

Outline of the report by Mario Bassani “The disciplinary sanctions for violating the prescribed regulations in the FISJ competitions: internal justice and access to ordinary and administrative jurisdiction”.

(issue updated up to 9 October 2007)

1. - Preambles.

1.- The juridical nature of the sports Federations.

With specific reference to FISJ, the Court of Appeal, with the sentence of the United Sections of 11 October, 2002, No. 14530, has considered that the national sports federations present a double aspect: one of contributing activities nature, linked to the performance of public functions relative to CONI, and the other of private nature, linked to the specific activities of these federations, activities that are detached from those of public nature since they are autonomous, and only relate to said federations (a similar matter arises for companies under private law, State licencees for the realization of works or supply of services: what does not pertain to the licence relation must not follow rules of public nature in the contractual activity, as can be read in the TAR of Lombardia’s sentence dated 15 February 2007, Section III).

1.2. - The hereby referred classification is important for the substantial and procedural system relative to provisions (according to the principles of fair course set forth by law 241/1990 ne s.m.), and for the trial provisions relative to disputes (arbitration and/or access to jurisdictional bodies).

1.2.1. - The associative structure of the Federations leads to the private nature of all that relates to the relations among the shareholders, and between the shareholders themselves and its own bodies.

1.2.2. - Acts and provisions of Federations’ bodies which perform functions relative to the issuance by CONI, refer to public nature, such as the organization of agonistic competitions of official character, the drawing up of competitions’ schedules, the formation of teams for international competitions, the setting up of technical teams to support the teams and the events, the release of certificates to perform the activity of ski instructor).

2.- Sports justice.

Sports justice is prescribed by L.D. dated 19 August 2003, converted into law No. 220 on 17 October 2003, which will be mentioned below.

3.- Dispute arising from the regularity of the competitions and from the violation of the prescribed regulations.

3.1. - The (Sanino) doctrine states that the decisions taken by the competent federal bodies during the assessment of the regularity of a competition by competent federal bodies of a sports competition, and in application of the technical standards that guarantee the regular unfolding of the competition, do not determine the violation of a subjective right, neither the violation of a licit interest and therefore they cannot be subject to examination by the State judge. Regarding the other aspects that do not concern the regularity of competitions, reference must be made to some authors (Manfredi), according to whom jurisdictional protection is also guaranteed within non recognised associations, and it involves the disciplinary power, since it is linked to the contractual nature of the associative relation. Similarly, it is considered (P. Sandulli) that jurisdictional protection is very broad and it is entrusted to ordinary jurisdiction (arbitration makes part of it) for inter-company relations and to administrative jurisdiction for the provisions of the Federations and of CONI.

3.2.- If the organization of sports competitions is of public nature and therefore it can be referred to the administrative action, the rules of fair procedure must be recalled, of which law 241/1990 must be recalled. The dispute that arises must be entrusted to the administrative judge. Provided that said judge is not involved in the evaluation of second degree, thus having to judge according to traditional parameters based on legitimacy only. Indeed, sports competitions could be compared, with the due differences, to insolvency proceedings, in which the participants are interested in the compliance with the participation rules, and those that concern the unfolding of competitions (admission requirements to competitions, such as FIS and FISU scoring, regularity of timing activities, technical evaluations of judges, and anything else related to the regularity of the competition).

3.3.- However, the legislative text excludes resorting to jurisdictional protection for the compliance of regulatory, organizational and statutory regulations of the national sports system and its articulations that have the purpose of ensuring the proper unfolding of sports activities, and for important behaviours under a disciplinary point of view and the imposition of the relative sanctions (L.D. dated 19 August 2003, No. 220, converted with modifications into law dated 20 August 2003, No. 192, art. 2,

paragraph 1, letters a) and b)). The relative controversies are devolved to the justice bodies of the sports system.

According to the same legislative text (art. 3, paragraph 1) the controversies that are not devolved exclusively to internal justice bodies, are devolved to the Lazio TAR as functional competence.

An in-depth examination of these regulations could lead to constitutional factors under two profiles: a. - the exclusion of jurisdictional measures opposing acts of administrative nature is in contrast with article 113 of the Constitution; b. - the appointment of functional competence to the Lazio TAR is in contrast with article 25 of the Constitution that restricts sentencing to the natural judge. Nevertheless, it must be stated that regarding the assignment of functional competence to the Lazio TAR, in derogation of the normal territorial competence, the Constitutional Court did not acknowledge censorships of unconstitutionality (Constitutional Court, 26 June 2007, No. 237)

4. - Sanctions for the violation of prescribed and conduct regulations.

4.1. - Imposition and measures.

The subject is governed by the Justice Regulation, approved with the deliberation dated 5 August 2004, No. 353, of the Federal Council of FISJ. Article 39 establishes that controversies concerning sports activity, in view of the provisions adopted, can be devolved to an arbitration court, with the procedure indicated in following article 40.

4.2.- Additional measures.

According to the administrative judge (the Emilia Romagna, Bologna I TAR, 4 May 1998, No. 178), the matters that concern subjective rights can be exercised by whoever is entitled, and therefore the internal regulations of the Federations apply, which bind the associates. If legitimate interests are instead involved, according to the above classification, the same interests cannot be object of a preventive and temporary limited renunciation of jurisdictional protection. The discriminating criterion therefore applies in view of the pretended claim: whether of patrimonial nature or relative to associate relations, the restrictions set forth by the single sports orders apply, since their contractual source derives from registration and as a consequence from the acceptance of social rules. If instead they concern aspects that derive from public functions, as those indicated in point 1.2.2., the subject of legitimate

interests will be considered, and therefore of devolution to the administrative judge.

Jurisprudence, which confirms this trend, is indeed very broad on the topic. See the Catania TAR sentences, IV, No. 679/07 (according to which L. D. 19 April 2003 No. 220, converted into law No. 280 on 17 October 2003, is very clear in identifying the classification criteria of jurisdiction, according to the above stated principles); the Lazio TAR, III ter, 21 June, 2007, No. 5645 (on the sentence before the arbitration body as necessary but not exhaustive assumption, of the dispute); Court of Appeal, I Civil, 27 September 2006, No. 21055 (on the nature of bond for the associates of a sports federation to accept full and definite effect of all general provisions and all particular decisions, such as those deriving from an arbitration court as 20032/2007 (on the authoritative nature of the decisions of sports Federations, and their impugnement before the administrative judge); State Council, 25 January 2007, No. 68 (on impugnability before the administrative judge of the arbitration as well, as set forth by article 3 of law 280/2003).

5.- The legal effect of the arbitration clause.

Based on the stated considerations, the legal effect of the arbitration clause is limited to inter-subjective relations inside the Federation and involves, in such a sphere, the renunciation of the parties to the jurisdictional protection of rights invoked in the dispute (Court of La Spezia, 8 September 2003, No. 990/03). What instead concerns the decisions made according to the regulations that order the regularity of competitions and acts derived by authoritative source, can be brought before the bodies of administrative justice.

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