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Analysis of the awards Zubkov and Legkov v. the IOC

On 1 February 2018, five days before the opening ceremony of the Winter Olympic Games in PyeongChang, the Court of Arbitration for Sport ('CAS') was facing heavy scrutiny from its critics. On that day, it was announced that the CAS Panel had decided to cancel the sanctions imposed by the International Olympic Committee ('IOC') Disciplinary Commission on 28 Russian athletes (out of 39 appeals decided by the CAS) resulting from the Sochi doping scandal. As a result, 28 Russian athletes were cleared to compete and were not facing any disciplinary consequences further to the alleged doping practices revealed by the McLaren Report. IOC President Thomas Bach was bitterly against the decision issued by the CAS and called for an urgent need to "reform" the CAS; IOC and ICAS member Dick Pound described the CAS decision not to sanction the 28 Russian athletes as "perverse." At that time, such comments were made without knowing the grounds for the award, which were finally issued on 23 April 2018. In this article Claude Ramoni, Partner at Libra Law, explores some explanations on why the CAS came to the opposite conclusion to the IOC in the matter of those 28 Russian athletes.

Background - the IOC Disciplinary Commission decisions

Further to the Sochi doping scandal revealed by the McLaren Report, the IOC appointed a disciplinary commission chaired by Prof Denis Oswald (the 'Oswald Commission') in order to investigate possible doping violations by athletes who may have benefitted from the organised doping scheme on the occasion of the Sochi Olympic Games and conduct disciplinary proceedings against the concerned individuals.

The Oswald Commission held that 43 Russian athletes had committed doping offences on the occasion of the Sochi Olympic Games and imposed lifetime bans on participation in all future editions of the Olympic Games.

In short, the Oswald Commission relied on corroborating evidence in order to decide that a scheme of doping practice and sample swapping - as described in

the McLaren Report and affidavit by Dr Rodchenkov - was indeed in place and implemented on the occasion of the Sochi Olympic Games. More specifically, the Oswald Commission relied on (i) the content of the so-called 'Duchess List,' i.e. a list of athletes who were allegedly given a doping cocktail developed by Dr Rodchenkov; (ii) the exchanges of emails between the Russian laboratory and third parties showing that some positive cases were covered up; (iii) forensic analysis of the Berlinger bottles used in Sochi revealing the presence of scratch marks possibly showing that the bottles had been opened and the urine sample tampered with; (iv) scientific analyses revealing that some samples provided by Russian athletes in Sochi revealed abnormally high level of salts, this evidence supported Dr Rodchenkov's revelations that he had to add salt to the 'clean' urine substituted against the urine provided on the occasion of the control in order to adjust the specific

gravity of the urinary sample; and (v) witness testimony of Dr Rodchenkov, notably based on his notes and diaries stating that he remembered that some athletes were using doping practices and/or needed to be 'protected' (possibly by swapping their urine).

The Oswald Commission went further in analysing the evidence available on each individual athlete. It held that the concerned athletes knew about the sample swapping scheme. Notably by being provided with the 'Duchess Cocktail' they could not ignore that measures were in place to shield them from adverse analytical findings or that they were being 'protected'; in order to allow urine substitution, their cooperation was needed to provide 'clean' urine; athletes had to collaborate in order to identify the reference number of the sample provided during doping controls in Sochi and pass this information to the laboratory in

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order to allow the sample swapping. Accordingly, the Oswald Commission decided that the concerned athletes were guilty of (i) allowing sample swapping and tampering (use of a prohibited method in the meaning of Art. 2.2 WADA Code/tampering in the meaning of Art. 2.5 WADA Code), (ii) use of a prohibited method in the meaning of Art. 2.2 WADA Code, and (iii) cover up/complicity contrary to Art. 2.8 WADA Code.

The CAS awards

Comparing the award issued by the CAS in the matter of athletes cleared of wrongdoing¹ and the ones in which the CAS confirmed the doping offences² helps create an understanding of the reasoning followed by the Panel. In actual fact, the CAS confirmed the ruling by the Oswald Commission against athletes whose samples revealed abnormal and not physiological salt levels (except for the length of the sanction); it cancelled the sanctions imposed against athletes where the urine samples provided in Sochi did not contain abnormal salt levels, notwithstanding whether or not there were scratches on the bottle or if the athlete's name was mentioned on the Duchess List or by Dr Rodchenkov in his testimony.

The assessment of evidence

It is not disputed that the IOC bears the burden of proof, i.e. has the burden of establishing that an anti-doping rule violation has occurred³. The standard of proof is the 'comfortable satisfaction' standard provided for under Article 3.1 WADA Code, i.e. greater than a mere balance of probability but less than proof beyond reasonable doubt. The CAS Panel here confirmed the CAS case law that the standard is not a variable one, but that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be proven⁴. In this respect, the CAS Panel in the *Legkov* and *Zubkov* cases simply confirmed previous CAS case law.

With respect to the 'means of proof,' Article 3.2 of the WADA Code provides that facts related to anti-doping violations may be established by any

reliable means, including circumstantial evidence. In the cases at hand, there was no direct evidence of doping practices; none of the athletes tested positive for a prohibited substance; no one actually saw the athletes using the Duchess Cocktail; there was no direct evidence of athletes bringing clean urine to the laboratory; there was also no clear evidence of athletes taking pictures of their doping control form and providing them to the Sochi laboratory. Anti-doping authorities have limited investigative power. Accordingly, the CAS Panel clearly mentioned that it could not impose unrealistic expectations concerning the evidence that the IOC is able to obtain from reluctant witnesses or other sources⁵.

The CAS Panel in the *Legkov* and *Zubkov* awards then confirmed the longstanding CAS case law accepting the reliance on indirect or circumstantial evidence, for example in the following cases:

- the athlete's biological passport is based on an analysis of blood values; if such values cannot reasonably be explained by any other cause than doping practices, the use of a prohibited method in the meaning of Art. 2.2 WADA Code is deemed proven, even in the absence of any direct proof of doping⁶; and
- in match-fixing cases, the use of indirect evidence, such as abnormal betting patterns or analysis of the game may be deemed sufficient as evidence of match-fixing⁷.

In the case of the Russian athletes, the CAS did not depart from its practice of accepting indirect evidence. Actually, the CAS sanctioned Zubkov and ten other athletes in the absence of any direct evidence.

It appears however that the CAS's appreciation differed from that of the IOC's on three main aspects:

1. For the Oswald Commission, the overall circumstances of the case, i.e. that the nature of the doping scheme and the revelations by the McLaren

Report were playing a decisive role. In other words, adverse inference could be drawn from the overall circumstances of the case. On the contrary, the CAS Panel adopted more of an "individual" approach, i.e. asking the IOC to bring evidence of the athlete's personal involvement in the wrongdoing⁸.

In the past, CAS Panels have adopted different approaches with respect to whether proof of doping within a group of athletes or a club is sufficient to further establish some malpractice for each individual athlete even in the absence of adverse analytical findings. For example, in *WADA v. Bellchambers et al., AFL & ASADA*, the Panel started from the point that a prohibited substance was injected into the players of a football team to rule that all players were subject to the same regime, even in the absence of any evidence supporting that all players were actually injected with the product. Therefore, the Panel sanctioned all players without assessing the specific circumstances of each individual case⁹.

On the contrary, in other awards, the CAS Panel adopted a more "individual approach." For example, in the case *WADA & FIFA v. Cyprus Football Association, Eranosian & al.*, the Panel held that one could not infer from the fact that some players of a football team were given pills containing a prohibited substance by their coach that the pills given by the same coach to the other players in the team were also prohibited (and that the other players also committed an anti-doping rule violation)¹⁰.

It is clear that, in the *Legkov* award, the CAS Panel gave less credit than the Oswald Commission to the overall circumstances of the case, preferring a more "individually based" assessment, requiring the IOC to demonstrate each athlete's personal involvement in the alleged doping scheme.

2. Dr Rodchenkov and Prof McLaren were cross-examined before the CAS and



continued

not before the Oswald Commission. There is little doubt that the core of the case file against each athlete sanctioned by the Oswald Commission was information provided by Dr Rodchenkov, first to Prof McLaren and then to the IOC. The CAS Panel however mentions that Dr Rodchenkov was not a direct witness of many of the doping practices he describes, in particular the use of the Duchess Cocktail. In actual fact, low probative value was given by the CAS Panel to the statement by Dr Rodchenkov affirming that a given athlete was using prohibited substances.

In all likelihood, when a witness is subject to cross-examination, the Panel is in a position to better assess the evidentiary value of a testimony. In particular, in case of whistleblower information, it is obvious that more weight is given to a direct witness of doping practices, or a witness that possibly heard admissions by an athlete about his or her doping practices¹¹, rather than indirect information by Dr Rodchenkov, who was not in direct contact with any athletes.

- Obviously, the CAS Panel was not comfortable in issuing sanctions on the circumstances of the case only, in the absence of any actual evidence relating to a specific athlete. The high level of salt in the urine is scientific evidence that led the CAS to infer that the urine of the concerned athletes had actually been substituted, meaning that the concerned athletes not only took part in urine swapping

practices, but also used prohibited substances (the reason for the urine substitution)¹². For the athletes who did not have abnormal salt levels, the mere circumstantial evidence about the doping scheme, without any actual evidence about the individual athlete was not deemed sufficient to reach the 'comfortable satisfaction' standard of proof.

This reasoning is simply a consequence of the standard of proof. It is not enough to demonstrate that a doping practice is more likely than any other explanation; this would meet the 'balance of probabilities' criteria but is still not enough for the 'comfortable satisfaction standard.'

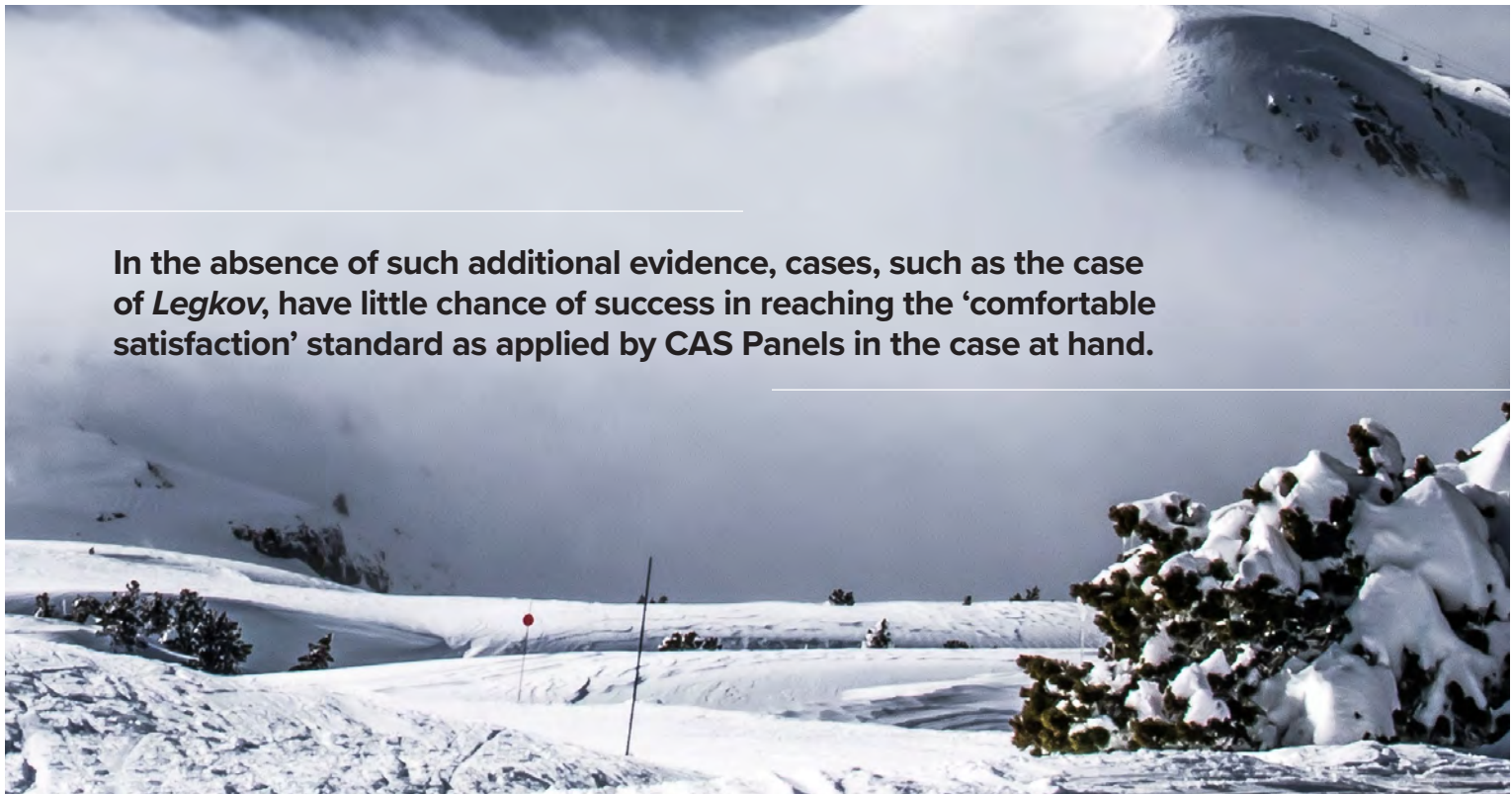
The outcome of the CAS Panel in the *Legkov* and *Zubkov* cases does not greatly differ from other non-analytical doping cases. In the case of *Valverde* e.g., the Panel was comfortably satisfied only because a DNA analysis proved that a blood bag seized in the context of the 'Operación Puerto' belonged to Valverde¹³. Similarly, in the blood doping cases that took place within the Austrian cross-country ski team on the occasion of the Torino Winter Olympic Games, the report by the Italian police was clear evidence of the doping practices¹⁴. On the contrary, the mere possession by a national canoe team of several items useful to perform blood doping was not considered as sufficient evidence to reach the comfortable satisfaction threshold and to sanction the concerned athletes¹⁵.

The doping offence

Apart from the assessment by the Panel of the evidence, another explanation for the CAS decision not to uphold the IOC's ruling may result from the interpretation by the Panel of Article 2.2 of the WADA Code.

Firstly, the Panel clarified when tampering qualifies as a prohibited method (Art. 2.2. WADA Code) and when it qualifies as 'tampering' in the meaning of Article 2.5 of the WADA Code. Actually, the Panel relied on the comment to Art. 2.5 WADA Code explaining that Art. 2.5 prohibits conduct that subverts the doping control process, but which would not otherwise be included in the definition of 'Prohibited Methods.' Given that urine substitution and/or alteration are defined as prohibited methods under Class M2.1 of the Prohibited list, the Panel consequently confirmed that the reproach made to the Russian athlete to have allowed urine substitution (by providing clean urine and/or transmitting the details of the doping control form to the laboratory in order to allow the urine swapping), if proven, would fall under Art. 2.2 WADA Code.

However, the Panel had to further interpret Art. 2.2 WADA Code. Actually, Art. 2.2.1 WADA Code mentions that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation for use of a prohibited method; on the other hand however, the text of Art. 2.2 WADA Code specifies that the offence is the use or attempted use by an athlete of a prohibited method.



In the absence of such additional evidence, cases, such as the case of *Legkov*, have little chance of success in reaching the ‘comfortable satisfaction’ standard as applied by CAS Panels in the case at hand.

Applying Art. 2.2 in the case of urine substitution in Sochi was quite challenging for the Panel as it was clear that the athletes did not personally substitute or attempt to substitute their own urine, nor did they try to reopen the bottles in order to swap the contents with clean urine on the occasion of the Sochi Olympic Games.

The Panel did not accept to endorse the “strict liability” principle provided for under Art. 2.2.1 WADA Code, i.e. that evidence of urine substitution, without the need to show the athlete’s knowledge or involvement, would be enough to prove the offence. On the other hand however, the Panel did not limit the scope of Art. 2.2 WADA Code of urine substitution by the athlete only, as the first sentence of this Article could be interpreted as meaning.

The Panel adopted a balanced interpretation of Art. 2.2 WADA Code. It ruled that Art. 2.2 WADA Code could apply in cases of urine substitution by another person other than the athlete, but only if the athlete had committed

some act to facilitate substitution, knowing the likelihood of substitution.

This reasoning confirms the concern by the Panel to take into consideration the individual situation of each athlete and not to infer from the general organised scheme the existence of individual offences.

This means in practice that it was not sufficient for the IOC to show, to a comfortable satisfaction standard, that urine substitution or sample manipulation occurred (based notably on scratches on the bottles or Dr Rodchenkov’s testimonies); the IOC had to further demonstrate involvement by an individual athlete. This of course was not an easy task and was admitted only for athletes with abnormal levels of salt in their urine.

Conclusion

The awards issued by the CAS cancelling the IOC decisions in the case of 28 athletes resulted from the approach by the CAS Panels focussing on the situation of each individual athlete supported by the ‘comfortable satisfaction’ standard and the wording of Art. 2.2 WADA Code.

Anti-doping organisations have struggled when trying to turn the information obtained from the work by Prof McLaren and the testimonies by Dr Rodchenkov into actual evidence of doping practices by individual athletes that reaches the comfortable satisfaction standard¹⁶. In general, cases have been put forward only when actual or factual evidence (such as e.g. the level of salt in the case at hand or an abnormal scientific analysis¹⁷) could be used in support of the statements by Dr Rodchenkov.

In the absence of such additional evidence, cases, such as the case of *Legkov*, have little chance of success in reaching the ‘comfortable satisfaction’ standard as applied by CAS Panels in the case at hand. However, it will be interesting to see whether possible additional information from the Moscow Laboratory database on individual athletes, combined with the other pieces of evidence available to WADA or the IOC, may be sufficient to reach the ‘comfortable satisfaction’ standard and result in sanctions against the athletes concerned.

1. CAS 2017/A/5379 Legkov v. IOC.
2. CAS 2017/A/5422 Zubkov v. IOC.
3. Art. 3.1 WADA Code.
4. CAS 2017/A/5379 Legkov v. IOC §§699-706.
5. CAS 2017/A/5379 Legkov v. IOC §716.
6. See notably TAS 2010/A/2308&2335 Pellizotti, CONI, FCI & UCI; CAS 2010/A/2235 UCI v. T & OCS.
7. See, amongst others CAS 2015/A/4351 Vsl Pakruojis FK & al. v. LFF; CAS 2016/A/4650 Skenderbregu v. UEFA.
8. CAS 2017/A/5379 Legkov v. IOC §718.
9. See CAS 2015/A/4059 WADA v.

10. See CAS 2009/A/1817&1844 WADA & FIFA v. Cyprus Football Association, Eranosian & al.
11. See as an example of a case where evidence by whistleblower Ms Stepanova was used by the CAS: CAS 2016/O/4481 IAAF v. ARAF & Savinova.
12. CAS 2017/A/5422 Zubkov v. IOC.
13. See CAS 2007/A/1396&1402 WADA & UCI v. Valverde & RFEC.
14. See notably CAS 2007/A/1286, 1288 & 1289 Eder & al v. IOC; CAS 2007/A/1290 Diethart v. IOC.
15. See CAS 2016/A/4708 Belarus Canoe Association & al. v. ICF.

16. See e.g. the decisions by the International Canoe Federation issued on 31 March 2017 closing disciplinary procedures against nine Russian canoeists, who were named in the McLaren Report, even though three of them had been barred from competing at the Rio Olympic Games based on evidence from the McLaren Report.
17. See e.g. CAS 2017/O/5039 IAAF v. RUSAF & Pyatykh where the athlete was sanctioned on the basis of information from the McLaren Report supported by abnormal T/E ratio in urine samples.