case law and could be also the first steps towards the creation of a *Lex Sportiva*. These are general principles which can also be applied to cases not related to doping, and are followed by principles specifically related to doping issues.

General principles

1. *The right to be heard*

Some cases brought before the CAS have made it possible to clarify this important notion.

In the case CAS 91/53, the International Equestrian Federation (FEI) notified a rider of the positive results of a urine analysis of his horse and gave him two deadlines: the first for requesting a confirmatory analysis; the second (10 days later) to supply written explanations and evidence, and to request a personal hearing before the FEI. The rider had to choose between these two possibilities, taking into account the fact that the results of the confirmatory analysis would not be known before the expiry of the second deadline.

The CAS considered that the rider had the right to request a confirmatory analy-

sis *and* a personal hearing if necessary. On receipt of the positive result of the confirmatory analysis, the FEI should have formally notified the rider, setting a new deadline for giving explanations and written evidence as well as for the purpose of seeking a personal hearing. In the case CAS 92/84, the CAS specified that the right to be heard did not include the right to be able to express oneself orally, in writing or both. In practice, the right to be heard postulates only the possibility for each party to express itself during the proceedings either orally or in writing.

2. *Good faith*

A water-polo player tested positive for salbutamol, which is a substance allowed by the rules of the International Swimming Federation (FINA) on condition that the its use be declared prior to the doping test. The water-polo player forgot to make this declaration and was sanctioned by FINA. During the proceedings, the athlete demonstrated that his national federation had given him a list of all the banned substances and some permitted substances; salbutamol was mentioned on this list as a permitted substance, without any other indications or conditions.

The CAS was of the opinion that an athlete should be able to trust the information given by his national federation, and annulled the sanction (CAS 96/149).

3. *The benefit of the doubt*

In a horse doping case, the jars containing the urine samples for analysis were not sealed, in accordance with the FEI regulations, after a doping test. Indeed, it

would have been possible to slide the seal placed on the jars and introduce a foreign substance. As it was impossible formally to exclude the possibility of manipulation and contamination of the jars, the CAS considered that this was an element of doubt which had to benefit the rider (CAS 91/56).

4. *Rules and guidelines*

The CAS has made clear in several awards that only the provisions contained in the statutes, rules or regulations of sports bodies can be considered texts of reference, and that the provisions contained in any accompanying guidelines should be used only as a means of interpreting these texts.

Principles specifically related to doping

5. *Strict liability*

The CAS applies the principle of strict liability in cases of doping. This means that once a banned substance is discovered in the urine or blood of an athlete, this athlete is presumed to have committed a doping offence. In such cases, the CAS considers that the general principle of law *nulla poena sine culpa* ("no punishment without guilt") must not be applied too literally. Indeed, if for each case the sports bodies had to prove the intentional nature of an act in order for it to be deemed an offence, the fight against doping would become virtually impossible. With this principle, the subjective elements of the case are not examined: the guilt of the athlete is presumed and she or he does not have the right to supply exculpatory evidence. The athlete is strictly liable for the presence of a banned substance and therefore automatically sanctioned; any distinction between deliberately doped ath-

letes, those doped without their knowledge and negligent athletes is thereby made impossible. However, the CAS has established some additional principles in order to temper the strict liability rule.

6. Possibility of exculpatory rebutting evidence

The principle of strict liability institutes a system of legal presumption. However, this presumption may be overturned by evidence given to the contrary. This means that an athlete who tested positive has the right to exculpate her- or himself by means of rebutting evidence (e.g. evidence that the doping analysis

was not performed pursuant to the procedure established).

7. Sanctions in cases of doping

In the case of a positive doping test, the CAS generally admits that the athlete must automatically be disqualified from the competition in question, without any possibility to rebut this presumption of guilt. Indeed, it would be manifestly unfair to include in a ranking athletes who had competed using different means from their opponents.

Besides the disqualification which is a sporting sanction, a disciplinary sanction may also be imposed (in most cases a

suspension). For these sanctions, and provided that the applicable rules on doping allow such an interpretation, the CAS considers that the seriousness of the penalty, but not the principle thereof, depends on the degree of the violation committed by the athlete. This implies that the subjective elements should be appreciated in each doping case in order to establish a just and equitable sanction.

All these principles will certainly serve as a reference in the field of sports justice in the future, and may thereby contribute to the development of a *Lex Sportiva*.

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