

Standing to appeal of third parties in front of CAS

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Abstract: Does a party which is not the addressee of a decision by an association have standing to appeal such decision? This question has been discussed intensely in various recent decisions by the Court of Arbitration for Sport (CAS). On the one hand, there is certainly a legitimate interest in not granting a right to appeal to every party remotely affected by a decision. On the other hand, there are a lot of cases in the sports world in which third parties are affected by decisions addressed to other parties. Does an athlete finishing tenth in an Olympic event have standing to appeal a decision determining that the gold medallist is not disqualified? How about the athlete who would have won the bronze medal if the gold medallist had been disqualified? Should the football player Giorgio Chiellini have standing to appeal a decision finding that Luis Suárez should not be punished for biting him during a match at the FIFA World Cup 2014? Although this question may be of great importance, neither the Code of Sports-related Arbitration (“CAS Code”) nor the association rules give clear guidance as to the circumstances under which a third party has standing to appeal. This article is providing an overview of the legal concept of standing to appeal of third parties against decisions not addressed to them (see 1. below), the most relevant CAS jurisprudence dealing with this topic (see 2. below) and a comparison with other fields of law addressing similar procedural scenarios (see 3. below). The authors’ aim is to identify objective guidelines for answering the question of standing to appeal in order to increase the predictability of CAS decisions dealing with this question.

Keywords: Standing, legal interest, directly affected, competitors’ eligibility, disqualification, disciplinary sanctions, victim.

1. Legal concept of *locus standi*

1.1. *Rationale of standing to appeal in sports arbitration*

It is a universal procedural principle that only parties with a legal interest in the outcome of a proceeding have *locus standi*. The same principle also applies to appeal proceedings in front of CAS.¹ For several reasons, not every person remotely affected by a decision of a sports body should have the right to challenge such decision. First, legal certainty would be greatly endangered if various time limits to appeal pursuant to Article R47 CAS Code would run simultaneously for every person remotely affected, depending on when the decision was notified to such persons (if at all). Second, the efficiency of the appeal process, which is of particular interest in sport dispute resolution, might be undermined if every party that purports to be remotely affected by a decision could appeal it. Third, it would be unfair to those with an obvious and concrete interest in the prompt resolution of the dispute if anyone were entitled to have a say on whether or not the decision should be upheld. For these reasons, there is a broad consensus that it is preferable to grant standing to appeal to only a few persons, namely those who have a special interest in the outcome of the case, which separates them from the "general public". However, at the same time, there is a broad consensus that standing to appeal cannot be limited exclusively to the addressee(s) of a decision.

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¹ Rigozzi and Hasler 2013, Article R47 CAS Code, para. 22.

1.2. Legal nature of standing to appeal

The first question frequently discussed in CAS proceedings is whether standing to appeal is a matter of admissibility or the merits. According to the Swiss Federal Tribunal, standing to sue and standing to be sued belong to the substantive side of the claim.² As a result, a lack of standing leads to a dismissal of the claim on the merits.

In CAS jurisprudence, two different views can be found. In CAS 2007/A/1392, the Panel considered that standing to file an appeal against decisions passed by the ordinary congress of an International Federation was related to the question of the admissibility of the Appeal and was, thus, considered to be a procedural issue.³

The opposite view was taken in CAS 2008/A/1583&1584. The Panel discussed the legal nature of the Appellant's standing to appeal against the decision of an association's legal body and came to the conclusion that

“if the decision by a sports organization were to be appealed against before a (first instance) state court (...), the right to appeal would be classified as a requirement for justification. The court would therefore, if the person concerned is not entitled to appeal, dismiss the action not as inadmissible but as unfounded.”

Recent CAS jurisprudence seems to have drawn a line in connection with this issue as it deals with the issue of standing as being part of the merits.⁴ For example, in CAS 2013/A/3417 the Panel stated that standing to sue relates to the entitlement to the right claimed, and that its absence entails the dismissal of the claim as unfounded based on the jurisprudence of Swiss Federal Tribunal.⁵

In summary, as per Swiss Federal Tribunal jurisprudence, and also the prevailing view in (recent) CAS jurisprudence, standing to appeal is considered an issue being part of the merits.

1.3. Distinction from the right to intervene pursuant to R41.3 CAS Code

Article R41.3 CAS Code provides the right of a third party to participate in a proceeding as an intervening party. An intervention also requires the intervening party to have a legal interest in the outcome of the dispute.⁶ However, Article 41.3 CAS Code only applies if a CAS proceeding has already been initiated by a claimant or appellant. Hence, Article 41.3 CAS Code does not apply in the situation discussed here, i.e. under which circumstances a third party has standing to appeal an association's decision without the participation of the decision's addressee.

² SFT 126 III 59, 63-64, para. 1a.

³ CAS 2007/A/1392, *Federación Panameña de Judo (FPJ) & Federación Venezolana de Judo (FVJ) v. International Judo Federation (IJF)*, Award of 9 September 2008, para 65.

⁴ CAS 2013/A/3417, *FC Metz v. NK Nafta Lendava*, Award of 13 August 2014, paras. 57 et seq.; CAS 2015/A/4151, *Panathinaikos FC v. UEFA & Olympiakos FC* Award of 26 November 2015, paras. 133 et seq.; CAS 2015/A/3874, *Albania v UEFA & Serbia*, Award of 10 July 2015, paras. 164 et. seq.; CAS 2015/A/4162, *Liga Deportiva Alajuelense v. Fédération Internationale de Football Association (FIFA)*, Award of 3 February 2016, paras. 72 et seq.

⁵ CAS 2013/A/3417, *FC Metz v. NK Nafta Lendava*, Award of 13 August 2014, paras. 57 et seq.

⁶ Mavromati and Reeb 2015, Art. R41 CAS Code, para. 80.

1.4. Legal Framework

The CAS Code does not contain any provision addressing the issue of standing to appeal in Article R47 et seq. CAS Code. Hence, and bearing in mind that standing to appeal is a question related to the merits, CAS has to solve the question in accordance with Article R58 CAS Code, which reads as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

Accordingly, one needs to look into the regulations of the federation in question and, subsidiarily, into the applicable state law. This warrants taking a look at some regulations of sports associations (see below 1.4.1) and into Swiss law (being the most regularly applied state law in CAS proceedings) on the question of standing to appeal.

1.4.1. Association Regulations

The regulations of most associations contain general provisions regarding the possibility to appeal a decision before the CAS, but do not provide any guidance under which specific circumstances a third party could do so. Some examples are listed in the following:

Article 61 Olympic Charter (2016):

“1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved (...) in certain cases, by arbitration before the Court of Arbitration for Sport (CAS). 2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.”

Article 58 FIFA Statutes 2016:

“1. Appeals against final decisions passed by FIFA’s legal bodies (...) shall be lodged with CAS within 21 days of notification of the decision in question. (...). 3. CAS, however, does not deal with appeals arising from:
a) violations of the Laws of the Game;
b) suspensions of up to four matches or up to three months (with the exception of doping decisions);
(...).”

Article 62 of the UEFA Statutes 2016:

“(1) Any decision taken by a UEFA organ may be disputed before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.
(2) Only parties directly affected by a decision may appeal to the CAS. However, where doping-related decisions are concerned, the World Anti-Doping Agency (WADA) may appeal to the CAS.
(3) (...).”

1.4.2. *Swiss Law*

As the majority of International Federations are based in Switzerland, Swiss law applies subsidiarily in most appeals in front of CAS (*see above* Article R58 CAS Code). Article 75 of the Swiss Civil Code (SCC) provides the following with respect to challenges of resolutions by an association:

“Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution.”

Based on the legal principle gleaned from this provision, the members of an association can challenge a decision which directly infringes on their membership rights.⁷ Also non-members having agreed to be subject to disciplinary regulations of an association are considered to be entitled to challenge decisions of such association against them according to Article 75 SCC.⁸ Furthermore, pursuant to Article 75 SCC, a decision by an organ of the association, which the members cannot influence, may not only be appealed by the addressee of the measure but also by third parties which are directly affected by the resolution.⁹ According to the Swiss Federal Tribunal, said “direct affection” could follow from the unequal treatment of the appealing party compared to other direct or indirect association members.¹⁰ This finding is in line with the *ratio* of Article 75 SCC to safeguard the “legality of corporate life in the association”.¹¹

2. CAS Jurisprudence regarding standing to appeal

2.1. CAS 2002/O/373, COC & Beckie Scott v. IOC, Award of 18 December 2003

In CAS 2002/O/373, the Appellant – Ms. Beckie Scott - finished third in the women’s 5 km free pursuit cross-country skiing competition at the 2002 Salt Lake City Olympic Winter Games and was awarded the bronze medal. After the competition, it was revealed that the silver medallist had tested positive for the banned substance *Darbepoetin* in December 2001 in two post-competition doping controls prior to the Olympic Winter Games. Consequently, all of the results of the silver medallist at the 2002 Salt Lake City Olympic Winter Games were annulled by the IOC and Ms. Beckie Scott was awarded the silver medal. However, one week after the women’s 5 km free pursuit cross-country skiing competition, the gold medallist also tested positive for *Darbepoetin* following a doping test before the start of the 4x5 km women’s relay cross-country skiing competition at the 2002 Salt Lake City Olympic Winter Games. As a consequence, she was excluded from the 2002 Salt Lake City Olympic Winter Games. However, the IOC decided that she did not have to forfeit her gold medal obtained in the women’s 5 km free pursuit cross-country skiing competition.¹² Ms. Scott did not agree with this decision and appealed it in front of CAS in order to obtain the gold medal.

In the respective decision, CAS first established that an appellant has standing to sue if she/he has an interest worthy of protection which was:

⁷ Niggli 2016, Art. 75 ZGB, para. 1, with reference to SFT 108 II 15, 18-19, para. 2, Scherrer 2008, pp. 58-65; Nater and Tuchschnid 2006, pp. 139-144.

⁸ Niggli 2016, Art. 75 ZGB, para. 4.

⁹ Riemer 1990, Art. 75 para 19; see also CAS/A/1583&1584, *Benfica v. UEFA & FC Porto, Vitória Guimarães v. UEFA & FC Porto*, Award of 15 July 2008, para. 29.

¹⁰ SFT 108 II 15, 22-24, para. 4.

¹¹ Riemer 1990, Art. 75 para 19.

¹² CAS 2002/O/373, *COC & Beckie Scott v. IOC*, Award of 18 December 2003, pp. 1 et seq..

“deemed to be the case if the appellant is factually and directly affected by the litigious decision in a fashion that can be eliminated by its annulment and if the appellant did not have the opportunity to be heard in the first instance.”¹³

The Panel then found that it would be:

“difficult to imagine an interest more worthy of protection than the interest of an athlete in securing an Olympic medal which she/he considers to have won fairly.”¹⁴

The Panel rejected IOC’s argument that allowing the athlete to appeal the decision would open the floodgates to endless litigation, *inter alia*, with the following finding:

“Standing to sue depends on having an underlying cause of action which needs to be established in each case and athletes who lack any chance of obtaining a medal or top ranking even if the sanctioned athlete loses a medal may not have sufficient interest in pursuing a claim (...).”¹⁵

Because Ms. Scott was seeking to obtain the gold medal in the women’s 5 km free pursuit cross-country skiing competition at the 2002 Salt Lake City Olympic Winter Games, the CAS confirmed that she had standing to appeal. CAS also upheld the appeal and ruled that the IOC had to rank Ms. Scott first and award her the Olympic gold medal in the 5 km free pursuit cross-country skiing competition.

Comment:

The Panel found that whether a party is directly affected by a decision not addressed to it has to be established on a case by case basis. The Panel determined that a silver medallist who might have been deprived of a gold medal by a decision is directly affected by said decision. However, it remained unclear whether an athlete who finished eleventh might also be directly affected by a decision depriving her or him of a top ten ranking. The effect of a successful appeal in both cases is reallocating a place in the ranking. Obviously, from a subjective point of view, more athletes would probably consider themselves more intensely affected if they feel deprived of a medal than of a top ten or top twenty ranking. However, this subjective effect mainly depends on the subjective goals of the athlete. Further, there might be benefits granted by the respective NOC or a sponsor of an athlete if he or she finishes in the top ten or twenty of an Olympic event. To grant standing to appeal only to those athletes who could win a medal with such appeal seems to be difficult to put in line with the Olympic spirit, sometimes equated with Pierre de Coubertin's statement that *"The important thing is not to win, but to take part"*. The argument that floodgates for endless litigation over results would open if, in cases like CAS 2002/O/373, an athlete finishing on eleventh position also would be granted standing to appeal is not entirely convincing. It is hard to imagine that all athletes not finishing with a *“top ranking”* would launch appeals in order to finish in tenth place instead of eleventh. However, doing so seems to indicate that the respective athlete from a subjective point of view is directly affected by the relevant decision.

¹³ Ibid., para. 23.

¹⁴ Ibid., para. 23.

¹⁵ Ibid., para. 24.

2.2. *CAS/A/1583&1584, Benfica v. UEFA & FC Porto, Vitória Guimarães v. UEFA & FC Porto, Award of 15 July 2008*

In this case, CAS also had to deal with a third party, which was not the addressee of the appealed decision (Benfica Lisbon, hereinafter “Benfica”), submitting that it could have benefited from a certain decision by UEFA against the addressee, FC Porto. During the 2007/08 season, FC Porto finished in first place in the Portuguese Primeira Liga and won the title. Benfica finished in fourth place and, therefore, did not qualify for UEFA club competitions. However, shortly after the 2007/08 season, the Disciplinary Committee of the Portuguese Primeira Liga imposed a deduction of six points on FC Porto as well as a fine of 150,000 EUR due to attempted bribery by the Club’s Chairman. Consequently, the UEFA Control and Disciplinary Body decided that Porto could not participate in the UEFA Champions League because of its non-compliance with Article 1.04 of the 2008/2009 UEFA Champions League Regulations (“UCL-Regulations”). Porto appealed against that decision in front of the UEFA Appeals Body and the Legal Counsel to the UEFA Disciplinary Services asked Benfica whether it wanted to participate in the appeal proceedings in light of Article 1.07 of the UCL-Regulations. According to the latter provision, a club which is not admitted to the competitions shall be replaced by the next best-placed club in the top domestic league championship of the same national association, provided it fulfils the admission criteria. The UEFA Legal Counsel noted that Benfica was directly concerned by the appeal proceedings in accordance with Article 28(2) of the Disciplinary Regulations given that Benfica could participate in the 3rd qualification round of the 2008/2009 UEFA Champions League. The UEFA Appeals Body ruled in favor of Porto allowing the club to participate in the UEFA Champions League. Subsequently, Benfica filed an appeal to CAS in order to reinstate the first instance decision.¹⁶

Turning to the reasoning of the decision, the CAS Panel had to address the question whether Benfica had standing to appeal according to Article 62(2) UEFA Statutes stating that

“Only parties directly affected by a decision may appeal to the CAS.”

The Panel, therefore, examined whether such wording would limit the group of persons with the right to appeal compared to the findings of former CAS decisions referring to Swiss law. After the Panel had established that:

“the wording of Art. 62(2) of the UEFA Statutes does not do much to put the flesh on the bones”¹⁷

it concluded that:

“It is undeniable that the association’s legislator can extend the group of persons, who have a right to appeal, compared with the statutory model in Art. 75 Swiss Civil Code (ZGB), CAS 2007/A/1278&1279, no. 87). By contrast, the Panel is of the opinion that the association’s legislator cannot make the group of persons, who have a right to appeal, smaller than the statutory model; for it is an indispensable essential part of the ordre public that an individual’s legal protection against measures by an association is guaranteed by an external instance that is independent from the measures by an association is guaranteed by an external instance that is independent from the association. Since it can be assumed that the association’s legislator wanted to comply with these (minimum) statutory requirements, this is

¹⁶ CAS/A/1583&1584, *Benfica v. UEFA & FC Porto, Vitória Guimarães v. UEFA & FC Porto*, Award of 15 July 2008, pp. 2 et seq.

¹⁷ *Ibid.*, para. 24.

*also an argument for granting third parties the right to appeal if they are directly affected by the measure taken by the association.*¹⁸

Subsequently, the Panel distinguished between “directly affected” and “indirectly affected” parties. After analyzing former CAS decisions, it concluded as follows:

*“Where the third party is affected because he is a competitor of the addressee of the measure/decision taken by the association, –unless otherwise provided by the association’s rules and regulations – the third party does not have a right of appeal. Effects that ensue only from competition are only indirect consequences of the association’s decision/measure. If, however, the association disposes in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal.”*¹⁹

Applying this finding to the case at hand, CAS found that UEFA’s decision granting entry to a club in a championship that has a closed field of participants, is also a decision excluding other potential participants. In the light of Article 1.07 of the UCL-Regulations, the allocation or denial of said entry was not the realization of any “vague hope or fateful bad luck” for the club concerned, but rather, a decision about a legal right of the clubs concerned. The Panel concluded as follows:

*“If therefore, the UCL-Regulations provide in Art. 1.07 that the starting place goes to the next-best-placed club in the top domestic league, said club [Benfica] has a right against the First Respondent [UEFA] that if the appropriate requirements are met this provision is applied just as the Second Respondent [Porto] has a right to be admitted to the CL pursuant to Art. 1.05 of the UCL-Regulations if it fulfils the admission criteria. To summarize, in the Panel’s opinion the Appellants have standing to appeal or to sue and, more particularly, both in the association’s internal legal process as well as before the CAS.”*²⁰

Comment:

This finding does not seem to be fully in line with the conclusions of the aforementioned Award CAS 2002/O/373, *COC & Beckie Scott v. IOC*. When the IOC decided not to disqualify the gold medal winner, one could argue that – in accordance with the test established in CAS 2008/A/1583&1584 – the IOC did not only dispose of the rights of the addressee, but also of all other athletes who competed in the same competition, i.e. not just of those who would have won a medal. For other athletes it also would not have been only a “vague hope” to gain a better place in the final ranking in the competition if the IOC had decided to disqualify the gold-winning athlete.

2.3. CAS 2015/A/4151, *Panathinaikos FC v. UEFA & Olympiakos FC*, Award of 26 November 2015

Olympiakos won the 2014/2015 Greek Super League, which qualified the club directly for the group stage of 2015/2016 UEFA Champions League. The UEFA Admission Criteria Form for this competition obliges all clubs to disclose any proceedings related to match-fixing involving its players, coaches, officials, etc. To UEFA Admission Criteria Form, Olympiakos attached a statement of alleged accusations against its President noting an ongoing match-fixing investigation in Greece. As a result, the UEFA General Secretary requested that the UEFA Ethics and Disciplinary Inspector conduct an

¹⁸ Ibid., para. 30.

¹⁹ Ibid., para. 31.

²⁰ Ibid., paras. 32 et. seq.

investigation regarding the admission of Olympiakos to the 2015/2016 UEFA Champions League. Panathinaikos, which finished second in the Greek Super League – not qualifying for the group stage but only to the qualification round for the UEFA Champions League –, submitted its view of the match fixing allegations to UEFA. The UEFA Disciplinary Bodies eventually found that there was not sufficient evidence to conclude that any official of Olympiakos had been involved in match-fixing and, therefore, provisionally admitted the club to the 2015/2016 UEFA Champions League. Panathinaikos did not agree with this result and appealed the decision to CAS in order to obtain the chance to qualify directly for the Champions League group stage. At this time, the qualification stage of the 2015/2016 UEFA Champions League had already started.²¹

Panathinaikos submitted that its standing derived from Article 4.08 UCL-Regulations, providing that a club which is not admitted to the competition is replaced by the next best-placed club in the top domestic championship.²²

However, the Panel found that because the qualification stage of the Champions League had already started, Panathinaikos had not established that Article 4.08 UCL-Regulations would still apply. Therefore, the Panel concluded that it would be for the UEFA Emergency Panel to decide whether Panathinaikos or any other club eliminated in the qualification round would replace Olympiakos, should Olympiakos not be eligible to participate.²³ According to the findings in the award:

*“standing to sue should be restricted to a club that should show to the Panel that it would directly replace an excluded club and not by the means of possibly being entered into a draw along with a number of other clubs or by a possible one-off decision that the Emergency Panel could take”.*²⁴

Comment:

The findings of the Panel are in line with CAS/A/1583&1584, *Benfica v. UEFA & FC Porto*, *Vitória Guimarães v. UEFA & FC Porto* in terms of differentiating between a club which can show that it would directly replace an excluded club in a competition and a club which can only show the possibility of a replacement. However, to have the “possibility” and not only a “vague hope” to replace a club at the UEFA Champions League could also be seen as a direct benefit. In other words, as Panathinaikos was one of the clubs with the chance to replace Olympiakos in case of its exclusion (arguably with the best chance considering its ranking in the Greek Super League), this chance could also be regarded as a sufficient legal interest to appeal the admission of Olympiakos.

2.4. CAS 2015/A/3874 Football Association of Albania (FAA) v. UEFA & Football Association of Serbia (FAS), Award of 10 July 2015

CAS 2015/A/3874 had to deal with a match played between the national teams of Serbia and Albania in the qualifying round for the 2016 UEFA European Championship. The match took place at the Partizan Stadium in Belgrade, Serbia. 25,550 spectators attended the match. Following an agreement reached between the Football Association of Albania (FAA) and the Football Association of Serbia (FAS), no tickets were sold to Albanian supporters. Only approximately 100 individuals linked to and invited by the FAA were allowed to attend the match. Shortly before kick-off, during the pre-match ceremony when the Albanian national anthem was played, and throughout the match, the Serbian

²¹ CAS 2015/A/4151, *Panathinaikos FC v. UEFA & Olympiakos FC* Award of 26 November 2015, paras. 4 et seq.

²² *Ibid.*, para. 56.

²³ *Ibid.*, para 147.

²⁴ *Ibid.*, para.146.

supporters made various chants, including “Kill, Kill the Albanians” and “Kill and slaughter them [the Albanians] until there are none left”.

Following that match, UEFA opened disciplinary proceedings against both federations. The UEFA Control Ethics and Disciplinary Body (“CEDB”) considered, *inter alia*, that FAS, via its supporters, had committed serious infringements regarding the order and security at UEFA competition matches under Article 16(2)(e) UEFA Disciplinary Regulations 2014 (“DR”). However, it found that no violation of Article 14 DR banning “racism, other discriminatory conduct and propaganda” had occurred. Based on this finding and a multitude of other infringements, the CEDB sanctioned the FAS with a deduction of three points in the 2016 UEFA European qualifying round, two matches behind closed doors and a fine of EUR 100,000.

The FAA filed an appeal against this decision at the UEFA Appeals Body, *inter alia*, requesting that the FAS should also be sanctioned according to Article 14 DR because of the behavior of the FAS supporters. The UEFA Appeals Body dismissed the Appeal finding that FAA was not “directly affected” by the decision to not sanction FAS according to Article 14 DR. Subsequently, the FAA filed an appeal at CAS submitting that it was “directly affected” by the decision to not sanction FAS according to Article 14 DR.

In order to determine if the FAA was a third party “directly affected”, the CAS Panel favored the approach taken by CAS 2008/A/1583&1584 and came to the conclusion that:

“the Appellant is not “directly affected” by the measures that may have been reasonably applicable for an infringement of Article 14 DR (see supra at para. 49). (...) Moreover, the Panel finds that the Appellant is also not directly affected as the “victim” of the racist and discriminatory chants, at least in the sense of the established case law. According to CAS 2008/A/1583&1584, this could only be envisaged if the UEFA rules provided a specific right for a victim to appeal, which they do not. Indeed Article 62 para. 2 of the UEFA Statutes links the “directly affected” requirement to the disciplinary decision and not to the conduct giving rise to the disciplinary proceedings (“directly affected by a decision”, emphasis added). Without such a right, the mere fact that an individual is a victim does not as such establish a standing to appeal a sanction imposed on the offender. Such an interpretation would have far reaching consequences and could lead to the possibility of appeals from a potentially very large group of persons. Under such an interpretation, for instance, any player who is injured by a dangerous tackle or is bitten by another player would be able to appeal if he were unhappy with the sanction imposed on the offender.”²⁵

Comment:

The arguments mentioned by the Panel for generally excluding a victim’s standing to appeal are not entirely convincing. When stating that a victim is not directly affected “in the sense of established case law”, the Panel misconceived the case law that it referred to, namely CAS 2008/A/1583&1584. According to this ruling, a third party does not only have standing to appeal if “UEFA rules provided a specific right for a victim to appeal” but also if the association disposes in its measure/decision of the rights of the third party.²⁶ Therefore, the Panel should have examined whether a decision not to sanction an offender could also be qualified as a decision disposing of the rights of the victim.

Furthermore, the Panel argues that allowing victims to appeal a decision against the offender would “have far-reaching consequences and could lead to the possibility of appeals from a potentially very

²⁵ CAS 2015/A/3874, *Albania v UEFA & Serbia*, Award of 10 July 2015, paras. 181 et. seq.

²⁶ CAS/A/1583&1584, *Benfica v. UEFA & FC Porto, Vitória Guimarães v. UEFA & FC Porto*, Award of 15 July 2008, para. 31.

large group of persons". This holds true if the Panel would have considered that the chants by the Serbian supporters were directed against an entire people: even though the Albanian team members were, of course, part of the group at which the discriminating behavior was directed, the same was true for all Albanian supporters in the stadium and every single Albanian person following the game elsewhere. In other words, the Football Association of Albania was only one member of a much larger group of victims. However, the examples offered by that Panel itself, i.e. a player "*tackled or bitten*" by an opponent, quite serve to prove the opposite: In those cases, it would be only one person - the one tackled or bitten -, rather than "a very large group of persons", who could appeal the respective decision (in addition to its addressee). One additional (potential) appellant would certainly not create the difficulties that the concept of standing to appeal is meant to avoid. Therefore, it is hard to see the "*far-reaching consequences*" invoked by the Panel.

3. Comparison to other fields of law

The question of whether a third party which is not the addressee of a decision has standing to appeal against it also arises frequently in public and criminal law. Therefore, the findings within these fields of law might also provide some guidance for CAS appeals proceedings.

3.1. Public law

If one studied law in Bavaria (like the authors), it is impossible to avoid the standard public law case at university that is dealing with the access of vendors to the Oktoberfest. For obvious reasons, every year there is a big run for any available spot and the city of Munich has to choose, based on objective criteria, which vendors receive a spot. Subsequently, appeals against concessions granted by the city are filed by third parties that did not obtain a spot (as there are no more spots available). Those third parties generally allege that the party that has been awarded the spot does not fulfil the necessary requirements. At least for vendors, a booth at the Oktoberfest is comparable to a spot in the group phase of the in UEFA Champions League for a football club. To give another example, a third party appeal situation also frequently occurs when public authorities grant building permits. The neighbor might not like it if someone is granted a permit to build a slaughterhouse next to his home. Hence, in public law, the question also frequently arises as to who has standing to appeal a decision addressed to another party. Public law also usually excludes a right for everyone (*quivis ex populo*) to appeal measures by public authorities (in Swiss law "*Ausschluss der Populärbeschwerde*"²⁷).

For example, Swiss law provides in the Swiss Administrative Procedure Act (APA) the following requirements for standing to appeal:

Art. 48D. Locus standi

1 A right of appeal shall be accorded to anyone who:

(...)

b. has been specifically affected by the contested ruling; and

c. has an interest that is worthy of protection in the revocation or amendment of the ruling.

²⁷ SFT 135 II 172, 174, para.2.1.

Hence, in public law, we find the exact same requirements for standing to appeal as discussed in the abovementioned CAS decisions. Therefore, administrative courts also have a long history in trying to find objective criteria to identify the parties who are “*specifically affected*” by a decision not addressed to them. According to the Swiss Federal Administrative Court, in order to have standing to appeal, a third party has to be affected more intensely than a random third person by the appealed decision and has to be in a special, noteworthy close relation to the subject-matter.²⁸

In Germany and Austria, administrative courts particularly take into account the provision allegedly violated by the appealed decision when determining whether a third party has standing. If said provision can be interpreted in a way that it is aimed not only at protecting the general public, but also the interests of a particular appellant, the latter has standing (so called “*Schutznormtheorie*”)²⁹. Coming back to the neighbour trying to appeal a granted building permit, the court reviews whether the allegedly violated provision has been designed to protect the rights of neighbours. For example, this is the case for regulations determining which distance has to be observed between neighbouring buildings, given that said provisions certainly (also) aim to protect the rights of a direct neighbour of a building. Hence, if said provision is violated by the permit, the neighbour has standing to appeal.

Coming back to the Oktoberfest booth case an appellant trying to attack the permit granted to another party only has standing if it can demonstrate that the decision in favour of the third party violated his subjective right to be granted a permit himself. German administrative courts found that in case of limited available space for an event each applicant (fulfilling the requirements to be allowed for the event) shall have a subjective right for a decision (also if it is in favour of a competitor) treating all applicants equally without violation of any regulations concerning the allocation of spaces or discretionary mistakes.³⁰ In case this subjective right is violated by the decision in favour of the competitor the third party has standing to appeal.³¹

These established legal principles in order to determine a party’s standing could be transferred to athletes/clubs trying to appeal decisions issued in favour of its competitors. For purposes of illustration, this legal theory will be applied in the following section to a number of well-known sports regulations.

3.1.1. Anti-doping rule violations

With respect to anti-doping rule violations, the purpose of the WADA Code is defined as follows:

To protect the athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide, and to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.

Hence, the provisions of the WADA Code, in principle, protect all athletes and the sport in general, not any individual athlete or a certain definable number of athletes. Applying the method explained above, an athlete would not have standing to appeal a decision in order to increase a period of ineligibility of a competitor, e.g. according to Article 10.2 WADA Code because this provision does not have the *ratio* to protect individual athletes.

²⁸ SFT 135 II 172, 174, para.2.1.

²⁹ German Federal Court of Administration (Bundesverwaltungsgericht), award of 25. February 1977, IV C 22/75, NJW 1978, 62 et seq.; Austrian High Court of Administration (Verwaltungsgerichtshof), 2002/03/0186.

³⁰ German Federal Court of Administration (Bundesverwaltungsgericht), order of 24 June 2011, 8 B 31/11, juris.

Rn. 5.

³¹ Ibid.

A different result could derive from an interpretation of Article 9 WADA Code stipulating the following:

“An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

The *ratio* of the automatic disqualification pursuant to Article 9 WADA Code has been defined by CAS, *inter alia*, as follows:

“The mere participation of the athlete in a competition while a prohibited substance was present in his or her body by itself establishes a situation of non-equality between him or her and the other participants in the competition, regardless of the question of culpability or intention.”³²

Hence, Article 9 WADA Code not only has the aim to protect all athletes and sports in general but also to protect the individual “*participants in the competition*” in which the athlete who tested positive participated. Therefore, an athlete who competed in said competition should have the right to claim for said protection if it is denied by the deciding body. In line with the method of interpreting the protective purpose of the alleged violated provision explained above, any participant in such competition should have standing to appeal a decision that refuses to apply Article 9 WADA Code. Such general approach would also eliminate the discussion as to whether only potential gold or bronze medallists or top ranked athletes should have standing to appeal in a comparable situation. Again, the argument that this could open the floodgates of multiple appeals is not really convincing for the reason mentioned above (*see above Comment to CAS 2002/O/373 under 2.1.*).

3.1.2. Eligibility for UEFA competitions

In CAS 2008/A/1583 (*see above*), Benfica’s appeal was based on the allegation that Porto would not fulfill the eligibility requirements to participate in the UEFA Champions League according to Article 1.04 of the UCL- Regulations stipulating that

“must not be or have been involved in an activity aimed at arranging or influencing the outcome of a match at national or international level.”

Therefore, Benfica argued that according to Article 1.07 UCL-Regulations the starting place of Porto would go to the next best placed club in the domestic league, i.e. Benfica. When determining whether Benefica would have standing the Panel found the following:

“UEFA’s allocation or denial of a starting place in the CL is not the realisation of any vague hope or fateful bad luck of the club concerned. Rather, it is a decision about a legal right of the clubs (...). For the clubs have a right that when it awards the starting places the First Respondent firstly complies with its own rules and secondly treats all of the candidates for said starting place equally.”

Hence, the Panel applied the exact same principles used by German administrative courts in order to determine whether an applicant for a market booth could appeal a decision granting a spot to another party (*see 3.1 above*), i.e. that a party applying for a permit to limit space has a subjective right to be treated equally like all other candidates and that the deciding body complies with the rules in its decision making process. In case this subjective right of an applicant is violated by the decision

³² CAS OG 16/13, *Anastasia Karabelshikova & Ivan Podshivalov v. FISA & IOC*, Award of 4 August 2016. para. 85.

granting another party the “starting place” or a permit for a booth at a market, the other applicant has standing to appeal this decision.

3.2. Criminal law

Criminal law also usually excludes individual parties other than the accused from taking an active role in criminal law proceedings. In most cases only the prosecutor or the convicted may file appeals against criminal court decisions and not any third party. However, in certain cases, victims of a crime may participate in criminal proceedings and even appeal against decisions rendered against the offender, in particular if the offender violated the victim’s physical integrity.

In Swiss law, private persons who are “suffering harm” may participate in criminal proceedings as private claimant (German: "Privatklägerschaft", French: "Partie plaignante", Italian: "L'accusatore private"), as follows from Article 118 of the Swiss Code of Criminal Procedure (“SCCP”). Pursuant to Article 115(1) S CCP:

“A person suffering harm is a person whose rights have been directly violated by the offence.”

“Rights” in the sense of Article 115 (1) S CCP are any individual rights, such as life, physical integrity, property, honour etc. The violation of these rights is sufficient to grant the right to participate in the criminal proceedings. There is no need for any damage.³³

Article 382 (1) S CCP states that:

“Any party with a legitimate interest in the quashing or amendment of a decision may seek an appellate remedy.”

Article 382 (2) S CCP states that:

“A private claimant may not contest a decision on a sanction that has been imposed.”

According to Swiss jurisprudence, any victim who legitimately participated from the beginning in the criminal proceedings as private claimant according to Article 118 (1) S CCP also has “legitimate interest” to appeal a decision acquitting the accused.³⁴

In German criminal procedural law, a victim of a crime, may only appeal an acquittal of the accused in certain enumerated crimes stipulated in Article 395 German Code of Criminal Procedure³⁵. All these enumerated crimes have in common that they violate the physical integrity of the victim, like causing bodily harm, sexual assault, stalking, insult. Crimes violating a victim’s property do not allow for an appeal by the victim.

Thus, the right to have standing to appeal depends on a particularly severe consequence for the victim, which seems natural when the physical integrity of the victim is compromised.

The authors are certainly aware of the CAS jurisprudence stipulating that disciplinary sanctions imposed by associations are subject to civil law and must be clearly distinguished from criminal penalties³⁶. However, this conclusion does not hinder the CAS and associations to analyze criminal law with respect to available guidance regarding the protection of the interest of a victim. The conclusion

³³ SFT 139 IV 78, 81-82, paras. 3.3.3.

³⁴ See SFT 141 IV 231,234-236, para. 2.5 with reference to SFT 139 IV 78 and SFT 139 IV 84.

³⁵ https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2240

³⁶ See CAS 2005/C/976 & 986, para. 127

that only victims who had to suffer severe violations of their personal integrity seems to be a concept fitting also in disciplinary proceedings in sports. There seems to be little justification for not granting such victims the right to appeal an acquittal of an offender.

4. Conclusion

The above shows that the question under which circumstances a party which is not the addressee of a decision may have standing to appeal has been discussed intensely in all fields of law. There is consent that this may only be the case if such party is (directly) affected by the decision and therefore, has “sufficient” or “tangible interest”³⁷ for an appeal. However, as also found by CAS these abstract terms hardly help a possible appellant or a CAS panel in determining whether a party has standing or not. For the sake of legal certainty it would be advisable for CAS to examine the similarities to other fields of law summarized above and to make use of perceptions obtained within such fields of law during the long legal history. The methods developed by public law to identify the third parties which should have standing to appeal a decision not addressed to them seem to be to a large extent transferable to decisions of International Federations dealing for example with the admission to a competitions. To identify the parties who should have standing to appeal a decision not addressed to them by interpreting the protective purpose of the provisions allegedly violated can be applied similarly on sports regulations (see 3.1.1 and 3.1.2 above).

In respect of a victim’s right to appeal a decision of a sports body to not sanction the offender the CAS could apply the criminal procedural law principles as explained above. It is hard to understand that a victim bitten or racially abused by a competitor should not have the right to appeal a decision by a sports body acquitting such offender. The mantra-like repeated open floodgate scenario leading to endless litigations simply does not seem to be realistic. There are still the limitations regarding field of play decisions. Like in criminal law the standing to appeal of a victim could be limited to cases in which a violation is not sanctioned at all. It could also be limited to certain serious violations (e.g. racist conduct, etc). There is no reason to believe that players would all of a sudden start endless litigations if these rights were granted in such a limited form.

Finally, one has to keep in mind that in only in respect of doping WADA as independent body controls the legality of sports federations decision. However, such independent organization does not exist for any other misconduct, like racist behavior, corruption, etc. Therefore, the federations (maybe only an investigatory chamber) have the power to decide whether such conduct is sanctioned or not without any controlling instance and without any third party having standing to appeal such decisions. Also for this reason the criteria for standing to appeal should be objective and not be applied too restrictively.

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³⁷ CAS 2007/A/1392, *Federación Panameña de Judo (FPJ) & Federación Venezolana de Judo (FVJ) v. International Judo Federation (IJF)*, Award of 9 September 2008, para 8.

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