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The Guide to Advocacy

General Editors

Stephen Jagusch QC, Philippe Pinsolle and Timothy L Foden

Second Edition

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Contents

Introduction ... ix
Stephen Jagusch QC, Philippe Pinsolle and Timothy L Foden

1 Case Strategy and Preparation for Effective Advocacy ... 1
Colin Ong QC

2 Written Advocacy ... 14
Thomas K Sprange QC

3 The Initial Hearing ... 30
Grant Hanessian

4 Opening Submissions ... 44
Franz T Schwarz

5 Direct and Re-Direct Examination ... 62
Anne Véronique Schlaepfer and Vanessa Alarcón Duvanel

6 Cross-Examination of Fact Witnesses: The Civil Law Perspective ... 76
Philippe Pinsolle

7 Cross-Examination of Fact Witnesses: The Common Law Perspective ... 86
Stephen Jagusch QC

8 Cross-Examination of Experts ... 100
David Roney

9 Closing Arguments 116
Hilary Heilbron QC and Klaus Reichert SC

10 Tips for Second-Chairing an Oral Argument 129
Mallory Silberman and Timothy L Foden

11 Cultural Considerations in Advocacy: East Meets West 138
Alvin Yeo SC and Chou Sean Yu

12 Cultural Considerations in Advocacy: Latin America 146
José I Astigarraga and Eduardo J De la Peña Bernal

13 Cultural Considerations in Advocacy: United States 154
Laurence Shore

14 Cultural Considerations in Advocacy: The UK Perspective 161
David Lewis QC

15 The Role of the Expert in Advocacy 167
Philip Haberman

16 The Effective Use of Technology in the Arbitral Hearing Room 178
Whitley Tiller and Timothy L Foden

17 Advocacy in International Sport Arbitration 190
James H Carter

18 Advocacy in Investment Treaty Arbitration 200
Stephen P Anway

About the Authors 213
The Contributing Arbitrators 223
Contact Details 231

17

Advocacy in International Sport Arbitration

James H Carter[1]

International sport arbitration has special characteristics that make it similar to yet also unlike most commercial arbitration, and good advocacy must begin by taking this into account. The skills and techniques described in other chapters of this book are applicable in sport arbitration, but the context typically is significantly different and requires additional knowledge.

Often the arbitration involves a dispute between an international sports federation and an individual athlete. At the dawn of the modern sports law era, a scholar-practitioner described such a case thus:

> *Typically the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licences to compete in the course of a season or admission to participate in specific events. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared. The same may of course be said for most litigants in ordinary court proceedings. The difference is that whereas in the latter context the accused may be represented by experienced practitioners who appear as equals before the court, the procedures devised by most sports federations seem to be so connected to the organisation that no outsider has the remotest chance of standing on an equal footing with his adversary – which is of course the federation itself.*[2]

1 James H Carter is a senior counsel at Wilmer Cutler Pickering Hale and Dorr LLP.

2 Jan Paulsson, *Arbitration of Sports Law Disputes,* 9(4) ARB INT'L 359, 361 (1993).

The situation of the accused athlete today is not always so dire, but sport arbitration often does involve one side that is familiar with the rules of the dispute and is represented by experienced sports law counsel and another side that begins the fight with much catching up to do. If you are the inexperienced sports lawyer in such an arbitration, good advocacy begins with bringing yourself up to speed with the '*lex sportiva*'.

The Lex Sportiva

Over the past quarter of a century, international sport law institutions gradually have constructed a framework to resolve these disputes. It is capped by the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland, which together with the Swiss Federal Tribunal has created a substantial body of both procedural and substantive international sports law, the *lex sportiva*.

International sport is organised primarily in a series of vertical silos, one for each sport. There are national governing boards or federations for each sport (gymnastics, swimming, archery, etc.), and each sport has an international federation sitting above the national federations. At the same time, there is a horizontal structure composed of National Olympic Committees (NOCs), which play a part with international federations in regulating access to national Olympic teams and related matters across all of the sports that are eligible for Olympic competition in each country and answer to the International Olympic Committee (IOC). Each of these federations and committees has its own set of by-laws and various types of internal disciplinary and review bodies. They are far from uniform.

As a further complication, the international sport anti-doping regime exists side by side with these organisations but under a different roof. The World Anti-Doping Agency (WADA), based in Montreal, Canada, is responsible for establishing annually a list of prohibited substances that are considered either potentially performance enhancing or dangerous to athletes and since 2003 has published the World Anti-Doping Code (the WADA Code).[3] Today, the national federations, international federations, NOCs and the IOC virtually all adopt some version of the WADA Code to govern doping offences within their jurisdictions, many of which give WADA or the national anti-doping authority power to bring disciplinary proceedings in its own name against athletes. Some countries have national bodies equivalent to WADA, such as the US Anti-Doping Agency (USADA),[4] which may publish their own protocols or codes based on the WADA Code. These national anti-doping codes sometimes contain differing procedural and other provisions.

In spite of this organisational semi-chaos, fortunately there is a substantial degree of uniformity in one respect: most international sport disputes arising from the activities of athletes and organisations involved in all of these contexts, prominently including alleged doping offences, ultimately are subject to resolution by CAS arbitration. This occurs as a result of agreements in several forms: federations and committees specify CAS jurisdiction in their by-laws; the anti-doping codes adopted by the organisations typically do the same;

3 See www.wada-ama.org.

4 See www.usada.org.

and individual athletes agree to CAS jurisdiction either as a condition of membership in a governing body or by agreements when participating in events.[5]

This does not mean that all international sport disputes are heard by the CAS. Many are dealt with, at least initially, by disciplinary bodies established under by-laws of national federations, international federations or NOCs, each with their own membership and procedures. Navigating such a process remains a challenge to the newly minted sports advocate. However, there generally is a right of appeal from the decisions of those bodies to the CAS, where uniform rules of advocacy apply and are available for study. The majority of the CAS's caseload consists of such appeals, mainly from decisions of federations.

International professional sport is also an important part of this picture. The most prominent feature in the case of professional sport is the web of agreements by which FIFA and other components of professional football commit resolution of their disputes, including disagreements over matters such as contracts, player transfers and discipline, to CAS resolution. A variety of commercial agreements both in football and in other sports involving professional sport organisations, managers and athletes include contract language agreeing to CAS jurisdiction for disputes, as well.

The *lex sportiva* thus consists of the rules and precedents established by all of these organisations, plus the national law of relevant jurisdictions. This is primarily Swiss procedural arbitration law, because all CAS arbitrations are sited in Lausanne (although arbitral procedures may take place at other physical locations, all CAS awards are issued from Lausanne) and because Switzerland is the home of a number of international federations. The law applicable to the merits in CAS appeals is made up of any relevant organisation by-laws, rules of law chosen by the parties or, in the absence of such a choice, the law of the jurisdiction where the organisation exists.[6] For ordinary disputes, the law applicable is that chosen by the parties or, as a default, Swiss law.[7] The Swiss Federal Tribunal exercises a limited scope of review authority over CAS awards, as is the case with its role under Swiss arbitration law generally, but it does consider appeals on the basis of grounds found in Swiss law, such as lack of impartiality of arbitrators, absence of jurisdiction and violation of public policy. Courts of other nations may play a role, too, for example when an international federation is located in a nation other than Switzerland or non-arbitrable employee rights are involved.

Finding the Lex Sportiva

An advocate entering a new jurisdiction is well advised to become acquainted with governing law, and in the case of the *lex sportiva* that can be challenging. Organisational rules typically are available electronically, as are the arbitration rules contained in the CAS Code

5 In 2016 the German Federal Tribunal held that an athlete's signed agreement with an international federation referring disputes to the CAS was valid and did not violate German competition law or public policy. See Despina Mavromati, *The Legality of the Arbitration Agreement in Favour of the CAS Under German Civil and Competition Law: the Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016, 2016(1)* CAS Bull. 27.

6 CAS Code, Art. R58.

7 Id. Art. R45.

of Arbitration for Sport.[8] The CAS publishes awards rendered in its appellate capacity, unless the parties agree otherwise, and a few awards made in its ordinary jurisdiction (but only if parties agree). These are available electronically and in some CAS print publications, and the Swiss Arbitration Association reports regularly in its Bulletin[9] on Swiss court decisions involving CAS awards and other international sport arbitration matters involving Switzerland. Some anti-doping organisations, such as USADA, publish all arbitral awards to which they are parties in which doping violations are established. Although prior awards generally are not considered binding on an arbitral tribunal, such awards may be and typically are cited to any international sport tribunal by advocates as potentially persuasive.

A quasi-official CAS book entitled *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, authored by CAS Counsel Despina Mavromati and CAS Secretary General Matthieu Reeb,[10] is essential reading for the advocate. It discusses procedures under the CAS Code in detail, with extensive advice on unpublished or otherwise little-known practices in CAS arbitrations and examples of CAS documents.

Types of international sport disputes

International sport arbitrations deal largely with three types of disputes: disciplinary issues (including but not limited to doping violations), disputes involving contested eligibility or qualification for competitions, and commercial or other contractual or intra- and inter-federation disputes. Disputes involving 'field of play' errors or disagreements are generally considered best resolved by umpires on the field and are treated as inappropriate for arbitral resolution.[11]

Doping and other disciplinary disputes receive the greatest prominence in the press and make up the largest part of the CAS's docket.[12] They usually are heard by the CAS under its appeal procedures, typically following one or more rounds of proceedings within the governing national federation or international federation. The CAS appeal procedures empower CAS arbitral tribunals to make *de novo* determinations of issues of both law and fact in such cases.[13]

In the case of some countries, notably the United States and Australia, national laws make CAS arbitration in that country the first-instance procedure for doping cases brought by the country's anti-doping agencies, after (or instead of) which either party make seek what is normally an appellate review before a second CAS panel seated in Lausanne.

Eligibility issues often arise shortly before national or international championship contests, including the Olympics, when federation rules must be interpreted to determine which athletes or teams will be admitted to compete.

8 Available at www.tas-cas.org.

9 ASA BULLETIN; see also Massimo Coccia, *The Jurisprudence of the Swiss Federal Tribunal on Challenges Against CAS Awards*, 2013(2) CAS BULL 2. Some Swiss cases also are reported in the semi-annual electronic CAS Bulletin.

10 Published by Wolters Kluwer Law & Business, 2015 (hereafter, 'Mavromati & Reeb').

11 Mavromati & Reeb at 56-57.

12 Id. at 401.

13 Art. R57.

Contractual disputes involve the full range of issues that may arise in international commercial arbitrations, distinguished only by the additional fact that the parties are involved in some aspect of sport and have selected CAS arbitration for dispute resolution.

The significance of expedited procedures

Because of the nature of sport, expedited procedures are the norm rather than the exception in sports arbitration. Eligibility issues often must be decided on the eve of an event, and doping or other disqualification questions require speedy decisions in light of the relatively few peak performance years available to athletes. The CAS Code and other rules therefore generally prescribe tight time limits for procedures, which may be accelerated even further if circumstances require. For disputes arising during the Olympics, two special divisions of the Court (one limited to anti-doping cases) are available on-site to be able to rule within 24 hours.

Not all cases call for special expedition, however, and this raises considerations for advocates. Some matters, such as commercial sport disputes, may not have the same degree of immediacy and might benefit from more complete development of issues. Doping disputes may require expert evidence, which sometimes is not available on very short notice. Agreement on an expanded schedule may be advisable.

Advocacy under CAS arbitration procedures

The CAS Code provides for two types of arbitration: ordinary and appellate. Appeal procedures following initial determinations by sport federations, including doping and other disciplinary and eligibility issues, as well as a substantial number of contractual disputes, make up about 85 per cent of the CAS caseload. The ordinary procedures, used in the remaining 15 per cent of cases, are applicable to *de novo* proceedings that do not originate in a non-CAS forum.[14]

Article R30 of the CAS Code, applicable to both types of arbitration, permits parties to be represented or assisted by persons of their choice, and non-lawyer sports organisation officials participate regularly in CAS arbitrations. A party's representative need not be a lawyer but must provide a power of attorney to the CAS in compliance with Swiss law. English and French are the official languages of the CAS, and English is used most often in CAS proceedings.[15]

The Code permits parties to choose the number of arbitrators but provides for a default choice of a three-person panel in the case of appeal cases, with one arbitrator to be chosen by each party and the third selected by agreement or by the CAS.[16] All arbitrators must be nominated from the list of persons who make up the CAS Court, which is composed of nearly 400 arbitrators of all nationalities. Their CVs are publicly available on the CAS website.[17]

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14 Mavromati & Reeb at 401.

15 Id. at. 89.

16 Arts. R40, R50.

17 www.tas-cas.org.

The CAS Code contemplates relatively extensive written submissions, including written evidence, followed 'in principle' in ordinary cases (where there will have been no prior hearing before a national federation or international federation) by what usually is a comparatively brief oral hearing. Brief oral hearings are also normal in appeal proceedings, although the appeal rules give a CAS panel discretion to decide not to hold an oral hearing if, after consulting the parties, it deems itself to be sufficiently well informed by the written record, including the proceedings at first instance.[18] Hearing some testimony by videoconference is common, and telephone testimony is also authorised. CAS panels have also admitted 'anonymous' testimony in the form of witness statements from persons whose identity was protected for fear of retaliation, with cross-examination through an 'audio-visual protection system'.[19] Although the rules do not require it, the written statements of witnesses and reports of experts often take the form of full affirmative testimony, as is common in international commercial arbitrations.

CAS Code Articles 44 and 57 govern procedures in ordinary and appeal arbitration, respectively, allowing in both cases for considerable flexibility. The procedures in a particular hearing therefore will be influenced by the national traditions of the arbitrators, including especially that of the panel president, who may have either a civil law or a common law background.

Article R44.1 outlines the ordinary written procedure, stating in pertinent part:

> *The proceedings before the Panel comprise written submissions and, in principle, an oral hearing ....As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response....*
>
> *Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.*
>
> *In their written submissions, the parties shall list the names(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.*

Article 44.2 describes the oral hearing, at which oral presentations by the advocates feature prominently and after which post-hearing procedures are discouraged:

> *If a hearing is to be held, the President of the Tribunal shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the respondent is to be heard last.*

18 Art. R57.

19 Estelle de La Rochefoucauld, *The Taking of Evidence Before the CAS*, 2015(1) CAS BULL 28, 35-36.

> *The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant….*
>
> *The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.*
>
> *The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.*
>
> *The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance*
>
> . . .
>
> *Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.*
>
> *After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.*

Document production from an adverse party is in principle limited and follows the pattern of the IBA Rules on the Taking of Evidence in International Arbitration.[20] Article 44.3 of the CAS Code permits a party to 'request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.' Article 44.3 adds that: 'If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, …' may itself appoint experts and may 'proceed with any other procedural step.'

Advocacy in doping disputes

The WADA Code, the current version of which became effective in 2015,[21] and its national and federation enactments emphasise the importance of a level playing field on which athletes compete without the advantage that some might gain from use of specified performance enhancing substances. The Code postulates each athlete's responsibility for whatever goes into his or her body, whether at the initiative of the athlete, a coach or trainer or a nutritional or health adviser. The Code provides the possibility of therapeutic exemptions, which may be granted pursuant to administrative reviews, for athletes whose medical condition makes the use of a particular substance appropriate.

The WADA Code prohibits use or attempted use by an athlete of a prohibited substance or a prohibited method, as well as any evading, refusing or failing to submit to sample collection or tampering or attempted tampering with any part of doping control activities.[22] It also includes a list of specified substances that are not on the 'prohibited' list because they 'are more likely to have been consumed by an Athlete for a purpose other than the

20 Available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

21 Available at https://www.wada-ama.org.

22 Art. 2.

enhancement of sport performance.'[23] Use of specified substances may be subject to lesser sanctions, as described below.

Athletes competing at the national and international levels are tested according to varying doping control protocols, often including testing of urine samples from all medal winners in an event and some random testing both at competitions and out of competition. Each collection results in an 'A' and a 'B' sample. If the A sample is analysed and found to be positive for a prohibited or specified substance, the athlete is given notice of that fact and the opportunity to be present or have a representative present when the B sample is analysed. A positive result from both samples is a necessary predicate for a doping violation charge.

The anti-doping organisation alleging a doping violation has the burden of proof, which is met if it establishes the doping violation by any reliable means 'to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.'[24] The WADA Code explains that 'This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt' and elaborates that this standard of proof 'is comparable to the standard which is applied in most countries to cases involving professional misconduct.'[25] The anti-doping organisation normally seeks to satisfy its burden in the first instance by presenting to the arbitrators a written dossier containing test results and chain of custody evidence. Counsel for the athlete will have access to this at a relatively early stage in the proceedings.

One possible area of controversy is the propriety of the procedures followed in a particular test, including the chain of custody of the sample and the testing done at the lab. However, Article 3.2 provides that analytical methods or decision limits approved by WADA after appropriate peer review are presumed to be scientifically valid and that WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with international standards. The burden therefore is on the athlete to establish a departure from international standards by a preponderance of the evidence.[26]

If testing establishes the presence of a prohibited substance in an athlete's sample, this may lead to imposition of sanctions including disqualification of results, forfeiture of medals, points or prizes and a period of ineligibility for individual athletes extending for as long as four years.[27] Individual disqualifications also may result in team disqualifications under some circumstances.[28]

The WADA Code first makes a distinction between intentional violations, for which a four-year suspension ordinarily is applicable, and those that are not intentional. For unintentional violations, the period of ineligibility may range from none to two years. The disqualification may be eliminated entirely if the athlete establishes that he or she bears no fault or negligence, and the period of ineligibility may be reduced to anything from no

23 Art. 4.

24 Art. 3.1.

25 Id.

26 Comment to Art. 3.2.2.

27 Art. 10.1

28 Art. 11

ineligibility to two years if there is no significant fault or negligence.[29] The burden is on the athlete to establish, by a balance of probabilities, either that the violation was not intentional or that presence of a specified or prohibited substance occurred without any fault or negligence on the athlete's part or without the athlete's significant fault or negligence.[30] Much doping jurisprudence involves defining fault or negligence and degrees of fault in particular circumstances.

Intentional conduct is defined by the Code as a category intended to identify athletes who knowingly cheat, either by engaging in 'conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.' But if the violation involves a specified substance the use of which is only prohibited 'in competition', a presumption of intent can be rebutted if the athlete establishes that it was used intentionally but only out of competition, when it was permitted.[31]

If a violation was not intentional, attention turns first to whether it involved no fault or negligence. The WADA Code sets a high standard for this defence, stating in an official comment that it 'will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor' and that it will not be available where, as illustrations, a positive test is the result of a mislabelled or contaminated vitamin or nutritional supplement about which the athlete has been warned or administration by a physician or trainer without disclosure to the athlete.[32]

But circumstances such as mislabelled vitamins or nutritional supplements or unauthorised or negligent actions of physicians or trainers may support a defence of no substantial fault or negligence, the Code Comment to Article 10.4 says, 'depending on the unique facts of a particular case.'[33] This invites the advocate to base a defence on any relevant unique facts, and success in doing so may result in a reduced suspension period of whatever time the arbitration panel considers proper (so long as, in the case of a prohibited substance, the reduced period of ineligibility is not less than one-half of the period of ineligibility otherwise applicable).[34]

Advocates often maintain that cases involving possible reduction of a sanction under WADA Code Article 10.5 should be analysed using the *Cilic* framework, applying the reasoning of a CAS award of 2014 that sought to encourage consistency.[35] The panel in that case introduced the concepts of objective and subjective types of fault and outlined three degrees of fault: considerable, normal and light.

The objective test looks at 'what standard of care could have been expected from a reasonable person in the athlete's situation.' In the case of a positive test due to use of a substance generally known to be banned at all times, a high degree of care would be required

29 Arts. 10.2, 10.4, 10.5; see Estelle de La Rochefoucauld, *CAS Jurisprudence Related to the Elimination or Reduction of the Period of Ineligibility for Specified Substances*, 2013(2) CAS BULL 18 (discussing cases decided under prior versions of the WADA Code, some parts of which were revised in 2015).

30 Arts. 10.4, 10.5.

31 Art. 10.2.3.

32 Comment to Art. 10.4.

33 Id.

34 Art. 10.5.2.

35 *Cilic v. Int'l Tennis Fed.*, CAS 2013/A/3327.

of a reasonable person, including such steps as reading the label of the product (or otherwise learning of its ingredients), checking the ingredients on the label with the WADA list of prohibited substances and making an internet search of the product.[36]

The *Cilic* panel's subjective test looks at what is to be expected of the particular athlete in question, taking into account his or her personal characteristics such as age and experience, language or other limitations and the extent of anti-doping education received by or accessible to the athlete.[37]

Using these concepts, a panel would apply the objective test to place an athlete's standard of expected care in one of the three categories of considerable, normal or light and then look to the subjective test to place the athlete either as a standard case of that type of fault or a greater or lesser example, all within a proposed sanction range. The *Cilic* panel proposed a sanction range of 16 to 24 months for violations involving considerable fault, with a sanction for a standard case of this type of 20 months; a sanction range of eight to 16 months for a case presenting a normal degree of fault, with a standard case sanction of 12 months; and a sanction range of zero to eight months for a light degree of fault, with a standard suspension of four months.[38]

For example, a violation in a case where the athlete should have exercised normal care (but failed to do so), and his or her personal circumstances were not unusual and therefore standard, would merit a suspension of 12 months.

Determining the date from which a suspension is to run also is important. Although the start date ordinarily is the date of the arbitration decision, it can instead be set at an earlier date if the athlete admits the fact of the violation and accepts a provisional suspension during the pendency of the arbitration, so long as at least half of the time remains to be served after the arbitration decision.[39]

The message to the advocate is clear: analyse and present evidence relevant to both objective and subjective factors applicable to a person accused of a doping violation. To establish favourable subjective factors, it normally is useful to present the testimony of the athlete in person to the arbitration panel if possible. Notably, the WADA Code states that a panel 'may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.'[40]

Finally, advocates in doping cases should bear in mind that negotiation with anti-doping authorities about the extent of a possible sanction is an important part of the process. They are interested in resolving cases without full adversary proceedings where possible, and they can be expected to have access to arguably comparable case outcomes to discuss.

36 Id., paras. 74-75.

37 Id., para. 76.

38 Id., paras. 69-70.

39 Art. 10.11

40 Art. 3.2.5

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