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The decisions on Pyeongchang and previous CAS case law

Claude Ramoni, Partner at Libra Law, provides indepth analysis of the Court of Arbitration for Sport ('CAS') and International Olympic Committee ('IOC') decisions relating to the participation of Russian athletes in the Pyeongchang 2018 Winter Olympic Games ('Pyeongchang') in the context of previous CAS ad hoc Division awards, and makes several observations on the implications of the confirmed admissibility of a decision banning a whole nation or a group of athletes, which marks a departure from the treatment of each case on an individual basis.

As was the case on the eve of the Rio Olympic Games, the issue of the participation of quite a large number of Russian athletes at Pyeongchang was only known at the last minute. By four awards, issued the day before and on the day of the opening ceremony, the CAS ad hoc Division confirmed that 53 Russian athletes and seven coaches were not eligible to take part at Pyeongchang.

Background

Further to the release of the first part of the McLaren Report before the opening ceremony of the Rio Olympic Games, the IOC appointed two commissions to address the doping scandal revealed by the McLaren Report:

- A first commission, chaired by Prof Denis Oswald (the 'Oswald Commission') to investigate anti-doping rule violations as a result of the doping practices described in the McLaren Report and conduct disciplinary proceedings against individual athletes; and
- A second commission, chaired by Samuel Schmid (the 'Schmid Commission') to investigate whether Russian officials and/or the Russian Olympic Committee should bear responsibility for the facts described in the McLaren Report and ought to be sanctioned.

The Schmid Commission issued its report on 2 December 2017, confirming the systemic manipulation of anti-doping rules and systems in Russia, more specifically in relation to the Sochi Olympic Games. Further to the issuance of this report, the IOC Executive Board decided on 5 December 2017 (the 'IOC EB Decision'), amongst other findings to (i) suspend the Russian Olympic Committee (the 'ROC'), and (ii) invite individual Russian athletes (and support personnel) to Pyeongchang as 'Olympic Athletes from Russia,' competing under the Olympic Flag, further to an invitation process to be put in place by a specific invitation panel, called the 'Invitation Review Panel.'

The IOC EB Decision granted the widest discretion to the Invitation Review Panel with respect to the criteria to be applied in order to invite Russian athletes and support personnel. In fact, the only requirements mentioned under the IOC EB Decision for considering an athlete 'clean' were the absence of past anti-doping rule violations and compliance with pre-Games and other testing requirements. With respect to support personnel, in principle, no support personnel whose athletes had committed an anti-doping rule violation, or who were part of the leadership of the Russian Olympic Team at the Sochi Olympic Games, were eligible.

On 19 January 2018, the IOC published on its website that the Invitation Review Panel and the Olympic Athlete from Russia Implementation Group had "established a pool of clean athletes from which athletes to be invited by the IOC to take part in the Olympic Winter Games PyeongChang 2018 as an 'Olympic Athlete from Russia' (OAR) can be chosen." The IOC further revealed that out of the 500 athletes included in the ROC pre-registration pool, 111 athletes were deemed ineligible by the IOC.

The criteria used by the Invitation Review Panel for establishing the pool of eligible Russian athletes was released by the IOC on 25 January 2018. The press release specifically mentioned that the role of the Invitation Review Panel was to make sure that only Russian athletes who were "considered clean" could be invited.

In the vast majority, the list of elements reviewed by the Invitation Review Panel relate to possible doping practices (including previous anti-doping rule violations, appearing in the McLaren Report and evidence, appearing on the Moscow laboratory database, having failed whereabouts obligations, or reporting suspect analysis under the athlete's biological passport and steroid profile analysis).

The CAS awards of 1 February 2018

In the last months of 2017, the Oswald Commission issued numerous decisions sanctioning individual athletes allegedly involved in - or at least having benefited from - the doping malpractice in relation to the Sochi Olympic Games. The concerned athletes were sanctioned by being declared ineligible for life

from all editions of the Olympic Games and all results obtained by them at the Sochi Olympic Games were cancelled.

The concerned athletes successfully appealed the Oswald Commission's decisions before CAS. On 1 February 2018, CAS ruled that 28 athletes sanctioned by the Oswald Commission had not committed any anti-doping rule violation, with only 11 athletes being declared guilty of doping practices, who were banned from only one edition of the Olympic Games.

The CAS ad hoc Division awards of 8 and 9 February 2018

On 6 February 2018, the first group of 32 Russian athletes filed an application with the CAS ad hoc Division. None of those athletes had ever been sanctioned for a doping offence - the Oswald Commission did not open any disciplinary procedure against any of them and all 32 athletes were eligible to compete in competitions organised by their respective international federations. The concerned athletes claimed that they learned through the press that they had not been invited to Pyeongchang and subsequently wrote to the IOC on 2 February 2018 to request that the IOC provide the reasons for not having included them in the list of invited athletes. A hearing took place on 7 and 8 February 2018. By an award issued on 9 February 2018, the CAS ad hoc Division dismissed the application of the 32 Russian athletes[1].

On 7 February 2018, a second group of 15 Russian athletes filed an application with the CAS ad hoc Division. Those 15 athletes were amongst the athletes who successfully appealed before CAS the decisions issued by the Oswald Commission sanctioning them. Further to the CAS awards of 1 February 2018, the athletes cleared by CAS regained eligibility and they (together with the ROC) requested that the IOC invite them to Pyeongchang. The IOC declined this request on 5 February 2018 and the CAS ad hoc Division confirmed this decision on 9 February 2018[2].

Also on 7 February 2018, a third group of six Russian athletes filed an application with the CAS ad hoc Division. Those six athletes had not been the subject of any decision by the Oswald Commission, but they all had committed an anti-doping rule violation in the past. Such athletes were already involved in a procedure against the IOC before the CAS Appeals Division, aimed at challenging the IOC EB Decision; they also unsuccessfully tried to seek provisional measures from an antitrust court in Lausanne, Switzerland. In fact, the concerned athletes wrote to the IOC on 31 January 2018 and 1 February 2018 to request information and documentation relating to the reasons for which they were not invited to Pyeongchang. The IOC replied on 2 February 2018, referring to the submissions filed in the framework of the request for provisional measures before a state court. The CAS ad hoc Division ruled that the dispute had arisen outside the ten day period provided for under Article 1 of the CAS Arbitration Rules for the Olympic Games (the 'CAS ad hoc Rules'), meaning that it did not have jurisdiction to deal with this application[3].

Also on 7 February 2018, seven Russian coaches and physicians filed an application with the CAS ad hoc Division. Those coaches initially filed an appeal against the IOC EB Decision before the CAS Appeal Division, as they had supervised athletes sanctioned by the Oswald Commission and were therefore not fulfilling one of the eligibility criteria as per the IOC EB Decision.

However, further to the CAS awards issued on 1 February 2018, clearing all athletes from the sports of skeleton and speed skating initially sanctioned by the Oswald Commission, the coaches and doctors from those sports wrote to the IOC to submit that in light of this change of circumstance, they should be deemed eligible and invited to Pyeongchang. The IOC replied on 4 February 2018 stating that due to the fact that no request was submitted or maintained through the ROC in order to invite such support personnel, no review had been conducted. This communication was challenged before the CAS ad hoc Division. The CAS panel ruled that this letter by the IOC was not a "decision" and that, as the decision not to invite the concerned support personnel had been issued on

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19 January 2018, accordingly, the dispute had arisen outside the ten day period provided for under the CAS ad hoc Rules and the CAS panel denied jurisdiction[4].

Issues raised by CAS ad hoc Division awards of 8 and 9 February 2018

Jurisdiction of the CAS ad hoc Division

According to Article 1 of the CAS ad hoc Rules, 'The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.'

Except for the case concerning the athletes cleared by the CAS on 1 February 2018, the CAS ad hoc panel ruled that in actual fact, the applicants had been notified of their non-selection on 19 January 2018, i.e. when the IOC sent to the ROC the list of athletes and support personnel who were eligible to be invited to Pyeongchang. Therefore, the dispute had arisen outside the period of ten days provided for under Article 1 of the CAS ad hoc Rules[5].

Nevertheless, it appears that the IOC never properly 'notified' an individually reasoned decision to each of the Russian athletes explaining the reasons for them not being invited to the Olympic Games on an individual and case-by-case basis. The communication of 19 January 2018 consisted of a list of names, sent to the (suspended) ROC. On 25 January 2018, the criteria used by the Invitation Review Panel to issue the list of 19 January 2018 was published by the IOC, without any indication as to how such criteria was applied in individual cases.

The CAS ad hoc Division in Pyeongchang adopted the strict approach followed by the CAS, notably in the award *Simari Birkner v. COA & FASA*[6], under which a dispute is deemed to have arisen as soon as an applicant is notified of his or her non-selection and is able to understand the reasons thereof.

Importantly however, previous CAS awards had been more flexible:

- In the *Schuler* case, the dispute was not deemed to have arisen on the date of publication of the decision on the Federation's website, but when the athlete complained for the first time against such decision[7];
- In the *Lund* case, the World Anti-Doping Agency's ('WADA') appeal was deemed admissible, even though, the decision and the full case file of the athlete Lund had been sent to WADA outside the ten day window[8]; and
- In the *Ward* award, the panel ruled that the dispute had arisen when the athlete had objected to his non-qualification after receiving a written explanation from the IOC[9].

Of course, the situation in the cases *CAS OG 18/04* and *CAS OG 18/05* was unusual, as the concerned applicants were already disputing the IOC EB Decision before CAS and were - in that sense - already in dispute against the IOC with respect to their participation at Pyeongchang.

However, the IOC's online publication stating that a list of names had been issued and sent to the ROC, without notification of individualised decisions to individual athletes, was deemed sufficient in order for CAS to consider that the dispute had "arisen" in the meaning of Article 1 of the CAS ad hoc Rules. This seems to contradict previous CAS awards where written explanations had been properly "notified" to the applicants.

These awards - if confirmed - may lead to undesirable results. This could strongly restrict the number of cases that could otherwise fall within the jurisdiction of the CAS ad hoc Division. Many Olympic-related decisions are actually taken more than ten days before the beginning of the Games, but the notification or the written grounds thereof occurs within the ten day timeframe. If such a strict approach is to be confirmed, many cases that were dealt with by CAS ad hoc Divisions in previous editions of the Olympic Games would no longer be deemed admissible.

A less strict approach would serve the rapid, efficient and cheap dispute resolution mechanism instituted by CAS ad hoc Divisions in the interest of the athletes and of the sport. Limiting the jurisdiction of the CAS ad hoc Divisions opens the door to the multiplication of applications for provisional measures before the CAS Appeals Division, or even state courts, with the risk that an athlete could be 'provisionally' authorised to take part in the Olympic Games. This would be against the very purpose of CAS to allow the issuance of final decisions before the start of major competitions.

Disciplinary cases or eligibility cases?

In both awards on the merits, the CAS panel ruled that the decision by the IOC to issue a list of invited Russian athletes - despite the ROC's suspension - and not to invite the applicants should not be considered as a "sanction" against the applicants, but as an eligibility decision[10].

No reference was made by the CAS ad hoc panel to the well-known award concerning the United States Olympic Committee ('USOC'), *USOC v. IOC*[11]. In this case, CAS had to address whether the so-called 'Osaka Rule,' i.e. a rule providing that an athlete sanctioned for a doping offence could not take part in the edition of the Summer and Winter Olympic Games following the expiry of his/her period of ineligibility, was to be qualified as a sanction or as an eligibility rule.

The panel ruled that the decisive criteria in order to distinguish a qualifying or eligibility rule from a sanction is whether the decision aims at sanctioning "undesirable behaviour by athletes." Then, not inviting an athlete to take part in an event - including

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refusing his or her entry to the Olympic Games - can qualify as a "sanction" if the reason for the lack of invitation is an "undesirable behaviour[12]."

The CAS ad hoc panel made reference to three CAS awards:

1. The award *ROC & al. v. IAAF* issued before the Rio Olympic Games[13]: in this case, the International Association of Athletics Federations ('IAAF') had adopted a rule providing that, as the Russian national athletics federation was suspended, Russian athletes could compete only if they could demonstrate that they had not been tainted by the absence of a system ensuring clean sport in this country, notably by showing that they had been subject to reliable, fully compliant and regular doping tests. In this matter, CAS ruled that it was actually a permissive rule - i.e. a rule providing for the conditions under which an athlete could regain eligibility despite the suspension of his or her national federation. The rule was not considered as a sanction due to the fact that "The athletes [were] ineligible because RusAF [had] been sanctioned, and accepted that sanction, not because of what the athletes [had] done[14]."
2. The award *RPC v. IPC*[15], confirming a decision by the International Paralympic Committee ('IPC') to ban the Russian Paralympic Committee ('RPC') and not to invite any Russian Paralympic athletes to the Rio Paralympic Games; and
3. The award *BWF v. IWF*[16], upholding a decision by the International Weightlifting Federation ('IWF') not to invite any Bulgarian athletes to the Rio Olympic Games due to the high number of positive cases reported by the IWF.

It is true that the process initiated by the IOC before Pyeongchang presents some similarities with the abovementioned cases involving the IAAF, IPC and IWF.

By suspending the ROC, the IOC could have decided not to invite any Russian athletes. Setting specific circumstances for allowing entries of athletes despite this suspension could then be seen as a permissive rule providing for an exceptional process for entries, such as a kind of "wild card." Consequently, such a decision - favourable to individual athletes - shall not constitute a "ban" from a competition. On another hand however, the Schmid Commission report mentions the need to protect the rights of the individual clean Russian athletes and the IOC EB Decision made it very clear that the suspension of the ROC shall not imply a blanket ban on all athletes.

Contrary to the above quoted IAAF and BWF awards - where the decisions not to invite athletes to the Olympic Games were based only on the objective criteria of the number of tests by a reliable anti-doping authority or of the athletes' nationality - the criteria adopted and published by the Invitation Review Panel for accepting entries of Russian athletes to Pyeongchang all relate to doping related practices.

As per consistently recognised jurisprudence, the criteria that no previous doping offence be committed in fact qualifies as a sanction, and not as an eligibility rule[17]. Other elements such as whereabouts failures, irregularities in the athletes' passports, dubious steroid profiles, mentions of possible unreported adverse analytical findings in the database of the Moscow laboratory, or information deriving from the McLaren Report, could serve as a basis for a procedure before anti-doping authorities.

Furthermore, the communication by the IOC about the purpose of the Invitation Review Panel's work made it very clear that it was to invite only "clean" athletes, implying that athletes who were not fully clean and could have been tainted by doping practices were not invited. The underlying criteria of being "clean" actually seems to relate to possible "misbehaviours by athletes," in the meaning of the *USOC v. IOC* award, as opposed to an objective criteria of eligibility.

The distinction between a sanction and an eligibility rule is not purely rhetorical. Sanctions for a doping offence are governed by the WADA Code. The IOC does not have the freedom to provide for sanctions, which do not comply with the fixed set of rules provided for by the WADA Code[18]. Furthermore, it is generally accepted that disciplinary sanctions, even though they are not criminal by nature, nevertheless have to comply with some basic principles (such as the principle of legality, the principle of proportionality, the principle of *nulla poena sine culpa* unless the rule clearly provides for a strict liability principle, the right to be heard etc)[19].

Starting from the quite 'conservative' approach adopted by CAS, notably in the *Valverde* and the *USOC* awards, recent awards such as the Pyeongchang CAS ad hoc awards are willing to not qualify as "sanction" rules those that could also be seen as eligibility rules, such as the process adopted by the IOC before Pyeongchang for inviting Russian athletes. This trend may however have the following downsides: (i) athletes may be deprived of protective rights, which apply to disciplinary sanctions, and (ii) efforts made by WADA to adopt a uniform set of rules governing eligibility or ineligibility in cases of doping offences or suspicion of doping practices may be jeopardised.

As a result, more than 50 Russian athletes, allowed to compete at the highest level in the winter 2018 season, were not invited to the Olympic Games due to being deemed not sufficiently "clean." There is then a new category of athletes, who have not been proven guilty of an anti-doping rule violation and who have not been provisionally suspended for suspicion of doping

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practices, but who are nevertheless not sufficiently "clean" enough to be at the Olympic Games, even though they were all subject to a very serious, efficient and extended pre-Olympic Games testing programme in 2017 and 2018.

Confirmation that the IOC has the power and freedom to decline an invitation to the Olympic Games

Both the *CAS OG 18/02* and *18/03* awards clearly confirm the validity of Rule 44 par. 3 of the Olympic Charter granting the IOC the right, at its sole discretion, to refuse any entry to the Olympic Games, with nobody being entitled - as of right - to participate in the Olympic Games.

Consequently, in view of this provision, the Pyeongchang CAS ad hoc Division applied the well-established CAS case law, according to which, if the rule provides for a discretionary power, the panel should intervene only if the process is discriminatory, arbitrary or otherwise unfair[20]. The Lausanne Antitrust Court came to a similar conclusion in the case of six athletes, ruling that, in the absence of a right to participate, refusing to invite an athlete was not a breach of his or her personality rights. Furthermore, not inviting the athletes to the Olympic Games was not considered as an abuse by the IOC of its dominant position[21].

Again, this reasoning also seems to contradict the CAS award *USOC v. IOC*, where the panel ruled that Rule 44.3 of the Olympic Charter did not grant the IOC full freedom not to invite athletes for reasons qualifying as a sanction. As a result, the CAS ad hoc panels did not address the situation of each particular applicant in turn. In fact, the CAS only examined the process adopted by the IOC to confirm its validity.

It did not specifically look into the situation of each individual athlete to determine whether the particular circumstances of his or her case would justify a refusal not to invite him or her to the Olympic Games. In this respect, these awards may contradict CAS awards issued before the Rio Olympic Games where the specific situation of individual athletes was duly considered in order to decide in any given individual case whether a refusal to enter an individual athlete was justified or not[22].

Conclusion

The awards issued by the CAS ad hoc Division relating to Pyeongchang highlight the uncertainty surrounding the CAS ad hoc Division's jurisdiction in relation to decisions issued shortly before the Games, but outside the ten day period. Those awards - followed in this respect by the Lausanne Antitrust Court ruling on provisional measures - confirm the freedom and authority of the IOC to accept or refuse athletes to the Olympic Games, as well as the absence of an individual right to take part in any given edition of the Olympic Games, in particular in cases of suspension of a national Olympic committee.

The IOC decision not to invite certain Russian athletes to Pyeongchang for reasons relating to possible doping offences was not qualified or defined as a "sanction." Is it a sign that the CAS jurisprudence - based on the *USOC* and the *Valverde* awards - no longer applies?

Finally, the CAS ad hoc awards relating to Pyeongchang confirm the admissibility of a decision banning a full nation, or a group of athletes, and a departure from the treatment of each case on an individual basis. Does it mean that collective bans are now widely authorised in sport? Possibly, but such awards may also be construed as the result of the very specific circumstances of the Russian doping scandal and the unprecedented situation revealed notably by the McLaren Reports.

1. CAS OG 18/02 Victor Ahn et al v. IOC.
2. CAS OG 18/03 Alexander Legkov et al v. IOC.
3. CAS OG 18/04 Tatyana Borodulina et al v. IOC.
4. CAS OG 18/05 Pavel Abratkiewicz et al v. IOC.
5. As the IOC did not dispute the admissibility of the application in the case CAS OG 18/02 Victor Ahn et al v. IOC, the CAS issued an award on the merits; on the contrary, the CAS upheld the IOC's objection to CAS jurisdiction in the cases CAS OG 18/04 Tatyana Borodulina et al v. IOC and CAS OG 18/05 Pavel Abratkiewicz et al v. IOC.
6. CAS OG 14/03 Maria Belen Simari Birkner v. COA & FASA.
7. See CAS OG 06/02 Schuler v. Swiss Olympic Association & Swiss Ski.
8. CAS OG 06/01 WADA v. USADA, USBF & Lund.
9. CAS OG 12/02 Ward v. IOC, AIBA & ANOC.
10. CAS OG 18/02 Victor Ahn et al v. IOC §7.4 et seq; CAS OG 18/03 Alexander Legkov et al v. IOC §7.4 et seq.
11. CAS 2011/O/2422 USOC v. IOC.
12. See CAS 2011/O/2422 USOC v. IOC §33-41; TAS 2007/O/1381 Valverde v. UCI.
13. CAS 2016/O/4684 ROC & al. v. IAAF.
14. CAS 2016/O/4684 ROC & al. v. IAAF §121.
15. CAS 2016/A/4745 RPC v. IOC, even though the concerned athletes were not a party to this procedure, the panel specifically mentioned that it did not address the question from the athletes' perspective [§79-80].
16. CAS 2015/A/4319.
17. See CAS 2011/O/2422 USOC v. IOC; CAS OG 16/012 Balandin v. FISA & IOC; CAS OG 16/013 Karabelshikova & Podhivalov v. FISA & IOC; CAS OG 16/021 Anyushina & Korovashkov v. ICF & RCF §7.28; CAS OG 16/019 Podolskaya & Dyachenko v. ICF §7.11 et seq.
18. See CAS 2011/O/2422 USOC v. IOC; CAS 2011/A/2658 WADA v. BOA; CAS OG 16/013 Karabelshikova & Podhivalov v. FISA & IOC; CAS OG 16/021 Anyushina & Korovashkov v. ICF & RCF §7.25.
19. See CAS 2007/O/1391 RFEC & Valverde v. UCI; CAS 2016/A/4701 WFRK v. IWF; CAS 2008/A/1583-1584 Benfica v. UEFA & FC Porto.
20. CAS 2017/A/5086 Chung v. FIFA §206 et seq ; CAS 2009/A/1817 & 1844 WADA & FIFA v. CFA et al. §174; CAS 2012/A/2762 Bayer 04 Leverkusen v. UEFA §122; CAS 2013/A/3256 Fenerbahçe Sport Kulübü v. UEFA §573.
21. Order issued by the Cour Civile du Tribunal Cantonal in case CM18.002875 Borodulina et al v. IOC.
22. See in particular CAS OG 16/024 Klishina v. IAAF, where an athlete was deemed eligible to participate at Rio as she could demonstrate having been submitted to a reliable pre-Games testing programme, even though her name had been mentioned in the McLaren Report.