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Contents

Sports law from an international perspective

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As with any area of law, mediation provides a useful avenue for parties to resolve issues prior to engaging, in what generally is, costly and lengthy court proceedings. In sports law, matters are time sensitive with delays potentially prejudicing athletes and players with financial consequences for teams and sponsors.

The subject matter of sporting disputes can range from anti-doping violations to player selection issues. While the National Sports Tribunal now plays a key role in determining selected disputes, National Sporting Organisations and clubs need to ensure that their policies and procedures reflect overall governing requirements and the changing landscape in sports law. In addition to this, effective dispute resolution procedures and awareness of, at times, intricate matters of law can assist in a speedy resolution and mitigating bad press.

This edition of the Sports Law Bulletin reminds practitioners of the usefulness of mediation in sporting disputes and then addresses the policy recently introduced by the *Federation Internationale de Natation* on Eligibility for the Men's and Women's Competition Categories by reviewing the history of women's sport and developments in transgender and intersex participation.

Those involved in Australian football (soccer) would agree that in recent years we have seen a number of football players opting to move oversees to progress their playing career with the Middle East (in particularly the United Arab Emirates and the Kingdom of Saudi Arabia) being a new "hub" for player movements. The article provided in our Second Edition is courtesy of Middle Eastern based sports lawyers from Squire Patton Boggs and addresses the requirements for intermediaries working in the UAE, and may assist lawyers who, through their practice, undertake intermediary work.

One of the more specialised areas of sports law is that of anti-doping. We are fortunate to have Janie Soublière, twice Women in Sports Law Arbitrator of the Year, co-author an article with Richard McLaren on the evolution of World Anti-Doping Code principles. This paper provides a deep dive into Court of Arbitration for Sport jurisprudence and I see it becoming a central resource for lawyers involved in anti-doping violations in Australia and supplements the article in our first Edition by Gayann Walker.

We await with interest the outcome of the World Cup which is set to commence in Qatar (at the time of writing) in one week. Based on media reports to date, there will likely be a number of themes which we will look to review in future editions.

Cassandra Heilbronn

Mediation in sporting disputes

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In 1962, during the Cuban missile crisis, then Chairman of the Council of Ministers of the Soviet Union, Nikita Khrushchev, wrote to the President of the United States of America, John Kennedy the following words:

> *Mr President, Mr Kennedy, you and I are like two men pulling on a rope with a knot in the middle, the harder we pull, the tighter the knot until it will have to be cut with a sword. Now why don't we both let up the pressure and maybe we can untie the knot.*

While the Cuban missile crisis is a long way from sports law disputes, the image is powerful reminder that the parties to a dispute — any dispute — can co-operate in untying the knot rather than having a solution imposed on them.

There are a myriad of ways to resolve disputes. When matters are of a legal nature in relation to sport, we tend to first think of the common dispute resolution methods such as litigation or arbitration. Perhaps due to the policy frameworks and contractual obligations surrounding sport, mediation is not front of mind.

However, mediation offers participants an opportunity to resolve disputes amicably and for the good of the sport (at least when the parties are negotiation in good faith). The core features[1] of mediation are:

1 It is a decision making process in which the parties make and own the decision.
2 The parties are assisted by an independent mediator.
3 The parties are in control of the process.
4 The parties can negotiate flexible outcomes that would not be available with an imposed solution. A judge, arbitrator or tribunal panel cannot split the difference. The parties are free to craft a resolution that is purpose built, subject to applicable rules and policies.
5 The process is confidential, as opposed to litigation, which is usually in open court or, for example, arbitration in the National Sports Tribunal who publish decisions on their website.
6 It can also be time efficient given the demand on sporting codes to conduct matters timely, often within a season or sooner. Also, the careers of athletes are fleeting. A delay of a year or two can wipe out a significant percentage of an athlete's prime.
7 Mediation is less costly than litigation.

Mediation provides an opportunity to preserve an ongoing relationship, whether that be a relationship between an athlete and a club, between clubs and leagues or even the management of spectators at sporting events. Additionally, mediation can assist the parties in finding a forward focused path such as mediating the negotiation of a future contract. Litigation is devoid of these opportunities. While there are no fixed rules for running the mediation process, mediation usually offers to the mediator an opportunity for a confidential and private intake session at the beginning of the mediation. There is also usually a joint session in which the parties can outline their respective positions. A joint session is most productive when the discussion is respectful and the mediator is able to control aggressive participants.

A search of the internet reveals many contributions about mediation in sport.[2] The internet contributions invariably extoll the virtues of mediation in sporting disputes. Many of them also lament that mediation is not resorted to as often as it could be.

Sport is big business. And where there is big business there are invariably disputes.

The question remains, what is the best way to resolve the disputes.

Blackshaw observes that alternative dispute resolution (ADR), which includes mediation, ". . . lends itself to the settlement of sports-related disputes because of the special characteristics and dynamics of sport . . ." encapsulated in the expression "specificity of sport".[3] The meaning of the expression "specificity of sport" is debated in Europe. It has no legal force in Australia.

Mediation is suitable for a wide variety of disputes. Many sport related disputes are really just commercial disputes in which there is a sports person or a sporting association involved. The classic case is a contract dispute.

Many commercial contracts now provide that the parties must attend a mediation before commencing proceedings in court or going to arbitration. That is also consistent with legislation that imposes on potential litigants an obligation to attempt to resolve disputes before commencing action, such as the —Civil Procedure Act 2010 (Vic).

Blackshaw points out that many sports federations now include in their constitutions specific provisions for mediation of appropriate sports disputes.[4]

It is generally accepted that there are some disputes in which mediation is not appropriate. These include doping disputes and some disciplinary cases.

But the majority of cases are suitable to submit to mediation.

Blackshaw reviews the mediation service offered by the Court of Arbitration for Sport (CAS)[5]. He offers examples of disputes that have been settled by CAS mediation. These include disputes between athletes and their advertising agencies in relation to commission payments.

We have a classic example here in Australia:

The late, great Henry Jolson was appointed mediator in a complaint about an episode of the Footy Show in 1999. Nicky Winmar had been invited on to the show but he cancelled his appearance. Sam Newman painted his face black in mockery. There was uproar amid allegations of racial vilification. The mediation processes resulted in apologies being delivered, something that a court would never order.

In some states there is a formal scheme established. For example, Sport SA, in South Australia, established a State Sport Dispute Centre (www.sportssa.org.au). The purpose was to provide a confidential and impartial mediation and dispute resolution service for the South Australian sporting community. According to its website the centre can handle a diverse range of disputes, including:

— workplace disputes;
— disciplinary hearings and selection disputes;
— disputes relating to the appointment of coaches and other officials;
— employment disputes;
— member complaints of harassment and discrimination; and
— grievances relating to volunteer screening.

The centre also offers the provision of trained and independent persons to chair tribunal hearings (fees apply).

The National Sports Tribunal (NST) can also assist parties in mediation in certain circumstances. Recently, the CEO of the NST John Boultbee suggested that the NST could assist in the Hawthorn Football Club investigation through its arbitral process.[6] I suggest that perhaps its mediation powers may be more effective given the healing that can occur during the process.

One advantage of mediation is that a mediator has an opportunity, through the use of private caucuses, to speak with the parties separately and confidentially. Grabowski refers to the mediator's ability to "mend fences" before bringing the parties together in a room to talk.[7]

Psychologists note that lawyers do not always spend sufficient time in the intake sessions — conducted privately with the parties. This is often the product of budgetary constraints. An intake session is a good opportunity for the mediator to assess what the parties really want and what drives them.

For example, when a party is angry it may be that they are afraid. The mediator can try to ascertain what the fear is so that the mediator is better prepared to help find some middle ground. While your stereotypical heavyweight boxer may not want to reveal their feelings, subtle probing by an independent third party can assist to getting to the crux of the issues.

Grabowski also points out that one difference between sport negotiations and other negotiations is that in an ordinary commercial dispute there are usually two parties each pressing its own interests.[8] However, sports negotiations tend to be more complex with other interested parties behind the scenes of the dispute. These include the sports associations and the fans. There might also be government interest in connection with grants to sporting bodies and the requirement for proper governance.

A mediator is likely to emphasize that mediation offers a golden opportunity to resolve a dispute and achieve finality in a confidential setting. The parties can settle their disputes "within the family of sport", an outcome sought after by many sporting codes and evidenced by the fact that sporting codes rarely, if ever, make public determinations of their internal tribunals.[9] While this is a noble objective, care must be taken to avoid the coercion of parties to settle to avoid adverse publicity.

Sometimes sports disputes spiral out of control. The passion for the sport, and the competitive spirit can spill over into the legal process. One example is the case of Mr Ragless, who was expelled from the South Australian Field and Game Association Southern Branch Inc (a clay target shooting club). He blamed Mr Stokes. The dispute involved no less than seven court battles.[10] One can only speculate whether an early mediation might have avoided all of that cost and distress.

It can be worthwhile for a mediator to point out what would happen if the dispute went to court or to arbitration. First, the individuals involved are silenced. Parties in litigation are not permitted to speak with the judge or the arbitrator directly. All communications are completed through lawyers and the message is filtered through legal language and restrained by protocol.

Further, litigation takes place in open court. Interested individuals, whether it be media, sponsors, groups

of fans or competitors can access documents that are filed and potentially watch the proceedings. From a public relations perspective, there are no winners. Significant public interest in an adverse event may impact corporate investment in either a league, club, sporting code or athlete.

Some disputes arise out of the rules of voluntary sporting associations. What must be borne in mind in these disputes is that some of the participants, perhaps the leaders of community associations, are well-meaning amateurs. They are not always commercially astute or considered legally sophisticated. Those same individuals may have overseen the drafting of the rules of their associations subject to challenge.

Lord Denning put it well in his book The Discipline of Law, although not specifically in reference to sporting associations:

> *Whenever a difference arose between a voluntary association and its members, the Courts said "Let us look at the Rules". Then they got into a pretty pickle. Usually because of the obscurity of the Rules. In point of drafting, the Rules of these associations are the worst ever . . ."*[11]

His Lordship suggested that the rules should be construed not literally but according to the spirit, the purpose that lay behind them.

Some sports administrators might not be aware of the benefits of mediation and the availability of mediators to assist in resolving disputes at the earliest opportunity. The message for sports administrators is that, if there a dispute that could embroil them in an ongoing, costly matter that has the capacity to affect a working relationship, then it would be wise to obtain advice prior to the matter getting out of hand.

Practical considerations for mediation of sports disputes

The first is that in any dispute with legal overtones (which is probably most disputes) having a legally trained meditor is beneficial. Mediation occurs in the shadow of the law, and it is helpful if the mediator has some idea of the possible consequences if there is no resolution and the dispute proceeds to litigation. The mediator does not offer legal advice, but does need to be aware of the broader options and issues such as costs consequences.

Secondly, it is helpful for the mediator to have some knowledge of the sport involved. The parties want to establish a rapport with the mediator and some understanding of the sport enhances the mediator's credibility with the parties.

Finally, the parties can agree on the terms of settlement, including what can be published about the process and the outcome. This might be by way of press release or a notice sent to relevant stakeholders containing information such as confirming that a mediation took place and either outlining the terms of settlement or announcing that the settlement was condiential. By contrast, in litigation the whole of the evidence is given in public, and the reasons for decision are published to the world.

Mediation is becoming a standard facet of the litigation process, and includes an increase in popularity of mediation of sporting disputes. As Blackshaw concludes:

> *There is, therefore, plenty of work for lawyers in the foreseeable future in this particular and growing field of ADR practice and long may this continue to be the case!*[12]

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Footnotes

1. These are motherhood statements that will be no surprise to any practitioner. Nevertheless, they bear repeating.
2. Some care needs to be taken because the internet offerings intersperse articles about *meditation* in sport, and the reader can be taken in by interesting discussions which lead on a different path, before the misprint is discovered.
3. I Blackshaw, ADR and Sport: Settling Disputes Through The Court Of Arbitration For Sport, Marquette Sports Law Review vol 24 2013 (Blackshaw) at p 1.
4. Blackshaw at p 27.
5. Blackshaw at p 19 et seq.
6. See www.theage.com.au/sport/afl/national-sports-tribunal-stands-ready-to-hear-hawthorn-case-20221003-p5bmtr.html (accessed 6 October 2022).
7. M Grabowski, "Both Sides Win: Why Using Mediation Would Improve Pro Sports" Journal of Sports & Entertainment Law 190 (Grabowski) at p 200.
8. Grabowski at pp 193–4.
9. Blackshaw at p 57.
10. See eg *Stokes v Ragless* [2017] SASC 159; BC201709694.
11. The Discipline of Law, Lord Denning, London Butterworths 1979 at 149–50.
12. Blackshaw at p 57.

Sports Law
Bulletin

FINA's transgender policy and the integrity of women's sport

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I Introduction

The recent announcement by the Federation Internationale de Natation (FINA) of its Policy on Eligibility for the Men's and Women's Competition Categories (the Policy) thrust this politically sensitive aspect of sport into the media spotlight. This article will examine the policy and its implications in the context of the integrity of women's sport. First, it will provide a brief overview of the development of women's sport.

II The development of women's sport

A feature of the 1896 Athens Olympic Games, the first of the modern era, was that there were no female participants. While tennis was added for the 1900 Games, it was not until the 1912 Stockholm Games that a women's event, the 100m freestyle, was added to the swimming program. Women were not added to the prestigious athletics program until the 1928 Amsterdam Games. However, for a number of Olympiad female athletes, they were restricted to competing in three events. For instance at the 1948 London Games, Fanny Blankers-Koen, while winning three individual gold medals was not able to compete in the high jump even though she was the world record holder. This was due to this women-only, three events-only rule.

Over the second of the twentieth century gradual improvements were made. A women's marathon, for example, was finally added to the Olympic athletics program at the 1984 Los Angeles Games. A feature of the early part of the twenty-first century has been the introduction of new leagues, such as the Australian Football League Women's (AFLW) and the development of professional leagues in already established women's sports such as netball. While the 2020 Tokyo Olympic Games will be remembered for the COVID related problems, it should also be remembered as the games in which it can be argued there was at last genuine gender equality. For instance, in swimming, the women finally had a 1500m while another feature of the program was the introduction of mixed relays which were also held in athletics.

These mixed relays produced some fascinating races but also provided visual evidence of the difference in the standards of the best men and women swimmers and runners in the world, differences based purely on biology. The participation meanwhile of the first known transgender Olympian, a weightlifter, at the 2020 Tokyo Games highlighted what had been a growing issue in world sport: the participation of transgender and intersex athletes in elite women's sport.

III Transgender and intersex participation

A Biological Testing

The fact that the participation of athletes who were not biologically women could affect the integrity of women's events was known back in the 1960s, as shown by the then International Amateur Athletic Federation (IAAF) (now World Athletics) introducing gender testing at the 1966 European Championships. This involved the chromosomal analysis of buccal check cells. Poland's Ewa Klobukowska, bronze medallist in the 100m at the 1964 Tokyo Olympic Games, was the first athlete to fail the test as she suffered from the rare genetic condition of mosaicism. This meant her cells produced a mixture of both male XY and female XX chromosomes.[2] Despite its issues, gender testing was to become standard practice in subsequent Olympiads.

While such testing can be seen as discriminatory it should be remembered it was introduced to protect the integrity of women's sport. The need for this was illustrated when former Polish sprinter, Stanislawa Walasiewicz, winner of the women's 100m at the 1932 Los Angeles Games, was killed during a robbery in the United States where she had been living. A post-mortem revealed she "had partially developed male genitalia and a chromosomal disorder that gave her both male and female genetic elements".[3] It therefore raised the issue as to whether there had been other undetected intersex Olympic champions.

B Intersex athletes

It was 2 years before the 2016 Rio Olympic Games that the Court of Arbitration for Sport (CAS) heard its first case concerning the then IAAF's regulations regarding hyperandrogenic competitors. The case involved

Indian sprinter, Dutee Chand,[4] who had been banned under the IAAF's Regulations Governing the Eligibility of Females With Hyperandrogenism to Compete in Women's Competition (the Regulations).[5] The CAS challenge was on the grounds the Regulations discriminated against female athletes possessing particular natural physical characteristics as they were based on flawed factual assumptions regarding the relationship between testosterone and athletic performance. The Panel held the Regulations were discriminatory, with the IAAF then having the burden to establish they were reasonable and proportionate to achieve their legitimate objectives.[6] These were to "provide for fair competition and a level playing field within the female category".[7] The Panel stated it was unable to conclude the Regulations fulfilled their stated purpose but acknowledged this may be due to sufficient data not yet being available.[8] The CAS verdict was that the Regulations were to be suspended for 2 years, and if the IAAF did not produce supporting evidence, the Regulations would be declared void.[9]

The CAS decision meant Chand was allowed to compete at the 2016 Rio Games, as was another athlete potentially affected by the Regulations, South African middle-distance runner, Caster Semenya, who won the 800 m track gold medal. However, IAAF announced in April 2018 it was reintroducing rules to prevent or limit hyperandrogenic females from competing in women's events. These Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations) came into operation on 1 November 2018. A level of five nmol/L was selected from the medical evidence as being the cut-off point, with athletes affected needing to reduce their blood testosterone to below this level by means of hormonal contraceptives for at least 6 months in order to be eligible to compete in the track events where intersex athletes were considered to have an advantage. These were distances from 400 m to 1500 m (and one mile). The DSD Regulations were challenged by Semenya and the majority of the CAS Panel held that while they were discriminatory such as discrimination was "a necessary, reasonable and proportionate means of achieving the aim of the integrity of female athletics' and upholding the 'protected class of female athlete in certain events".[10]

C Transgender participation

New Zealander, Lauren Hubbard, participated in the women's weightlifting competition at the 2020 Tokyo Games. Hubbard, 43 years of age, had won national junior titles and set records in the boy's divisions before giving the sport away, but in 2017, 5 years after her transition, she began competing in the women's heavyweight division. She was eligible to compete at the Games as she had met the requirements set by the International Weightlifting Federation (IWF), namely having a testosterone level at below 10 nanomoles (nm) per litre for 12 months before first competition. Many sports scientists however suggest this level is too low as the average range for women is between 0.3 nm and 2.4 nm. While Hubbard was eliminated without registering a score after failing at each of her three attempts in the snatch,[11] it was clear this was an issue that would not go away. After Tokyo, seven-times medallist, Australian swimmer Emma McKeown, publicly stated she would refuse to compete against anyone who was born a male, a statement supported by Swimming Australia President, Tracey Stockwell.[12] Two months later FINA stated a transgender policy would be announced after a Congress to beheld at Budapest on the weekend of 18–19 June 2022.

D The FINA policy

At the Congress in Budapest the attending delegates received a detailed report FINA had commissioned from independent scientists and medical experts, its most significant conclusion being "that the physical benefits males derive from puberty cannot be reversed".[13] Seventy-one of the delegates then voted in favour of the Policy[14] which bans male to female transgender and 46 XY DSD athletes from elite female competition unless they can comply with cl 4(b). This states they need to "establish to FINA's comfortable satisfaction that they have not experienced any part of male puberty beyond Tanner Stage 2 or before age of 12, whatever is the later". It then states they must specifically produce evidence which establishes that they either "have complete androgen insensitivity and could not have experienced male puberty" or that "they are androgen sensitive but had male puberty suppressed". They are then required to "have maintained testosterone levels below 2.5 nmol/L".[15] The Policy also covers female to male transition, and in a more limited way, intersex athletes as the Policy's definitions state:

> Differences of sexual development (DSD) area a group of conditions where external genital appearance is discordant with internal sex organs (testes and ovaries). This Policy is only concerned with 46 XY DSD, ie DSD affecting athletes with testes (males as defined below).[16]

The Policy will apply to events organized by FINA and the recognition of world records. Each member federation, such as Swimming Australia is then expected to adopt its own policy, using the Policy as "a guideline".

III Discussion

Not unexpectedly, FINA's announcement did receive criticism. Anna Brown, chief executive of Equality Australis, for instance, stated the policy risked violating

principles of international law. Kieran Perkins, chief executive of the Australian Sports Commission, meanwhile questioned the impact it may have on swimming at community level.[17] However, the policy was also "widely applauded"[18] as it was seen as protecting the integrity of women's sport at the elite level.

A question raised by the policy is at what level does sport stop being "elite" and become a "community" sport. Within Australia there would be no doubt any Swimming Australia policy needs to include national championships in its definition of elite. The author suggests state championships should also be included. One reason is that they are a standard pathway to qualifications for national championships and world records have been set at these championships. It is also suggested there are potential benefits as being a state champion can be directly relevant to jobs within the sporting industry. Even outside that industry being a state champion can have indirect employment benefits as it illustrates commitment and ability to perform under pressure. It is at club level where events can be seen as ones where participation and inclusion are as significant as the actual competition. However, it may still create situations where a female athlete finds herself continually finishing second behind someone who was not born female and therefore has an on-going biological advantages. Despite this potential scenario, Tennis Australia has gender inclusion guidelines that apply to local club level while "Cricket Australia affiliated associations, clubs or indoor centres must permit players to participate in community cricket competitions in accordance with their gender identity".[19]

The Policy also states that those who "do not meet criteria many compete in any open event FINA may develop in the future".[20] This idea of a separate event is not a new one, and while in *Chand* the IAAF stated it would not be implementing such a competition, the fact it was mentioned indicates it was at least a possible consideration. While having open evens may appear a logical solution, the present lack of numbers would make such events impractical at an elite international level. In swimming, for instance, the only transgender swimmer who would appear to be of an elite level is American Lia Thomas who won a college championship in 2021. Another question is whether intersex and transgender athletes be treated the same, despite differences between the two groups as an intersex athlete is born with biological differences, transgender athletics acquire them later in life. This raises a question as to whether a competition open to both transgender and intersex athletes can itself provide a fair and even competition.

IV Conclusion

The impact of FINA's announcement can be seen by the fact it was the second most covered media story in the following week, only the Reserve Bank's announcement it was raising interest rates receiving more media attention.[21] However, as Webster points out, this far from the most important issue facing sport when compared to areas such as doping and corruption as it affects such few athletes.[22] FINA's policy on elite competitions is also not the first by a world governing body, World Rugby for instance having already made the same decision in regard to elite levels of rugby union. It is suggested that this is likely to become the standard for most sports: limited inclusion at the elite level where a small biological advantage can be highly significant and full inclusion within community sport. The difficulty then will be deciding where the later finishes, and where the former begins.

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Footnotes

1. Associate Professor, College of Business, Law and Governance, James Cook University.
2. D Goldblath, *The Games*, Macmillan, 2016, 268.
3. Ibid.
4. CAS 2014/A/379 *Dutee Chand v Athletics Federation of India & International Associations of Athletic Federations.*
5. Ibid at [4].
6. Ibid at [501].
7. Ibid at [508].
8. Ibid at [531].
9. Ibid at [548].
10. Ibid at [626].
11. M Dickenson, "Early exit cannot allow IOC to dodge transgender issue", *The Australian*, 4 August 2021, 25.
12. J Linden, "Swim boss backs MeKeon's call", *The Australian*, 21 April 2022, 28.
13. J Linden, "What science has to say about male advantage", *The Weekend Australian*, 25–26 June 2022, 40.
14. Policy on Eligibility for the Men's and Women's Competition Categories, www.resources.fina.org.document.2022/06/19.
15. Ibid at 7.
16. Ibid at 4.
17. J Halloran, "Can gender beat biology?", *The Weekend Australian*, 25–26 June 2022, 17.
18. J Linden, "Mountain of evidence for trans policy", *The Weekend Australian*, 25–26 June 2022, 37.

19. C Helmers, "Ever-changing area: Community guidance on adopting their transgender rules", *The Sydney Morning Herald*, 23 June 2022, 43.
20. Policy on Eligibility for the Men's and Women's Competition Categories, www.resources.fina.org.document.2022/06/19, 9.
21. Leading news stories of last week, *The Australian*, 27 June 2022, 20.
22. A Webster, "Transgender genie should go back into the bottle", *The Sydney Morning Herald*, 24 June 2022, 47.

Sports Law
Bulletin

The regulation of football intermediaries past, present and future: a perspective from the uae

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1. Introduction

According to FIFA's latest intermediaries report,[1] football intermediaries involved in international transfers during 2021 (ie, those involved in the transfer of a player from one national association to another) earned $500.8 million in commissions, representing a 381% increase since 2011. A total of $3.5 billion was paid to intermediaries in commissions in connection with international transfers between 2011–2020.[2]

Unsurprisingly, figures like these make headlines and foster suspicion from casual observers as to what intermediaries actually do and what value they add to the footballing ecosystem. For some, these commissions simply represent money "lost from the game". However, the reality is somewhat more nuanced than that. Intermediary commissions by and large reflect the highly-commercialized world of modern football. As in any lucrative industry, well-connected and highly-skilled negotiators who protect the interest of their clients and maximize their returns will always be sought after and paid accordingly. The typical football intermediary works extremely hard in a highly competitive industry for relatively modest commissions and sometimes for no commission at all if the player in question is a minor, does not make the grade or suffers a career-ending injury. Often a large part of an intermediary's role is as a mentor to young players at the start of their careers on how to navigate a path through the notoriously unforgiving world of football.

There are exceptions of course. At one end of the spectrum are super agents who represent global superstars and can therefore command premium commissions, such as Jorge Mendes (who counts Cristiano Ronaldo and David de Gea amongst his stable) and the late Mino Raiola (who reportedly was paid a commission of $50 million in connection with Paul Pogba's 2016 transfer from Juventus to Manchester United).[3] At the other end of the spectrum are, what may be referred to as, unscrupulous intermediaries who engage in unethical practices that violate the relevant football regulations (eg, conflicts of interest, tapping up and poaching) and at times the law as well (eg, fraud, bribery and tax evasion). Over the years, calls to limit the power and influence of football intermediaries have tended to focus on one or both of these ends of the spectrum.

In an attempt to limit the flow of money out of the game, in 2014 FIFA controversially decided to deregulate football agent activity by replacing its Players' Agents Regulations (in force since 2007) with the FIFA Regulations on Working with Intermediaries (FIFA RWI) which came into force on 1 April 2015. In doing so, the agent licensing regime (which involved agents having to pass an exam, hold a license issued by their national association and hold professional liability) was dispensed with. One of FIFA's core justifications for doing so was that less than 20% of the international transfers that had taken place since 2013 had involved a licensed agent[4] and therefore the focus should shift away from strict controls on agents to greater transparency and a proposed 3% cap on commission.

Since 2015, the regulation of intermediaries has in effect been delegated to national associations, with the FIFA RWI prescribing certain mandatory minimum requirements for national associations to implement and enforce in relation to the involvement of intermediaries in (a) concluding an employment contract between a player and a club, and (b) concluding a transfer agreement between two clubs.[5] National associations are expressly permitted to regulate beyond the minimum requirements of the FIFA RWI.[6]

As the number of Australian based players moving to the Middle East to pursue their football career is increasing, this article examines the regulatory framework for intermediaries in the UAE overseen by the UAE Football Association (UAEFA) and considers how that landscape looks set to change in light of the imminent new FIFA regulations for football agents. Football Australia's Regulations on Working with Individuals remains the base regulation for which indermediaries acting in Australia must follow.

2. Regulation of intermediaries in the UAE

As a member association of FIFA, the UAEFA is required to issue and enforce regulations which incorporate the minimum requirements under the FIFA RWI, subject to mandatory UAE laws.[7] Accordingly, on

30 June 2015 the General Assembly of the UAEFA approved the UAEFA Football Intermediaries Regulations (UAE RWI) to regulate the relationship between intermediaries and players/teams.

As a general observation, the UAE RWI is largely based on the FIFA RWI and does not include many requirements over and above the mandatory minimum provisions of the FIFA RWI. The UAE RWI is therefore a relatively basic set of regulations compared to certain other jurisdictions. For example, the English Football Association has relatively sophisticated regulations that are largely based on its previous Football Agents Regulations (in effect between 4 July 2009 and 1 April 2015) and they substantively address issues such as tapping up, poaching, concealment and the representation of minors, as well as annexing mandatory standard form representation contracts.

The key aspects of the UAE RWI are summarized below. Unless noted otherwise, the scope of the UAE RWI under each section is materially consistent with the FIFA RWI.

A. Definition of intermediary

The UAE RWI defines an intermediary as "*a natural person or legal person who, with or without fee, represents players and/or clubs in negotiations with a view to concluding an employment contract, or represents clubs in negotiations with the view of concluding a transfer or loan agreement*".[8]

The definition of an intermediary under the UAE RWI is therefore materially the same as the definition of an intermediary under the FIFA RWI.[9] Notably, like the FIFA RWI, the UAE RWI does expressly permit companies being intermediaries. It is also notable that like the FIFA RWI, but unlike certain other jurisdictions (such as England), the UAE RWI does not define "intermediary services". The presumption therefore being that the UAEFA would take a broad view of what constitutes intermediary activity.

B. Scope of the UAE RWI

The UAE RWI expressly states that it applies to the use of intermediary services by clubs and players in connection with the conclusion of an employment contract between a player and a club and the conclusion of a transfer or loan agreement between two clubs and a player.[10]

C. General principles

The general principles of the UAE RWI are stated to be:[11]

1. players and clubs may use the services of intermediaries when conclusion of an employment contract, transfer or loan agreement;
2. an intermediary must be registered in accordance with the provisions of the UAE RWI;
3. when selecting an intermediary, clubs and players must act with "due diligence", ie, they must exert reasonable efforts to ensure that the intermediary signs the intermediary declaration prescribed by the UAEFA as well as the representation contract between the parties; and

use of officials (as defined in Article 1 of the UAEFA Statutes) to act as intermediaries is prohibited.

D. Registration of an intermediary

The UAE RWI prescribes the following registration framework:[12]

1. a register of intermediaries shall be maintained by the UAEFA;
2. to ensure transparency, intermediaries must be declared each time they are involved in a transaction; and

clubs or players, who used the services of an intermediary, must submit an intermediary declaration (in the form prescribed in Annexes 1 and 2 of the UAE RWI) and any other documents required by the FA for each transaction involving an employment contract, transfer or loan agreement.

E. Intermediary registration requirements

The UAE RWI prescribes registration requirements,[13] which include submitting a valid police clearance certificate, holding an appropriate commercial licence and having a permanent office, with the applicant to have at least five years' experience in the sports field. There is also requirement that the applicant does not have any contractual relationship with any local, continental or international football associations that may lead to the possibility of a conflict of interest.

The registration requirements under the UAE RWI are materially the same as those under the FIFA RWI,[14] save that there are additional requirements under the UAE RWI (subparas 1, 2, 3 and 4 above).

F. UAEFA fees

The UAE RWI specifies the following fees are payable to the UAEFA:

1. an annual license fee of AED 20,000;[15] and
2. a share of the amount paid to the intermediary in each contract, transfer or loan process upon registration of the player, as follows:
   a. 5% where the intermediary has a registered office in the UAE; or

b. 10% where the intermediary does not have a registered office in the UAE.[16]

The above fees payable to the UAEFA under the UAE RWI are not prescribed under the FIFA RWI and should therefore be borne in mind as an extra cost associated with conducting intermediary activities in the UAE. Interestingly, the payment of an annual license fee is one of the proposals expected to be included in the new FIFA agents regulations (see s 3 below).

G. Terms of representation contract

THE UAE RWI specifies the following requirements in relation to the relevant representation contract:[17]

1. players and clubs shall determine in writing the nature of the legal relationship with the intermediary within the representation contract;
2. the representation contract, as a minimum, shall include the name of parties, scope of services, term of the relationship, intermediary fee, general conditions of fee payment, date of signing, termination conditions and the signature of the parties; and
3. for each transaction involving the intermediary, the representation contract between the intermediary and player or club must be handed over to the UAEFA upon registration of the player.

Whilst there is no express requirement in the UAE RWI that the representation contract be entered into prior to the intermediary commencing intermediary activities or that the representation contract must be signed by a player's guardian(s) if the player is a minor, the registration framework under the UAE RWI is otherwise materially the same as that under the FIFA RWI.[18]

Notably, unlike in certain jurisdictions (such as England), the UAEFA does not prescribe a template standard representation contract that must be used in relation to intermediary activity in the UAE, nor does it prescribe a maximum duration for representation contracts (eg, in England the maximum permitted duration is two years)

H. Disclosure of information

THE UAE RWI prescribes the following disclosure requirements:[19]

1. players and clubs shall disclose to the UAEFA all details in relation to the agreed fees and the payments paid or to be paid to the intermediary of any kind whatsoever;
2. upon request by the UAEFA, players and clubs shall disclose all contracts and agreements concluded with intermediaries for the purpose of UAEFA investigations;
3. all contracts and agreements with intermediaries shall be attached to the relevant transfer agreement or employment contract for the purpose of registering the player;
4. the relevant employment contract or transfer agreement shall include the name and signature of relevant intermediary, and it must be proved if no intermediary was used; and
5. the UAEFA shall disclose on its official website, at the end of May each year, all intermediaries' names, who have been registered and their transactions. The UAEFA shall disclose the total amount of all fees or payments paid to intermediaries by players registered by the UAEFA or affiliated clubs, separately.

The UAEFA may disclose, to registered players and member clubs, information in connection with transactions found to be in violation of these provisions.

I. Payments to intermediaries

THE UAE RWI prescribes the following requirements relating to payment of intermediaries:[20]

1. an intermediary's fee for representing a player or club in concluding an employment contract shall not exceed 3% of the player's total monthly salary for the entire term of the contract;
2. an intermediary's fee for representing a club in any loan or transfer agreement shall not exceed 3% of the player's total monthly salary with the new club for the entire term of the contract, and the intermediary shall be entitled to a lump sum unless otherwise agreed prior to the completion of the services;
3. clubs warrant not pay the dues in respect of a transfer or loan (such as transfer fee, training compensation and solidarity contribution) to or by intermediaries, nor can clubs assign such sums to intermediaries;
4. subject to subparas 6 and 10 below, an intermediary's dues for services shall be paid directly and exclusively by the intermediary's client;
5. following the conclusion of an employment contract between a player and club, the club may, by written agreement between them, make the payment to the intermediary on behalf of the player, in accordance with the payment terms agreed upon between the player and the intermediary;
6. officials must not receive any amounts from an intermediary; and
7. players or clubs who use intermediary services when negotiating an employment contract or transfer agreement, must not pay any amount to the intermediary if the relevant player is a minor.

The disclosure requirements under the UAE RWI are therefore materially the same as those under the FIFA RWI.[21] Notably the UAEFA has elected to impose a mandatory cap on commission of 3% despite the FIFA RWI cap being non-mandatory.

J. Conflicts of interest

The UAE RWI imposes the following requirements in relation to conflict of interest:[22]

1. before using an intermediary, players and clubs shall exert reasonable efforts to ensure that there is no or potential conflict of interest, whether with respect to the player, club or intermediaries;
2. in the event that an intermediary has declared in writing the existence of an actual or potential conflict of interest with any party and the intermediary obtained the express written consent of the parties prior to the commencement of negotiations, then there is no conflict in interest; and

if a player or club desires to use the same intermediary's services in connection with the same transaction in accordance with the terms mentioned in subpara 2 above, the club and player shall provide an express written consent prior to the commencement of the negotiations, clarifying in writing the party (whether club or player) who will pay the intermediary's fee. The parties shall notify the UAEFA of this agreement and provide all aforementioned documents upon registration of the player.

K. Penalties

The UAE RWI prescribes the following sanctionable violations:[23]

1. providing false information to circumvent the provisions of the UAW RWI;
2. breaching of contractual obligations;
3. inducing a player to terminate or breach a contract; and
4. violating the provisions of the UAE RWI, UAEFA statutes, regulations or circulars annexed thereto, or failing to comply with the decisions of relevant UAEFA committees.

The applicable sanctions for the above violations being:

a. written warning;
b. fine of not less than AED 20,000 and not more than AED 100,000;
c. temporary suspension of license;
d. license withdrawal; and
e. ban from participating in any football-related activity.

In accordance with the FIFA RWI,[24] the UAEFA has prescribed sanctions for non-compliance with the UAE RWI.

3. The new FIFA agents regulations

After sustained criticism of FIFA's decision to deregulate agents, in 2019 the FIFA Council unanimously endorsed a series of reform proposals designed to address the "*law of the jungle currently in place, with conflict of interests rife and exorbitant 'commissions' being earned left and right*".[25] Three subsequent years of consultations between stakeholders (including FIFA, the confederations, FIFPRO, ECA and the World Leagues Forum) have resulted in draft new FIFA agents regulations to regulate international transfers, which are expected to be issued imminently.

Although yet to be finalised, the key proposals that may feature in the new FIFA agents regulations include:[26]

1. representation contracts in force on the date the new FIFA agents regulations are issued will remain valid (save for those that do not contain the prescribed minimum terms) until they expire, but they cannot be extended;
2. new or renewal representation contracts must be in writing on FIFA's standard form;
3. representation contracts with player must only be for a maximum duration of 2 years;
4. a representation contract with a minor may be entered into no earlier than 6 months before the player reaches the age at which they can sign their first professional contract in the jurisdiction of the employing club;
5. a mandatory commission cap of 10% of the transfer fee for agents of releasing clubs, 3% (or 5% if the player's annual remuneration does not exceed $200,000) of the player's remuneration for player agents, and 3% (or 5% if the player's annual remuneration does not exceed $200,000) of the player remuneration for agents of engaging clubs;
6. dual-representation is limited to an agent acting for the player and the recruiting club to avoid conflicts of interest;
7. all payments of agent commission must be paid via the new FIFA clearing house;
8. an agent must only be paid by its client and not by any third party;
9. payment of commission may only take place after the closing of the registration period in which the transfer took place and in instalments every three

months during the relevant employment contract (except in the case of an agent representing a selling club who will be entitled to receive their commission when the transfer fee is received from the buying club);

10. "other services" provided by the agent to the client (eg management of image rights and negotiating commercial contracts) may also be subject to the relevant commission cap;
11. all relevant documents (eg, the relevant representation agreement, "other services" agreements, settlement agreements) must be uploaded to the FIFA platform;
12. reintroduction of a mandatory licensing system, with licenses only being awarded to natural persons (ie not companies) who have passed an exam, satisfied ongoing good character requirements and paid the annual FIFA license fee;
13. licenses will be granted indefinitely (subject to continuing payment of the annual fee and professional development requirements) and will enable holders to conduct agent activities worldwide (though stricter national regulations may apply);
14. a FIFA dispute resolution system will be established to address disputes between agents, players and clubs;
15. tapping up, concealment, inducements are all specifically prohibited;
16. coaches may be included within the scope of the regulations, as well as players; and
17. details of all agents, commissions and sanctions imposed on agents will be published by FIFA.

4. Impact of the new FIFA agents regulations on the UAE RWI

It is expected that FIFA will require national associations to implement domestic agents regulations based on the principles of the new FIFA agents regulations within a grace period (yet to be determined) and to include certain mandatory provisions (eg, disclosure of information to FIFA and dispute resolution). National associations will be responsible for enforcing their domestic agents regulations.

Given the significant divergence between the current intermediaries regime and the imminent agents regime, once the new FIFA agents regulations come into force, the UAEFA will need to replace its UAE RWI with a new set of UAE agents regulations that incorporate the principles and mandatory provisions of the new FIFA agents regulations. As the UAE RWI does not include many requirements over and above the mandatory requirements of the FIFA RWI, there may be a relatively steep learning-curve for stakeholders in the UAE as they transition to the new FIFA agents regime as compared to certain jurisdictions (eg, England) whose current regulations have developed over time to cover off some of the features that are expected to be included in the new FIFA agents regulations (eg, maximum 2-year duration of representation contracts, standard form representation contracts and restrictions on representation of minors).

That said, certain features of the UAE RWI that are not found in the FIFA RWI appear set to be included in the new FIFA agents regulations, such as annual license fees and mandatory commission caps (if these survive the various ongoing — and potential additional — legal challenges against their legitimacy). It should also be borne in mind that the UAEFA would be free to include stricter provisions in its domestic regulations if it sees fit to do so in order to achieve its objectives.

Ultimately, it is currently a case of wait and see as to what will the new FIFA agents regulations will contain and therefore how the regulatory landscape for intermediaries in the UAE will need to change. Whilst some aspects are still the subject of consultation between the various stakeholders, it does seem clear that the new agents regime will be stricter, more transparent and more difficult to abuse. These developments should be welcomed by players, federations and scrupulous agents alike.

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Footnotes

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Sports Law
Bulletin

The evolution of key world anti-doping code principles (for "Presence" cases)

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Introduction

Anti-doping regulations and Court of Arbitration for Sport (CAS) jurisprudence applying the same have come a long way since the World Anti-Doping Agency was created and first published the World Anti-Doping Code (the Code) in 2003.

The Code is the core document that harmonises anti-doping policies, rules and regulations within sport organisations and among public authorities around the world. All signatories agree to implement the Code and to enact and respect anti-doping policies that wholly conform to it (a mandatory compliance obligation). This uniform approach addresses problems that previously arose from disjointed and uncoordinated anti-doping efforts, such as among others: a scarcity and splintering of resources required to conduct research and testing, a lack of knowledge about specific substances and procedures being used and to what degree, and, markedly prior to 2003, an inconsistent approach to sanctions against those Athletes found guilty of doping.[1]

CAS comprises the Anti-Doping Division (the ADD), the Ordinary Arbitration Division and the Appeals Arbitration Division. The ADD was established in 2019 as a delegated first instance panel to hear matters resulting from breach of Code signatories' anti-doping rules. Additionally, and as always, pursuant to Article 13.2 of Code, the CAS Appeal's division acts as the appeals body regarding anti-doping decisions taken under Code in cases arising from first instance anti-doping decision taken by any signatory's judicial body, which may be the CAS ADD or any other operationally independent first instance disciplinary body. Finally, the Ordinary Division may hear anti-doping cases where both parties agree to bypass the first instance and have the matter heard directly at CAS.[2]

A CAS arbitrators' responsibility is first and foremost to apply the law. In anti-doping cases, that of course is the Code and each Code signatory's anti-doping rules, which are harmonised and substantively identical. Whilst the Code's legal requirements have consistently been upheld by CAS, regulatory amendments and legal precedent have allowed for many of the Code's core legal principles to evolve, with CAS Panels occasionally even taking on the role of regulator to fill a perceived lacuna in the Code — with pertinent regulatory amendments often following as a result.[3]

The doping *lex sportiva* has flourished at the CAS into a body of law that is extensive, expansive and reflective of the ever-evolving Code and the universal legal principles that are fundamental to the fight against doping in sport. This article identifies some of the Code's core principles, namely: strict liability, fault, intention, and proportionality and discusses, with reference to CAS jurisprudence, how they have evolved since the first version of the Code.

Strict liability

Under the Code, all athletes are bound by the principle of "strict liability". This means that all athletes are responsible for any prohibited substance found in their sample and *it is not necessary that intent, Fault, Negligence, or knowing Use on the Athlete's part be demonstrated by the Anti-Doping Organization in order to establish an anti-doping rule violation*.[4] As stated in the Comment to Article 2.1 of the Code:

> *An antidoping rule violation is committed under this Article without regard to an Athlete's fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.*[5]

The Code's strict liability principle differs from what is envisioned by common law principles. As with the Code's definition for "intentional" which as discussed below differs from the proper definition of intentional, the Code's definition of strict liability is also not exactly that applied in common law where strict liability, or absolute liability, refers to the legal responsibility for damages or injury even if the person who is found strictly liable was not at fault or negligent. Most commonly used and relied upon in product liability cases in tort law, to be successful in establishing strict liability, the injured party must prove causation, eg: that the product was defective or that harm was caused as a result to the same.

Applied in anti-doping and a fundamental principle of the Code since its inception, the principle of strict liability makes an athlete strictly liable and subject to sanctions even if there are effectively no damages or injury committed by the Athlete in question and if the sanctioning authority has not established such harm or damage. For this reason, the Code's application of the strict liability principle is sometimes criticized as being overly unforgiving for athletes who inadvertently test positive, especially when minimal concentrations of a non-performance enhancing substance is detected in their urine sample.

Nonetheless, the application and definition of strict liability under the Code have remained unchanged and for the most part unchallenged since 2003. While the principle itself and its rigorous application has not evolved, it appears from CAS jurisprudence that in some circumstances the principle is not perceived as a just cornerstone of anti-doping regulations.[6] Commentary from CAS awards seems to indicate that there is a certain uncomfortableness by panels to be bound to apply the strict liability principle in cases where the evidence supports the allegation that an Athlete exercised utmost caution yet truly has no idea where the substance detected in their urine might have come from (usual is minimal concentrations) and that its use could not have been performance enhancing. This is notably so in cases where supplements, food and environmental contaminants cause Adverse Analytical Findings ("AAF") reported in trace concentrations, on account of laboratories enhancing their capacity to detect substances in such negligible amounts. The "uncomfortableness"[7] voiced by panels stems from the burden strict liability places on athletes in cases where circumstances are such that no damage or harm could have been caused by the AAF and where the Athlete can simply not bring evidence to support their innocence.

Time will tell whether the Code's still immutable principle of strict liability will be modified to better allow for CAS awards to allow "clean" athletes not to be wrongly convicted in the face of the impossibility of countering the principle of strict liability. In the meantime, CAS Panels and all athletes continue to be bound by the same.

Although an Anti-Doping Rule Violation ("ADRV") is established notwithstanding an Athlete's state of knowledge, the same athlete's "fault", "negligence" and "intention" are directly relevant to the questions of liability and sanction. These Code principles have evolved through time as discussed below.

No fault or negligence/no significant fault or negligence

Since the first edition of the Code in 2003, to benefit from a reduction of sanction based on "no significant fault or negligence", athletes have always held the onus to establish the source of the prohibited substance on a balance of probability as a mandatory first hurdle.[8]

CAS jurisprudence has firmly established that, "*[i]n order to establish the origin of a Prohibited Substance by the required balance of probability, an Athlete must provide actual evidence as opposed to mere speculation*".[9] In addition, it is not necessary to identify one particular source as the one for the Appellant to be able to benefit from the No Fault or Negligence provisions. "*The standard of proof of balance of probability requires that the occurrence of a scenario suggested by an Athlete must be more likely than its non-occurrence, and not the most likely among competing scenarios.*"[10]

Once an athlete has succeeded, with compelling supporting evidence, in establishing on a balance of probability the source of a prohibited substance detected in their sample, then an athlete's degree of fault and negligence (and possibly intent as discussed below) are taken into consideration in order to set the appropriate Consequences (sanction) applicable as a result of the "presence ADRV" (where a sample analysis has detected a prohibited substance in their sample).

There are two options. Once the source of the AAF has been established, an athlete holds the burden of establishing that his or her degree of fault or negligence is either not existent (which would fully absolve him or her) or not significant (which would allow one to benefit from a reduction of sanction ranging from two years down to a warning).

For a finding of no fault the case must be exceptional. This is especially so considering the strict liability standard that is applicable to all cases. CAS' generally confirmed approach is that a finding of No Fault applies only in truly extraordinary cases. For a finding of No Fault, the athlete must have exercised the "utmost caution" in avoiding doping.[11] The athlete's fault is "*measured against the fundamental duty which he or she owes under the (Code) to do everything in his or her power to avoid ingesting any Prohibited Substance*".[12] Athletes have rarely been successful in establishing No Fault, and where CAS awards have sided in their favour on this point, the cases have been referred to, whether rightly or wrongly as "outliers".[13]

The principles of no fault or negligence and no significant fault or negligence have been in the Code since inception but have both evolved and expanded in CAS jurisprudence and through various amended versions of the Code — notably to deal with contamination cases, contaminated product cases,[14] minors or protected persons,[15] substances of abuse,[16] recreational athletes,[17] whereabouts violations etc all of which were not anticipated when the first Code was drafted.

In the early years of the application of the Code, little flexibility was afforded to panels to reduce the presumptive period of ineligibility.[18] Notably, subjective elements were rarely considered in the assessment of fault. In time, as the Code evolved, as cases became far more complex, and as arbitrators' knowledge of antidoping progressed, CAS Panels have sometimes taken more of a regulatory role in order to advance the assessment of fault and negligence.

Perhaps the greatest example of CAS acting as regulator is one in which CAS instituted what is often perceived to be a decisive criterion based on which an Athlete's period of ineligibility (for specified substances) should be determined based on applicable range and assessment of fault.[19] At the time, (and still today) the Code had not provided for any range of fault, and yet the panel in that case decided that such a range should be established as being standard, normal or light. The panel then went even further and found that in order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. This case has been referred to and relied upon consistently as somewhat of a sentencing guideline, even if such an assessment of the range of fault is not provided for in the Code.

Another important element that has evolved over time in CAS Panels' assessment of fault is the ability for athletes to ascribe some responsibility on others for their ADRV in order to successfully rely on the Code's no-significant fault provisions and benefit from their leniency. While for the most part the Code and CAS case law maintains the position that athletes are responsible for any substance found in their body, that they alone hold a "duty of utmost caution"[20] and that they cannot point the finger at others, as sport becomes bigger business and Athletes hold entourages on which they increasingly rely, CAS has found in some circumstances that an athlete's reliance on their entourage (a member of which was responsible for an oversight leading to an AAF (eg: failure to inform the athlete of new substances on the Prohibited List) could, by assessing objective and subjective fault, justify a reduction in sanction.

All the cases referred to demonstrate the CAS evolution from what was at first a very rigid application of the no fault or negligence and no significant fault or negligence provisions of the Code, to one where sanctions are imposed based on a more balanced assessment of objective and subjective fault.

If it took many years for CAS and other arbitral bodies to comfortably and consistently navigate the application of the principles of fault and negligence, the introduction of the principle of intention complicated things further.

Intention

In 2015, when the third version of the Code was published, the concept of *intention* was first introduced, along with different classifications of substances, and an increased period of ineligibility. For ADRVs involving "non specified substances", which are substances that are most egregious eg EPO, Steroids etc and for which the "presence" in a urine sample is usually the result of "intentional" use, the presumptive period of ineligibility became four years, with a possibility of reducing the period of ineligibility to two years where an athlete could establish the ADRV was not intentional and then a further year if an athlete could also establish that he or she has no significant fault or negligence for the ADRV (again contingent on the Athlete first establishing the source of the AAF on a balance of probabilities).

What is noteworthy is that the definition given to Intentional ADRVs in 2015 was not (and is still not) the definition of "intentional" as provided in the dictionary. For example, *made, given, or done with full awareness of what one is doing.*[21] Rather prior to 2021, as used in Articles 10.2 and 10.2.3,

> *the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*

As of 2015, a 4-year period of ineligibility for the "presence" of a non-specified substance (mandatory pursuant to Code Article 10.2.1) could be reduced down to 2 years — if an athlete could effectively establish (again on a balance of probabilities) that he or she did not have the "intention" to commit the ADRV. Any further reduction in the sanction would follow the same logic as it would for a specified substance.[22] The CAS Panel's assessment of the athlete's degree of "fault" would then be as above, based on an objective and subjective assessment of all the evidence and circumstances of a particular case.

Further to the publication of the 2015 Code, CAS Panels sought to interpret Code Article 10.2.1.1.[23] Specifically, they questioned whether to establish a lack of intention, an athlete first had to establish the source of the prohibited substance to gain access to the 2-year sanction reduction it offers.

Upon publication of the 2015 Code, the initial finding by most CAS Panel's was that an athlete had to identify source to benefit from lack of intention.[24] Then in time, there was an acknowledgement that the principle of having to establish source to dispel intention was not an absolute,[25] especially when the specific circumstances of some unique cases did not warrant a finding that an athlete had intentionally committed an ADRV and where a panel found that the Athlete did not "intend" to cheat.

Various CAS Panels also relied on legislative history to guide their findings on this point, relying on the following:

> *The legislative history clearly evidences that in order to rebut the presumption of intent the Athlete need not show how the prohibited substance entered into his or her system.*
> *The drafting team of the WADA Code 2015 had contemplated at the time to introduce such requirement into Art. 10.2 of the WADA Code and had requested a supplementary expert opinion by Judge Jean-Paul Costa on this issue, i.e. the new draft wording. The latter stated in his expert opinion as follows:*
>
> > free translation: *Such proof* [how the substance entered the body] *is difficult to provide. Is such aggravation excessive? One could have doubts in this respect, because an impossible proof either leads to a reversal of the burden of proof or to the irrefutable assumption of an anti-doping rule violation* [. . .] *I conclude, thus, not without some hesitation, that this new text of the draft may be considered acceptable, subject however that it will be for the competent jurisdiction in the individual case to assess the elements of evidence adduced by the parties. ... I conclude, thus that . . . the WADA Code redaction group went back to the initial text of the draft (which corresponds to the final text enacted) and acknowledged that whilst the route of the ingestion of the prohibited substance is an important fact in order to establish whether or not an athlete acted intentionally, it should not be a mandatory condition to prove lack of intent on the part of the Athlete.*[26]

This view was confirmed by experts in the field of anti-doping who stated that:

> *The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete's level of Fault, in the context of Article 10. 2. 3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional.*[27]

And, in an often-cited CAS case in which again, CAS acted a regulator by resolving the heated debate, it was perhaps once and for all decided that it was possible for an athlete to establish lack of intention without establishing the source but that this unlikely occurrence would require the Athlete to pass through the "narrowest of corridors".[28] Still, an article published at the time underlined "*that CAS Panels struggle to find a consistently fair test, without letting "intentional" become the implicit default standard for non-Specified Substances*.[29]

As a result of the conflicting body of jurisprudence that emanated from the application of the "intention" provisions, in 2021, the comment to Code Article 10.2.1.1 expressly resolved the debate and now reads that *it is possible for an athlete to disprove intention without establishing the source, even though this would be highly unlikely.*[30]

Most CAS awards concur that it is, in practice, very difficult to rebut the presumption of intent without showing how the prohibited substance entered the athlete's system.[31] But the comment to Code Article 10.2.1.1 has nonetheless kept the door, or a "narrow corridor", open for athletes to pass through where they are able to convince a CAS Panel, with exceptionally compelling evidence, that the ADRV for which they are being charged was effectively not intentional.

Noteworthy is that the definition of "intention" in the Code has since been modified in the 2021 Code and no longer refers to the word "cheater". This regulatory amendment, which pointedly deleted the words "refers to Athletes who cheat" was likely a direct result of cases were an athlete benefited from a reduction from 4 to 2 years, without establishing the source, based on a panel's assessment of the evidence and credibility of an athlete, which the panel found should not result in them being branded as a "cheater".[32] In these cases, CAS underlined the importance of identifying those players who cheat as opposed to players who inadvertently commit ADRVs. Thus, notwithstanding the regulatory amendments, CAS precedent supports that in exceptional circumstances panels may examine all the objective and subjective circumstances of a case to decide if a finding that an ADRV was not intentional is warranted, even where a player is unable to determine the exact origin of the substance to the required evidentiary standard of proof.[33]

Given that a 4-year period of ineligibility is the presumptive sanction for "presence" ADRVs involving non-specified substances, which for many athletes is a career ending sanction, the clarification of the principle of "intention" in the Code and in the comment to Article 10.2.1.1 now betters allows CAS Panels to assess evidence and render what they perceive to be a fair decision, grounded in law and evidence, whilst being proportionate to the infraction and the Athlete's conduct in relation to the same.

Proportionality

Although the principle of proportionality was inherent in most doping disputes when the 2003 Code was in force, jurisprudence, and Code revisions, have modified

this significantly. Anti-doping case law has evolved tremendously since, and where proportionality used to be one of the main legal principles applied in awards rendered under the Code, this principle has now been all but cast aside in favour of evidence relating to: "fault and negligence" and "intention".

Since the coming into effect of the 2015 Code CAS, jurisprudence "*is now clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the Code*".[34] It is widely accepted that the Code has already incorporated sufficient flexibility in its application.

Pre 2015, various CAS Panels applied the principle of proportionality when quantifying consequences and sanctions in order to fill a so-called lacuna in the Code. One case from 2006, indicated that in the very rare case in which the Code does not provide a just and proportionate sanction, "*there is a gap or lacuna which is to be filled by a Panel, not exercising a discretion, but applying the overarching principle of justice and proportionality on which all systems of law, and the Code itself, are based*".[35]

Since the entry into effect of the 2015 Code, CAS jurisprudence is no longer favourable to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the Code. The Code has been found repeatedly to be proportional in its approach to sanctions and CAS Panels have generally agreed that the question of fault has already been built into its assessment of length of an applicable sanction.

The 2015 Code was the "*product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim"*[36] and confirmed the well-established view that the Code "*has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction"*.[37]

CAS Panels now widely and generally find that the no fault or negligence and no significant fault or negligence provisions in the Code are themselves embodiments of the principle of proportionality.[38]

Even where CAS Panels found that "*even an 'uncomfortable feeling' regarding a sanction mandated in the rules, had there been one, would not have been sufficient to involve the principle of proportionality where the applicable rules include a sanctioning regime which is proportionate and contains clear and concise mechanism which allows for a reduction of the applicable sanction*"[39] or had "an uncomfortable feeling" regarding the applicable sanction[40] as a result of being bound by the strict liability principle, this uncomfortable feeling was usually not sufficient to involve the principle of proportionality by reducing a sanction that has been ruled appropriate on the basis of facts and evidence before the panel and more importantly on the basis of the applicable rules.[41]

Thus, the principle of proportionality is now embodied in the Code and rarely if ever successfully relied upon before CAS to further reduce a sanction, beyond what is already provided in the Code.

Proportionality for disqualification

If proportionality is no longer relevant in the application of the appropriate sanction, it remains relevant when considering disqualification of results: *When applying the wide discretion it retains in the disqualification of results, a CAS Panel must be guided by the principles of fairness and proportionality.*[42]

According to CAS, the principle of proportionality requires panels to assess whether a sanction is appropriate to the violation committed. Excessive sanctions are prohibited.[43] Accordingly, arbitrators have found that the principle of proportionality must still be considered when establishing a period of disqualification. Specifically, whether it would be fair to disqualify the athlete's results for a period well over the time for which the athlete will effectively be sanctioned.[44]

This is wholly consistent with Article 10.10 of the Code which provides that *"if fairness requires otherwise", proportionality may allow for a different period of disqualification than the one strictly provided in the Code*.[45]

Conclusion

The implementation of the concepts of intention, fault and proportionality in the Code and CAS jurisprudence has resulted in a rich anti-doping *lex sportiva* that continues to evolve. Time will tell if a regulatory evolution to the Code's rigorous approach to strict liability may be implemented whilst maintaining the integrity and fight against doping in sport. In the meantime, CAS Panels can, as always, be expected to continue to apply the Code and all its core principles in their current version fairly, independently and impartially.

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Footnotes

1. www.wada-ama.org/en/what-we-do/the-code.
2. Article 8.5 of the Code reads: "Anti-doping rule violations asserted against International-Level Athletes, National-Level Athletes or other Persons may, with the consent of the Athlete or other Person, the Anti-Doping Organization with Results Management responsibility, and WADA, be heard in a single hearing directly at CAS".
3. *Union Cycliste Internationale (UCI) v Monika Schachl & Österreichischer Radsport Verband (ÖRV),* CAS 2008/A/1744 at [1]; *Mariano Puerta v International Tennis Federation (ITF)*, CAS 2006/A/1025 at [5]; *International Olympic Committee (IOC), World Anti-Doping Agency (WADA), International Skating Union (ISU) v Russian Anti-Doping Agency (RUSADA), Kamila Valieva, Russian Olympic Committee (ROC)*, CAS OG 22/08 -CAS OG 22/09 -CAS OG 22/10 at [196].
4. See Article 2.1.1 of the Code.
5. See comment to Article 2.2.1 of the Code.
6. *Jarrion Lawson v International Association of Athletics Federations,* CAS 2019/A/6313 at [83] (*Lawson*); *Canadian Centre for Ethics in Sport (CCES) v Dominika Jamnicky and Dominika Jamnicky v Canadian Centre for Ethics in Sport (CCES)* CAS 2019/A/6443 and 6593 at [184] (*Jamnicky*); *World Anti-Doping Agency v Swimming Australia, Sport Integrity Australia and Shayna Jack and Sport Integrity Australia v Shayna Jack and Swimming Australia Limited,* CAS 2019/A/7579–7580 at [138] (*Swimming Australia)*; *Ivan Ukhov v International Association of Athletics Federations (IAAF),* CAS 2019/A/6168 at [5].
7. Arbitration CAS 2019/A/6541 *Hiromasa Fujimori v Fédération Internationale de Natation (FINA)*, award of 6 March 2020, CAS 2019/A/6451 at [94], *Neiki Nabi v Estonian Center for Integrity in Sports*, award of October 20 2022, CAS 2021/A/8125 CAS 2021/A/8125 at [189].
8. In 2003 and 2009, both articles 10.5.1 and 10.5.2 expressly stated this requirement. In 2015, it was moved out of the provision and inserted in the Definitions and remains in the Definitions in the 2021 Code. Specifically, in the 2021 Code at Appendix 1 — Definitions.
   "*No fault or Negligence: The Athlete or other Peron's establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she has used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.* ***Except the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system***".
   "*No Significant Fault or Negligence: The Athlete or other Peron's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No fault or Negligence, was not significant in relationship to the anti-doping rule violation.* ***Except the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system***".
9. *World Anti-Doping Agency (WADA) v Damar Robinson & Jamaica Anti-Doping Commission (JADCO)*, CAS 2014/A/3820 at [80].
10. *Sara Errani v International Tennis Federation (ITF) and National Anti-Doping Organisation (Nado) Italia v Sara Errani and ITF*, CAS 2017/A/5301 & 5302 at [183]; *Oleksandr Rybka v Union of European Football Association (UEFA)*, CAS 2012/A/2759 at [18]–[49].
11. *José Paolo Guerrero v Fédération Internationale de Football Association (FIFA) and CAS World Anti-Doping Agency (WADA) v FIFA and José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018)*, CAS 2018/A/5546 at [80] (*Guerrero*); *Arbitrations International Ski Federation (FIS) v Therese Johaug and Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) and Therese Johaug v NIF, award of 21 August 2017*, CAS 2017/A/5015 & 2017/A/5110 at [172]–[176] and [185]–[186] (*Johaug*).
12. *Guerrero*, above, at [80]; *Robert Kendrick v International Tennis Federation (ITF), award of 10 November 2011 (operative part 22 August 2011)*, at [22].
13. *Lawson*, above, at [83]; *Jamnicky*, above, at [190].
14. Defined in Appendix 1 of the Code 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"*.
15. Defined in Appendix 1 of the Code as: "*An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation"*.

16. Defined in Article 4.2.3 of the Code as: substance "*which are specifically identified as Substances of Abuse on the Prohibited List because they are frequently abused in society outside of the context of sport*".
17. Defined in Appendix 1 of the Code as: "*A natural Person who is so defined by the relevant National Anti-Doping Organization; provided, however, the term shall not include any Person who, within the five years (5) prior to committing any anti-doping rule violation, has been an International-Level Athlete (as defined by each International Federation consistent with the International Standard for Testing and Investigations) or National-Level Athlete (as defined by each National Anti-Doping Organization consistent with the International Standard for Testing and Investigations), has represented any country in an International Event in an open category or has been included within any Registered Testing Pool or other whereabouts information pool maintained by any International Federation or National Anti-Doping Organization*".
18. *International Association of Athletics Federations (IAAF) / Fédération Camerounaise d'Athlétisme (CMR*), *award of 2 October 2003*, CAS 2003/A/448 at [11]–[14]; *H. v Association of Tennis Professionals (ATP), award of 24 March 2005*, CAS 2004/A/690 at [49]–[56], see also, consideration of "No Fault or Negligence" applied at [24]–[32].
19. *Marin Cilic v International Tennis Federation (ITF) and International Tennis Federation (ITF) v Marin Cilic, award of 11 April 2014 (operative part of 25 October 2013*), CAS 2013/A/3327 and CAS 2013/A/3335 at [67]–[74].
20. *(CAS) advisory opinion FIFA and WADA (CAS 2005/C/976 and 986, 21 April 2006,* at [73].
21. Merriam Webster, accessed 14 October 2022, available at www.merriam-webster.com/dictionary/intentional.
22. Specified substances are less egregious substances that are usually the result of inadvertent use or the use and performance enhancing benefits of which warrant lesser sanctions e.g. stimulants). See WADA Prohibited List.
23. Which provides that the period of Ineligibility shall be 4 years where the anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.
24. See for example: *WADA v IWF and Yenny Fernanda Alvarez Caicedo, award of 29 June 2016,* CAS 2016/A/4377 at [51]–[52]; *WADA v Indian NADA and Mhaskar Meghali, award of 20 September 2016*, CAS 2016/A/4626 at [26]; *WADA v EGY-NADO and Radwa Arafa Abd Elsalam award of 16 January 2017,* CAS 2016/A/4563 at [50],[52], *WADA v World Squash Federation and Nasir Iqbal*, CAS 2016/A/4919 at [66], "*in all but the rarest cases the issue is academic*".
25. See for example: *Tomasz Zieliński v IWF, award of 15 March 2018,* CAS 2017/A/5178 at [88] (*Zieliński*); *WADA v SAIDS and Ruann Visser, award of 19 February 2020*, CAS 2018/A/5990 at [192]; *Maurico Fiol Villanueva v FINA, award of 16 March 2017*, 2016/A/4534 at [35],[37] (*Fiol*); *Arijan Ademi v Union of European Football Associations, award of 24 March 2017*, CAS 2016/A/4676 at [72] (*Ademi*); *Carlos Iván Oyarzun Guiñez v UCI, UCI-ADT, PASO & CNOC*, *award of 31 May 2017*, CAS 2016/A/4828 at [136] (*Guiñez*); *WADA v Indian NADA, Geeta Rani (Case I) and WADA v Indian NADA, Geeta Rani (Case II) and WADA v Indian NADA, Geeta Rani (Case III), award of 7 March 2018*, CAS 2016/A/4627 & 4628 and 5283 at [49] (*Rani*).
26. *Zieliński*, above, at [87].
27. A Rigozzi and U Hass, ″Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code", *International Sports Law Journal*, (2015) 15:3-48.
28. *Fiol*, above, at [37].
29. WADA Commentary Team, "The Ademi CAS award: One substance? No Source? No Problem." *WADA Commentary,* accessed 6 Oct 2022, www.wadc-commentary.com/ademi/.
30. See comment to Code Article 10.2.1.1
31. See for example: CAS 2018/A/5739; *World Athletics v Shelby Houlihan* at [90], CAS 2021/O/7977 at [91]; *Fiol*, above, at [37]; *Guiñez*, above, at [136]; *FIFA v CBF & Cristiano Lopes, award of 28 September 2017,* 2017/A/5022 at [97]; *Arsan Arashov v ITF, award of 21 November 2017*, 2017/A/5112 at [109]; *IAAF v RUSAF and Vasiliy Kopeykin, award of 12 July 2018*, CAS/0/5218 at [166]; *WADA v SAIDS and Demarte Pena, award of 21 June 2018*, CAS 2017/A/5260 at [151]; *FINA v GADA and Eastern Europe RADO and Irakli Bolkvadze*, *award of 11 June 2018,* 2017/A/5392 at [72].
32. *Ademi*, above, at [76].
33. See for example: *Fiol*, above, at [35], [37]; *Ademi*, above, at [70], [72]; *Rani*, above, at [47], [48].
34. *Guerrero*, above, at [86].
35. *Mariano Puerta v ITF, award of 12 July 2006,* CAS 2005/A/1025 at [90], [94] (*Puerta*).
36. *Fiol,* above, at [51].
37. *Johaug,* above, at [227].
38. *Serge Despres v CCES and WADA v Serge Despres, CCES and BCS, award of 30 September 2008*, CAS 2008/A/1489 and 1510 at [24]; *Guerrero*, above, at [87] with reference to www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-worldanti-doping-code a legal opinion provided by Jean Paul Costa, a former president of the European Court of Human Rights.
39. *Hiromasa Fujimori v FINA, award of 6 March 2020,* CAS 2019/A/6541 at [3], [92] and 93] (*Fujimori*). See also *S. v FINA, award of 15 July 2005*, CAS 2005/A/830 at [50] (*FINA*); *Joe Warren v USADA, award of 24 July 2008*,CAS 2008/A/1473 at [25] (*Warren*).
40. *Fujimori,* above, at [94]; *Warren*, above at [25].
41. *Nabi* above at [193].
42. *Ekaterina Galitskaia v IAAF*, CAS 2019/A/6167 at 2.
43. *FINA,* above, at [40], [44]–[50]; *Puerta*, above, at [82].
44. *IAAF v RUSAF and Tatyana Firova, award of 1 February 2019*, CAS 2018/O/5666 at [156].

45. *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall**, **unless fairness requires otherwise**, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes*".

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