THE ROLE OF ARBITRATION IN DEALING WITH SPORTING FRAUD ISSUES

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Contents

I. Introduction
II. What is “Sporting Fraud”? 
III. The Actors of Sporting Fraud 
   A. Fixers 
   B. Facilitators 
   C. Perpetrators 
   D. The important distinction between the various types of actors 
IV. The Assessment of Evidence 
   A. Introduction 
   B. The burden of proof 
   C. The standard of proof 
V. The Use of Protected Witnesses 
   A. Introduction 
   B. The use of protected witnesses in criminal proceedings 
   C. The use of protected witnesses in disciplinary proceedings 
VI. Sanctions 

I. Introduction

“I can’t open any newspapers without finding an article on the prevalence of cheating and match fixing. In Germany, Italy, Belgium, Hungary, Turkey, Greece. In China, South Korea, in Singapore. It is a world problem and a very pernicious problem.” IOC President, Jacques Rogge, July 2011.1

Doping issues and football-related transfer disputes have long accounted for the majority of the caseload at the Court of Arbitration for Sport (the “CAS”). However, if events in recent months are any indication, match-fixing and other forms of sporting fraud are likely to become the subject matter of an increasing number of CAS disputes.

The manipulation of results is not new to sport and indeed can be traced back to the Ancient Olympics, where it is believed that sports such as chariot racing, boxing, pentathlon and wrestling were affected2. Most readers will be familiar with the oft-referenced 1919 Chicago White Sox scandal, from which it emerged that 8 members of the team had conspired to lose the World Series. There have

been other notable incidents in subsequent decades in sports as diverse as badminton, sumo, handball, football and cricket.

However, a surge of revelations in this decade suggests that these were not isolated events confined to footnotes of sports history, but rather the tip of something far more endemic. The past two years alone has seen dozens of sporting fraud incidents exposed across a variety of sports around the world, ranging from cricket\(^3\), football\(^4\), handball\(^5\), rugby league\(^6\), tennis\(^7\), snooker\(^8\) and sumo wrestling\(^9\).

A lot of conjecture could be advanced as to why this age-old issue has only recently become the focus of so much attention. Some may speculate that the increase in revelations indicates an increase in the prevalence of the practice. Others would venture that law enforcement agencies and sports have simply become better at identifying sporting fraud.

Irrespective of the reasons, sport is faced with a dilemma that is not about to disappear. The CAS can expect its caseload to swell with sporting fraud disputes in the following months and years. This article examines some of the issues which arbitrators are most likely to have to resolve during the course of those disputes, namely:

1. evidentiary issues such as the burden and the standard of proof;
2. the use of protected witnesses; and
3. applicable sanctions.

Before that, however, it is important to have an understanding of the following:

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\(^3\) See:  
(1) http://www.telegraph.co.uk/sport/cricket/international/pakistan/8303037/Pakistan-spot-fixing-timeline-of-the-scandal.html;  

\(^4\) See:  
(1) http://news.bbc.co.uk/sport1/hi/football/europe/8575595.stm;  
(2) http://www.tas-cas.org/d2wfiles/document/4509/5048/0/Press20release20EN202011.01.18.pdf;  
(3) http://www.aljazeera.com/sport/football/2012/02/20122181441736221.html;  
(4) http://www.nytimes.com/2011/07/08/sports/soccer/08iht-soccer08.html;  
(5) http://www.soccerex.com/industry-news/serie-a-duo-face-match-fixing-punishment;  
(6) http://news.bbc.co.uk/sport1/hi/football/14481355.stm;  
(7) http://www.reuters.com/article/2011/08/26/soccer-turkey-fenerbahce-idUSL5E7JQ0IW20110826;  

\(^5\) See:  

\(^6\) See:  

\(^7\) See:  
(1) http://www.tennisintegrityunit.com/media/11/daniel-koellerer-anti-corruption-disciplinary-hearing;  
(2) http://www.tennisintegrityunit.com/media/12/david-savic-anti-corruption-disciplinary-hearing.

\(^8\) See:  

\(^9\) See:  
(1) http://www.guardian.co.uk/world/2011/feb/06/sumo-match-fixing-corruption-japan;  
The Role of Arbitration in dealing with Sporting Fraud issues

(1) the types of activities that fall under the term “sporting fraud”; and
(2) the actors typically involved in acts of sports fraud.

II. What is “Sporting Fraud”?

It is important for the purposes of this article to understand at the outset what the term “sporting fraud” encompasses. Sporting fraud comprises (at least) the following acts:

**Match-fixing** - At its most primal, match-fixing involves the activities which lead to the fixing of the outcome of a match. The term “match-fixing” is often used in the popular media to describe all forms of manipulation which result in damage to the authenticity of sports competition and/or the distortion of the betting markets. However, it is important to understand that “match-fixing” is a distinct fraud in its own right and that the motive behind other types of manipulation (as described below) may have no designs on the overall outcome of a contest (i.e. whether a team wins or loses).

**Spot-fixing** - The evolution of legal (and illegal) gambling means that many aspects of a sports event can be and are subject to bets, for instance, which team or player will kick the ball out of play first, how many players will be booked by a referee during the course of a football match or how many times a boxer will be knocked down during the course of a bout. Deliberately fixing these discrete aspects of a sports event is known as spot-fixing or micro-fixing. The problem with spot-fixing is its ostensibly lack of effect on the outcome of the contest, which makes it even more difficult to detect than an attempt to fix the final outcome of a match.

**Point-shaving** - Modern-day betting means that bets can also be placed on the margin of victory of one team over another, which has led to another form of match-fixing known as point-shaving. Point-shaving is essentially a practice by which players in a team favoured to win, agree to ensure that their team will not win by more than a pre-determined margin. The intention is to manipulate scoring in such a way that the final score falls within a margin against which the fixer has wagered. The term “point-shaving” appears to have originated from the United States where basketball is considered to be particularly susceptible to the practice because of the scoring tempo of the game and the ease by which a single player can influence events.\(^{10}\)

**Inside information** - By virtue of their position within a particular sport, certain participants will have access to inside information that is not publicly available and therefore subject to potential misuse. In horse

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\(^{10}\) Given that results in other sports can also be recorded in terms of “goals” or “runs”, the generic term “point-shaving” would perhaps be better described as “score-shaving” or “margin-shaving”.

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racing, for instance, “inside information” includes information on the likely performance of a horse, known only by an owner, trainer or rider, and not by the general public\textsuperscript{11}. Such information could readily be exploited in at least two ways: the first is to bet on an expected outcome based on information not available to anyone else and the second is to use the information to facilitate other types of sporting fraud (for instance, finding out in advance which players of a team will be fielded for a particular match would enable a fixer to target specific players for an illicit approach).

The distinction between the different types of sporting frauds outlined above is important, as the CAS and other disciplinary tribunals will inevitably one day be faced with the argument that certain acts of sporting fraud (e.g. spot-fixing) should not be penalised as heavily as others (e.g. match-fixing) or vice versa (see Section VI below for further discussion on this point).

### III. The Actors of Sporting Fraud

The actors of sporting fraud can be broadly categorised as fixers, facilitators and perpetrators. It is important to understand that sporting fraud often goes far beyond the athletes themselves and sometimes does not even require the participation of athletes. Indeed, to this author’s knowledge, the CAS has so far dealt with as many cases involving referees and club officials as it has cases involving athletes/players\textsuperscript{12}.

#### A. Fixers

First, there are the fixers, essentially the architects of the fraud. The public perception is that fixers, more often than not, work for crime syndicates and are aiming to defraud the betting markets. While that may often be right, it must be borne in mind that some fixers may have no designs on the betting markets, for instance club administrators wishing to improve their team’s chances of success. By way of example, in June 2011, former Juventus FC General Manager, Luciano Moggi, was banned from football for life when it emerged that he manipulated referee appointments and decisions to improve his team’s chances of success\textsuperscript{13}.

\textsuperscript{11} \textsuperscript{See Part 4 (36.1) of the British Horseracing Authority’s Rules of Racing.}

\textsuperscript{12} \textsuperscript{The CAS has dealt with at least two cases involving referees:}

(1) CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA, Award dated 15 April 2010; and

(2) CAS 2010/A/2172, O. v. UEFA, Award dated 18 January 2011.

and two cases involving players:

(1) CAS 2011/A/2490 Daniel Köllerer v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation and Grand Slam Committee; and

(2) David Savic v. Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation and Grand Slam Committee.

\textsuperscript{13} \textsuperscript{http://www.guardian.co.uk/football/2011/jun/16/juventus-luciano-moggi-banned-life.}
Of course, some fixes may have more modest ambitions and may be much simpler to organise, for instance, a player may arrange for a bet to be placed on him/her being the first person to be sent off or kick the ball out of play during a match. Former Southampton FC player, Matthew Le Tissier, admitted in 2009 that he made an arrangement with some friends in 1995 by which he would have made £10,000 had he successfully kicked the ball out of play within the first 60 seconds of his club’s match against Wimbledon. Such lone arrangements will be arguably more difficult to detect than grander schemes involving more people and larger sums of money.

B. Facilitators

It is reported that among the larger sporting fraud schemes, fixers commonly use facilitators, also known as "runners". These are people who have or will gain the trust of a player/athlete, coach or referee over a period of time and use that relationship to facilitate the fraud. Typical facilitators may include the following:

- **Agents** – Agents evidently enjoy close relationships with their charges and are obvious targets for fixers. Indeed, sports agent Mazhar Majeed was at the centre of the recent spot-fixing case involving the Pakistani cricket players, Mohammad Asif, Mohammad Amir and Salman Butt.

- **Former players** – The investigative journalist Declan Hill reveals in his book, “The Fix”, that it is not unusual for fixers to rely on retired players to act as their facilitators as they will usually be able to gain access to current players/athletes relatively easily.

- **Club officials** – Club officials have the power to control coaches and players on their wage roster. Telephone conversations intercepted in Russia in 2004 appeared to show that officials from second tier clubs in the Russian football leagues were prepared to fix the outcome of matches and in some cases even colluded with officials from other clubs to agree the outcome of matches.

C. Perpetrators

The perpetrators are those in a position to directly commit the sporting fraud, although, as described above, the fixer can sometimes also be the perpetrator in instances where the fraudulent act starts and ends with a player. The scale of the problem is exacerbated by the fact that sporting fraud does not necessarily require the participation of players/athletes but can be achieved through the participation of coaches, match officials and even groundsmen:

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14 [http://www.telegraph.co.uk/sport/football/teams/southampton/6219479/Matt-Le-Tissier-to-face-no-charges-for-10k-betting-scam.html](http://www.telegraph.co.uk/sport/football/teams/southampton/6219479/Matt-Le-Tissier-to-face-no-charges-for-10k-betting-scam.html)


16 Although note that in that case, Majeed and the cricketers were not found to have been involved with any crime syndicate but rather, were held to be acting alone.


• **Players/athletes** – The players/athletes themselves are the most obvious targets since their performance is, in effect, what the fixers are aiming to control. Indeed, point-shaving would be difficult to achieve without the participation of the athletes themselves.

• **Coaching staff** – Coaches can have an enormous impact on the result of a match, although they will often require the participation of their charges. This is well-illustrated by the admission in 2008 of the head coach of the Chinese National Badminton Team that the women’s singles semi-final at the 2004 Athens Olympics between Zhou Mi and Zhang Ning was fixed to allow the latter to win, as it was felt she had a stronger chance of winning gold in the final. However, in some instances, a coach may not even require the participation of any players – he/she may choose to field an under-strength team or even deploy an ineffective game plan in order to deliberately lose a match.

• **Referees/umpires** – Referees and umpires are often the target of fixers as they can play pivotal roles in the outcome of a sports contest. In football, for instance, referees have the power to send off players or award penalties. Indeed, referees were at the centre of match-fixing allegations in the 2004 Bundesliga match-fixing scandal and the 2005 Brazilian football match-fixing scandal, where it emerged that gambling syndicates had bribed referees to fix the outcome of matches.

• **Groundsmen** – there have been reports over the past 20 years that cricket groundsmen in some test-playing nations have accepted payments from bookmakers to change the conditions of pitches to favour or hinder particular teams. The effect that groundsmen are capable of having on the outcome of matches in certain sports should therefore not be underestimated.

**D. The important distinction between the various types of actors**

The distinction between the various types of actors involved in acts of sporting fraud is particularly important. First, because the precise relationship between the individuals involved and the sport in question will determine whether or not those individuals are even subject to the rules of the sport, and secondly because the level of sanction that is imposed on those who are in fact subject to the rules could well depend on the individual’s precise role in the fraud (see Section VI below for further discussion on this point).

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IV. THE ASSESSMENT OF EVIDENCE

A. Introduction

One of the biggest challenges facing sports is the fact that acts of sporting fraud are arguably harder to detect than doping since they cannot be exposed by science; uncovering acts of sporting fraud is likely to require a far more intelligence-based approach and reliance on evidence of a similar nature to that utilised in non-analytical doping investigations. The rules that apply to the assessment of such evidence in disciplinary proceedings are therefore likely to be of some considerable significance.

B. The burden of proof

The issue of which party bears the burden of proof is a relatively settled one in CAS jurisprudence. It is summarised as follows in CAS 2007/A/1380 MKE Ankaragücü Spor Kulübü v. S22:

> It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites included in the concept of “burden of proof” are (i) the “burden of persuasion” and (ii) the “burden of production of the proof”. In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.

This reflects the practice followed in general international arbitration and is sufficiently uncontroversial that it merits no further discussion here23.

C. The standard of proof

A far more contentious issue relates to the requisite standard of proof. There are two angles from which to examine the topic; those cases where the applicable rules do not specify the requisite standard of proof and those cases where the rules do.

(i) Absence of express provisions

Many sports do not yet have regulations dealing specifically with sports fraud, and unfortunately many of those that do, do not address important but oft-neglected evidentiary issues such as the standard of proof.

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22 Award of 11 June 2008.
23 Michael Hwang and Kevin Lim, Corruption and Arbitration – Law and Reality, (Asian International Arbitration Journal), para. 27. In international arbitration, it is axiomatic that each party bears the burden of proving the facts relied on in support of its claim or defence.
In CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA24 (“Pobeda”), a Macedonian football club, its President and a former captain of the club were accused of match-fixing contrary to provisions of the 2004 UEFA Disciplinary Regulations (the “UDR”). The UDR did not specify any rules on the assessment of evidence.

Following a hearing, the UEFA Control and Disciplinary Body suspended the club from competing in any UEFA competition for eight years and banned the president and former captain of the club from exercising any football-related activities for life. The respondents lodged an appeal with the UEFA Appeals Body, which dismissed the appeal. The respondents then filed an appeal with the CAS.

In relation to the assessment of evidence, the CAS held that:

85. Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts “to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made” (CAS 2005/A/908 nr 6.2).

On that basis, the CAS upheld the charges and the sanctions against the club and the president, although it dismissed those against the former captain, Nikolce Zdraveski.

In another case relating to match-fixing, CAS 2010/A/2172 Mr Oleg Oriekhov v/ UEFA (“Oriekhov”)25, the CAS agreed with the panel in Pobeda that the requisite standard of proof applied in match-fixing cases should be the same one applied doping cases – in other words, that the commission of an offence must be established to “the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made”.26

This standard of proof was first utilised by the CAS in K. and G. v. IOC (CAS OG 96/003-004), and was described by the panel in CAS 98/208 N., J., Y., W. / FINA27 as being greater than the civil law standard (typically referred to as either the balance of probabilities or preponderance of the evidence) but less than the criminal standard of proof “beyond reasonable doubt”. One prominent CAS arbitrator described the standard and its application as follows28:

The CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard. The Panel was also content to adopt the test, set out in Korneev and Gouliev v IOC, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegation made. […] The CAS went on, in Korneev, to reiterate the proposition

24 Award dated 15 April 2010.
25 Award of 18 January 2011.
26 See Oriekhov at para. 53.
27 Award of 22 December 1998.
The Role of Arbitration in dealing with Sporting Fraud issues

that the more serious the allegation, the greater the degree of evidence required to achieve ‘comfortable satisfaction’.

The standard is therefore high, though the fact it falls short of the criminal standard of proof is notable since match-fixing and other types of manipulation fall within the realm of criminal law in many jurisdictions across Europe and Asia.

In that regard, parallels may be drawn from private commercial arbitrations in which one party accuses the other of corruption and/or bribery. The prevailing practice in such arbitration proceedings appears to be leaning towards the application of higher standards of proof which approximate the “beyond reasonable doubt” standard or something close to it – for instance “clear proof”, “irrefutable evidence”, “conclusive evidence” and “certainty”.

Some legal commentators have expressed concern with the application of the “beyond reasonable doubt” standard in such proceedings:

[…] given the difficulty in proving corruption, a criminal standard of proof would be almost impossible to satisfy and plays directly into the hands of unscrupulous parties, who can simply deny wrongdoing and exploit the high threshold of proof to avoid liability. The current trend of tribunals imposing such a high standard of proof […] is thus regrettable.

Those who advocate the application of less stringent standards of proof in corruption cases, typically cite justifications such as these:

- arbitral tribunals do not have the same powers of a court to compel the production of evidence;
- “like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected”; and
- complainants often cannot produce physical or documentary evidence of the corruption, relying instead on witness testimony.

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29 See Michael Hwang and Kevin Lim, Corruption and Arbitration – Law and Reality, (Asian International Arbitration Journal) at para. 31:

This position reflects the prevailing arbitral practice of subjecting complainants of corruption to a high standard of proof: in a survey of arbitral case law on corruption, it was found that in just one out of twenty-five cases, a —low standard of proof was applied, whereas in fourteen cases, a —high standard of proof applied, which were variously described as —certainty, —clear proof, —clear and convincing evidence, and —conclusive evidence. [...] This standard of proof appears to approximate the —beyond reasonable doubt standard in criminal law.


These justifications were evidently not lost on the CAS panels in Pobeda and Oriekhov:

- In choosing to apply the “comfortable satisfaction” standard instead of a higher standard, the panel in Pobeda remarked:

  [...] considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts “to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made.”

- As for the panel in Oriekhov, it observed that:

  54. [...] the Panel has well in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing.

It seems therefore, that in the absence of any express rules, CAS panels will be inclined to apply the “comfortable satisfaction” standard of proof in its assessment of evidence in sporting fraud cases. In doing so, however, panels must remain vigilant that they have “in mind the seriousness of allegation which is made”\textsuperscript{33}. One obvious measure of the “seriousness of the allegation” will often be the sanction facing the individual in question; the more serious the allegation and the harsher the consequences, the more comfortable the panel must be that the evidence does indeed prove the alleged wrongdoing.

(ii) Express provisions

Some sports do have rules in place to deal with sporting fraud and the assessment of evidence in such cases.

In CAS 2011/A/2490 Daniel Köllerer v. ATP, WTA, ITF and Grand Slam Committee (“Köllerer”)\textsuperscript{34}, a professional tennis player was accused of inviting other players to fix matches on five occasions. The Anti-Corruption Officer (the “AHO”) empowered by the Uniform Tennis Anti-Corruption Program (the “UTACP”), held that the player was guilty on three of the five counts of attempted match-fixing and sanctioned him with a lifetime ban from tennis and a $100,000 fine. In assessing the evidence before him, the AHO was directed by Section G(3)(a) of the UTACP which provides that:

[t]he standard of proof shall be whether the PTIO has established the commission of the alleged Corruption Offense by a preponderance of the evidence.

The player appealed the decision to CAS, submitting (amongst other arguments) that:

\textsuperscript{33} First coined by the CAS in CAS OG. 96/003- 004. Korneev &. Gouliev vs. IOC.

\textsuperscript{34} Award of 23 March 2012.
The Role of Arbitration in dealing with Sporting Fraud issues

- the AHO had improperly considered himself limited by the UTACP in applying a “preponderance of the evidence” standard;
- the imposition of a lifetime ban on the basis of a mere balance of probabilities would go against the principles of ordre public;
- the standard of proof should be no less than the “comfortable satisfaction” standard applied in CAS jurisprudence; and
- the standard of proof clause should be voided for unconscionability, on the basis that the player’s consent to be bound by the rules was not a genuine consent.

The CAS rejected the player’s arguments holding instead that:

- each association could decide for itself which standard of proof to apply, subject to national and/or international rules of public policy. In the present instance, the panel did not consider that applying the standard of proof provided for by the UTACP would violate any rules of national and/or international public policy;
- CAS jurisprudence provided no basis upon which to apply a different standard of proof in circumstances where a standard of proof was expressly prescribed by the rules of the association;
- the player’s consent was valid and so the standard of proof contained in the UTACP to which the player had agreed to be subject was not void for unconscionability. In this regard, the panel noted in particular that:

  ...the player had already consented to the same standard of proof clause contained in the ATP rules on multiple occasions in the past;

  and that:

  the ATP had established a Player Council in an effort to balance any unequal bargaining power that the Governing Bodies might have over individual players, and that no issue had been raised by the Player Council in respect of this standard of proof in the UTACP.

Further to its assessment of the evidence, the panel concluded as follows:

119. [...], the Panel is satisfied that the Player attempted to engage in match fixing. The Governing Bodies have met their burden of proof. The Panel confirms the Decision of the AHO and upholds the three charges against the Player relating to his attempts to fix matches.

Having confirmed the charges against the player, the CAS also upheld the lifetime ban imposed on the player by the AHO.

The panel evidently felt itself bound to apply the standard of proof provided for in the UTACP, concluding that each association could decide for itself which
standard of proof to apply and that the player had in any event consented to the terms of the UTACP.

Given the monopolistic position of International Federations, the issue of athlete consent is a sensitive one in sports regulation, particularly where the relevant regulation provides for draconian sanctions. Irrespective of the applicable system of law, legal commentators may question whether an athlete could genuinely consent to a standard of proof:

- he/she had never seen;
- the niceties and precise application of which could only be understood by a lawyer;
- the application of which could result in the permanent termination of his/her career;
- he/she could not, in any event, have amended; and
- the application of which was not consistent with the prevailing practices of the legal profession.

The panel emphasised in its decision that the ATP Player Council, which represents the interests of players, had not previously raised any issue in respect of the standard of proof. Two immediate observations arise from the panel’s reference to the Player Council:

(1) it would be surprising if such a player body did indeed examine the rules of the UTACP so closely that it questioned the standard of proof applicable in match-fixing disciplinary proceedings; and

(2) it is probably not unfair to say that athletes are often guided by moral proclivities as opposed to an understanding of the intricacies of the law; in that context, it would take a brave athlete to suggest to his peers increasing the threshold before which a player could be convicted of sporting fraud.

The issue of consent is sufficiently complex that it cannot be fully debated in the confines of this article, although it will suffice to say for now that the validity of any consent would fall under even greater scrutiny if it emerged that the particular standard of proof applied in any particular case were deemed contrary to national and/or international public policy or some other legal instrument.

The “preponderance of evidence” standard of proof applied in Köllner is also known as the “balance of probabilities” standard of proof and is the standard usually applied in civil proceedings in common law jurisdictions. On this standard, an event is taken to have occurred if, on the evidence, its occurrence is more likely than not. The athlete in Köllner argued that the imposition of a lifetime

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ban on the basis of mere balance of probabilities would be contrary to public policy\(^{36}\), though the athlete could not cite any authority in support of his assertion. While the athlete’s argument was ultimately rejected by the CAS, it is worth noting that in his first instance decision, the AHO had himself also expressed some concern about the application of this standard, stating that he could not find:

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\text{any jurisprudence which empowers me to do other than apply, albeit with some unease, the standard of proof provided for in the Program, which is the ordinary standard of proof by a preponderance of the evidence, which, I accept, would in England be described as the balance of probabilities}^{37}.\]

The AHO’s discomfort is likely to have been heightened by the consequences facing the athlete in the event it was established that, on the balance of probabilities, he had attempted to fix matches. As it was, the athlete was found to have committed the offence, received a lifetime ban from tennis and was fined $100,000 following the first instance proceedings.

There is no harsher penalty to any professional athlete than to deprive him permanently of the ability to earn a living from his sport. In that regard, the CAS and other disciplinary bodies are bestowed an extraordinary amount of control over the lives of athletes. In Köllner, the AHO and the CAS also had the authority to fine the player up to $250,000, in addition to imposing on him a lifetime ban from his profession. It is difficult to conceive any other sphere of life outside of the criminal courts in which an adjudicator enjoys such extensive punitive powers.

And yet, defendants in criminal proceedings in most democratic states are entitled to the protection of a much higher standard of proof before they can be exposed to sanction and vilification. Moreover, their rights are usually also ensured by various national and/or regional legal instruments for the protection of human rights.

Athletes have in the past attempted to argue that anti-doping proceedings were akin to criminal proceedings and should therefore be entitled to the same safeguards. Those arguments, however, have generally failed, as recounted by the CAS in one recent case:

\[54. [...] Several awards have withstood the scrutiny of the Swiss Federal Tribunal, which has stated that anti-doping proceedings are private law and not criminal law matters and that “the duty of proof and assessment of evidence [are] problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law” (Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, c. 3.d)\(^{38}\).\]

A notable distinction to be raised at this point is the fact that the standard of proof which governing bodies must discharge in order to prove that a doping

\(^{36}\) See paragraph 50.

\(^{37}\) See paragraph 84 of Köllner.

violation has been committed is “comfortable satisfaction”. That standard undoubtedly provides greater protection than that provided by the standard applied in Köllerer (i.e. “balance of probabilities”).

Moreover, as governing bodies of sports ordain on themselves greater punitive powers, it becomes increasingly difficult to frame disciplinary sanctions as matters belonging purely in the realm of private contract law. Indeed, two prominent Swiss practitioners noted the following shift in opinion as far back as 2007:

27. [...] because sports governing bodies hold a monopolistic “quasi-public” position in their relation with the athletes, there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental right issues in their activities, at least if they intend to avoid governmental intervention

There are too many legal instruments for the protection of human rights to consider in the scope of this article but, for illustrative purposes, we will briefly consider the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (“ECHR”). Article 6 ECHR ensures that defendants facing criminal charges in signatory states are entitled certain minimum rights. The notion of what constitutes a “criminal charge” is autonomous to ECHR – in other words, the fact that domestic law does not classify a matter as “criminal” is not in itself conclusive evidence that it does not fall within the meaning of a “criminal charge” for the purposes of Article 6. In the same vein, the fact that a sport might classify a disciplinary charge as a contractual, civil matter does not mean that it will not be classified as a “criminal charge” for the purposes of Article 6. In assessing whether proceedings involve the determination of a “criminal charge”, the following criteria may be considered:

(1) the nature of the offence, which may include an assessment of the conduct being punished. For instance, whether the conduct under scrutiny is considered “especially grave” or whether it is of an “anti-social” nature as opposed to “purely disciplinary” in nature; and

(2) the severity of the possible punishment. This may include an assessment of any monetary penalty and whether its purpose is punitive and deterrent in nature.

The issue has been examined at length by the European Court of Human Rights and by national courts. In Official Receiver v Stern [2000] 1 WLR 2230, the Court of Appeal in England was required to assess whether director disqualification

41 Engel v. Netherlands (1967) 1 EHR 647.
proceedings violated the right to a fair trial secured by Article 6. In delivering the judgment of the Court, Lord Justice Henry remarked that:

So disciplinary proceedings against a professional man or woman, although certainly not classified as criminal, may still bring in play some of the requirements of a fair trial spelt out in Article 6(2) and (3), including the presumption of innocence.

In the Court of Appeal in *R (G) v X School Governors*[^45^], Lord Justice Laws emphasised the importance played by the seriousness of the alleged transgression in determining whether a proceeding fell within the ambit of Article 6:

The jurisprudence is increasingly to the effect that what matters is the gravity of the issue in the case, rather than the case's classification as civil or criminal. That is the primary driver of the reach of the rights which Article 6 confers.

In summary then, the fact that sports disciplinary proceedings are not classified as “criminal”, does not mean that they necessarily fall outside the reach of the protections of Article 6 of ECHR, or indeed those afforded by other legal instruments protecting fundamental rights, particularly if the subject matter and potential consequences of the proceedings are sufficiently serious. And if such proceedings ever came to be regarded as sufficiently close in nature to "criminal" proceedings, there is a theoretical possibility, at least, that a supervisory court might be prepared to examine the reasons for which a respondent was not granted criminal procedural protections commensurate with the gravity of the consequences facing him. One such protection might include the application of the criminal standard of proof, or at least a standard higher than that applied in mere civil proceedings.

Alternatively, and assuming such disciplinary proceedings were not considered criminal in nature, then it cannot be ruled out that imposing a particularly severe sanction on the basis of balance of probabilities for an offence akin to a crime would fall to be considered a matter of public policy in certain states.

Match-fixing constitutes a criminal charge in many states and, rightly or wrongly, has connotations of association to the criminal underworld. The mere accusation of involvement in match-fixing therefore has the capacity to severely adversely affect the career and reputation of the individual involved. If, in addition, the consequences of a disciplinary charge include particularly harsh sanctions, then governing bodies of sport would be well advised to consider carefully what standard of proof is prescribed in their rules, before exposing an individual to such sanctions.

[^45^]: [2010] 1 WLR 2218, paragraph 56.
V. THE USE OF PROTECTED WITNESSES

A. Introduction

In addition to questions relating to the burden and standard of proof, arbitrators may also need to resolve questions as to the admissibility of certain evidence in arbitral proceedings. Those tasked with detecting acts of sporting fraud are likely to rely on evidence of a similar nature to that utilised in non-analytical doping investigations. That may include witness testimony from individuals who, for a variety of reasons, wish to remain anonymous.

The issue of anonymous or protected witnesses in legal proceedings is an extraordinarily sensitive one. The issue most frequently arises in the sphere of criminal proceedings, although it is increasingly emerging in disciplinary proceedings relating to doping and match-fixing.

B. The use of protected witnesses in criminal proceedings

In order to fully understand the concerns that exist in relation to the use of evidence from unidentified witnesses, it is useful to consider the position under criminal law, where the issue has been extensively debated and is therefore far more developed.

The right to know the identity of an accuser has long been held to be a fundamental element of a fair hearing in jurisdictions across the world. Withholding the identity of an adverse witness is often therefore regarded by the courts with some unease. See for instance, the majority decision of the Court of Appeal of New Zealand in *R v Hughes* [1986] 2 NZLR 129, where Richardson J, observed (at pp 148-149):

_The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue._

The general discomfort that criminal courts around the globe share in relation to unnamed witnesses stems partly from a concern that allowing a witness to provide evidence behind the cloak of anonymity could severely curtail the ability of a defendant to defend him/herself:

(1) In *S v Leepile and Others* (5) 1986 4 SA 187, the prosecution applied to withhold the name and identity of a witness from the defendant during the course of a trial in South Africa. Judge Ackerman summarised the problems of allowing such an application (p 189):

_The wide direction regarding secrecy sought by the State in the present application has far more drastic consequences for the accused than an in camera hearing with a restriction on the_
publication to the public of a witness’ identity. The consequences to the accused of such a wide direction are, inter alia, the following:

(a) No investigation could be conducted by the accused’s legal representatives into the witness’ background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.

(b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.

(c) It would further heighten the witness’ sense of impregnability and increase the temptation to falsify or exaggerate ...

(2) Those concerns were echoed by the House of Lords in R v Davis [2008] UKHL 36. Lord Bingham outlined the serious impediments faced by the defence as a result of withholding the identity of a witness in proceedings before a lower court (see pages 18 and 19):

32. To decide whether the protective measures operated unfairly in this case it is necessary to consider their impact on the conduct of the defence. For that purpose it cannot be assumed at the outset that the defendant is guilty and all that he says false. The appellant denied that he was the gunman. Why, then, did witnesses say that he was? His answer, on which his instructions to counsel were based, was that he believed the false evidence to have been procured by a former girlfriend with whom he had fallen out. Mr Swift duly sought to pursue this suggestion in cross examination of the unidentified witnesses, but was gravely impeded in doing so by ignorance of and inability to explore who the witnesses were, where they lived and the nature of their contact with the appellant. When, eventually, subject to the protective measures a female witness was called whom the appellant believed to be the girlfriend it was at least doubtful whether she was or not, but this was a question that could not be fully explored. If the jury concluded that she was probably not the former girlfriend, they would also conclude that the defence had been based on a false premise. But this was an unavoidable risk if the defence were obliged, in the words of Lord Hewart CJ in a very different context (Coles v Odhams Press Ltd [1936] 1 KB 416), to take blind shots at a hidden target. A trial so conducted cannot be regarded as meeting ordinary standards of fairness.

The above notwithstanding, criminal courts do occasionally allow the identity of witnesses to be withheld, usually on the proviso that certain exceptional conditions exist:
(1) In Visser v. the Netherlands\(^{46}\), a Dutch national was convicted of a criminal offence on the basis of, among other evidence, the statement of an unnamed witness. The European Court of Human Rights was required to consider whether the use of the statement as evidence was in breach of Article 6 (1) and (3) (d) of ECHR or whether such use was justified in the circumstances. The Court concluded that the Dutch courts had not assessed the reasonableness of the personal fear of the witness nor conducted sufficient examination into the seriousness or basis of the reasons put forward to obtain the anonymity of the witness. The Court therefore concluded unanimously that the proceedings, as a whole, were not fair and that there had accordingly been a violation of Article 6 (1) and (3) (d) of the Convention.

(2) The criteria applied in Visser form the basis upon which the issue of witness anonymity is considered under Swiss law. Any alleged threat to a witness has to be carefully examined to ascertain whether it is serious and real enough to justify the severe restriction on the right to be heard. In other words, as a matter of Swiss law, anonymous witness examination is possible, provided the deciding authority is satisfied that the alleged threat is actual and real, and not just theoretically possible or plausible.\(^{47}\)

In summary, criminal courts will generally be reluctant to admit evidence from a protected witness since such measures could severely impinge on a defendant’s right to a fair hearing. However, the courts may, in exceptional circumstances, consider allowing such evidence where there is a threat against the witness and that such threat is (1) serious; (2) substantiated; and (3) actual and real, and not just theoretically possible or plausible.

C. The use of protected witnesses in disciplinary proceedings

As a preliminary point, it is worth noting that many sports disciplinary proceedings, such as those at the CAS, take the form of arbitrations. A number of these arbitral tribunals will often seek guidance on evidentiary matters from the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”). The first obstacle in relation to anonymous witnesses thus arises from the usual requirements in relation to witness statements, encapsulated by Article 4(5) of the IBA Rules:

\[\text{Each Witness Statement shall contain:} \]

\[\text{(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement.}\]

\(^{46}\) (no. 26668/95) ECHR 108 (14 February 2002).

\(^{47}\) see BERTRAND PERRIN, Commentary to Article 149 of the Swiss Code of Criminal Proceedings, in Kuhn/Jeanneret (Ed.) Commentaire Romand CPP, Basle 2011, No. 9 ad Art. 149, p. 688.
That notwithstanding, arbitral panels will often allow themselves the discretion to consider the admissibility of evidence, even if they do not strictly conform to the requirements of the IBA Rules. In the case of the CAS, for instance, matters of evidence fall subject to Article 184.1 of the Private International Law Act (“PILA”) (as do all international arbitrations that have their seat in Switzerland).

Article 184.1 of the PILA provides that an arbitral panel “... itself shall conduct the taking of evidence”. CAS panels have interpreted this provision to mean that it gives them the discretion to decide whether or not evidence adduced by a party is admissible.

The next issue arbitrators must thus address is whether, in the particular circumstances of the case, allowing evidence from an anonymous witness would be a disproportionate violation of a party’s right to a fair hearing.

The issue of protected witnesses is relatively new in sports disciplinary proceedings and so useful guidance can and should be sought by disciplinary tribunals from the jurisprudence of the criminal courts. Moreover, as discussed at Section IV above, disciplinary proceedings are becoming increasingly akin to criminal proceedings and so disciplinary bodies are well-advised to ensure that they do not deviate too far from principles established under criminal law. Indeed, it is perhaps no coincidence that CAS panels dealing with the issue of protected witnesses have expressly referred themselves to Article 6 of ECHR as well as ECHR jurisprudence:

(1) In the recent Contador case, the CAS acknowledged as follows:

172. The issue of the anonymous witness is linked to the right to a fair trial guaranteed under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter: the "ECHR"), notably the right for a person to examine or have examined witnesses testifying against him or her (Article 6.3 ECHR). As provided under Article 6.1 ECHR, this principle applies not only to criminal procedures but also to civil procedures.

173. The Panel is of the view that even though it is not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy.

174. In addition, it is noteworthy that Article 29.2 of the Swiss Constitution guarantees the same rights, aimed at enabling a person to verify and discuss the facts alleged by a witness.

49 For examples of such cases see Pobeda; and CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC.
175. Admitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information to have in hand when testing his/her credibility.

[...]

182. Again referring to the ECHR jurisprudence, the Swiss Federal Tribunal concludes that (i) the witness must be concretely facing a risk of retaliations by the party he/she is testifying against if his/her identity was known; (ii) the witness must be questioned by the court itself which must check his/her identity and the reliability of his/her statements; and (iii) the witness must be cross-examined through an “audiovisual protection system”.

(2) In Pobeda, the CAS held that:

72. When facts are based on anonymous witness statements, the right to be heard which is guaranteed by article 6 of the European Convention of Human Rights (ECHR) and article 29 par. 2 of the Swiss Constitution is affected.

The panel in Contador was not satisfied that The World Anti-Doping Agency’s (“WADA”) witness was “threatened to an extent that could justify a complete protection of the witness’ identity from disclosure to the Respondents” and thus refused to hear evidence from the anonymous witness on the conditions proposed by WADA. Conversely, the CAS panel in Pobeda allowed the evidence of multiple protected witnesses on the basis that these witnesses would be exposed to serious and actual threats if their identities were revealed.

Disciplinary tribunals faced with an application to hear the evidence of an anonymous witness must thus make all necessary enquiries to establish whether a particular witness is subject to threats against his/her personal safety and that such threats are real. If those threats are real and serious in nature, the tribunal should then consider the modalities by which the witness’ evidence is to be delivered, always ensuring at a very minimum that (1) the identity of the witness is to be verified by the court; (2) the witness is to be questioned by the court itself to test the reliability of his/her statements; and (3) the defence is able to put pre-agreed questions to the witness, even if such questions are to be delivered by the court.

The author wishes to emphasise that in the majority of cases, this bare minimum would constitute a serious and disproportionate violation of the accused’s right to a fair hearing and could reasonably only be applied in the most extreme of circumstances.

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See paragraph 184 of Contador.
See paragraph 73 of Pobeda.
The Role of Arbitration in dealing with Sporting Fraud issues

Tribunals must ensure that any protective measure proposed is both adequate and proportionate to the interests of all the parties. In doing so, this author suggests adopting the following principle articulated by the CAS in *Contador*\(^{53}\):

*The more detrimental the measure is to the procedural rights of a party the more concrete the threat to the protected interests of the witness must be.*

In summary, there is no question that allowing the evidence of a protected witness restricts an accused’s right to a fair hearing and it should be regarded as an extreme measure reserved for extreme circumstances. For the few tribunals that find themselves in a position in which the circumstances justify the admission of evidence from unidentified witnesses, they must ensure that the protective measures imposed are proportionate both to the rights of the witness and the rights of the accused.

**VI. SANCTIONS**

In the past three years the CAS has issued decisions in at least four cases involving issues of sporting fraud\(^{54}\). In each case, the CAS upheld lifetime bans imposed at first instance:

1. In *Pobeda*, the president of a Macedonian football club, was held to have been involved in match-fixing and was banned from exercising any football-related activities for life\(^{55}\);
2. In *Oriekhov*, a Ukrainian football referee was banned from exercising any football-related activities for life after failing to report to UEFA, approaches that had been made to him by members of a criminal group involved in match-fixing and betting fraud;
3. In *Köllerer*, a professional tennis player was held to have attempted to fix matches on several occasions and was sanctioned with a lifetime ban from tennis; and
4. In *Savic*, a professional tennis player was held to have attempted to fix sets and was sanctioned with a lifetime ban from tennis.

The individuals involved in these cases ranged from players to referees to club presidents. Moreover, the violations ranged from match-fixing, attempted match-fixing and attempted set-fixing. Yet, it is notable that the same permanent sanction was imposed in all four cases.

The issue of sanction is one that has been debated at great length in the realm of anti-doping. While there are appreciable differences between sporting fraud and

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\(^{53}\) See paragraph 180.

\(^{54}\) The cases are (1) *Pobeda*; (2) *Oriekhov*; (3) *Köllerer*; and (4) *David Savic v. Association of Tennis Professionals, Women's Tennis Association, International Tennis Federation and Grand Slam Committee*.

\(^{55}\) Note, however, that the CAS held that it was not satisfied that sufficient evidence existed to establish that the co-appellant in that case, the captain of the club, was involved in match-fixing and so no sanctions were imposed on him.
doping, disciplining any individual remains subject to one overriding principle of law – proportionality.

The principle of proportionality is well-established within most systems of law and plays an important role in the determination of sanctions applicable in disciplinary matters, whether in a public or private forum. The principle pervades Swiss law56, EU law57 and general principles of (sports) law58.

The parameters within which the proportionality of a sanction falls to be measured were described by the CAS in CAS 2005/C/976 & 986 FIFA & WADA:

138 The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.

139. A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim.

(Emphasis added)

The CAS panels in Pobeda, Oriekhov, Köllerer, and Savic evidently considered that a lifetime ban was proportionate in the circumstances of each case. While that may have been the case, future CAS panels should beware that just as different categories of doping exist (e.g. “use or attempted use”, “possession”, “trafficking”, etc.), so too do different categories of sporting fraud (i.e. “match-fixing”, “point-shaving”, “spot-fixing”, etc.). The relevance of these distinctions under anti-doping rules is that substantially different sanctions may apply depending on the particular act under scrutiny. For instance, the standard sanction imposed under the WADA Code for possession of a prohibited substance is a two year ban (for a first offence), while an athlete held to have been trafficking a prohibited substance could receive a ban of between four years to life59. This difference in the applicable sanctions presumably reflects a consensus that trafficking is generally considered a worse offence than mere possession. Similarly, the time will soon come when tribunals dealing with sporting fraud cases will have to consider whether it is proportionate to sanction, for instance, an act of spot-fixing as harshly as an act of match-fixing.

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59 See Articles 10.2 and 10.3 of the WADA Code.
Equally, another decisive factor in the determination of sanctions may be the role that the individual played in the scheme. For instance, it is surely only a matter of time before a distinction is drawn in relation to the sanctions imposed on the architect of a fraud as opposed to a player who acts under duress or on the instructions of coaches, more senior players or club officials.

If and when it is acknowledged that these distinctions must be reflected in the level of sanction imposed, tribunals will then be required to determine what that level should be in a given case. That in itself is likely to be the source of some considerable debate.

There is almost universal recognition that a two-year sanction for a disciplinary offence is a significant incursion on the rights of the individual affected and is already the limit of the severity of sanction that can be imposed for a first doping violation in the absence of aggravating circumstances\textsuperscript{60}. The regularity with

\textsuperscript{60} See:


142. There is no doubt that a two-year suspension (not to mention a lifetime ban) has a direct impact on the personal freedom of an athlete. In a recent decision, the Swiss Federal Supreme Court recognized that a ban of two years results in a restriction of athletes’ freedom of movement which may adversely affect their international careers as top-level competitors.

143. Moreover, for professional athletes, a two-year suspension (and, a fortiori, a lifetime ban) will likely affect their right to work. In the context of the EU, the imposition of a suspension on an athlete may also encroach on the freedom of movement for workers within the meaning of Article 39 of EC Treaty and, for self-employed athletes, on the freedom of establishment within the meaning of Article 43 of the EC Treaty.

(2) Paragraphs 3 (b) (aa) (page 26) and 3(f) (aa) (page 32) of Legal Opinion, Dr. Claude Rouiller, 25 October 2005:

3 (b) (aa) (page 26) [...] To the extent that it punishes a first anti-doping rule violation by imposing a fixed penalty of two years’ suspension, Article 10.2 of the Anti-Doping Code has a major impact on personal liberty from the perspective of the respect for one’s person.

[...]

3. (f) (aa) (page 32) [...] A two-year suspension will very often mean – in any case in sports where national and international performances go on regularly – the end of the athlete’s career, or at least that he or she will go down in the rankings and find it hard to catch up having not had the opportunity of truly measuring himself or herself against the most talented competition in the field for the duration of the suspension period. In practical terms, the suspension gives rise to a “Berufsverbot” and that will always – in circumstances like these – compromise economic liberty in a grave and serious, even an irreparable manner.

(3) Paragraphs 33, 114, 138 and 139 of Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes, Professor Gabrielle Kaufmann-Kohler and Antonio Rigozzi, 13 November 2007:

33. [...] One can hardly deny that the imposition of a two-year ineligibility period to an athlete may constitute a severe sanction.

[...]

114. [...] the imposition by a sports governing body of an ineligibility period of two years (and a fortiori a longer suspension) constitutes a restriction of the athletes’ personal liberty under Article 8 EHRC and similar constitutional provisions [...] and personality rights within the meaning of Article 28 CC [...]. For professional or semi-professional athletes, the imposition of such a ban would also entail an infringement of their right to work guaranteed by Article 6 of the UNCSR and similar constitutional provisions as well as a restriction of competition within the meaning of Article 81 CE [...].
which lifetime bans have been handed in sporting fraud cases may therefore have come as a surprise to some legal observers. It would, of course, be dangerous to draw too many parallels between doping and other forms of sporting fraud given the many differences that exist between the two but it would equally be imprudent to disregard years of jurisprudence developed in another area of disciplinary sanctions which is subject to the same overriding principles of law.

Sport is unquestionably faced with a serious problem. There are already signs that public confidence in the integrity of sports competition is eroding; surprise results raise eyebrows, below-par performances are met with cynicism and contentious refereeing decisions lead to suspicions of foul play. However, tribunals must be cautious that their decisions are not knee-jerk reactions to the hype surrounding sporting fraud and that they are dispassionately guided, instead, by fundamental principles of law.

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[...] one should bear in mind that a four-year ban would most often put an end to an athlete's (high level) career and thus be tantamount to a life ban. Therefore, an aggravated first offence could de facto be punished as harshly as numerous second offences (Article 10.7.1) and almost all third offences (Article 10.7.3).

This could raise problems if the ineligibility period were automatically of four years in the presence of aggravating circumstances. In reality, Art. 10.6 provides for an increased suspension of up to four years, which means that the adjudicating body is afforded sufficient flexibility to take into account all the circumstances to ensure that aggravating circumstances do not systematically result in a four-year period of ineligibility.