Korda v ITF Ltd (t/a The International Tennis Federation) [1999] APP.L.R. 03/25

CA on appeal from Chancery Division (Mr Justice Lightman) before Morritt LJ; Auld LJ; Clarke LJ. 25th March 1999

LORD JUSTICE MORRITT: Lord Justice Clarke will give the first judgment.

LORD JUSTICE CLARKE:

Introduction

1. On 22 December 1998 an independent Appeals Committee appointed by the respondent, the International Tennis Federation ("the ITF"), issued a decision ("the decision") under the ITF's Tennis Anti-Doping Programme ("the Programme"). On or about 8 January 1999 the ITF purported to file an appeal against the decision with the Court of Arbitration for Sport ("CAS") which is based in Lausanne in Switzerland. On 13 January the respondent issued an originating summons seeking a declaration that the ITF was not entitled to appeal to the CAS and an injunction restraining it from doing so. On 29 January Mr Justice Lightman made a declaration to that effect. He did not grant an injunction, presumably because it was not necessary to do so, but he gave the ITF leave to appeal to this court.

The contract and background facts

2. The respondent is Mr Petr Korda, a well-known international tennis player. His ATP ranking in August 1998 was 4 and at the end of 1998 was 13. On 7 May 1998 he signed an application form to enter the 1998 Wimbledon championships. By that form he agreed to abide by the conditions set out on pages 1, 2, and 23 of the Competitors Guide 1998 which provides (so far as relevant) as follows:

   "1. The meeting is sanctioned by the Lawn Tennis Association and will be played under the Rules of Tennis as approved by the [ITF].

   16... Competitors should be prepared to undergo drug testing as a result of governmental or other binding regulations imposed on the Championships by authorities outside its control or by the governing bodies of the game."

3. The Wimbledon Championships are a Grand Slam event recognised by the ITF.

4. It is not now in dispute that both the appellants and the ITF are contractually bound by the terms of the Programme. As of March 1998 the ITF promulgated the Programme. Sections (A), (B) and (C) provide so far as relevant as follows:

   "(A) General Statement of Policy

   The purpose of the... Programme is to maintain the integrity of tennis and protect the health and rights of all tennis players, by education and controlled doping tests. The scope of the Programme includes:-

   (a) Doping tests in and out of competition;

   (b) The imposition of penalties for doping offences....

   (B) Covered Players and Events

   1. *Any player who enters of participates in an event or activity organised, sanctioned or recognised by the ITF or who has an ATP Tour... ranking, shall comply with and be bound by all of the provisions of this Programme.*
   2. *Recognised events include, but are not limited to, Grand Slam tournaments...*

   (C) Doping Offences

   1. *Doping is forbidden. Under this Programmes the following shall be regarded as doping offences:-*

      (c) A Prohibited Substance is found to be present within a player's body....

   2. *A player is absolutely responsible for any Prohibited Substance found to be present within his body. Accordingly, it is not necessary that intent or fault on the player's part be shown in order for a doping offence to be established under paragraph 1 of this Section (C); nor is the player's lack of intent or lack of fault a defence to a doping offence."*

5. Section (D) and Schedule 1 set out a list of prohibited substances in three classes. Class 1 includes nandralone which is described as an anabolic agent. Section (G) provides for in competition testing of players at ITF recognised events. Section (J) provides for the test results to be sent to a Review Board. Mr Flint stresses the fact that, if there is any defect in the process at any stage, as, for example, if one of the samples is disqualified or two valid samples are not identical, no further action can be taken against the player by the ITF. By section (J)14, if the Review Board unanimously determines that a violation of the programme has occurred, the ITF is notified and the ITF must notify the player that he is in violation of the Programme and that he *"shall be subject to the penalties set out under the provisions of the Programme"*.

6. Section (M) provides that in the case of Class 1 Prohibited Substances and a first violation the penalties shall be a mandatory suspension of one year. In addition, section (N)3 provides that the player shall forfeit all ranking points and prize money earned at the tournament where the player provided a positive sample, and section (N)4 provides that he shall forfeit all such points and prize money earned at all recognised events subsequent to the time the player provided the positive sample until the commencement of any sanction imposed by the ITF.

7. Section (N) provides: "*Suspensions shall commence on the day following the deadline for receipt of notification that the player will appeal or the day after an admission by a player that he is in violation of the Programme, or, in the case of an appeal to the Appeals Committee, shall commence on the day after the appeal is unsuccessfully concluded.*"

8. In this case the appellant provided a urine sample after losing in the quarter final. It proved positive because nandrolone was found to be present. The Review Board unanimously determined that a violation of the

Programme had occurred on the ground that the sample contained two metabolites of nandrolone. As a result, on 28 October 1998 the ITF issued Mr Korda with a notice of violation to that effect.

The Appeals Committee

9. It is common ground that Mr Korda had a right of appeal to the Appeals Committee. It is also common ground that the ITF would in no circumstances have such a right of appeal. Mr Korda exercised his right by filing a notice of appeal on 6 November 1998. The Programme provides for that right in section (L), which sets out the relevant procedure. Section (L), which is headed "Player's Appeal Process", provides (so far as relevant) as follows:

"2. The case shall be heard by the Appeals Committee on a confidential basis... The Appeals Committee shall determine whether there has been a violation of the Programme...

5. ... The Appeals Committee will not be bound by judicial rules governing the procedure or the admissibility of the evidence, provided that the hearing is conducted in a fair manner with a reasonable opportunity for each party to submit evidence, address the Appeals Committee and present his or its case."

6. At any hearing before the Appeals Committee the following will apply:

(a) the hearing shall be in private; and

(b) decisions must be unanimous; and

(c) the ITF shall have the burden of proving, on the balance of probabilities, that there has been a violation of the Programme.

7. After an appeal is unsuccessfully concluded, the ITF shall make a reasonable effort to notify the player or his representative before a suspension commences.

8. The Appeals Committee's decision shall be the full, final and complete disposition of the appeal and will be binding on all parties. Such decision will be submitted confidentially in writing to the ITF Medical Administrator who shall forward the decision to the President."

10. Further provisions of the Programme relating to the Appeals Committee are to be found in section (E)4 under the heading "Appeals Committee". That section provides as follows:

"(a) The Appeals Committee shall hear on a confidential basis all appeals of violations of the Programme. The Appeals Committee shall be appointed by the ITF Medical Administrator or his designee and shall be composed of three (3) experts with medical, legal and technical knowledge of anti-doping procedures and shall act in accordance with Section (L) of this Programme. The Appeals Committee member with legal expertise shall act as the Committee's chairman.

(b) Subject to paragraph (c) below, the Appeals Committee shall not review, or consider, or have authority to modify the penalties prescribed under Sections (M) and (N) of the Programme.

(c) The Appeals Committee may reduce the penalties as set out in Section (M) and Sections (N)4 and (N)5 of the Programme (but not overturn the violation of the Programme) only if the player establishes on the balance of probabilities that Exceptional Circumstances exist and that as a result of those Exceptional Circumstances the penalties as set out in Section (M) and Sections (N)4 and (N)5 in the Programme should be reduced. For the purpose of this paragraph, Exceptional Circumstances shall mean circumstances where the player did not know that he had taken, or been administered the relevant substance provided that he had acted reasonably in all the relevant circumstances."

11. Section (S), which is headed "Confidentiality", provides (so far as relevant): *"The ML, APA, Review Board, non-voting observers, selected surrogates, other relevant ITF staff and representatives and the Appeals Committee shall use their best endeavours to maintain in strict confidentiality the results of all testing and the identities of any persons involved in proceedings under this Programme, until such time as (1) all proceedings under the Programme are concluded and (2) it has been determined that there has been a violation of the Programme."*

12. As can be seen from these provisions the Appeals Committee has jurisdiction by section (L)2 to determine whether there has been a violation of the Programme and, if there has, by section (E)4(c) in limited circumstances to review the penalties which would otherwise be imposed by sections (M) and (N).

13. In his notice of appeal Mr Korda both challenged the notice of violation and asserted that exceptional circumstances existed within the meaning of section (E)4(c) and that the penalty should be reduced.

14. Between 6 and 17 November 1998 the ITF appointed an independent Appeals Committee to hear the appeals, consisting of Mr David Pannick QC, Dr Michael Peat, who is a specialist in toxicology, and Dr Ronald D Springel, who is a specialist in addiction medicine and a certified medical review officer. They heard the appeal on 21 December 1998. At the hearing both Mr Korda and the ITF were represented by solicitors and counsel. Mr Korda gave oral evidence and was cross-examined on behalf of the ITF. As I see it, although the hearing was called an appeal it was really a first instance hearing before the Appeals Committee.

The Decision

15. The essence of the decision of the Appeals Committee can be seen from the following paragraphs of its confidential report:

"3. Having considered the evidence and the submissions, and for the reasons set out in more detail below, we conclude that

(1) There was found to be present within the Appellant's body a Prohibited Substance, that is metabolites 19-norandrosterone and 19-noraetiocholanolone of Nandrolone (an anabolic agent), contrary to the Anti-Doping Programme. Therefore, the Appellant committed a doping offence.

(2) The Appellant has established that Exceptional Circumstances exist in that the Appellant did not know that he had taken (or been administered) the relevant substance and he acted reasonably in all the relevant circumstances.

(3) By reason of the contents of the Programme, we have no power to mitigate the mandatory sanction imposed by Section N(3) of the Programme: that is the sanction that the Appellant must forfeit all computer ranking points earned at the Wimbledon tournament at which the positive sample was given, and must return to the ITF all prize money earned at that tournament.

(4) By reason of the Exceptional Circumstances which we have found to exist, we have decided that there should be no other sanction imposed on the Appellant for the doping offence which we have found proved in this case. ....

41. Although the Anti-Doping Programme imposes strict liability for Doping Offences, it allows for mitigation of the otherwise mandatory penalties where the Appellant can show that he did not know he had taken (or been administered) the relevant substance and that he had acted reasonably in all the relevant circumstances.

42. ... the Appellant has failed to explain the source of the positive findings. Two possible explanations have been advanced by the Appellant [which we reject]...

43. However... the Appellant... does not have to show the source of the positive test results. The Programme confers a discretion on this Appeals Committee where we are satisfied, on the balance of probabilities, that the Appellant acted innocently and reasonably.

44. We are satisfied that there are Exceptional Circumstance in this case. We so decide for the following reasons:

(5) We heard evidence from the Appellant. Each of us found him to be an honest, open and reliable witness. His evidence was supported by the absence of any prior or subsequent positive results, by the absence of any medical evidence of chronic steroid abuse, and by the character evidence from Mr Boris Becker and from Mr John Pickard. We accept the Appellant's evidence that he did not knowingly take (or have administered to him) a prohibited substance.

(6) In our judgment, the Appellant has established that he acted reasonably (as well as innocently) in all the relevant circumstances. Whatever the cause of the positive results, we are satisfied that the Appellant could not be faulted in any relevant respect. We reject Mr Stoner's criticism by reference to the Appellant's willingness to take various other preparations (such as minerals and vitamins). There is no evidence to suggest that any of those other preparations contain Prohibited Substances.

45. By reason of the contents of section (E)4(b) and (c) of the Programme, we have no power to alter the mandatory sanction imposed by section N(3) of the Programme: that is the sanction that the Appellant must forfeit all computer ranking points earned at the Wimbledon tournament (at which the positive sample was given) and return to the ITF all prize money earned at that tournament.

46. We have decided that, by reason of the Exceptional Circumstances which we have found to exist, there should be no other sanction imposed on the Appellant for the doping offence which we have found to be proved in this case."

The Issue

16. On 22 December 1998, but before Mr Korda was aware of the decision, his solicitors wrote to the solicitors for the ITF informing them that in the event of an adverse decision of the Appeals Committee they would be considering the possibility of an appeal to the CAS or alternatively recourse to the courts. Mr Korda subsequently accepted the decision, whereas the ITF did not. It asserted and continues to assert a right in effect to appeal to the CAS by reason of section (V)3 of the Programme. As I have already indicated, the judge held that the ITF had no such right. The issue in this appeal is whether he was right so to hold.

The Clause

17. Section V of the Programme is headed "General" and provides (so far as relevant) as follows:

"1. This Programme shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) exclusively by the laws of England and Wales and subject to the exclusive jurisdiction of the English Courts. ...

3. Any dispute arising out of any decision made by the Anti-Doping Appeals Committee shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport which shall resolve the dispute in accordance with the Code of Sports Related Arbitration. The time limit for any such submission shall be 21 days after the decision of the Appeals Committee has been communicated to the player."

18. There was an issue before the judge as to whether there was a contractual relationship between the appellant and the ITF on the terms of the Programme and, more particularly, a contractual relationship which embraced the provisions of section (V)3. The judge held that there was and Mr Korda does not challenge that decision. It follows that the question for decision in this appeal is whether, on the true construction of section (V)3, the ITF is entitled in effect to appeal to the Appeals Arbitration Division of the CAS. That involves some consideration of the way in which the CAS, and in particular the Appeals Arbitration Division, operates.

19. The CAS publishes a "Guide to Arbitration", which describes it as an arbitration institution. It comprises two divisions, the Ordinary Arbitration Division, whose task is to resolve all disputes subject to the ordinary arbitration procedure, and the Appeals Arbitration Division, whose task is to resolve disputes subject to the appeals arbitration procedure. The Guide describes the procedure, from which it appears to me to be clear that what is contemplated is an appeal process. Thus its aim is described in these terms under the heading "Appeals Arbitration Proceedings": *"The appeals arbitration procedure is applied to all disputes arising from decisions taken by the internal tribunals, or similar bodies of sports federations, associations or other sports bodies, when the statutes and regulations of these bodies or a specific arbitration clause provide for the competence of the CAS. It presupposes that the appellant has exhausted all internal judicial remedies."*

20. In Appendix 1 to the Guide the CAS sets out standard clauses, of which the following is recommended in the case of what are called appeals arbitration proceedings: *"Any decision made by... [insert the name of the disciplinary tribunal or similar court of the sports federation, association or sports body which constitutes the highest internal tribunal] may be submitted exclusively by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-related Arbitration. The time limit for appeal is twenty-one days after the reception of the decision concerning the appeal."*

21. The judge placed particular reliance upon the fact that the ITF did not choose that clause but a different one in section (V)3 of the Programme. However, it is or may be significant to observe that section (V)3 does not refer to the Guide but to the Code of Sports-related Arbitration. The Code sets out what it calls the statutes of the bodies working for the settlement of sports-related disputes. Those statutes provide (so far as relevant) as follows:

"S1 In order to settle, through arbitration, sports-related disputes, two bodies are hereby created:

- *the International Council of Arbitration for Sport (ICAS) and*
- *the Court of Arbitration for Sport (CAS).*

22. The disputes referred to in the preceding paragraph include, in particular, those concerned with doping. The disputes to which a federation, association or other sports body is party are a matter for arbitration in the sense of this Code, only insofar as the statutes or regulations of the said sports bodies or a specific agreement so provide.

"*The seat of the ICAS and the CAS is established in Lausanne, Switzerland. ....*"

S12 The CAS sets in operation Panels which have the task of providing for the resolution by arbitration of disputes arising within the field of sport in conformity with the Procedural Rules (Articles R27 et seq)....

The responsibility of such Panels is, inter alia:

a. *to resolve the disputes that are referred to them through ordinary arbitration;*
b. *to resolve through the appeals arbitration procedure disputes (including doping-related disputes) concerning the decisions of disciplinary tribunals or similar bodies of federations, associations or other sports bodies, insofar as the statutes or regulations of the said sports bodies or a specific agreement so provide..."*

23. S20 describes the Appeals Arbitration Division panels in similar terms and S23 provides for the statutes to be supplemented by procedural rules.

24. The Procedural Rules include the following: *"R27 These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause or be the subject of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision given by the disciplinary tribunals or similar bodies of a federation, association or sports body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings)."*

25. By R28 the seat of each panel is in Lausanne.

26. Section C of the Procedural Rules is entitled *"Special Provisions Applicable to the Appeal Arbitration Proceedings"* and comprises articles R47 to R59. R47 provides under the heading *"Appeal"*: *"A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provides or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body."*

27. There then follow detailed provisions providing for matters such as statement of appeal and so on. All the rules, to my mind, show that what is to be determined is an appeal.

28. R57 is entitled "Scope of Panel's Review, Hearing" and provides: *"The Panel shall have full power to review the facts and the law. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments..."*

29. R59 is entitled "Award" and provides (so far as relevant): *"... The award shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration."*

30. Both the statutes and the regulations form part of the Code which is expressly referred to in section (B)3 of the Programme.

ITF's case

31. In its notice of appeal to the CAS Appeals Arbitration Division the ITF advanced three grounds of appeal as follows:

"1. The Appeals Committee misinterpreted and/or misconstrued section (E)4(c) of the Tennis Anti-Doping Programme.

3. Contrary to the decision of the Appeals Committee, Exceptional Circumstances were not established in accordance with section (E)4(c) of the Tennis Ant-Doping Programme.

4. The Appeals Committee misapplied section (E)4(c) of the Tennis Anti-Doping Programme and did not apply the appropriate penalties in relation to the doping offence involving a Class 1 Prohibited Substance that was found to have been committed."

32. As I read those grounds of appeal, the ITF is saying that the Appeals Committee made errors of both law and fact. Since it may be taken that the appellant does not accept that that is so, the ITF says that there is a dispute between the parties arising out of the decision of the Appeals Committee which by section (V)3 is submitted exclusively to the Appeals Arbitration Division of the CAS. Mr Flint submits that that is wrong and that section (V)3 has the effect of submitting only a limited class of dispute to the CAS, of which this is not one. In short, Mr Flint submits, only disputes as to the enforceability or effect of the decision are referred to arbitration under the clause.

The judgement

33. The judge accepted Mr Korda's submissions. His conclusions are concisely stated in paragraphs 12 to 15 of his judgment. He held in paragraph 12 that, looking at the language of section (V)3 alone, Mr Korda's submission that the words extended only to "disputes as to the validity, enforceability or construction of the decision" was correct. He said this: *"The Section does no more than allow reference to the CAS of disputes as to the parties' legal rights and obligations to which the decision gives rise. Section (V)3 requires the dispute to arise out of the decision of the AC, not out of the underlying merits of the dispute referred to the AC, nor as to the merits of the decision; it assumes that a final decision has been made and is concerned with resolving questions as to the impact of that decision on the parties. I may add that nothing would have been easier than to provide expressly for appeals to the CAS if that had been intended."*

34. He then considered that conclusion in the context of the programme. His conclusions are set out in paragraphs 13 to 15 of his judgment in these terms:

"13. This is confirmed when Section (V)3 is construed in its context in the Programme. The Programme lays down a tight timetable designed to secure an expeditious procedure for the final determination of charges of doping offences. This is plainly necessary for the proper conduct of the sport of tennis, to ensure public confidence in its administration and to safeguard the interest of players. Any sustained period of uncertainty as to the outcome of proceedings whilst they take their course is likely to be highly damaging to all concerned. (For example, under Section (N)4 the longer the trial process, the greater is the financial penalty on the player.) Again to this same end, Section (L)8 provides that the decision of the AC shall be the ´full, final and complete disposition of the appeal and will be binding on all parties'. Such a contractual provision should be given full effect and is inconsistent with the existence of any further right of appeal: see ***Jones v. Sherwood Computer Services Plc*** *[1992] 1 WLR 277 at 287E-G. Where such a formula is used, so long as the body in question answers the right question, even though it answers it the wrong way, its decision is final and cannot be impugned: see* ***The Glacier Bay*** *[1996] 1 Lloyd's Law Rep 370 at 377 (2nd column). What that formula does not preclude is a dispute as to the rights or obligations of the parties to which a decision of the AC gives rise. Such dispute may relate to whether the decision is open to challenge or is unenforceable on the ground e.g. that the conduct of the hearing before the AC was not fair, or that the relevant Rule of the ITF (and accordingly the decision of the AC) is open to challenge on public policy grounds, e.g. restraint of trade, or the dispute may relate to the construction of the decision made. In the absence of some such provision as Article (V)3, such disputes require resolution by the courts. The ITF has itself recently had the experience of such proceedings: see* ***Wilander v. ITF*** *[1997] 2 Lloyd's Rep 293. The purpose behind this provision is to require such disputes to be resolved expeditiously by the CAS without the need for the expensive and slower moving processes of the courts. The 21 day limitation period for a reference is in accordance with the policy of the Programme as a whole to place a premium on the urgent resolution of such disputes.*

14. In my view, so to read Section (V)3 entirely accords with the scheme of the Programme as a whole. There is nothing within the Programme which gives any intimation that a full scale further appeal from the AC was ever contemplated. It is difficult to believe it could be intended: (a) that there should be a second full scale appeal, with the enormous costs, inconvenience to the parties and witnesses and delay which this would involve; (b) that a player acquitted by the AC should be subject to double jeopardy and be required to face a retrial on appeal before the CAS; and (c) that there should be a full appeal from the AC, a committee composed of experts including one expert with medical and one with technical knowledge of anti-doping procedures, to a committee composed of the CAS arbitrators possessed only of a legal training and a recognised competence with regard to sport: looking at the respective composition of the two bodies alone, the inference must surely be that there is not to be a full appeal with a rehearing on the merits (as claimed by the ITF) but rather a limited review of legal questions of the character I have referred to. I may add that some further support may be obtained from the fact

that, in incorporating Section (V)3 in the Programme the ITF deliberately omitted the words in the CAS recommended standard form "by way of appeal.

15. I have been taken through statutes of the CAS. They are of little, if any, assistance on the issue before me for at least two reasons. The first is that the provisions make plain that the jurisdiction of the two divisions of the CAS, both the Ordinary Arbitration Division and the Appeals Arbitration Division, is limited to what is provided for in the statutes and regulations of the sports body in relation to whose decision a reference is made. The jurisdiction is accordingly in this case determined by Section (V)3 and the statutes of the CAS provided no guidance as to the construction of Section (V)3. Secondly Mr Reid fairly and sensibly agreed that the statutes of the CAS admit of the reference to the Appeals Arbitration Division of disputes of the limited character which Article (V)3 on my construction provides for."

Discussion

35. The question for decision in this appeal depends on the true construction of section (V)3, construed in the context of the contract as a whole, which in turn must be set against its surrounding circumstances or factual matrix. We must of course bear in mind in this regard the principles comparatively recently set out by Lord Hoffmann in ***Investors Compensation Scheme v Hopkins & Sons*** [1998] 1 WLR 896. The crucial part of section (V)3 reads:

36. "Any dispute arising out of any decision made by the Anti-doping Appeals Committee shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport which shall resolve the dispute in accordance with the Code of Sports Related Arbitration."

37. As indicated above, it is the ITF's case that the Appeals Committee made errors of both fact and law. Mr Korda does not accept that. It follows that there is a dispute between the parties as to whether such errors were made: see, for example, ***Halki Shipping Corporation v. Sopex Oils Ltd*** [1998] 1 WLR 726.

38. On the face of the clause the next question is whether the dispute arises out of the decision of the Appeals Committee. I am bound to say that as a matter of ordinary language it appears to me that the dispute plainly arises out of the decision. Indeed it is the decision about which the ITF complains. It says that the Appeals Committee was wrong both on the facts and in law. I would reach that conclusion by simply reading the clause without reference to the authorities, but the cases suggest that the expression "arising out of" will ordinarily be given a wide meaning: see in the context of arbitration clauses Mustill and Boyd on Commercial Arbitration, 2nd Edition, page 120; the cases there cited, and ***Harbour Assurance Co (UK) Ltd v. Kansa General International Insurance Co Ltd*** [1993] Q.B. 701.

39. The judge did not construe section (V)3 in this way even looking at the section alone. His view was that section (V)3 does no more than allow reference to the CAS of disputes as to the legal rights and obligations to which the decision gives rise. That is on the basis that the clause requires the dispute to arise out of the decision of the Appeals Committee, not out of the underlying merits of the dispute, nor out of merits of the decision itself, and that it is concerned only with questions as to the impact of the decision on the parties and to the enforceability of the decision.

40. In my opinion that is to give too narrow a meaning to the language of the clause, which is in wide terms. It expressly submits "any dispute arising out of any decision" made by the Appeals Committee. The ITF is complaining about the decision. I do not see how it can fairly be said as a matter of language that the dispute to which that complaint gives rise does not arise out of the decision. In paragraph 18 of his outline submissions in this appeal, Mr Flint submits that the essence of Mr Korda's argument is that, read consistently with the other clauses of the Programme, the clause means: *"Any dispute [ie any dispute as to the enforceability and effect of the decision] arising out of any decision made by the Anti-doping Appeals Committee [which is full, final complete and binding by virtue of clause (L)8] shall be submitted [ie by way of arbitration on appeal] exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport which shall resolve the dispute [not appeal] in accordance with the Code of Sports Related Arbitration..."*

41. In my opinion the words in square brackets at the beginning of that quotation introduce an impermissible gloss into the clause which is not justified by its language. The position is perhaps not dissimilar from that in the ***Harbour Assurance*** case where the court was considering whether a dispute as to whether an insurance contract was void for lack of an insurable interest was within a clause which referred "*all disputes or differences arising out of this agreement*" to arbitration. This court held that it was. Lord Justice Leggatt said at page 719F: *"But there is no issue about the making of the arbitration agreement, and it is undoubtedly out of the retrocession agreement that, on account of the contention that it is void for lack of an insurable interest, the dispute between the parties arises."*

42. In my opinion the same can be said here. It is undoubtedly out of the decision of the Appeals Committee that, on account of the contention that it is wrong in law and fact, the dispute between the parties arises.

43. The judge said that nothing would have been easier than to provide expressly for appeals to the CAS if that had been intended. But as I see it, on a fair reading of the clause, that is what was agreed. It is true, as the judge observed at the end of paragraph 14, that in incorporating section (V)3 of the programme it did not use the words *"by way of appeal"*. But it is not quite right to say that they were deliberately omitted from the CAS recommended standard form, because the draftsman of the programme did not use that clause at all. In the standard clause, which I have already quoted, there is a reference to *"by way of appeal"* but no reference to the Appeals Arbitration Division, whereas in section (V)3 there is an express reference to the Appeals Arbitration

Division. The dispute was expressly submitted to the Appeals Arbitration Division of the CAS which was to resolve the dispute in accordance with the code.

44. Although the judge said that the code provided no guidance to the construction of section (V)3 and although Mr Flint may be right in saying that the code is not strictly incorporated into the Programme, the code seems to be of considerable assistance in determining the correct construction of the clause. The extracts from the statutes and the regulations to which I have referred show that the Appeals Arbitration Division is essentially concerned with appeals from bodies such as the Appeals Committee of the ITF.

45. While it may be true to say, as Mr Reid apparently conceded on behalf of the ITF, that a narrower construction could presumably have been submitted to the Appeals Arbitration Division, there is in my opinion nothing in the language of section (V)3 to lead to the conclusion that it was intended to submit a narrow question to the Appeals Arbitration Division or, if it was, what that narrow question was.

46. There is in my judgment considerable force in Mr Driscoll's point that, by providing for a submission of the dispute to the Appeals and not the Ordinary Arbitration Division of the CAS, the Programme intended that there should be an appeal from the decision of the Appeals Committee. Since section (V)3 provides that "any dispute arising out of any decision ... shall be submitted", if the ordinary meaning of that expression is to be narrowed, the justification is not to be found in the language of the clause. So it must be found elsewhere in the Programme or in the Programme as a whole.

47. In reaching his conclusion the judge relied on two particular aspects of the matter. First, he placed particular reliance upon section (L)8 which provides that the decision of the Appeals Committee shall be the *"full, final and complete disposition of the appeal and will be binding on all parties"*. He relied upon two cases, namely Jones ***v Sherwood Computer Services Plc*** (supra) and ***The Glacier Bay*** (supra) and Mr Flint has directed our attention to other cases including, in particular, ***Pearlman v. Harrow School*** [1979] 1 Q.B. 56 per Lord Justice Geoffrey Lane at 74 in a dissenting judgment, which was subsequently approved in ***South East Asia Fire Bricks v. Non-Metallic Minerals*** [1981] A.C. 363 at 370 and ***Re A Company*** [1981] A.C. 374 per Lord Diplock at 384. Mr Flint has also referred us to section 79 of the County Courts Act 1984 and section 18(1)(c) of the Supreme Court Act 1981.

48. Only the first two of those cases, namely the two referred to by the judge, were concerned with contractual provisions. In my judgment none of the other cases is of direct relevance because this appeal was concerned with the construction of a contract, namely the Programme. The question is how section (V)3 should be construed in the context of the Programme as a whole, including in particular section (L)8. The question is whether that clause precludes further appeal, or at least all further appeals, save for the purpose of the kind of challenge which would be permitted by recourse to the courts in the absence of such a clause. There are undoubtedly some aspects of a decision which is agreed to be final and binding which can nevertheless in principle be challenged in the courts even in the absence of an express contractual right to do so: see ***Jones v. Sherwood Computer Services , The Glacier Bay*** and, with regard to a predecessor of this very contract, ***Wilander v. ITF*** [1997] 2 Lloyd's Rep 293.

49. Mr Flint submits with force, and the judge held, that the effect of section (L)8 is to limit the disputes which are referred to arbitration and limit section (V)3 to disputes relating to such matters. The difficulty is that (L)8 does not expressly qualify section (V)3. It merely states that the decision of the Appeals Committee shall be the full, final and complete disposition of the appeal, that is of the appeal to the Appeals Committee. As I see it, it does not forbid a further appeal if the contract itself provides for a further appeal. So, for example, a determination of ITF's appeals to this court will be a full, final and complete disposition of the appeal and will be binding on the parties, but that does not preclude a further appeal to the House of Lords if leave to appeal is obtained.

50. As I read section (L)8 it does not preclude a further appeals. Whether either party has the right of further appeal depends upon the provisions of the contract as a whole and in particular section (V)3. It is indeed common ground that notwithstanding section (L)8 the effect of section (V)3 is to give some right of challenge to a decision of the Appeals Committee. The question is what.

51. The judge limited the operation of the clause to disputes as to the rights or obligations of parties to which a decision of the Appeals Committee gives rise. He said that such disputes may relate to whether the decision is open to challenge or is unenforceable on the ground, for example, that the conduct of the hearing was not fair, or that the relevant rule of the ITF, and accordingly the decision, was open to challenge on public policy grounds, as, for example, restraint of trade.

52. In my opinion there are two difficulties with that analysis. The first is that it does not clearly state the permissible limits. It is not, it appears, limited to disputes arising out of the effect of decision but includes some challenges to it, as for example if the hearing before the Appeals Committee was not fair, or if the decision was within a clause which was open to challenge on the grounds of unreasonable restraint of trade. I recognise that that may not be a serious difficulty, because it would no doubt be possible to formulate the limitation along the lines suggested by Mr Flint, namely that only disputes relating to the effect and enforceability of the decision are referred.

53. The crucial difficulty, as I see it, is that to which I have already referred. It is that there is nothing in section (V)3 to support a limited construction of the clause let alone one limited in the way suggested. On the contrary, the clause covers any dispute arising out of any decision, not just disputes of the kind identified by the judge or Mr Flint. Of course, section (V)3 could have been drafted more narrowly, but it was not. It seems to me that the two clauses can be read together on the basis that the Appeals Committee's decision is a full, final and complete disposition

of the appeal and binding on the parties subject to a reference to the Appeals Arbitration Division of the CAS of any dispute arising out of any decision of the Appeals Committee as expressly provided for in section (V)3.

54. Section (L)8 is to be contrasted with article R59 of the Code, which I quoted earlier. The difference is that there is no equivalent in the Code to section (V)3 of the Programme.

55. I have already set out section 1 of the code. It is clear from the last part of that quotation that the CAS will have jurisdiction, where it is given jurisdiction on the true construction of a specific agreement. For the reasons which I have tried to give, in my opinion section (V)3 is just such a specific agreement. I do not think there is anything in section (L)8 which should lead the court to give other than its natural meaning to section (V)3.

56. The second principal basis for giving it a limited meaning is said to be found in the Programme itself. The judge stressed the fact that the Programme lays down a tight timetable and the importance of ensuring that there should be an expeditious procedure for the final determination of charges of doping offences. I entirely agree that it is indeed important to have an expeditious procedure and if possible to avoid any sustained period of uncertainty. The judge set out those considerations in paragraphs 13 and 14 of his judgment, which I have quoted. Although they are relevant considerations in construing the contractual provisions in the Programme, the question remains one of construction of the relevant sections. It must, I think, be remembered that, although in this case it is the ITF which wishes to challenge the decision of the Appeals Committee, it will often be the player. Indeed, Mr Korda's solicitors themselves indicated that they were considering an appeal to the CAS before they knew the results of the Appeals Committee's decision. It is true that article R57 gives the panel, which is comprised of lawyers, power to review the facts and the law. But I see no reason why the parties should not have agreed to such an appeal by way of rehearing, subject presumably to appropriate directions by the panel in a particular case.

57. I have already stated my view that the Appeals Committee is really a hearing at first instance. There does not seem to me to be anything improbable about giving a player a right of appeal to an entirely independent body, not appointed by any organ of the ITF, without in any way impugning the impartiality of those who sit on the Appeals Committee appointed by the ITF's medical adviser or his designee under section (E)4(a). On the contrary, many players might welcome the opportunity to challenge the decision of the Appeals Committee in a matter which both parties to this appeal agree may have very far reaching consequences for a player's career and therefore his livelihood.

58. Our attention has been drawn to a number of particular provisions of the Programme but in particular to the fact that under section (N)4 the longer the trial process the greater the financial penalty on the player. However, that consideration must, I think, be put in context. It is the player who sets the appeal to the Appeals Committee in motion. If he succeeds in avoiding suspension, either before the Appeals Committee or on a further appeal to the Appeals Arbitration Division of the CAS, section (N)4 will ultimately have no effect. If, on the other hand, he is ultimately suspended it may fairly be said that he has only himself to blame for embarking on the appeal process.

Conclusion

59. While I recognise the force of the general points made by the judge and cogently stressed before us by Mr Flint, section (V)3 seems to me to be clear. There is nothing in section (L)8 which requires the court to give section (V)3 anything other than its ordinary and natural meaning. As I have already said, section (V)3 refers any dispute rising out of any decision made by the Appeals Committee to the Arbitration Appeals Division. It is clear from the CAS code that it does so by way of appeal. A dispute as to whether the Appeals Committee was right or wrong is a dispute within the clause.

60. It follows that I have reached the conclusion that the ITF was entitled to submit the dispute to the Arbitration Appeals Division of the CAS under section (V)3, just as Mr Korda would have been if he had wished to challenge the Appeals Committee's decision that there was a violation of the Programme. So far as I am aware no-one suggests that, whatever the scope of section (V)3, the machinery can be operated by only one party and not the other.

61. For these reasons (given, I regret to say, at inordinate length) I would allow the appeal.

LORD JUSTICE AULD:

62. I agree that the appeal should be allowed. I do so after considerable hesitation because of seemingly internal inconsistencies in the ITF Programme and because of the bad fit between that Programme and the CAS Code.

63. I was tempted at first by Mr Flint's submission that the only way in which the relevant provisions of the Programme could be made to work together and with the Code was something short of strict incorporation into the Programme of all the material parts of the Code, namely that, when the two were in conflict or simply did not hang together, the provisions and limitations of the Programme would prevail. In particular, I was struck by the role and effect of article S1 of the CAS Code. It provides that *"[doping disputes] to which a federation, association or other sports body is party are a matter for arbitration in the sense of this Code, only insofar as the statutes or regulations of the said sports bodies or a specific agreement so provide."*

64. However, I am driven to accept, albeit with some lack of enthusiasm, that that provision simply drives one back to the unhappy conjunction in the ITF Programme of paragraph (L)8, declaring the finality of the ITF Appeals Committee's decision in respect of a player's appeal, and paragraph (V)3, providing under a general section of

the Programme for submission to the CAS Appeals Arbitration Division of *"any dispute arising out of any decision made by"* the ITF's Appeals Committee.

65. That formula in the latter provision is, as my Lord, Lord Justice Clarke, has said, of great breadth. It must have some function, clearly one of providing for appellate challenge of the Appeals Committee's decision. Short of rewriting the Programme, such appellate function cannot be readily and precisely cut down so as to confine it only to certain types of challenge of decisions of the ITF's Appeals Committee, as submitted by Mr Flint. I am therefore driven, for the reasons given by my Lord, Lord Justice Clarke, to conclude that the finality of the Appeals Committee's decision declared in paragraph (L)8 of the ITF Programme takes effect only if and when the tight timetable for submitting a dispute arising out of it, in the sense of an appeal under paragraph (V)3, has passed without any such appeal having been made.

LORD JUSTICE MORRITT:

66. Lord Justice Clarke has explained the circumstances in which this appeal arises. I gratefully adopt his account of them and restrict myself to quoting again the material sentence from (L)8 which is: *"The Appeals Committee's decision shall be the full, final and complete disposition of the appeal and will be binding on all parties..."* and the material sentence in (V)3 which provides: *"Any dispute arising out of any decision made by the Anti-Doping Appeals Committee shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport which shall resolve the dispute in accordance with the Code of Sports Related Arbitration."*

67. Counsel agreed that ultimately the problem on this appeal is how to reconcile the provisions of (L)8 and (V)3, it being the duty of the court to do so if it can. But there the agreement ended, for their suggested solutions were radically different. For the ITF it was submitted, principally, that the reconciliation was to read (L)8 in effect as if it started with the words "*subject to the provisions of (V)3*". In the alternative, it was submitted that, assuming that there is a limit on the right covered by (V)3, the limit does not exclude those matters in respect of which the parties are unable to exclude the jurisdiction of the court, such matters, but only such matters, being referable to CAS.

68. For Mr Korda it was contended that the right conferred by (V)3 was limited to disputes as to the enforceability or effect of a decision of the Appeals Committee. The examples given were unreasonable restraint of trade, breach of natural justice or ambiguity. This latter solution was the one that appealed to the judge.

69. For my part I accept the first submission for ITF. I can state my reasons quite shortly. First, the structure of the Anti-Doping Programme is such that for some purposes and on some issues the reference to CAS would be the only opportunity to challenge relevant findings. Thus the taking and analysis of the samples and decision by the review board thereon is an administrative process. It is true that only the player can challenge the findings if the samples are tested positive. But if they are then he may appeal to the Appeals Committee. Though described as an appeal this is the first occasion of a quasi-judicial nature available to the player at which to challenge the notice of violation. Equally it is the forum charged with deciding the question whether, for the purpose of (E)4(c), there are exceptional circumstances and if so what (if any) effect they should have on such penalties as are discretionary. On the latter point at least, if CAS does not have a more general jurisdiction than that conceded by Mr Korda there is no further hearing on points of concern equally to the player as to the ITF. It was suggested that it would be contrary to those provisions which deal with the termination of the player's appeal if there could be a subsequent reference to CAS. This is true but the point is equally valid in respect of those disputes which counsel for Mr Korda accepted would be referable to CAS. Thus I see no reason in the nature of the process to favour a limited application of section (V)3.

70. Second, it is accepted by both sides that section (L)8 cannot be applied strictly in accordance with its terms for it is a necessary part of the submissions for Mr Korda that there are some "*decisions*" of the Appeals Committee which would not be finally and completely dispositive of the player's appeal. There is nothing in the wording of section (L)8 to admit finality for some decisions but not for others nor, if there is to be a dividing line, to indicate where the line might be drawn.

71. Third, the words in section (V)3 *"any dispute arising out of any decision"* is as unqualified in conferring a jurisdiction as section (L)8 appears to be in excluding it. There is nothing in the wording of section (V)3 to admit of the reference of some disputes but not others. The only conditions are that there should be a dispute and that the dispute should arise out of the decision of the Appeals Committee. As Lord Justice Clarke has demonstrated those words are of wide import and, as I would construe them, are applicable to the circumstances of this case.

72. In short it appears to me that the reconciliation which does least violence to the language of the Programme is that first propounded by counsel for ITF, namely the interpolation of the words *"subject to the provisions of section (V)3"* at the commencement of (L)8. Such solution has the additional merit of providing for the benefit of player and ITF alike the opportunity expeditiously to challenge what are likely to be important decisions of the Appeals Committee as to the existence and consequence of "*exceptional circumstances"* in any given case. If they cannot do so before the CAS then, subject to the jurisdiction of the court, they cannot do so at all.

73. For those and the other reasons given by Lord Justice Clarke I too would allow this appeal.

Order: Appeal allowed with costs; application for leave to appeal to the House of Lords refused.

MR MICHAEL DRISCOLL QC and MR CHRISTOPHER STONER (instructed by Messrs Townleys) appeared on behalf of the Appellant (Defendant).
MR CHARLES FLINT QC (instructed by Messrs Bird & Bird, appeared on behalf of the Respondent (Plaintiff).