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Allegations against Nike Oregon Project

Catch Me If You Can, a BBC Panorama programme aired on 3 June, has claimed that Alberto Salazar, Head of the Nike Oregon Project, encouraged athletes to use prescription medication in order to gain a competitive advantage. Former athletes and a former assistant coach have made allegations relating to doping including that 2012 Olympic silver medalist Galen Rupp was using testosterone and prednisone for many years prior to and whilst at the Nike Oregon Project.

The US and World Anti-Doping Agencies are investigating Salazar and Rupp, both of whom have denied the allegations and no member of the Oregon Project has ever failed a drug test, including Rupp.

"Everyone must remember that allegations alone are not enough to prove that Salazar or Rupp committed anti-doping rules violations," said Paul J. Greene, Founding Attorney at Global Sports Advocates. "The WADA Code requires that an anti-doping rules violation be proved to the comfortable satisfaction of the hearing panel and that a person be given the opportunity to confront the evidence against them at a hearing before an impartial arbitration panel. None of those things have happened yet here."

IN THIS ISSUE

The need for reform in the wake of the FIFA tsunami

It is hard to predict the ultimate impact of the investigation into FIFA, which broke on 27 May with the arrest of seven FIFA officials at a FIFA Congress in Switzerland, said Luca Ferrari, Partner and Global Head of Sports at Withers LLP. A much publicised criminal investigation into the alleged corruption of international football that saw Sepp Blatter resign as President of FIFA days after being re-elected for a fifth term.

The criminal investigation being carried out by the US Department of Justice alleges that a number of sports marketing executives paid millions of dollars in bribes to FIFA officials to secure broadcast rights, with charges including money laundering, wire fraud and racketeering. The claim is that such activities were used to benefit the accused through the corruption of international football over a 24-year period. Swiss authorities announced that they too have opened their own investigation into the bidding process, which resulted in the award of the 2018 World Cup to Russia and the 2022 World Cup to Qatar.

The European Parliament ('EP') passed a resolution on 11 June expressing regret that the corruption allegations against FIFA have seriously damaged the credibility and integrity of global football and calling for urgent 'structural reforms.' The resolution states that FIFA should put in place 'a transparent, balanced and democratic decision-making process.' Ferrari is critical of the EP's resolution, which he believes squarely contradicts prior appeals to let sports governing bodies skip judicial scrutiny.

"I know what would be in the best interest of football: FIFA should finally embrace its responsibilities as football's world governing body and undertake much needed good governance and transparency reforms," said Ferrari. "Something will have to happen in the wake of this tsunami. But let's face reality: it is unlikely, if not impossible, for a political system of this kind to reform itself. I will be extremely sceptical of any changes falling short of dismantling the current 'feudal' system, in which a devoted constituency tends to guarantee life-long tenure."

Two fundamental steps in the right direction in reforming FIFA would be changing the electoral system and limiting the presidency tenure to two four-year terms, thinks Ferrari. "FIFA must think about its role as the trustee of a sport that is world heritage. Conceding that involves the pursuit of profit - as a means, not an end - FIFA board members ought to be fully aware of their mission."

Boca Juniors sanctioned for violent behaviour of its fans

Boca Juniors was sanctioned by the Disciplinary Tribunal of Conmebol on 16 May after Boca fans sprayed River Plate players with an irritant before the start of the second half of the Copa Libertadores football match between the Argentinian rivals on 14 May.

The three-member disciplinary panel sanctioned Boca: eliminating them from the current Libertadores Cup; requiring the next four matches in international competitions to be played behind closed doors; prohibiting the sale of tickets to Boca fans for the next four away matches in international competitions; and fining them $200,000.

Eduardo Carlezzo, Founding Partner at Carlezzo Advogados Associados, who represented Boca during the Disciplinary Tribunal and appealed the decision to the Chamber of Appeals of Conmebol, which was subsequently rejected, explains that Boca's position following the incident was to recognise the responsibility of the club for such actions by fans and to identify the perpetrators.

"Despite the heavy sanctions, we are happy to have eliminated another heavy sanction being considered, which was the exclusion of Boca from international competitions in 2016 and 2017," explains Carlezzo.

The club was punished for the action of their fans, which included the launch of objects onto the pitch, the use of a drone carrying a flag that mocked River's recent relegation to the second division in the Argentinean league, and the launch of an irritable liquid or gas at River players.

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FIFA: how football's governing body can still come clean

Julian Diaz Rainey, Barry Vitou and Trevor Watkins of Pinsent Masons LLP explore the background to the recent developments, the legal implications and their view on what FIFA must do if it is to overcome it's current issues. Barry Vitou is a Partner and Head of the Bribery and Corruption team, Julian Diaz Rainey is a Partner and oversees all dispute work within sport, and Trevor Watkins is a Partner and Global Head of Sport.

Barry Vitou

In the last month, criminal investigations mounted by external agencies in the US and Switzerland have brought FIFA and officials within it into the media spotlight. FIFA will now have its business investigated - and judged - by agencies working to apply laws created beyond FIFA's influence. Whilst much has been made of FIFA being in the dock, both they and the agencies now investigating have common purpose in seeking to deter abuse of process and corruption.

News of the US Department of Justice ('DOJ') investigation broke in late May 2015 with the initial arrest of seven officials from FIFA whilst attending the FIFA Congress in Switzerland. Some short hours later, Swiss officials announced that they had opened their own parallel investigation into the World Cup bidding process which resulted in the award of the 2018 World Cup to Russia and the 2022 World Cup to Qatar.

The DOJ alleges that a number of high profile sports marketing executives paid in excess of $150 million in bribes to FIFA officials to secure broadcast rights. Nine FIFA officials and five sports executives were indicted, as part of a 47-count indictment, raised early on the morning of 27 May in a federal court in Brooklyn, New York. Charges included racketeering, wire fraud and money laundering. The allegations are said to span a period of 24 years and claim that this was a scheme to enrich the accused through the corruption of international football, something US Attorney General Loretta Lynch described as "rampant, systemic and deep-rooted, both abroad and […] in the United States."[1]

Most interestingly, the DOJ also announced the guilty pleas of four individual and two corporate defendants, including that of defendant turned informant Charles Blazer, the long-serving former general secretary of CONCACAF and former US representative on the FIFA executive committee. Two Florida-based companies, Traffic Sports International Inc. and Traffic Sports USA Inc. also pleaded guilty, alongside their owner José Hawilla who founded the Traffic Group, a multinational sports marketing conglomerate headquartered in Brazil. Those who pursued the principal process are now being found to have corrupted the purpose.

It was further revealed that in July 2013, Daryll Warner, son of Jack Warner and a former FIFA development officer, had pleaded guilty to wire fraud and money laundering; his brother Daryan subsequently pleaded guilty to similar offences, forfeited over $1.1 million and has agreed to pay a second forfeiture money judgment at the time of sentencing.

Mr Warner senior is also indicted and has spoken openly of his determination to release an "avalanche" of information about wrongdoing at FIFA. Blazer is ahead of him in doing so, having explicitly admitted to taking bribes in exchange for votes in the bidding for the 1998 World Cup to France and the 2010 World Cup to South Africa. The conspiracy has therefore been proven. The basis of Blazer's plea is such that prosecutors no longer need to concern themselves with evidencing the meeting of two minds, the collusion or the agreement to commit the offences alleged. Their attention has turned to the bigger question of with whom did Blazer conspire?

Loretta Lynch went on to say that the alleged corruption spanned "at least two generations of soccer officials who, as alleged, have abused their positions of trust to

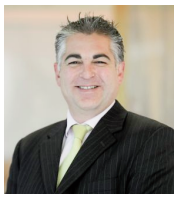
acquire millions of dollars in bribes and kickbacks. And it has profoundly harmed a multitude of victims, from the youth leagues and developing countries that should benefit from the revenue generated by the commercial rights these organizations hold, to the fans at home and throughout the world whose support for the game makes those rights valuable."

The long arm reach of the prosecutor was felt later the same day, when Swiss authorities in Zurich arrested seven of the defendants charged in the indictment at the request of the DOJ. The message was clear; the DOJ had invested in its investigation and intends to bring wrongdoers to justice, wherever they may be located. Long-time president Sepp Blatter abruptly resigned as president of FIFA just days after winning re-election to a fifth term; the following day the *New York Times* claimed he was the subject of a corruption inquiry by the FBI.

So far the arrests and pleas in the public domain focus on those who, it is alleged, received bribes. Those suspected of the payments will almost certainly be next to face scrutiny by prosecutors and by the media. It is alleged that conduct has spanned the course of two decades; inevitably more revelations will follow. Organisations with historical and ongoing dealings with FIFA could be tainted by impropriety and should now take steps to ensure that their arrangements are above-scrutiny. As the last fortnight has revealed, there is more than just reputation at stake.

FIFA and its officials have long had to deal with accusations of bribery and corruption. It has long recognised the need for standards to which member associations and officials must adhere to, no doubt for ensuring belief amongst

So far the arrests and pleas in the public domain focus on those who, it is alleged, received bribes. Those suspected of the payments will almost certainly be next to face scrutiny by prosecutors and by the media



Julian Diaz Rainey

sponsors, associations and participants in the strength, transparency and integrity of its business and competitions.

A FIFA Code of Ethics has been in place since 2004[2], last revised in 2012 and underscores key principles on which FIFA and all those 'within' it must abide by, stating:

'We reject and condemn all forms of bribery and corruption. We all behave ethically and act with integrity in all situations, keeping in mind that a reputation for integrity is of the utmost importance to FIFA and its objectives. We seek transparency and strive to maintain a good compliance culture with checks and balances.'

There are clear prohibitions banning bribes or gifts that look to influence or could be perceived as being an attempt to influence.

In 2012, Sepp Blatter introduced further reforms. The FIFA Ethics Committee is empowered to oversee any actual or attempted breach of FIFA rules by participants, accomplices or instigators. It has extensive investigatory powers. With a 10 year statute of limitations save for bribery and corruption, it can impose penalties ranging from a warning to a fine and impose a ban on being involved in any football related activity. It also has the power to notify law enforcement agencies of its findings.

The Committee is split into two functions - investigatory, originally headed by US attorney Michael Garcia and adjudicatory - overseen by German judge Hans-Joachim Eckert.

It's initial work eventually led to Garcia concluding that illegal payments had been made by FIFA marketing company International Sports and Leisure ('ISL') to Joao Havelange, the previous FIFA president (and others).

Yet public confidence in the strength of the Ethics Committee has been shaken. Garcia was also mandated to prepare a report investigating in detail the circumstances surrounding the bidding process for the 2018 and 2022 World Cup. Delivered in August 2014, Garcia subsequently argued for the report to be released in full. Three months later a 42-page summary was published by Hans-Joachim Eckert, clearing the winners of 2018 and 2022 of any wrongdoing whilst also criticising unsuccessful bidders. Garcia subsequently resigned saying that the summary contained "numerous materially incomplete and erroneous representations of facts and conclusions." He stated his report had "identified serious and wide-ranging issues with the bidding and selection process."

FIFA subsequently made a referral to the Swiss authorities in relation to unnamed individuals and has agreed the report will be published in a "legally appropriate" form once ongoing investigations into five individuals are completed[3].

FIFA could rightly emphasise that many of the allegations and the DOJ inquiries concern matters occurring prior to the 2012 changes to the Code of Ethics. No further concerns may arise notwithstanding the continuing inquiries. Yet with Sepp Blatter potentially reconsidering his decision to step down, FIFA's own investigator expressing concern about the reform process and inquiries now taking place on two continents, the looming question that remains is: can FIFA survive this crisis in its current form without acting further?

We do not believe it can escape from the whirlpool of rumour it finds itself in and have a strong future unless it acts now to meet concerns. FIFA is currently in a

state of limbo, plans to announce the bidding process for the 2026 World Cup are frozen pending further developments. It is riven by debates over leadership and split between continents and national associations in a way it has not been before. Irrespective of division or loyalty to any candidate in the forthcoming Presidential election, FIFA recognises the importance of a system built on transparency, integrity and confidence that lead to the spectacle of a World Cup whose revenues should drive the game globally and not be lost to it.

In our view it requires a full and thorough 'public inquiry'-style process. Only by exposing FIFA's demons can they be exorcised.

Precedent

There is precedent. The inquiry conducted in 2002 into corruption surrounding the Winter Olympics helped to deliver change and restore some credibility to the IOC.

While an inquiry into FIFA would dwarf that process, it would also provide a level of closure to long-standing controversial issues. We'd advocate it progressing now. If an external, public investigation proves no further wrongdoing took place beyond that uncovered to date or that the existing checks and balances introduced subsequently are appropriate, being observed and complied with, then there will be greater acceptance that the game is not corrupt at a fundamental level. Conversely, if wrongdoing is proven and/or unchecked it will expose the governance failings that allowed a culture of corruption to develop, and ensure the errors of the past are not repeated.

Unlike the FBI investigation and related proceedings, the aim would not be to target individuals and punish, but to understand what steps need to be taken from a

Trevor Watkins

corporate governance perspective to deliver meaningful reform. It needs to be independent of those involved to date, multinational and judicial with a clear mandate from start to finish. It would require the power to investigate, publish findings and make recommendations for reform up to and including a review of the structure and governance of football worldwide. This would be a very different animal from the Garcia inquiry.

FIFA can, as it does with the Ethics Committee, ensure 'all participants in worldwide football have an obligation to co-operate in providing witness statements and/or documents.' Terms of reference to the inquiry can be agreed between FIFA's interim leadership and those who have been appointed to lead it; the latter must have no links to either FIFA or any other Football Association or Confederation. We suggest a strong, independent judicial background in the members.

Hurdles

There will be hurdles. Firstly FIFA needs to have the willingness to embrace such a bold move. In addition, public inquiries are incredibly expensive and time consuming. The Garcia inquiry, limited in scope, lasted for 18 months and cost an estimated £6m. Given the resources available to FIFA it would be money well spent, the costs would pale into insignificance by comparison to the financial consequences of not re-establishing faith in the governance of the game.

Individuals under investigation will be mindful that any documentation and/or information to be provided to an inquiry could be used against them in criminal proceedings. These individuals will be reticent to assist. To give maximum opportunity the Baha Mousa Public Inquiry approach should be adopted and stuck to - no evidence given by an individual would be used against him in any criminal proceedings.

Conclusion

FIFA faces an unprecedented downturn in confidence following these damaging events. Key sponsors and major footballing nations have intimated their willingness to abandon the World Cup, the competition that is at the heart of this founding institution. Strong leadership, a bold approach and a willingness to accept the result is absolute bare minimum if disaster is to be averted. At the most fundamental level, a legitimate, transparent global football organisation which delivers spectacular World Cups and significant social benefits around the world is in the interest of everyone who loves the sport. Whether that organisation can be FIFA depends on the decisions it takes in coming weeks. FIFA should not miss a golden opportunity to lead and be ahead of the game.

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1. US Attorney General Lorretta Lynch, 27 May 2015.
2. Revised in 2006, 2009, 2012.
3. Spaniard Angel Maria Villar, a FIFA vice-president; Belgian Michel D'Hooghe; Thailand's Worawi Makudi; former executive committee member Franz Beckenbauer; and former Chilean football leader Harold Mayne-Nicholls.

The concept of 'no significant fault' in anti-doping litigation

Dr Gregory Ioannidis, a Senior Lecturer in Law at Sheffield Hallam University, an Academic Associate at Kings Chambers in Manchester and newly appointed member of the *World Sports Law Report* editorial board, discusses the concept of 'no significant fault' in the revised WADA Code 2015 and highlights its application and interpretation with regards to the use of nutritional supplements by professional athletes. Having acted for several professional athletes, Gregory explains that the 'no significant fault' concept can now be interpreted in a wider manner and that the need for effective education is imperative.

Introduction

One of the most important new elements in the revised World Anti-Doping Agency Code 2015 ('WADAC 2015') is the recognition of the application of the principle of proportionality. Such is its importance that the revised WADAC 2015 acknowledges that innocent athletes need to be protected, with the creation of appropriate rules that would strike a balance between the rights of the individual and those of the sport.

Although the revised regulations offer more latitude and flexibility to adjudicating panels, the application of the strict liability principle remains in place and confirms the uncertainty and injustice that the system can create. Although a purposeful interpretation and application of the revised regulations may limit the operation of injustice, the author submits that we are still a long way away from creating a regulatory framework that would equally respect and safeguard the rights of individual athletes and those of the sport.

The regulatory framework and interpretation of the 'no significant fault or negligence' principle

Practice and jurisprudence in this field clearly indicate that the lack of clarity and consistency in the application of sanctions, are the main reasons behind the main revision of the new WADAC 2015. This is because the level of fault, on the part of the accused athlete, required for the application of sanctions, is usually interpreted with a very narrow and inconsistent approach by different adjudicating panels[1]. The new wording does attempt to produce some consistency in the application of sanctions; however, it is submitted that the wording of the revised WADAC 2015 does not necessarily suggest a solution to the current problem, but rather offers a slight improvement.

The degree of fault

The test is two-fold and although the revised WADAC 2015 does not specifically state the well-established threshold criteria, it is submitted that panels of judges would continue to apply the two-stage test. Under the current regulatory framework, once an adverse analytical finding is established and the substance found in the athlete's sample is a specified substance[2], the athlete is deemed to have committed an anti-doping violation[3], with a maximum penalty of a two-year period of ineligibility.

The legislator, however, has considered the situation where some athletes could, as a matter of fact, be without fault or without significant fault. He has created, therefore, specific regulations, whereby athletes could reduce, or even eliminate the two-year period of ineligibility[4]. To do so, athletes must establish that they bear 'no fault or negligence' or 'no significant fault or negligence.' The necessity of the creation of such regulations, as stated above, relates to the application of the principle of proportionality and the parameters in which such a principle could operate. At the same time, the legislator requires the accused athlete to establish their level of culpability and the degree of fault.

The degree of fault, therefore, is established with the application of the two-stage test. The athlete is given the opportunity not only to reduce the level of fault, but also to eliminate it, by establishing the following two initial steps:

1. How the substance entered his/her body; and
2. That the athlete did not intend to enhance his/her performance

with the use of such substance.

Although the revised WADAC 2015 does not specifically state the standard of proof, it is submitted that practice and jurisprudence suggest that the standard of proof remains 'the comfortable satisfaction of the Tribunal.'[5] Accordingly, if an athlete can establish to the comfortable satisfaction of the Tribunal that he/she bears no fault or negligence[6] or no significant fault or negligence[7], the period of ineligibility could be reduced or eliminated.

Depending on the evidence, its evaluation and analysis and the athlete's degree of fault, practitioners could advise their clients as to the appropriate regulation that applies to the facts of the matter. There are two options:

No fault or negligence

Here, if an athlete can show 'no fault or negligence,' the period of ineligibility can be eliminated, pursuant to Article 10.4[8]. Prerequisite for a complete elimination of any period of ineligibility would be evidence that there are 'exceptional circumstances,' under which the adverse analytical finding was established. As the WADAC 2015 states, the circumstances must be truly exceptional, such as, for example, that the athlete's sample or the product he/she was using was sabotaged by a competitor.

Advisers must also pay attention to the explicit instruction by WADA that a sanction cannot completely be eliminated if the positive finding was the result of the use of a contaminated supplement. On these premises, it is submitted that the legislator's intention here is to completely preclude adjudicating panels from waving any responsibility on part of the athlete, where a nutritional supplement is involved. In essence, the legislator is sending the message that athletes should face the consequences and accept the risks that are inherent with the use of nutritional/dietary supplements. Advisers, therefore, need to evaluate with the utmost attention, the evidence and the facts that relate to their clients' use of such nutritional supplements[9].

It is submitted that practitioners must be aware of the dangers of relevant submissions regarding the degree of fault and the strategy they need to follow to establish a low degree of fault

No significant fault or negligence

Pursuant to Article 10.5[10] if an athlete can establish 'no significant fault or negligence' and subject to the relevant degree of fault, the period of ineligibility could be reduced with sanctions ranging from a reprimand (with no period of ineligibility and at the lowest end of the spectrum of fault), to a maximum of a 24-month period of ineligibility (at the highest end of the spectrum of fault). This Article also contains two different subsections[11], both requiring the same analysis with regards to the degree of fault on the part of the accused athlete.

It is submitted that the new ingredient in the interpretation of this regulation suggests that Article 10.5.1 no longer requires the athlete to establish 'specific circumstances,' which means that adjudicating panels will now have a greater degree of discretion in interpreting 'fault.' Those practicing in this area of sports law would recall that under the WADAC 2009, an athlete had to establish the 'specific circumstances' that led them to the offence and which, subsequently, would have determined the degree of fault. The revised WADAC 2015 does not expressly state such requirement, but the author is of the view (based on the current litigation) that such 'specific circumstances' will continue to be examined by different adjudicating panels.

In light of the above, the author submits that the new wording of this concept allows for a better, more effective and more purposeful application and interpretation of the principle of proportionality. On proper construction of such principle, the author submits that the aim here is to make sanctions more proportionate to the offence committed.

On these premises, it is submitted that practitioners must be aware of the dangers of relevant submissions regarding the degree of fault and the strategy they need to follow to establish a low degree of fault. The analysis here is always fact-specific and the degree of fault of the athlete would depend on a number of different steps that the athlete has taken to ensure that the prohibited substance did not enter his/her body. In other words, the purposeful interpretation of the relevant regulation[12] creates a spectrum of fault, in which the lowest end of the spectrum of fault would guarantee a simple reprimand and no period of ineligibility and the highest end of the spectrum of fault would trigger a 24-month period of ineligibility.

Evidential and interpretative methods at the Court of Arbitration for Sport ('CAS')

It is submitted that the degree of fault of an athlete would depend on the steps the athlete has taken to ensure that a specified substance did not enter his/her body. It follows that the analysis is fact-specific and practitioners are best advised to collect substantial evidence and evaluate its probity, before making use of the relevant and applicable regulations. Given that the revised WADAC 2015 promotes the application of the principle of proportionality, any submissions in favour of the

application of such principle would very much depend on what the athlete did or ought to have done, to ensure that the prohibited substance did not enter his/her body. This interpretation usually tends to be very subjective, given that different panels may interpret an athlete's steps in different ways. The author submits that the revised WADAC 2015 may allow panels greater flexibility in interpreting 'fault' and for this reason it is advised that practitioners pay attention to specific pieces of evidence, should such evidence exist.

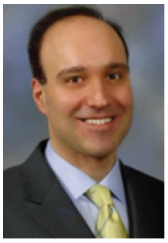
From the author's experience in recent and current anti-doping litigation, one important evidential matter concerns the athlete's reliance on the doctor's advice to use the supplement that subsequently led to the adverse analytical finding[13]. Although the revised WADAC 2015 does not expressly distinguish between a supplement and a medicinal product[14], it is submitted that evidence that can be presented 'to the comfortable satisfaction of the Panel,' which shows that the athlete relied heavily on the doctor's advice to use the supplement, may reduce considerably the degree of fault.

On these premises, advisers must file submissions outlining the athlete's reasonable and practically possible steps prior to the use of the supplement/medicinal product, in a clear and concise manner. Such evidence must be corroborated with witness statements that add credibility to the athlete's submissions. CAS Panels pay enormous attention to the diligence employed by the athlete in question[15], as well as to the athlete's character[16].

Conclusion

Current practice and a more purposeful interpretation of the revised WADAC 2015 suggest that adjudicating panels can now interpret the athlete's degree of fault with greater flexibility and latitude. Such flexibility, however, should not be taken for granted by advisers, nor should it be construed as the general rule. Flexibility in a Panel's interpretation would very much depend on the precise and objective evaluation of the evidential background, combined with the athlete's attitude prior, during and after the adverse analytical finding. As the analysis is always fact-specific, advisers are urged to focus on the weight of the evidence before them and the credibility the athlete can establish in his/her subsequent testimony.

Finally, one must not dismiss the enormous responsibility that governing bodies owe to their members. The analysis of several of the cases the author is currently involved in indicates that almost without exception, governing bodies fail in their duty to educate their athletes as to the dangers from the use of supplements. Although athletes are responsible for what they put in their system, it is respectfully submitted that governing bodies have an equally great duty to ensure that athletes fully understand that duty.



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1. See Gregory Ioannidis, 'Contaminated Supplements in Sport,' Solicitors Journal, 159/19, 19 May 2015.
2. As they are stated in the relevant list of the WADAC. Specified substances do not include anabolic and androgenic steroids.
3. Such violations give rise to strict liability offences.
4. Articles 10.4 and 10.5 of the WADA Code 2015.
5. CAS jurisprudence explains that such standard is below the criminal standard of proof, but above the civil standard of proof, CAS 2010/A/2229.
6. Article 10.4 WADAC 2015.
7. Article 10.5 WADAC 2015.
8. Article 10.4 of the WADAC 2015.
9. A 'grey' area here concerns the use of medicinal products, as the revised WADAC 2015 does not distinguish between supplements and medicinal products. As the WADAC 2015 is silent on the point, advisors, it is submitted, may be forced to submit before panels that supplements could not possibly be equated with medicinal products and the application of Article 10.4 may therefore be reduced only to the use of nutritional supplements.
10. Article 10.5 of the WADAC 2015.
11. Article 10.5.1 of the WADAC 2015 deals with specified substances and Article 10.5.2 deals with contaminated supplements.
12. Article 10.5 of the WADAC 2015.
13. CAS 2011/A/2645, UCI v. Kolobnev & RFC.
14. Cielo Award CAS 2011/A/2495. Reliance on medical advice justified only a warning against the athlete. The Panel stated: "…[it] cannot utilise, without significant unwarranted adjustment to the concept of 'No Fault or Negligence' employed in this Rule, notions of what would be regarded as fault or negligence under either civil or common law."
15. CAS Arbitration N CAS OG 12/07, FIFA v. WADA, CAS Advisory Opinion dated 21 April 2006, CAS 2005/C/976 & 986 FIFA and WADA.
16. CAS 06/001 WADA v. USADA & USBSF & Zachery Lund.

The N. Srinivasan case and 'conflict of interest' in sport

On 22 January 2015, the Supreme Court of India rendered a landmark judgment disallowing former President of the Board of Cricket Control in India ('BCCI'), Mr N. Srinivasan from contesting elections for the top post of the game's administrative body. The apex court struck down the amendment to Rule 6.2.4 of the BCCI Rules and Regulations which permitted BCCI office bearers to have a commercial interest in owning teams in the Indian Premier League ('IPL') and Champions League T20. For the first time in the history of Indian sport, a judicial precedent has been set expounding the principle of what constitutes a conflict of interest in a sporting environment. In this article, Amrut Joshi, Aditya Shamlal, Vishnupriya Sainath and Mahit Anand of GameChanger Law Advisors analyse the rationale to the Supreme Court's judgment and argue that Indian sport will never be the same again. The authors also analyse in detail the concept of 'conflict of interest' as expounded by the Supreme Court's judgment.

In a meeting in September 2007, the working committee of the BCCI decided to launch the IPL, to be run and administered by a sub-committee of the BCCI known as the IPL Governing Council. In December 2007, the IPL Governing Council invited tenders for IPL franchises in an open bidding process. India Cements Ltd (promoted by Mr N. Srinivasan) was awarded the Chennai City franchise, known as Chennai Super Kings ('CSK'). At the time India Cements Ltd was awarded the CSK Franchise, Srinivasan was also the Treasurer of the BCCI and President of Tamil Nadu Cricket Association. Allegations of a conflict of interest first surfaced when Mr A.C. Muthiah (Ex-President of BCCI) wrote to the then President of the BCCI, Mr Sharad Pawar, on 5 September 2008, highlighting that a violation of Rule 6.2.4 of the BCCI Regulations had been committed by Srinivasan during the IPL auction, by virtue of the fact that India Cements Ltd had acquired the CSK Franchise. Rule 6.2.4 of the BCCI Regulations stipulated that 'No Administrators shall have, directly or indirectly, any commercial interest in the matches or events conducted by the Board.'

Amrut Joshi

As no action was taken by BCCI, Mr Muthiah filed a petition before the Madras High Court on the grounds that Srinivasan's actions amounted to an act of indiscipline and misconduct under BCCI Rules and Regulations[1]. The Court refused to pass an *ex-parte* temporary injunction and Srinivasan was allowed to participate in the Annual General Meeting of the BCCI where he was elected as Secretary. In the same meeting, Rule 6.2.4 of the BCCI Rules and Regulations was amended to exclude events like the IPL and Champions League T20 from its purview.

Aggrieved by the amendment, Muthiah approached the Madras High Court, contending that the amendment to Rule 6.2.4 of the BCCI Rules and Regulations was made to serve the personal interest of Srinivasan and that it contravened public policy. However, the Madras High Court held that the amendment was purely commercial in nature and was not in violation of any public policy. Muthiah appealed this decision before the Hon'ble Supreme Court of India in 2011[2].

On hearing his appeal, a two judge bench of the Supreme Court arrived at a split verdict[3]. Justice J.M. Panchal agreed with the decision of the Madras High Court and held that the amendment made to Rule 6.2.4 was not *mala fide* in nature and was not opposed to public policy. He based his decision on the fact that India Cement Ltd was a public company and Srinivasan held a mere 0.05% in shares. Further, Justice Panchal was of the opinion that Srinivasan's decisions in his capacity as an office bearer of the BCCI were subject to the approval of the General Body consisting of all members of the BCCI. On these grounds, Justice Panchal rejected Muthiah's appeal.

However, Justice Gyan Sudha Mishra in her judgment held that "conflict of interest does not require actual proof of any actual pecuniary gain or pecuniary loss as the principle of 'conflict of interest' is a much wider, equitable, legal and moral principle which seeks to prevent even the coming into existence of a future and/or potential situation which would inhibit benefit or promise through any commercial interest in which the principal actors are involved." Justice Mishra concluded that as Secretary of the BCCI, Srinivasan was privy to "highly sensitive information about the bidding process, the design of the tender, the rules of the game, the future plans of BCCI in respect of IPL and so on and so forth," which could have been misused in his capacity as a bidder through his company India Cements Ltd. Thus, Justice Mishra concluded that it was correct to submit that "no artificial Chinese walls can be assumed to exist between the multiple personalities and activities of respondent No.2 both as tender issuer and as a bidder."

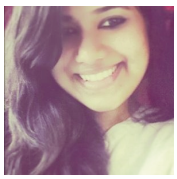
Since there was a difference in opinion, the matter was placed

before the Hon'ble Chief Justice of India for assignment to a larger Bench. However, the appeal went into cold-storage until fresh circumstances arose to bring the ball back to the Supreme Court. In 2013, the Special Cell of the Delhi Police received a tip-off that certain people involved in organised crime were fixing matches played during the 2013 edition of the IPL. At around the same time, Mr Gurunath Meiyappan, son-in-law of Srinivasan, was arrested on allegations of spot-fixing and betting[4]. Soon after his arrest, the BCCI constituted a Probe Commission comprising of two former Judges of the High Court of Madras to investigate the allegations. Almost simultaneously, Srinivasan announced that he was stepping down from the post of President until the probe against Meiyappan was complete.

The two-member Probe Commission appointed by the BCCI submitted its report stating that no evidence or findings were recorded against Meiyappan for his alleged involvement in the betting and spot-fixing scandal. At this point, the Cricket Association of Bihar ('CAB') filed two writ petitions in the High Court of Bombay seeking the following reliefs: (i) to direct the BCCI to recall the probe panel declaring it to be *ultra vires* the BCCI Rules and Regulations; and (ii) to remove Srinivasan from the post of President of the BCCI and the cancellation of the CSK Franchise from participation in the IPL.

On 30 July 2013, the Bombay High Court passed an order declaring that the two-member probe was not validly constituted by the BCCI[5]. However, the Court declined to conduct an inquiry and maintained that the constitution of the probe was the BCCI's prerogative under its Operational Rules.

Aditya Shamlal



Vishnupriya Sainath

The Mudgal Committee

The appeal made by the CAB against the decision passed by the Bombay High Court came up before the Supreme Court on 27 September 2013, when an order was issued permitting Srinivasan to participate in the election for the post of President of the BCCI subject to the condition that, in the event Mr Srinivasan was elected as President, he would not take charge until further orders were passed by the Court[6].

This matter then came up before the Supreme Court on 8 October 2013. The Court constituted a three-member Probe Committee to conduct an independent probe into the betting and match-fixing allegations against Meiyappan, certain players of the Rajasthan Royals Franchise and Mr Raj Kundra, the owner of Rajasthan Royals. The committee held that Meiyappan was an integral part of the CSK franchise and was regarded as the team official of CSK within the meaning of IPL Operational Rules. The Committee further held Meiyappan guilty of placing bets in favour and against his team.

The Mudgal Committee also highlighted the issue of conflict of interest. The Committee recognised that this issue was not within its terms of reference but, stated that "While it is evident that the questions raised before us about conflict of interest are serious and may have large scale ramifications on the functioning of cricket, we do not deem it proper to pronounce our opinion on this issue as it is not directly in our terms of reference. However, since several stakeholders repeatedly stressed on this issue, we thought it proper to bring this issue to the attention of this Hon'ble Court." This served as a trigger for the Supreme Court to debate the issue of conflict of interest further.

The 'conflict of interest'[7]

The CAB contended that the amendment to Rule 6.2.4 of the BCCI Rules and Regulations was *mala fide*, as the purpose of the amendment was to protect the grant of the CSK franchise to India Cements Ltd, which was a clear breach of Rule 6.2.4 as it existed before its amendment. As treasurer of the BCCI, Srinivasan could neither have acquired nor held any commercial interest in any BCCI event including the IPL and Champions League T20.

The CAB also contended that the amendment was hurriedly brought in, without supporting recommendations, without an agenda item for deliberations and without providing proper notice to members. The amendment was pushed through as 'any other item' on the agenda even though it had implications on a fundamental imperative applicable to all events organised by the BCCI.

These contentions of the CAB, and the findings of the Mudgal Committee, formed the basis for the Supreme Court to conclude that the amendment to Rule 6.2.4 permitted its administrators to have commercial interests in the events organised by the BCCI and this amended provision disregarded potential conflicts of interest between an administrator's duty as a functionary of the BCCI on one hand and their interest as the holder of any such commercial interests on the other.

Srinivasan's personal interest

In addition to the contentions raised by the CAB, there were certain instances which clearly indicated a conflict between the duty owed by Srinivasan to the BCCI and his personal interest in owning the CSK franchise.

The first instance arose when the BCCI awarded compensation of INR 104 million to CSK for

cancellation of the Champions League T20 Tournament in 2008. It was not disputed that Mr Srinivasan was among the decision making panel which approved the amount, which was paid to his own team and to Rajasthan Royals. This implied that Srinivasan most likely participated in proceedings leading to the award of compensation to his own franchise. A similar award of INR 131 million was paid to the CSK franchise in 2009. Though it was argued that this amount was returned by India Cements Ltd, the decision to award such an amount raised the pitch for Srinivasan's removal from the BCCI on grounds of conflict of interest[8].

Lastly, the alleged attempt by Srinivasan to set up a probe commission comprising of two judges of the Madras High Court to cover up allegations against Meiyappan indicated a conflict of interest, as a finding in favour of Meiyappan would have meant that the CSK franchise would have been found to be in breach of Clause 11.3(c)[9] of the franchise agreement with the BCCI. The CAB's submission was that as President of the BCCI, it was Srinivasan's duty to ensure a free and fair probe into allegations of betting and spot-fixing in the IPL. However, the CAB maintained that as a franchise owner and father-in-law of the person implicated, Srinivasan's actions in hurriedly constituting a probe panel without complying with the BCCI Rules, were a clear indicator that Srinivasan was deviating from his duties as President of the BCCI to protect his personal interests.

A conflict of interest in sport

The CAB case has prompted much debate on what constitutes a conflict of interest in a sporting context. Justices T.S. Thakur and Fakir Mohammed Ibrahim Kalifulla who authored the judgment in the CAB case, have, like Justice Mishra before, concluded unequivocally that an administrator of a sport cannot have a commercial interest in the same sport and continue to hold their administrative position in the governing body of such sport. The Court's attention was also drawn to other instances where former sportspersons, because of their proficiency in cricket, were often engaged as coaches, mentors or commentators for the IPL while being a part of the BCCI. The court has reserved comment on whether such situations would be tantamount to a conflict of interest. In the Court's own words "whether or not a player who is an 'administrator' by reason of an existing or earlier assignment held by him can acquire or hold a commercial interest in any BCCI event, will depend upon the nature of the interest that such person has acquired and whether the same is purely professional or has any commercial element to it."

This judgment has set a precedent for all sporting organisations and federations to ensure that their administrators are free of any conflict of interest and that they place the interest of the sport above personal commercial gain

Mahit Anand

What next?

We believe that an exposition of the principle of conflict of interest was an overdue step required to restore integrity in the administration of cricket. This judgment has set a precedent for all sporting organisations and federations to ensure that their administrators are free of any conflict of interest and that they place the interest of the sport above personal commercial gain. The Supreme Court has ordered a three-member committee to make recommendations to amend the BCCI's practices, procedures and rules with a view to making the BCCI's internal mechanisms more transparent.

Internationally the matter of conflict of interest has received attention from a number of sports governing bodies. Sport England, in 2004, published a Good Governance Guidance which made it mandatory for all sporting organisations which sought funding from Sport England to disclose pertinent information. Sporting organisations are required to demonstrate their commitment by ensuring that there are no conflicts of interest that influence the decisions of the organisation[10]. The Committee constituted by the Supreme Court would do well to analyse all such governance and recommend the formulation of similar codes and processes.

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1. http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=25306
2. A.C. Muthiah v. Board of Cricket Control in India and another, http://judis.nic.in/supremecourt/imgs1.aspx?filename=37944
3. A.C. Muthiah v. Board of Control for Cricket in India, http://indiankanoon.org/doc/1333395/
4. Para 7 of the Judgment in Board of Control for Cricket in India v. Cricket Association of Bihar and Ors, http://supremecourtofindia.nic.in/FileServer/2015-01-22_1421928541.pdf
5. The Bombay High court held that the Probe Commission was not duly constituted and was contrary to Rules 2.2 and 3 of Section 6 of the IPL Operational Rules.
6. Para 10 of footnote 4.
7. Paras 66-69 of footnote 4.
8. IPL Verdict, http://www.firstpost.com/sports/ipl-verdict-three-instances-that-demonstrate-n-srinivasans-conflict-of-interest-2059981.html
9. Clause 11.3 (c) of the Franchise Agreement reads as 'BCCI-IPL may terminate this agreement with immediate effect by written notice if the franchisee, any group company of the franchisee and/or any owner acts in any way which has a material adverse effect upon the reputation or standing of the league, BCCI-IPL, BCCI, the franchisee, the team (or any other team in the league) an/or the game of cricket.'
10. 'Good Governance Guidance,' https://www.sportengland.org/media/32986/Good-governance-guidance.pdf

Ironman Lottery declared illegal by the DOJ

The largest participation sports platform in the world - the iconic Ironman series of events - has found itself in hot water and nearly $2.8 million poorer following a joint investigation by the FBI and the US Department of Justice. Kaitlyn Humphreys, of DLA Piper Australia, explains the background to the investigation, and the impact on the Ironman Lottery, with a particular focus on how this plays out in Australia.

World Triathlon Corporation ('WTC'), a Florida-based US corporation, operates Ironman branded triathlons across a number of distances in more than 20 countries. Completing one of these events is a fitness goal for many people. But, for the privileged few with the requisite athletic prowess, competing at the Ironman World Championship in Kailua-Kona Hawaii is a life goal.

Comprising a swim-bike-run course of 3.8km, 180km and 42.2km respectively, Kona is renowned as the world's most challenging and iconic one-day endurance event. It's also extremely exclusive. A finite number of top finishers in each full distance race qualify to compete in Kona each year. But for those 'age groupers' who aren't elite athletes, and can't afford to buy their way in[1], since 1983 the IRONMAN Lottery has provided an alternative path to the starting line.

The Ironman Lottery

For a fee ($50 in 2015) athletes can enter the Lottery for the chance to win one of 100 entries into the event. Only one entry is permitted but since 1990, a further fee ($50 in 2015) provides a 'Passport Club membership' with a second entry into the Lottery.

Kaitlyn Humphreys

Winners must pay the Kona entry fee ($850 in 2015) and complete a full or half distance Ironman event before Kona. Their entries can't be transferred or deferred and there are no refunds.

The FBI and DOJ investigation

Earlier this year the US Department of Justice ('DOJ'), with assistance from the Federal Bureau of Investigation ('FBI'), investigated the Lottery and concluded that it constituted both a prohibited lottery in breach of Article 10, Section 7 of the Florida Constitution, and the conduct of an 'illegal gambling business' under Title 18, United States Code, Section 1955.

An 'illegal gambling business' arises where a business which employs five or more persons and either remains in continuous operation for at least 30 days or has gross revenue of $2,000 in a single day, violates the gambling laws of a State in which it conducts business.

Florida law prohibits lotteries that contain the three elements of consideration, chance and a prize[2]. Had WTC not charged athletes to enter - the consideration element - the Lottery would not have contravened the law.

It is unclear what prompted the investigation.

Impact of the investigation on the lottery

Since the lottery entry fees represent proceeds traceable to a violation of the United States Code, they are subject to forfeiture to the United States government[3]. The FBI and the DOJ limited their investigation to the past three lotteries, calculating the total amount WTC were required to forfeit as $2,761,910.

WTC cooperated fully with the investigation and forged a Consent Forfeiture Agreement with the DOJ under which WTC agreed not to contest the allegations without any admission of wrongdoing.

WTC has agreed to no longer operate the lottery in its current form and will announce later in the year its plans for the 100 slots previously distributed through the Lottery. The winners of the 2015 Lottery are unaffected and will be the last group of age groupers to compete at Kona through the current lottery system.

How would this play out in Australia?

Ironman enjoys a high level of brand awareness in Australia some of which is no doubt attributable to the success of local heroes Craig 'Crowie' Alexander and Mirinda 'Rinny' Carfrae, both three-time World Champions. Four full distance Ironman events are held in Australia annually including the Asia-Pacific Championships, as well as numerous 70.3® (half distance), 5150® (shorter distance) and other events.

Australians are eligible to enter the Lottery and are prompted to do so when completing an entry form for Ironman Port Macquarie, Cairns, Busselton or Melbourne. Those who so elect have the Lottery entry fee added to their race entry fee.

In Australia, lotteries are governed by the individual states and territories.

In New South Wales for instance, public lotteries can only be conducted by a licensed lottery operator of which there are only two. There are a myriad of other games of chance such as raffles, jackpots, bingo and sweeps in which entrants can pay to enter for the chance to win a prize but these can only be conducted for the benefit of a not-for-profit organisation.

Competitions conducted by businesses - known as trade

promotions - require entry to be free[4]. They also need a permit[5] and all entrants to have a fair and equal chance of winning[6]. The Ironman Lottery falls down on all of these fronts - it charges for entry, doesn't have a permit, and, in 2012, implemented a system where entrants gain an increased chance of winning based on the number of consecutive years they have entered the Lottery.

The Passport Club membership may comply if the $50 fee actually provides membership privileges (in 2015 the sole benefit besides the lottery entry was a DVD) and the chance to win a Kona entry was an incentive ancillary to that membership. This would be a trade promotion akin to those frequently run by businesses where, as an incentive, purchasers of a product or service are entered into a prize draw. The issue then however, besides the need for a permit, is the nature of the prize.

At its essence, the prize is actually an opportunity to buy an entry to Kona. This could constitute the selling of property by chance which is prohibited by section 3 of the Lotteries and Art Unions Act 1901 (NSW), and this prohibition extends extra-territorially to 'foreign lotteries' conducted outside of New South Wales ('NSW')[7]. Penalties apply for advertising or selling tickets in a foreign lottery so an entity considered to be promoting the lottery in NSW - for example local organisers and triathlon clubs - may be subject to a fine[8].

The sporting ballot

The notion of a competition where the prize is an opportunity to buy tickets to an event is not new in Australia. It has generally been the only way to get to major sporting events such as the Sydney 2000 Olympics, the 2006 Melbourne Commonwealth Games and the 2015 ICC Cricket World Cup.

Many businesses navigate their way around trade promotion requirements by removing any element of chance from their competitions, instead designing them to be a 'game of skill'

Organisers of events such as these typically conduct a ballot whereby people who want to buy tickets to an event register their interest, a draw takes place and the lucky few whose names are drawn can then purchase their tickets.

Under NSW law this would be a gratuitous lottery which doesn't need a permit so long as entry is free and it isn't conducted for the purposes of promoting a trade or business[9]. In the case of the Sydney Olympics, Melbourne Commonwealth Games and Cricket World Cup it would seem apparent that the ballots aren't conducted for the purposes of promoting a trade or business since the entities responsible are event organising committees, often established by government, and are not primarily pursuing a profit from ticket sales. But in the case of WTC, a for-profit corporation whose business is organising or promoting professional events, the converse is likely the case, so even if there was no fee to enter the lottery, it still wouldn't meet the requirements.

A solution?

Many businesses navigate their way around trade promotion requirements by removing any element of chance from their competitions, instead designing them to be a 'game of skill.' Provided a competition is judged using set criteria to determine the winner, rather than using chance, it will operate outside the legislation[10].

Perhaps when WTC announce their plans for the next iteration of the Lottery, entrants will be required to describe in 25 words or less why they deserve to compete at Kona?

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1. A number of slots are able for purchase via eBay with a minimum bid of $10,000. According to WTC CEO Andrew Messick, the slots auctioned in this manner over the past five years have averaged at $39,000.
2. Fla. Stat. 849.09.
3. Title 18, U.S.C. Section 981(a)(1)(C).
4. Section 4B(3)(c) Lotteries and Art Unions Act 1901 (NSW).
5. Ibid sections 4B(3)(a).
6. New South Wales, Department of Trade and Investment, Regional Infrastructure and Services, Office of Liquor Gaming and Racing, http://www.olgr.nsw.gov.au/pdfs/gofc_fs_trade_promotion_lotteries.pdf
7. Section 19A Lotteries and Art Unions Act 1901 (NSW).
8. Ibid sections 20, 21.
9. Ibid section 4G.
10. New South Wales, Department of Trade and Investment, Regional Infrastructure and Services, Office of Liquor Gaming and Racing, http://www.olgr.nsw.gov.au/trade_promos_faqs.asp

Training compensation and the transfer of minors

The spirit and purpose of training compensation is to encourage clubs to train their young players[1] and to grant them the necessary financial and sportive incentives to invest in the training and education of young players[2]. Leander Monbaliu, Attorney-at-Law at Koan Lorenz and Legal Counsel for the Belgian Pro League, explains why in his view, a recent small - but important - change in the calculation of training compensation has ignored this rationale.

The principles of training compensation

In 2001 FIFA introduced its new Regulations on the Status and Transfer of Players ('RSTP'). The training and education of young players was one of the pillars of these new regulations, which entered into force after intensive discussion between stakeholders at European level.

Not taking into account the different exceptions contained in the Regulations, such as for transfers within the EU/EEA, the principles of the FIFA Regulations on training compensation can be summarised as follows. Training compensation is payable when a player signs his first professional contract and each time a professional is transferred between clubs, either during or on expiry of his contract, until the end of the season of his 23rd birthday.

Compensation is, in principle, payable for training as from the season of the player's 12th birthday up to the season of the player's 21st birthday and calculated on the basis of the training costs of the new club, taking into account that each association divided its clubs into different categories (I to IV). The training cost is then multiplied by their number of years with the former club.

Beside the special rules for transfers within the EU/EEA[3], an important exception is contained in Article 5.3. of Annex 4 to the FIFA Regulations. This rule concerns the transfer of minors, i.e. players under the age of 18. This rule was subject to several changes since the implementation of the Regulations in 2001, which are further discussed below.

The bumpy road to the current version of Article 5.3.

2001: exception for the early training years

Article 5.3. Annex 4 to the Regulations foresaw derogation for the first years of training and education provided to a player, i.e. between the player's 12th and 15th birthday. For these seasons, the training costs of a category 4 club were to be applied, independently of the new club's actual category[4]. Thus, lower amounts applied. The Article itself explained that its aim was to 'ensure that training compensation for very young players is not set at unreasonably high levels.'

2009: exception to the exception to protect minors

By means of its then new regulations coming into force on 1 October 2009, FIFA introduced[5] an important amendment to the relevant article, adding an exemption in the case of a transfer of a minor[6]. In particular, in the case of a young football player transferred before the season of his 18th birthday, the actual training costs would apply. In practice, this meant that training clubs received a higher amount of training compensation in such cases.

2014: Back to the original wording

FIFA only recently decided to bring the scope back to the original wording, i.e. as it was before 1 October 2009: a small change with huge financial consequences for training clubs.

The (lack of) rationale behind the new Article

Circular 1437, by means of which FIFA announced the approval of the new amendment by the Executive Committee, remains rather vague with regard to the reasons for this change: 'The revised text of Annexe 4, art. 5 par. 3 of the Regulations brings the scope of the relevant provision back to its original wording. In keeping with the principle under which a provision could not be applied retrospectively, in its jurisprudence the Dispute Resolution Chamber (DRC) had yet to apply the amendment introduced on 1 October 2009. Furthermore, it appeared that applying the higher costs of the actual category to the training years of very young players would not be justified.'

Protection of minors no longer justified?

A first general argument of FIFA is that the application of higher costs (in other words not applying the exception, but applying the actual costs) is not justified. FIFA does not give more of an explanation in this regard. However, taking into account that the rationale behind the exception introduced in 2009 was to 'further fight the (financial) exploitation of very young players, considering that the need to protect minors prevails over the aim that the relevant exception pursues,'[7] this justification apparently no longer applies. This seems rather strange, especially since other specific regulations apply to (the transfer of) minors[8]. Moreover, in the past couple of years FIFA initiated proceedings

against several clubs for violations of these regulations.

Besides, for training clubs training compensation is on many occasions the only incentive in order to keep investing in young talent. This incentive is further diminished due to the reduced return on investment following the introduction of this amendment.

The '(non-)retroactive' application of Article 5.3.

The second argument for FIFA to change the Article back to its original wording relates to the Dispute Resolution Chamber ('DRC') jurisprudence whereby a rule cannot be applied retrospectively.

Indeed, the FIFA DRC decided in several cases[9] that the exception for transfers of minors could not be applied with regard to the training years before the coming into force of the new regulations, even if the event giving rise to the dispute, i.e. the transfer, took place after 1 October 2009. In this regard the DRC has always been consistent in its argument that:

'Against this background, in particular since the aforementioned amendment of the pertinent article of Annexe 4 of the Regulations only came in force on 1 October 2009, the Chamber found that it cannot apply said amendment to the years of training and education of the player prior to the coming into force of the amended art. 5 par. 3 of Annexe 4 i.e. prior to 1 October 2009. In other words, the Chamber concurred that the said provision could not be applied retro-actively and, consequently, decided that the second sentence of art. 5 par. 3 of Annexe 4 of the Regulations does not apply to the 2005/2006 and 2006/2007 seasons during which the player was registered with the Claimant.'

One could argue that the FIFA

Leander Monbaliu

DRC did not give a correct interpretation of the concept of retroactivity, referring to the fact that, pursuant to Article 26.2 FIFA RSTP, disputes regarding training compensation shall be assessed according to the regulations that were in force when the disputed fact arose, i.e. when the player signed his first professional contract. However, the Court of Arbitration for Sport ('CAS') in 2014/A/3500 *FC Hradec Kralove v. Genoa Cricket and Football Club* concurred with the view of the FIFA DRC[10]:

"Applying the amended regulations to seasons that had already elapsed upon their entry into force would be contrary to the prohibition of retroactive application of the law […]

A difference exists between the moment on which the right for compensation is born and can be duly exercised, which happens when the player signs his first professional contract or is subsequently transferred, and the determination of the contents of such right, that must be done according to the regulations in force at the time during which a player trains as an amateur with his club of origin."

According to the Panel, holding the opposite would lead to 'absurd results' whereby the same training period could lead to different compensation depending exclusively on the date on which the player signs his first professional contract or is transferred.

Furthermore the justification given by FIFA in its Circular 1437 to put the regulations back to their original wording is based on this approach by the DRC. However, given the consistency of the jurisprudence, it seems to be expected that this reasoning would also be applied to the new FIFA Regulations of 2014 which would mean that those regulations may also not be applied 'retrospectively.' So if a minor transfers after the implementation of the new regulations, i.e. after the 1 August 2014, for the calculation of the training years between 1 October 2009 and the 1 August 2014, the old regulations should apply with regard to the relevant training years. For these years (i.e. 2009 - 2014) the amount will thus be calculated on the basis of the new club's actual category.

This jurisprudence is thus of great use for clubs that are confronted with young players under 18 that are transferring to foreign clubs. Where the new club will refer to the new regulation, claiming lower amounts, the old club can claim the higher amounts, referring to the consistent jurisprudence of the FIFA DRC and the Court of Arbitration for Sport ('CAS').

The consequences in practice

Let's assume a player is trained by a category II club in Belgium and signs a contract for the season of his 18th birthday with an English category I club. A hypothetical situation, but realistic nevertheless.

Situation 1: training period containing years between 2009 and 2014[11]

The player was born in 1996 and the training period thus starts in season 2008-2009 when the player turns 12. For this season, an amount of €10,000 is applicable as the regulations in force at that time are equal to the new regulations of 2014. As of season 2009-2010 until the season of the players 15th birthday (three seasons) an amount of €10,000 would be applicable according to the new regulation; however, according to the jurisprudence described above, the regulations that were in force at that time are to be applied. This

means that 'the exception to the exception' is applicable and the actual training costs apply.

In line with the regulations this leads to the following calculation:

- 2008-2009 Cat. II Belgium (amateur) - player turns 12: €10,000
- 2009-2010 Cat. II Belgium (amateur): €75,000
- 2010-2011 Cat. II Belgium (amateur): €75,000
- 2011-2012 Cat. II Belgium (amateur): €75,000
- 2012-2013 Cat. II Belgium (amateur): €75,000
- 2013-2014 Cat. II Belgium (amateur): €75,000

TOTAL: €385, 000

Situation 2: training period starts after the coming into force of the new regulations

When a player turns 12 in season 2015-16 the new regulations will apply to the entire training period (if FIFA does not decide to change this in future). This results in the following calculation:

- 2015-2016 Cat. II Belgium (amateur) - player turns 12: €10,000
- 2016-2017 Cat. II Belgium (amateur): €10,000
- 2017-2018 Cat. II Belgium (amateur): €10,000
- 2018-2019 Cat. II Belgium (amateur): €10,000
- 2019-2020 Cat. II Belgium (amateur): €75,000
- 2020-2021 Cat. II Belgium (amateur): €75,000

TOTAL: €190, 000

The amendment of Article 5.3. Annex 4 to the FIFA regulations brings about important consequences for training clubs, which will see the compensation for training young talent reduced further

Conclusion

The amendment of Article 5.3. Annex 4 to the FIFA regulations brings about important consequences for training clubs, which will see the compensation for training young talent reduced further. Moreover, clubs are no longer discouraged from transfering minors, as reduced compensation will also apply. The author therefore questions whether this amendment is to be welcomed, as it is not in line with the principal purpose of training compensation which is to encourage clubs to train young players.

Moreover the reasoning given by FIFA to bring the scope of the Article back to its original wording is, according to the author, not sufficient. More than anything this amendment seems to be the consequence of lobbying by certain stakeholders.

Therefore, it seems desirable that the stakeholders urge FIFA to review its amendments. In the meantime, training clubs can rely on FIFA and CAS jurisprudence to delay the consequences of the new regulations.

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The position expressed in this short article reflects the personal opinion of the author and do not necessarily reflect those of the Belgian Pro league.

1. ECJ, 16 March 2010, Olympique Lyonnais v. Olivier Bernard and Newcastle United FC, C-325/08; CAS 2009/A/1757 MTK Budapest v. FC Internationale Milano S.p.A., 30 July 2009.
2. CAS 2006/A/1152 ADO Den Haag v. Newcastle United FC, 7 February 2007.
3. Article 6 of Annex 4 to the FIFA Regulations.
4. Annexe 4 art. 5 para. 3 of the FIFA Regulations 2001-2008.
5. FIFA Circular 1190, 20 May 2009.
6. Annexe 4, art. 5 para. 3 of the FIFA Regulations 2009 stating '…this exception [exclusive application of training costs of category 4 clubs] shall, however, not be applicable where the event giving rise to the right to training compensation […] occurs before the end of the season of the player's 18th birthday.'
7. O. Ongaro, 'The System of training compensation according to the FIFA Regulations on the Status and Transfer of Players,' European Sport Law and Policy Bulletin 1/2010, page 85.
8. See for example Article 19 FIFA Regulations.
9. See for example FIFA DRC n°08131673, 30 August 2011, FIFA DRC n° 2122003, 1 February 2012, DRC 30 August 2013, nr. 08121946.
10. CAS 2014/A/3500 FC Hradec Kralove v. Genoa Cricket and Football Club, para. 48 and 50.
11. These examples are meant to give a general idea of the consequences of the amendment, however, for the sake of clarity it does not take into account certain particularities that might be applicable or arguable.