

Kluwer Arbitration Blog

Anti-Doping Lessons from Tokyo 2020: Liability of Athletes for Signatory Actions

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Hidden behind the glamour and grandeur of major sporting events such as the Olympics is the way the sport comes to terms with various aspects of the law. The Court of Arbitration for Sport (CAS), or the *Tribunal Arbitral Du Sport (TAS)*, based in Lausanne, is at the apex of a now complex pyramid of national and international arbitral bodies that enforce swift and efficient decisions to the disputes that arise in sports. Amongst others, doping in sports, now harmonised by the World Anti-Doping Agency (WADA) through the [World Anti-Doping Code \(WADC\)](#), is the most common dispute that arises out of sporting events today. Until 2019, the Appeal Arbitration Division of CAS adjudicated upon appeals from WADA with respect to the anti-doping cases. However, in 2019, deriving power from the signatories of the WADC such as the International Olympic Committee and International Sports Federations (IFs) with Olympic Recognition, CAS set up the Anti-Doping Division of the Court of Arbitration for Sports (CAS ADD) to hear and decide anti-doping cases as a first-instance authority. While the CAS ADD Arbitration Rules apply to the procedural aspect of the arbitration, the WADC Anti-Doping Rules continue to be the substantive law governing the dispute.

Against this backdrop, the recently concluded Tokyo Olympics 2020 offer a lot to write in the history books. Alongside the record-shattering performances and unprecedented obstacles presented by COVID-19, was the participation of Russian athletes under the acronym 'ROC', short for Russian Olympic Committee, despite their ban from participation in major sporting events by WADA and CAS as a result of an infamous doping scandal by the Russian Anti-Doping Agency (RUSADA). This raised a plethora of questions regarding the integrity of sports and the authority of arbitral bodies such as WADA and CAS over sporting events.

Thus, the following post sets to dive deep into the decision of CAS in [2020/0/6689 World Anti-Doping Agency v Russian Anti-Doping Agency](#) (WADA v RUSADA), and the sanction mechanism in anti-doping cases apropos the WADC. It is caveated that this case was before the establishment of CAS ADD. Thus, the altered independent regime of CAS ADD is taken into consideration while suggesting steps that CAS may take to course-correct anti-doping infractions going forward.

I. World Anti-Doping Agency v. Russian Anti-Doping Agency

The factual background behind the arbitral award delivered by CAS in *WADA v RUSADA*, which

led to Russia's ban from all sporting events, including the Olympics commences with the closing of the Sochi Olympics in 2014.

After the conclusion of the 2014 Olympics, a German television channel broadcast a documentary that exposed sophisticated systemic doping practices within the All-Russia Athletics Federation, the governing body for athletics in Russia. Subsequently, an independent commission set up by WADA confirmed the involvement of RUSADA and the Moscow Anti-Doping Laboratory, the only WADA accredited laboratory in Russia, in the doping practices. WADA, thus, declared RUSADA non-compliant and suspended the accreditation of the Moscow Anti-Doping Laboratory under the WADC. In 2017, attempts were made to reinstate RUSADA as a code-compliant signatory of WADA, in response to which RUSADA repeatedly failed to fulfil the data/samples requirement. It was also later revealed that these samples were altered by the Moscow Laboratory. All this prompted WADA, in 2019, to finally deem RUSADA as non-compliant and banned Russia for a period of four years in all forms of engagements or affiliations to sporting events across the globe. RUSADA appealed the decision of WADA before CAS, which limited its adjudication to the disputed issue of RUSADA's non-compliance of the delivery of authentic data from the Moscow Laboratory to WADA, a requirement under the [International Standard for Code Compliance by Signatories \(ISCCS\)](#) of WADA.

CAS found RUSADA to be non-compliant with the WADC. It reduced the ban period from four years to two years and allowed Russian athletes to participate in sporting events if the name 'Russia', its anthem, and the flag are not used by the athlete. However, the scope of scrutiny by CAS in this case, as was the scope of inquiry of WADA previously, albeit voluminous – spanning over 48,000 pages of submissions by all parties and interveners – was restricted to the determination of whether RUSADA complied with its obligations under ISCCS. While an alternative affirmation of actual doping of Russian athletes via an elaborate state-sponsored scheme backed by data as per the ISCCS norms would have, with certainty, meant that Russian athletes have used prohibited substances, such a conclusion would have yielded a different outcome for the athletes. The Russian State's recalcitrance to reveal data, in a way, protected the athletes who perhaps failed to abide by the WADC. The next section thus explores the strict liability of an athlete under the WADC, and ponders upon whether the same must be revised, synchronous with the relationship of signatories and athletes under the ISCCS, to course-correct and protect the integrity of sports.

II. Revisiting the Rule of Strict Liability Under WADC Vis-À-Vis ISCCS – Consequences of State Action

The WADC adopts the rule of strict liability when it comes to anti-doping violations, the most common of which is the presence of prohibited substances found in the testing of an athlete's bodily specimen. The doctrine holds that an athlete is strictly liable for the presence of a prohibited substance irrespective of whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. This onerous burden on an athlete is justified by the school of thought that the winner of a gold medal who has a prohibited substance in his body has put the other clean athletes at a disadvantage regardless of the intention of the athlete and that genuine cases of mistake or no-fault would be anyway exempted from a sanction under Article 10 of the WADC. The seminal CAS award of *94/129 USA shooting & Quigley v UIT (Quigley)*, was a landmark on strict liability which came at a time when there was widespread upheaval against this

pure strict liability regime. In this case, CAS modified the strict liability with a rebuttable presumption of fault on behalf of the athlete which was interpreted to be concomitant with the [sanction provisions of the WADC](#) under Article 9 (automatic disqualification of individual results); Article 7.5 (provisional suspension based on A-sample adverse analytical finding), and Article 10.2 (two-year period of ineligibility on the confirmation, A and B sample, of adverse analytical finding).

Turning to the findings of CAS in *WADA v RUSADA* which was entirely based on the signatory non-compliance under Article 7 of ISCSS, the sanction, particularly concerning the relaxation given to the Russian athletes as ‘neutral athletes’, is disconcerting. The WADA ecosystem is an advanced and harmonised system, with its signatories, along with the athletes, coming under the same umbrella. As evidenced by ISCSS Articles 9 and 10, there *prima facie* exists a close connection between the athletes and the signatory. Article 1 sets out the scope of ISCSS:

...if a Signatory fails to correct the Non-Conformities, the process to be followed to get CAS to hear and determine an allegation of non-compliance and to determine the Signatory Consequences of such non-compliance. This process mirrors, insofar as is appropriate and practicable, the process followed in determining Code non-compliance and the Consequences of such non-compliance for Athletes and other Persons...

Further, Article 10.2.6 of ISCSS envisages the possibility of athletes’ participation in sporting events as ‘neutral athletes’ through the application for special eligibility, and that there must be evidence that the suspended signatory’s failure to enforce ISCSS did not affect the athlete in any way. In this context, [CAS 2016/O/4684 ROC et al v IAAF](#) held:

the Athlete had to show that he or she had been subject to fully compliant Testing both in and out of competition that was equivalent in quality to the Testing to which his or her competitors in the international competition(s) in question were subject in the relevant period

A closer look at Article 10.2.6 reveals that the standard is similar to the rebuttable presumption of fault standard of modified strict liability held by *Quigley*. The argument that the athletes bore the burden to prove *bona fide* in cases of a direct anti-doping violation under Article 2 of the WADC or, in case of signatory non-compliance under Article 10.2.6, uncovers an unexplored aspect of strict liability of athlete under ISCSS owing to a fault of the signatory. This proposed renewed position of strict liability under ISCSS, exasperated by the close relationship of athletes with the signatories of WADA, is justified for two reasons. First is the possibility of recalcitrant signatories taking the fall for the athletes under ISCSS, allowing the athletes to participate as ‘neutral athletes’. Second and more importantly, CAS’s lack of scrutiny into the standard for allowing an athlete as neutral under Article 11.2.6 of ISCSS, in *WADA v RUSADA*, would change with the establishment of CAS ADD. With a permanent division to specifically deal with anti-doping at first instance, due attention can be paid to an athlete’s defence under the renewed strict liability. In this new regime, parallel application of the WADC and ISCSS in a CAS ADD arbitration as substantive law would certainly arrest the consequences of signatory backed doping violations.

III. Conclusion

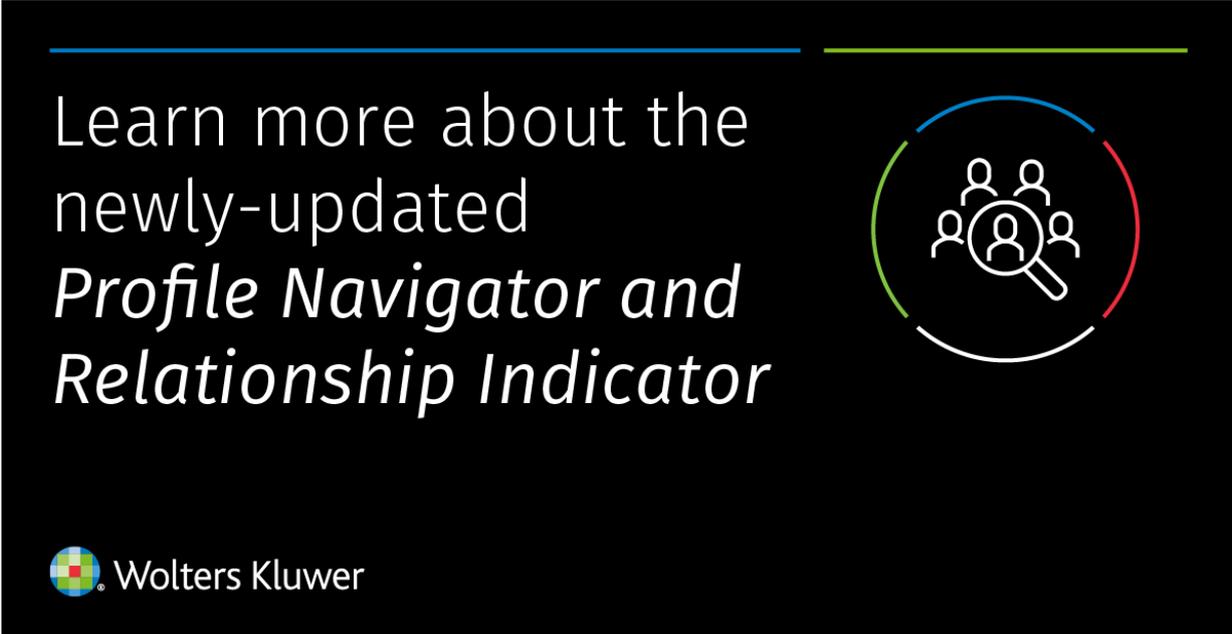
WADA envisions a world that values and fosters doping-free sports so as to protect the integrity of sports. The introduction of CAS ADD in 2019, distracted unfortunately by COVID in 2020, is a positive step in the right direction. If Russia's indirect participation in Tokyo 2020 is any lesson, the emphasis must be on signatory-athlete relations and compliance with WADA standards. The renewed strict liability protects the genuine innocence of athletes akin to the protection offered by the *Quigley* modified principle of strict liability under the WADC. What could otherwise have been a precedent for CAS in *WADA v RUSADA*, must now be realised either through an amendment to the WADC/ISCSS, or CAS must wait with bated breath for another opportunity to reconsider this principle. As much as CAS lost the opportunity to revisit the principle of strict liability of athlete in *WADA v RUSADA*, it is hoped that the establishment of CAS ADD, with a receding COVID pandemic, rise in online hearings and a shift of focus back on prevention of anti-doping violations, together with a watertight renewed strict liability principle will streamline the analysis of future anti-doping infractions, ultimately protecting the integrity of sports.

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