Reading 2

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2.1 LEGAL REMEDIES: LITIGATION & ARBITRATION

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- 2.1.2 Discovery

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2.1.1 Introduction to Litigation

Litigation is a terrifying word for those engaged in running a business. It is an aggravating, disruptive, and costly venture. It takes time, effort and resources. It blows budgets, and it can even cripple productivity. It conjures up images of courtrooms, robed judges, and harsh judgments.

However, when the stakes are high, litigation –an artful word for lawsuits– is almost inevitable. When parties with resources are wronged, they seek remedies, as they are entitled to do under the law. And though well-written contracts can preempt many disputes, most major businesses will eventually be faced with litigation, and a seasoned executive should understand the basics of a process that is obscure, but ultimately manageable, with the assistance of capable counsel.

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2.1.2 Discovery

A comparative analysis of legal procedure is beyond the capabilities of the course (and this professor). However, there are certain procedural mechanisms that are almost universal in nature and should be understood by executives engaged in cross-border businesses.

Like preparing for a game on the field, preparation for courtroom confrontation begins with learning about your opponent and his case. This starts with “discovery”. This is the process through which litigants, i.e., the parties to the lawsuit, can “discover” (exchange) information about the other party and the case.

In Europe, the mechanisms for discovery are much more limited than they are in the United States. As Steven Whitaker, former Senior Master of the Senior Courts of England and Wales in the Queen's Bench Division, noted at a recent seminar: “You can actually deliberately keep back documents that you know undermine your case and just hand over the ones that support it."

This is in stark contrast to the United States and the United Kingdom, where parties are required to turn over all documents that may be relevant to the case, even those that may be extremely damaging.

As you negotiate contracts –or any sensitive matter– via email, you should remember that in many jurisdictions, including the United States, that email can be produced, read in court, and used against you if it is relevant to a lawsuit that you or your business become involved with. Therefore, think twice before hitting SEND!

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Introduction

When parties do not want to subject themselves to the courtroom, they can elect an alternative forum in a contractual agreement. This is known as “alternative dispute resolution” and, over the course of the past two decades, has cemented itself as an integral part of the international legal framework.

In sport, arbitration is king. From doping disputes to salary arbitrations and private commercial contracts, disputes in sports are more often than not resolved by private arbitrators rather than public judges.

Arbitration consists of a private person –or persons– that preside over a case in a private, non-courtroom setting. They can hear witnesses, order discovery, ask questions, make factual determinations, and draw legal conclusions.

Ultimately, they have as much power as the arbitration rules provide in a particular forum. That’s why the selection of an arbitration forum –and arbitration rules– should not be overlooked. Arbitrations can take place anywhere in the world. They can be presided over by anybody the parties agree to (e.g., a league’s commissioner, retired judges, neutral parties, with subject matter expertise, etc.). When you agree to arbitrate disputes, be thoughtful and careful about what you agree to and whether it is in your best interests. The arbitrator will often have the final say, as it was the case for Maria Sharapova whose case was arbitrated before the Switzerland-based Court of Arbitration for Sport, which was “an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the-specific needs of the sports world.” (Tribunal Abritral Du Sports / Court of Arbitration for Sport, n. d., https://goo.gl/BRu6j4).

Reading Assignment 2.2: The Maria Sharapova Case (Excerpt)

CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Jeffrey G. Benz, Attorney-at-Law,Los Angeles California, USA and London, United Kingdom

Mr David W. Rivkin, Attorney-at-Law, New York, New York, USA

3.6 The Dispute

A. Introduction

75. This dispute concerns the Decision rendered by the Tribunal, which found the Player responsible for the ADRV, declared her ineligible for a period of two years, and disqualified the results she had obtained at the 2016 Australian Open Championships, with all ensuing consequences. The Player disputes in part this conclusion, and requests that the Panel find that she bears NSF for the ADRV and, on such basis, that the period of ineligibility be reduced. On the other side, the Respondent requests the Panel to confirm the Decision rendered by the Tribunal.

76. In essence, on the basis of the parties' submissions, issues relating to the commission by the Player of the ADRV and to the consequences other than the length of the period of ineligibility are not before this Panel. At the same time, the Player accepts that she bears some "minimal" degree of fault. As a result, the main questions that the Panel has to examine are the following:

i. what is the Player's level of fault and more specifically, did the Player commit the ADRV with NSF?

ii. if so, what is the proper sanction?

77. The Panel shall examine those main issues separately.

i. What is the Player's level of fault?

78. The Tribunal found that the Player, responsible for the ADRV, was not entitled to the benefits under Article 10.5.2 of the TADP. The Tribunal, in fact, came to the conclusion, expressed with plain language, that the Player could "*not prove that she exercised any degree of diligence, let alone utmost caution, to ensure that her ingestion of Mildronate did not constitute a contravention. To the contrary her concealment from the anti-doping authorities and her team of the fact that she was regularly using Mildronate in competition for performance enhancement was a very serious breach of her duty to comply with the rules. Her conduct was serious in terms of her moral fault and significant in its causative effect on the contravention*". In other less severe words, the Tribunal found the degree of the Player's negligence to be significant, considering the totality of the circumstances of the case. As a result, the Tribunal concluded that the otherwise applicable period of ineligibility could not be reduced.

79. Article 10.5.2 of the TADP sets two conditions for the reduction of the ineligibility period to be applied on an athlete following the finding of the violation of Article 2.1 of the TADP (presence of a prohibited substance):

i. the athlete must establish how the prohibited substance entered his or her system;

ii. the athlete must establish that he or she bears "No Significant Fault or Negligence".

80. The Panel notes that the first condition is satisfied. The issue is indeed not even disputed by the parties in this arbitration. The Tribunal held that the Player had established that the prohibited substance (Meldonium) entered into her system as a result of her use of Mildronate; and the ITF accepts that the Player tested positive because of the product (Mildronate) she ingested.

81. The dispute between the parties instead concerns the satisfaction of the second condition, denied by the Respondent and claimed to be fulfilled by the Appellant, who disputes the conclusions of the Tribunal.

82. The issue whether an athlete's fault or negligence is "significant" has been much discussed in the CAS jurisprudence, and chiefly so with respect to the various editions of the WADC (in the cases of *Lund*, *Cilic*, *and Kreuzmann* discussed by the parties in the present arbitration, but also in a number of other cases: e.g., inter alia CAS 2004/A/690; CAS 2005/A/830; CAS 2005/A/847; CAS OG 04/003; CAS 2006/A/1025; 2008/A/1489&1510; CAS 2009/A/1870; CAS 2012/A/2701; CAS 2012/A/2747; CAS 2012/A/2804; CAS 2012/A/3029). These cases offer guidance to this Panel. It is, however, to be underlined that all those cases are very "fact specific" and that no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the TADP itself, while defining the conditions for the finding of NSF, stresses the importance to establish it *"in view of the totality of the circumstances"*, and therefore paying crucial attention to their specificities.

83. Two points need to be underlined in this respect.

84. First, a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the *"utmost caution"*

are truly exceptional, and not in the vast majority of cases. However, in the Panel's opinion, the "bar" should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "stones unturned". As a result, a deviation from the duty of exercising the *"utmost caution"* does not imply *per se* that the athlete's negligence was "significant"; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances. It is in fact clear to this Panel (as noted in Cilic, §§ 74-75) that an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross- check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti- doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.

85. Second, the parties agreed before this Panel to follow the approach indicated by *Al Nahyan* (§ 177), i.e. that athletes are permitted to delegate elements of their anti-doping obligations. If, however, an anti-doping rule violation is committed, the objective fact of the third party's misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete's personal fault or negligence in his/her selection and oversight of such third party or,

alternatively, for his/her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice. As a result, as the Respondent put it, a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task. The Panel also concurs with such approach.

86. In light of the foregoing, the Panel finds that that the Player's fault was not significant.

87. In that respect, the Panel remarks that the Player chose to rely on Mr Eisenbud and his organization (IMG) for the performance of all anti-doping related matters based on a long history of satisfactory compliance with anti-doping rules and regulations with respect to (1) the submission, through ADAMS, of the Player's "whereabouts" information, and for the filing of TUE applications, if and when required; and (2) for the checking of the Prohibited List and the observation of the evolution in the anti-doping regulations since 2013. This point is confirmed not only by consistent testimony of the witnesses heard, but by the very actions of the ITF, which, on 22 December 2015, emailed to a representative of the Player at IMG the explanation of the *"Main Changes to the Tennis Anti-Doping Program me for 2016"*.

88. The Panel finds the choice of Mr Eisenbud to be reasonable in the circumstances of the case. In fact:

i. even though, under the TADP, it is the Player's personal duty to ensure that no prohibited substance enters his/her body (Article 2.1.1) and it is the responsibility of each player to be familiar with the most current edition of the Prohibited List (Article 3.1.2 in fine), nothing prevented the Player, a high-level athlete focused on demanding sporting activities all over the world, from delegating activities aimed at ensuring regulatory compliance and more specifically that no anti-doping rule violation is committed;

ii. Mr Eisenbud and IMG were, in 2013, when the Player left the care of Dr Skalny, already taking care of other aspects of her anti-doping compliance, which, such as TUE applications, involve some complexities;

iii. checking a substance against the Prohibited List is not an action for which specific anti-doping training is required. It is expected to be made, as a rule and under Article 3.1.2 of the TADP, by the player personally, and a player does not need to have scientific or medical expertise for such purpose. No standard in the WADC or otherwise raises such a high bar. Therefore, the delegation to Mr Eisenbud, an expert sports agent, aware of the importance of the services rendered to the Player, and whose livelihood was dependent on the athletic success of the Player, was not

precluded by any lack of scientific or medical qualification, openly recognized by Mr Eisenbud himself. In other words, the Player chose a sufficiently qualified person as her delegate for the purposes of checking the Prohibited List.

89. The Player, however, did not give Mr Eisenbud instructions as to how this task had to be performed. The Player did not tell Mr Eisenbud to check (and Mr Eisenbud therefore did not check) whether Mildronate was only a "brand name" or indicated the ingredient of the product; she did not put him in touch with Dr Skalny at the time she left the care of Dr Skalny, but simply supplied Mr Eisenbud with the names of the Skalny Products; she did not instruct Mr Eisenbud to consult the WADA, ITF or WTA website, to call the ITF "hot line", to open the flash drive supplied with the "wallet card", or even to read the emails received, opening the "links" therein contained. She simply passed the entire matter over to Mr Eisenbud, completely relying on him.

90. In the same way, the Player did not establish any procedure to supervise and control the actions performed by Mr Eisenbud in the discharge of the tasks he was expected to perform: no procedure for reporting or follow-up verification was established to make sure that Mr Eisenbud had actually discharged the duty, for instance, of checking year after year the Skalny Products towards the Prohibited List.

91. Such circumstances show some degree of fault on the part of the Player, but they do not exclude altogether the possibility for the Player to invoke NSF.

92. The Panel finds in fact that the Player had a reduced perception of the risk she was incurring while using Mildronate, and that this reduced perception of risk was justified, because:

i. Mildronate was one of the Skalny Products that the Player, at the beginning of 2016, had used for 10 years without any anti-doping issue, as confirmed by the certificates of anti-doping compliance obtained by Dr Skalny, and by the lack of any positive result returned by the numerous anti-doping tests to which the Player had also undergone after she had left Dr Skalny and through 2015;

ii. as recognized by the Tribunal (§ 24 of the Decision), the Player did not seek treatment from Dr Skalny for the purposes of obtaining any performance enhancing product, but for medical reasons. The fact that she continued to also use the Skalny Products after she had left Dr Skalny and without a medical prescription (except those obtained years before) (though no prescription from a physician was required to obtain Mildronate over the counter) could not change, in the Panel's opinion, the perception of the Player, also in light of the recommendation of Dr Skalny (confirmed by his testimony) that she continued to take those substances;

enhancing product, but for medical reasons. The fact that she continued to also use the Skalny Products after she had left Dr Skalny and without a medical prescription (except those obtained years before) (though no prescription from a physician was required to obtain Mildronate over the counter) could not change, in the Panel's opinion, the perception of the Player, also in light of the recommendation of Dr Skalny (confirmed by his testimony) that she continued to take those substances;

iii. no specific warning had been issued by the relevant organizations (WADA, ITF or WTA) as to the change in the status of Meldonium (the ingredient of Mildronate). In that respect, the Panel notes that anti-doping organizations should have to take reasonable steps to provide notice to athletes of significant changes to the Prohibited List, such as the addition of a substance, including its brand names. Indeed, the ITF had done so when the substance DBMA had been added to the Prohibited List. Here, the ITF relies on its wallet card, emails, and other online resources, on which the Panel heard testimony. The Panel notes that an athlete or his/her delegate could have found reference to both Meldonium and its brand name Mildronate through a couple of links on the ITF website. However, it is concerned that the ITF's notices to athletes that referred to "Significant Changes" to the TADP referred only to procedural changes and not to the addition of new prohibited substances.

93. In addition, the Panel notes that:

a. There had been no significantly publicized case of a Meldonium positive in Olympic sports and no prior case at all in tennis;

b. The Player took a public position acknowledging that she took Meldonium and that she accepted responsibility therefor, and she did so in a very public way, calling a press conference, on her own, that brought worldwide publicity to her case and to the use of Meldonium going forward;

c. The Panel gives no weight to the fact that the ITF later rejected her application for a TUE to use Mildronate; that action in part precipitated her appeal of the charges in this case, and so it could not be used as a basis to justify a longer sanction as requested by the ITF.

94. In light of the totality of such circumstances, the Panel concludes that the Player's claim of NSF can be accepted.

ii. What is the appropriate length of the ineligibility period to be imposed on the Player?

95. The measure of the sanction to be imposed depends on the degree of fault.

96. The Panel notes that, even though the Player committed the ADRV with NSF, she bears some degree of fault, which prevents a reduction to the minimum measure of ineligibility under Article 10.5.2 of the TADP.

97. Having considered the precedents, and the framework of the review of these cases provided by the Cilic case (incorporated under the 2015 WADC in 2016/A/4371 Lea v. USADA), the Panel is of the view that:

a. The relevant measure of fault here is whether the Player was reasonable in selecting IMG to assist her in meeting her anti-doping obligations. The Panel has already determined that her decision was reasonable. Where the Player fell short, however, was in her failure to monitor or supervise in any way whether and how IMG was meeting the anti-doping obligations imposed on an athlete when IMG agreed to assist her. She failed to discuss with Mr Eisenbud what needed to be done to check the continued availability of Mildronate (as opposed to the procedure to check new substances she was prescribed), to put him in contact with Dr Skalny to understand the nature of the Skalny products, to understand whether Mildronate was the name of the product or the substance, and whether he had made the necessary confirmation each year that the product had not been added to the Prohibited List. It cannot be consistent with the relevant precedents and the WADC that an athlete can simply delegate her obligations to a third party and then not otherwise provide appropriate instructions, monitoring or supervision without bearing responsibility; such a finding would render meaningless the obligation of an athlete to avoid doping.

b. In addition, unlike *Lund*, Ms. Sharapova did not disclose on her anti-doping control forms her use of the prohibited substance, a factor that clearly weighed heavily in the mind of the CAS Panel in Lund for the Panel to reach its conclusion of one year.

98. For these reasons, the Player's fault is greater than the minimum degree of fault falling within NSF, but as noted less than Significant Fault. Accordingly, the Panel has determined, under the totality of the circumstances, that a sanction of fifteen (15) months is appropriate here given her degree of fault.

99. The Panel is also of the view that there is no basis for reducing her sanction further by applying principles of proportionality. The Panel's basis for this position is that the WADC, from which the ITF ADP is derived and on which it is based, has been found repeatedly to be proportional in its approach to sanctions, that the question of fault is built in to analysis of length of sanction under the ITF ADP, and that no case has been cited that could justify a further reduction of the Player's sanction here.

100. The Panel wishes to emphasize that based on the evidence, the Player did not endeavour to mask or hide her use of Mildronate and was in fact open about it to many in her entourage and based on a doctor's recommendation, that she took the substance with the good faith belief that it was appropriate and compliant with the relevant rules and her anti-doping obligations, as it was over a long period of her career, and that she was not clearly informed by the relevant anti-doping authorities of the change in the rules. After its de novo review here, the Panel has determined it does not agree with many of the conclusions of the Tribunal, except as otherwise specifically indicated herein.

101. Finally, the Panel wishes to point out that the case it heard, and the award it renders, was not about an athlete who cheated. It was only about the degree of fault that can be imputed to a player for her failure to make sure that the substance contained in a product she had been legally taking over a long period, and for most of the time on the basis of a doctor's prescription, remained in compliance with the TADP and WADC. No question of intent to violate the TADP or WADC was before this Panel: under no circumstances, therefore, can the Player be considered to be an "intentional doper".

102. Accordingly, considering all of the foregoing reasons, the Panel has determined that the appropriate length of sanction here is fifteen (15) months; in other words, the Panel is reducing her sanction on the basis of NSF by nine (9) months.

3.7 Conclusion

103. Based on the foregoing, the Panel, based upon its de novo review of this entire matter, finds that the appeal is to be partially granted, and the period of ineligibility reduced to fifteen (15) months. The starting date of the ineligibility period remains 26 January 2016, set by the Decision and unchallenged in this arbitration. (Maria Sharapova v. International Tennis Federation, 2016, https://goo.gl/ZhKRCb

2.2.1 Winning is Only the Beginning: Collections and Domestication

Whether you have won or lost in arbitration or litigation, which is not the end of the dispute, unless the other party agrees to the remedy awarded by the court, whether it be money damages, or performance of some act or omission.

If you have won, you still must enforce that victory and ensure that the other party does what the court or arbitrator has ordered them to do. This is known as “enforcement.”

In the world of organized professional sports, judgments (e.g., fines) are generally recognized and enforced. Leagues enforce them, and players that do not honor them face severe consequences. However, in the world of cross-border transactions, the rules are much different.

Money and defendants sometimes need to be chased around the world, and disputes that are settled in one country must be recognized and enforced in another. In Europe and a handful of other countries, there are treaties that provide for the recognition and enforcement of foreign judgments.

In countries without such treaties, the process for having a litigation or arbitration victory recognized and enforced can be tedious, expensive and time-consuming. Oftentimes, it will give your adversary a second chance to prove its case.

Be mindful of judgment recognition and enforcement issues when you negotiate agreements and decide whether to pursue litigation or arbitration. If the other party can escape its contractual obligations –and avoid consequence if/when it loses in court– the agreement may be no more valuable than a handshake.

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