worldsportslawreport

THE NEWSLETTER FOR THE SPORTS BUSINESS
VOLUME 11 ISSUE 09 SEPTEMBER 2013
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Stephen Lee: 12-year ban for fixing

Stephen Lee has been suspended for 12 years for involvement in fixing seven snooker games, the World Professional Billiards & Snooker Association (WPBSA) announced on 25 September. Lee was sanctioned under Rule 12.1(a) of the WPBSA's Disciplinary Rules and will serve his suspension from 12 October 2012, when his interim suspension was imposed. 'Mr Lee has indicated his intention to appeal against the finding of guilt', reads the sanction notice.

On 16 September 2013, the WPBSA found Lee guilty of accepting benefits to fix the outcome of seven matches at the Malta Cup 2008, the UK Championships 2008, the China Open 2009 and the World Championships 2009. The judgment finds Lee guilty of breaching Rule 2.9 of the WPBSA Members Rules and Regulations.

The WPBSA began investigations on 2 October 2012, after the Crown Prosecution Service (CPS) decided not to proceed with a case against Lee under Section 42 of the Gambling Act 2005. The CPS decision not to prosecute followed a two-year police and Gambling Commission investigation.

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ERC: Premier Rugby's TV deal breaches IRB rules

The European Rugby Cup (ERC) is fighting Premier Rugby's plans to set up a breakaway competition structure for European rugby union, arguing that its broadcasting deal with British Telecom breaches International Rugby Board (IRB) regulations. "Our position has always been that Premier Rugby's broadcasting deal is illegal", said an ERC spokesperson.

IRB Regulation 13.2 prevents any 'Rugby Body, Club or Person' from agreeing a broadcasting deal 'except with the express written consent of the Union within whose territorial jurisdiction such Match…is to be played'. It is understood that under Premier Rugby's £152 million contract, agreed on 12 September 2012, British Telecom has the right to broadcast any games played at Aviva Premiership grounds, including European competition games. "The RFU has yet to give its consent, however it hasn't refused consent either", said a Premier Rugby spokesperson.

ERC signed a deal for BSkyB to broadcast its Heineken and Amlin Cup competitions until 2017/18 on the same date, and is keen for English and French teams to stay in the competition. BSkyB declined to comment on whether their exit would jeopardise the deal.

Premier Rugby and the French Top-14 competition are unhappy about the qualification structure for the Heineken Cup. Currently, the top six of 12 English clubs and 14 French clubs qualify for the Heineken Cup, as do three of the four clubs both Ireland and Wales enter in the RaboDirect Pro12 competition. The Italian and Scottish rugby unions nominate two clubs each. "We want to build a new rugby framework built on merit", said a Premier Rugby spokesperson.

ERC has invited all parties to a 23 October meeting to formulate an agreement to put in place European rugby competitions 'for the 2014/15 season and beyond'. Greame Mew, a Partner with Clyde & Co, has been appointed mediator. However, a Premier Rugby statement said its clubs 'see no purpose in new discussions starting as late as the end of October 2013'. RFU Chief Executive Ian Ritchie told the *Daily Telegraph* that he is "optimistic" a compromise will be reached, but that the RFU would refuse to "give up our negotiating position in public".

Premier Rugby and the Top-14 served notice on 1 June 2012 under its 'Paris Accord' that they intend to pull out of ERC competitions. The Accord, which governs ERC competition participation, expires at the end of the 2013/14 season.

FIFA aims to fight 2022 World Cup compensation claims

FIFA has said that it will fight any attempt at compensation or a re-hearing of bids, should it switch the Qatar 2022 World Cup from summer to winter at its Executive Committee meeting on 3-4 October. It has also confirmed that no formal investigation into the bidding process is underway, despite reports to the contrary.

"As part of the bidding documents all bidders, including the FA Australia, accepted that the final decision regarding the format and dates of the staging of the FIFA World Cup and FIFA Confederations Cup, though initially expected to be in June/July, remains subject to the final decision of the FIFA Organising Committee", said a FIFA spokesperson.

FIFA said that it was confident this would protect it against claims for bids to be reheard as well as compensation, despite all bids being assessed by FIFA on the basis of the tournament being held in summer. "There is no ground for any speculation", said the spokesperson.

FIFA also said that no formal investigation is underway into the bidding process for the 2022 World Cup, despite a 17 September statement from the Football Federation of Australia (FFA) suggesting otherwise. A spokesperson said FIFA's Ethics Committee had only pledged to investigate media articles suggesting corruption at its Congress in May; media reports suggesting that an 'investigation' was about to reveal its results were "erroneous" and that comments from Sepp Blatter suggesting that political influence had affected the vote had been "lost in translation".

Sanctions for non-intentional doping: Article 10.4

Clifford J. Hendel, a Partner with Araoz & Rueda Abogados, is an expert in international arbitration having acted in numerous proceedings administered by the Court of Arbitration for Sport (CAS). In this article, he examines difficulties regarding a serious recent split in CAS jurisprudence (reflected in the jurisprudence of other sports tribunals) involving Article 10.4 of the 2009 World Anti-Doping Code.

The Foggo v. Oliveira debate

Harmonisation of standards across the sporting world is an essential object of the World Anti-Doping Agency's (WADA) World Anti-Doping Code (WADC), first promulgated in 2004, with its current version effective from 2009 and currently undergoing revision in anticipation of taking effect in 2015. Similarly, the achievement of a significant level of uniformity and predictability in sports-related jurisprudence is the very '*raison d'être*' for the Court of Arbitration for Sport (CAS). By and large, the WADC has achieved its goal of ensuring harmonisation, and the CAS has achieved its goal of creating a '*corpus*' of coherent jurisprudence furthering legal certainty in the sporting world.

But jurisprudential coherence is not always possible. The recent split in CAS jurisprudence involving the proper meaning of 'intent to enhance sport performance' for possible reduction of ineligibility sanctions in doping cases involving specified substances (typically involving training or dietary supplements) as set out in WADC Article 10.4 is a case in point. An intractable jurisprudential split (referred to as 'Foggo v. Oliveira', as these are the leading cases on the two sides of the issue) will be resolved by 'legislative' change, i.e., amendment of the WADC. But until the new text takes effect in 2015, similarly-situated athletes may continue to face quite different sanctions for engaging in the same conduct, something which runs against the very grain of both the WADC and the CAS, with their focus on harmony, predictability and legal certainty. This article will analyse the Foggo v. Oliveira debate in the context of the differing solutions to the issue proposed successively in versions 1.0, 2.0 and 3.0 of the WADC 2015.

Article 10.4 of WADC 2009

The current text of Article 10.4 (WADC 2009) permits reduction or elimination of ineligibility sanctions for athletes considered to have credible, non-doping explanations for their 'specified substance' positive. This is not available to deliberate dopers, such as steroid-users.

According to Article 10.4[1], two conditions must be satisfied. The first is for the athlete to establish how the specified substance entered their body. The second is for the athlete to establish (with corroborating evidence in addition to their word, and to the satisfaction of the hearing panel) the absence of intent to enhance sport performance.

The first condition has posed no particular problem; it is a mere corollary of the basic anti-doping rule of 'strict liability', i.e., athletes are responsible for what they ingest. The second condition, however, has proven to be a jurisprudential minefield. What has been referred to as the 'polarized debate that is now taking place between [sporting] tribunals' involves what might at first appear a simple question: what must the athlete show to prove the absence of 'an intent to enhance sport performance' so as to be in a position to benefit from the reduction or elimination of sanctions contemplated in Article 10.4? As a summary of some of the principal cases set out below will reflect, few (if any) topics in sports jurisprudence have been so 'hot' in the past two or three years[2].

Oliveira and some of its progeny

Flavia Oliveira v. United States Anti-Doping Agency[3] (USADA) involved a cyclist who tested positive for oxiolofrine, a stimulant that was contained in a dietary supplement called Hyperdrive, which she took to combat the fatigue that her allergy medication caused. It is the same substance for which Jamaican sprinter Asafa Powell tested positive in July.

The Panel said the case raised 'an important issue of first impression' as to Article 10.4's requirement for the athlete to establish the absence of intent to enhance sport performance, involving interpretation or reconciliation of ambiguous drafting: the first clause of Article 10.4 points clearly to intent with respect to the specified substance, but not the product containing it, but the second clause doesn't mention the specified substance and appears to focus the inquiry on a general intent/lack of intent to enhance performance by taking the product.

Observing that 'the express language of this clause is ambiguous and susceptible to more than one interpretation', the Oliveira Panel rejected USADA's argument that Article 10.4 'required the athlete to prove that she did not take the product (Hyperdrive)... with the intent to enhance her sport performance'. The Panel instead held that 'Article 10.4 requires Oliveira only to prove her ingestion of oxiolofrine [i.e., the substance, not the product] was not intended to enhance her

sport performance'.

The Panel found it had been established that the athlete did not know that the product Hyperdrive contained oxilofrine (the substance was labelled differently on the product than on WADA's list) and thus did not intend to enhance her performance by unknowingly ingesting the substance.

Oliveira was followed in UCI v. Alexander Kolobnev & Russian Cycling Federation[4]. The case involved a cyclist who tested positive in the 2011 Tour de France for the diuretic HTC, contained in a food supplement recommended by the athlete's personal doctor to treat varicose veins.

The Panel was satisfied that the athlete didn't know the product contained HTC and concluded that 'no intent to use HTC, for whatever purpose, could be imputed'. Concurring with Oliveira's conclusion that an athlete only needs to prove that he/she did not take the specified substance (here, HTC) with an intent to enhance performance, but not that he/she did not take the product (the supplement) with such intent, the Panel stated '[I]ndeed, only the construction of the (ambiguous) second paragraph of Article 295 [10.4] as having the same meaning of the (much clearer) first paragraph harmonizes the provision and appears to be consistent with the very concept of "Specified Substances" as prohibited substances "which are particularly susceptible to unintentional anti-doping rule violation" or susceptible to have a "credible non-doping explanation"'.

Erkand Qerimaj v. International Weightlifting Federation[5] (IWF) also adopted the Oliveira approach. The case involved a wrestler who had tested positive for the stimulant methylhexaneamine (MHA) which had entered his body through the intake of a food supplement, the label of which did not mention MHA, but did mention its synonym, 1.3-dimethylamine.

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The Panel found, and the IWF did not dispute, that the athlete did not know that MHA was contained in the product. Asserting that 'the wording of Article 10.4... speaks in favor of Oliveira' and that the purpose of the article is to reflect the general risk in everyday life that specified substances may be taken inadvertently by an athlete, the Panel concluded that the relevant absence of intent to be established by the athlete was with respect to the substance (MHA).

Foggo and some of its progeny

Kurt Foggo v. National Rugby League[6] represents the other pole in the 'bi-polar' debate on the issue of 'intent to enhance' under Article 10.4. The case involved a rugby league player who had tested positive for the stimulant 1.3-dimethylpentylamine contained in a popular vitamin supplement known as Jack3d, which the athlete had purchased after having searched the internet as to the ingredients of Jack3d and finding no prohibited or specified substances identified.

The Foggo Panel rejected ('[w]ith respect') the approach taken five months earlier by the Panel in Oliveira, holding that both the 'natural and ordinary meaning' of the text of Article 10.4 and 'the context of the rules as a whole' rendered the proper construction of the rule such as 'to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance', and thus the mere fact that the athlete did not know that the product contained a specified substance did not itself establish the absence of intent.

In a nuanced, exhaustive and (some might say) 'tour de force' opinion, a majority Panel in Dimitri Kutrovsky International Tennis Federation[7] came down on the Foggo side of the debate. The case involved a tennis player who, as in Foggo, tested positive for MHA contained in the food supplement Jack3d.

The athlete testified that he had been advised that the product would give him energy ('like Red Bull, but stronger') for training and recovery and to combat jet lag. The Kutrovsky majority concluded that the Oliveira-based reading of clauses one and two of Article 10.4 as reflecting a significant and intended differentiation is over-literal and supported by neither the text nor the context. Accordingly, the majority asserted, while an athlete's knowledge (or lack of) that he has ingested a specific substance is relevant to the issue of intent, it is not dispositive, and what is essential for purposes of benefiting from Article 10.4 - what is the true focus of the second condition - is the absence of intention to enhance performance by taking whatever was taken. Thus, no relevant distinction for Article 10.4 purposes should be drawn between a product and the specified substance that it may contain. The Kutrovsky majority forcefully observed that '[i]t is counter-intuitive that in a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage'.

The CAS may be 'the Supreme Court of Sport', but each CAS panel is unique and of equal stature, and there is no formal, hierarchical mechanism to harmonise divergent jurisprudential lines. As mentioned by the Kutrovsky Panel, the more cogent and well-reasoned a CAS decision is, the less likely another

CAS panel would be to disregard it; but it is free to do so. Given the impasse at the jurisprudential level of the 'intent to enhance' issue, hopes for finding a common way forward have turned to the legislative arena, i.e., to the ongoing WADC revision process.

WADC 2015

After a review phase commencing in November 2011, Version 1 of the WADC 2015 revision was circulated to WADA stakeholders worldwide in June 2012. After a further review, Version 2 was circulated in November 2012. A final consultation phase having now concluded, Version 3.0 has recently been tabled and is scheduled to be presented for final approval in November of this year. The treatment in the various versions of WADC 2015 of Article 10.4 and in particular of the Foggo v. Oliveira debate reflects an interesting evolution.

Version 1.0

Version 1.0 of WADC 2015 addressed the issue in a simple and succinct fashion, without making material language changes from the text of WADC 2009 or introducing new explanatory commentary - i.e. it just takes sides on the interpretation issue, coming down in favour of the Foggo line of authority. As set out in a proposed Comment to Article 10.4.1:

'Contrary to the CAS decision in Oliveira v. USADA, CAS 2010/A/2107, where an Athlete or other Person Uses or Possesses a product to enhance sport performance, then, regardless of whether the Athlete or other Person knew that the product contained a Prohibited Substance, Article 10.4.1 does not apply.'

Version 2.0

Version 2.0, however, reflected a departure from the approach taken in Version 1.0. Rather than resolving the dispute by quashing Oliveira in favour of Foggo, Version 2.0 took the dispute off the table: it deleted from Article 10.4.1 all mention of 'intent to enhance' (together with the large part of the related comments involving corroborating/credible evidence, the comfortable satisfaction level of proof, etc.)[8].

Each CAS panel is unique and of equal stature, and there is no formal, hierarchical mechanism to harmonise divergent jurisprudential lines

As a result, the scope for dispute as to 'intent to enhance' would no longer apply in the typical supplement case. Instead, in these cases, the focus would be limited to whether the athlete is able to establish No Significant Fault - but nothing with respect to his intent or absence of intent to enhance performance - in respect of the specified substance. To this extent, it can be said that the proposed change harmonises Article 10.4.1 with the more familiar Article 10.5.2, save that the reduction can go all the way down to no period of ineligibility.

Version 3.0 - endgame?

Version 3.0 confirms the approach anticipated in Version 2.0: references to 'intent to enhance sport performance' are suppressed on the basis of a simplified Article 10.4.1 (now 10.5.1)[9], with reduction (or even elimination) in sanction now available if the athlete can show the absence of significant (or any) fault or negligence.

This change can be viewed as a commendable compromise among WADA's various constituencies, reflecting apparent stakeholder consensus for the dual objectives of providing for longer (four v. two years) periods of ineligibility for 'real cheats', but at the same time affording greater flexibility in specific circumstances meriting the same[10]. Without entirely tipping the balance towards Foggo as per the Version 1.0 approach (in what would surely have been considered a very stringent resolution of the issue, raising very vocal opposition from athletic and other quarters), the new text will tighten to a certain extent the standards under the current version of Article 10.4.1. If under the Oliveira line of authority sanction reduction in supplement cases was available in situations perhaps not appropriate for the same, e.g., for failing to check labels properly, this will be the case no longer. WADC 2015 is headed for a more harmonised, fault or intention-based standard for reduction of sanctions.

Still, the revised WADC will only take effect in 2015. Between now and then, the legacy of the Foggo and Oliveira dichotomy will continue to plague sporting tribunals and athletes.

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A version of this article was prepared with the assistance of Elijah Ochoga as part of the requirements of the Instituto Superior de Derecho y Economía (ISDE) Global Executive Masters in Sports Law. A full version of the following footnotes is available on World Sports Law Report's internet site: www.e-comlaw.com/world-sports-law-report

1. See Article 10.4 of the 2009 Code at: www.wada-ama.org/rtecontent/document/code_v2009_en.pdf
2. See 'A Revised WADA Code for 2015 Tackles Article 10.4', in the October 2012 issue of PPF Sports Focus, 'Tough Love for Accidental Dopers', http://e-comlaw.com/sportslawblog/template_permalink.asp?id=516 and 'UKAD V. Whyte: CAS interpretation of Article 10.4', World Sports Law Report, July 2013, discussed again on page 8 of this issue.
3 CAS 2010/A/2107.
4. CAS 2011/A/2645.
5. CAS 2012/A/2822.
6. CAS A2/2011.
7. CAS 2012/A/2804.
8. See Version 2.0 text of Article 10.4.1 on the WADA website.'
9. The proposed text of Article 10.5.1, similar to that proposed in Version 2.0 for Article 10.4.1, is available on the WADA website.