



Arbitration CAS 2008/A/1574 Nicholas D'Arcy v. Australian Olympic Committee, award of 7 July 2008

Panel: Mr Malcolm Holmes QC (Australia), President; Mr David Grace QC (Australia); Mr Alan Sullivan QC (Australia)

Swimming

Breach of the membership agreement resulting in the termination of the athlete's selection for the 2008 Australian Olympic Team

Scope of review of the arbitration panel

Proportionality of the decision to terminate membership

1. When the parties' agreement expressly confers on the appeal panel "full" power to "review" the "facts" and the "law", it reinforces the view that objectively, the parties intended a complete rehearing of their dispute. Any defect or procedural error even in violation of the principle of due process which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS panel, will be cured by the arbitration proceedings before the CAS. The appeal panel is therefore not required to consider any such allegations. The CAS Code, if unaltered by the parties, is a constant no matter what the system of law the parties are familiar with and no matter what law the parties have agreed to be applicable to the merits of their dispute.
2. The grossly excessive consumption of alcohol resulting in intoxication, culminating in the athlete's involvement in a fracas, constitutes a breach by the athlete of the Membership Agreement. This conduct triggers the exercise of the discretion to terminate the Appellant's membership of the team provided by the Membership Agreement. The decision of the AOC Executive to terminate the athlete's membership in such circumstances cannot be considered as aberrant. The sanction is not disproportionate, nor manifestly excessive so as to give rise to a finding of "irrationality". The suggestion of alternative sanctions, in the absence of any contractual basis, by itself cannot be determinative of the question of the proper exercise of discretion.

On 28 February 2008 Mr Nicholas D'Arcy ("Mr D'Arcy") entered into an agreement with the Australian Olympic Committee Inc. (AOC) which governed the conditions by which Mr D'Arcy was to participate, if selected, as a member of the 2008 Australian Olympic Team and his continued membership of the team ("the Membership Agreement").

Under the terms of Clause 2(8) of the Membership Agreement, Mr D'Arcy agreed, to continue to observe the provisions of the AOC Ethical Behaviour By-law and in particular Clause 2.2(6) of the by-law which provided that he “must not, by [his] acts or omissions, engage or participate in ... conduct which, if publicly known, would be likely to bring ... [him] into disrepute or censure”.

On 29 March 2008 Mr D'Arcy was selected as a member of the 2008 Australian Olympic Team as a member of the swimming section following selection trials held in Sydney.

In the early hours of 30 March 2008 in a public establishment known as The Loft bar in Sydney, Mr D'Arcy struck Simon Cowley in the face with his elbow and inflicted serious injuries upon him.

By letter dated 7 April 2008 Mr John Coates AC, in his capacity as President of the AOC, wrote to Mr D'Arcy raising the incident in question, referred to some other matters and sought a written response within seven days. Mr D'Arcy responded by letter dated 11 April 2008 which also enclosed a number of favourable references. This letter included his account of the incident in the early hours of 30 March, his comments in relation to certain other matters raised by Mr Coates and a general statement of matters which should be taken into account in his favour.

By letter dated 18 April 2008, Mr Coates, in his role as President of the AOC, informed Mr D'Arcy that he had decided to terminate his membership of the team.

By an application also dated 18 April 2008 Mr D'Arcy lodged an appeal to the Court of Arbitration for Sport against the decision to terminate his membership of the 2008 Australian Olympic Team. He sought an order setting aside the decision to terminate his membership of the team and a declaration that he be reinstated as a member of the team in accordance with the terms and conditions of the Membership Agreement.

The application dated 18 April 2008 was originally filed with the CAS Oceania Registry in the Ordinary Division and was then assigned by the CAS Court Office to the Appeals Division of CAS.

The parties to the appeal agreed and consented to the jurisdiction of CAS in accordance with the Code of Sports Related Arbitration (“the CAS Code”) to hear and determine the appeal.

On 27 May 2008 the First Panel made a Partial Award (“the First Award”) determining and declaring that:

“On 30 March 2008 Mr Nicholas D'Arcy did not continue to observe the provisions of the AOC Ethical Behaviour By-law, to wit clause 2.2(6) thereof, and so did not meet the conditions of clause 2(8) of the Membership Agreement between himself and the Australian Olympic Committee Inc”.

In the First Award, the First Panel reasoned that the proper procedure laid down by Clause 2 of the Membership Agreement in relation to the termination of an athlete's membership had not been followed. Consequently the First Panel reasoned that the decision to terminate Mr D'Arcy's membership from the 2008 Australian Olympic Team ought to be set aside.

On 2 June 2008 the First Panel made a further award (the “Second Award”) and (1) ordered that the decision of Mr John Coates dated 18 April 2008 to terminate Mr Nicholas D’Arcy’s membership of the 2008 Australian Olympic Team be set aside, and (2) ordered that the matter be remitted to the AOC for the purposes of deciding whether the discretion under Clause 2 of the Membership Agreement should be exercised.

In response to these awards, on Tuesday 3 June 2008 the AOC’s Secretary-General issued a notice convening a meeting of the AOC Executive on Wednesday 11 June 2008 to consider the exercise of the discretion. The AOC invited Mr D’Arcy to make a submission to the AOC relating to his membership of the team and his submission was distributed to members of the AOC Executive on Friday 6 June 2008. The AOC executive were also provided with the two awards made by the First Panel, the New South Wales Police Facts Sheet relating to the incident and Mr D’Arcy’s bail conditions and the letter requesting a submission from Mr D’Arcy.

Following the meeting a statement was issued on behalf of the AOC by Mr Ronald G. Harvey, Vice-President of the AOC in which it was said:

“We have approached this matter based on the standards of behaviour expected of a member of the Australian Olympic Team, drawing our many years of collective experience.

The effect that Nicholas D’Arcy’s conduct had on his reputation, as found by the President and confirmed by the CAS, was the basis for the decision by the AOC Executive.

The matter of criminal proceedings is entirely separate from today’s decision.

The Australian Olympic Committee is proud of the excellent standards and conduct of past and present Olympians and in the eyes of the Australian public we have an obligation to protect that reputation.

To terminate the membership of an athlete on the Australian Olympic Team is a very serious matter. After careful consideration we have reached a decision based on that responsibility”.

By an application dated 11 June 2008, Mr D’Arcy lodged an Appeal against the decision handed down that day by the AOC Executive to terminate his membership of the 2008 Australian Olympic Team.

A hearing took place on Monday 16 June 2008 in Sydney.

At the hearing the finding of breach of the Membership Agreement which had been made by the First Panel, was accepted by Mr D’Arcy. Following the hearing the Panel adjourned to consider its decision. After considering the matter the Panel announced its decision that the Appeal would be dismissed and that the Panel would publish its reasons in writing.

LAW

1. The first issue raised by the parties concerned the powers available to the Panel on the hearing of this “Appeal”. The AOC submitted that as the applicable law for the review is the law of New South Wales the Panel was required “to limit its review to whether the decision appealed against was obviously or self-evidently so unreasonable or perverse that it could be said to be irrational”. This is commonly known as “Wednesbury unreasonableness” so named after the decision in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, [1948] 1 KB 223. In response, Mr D’Arcy submitted that there was no such limitation on the powers of this Panel. It was submitted that this particular limitation which was imposed by the law of New South Wales in particular circumstances on the jurisdiction of a court of law did not apply to this arbitration tribunal which was acting pursuant to the parties’ agreement in terms of the special provisions of the CAS Code applicable to the Appeal Arbitration Procedure and in particular Article R.57 by which the parties agreed that the appeal panel has “full power to review the facts and the law”. In the alternative Mr D’Arcy submitted that even if the Panel’s powers were limited to a consideration of whether the decision appealed against was obviously or self-evidently so unreasonable or perverse that it could be said to be irrational, this was nevertheless such a case and one where the decision could and should be set aside.
2. The Panel, by a majority, is of the view that it is not limited in the manner described above in its powers to review the decision. Nevertheless, whichever view is taken of the powers of the Panel on this Appeal, it is the unanimous view of the Panel that in the particular circumstances of this case the Appeal should be dismissed.

The Preliminary Issue

3. The preliminary issue relates to the proper construction of the arbitration agreement between the parties. This issue may be addressed shortly. However, there is a need to address not only the matter of principle but also to answer the various reasons advanced in support of the opposing view.
4. The AOC submitted that on a proper construction of the arbitration agreement, the Panel is obliged by law to apply the test of “Wednesbury unreasonableness” in this arbitration and “unless the decision can be set aside on grounds of Wednesbury unreasonableness, the CAS cannot substitute its own decision for that of the AOC”. It is not in dispute that a court applying the laws of New South Wales has a strictly limited role when reviewing the exercise of an administrative discretion. That limited ground of review is only made out if it can be shown that the decision was so unreasonable that no reasonable person could have come to it (*Associated Provincial Picture Houses Limited v Wednesbury Corporation*, supra, at 230, 233-234 and *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 per Mason J at 40-42).
5. This principle is not in doubt and it cannot be changed by parties to court proceedings. It is not the function of a court to substitute its own decision for that of the administrator by

exercising a discretion which the legislature has vested in the administrator. Private parties cannot confer by agreement jurisdiction on a court which the court does not have. On the other hand private parties can by their agreement agree on a process such as arbitration by which a matter in dispute between them can be reviewed and determined by an award. The parties by their agreement may also include an appellate arbitration process. And they can agree on the powers which the independent arbitrators involved in the agreed appellate process can exercise in determining such an “appeal”.

6. It is simply a question of ascertaining the proper construction of the arbitration agreement reached between the parties.
7. The law recognises that several interlocking documents may evidence or constitute the agreement between the parties. The Membership Agreement is such an agreement. In the present case the parties by the provisions of Clause 20.1 of the Membership Agreement, have incorporated the terms of the CAS Code. The starting point is therefore that the parties have agreed to have their dispute arbitrated according to the Appeals Arbitration Procedure of the CAS Code, which, as was submitted by the AOC, has been “incorporated by the reference at the end of that provision” (viz, Cl. 20.1). The language employed in Clause 20 of the Membership Agreement does not of itself require demonstration of any particular error, although Clause 20 cannot be viewed in isolation and it must be viewed in its proper context.

The Structure of the CAS Code

8. The CAS Code makes a distinction in Art. R27 between proceedings which are commenced in the Ordinary Arbitration Division of CAS (“the Ordinary Division”) and those which are commenced in the Appeals Arbitration Division of CAS (“the Appeals Division”). Art. R27 relevantly provides as follows:

*“These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of an arbitration clause inserted in the contract or regulations or of a later arbitration agreement (**ordinary arbitration proceedings**) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies or a specific agreement provides for an appeal to the CAS (**appeal arbitration proceedings**)”.*

[emphasis added]

9. The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.
10. Section B of the CAS Code contains Art. R38 to R46 under the heading “Special Provisions Applicable to the Ordinary Arbitration Procedure”. Hence Art. R38 – R46 apply to the first type of procedures contemplated in Art. R27.
11. On the other hand, section C of the CAS Code is headed “Special Provisions Applicable to the Appeal Arbitration Procedure” and is comprised by Art. R47 to R59. Those provisions

together with certain other provisions contained in Section B govern appeals heard by the Appeals Division of CAS.

12. The function of the Ordinary Division is to hear those disputes which fall within the first category mentioned in Art. R27 whilst the function of the Appeals Division is to hear those disputes which fall within the second category referred to in Art. R27 (see Art. S20 of the CAS Code).
13. Given the structure of the CAS Code and the organisation of CAS, it is of some significance that the appeal has been filed in the Appeals Division of CAS and that neither party disputes the propriety of that filing even though, as set out above, Clause 20.1 of the Membership Agreement makes no express reference to an “Appeal” but rather talks, in much more general terms, about the resolution of “any dispute”.
14. However, it is common ground that the language of Clause 20 of the Membership Agreement is sufficiently broad to confer on CAS a jurisdiction to hear an “appeal” from a decision made by the Respondent to terminate selection of an Athlete pursuant to Clause 2 of the Membership Agreement and, in any event, under Australian law, the arbitration clause is clearly wide enough to confer such a jurisdiction (see *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [15], [7], [9], [175], [176] and [187]; see also the language of Art. S20 of the CAS Code).

The Present Appeal

15. The Appellant’s Application Form instituting this appeal expressly stated that the application was an appeal to the Appeals Division from the decision of the Respondent made on 11 June 2008 to terminate the Appellant’s membership of the 2008 Australian Olympic Team.
16. Clause 20 and these provisions of the Code form the terms of the arbitration agreement between the parties. The provisions of the Code, and in particular those relating to the Appeal Arbitration Procedure, have been incorporated unaltered, and need to be construed with Clause 20 as a whole. Accordingly, it is necessary to consider the nature of the process which the parties have agreed should be followed on the appeal which may be brought from an initial decision by a federation, association or sports-related body or *an arbitration award* of CAS, see Art. R47.

The Appeal Arbitration Procedure under the CAS Code

17. The parties have agreed that the party lodging the appeal is required to lodge a statement of appeal (Art. R48) within 21 days from the receipt of the decision appealed against (Art. R49) in the absence of a time limit agreed by the parties. In addition, within 10 days following the expiry of the time limit for the appeal, the appellant party is required to file an appeal brief and submissions in which the appellant is required (Art. R51) to specify any witnesses or

experts whom he intends to call and state any other evidentiary measure which he requests and the witness statements if any must be filed together with the appeal brief. There is no restriction on the evidence on which the appellant party can rely. The parties have not used terms suggesting that “further evidence” or “fresh evidence” may require separate consideration (cf. *CDJ v VAJ* (1998) 197 CLR 172 per McHugh, Gummow and Callinan JJ at 199).

18. The respondent to the appeal has 20 days from receipt to submit an answer which includes any exhibits or other evidence upon which the respondent intends to rely including the names of the witnesses and experts whom he intends to call and the witness statements. Again, the respondent is unrestricted in any manner in presenting its evidentiary case on the appeal including the witnesses and other evidence on which it may rely. It is in this context that the parties’ agreement in Article R.57 that the appeal panel when conducting a hearing the Appeal Arbitration Procedure “shall have full power to review the facts and the law” must be considered.
19. This procedure whereby the appeal procedure is initiated strongly suggests that each party has a right to advance a completely fresh case on the facts. This procedure does not imply that the party appealing is required to show any error on the facts presented to the initial decision maker or arbitration panel. It suggests the contrary. It suggests that the issue is being heard afresh with both parties able to lead such evidence (whether old or new it does not matter) and to make such submissions relating to the dispute and not the decision, as it chooses. The facts are not limited to the facts as found by the initial arbitration panel. The parties agreement expressly confers on the appeal panel “full” power to “review” the “facts” and the “law”. Each of these elements combines to reinforce the view that objectively, the parties intended a complete rehearing of their dispute. The wording used by the parties is “full power” and this must be given effect. The wording contradicts any suggestion that there is a narrow power of review (cf *Siddick v WorkCover of NSW*, [2008] NSWCA 116 per Giles JA at [9]). There is nothing which suggests that the appeal arbitration panel is limited in any way in its review of both the facts and law.
20. The type of decision which an appeal panel may make is described in the second sentence of Art. R57 which states that the appeal panel “may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”. This description does not seek to limit the powers of the appeal panel or that it can only act if it finds error in the initial decision or award.
21. Furthermore, the law to be applied by the appeal panel is not necessarily limited to that found or applied by the initial decision maker or arbitration panel. As part of their agreement, where the parties have incorporated the CAS Code into their contract, the parties have agreed on a choice of law clause in terms that emphasises that the Appeal Arbitration Procedure is a completely fresh hearing of the dispute. The appeal arbitration panel is obliged under the terms of Art. R58 to “decide the dispute according to ... the rules of law chosen by the parties ...”. This is an independent obligation found in Art. R58 which the parties have agreed should apply to their appeal. On the appeal, in default of agreement Art. R58 states “in the

absence of such a choice, according to the country in which the federation, association, or sports-related body which has issued challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate". By contrast, in conducting the initial arbitration proceedings in the ordinary division of CAS, the panel is obliged under Art. R45 to "decide the dispute according to the rules of law chosen by the parties, ..." and "in the absence of a choice, according to Swiss law". Accordingly, in the absence of agreement, the original arbitration panel is obliged to apply one law to the merits and the appeal arbitration panel may be obliged to apply a different law to the merits. This is incompatible with any suggestion that the appeal panel cannot reach a different decision to the original panel unless it is satisfied that there has been an error shown in its decision. These provisions emphasize that they are two separate and independent arbitration processes. The second occurs as a complete rehearing under agreed but different terms.

22. It is also significant that there is no requirement in the provisions applicable to the Appeal Arbitration Procedure to establish any particular grounds of the appeal. The jurisdiction of the Appeal Panel is not "an error-based jurisdiction" (cf *Siddick v WorkCover Authority*, supra, per McColl JA at [96]). The provisions address the "facts" and the legal arguments and submissions giving rise to the appeal and the parties are not required to identify, asset or address any error in the initial decision or in the initial arbitration award. Further it is significant that the requirement is to provide a "copy of the decision appealed against" and not a statement of the reasons for that decision.
23. Both the initial arbitration panel (as with the initial decision maker) and the appeal arbitration panel are not bound by the rules of evidence and may inform themselves in such manner as the arbitrators think fit. Nor are they expected to set out their reasons at length. In the Ordinary Division the panel is only required to "briefly state reasons" for its award (Art. R46 of the Code) and in the Appeals Division, the panel is also only required to "state brief reasons".

The Proper Construction of the Arbitration Agreement

24. The words of Mason J in *Builder's Licensing Board v Sperway Constructions (Syd) Pty Limited* (1976) 135 CLR 616 at 621, albeit in relation to a slightly different context, are therefore apposite. "There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo ... The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provisions for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which may arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for the exercise of original jurisdiction or for a hearing de novo". His Honour's reasoning is readily applicable to the Appeal Arbitration Procedure in the CAS Code and provides further support for the view that on the proper construction of the contractual provisions, in conformity with the law

of NSW, the hearing before the appellate panel is in the nature of a fresh hearing of the dispute.

25. The proper construction of a agreement under the law of New South Wales requires consideration, not only of the text of the documents, but also the surrounding circumstances known to both parties, and the purpose and object of the transaction¹. In essence, a reasonable person in the position of the parties would understand the language of the contract to mean that the parties have a contractual right to continue the process of dispute resolution and to have a full re-hearing of the dispute which resulted in the initial decision of the federation, association or sports-related body or in the award rendered by CAS acting as a first instance tribunal. The terms of Art. R47 of the Code allow a party to bring an appeal to the Appeals Division of CAS from a decision or an award by CAS acting as a first instance arbitral tribunal if “such appeal has been expressly provided by the rules applicable”. This provision also supports the construction that the nature of the appeal arbitration is in the nature of continuation of an internal review process rather than a process which requires a demonstration of error in the initial decision. “The CAS is not a court of law. It is an arbitral body set up to entertain disputes referred to it (inter alia) by the agreement of the parties. It must necessarily, therefore, enter into the procedural affairs of the relevant domestic body if the agreement of the parties requires it to do so”². On the other hand a court can only interfere on a strictly limited basis in the affairs of a domestic tribunal³.
26. The parties can of course agree to vary or amend the ambulatory contractual effect of the special provisions applicable to the Appeal Arbitration Procedure. An example is seen in *Raguz v Sullivan*⁴ where the arbitration agreement stated that any dispute regarding the nomination or non-nomination of the athlete was to be subject to an appeal to be heard by the Court of Arbitration for Sport according to the CAS Code and subject to the Olympic Charter. The parties in their agreement added a further contractual provision that “*the sole grounds for an appeal are that the nomination criteria have not been properly followed and/or implemented*” (emphasis added, see Clause 7.1(2) of the parties agreement which is set out in the report of the decision at page 240 at para. [11]) thereby restricting the power of the appeal panel to a determination of this issue rather than a complete rehearing on the merits.
27. In the present case, the special provisions relating to the Appeal Arbitration Procedure have been incorporated without alteration by Clause 20.1. Both parties only referred to and only relied on Clause 20 and the CAS Code in relation to this dispute. Neither party sought to rely on the Order of Procedure as having any contractual effect⁵. Neither party sought to rely on the references to CAS elsewhere in the Membership Agreement relating to other types of

¹ *Pacific Carriers Ltd v BNP Paribas*, (2000) 218 CLR 451 at 462, para. [22].

² CAS 96/153, at [18(ii)].

³ See *AFL v Carlton Football Club Ltd*, [1998] 2 VR 546, per Tadgell JA at 549 discussed below.

⁴ *Raguz v Sullivan*, (2000) 50 NSWLR 232.

⁵ See *Raguz v Sullivan*, supra, per Spigelman CJ and Mason J at 250, [64], and cf. *Commonwealth Development Corporation v Montague*, [2000] QCA 252, unreported, 27 June 2000, BC 200003514, esp. *Lesotho Highlands Development Authority v Impregilo SpA and Others*, [2005] UKHL 43 per Lord Steyn at [21] and *Dalmia v National Bank*, [1978] LLRep 223 at 233 per Kerr J at 233 where the equivalent procedural directions, there called the Terms of Reference, were held to have had such an effect.

dispute such as the indirect reference to CAS in the Olympic Charter (Clause 7.1(1)) and the reference in relation to doping disputes (Clause 15.5). The Panel notes that elsewhere in the Membership Agreement in relation to other types of dispute, the parties have altered the terms of the CAS Code. For example the provisions of the CAS Code have been expressly altered in clause 15.5 and, for doping matters, the parties have confirmed that the process is a hearing *de novo* of the dispute in clause 10.4 of the Anti-Doping By-Law.

Previous CAS Awards

28. CAS arbitration panels when faced with the issue have consistently expressed the view since the appellate process was added to the Code in 1991 that the procedure before an appeal panel under the Code is a hearing *de novo* of the dispute⁶. A relatively recent example is the case CAS 2004/A/651. There the appeal panel concluded that as it was the complete rehearing of the dispute in accordance with the terms of the Code, the respondents were permitted to cross appeal and furthermore, the respondent was not limited to the issues raised by the appellant's appeal (provided all matters were encompassed by the ambit of the dispute). The appeal panel ruled that it would consider all oral, documentary and real evidence produced before it and that any fresh evidence may be adduced as of right in a rehearing whether or not new evidence was available for use at first instance or discovered subsequently.
29. The very few arbitration awards of which the Panel is aware which have taken a different view⁷, do not appear to have addressed the issue as one of determining the nature of the Appeals Arbitration Procedure under the Code. Nor do they appear to have addressed the nature of the powers which the parties had conferred on the arbitrators by their agreement. Nor were they required to consider the proper construction of the underlying arbitration agreement. For example in CAS 2004/A/675, the appellant agreed that its attack against the decision appealed against was specifically confined to two limited grounds; (a) that it was affected by actual bias, and (b) it was "*obviously or self-evidently so unreasonable or perverse that it could be said to be irrational (Wednesbury unreasonableness)*"⁸.
30. Another example of the accepted and well entrenched view is seen in CAS 2006/A/1025, where the appeal panel said: "*Under art. R57 of the Code and art O.5.1 of the Programme, the Panel has full power to review the facts and the law. The Panel did not restrict its review of the facts only to the formal aspects of the appealed decision, but considered the subject matter of the dispute de novo, evaluating all of the facts*"⁹.

⁶ E.g. TAS 98/184, CAS 98/208, CAS 98/211, CAS 2005/A/830, CAS 2006/A/1025, and most recently CAS 2007/A/1394, at para. [21]. Others have embarked on a full rehearing of the dispute tacitly following the universal construction of the CAS Code that it is a full rehearing, e.g. CAS 2007/A/1291.

⁷ E.g. CAS 2007/A/1283, at para. [54]. In CAS 2004/A/582, specific rules limited the Appeal Panel as if it were a court of law.

⁸ CAS 2004/A/675, at [13] and [16].

⁹ The programme also stated that the appeal should take the form of a hearing *de novo* of the issues but that "*it shall be interpreted in a manner that is consistent with the applicable provisions of the Code*" (see Art. S1 quoted at para. 10.5 of the award).

31. When the issue relating to Art. R57 was most recently considered by an arbitral panel under the CAS Code, the panel stated that “it is *the duty* of the [appeal panel] to make its independent determination of whether the Appellant’s contentions are correct, not to limit itself to assessing the correctness of the”¹⁰ award or decision from which the appeal was brought.
32. The issue of the powers of the appeal panel has also been considered time and time again by CAS appeal arbitration tribunals when considering allegations of a denial of natural justice in the making of the original decision. An equally well accepted view has been taken that as it is a completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error (“even in violation of the principle of due process”¹¹) which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS panel, will be “cured”¹² by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations (see for example CAS 98/211, at para. [8]). This approach to the issue is based on a commonsense construction of the appellate procedure rules in the CAS Code having regard to the fact that it is a repeat informal arbitration process with an express obligation on both parties to lodge witness statements and other evidentiary measures when initiating the appeal procedure where the panel has full powers to review the facts and the law¹³. The practical benefits to the parties have been described in the following terms: “the *de novo* rule made a lot of sense because you could cut through all those due process issues, get right to the merits and get the case done”¹⁴.
33. Of course, we are not bound by any previous determinations or awards of other panels of CAS. Arbitration awards are binding only by contractual force on the parties and do not create precedents. However, where those awards relate to the interpretation, scope or content of the CAS Code, considerations of certainty and consistency suggest that subsequent panels should not take a different approach to that adopted by earlier panels unless satisfied that the approach or view of the earlier panel is an erroneous one or is inapplicable because of different circumstances or different contractual language.
34. Nevertheless, notwithstanding the strength, consistency and longevity of such expressions of opinion, and as this was raised as a substantial preliminary issue, the Panel has considered the matter afresh in the particular circumstances of the present case and arrived at a similar view independently of the reasoning in these prior arbitral awards.

¹⁰ CAS 2007/A/1394, at para. [21], emphasis added.

¹¹ CAS 2004/A/714, at para. 57 and the CAS cases cited therein.

¹² CAS 2004/A/633, at para. 6.9, see also CAS 2004/A/607.

¹³ Cases relating to the power of the courts when considering applications to challenge “expert determinations” made under a contract between the parties (such as *Legal & General Life of Australia Limited v A Hudson Pty Limited* (1985) 1 NSWLR 314) are concerned with the court’s jurisdiction based upon ensuring the parties obtained what they had contracted for and are not directly relevant to construing an agreement which provides for an appellate arbitration process.

¹⁴ As stated by counsel for USADA and quoted by the Appeal Panel in CAS 2007/A/1394, at para. [21].

Other Considerations

35. There were a number of particular considerations which also support the conclusion which we have reached. For example it is questionable whether, as a matter of construction of the parties' agreement under the law of New South Wales, a comparison should be made with the number of different types and nature of the various appeal processes available in judicial proceedings in Australia or a detailed consideration should be given as to whether there has been conflating, in an appellate context, of the concepts in Australian law of a "rehearing" and a "hearing *de novo*".
36. Under the law of New South Wales there is no common law right of appeal. An appeal is always a creature of statute. In the case of *Builder's Licensing Board v Sperway Constructions (Syd) Pty Limited* (1976) 136 CLR 616 at 619-622, Mason J, with whose judgment Barwick CJ and Stephen J agreed, outlined "four" categories of appeal. As has been pointed out by the High Court in *Dwyer v Calco Timbers Pty Limited* [2008] HCA 13 at [2] and more recently by the New South Wales Court of Appeal in *Siddik v WorkCover Authority of New South Wales* [2008] NSWCA 116 at [62] "... these [four] categories cannot represent a closed class and particular legislative measures ... may use the term "appeal" to identify a wholly novel procedure or one which is a variant of one or more of those just described". These courts also noted that McHugh J had said in *Eastman v The Queen*¹⁵, "which of these meanings the term "appeal" has depends on the context of the term, the history of the legislation, the surrounding circumstances and sometimes an express direction as to what the nature of the appeal is to be"¹⁶.
37. Thus in the present context, the Panel must look to the proper construction of the terms of any particular contractual grant of a right of appeal to determine its nature and if the parties have by their contract "conflated" the Australian concepts of a "rehearing" and a hearing "*de novo*" then so be it; that is what the parties have objectively agreed to. As was appropriately submitted by the AOC, the terms of Art. R57 "*of course are not to be read as dominated by Anglo-Saxon ideas*".
38. The proper construction of the parties' arbitration agreement must involve a consideration of its terms, the context known to both parties, in which it was made and the objectives it was obviously designed to achieve. The context and terms of the provisions governing the appellate procedure in the Code analysed above which contain an "express direction" (see the words of McHugh J in *Eastman v The Queen*, quoted above) that the appeal panel shall have "full power to review the facts and the law" provide an overwhelming inference that the parties objectively intended that the nature of the appeal was to be a full rehearing of the dispute.

¹⁵ (2000) 203 CLR 1 at para. [130] on pages 40 and 41

¹⁶ *Dwyer*, supra, per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JA at [2] and *Siddick*, per McColl JA with whom Mason P agreed, at [62].

39. The Code is a template for contractual dispute settling processes for parties to incorporate by reference into their agreement¹⁷. It is not a product of the common law or of common law lawyers¹⁸. As was noted by the NSW Court of Appeal in *Raguz v Sullivan*¹⁹, the Court of Arbitration for Sport was established in 1984 in Lausanne, Switzerland and the Appeals Division introduced in 1991. The CAS operates on a global basis and includes arbitrations on the site of the Olympic Games wherever they may be held. The CAS Code, if unaltered by the parties, is a constant no matter what the system of law the parties are familiar with and no matter what law the parties have agreed to be applicable to the merits of their dispute.

Special Expertise and Qualifications

40. Under the Code, the CAS has a list of arbitrators who are required under Art. S14 of the Code to be “personalities with full legal training, recognised competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least CAS working language”. Where the parties adopt the CAS Code they are required to have their dispute arbitrated by persons with a particular background and knowledge which they can properly bring to bear in the resolution of their dispute. They are not bound by the rules of evidence. The panel is “entitled to draw upon its own expert resources...”²⁰ although it must not “derogate from evidence of the [parties] without putting [the Panel’s] knowledge to them and giving them the chance of answering it ...”²¹. Again, this use of a panel of arbitrators with specialised knowledge for the appeal arbitration procedure rather than a court of law which is bound to apply the strict rules of evidence and which has “a strictly limited”²² ability to intervene, supports the construction of this agreement that where there is an Appeal Arbitration Procedure under the Code, the parties have agreed that it is to be a completely fresh rehearing of the dispute and not one narrowly focussed on finding error in the original decision. The “courts have been prepared to recognise that there are some kinds of dispute that are much better decided by ... people who have special knowledge of or expertise in matters giving rise to the dispute...and that it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private or domestic tribunal has been appointed to decide”²³.

¹⁷ Cf. the discussion of the reference to surrounding circumstances mutually known to the parties by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW*, (1982) 149 CLR 337 at 350-351, and by Kirby J in *Zhu v Treasurer of NSW* (2004) 218 CLR 530 at 559.

¹⁸ The French language version of Art. R57 was considered by the appeal panel in the case CAS 2004/A/651. There the Code had been incorporated in an agreement made in Australia between Australian parties. The panel stated that it provides a slightly more complete explanation of that power and the unofficial literal translation of the French version used by that Panel was that the panel shall review the facts and the law “with full scope of examination”.

¹⁹ (2000) 50 NSWLR 232.

²⁰ *Kalil v Bray* (1977) 1 NSWLR 256, per Street CJ at 261.

²¹ *Fox v Wellfair* [1981] 2 LLR 514 per Lord Denning at 522.

²² *AFL v Carlton Football Club Ltd*, [1998] 2 VR 546, per Tadgell JA at 549, line 8. A contrasting example where a selection dispute was before a court is seen in *Forbes v Australian Yachting Federation*, (1996) 131 FLR 241.

²³ *AFL v Carlton Football Club Ltd*, [1998] 2 VR 546, per Tadgell JA at 549, lines 35-42.

The First Panel

41. A fair reading of the First Award also supports the view that the width of the appeal rights enables a rehearing of the underlying dispute. The First Panel did not state or apply the “*Wednesbury*” test of unreasonableness or its “contractual equivalent”, they referred to the “width” of the appeal as being a safeguard. The First Panel said at [7.4]: “*Moreover, the width of the appeal provisions by virtue of clause 20 of the Membership Agreement, when coupled with the CAS Code, is a safeguard for athletes and substantially ameliorates the possibility of flawed or arbitrary decision-making*”.
42. A fair reading of their award suggests that the members of the First Panel held the view that an appeal panel could look at the matter afresh and come to a different decision to that appealed from in circumstances including, but not limited to, where there has been “flawed” or “arbitrary” decision making. As has been emphasised in the authorities explaining the *Wednesbury* test of unreasonableness, the mere fact that a decision is flawed, does not provide a Court with power to set aside the decision. The mere fact the decision is arbitrary is not a basis to set aside the decision²⁴. Before a decision can be set aside on the basis of the *Wednesbury* principles it must be “obviously or self-evidently so unreasonable or perverse that it could be said to be irrational”. As was observed by Tadgell JA in *Australian Football League v Carlton Football Club Limited*, supra at 559: “*A court is entitled to substitute its own opinion for that of the Tribunal only if the Tribunal’s decision is so aberrant that it cannot be classed as rational*” [underling added].

Comparison with the Limited Powers of a Court

43. Under the law of New South Wales, a court of law has a strictly limited basis on which the court may intervene in a decision of a domestic tribunal. There is a marked distinction between the role of a court as an “outside” judicial supervisor and the role an “internal” appellate arbitration panel provided for in the rules of a federation or body which is not bound by the rules of evidence and where the parties must introduce the evidence they rely upon afresh and where the arbitration panel has full power to review the facts and the law. Unlike the present case, in a court “*there is no right of appeal from [the decision of the sporting] body to the court*”²⁵. These judicial decisions do not assist in construing the powers which parties may have conferred on one domestic tribunal on appeal from another domestic tribunal. A court does not have any power to open up and review a decision made under contract²⁶. If the parties by their contract have conferred such a power on an arbitrator not bound by the rules of evidence then the fact that a court may have no such power is not in point. There have been various expressions of the circumstances when a court has power to interfere with a

²⁴ See the “various expressions” of the test in *AFL v Carlton Football Club Ltd*, [1998] 2 VR 546, per Hayne JA as his Honour then was at 568-569.

²⁵ *AFL v Carlton Football Club Ltd*, supra, per Tadgell JA at 561.

²⁶ Although arbitrators have been given such a power, e.g. in the construction industry as seen in the cases of *Toll (FHL) Pty Ltd v Prixcar Services Pty Ltd*, [2007] VSC 187 at [47], and see “in the same way as an arbitrator is often, by the contract concerned, empowered to substitute his own decision when ..[a] certificate is disputed”, per Ipp JA in *WMC Resources Ltd v Leighton Contractors Pty Ltd*, [1999] WASCA 10 at [21] and at [48] – [53] the discussion of such cases as *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*, [1998] 2 WLR 860 at 881.

contractual decision validly made under a contract. These statements are not directly relevant when considering the proper construction of the parties' agreement in the present case.

44. For these reasons, the Panel, by a majority, does not accept the submission of the AOC that it is obliged by the law of New South Wales to apply the test of "*Wednesbury unreasonableness*" in this arbitration.

Matters not in dispute

45. The First Panel was satisfied that the conduct of the Appellant "*was likely to and did bring himself into disrepute*". Clause 2 of the Membership Agreement provides, inter alia, that a person's selection and continued membership of the Olympic Team is at the discretion of the AOC and is conditional upon the person not having "*engaged at any time in conduct which is publicly known and in the absolute discretion of the President of the AOC has brought or will be likely to bring*" the person into disrepute or censure. Importantly, the final sentence of Clause 2 provides as follows:

"If I have not met the above conditions, I agree that the AOC or the Chef de Mission in their respective sole and absolute discretion may terminate my selection to, and continued membership of, the team..."

46. The First Panel found that the President of the AOC, Mr. John Coates, was entitled to find that the Appellant's conduct was likely to and did bring himself into disrepute. In paragraph 7.1 of the First Award, the First Panel stated:

*"Bringing a person into disrepute is to lower the reputation of the person in the eyes of ordinary members of the public to a significant extent. In our opinion, the conduct of the Appellant was such that, when reported by the public media, it could not help but be likely to bring him into disrepute. Members of the public would learn that a member of the Olympic Team had been out at a public bar in the early hours of the morning, intoxicated and had become involved in a fracas with another former athlete, which led to that person being very seriously injured and taken to hospital. Members of the public were also told that the conduct of the Appellant was such as to cause members of the New South Wales Police to reasonably believe that he was guilty of a serious criminal charge arising out of the incident. Although the question here is not quite the same as that arising in defamation cases, consideration of similar issues that arise in that field are of assistance. The reasoning of the members of the High Court in *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 and *Favell v Queensland Newspapers Pty. Ltd.* (2005) 221 ALR 186; (2005) 79 ALJR 1716 points clearly to the conclusion that a reasonable member of the public would think considerably less of the Appellant on account of his conduct, albeit realising that he may have a defence to the criminal proceedings and might be acquitted at trial"*

47. As mentioned above the dispute before this Panel is not whether the Appellant has breached the conditions of the Membership Agreement and in particular Clause 2. The dispute between the parties relates to the consequences of that breach and the decision by the AOC, in the exercise of its discretion, to terminate the Appellant's selection to, and continued membership of, the 2008 Australian Olympic Team.

The Findings

48. As stated above, this Panel has approached the matter on the basis that it is a hearing *de novo*, and on the material before it, the Panel finds that it would have reached the same conclusion in the exercise of its discretion as the AOC Executive. We have reached this conclusion after taking into account in the Appellant's favour all the relevant matters that have and could be put on his behalf.
49. The conduct of the Appellant on the night in question, putting to one side the allegations of criminal misbehaviour, was serious misconduct. The grossly excessive consumption of alcohol resulting in intoxication, culminating in his involvement in a fracas, was conduct that could form an ample basis for the exercise of discretion to terminate the Appellant's membership of the team.
50. The decision relates to whether or not he should be part of a large group of athletes, young and old, travelling overseas as a united body of representatives of his country and living together during periods when they are under the pressure of competition and periods when the competition has finished. The likely impact of his serious misconduct on the problems and responsibilities faced by other athletes in the team and on those involved in the management and organization of such a large group of diverse athletes in varying and unusual circumstances, is a matter particularly within the knowledge and experience of the members of the AOC Executive. Their unanimous view must be given great weight. Nevertheless, as has been recognised, whilst this panel "*can use the rationale and wisdom of the lower panel as a guide*" ultimately the Panel must make its "*independent determination*" of the matter²⁷ and this it has done.
51. The extent of the disrepute that the Appellant's behaviour has brought himself is highlighted by the voluminous number of media reports that have accompanied his misconduct. Many of these reports were provided to the Panel and the Panel has considered their contents whilst noting that many of the allegations contained within the media reports are unproven and sensationalist. There are, however, a considerable number of statements in the media reports that are substantiated by the admitted facts and amplify the conclusion of the first CAS Panel that the media reports "*could not help but be likely to bring him into disrepute*".
52. Further in the alternative, given the accepted finding of the First Panel that the Appellant's conduct was likely to and did bring himself into disrepute and the acceptance therefore that there had been a breach by the Appellant of the Membership Agreement, the exercise of the discretion was triggered. It could not be said that the decision of the AOC Executive was perverse or irrational, or aberrant in the "*Wednesbury*" sense. It could not be said that the AOC Executive could not honestly and reasonably have come to the decision it did. The Appellant's submissions either taking singly or in combination do not give rise to a conclusion that the decision of the AOC Executive is so aberrant that it cannot be classed as rational (see

²⁷ As stated by counsel for USADA and quoted with apparent approval by the Appeal Panel in CAS 2007/A/1394, at para. [21].

Australian Football League v Carlton Football Club Limited, supra, at 559). The sanction was not disproportionate, nor manifestly excessive so as to give rise to a finding of “irrationality”.

53. An issue arose during the proceedings as to the significance of the offer by the AOC to the Appellant prior to the AOC Executive decision on 11 June 2008 requesting the Appellant to suggest alternative sanctions to the AOC for it to consider in the exercise of its discretion. There was no contractual basis for alternative sanctions and although it was unfortunate that the AOC held out this possible “lifeline” to the Appellant to preserve his team membership, the AOC was not required to pursue this alternative. It would have been open to the parties at any time to formally vary the Membership Agreement. However, this did not occur. The fact of the suggestion of alternative sanctions, in the absence of any contractual basis, by itself cannot be determinative of the question of the proper exercise of discretion.
54. Accordingly, the Panel finds that none of the Appellant’s contentions have been made out and the appeal must be dismissed.

Conclusion

55. For these reasons, the appeal is dismissed. A separate award will be made in relation to the question of costs.

The Court of Arbitration for Sport rules:

1. Orders that the Appeal by Mr Nicholas D’Arcy filed on 11 June 2008 be dismissed.