

Kluwer Arbitration Blog

Russian Rio 2016 Saga: Lex Sportiva in Action

Ilya Kokorin (Buzko & Partners) · Friday, September 2nd, 2016

No other sport event has attracted as much attention recently as the 2016 Summer Olympics in Rio (Rio 2016). Due to the international scale, high stakes involved, close emotional attachments as well as the increased publicity, Rio 2016 came under close scrutiny from all kinds of stakeholders. Just like in old times (remember boycotts of the Moscow Games of 1980 and the Los Angeles Games of 1984), issues of political involvement and the role of politics in sport have risen to the surface and were fiercely debated, at least in Russia.

Background

On 18 July 2016 Professor Richard H. McLaren presented his [Independent Report](#) to the World Anti-Doping Agency (WADA), finding the Russian state manipulation of the doping control process during the Sochi Olympics of 2014. Based on this report, WADA has recommended the International Olympic Committee (IOC) and the International Paralympic Committee (IPC) to consider declining entries of all Russian athletes for Rio 2016.

The IOC faced calls from the anti-doping community to ban all the Russian Olympic Committee (ROC) and its athletes of any sport from competing at Rio 2016. The IOC decided not to do so. On 24 July 2016 it announced its [decision](#) (IOC decision) effectively imposing collective responsibility on all Russian athletes, thus depriving them of the presumption of innocence. On the other hand, the IOC affirmed the application of the rules of natural justice so that each affected athlete could rebut the applicability of collective responsibility by satisfying rigorous criteria prescribed by the decision at hand and further clarified by the respective international federations.

It came as no surprise that such strict (for some “nuanced”) rule attracted strong criticism from Russian officials and athletes, who trained so hard to participate in the Olympics and were hit just in the weeks before the opening of Rio 2016. Anyway, it is not the purpose of this article to discuss political background or political implication of the IOC decision, but rather analyze a legal aspect of the story, as the sport organ decision had to withstand a close up look from the Court of Arbitration for Sport (CAS), which, according to Rule 61 of the Olympic Charter, has the exclusive authority to consider any disputes arising in connection with the Olympic Games.

CAS Flooded with Russian Applications

According to the CAS, in total 28 applications were registered by the CAS *ad hoc* Division, amounting to a new record of cases for one edition of the Olympic Games (previous record was 15 cases in Sydney 2000). Out of these 28 applications, 16 related to the status/eligibility of Russian

athletes. This was logical, taking into account the fact that the CAS remained the last chance (*ultima ratio*) for Russian athletes to participate in Rio 2016.

Before turning to the awards rendered as a result of the above applications, it seems logical first to give a general overview of some peculiar characteristics and principles of sport and CAS arbitration. It has been noted that in “CAS jurisprudence there is no principle of binding precedent, or *stare decisis*” (*CAS 2004/A/628 dated 28 June 2004*). At the same time, the CAS tries to follow its case law, developing the so called *lex sportiva*, distinct universal principles of sports law. Such principles include, *inter alia*, the right to be heard, procedural fairness, proportionality and legitimate expectation.

Another important aspect of CAS jurisprudence is that it allows a wide discretion or significant degree of deference to international sports governing bodies in eligibility determinations. Accepting the existence of a duty of confidence between an individual athlete and a federation, the CAS limits such duty to the avoidance of acting in bad faith, that is “acting in a completely arbitrary, blatantly, unsustainably, unreasonably or abusively manner” (*CAS 95/142 dated 14 February 1996*). From such wording, it is clear that the bar for sports bodies is set rather low, thus allowing sports federations considerable leeway in dealing with their member athletes.

Despite the fact that collective responsibility may raise justified concerns from a bystander’s perspective – it naturally feels unfair to be punished for wrongdoing of others, it does not necessarily contravene the cited *lex sportiva* (take, for example, team punishment cases). Keeping in mind a wide margin of discretion attributed to sports bodies, the CAS generally decided not to interfere with the IOC decision on Russian athletes. When considering the balance struck in it, the CAS noted that it had no doubts that the IOC “acted in good faith and with the best intentions” (*CAS OG 16/12 dated 6 August 2016*). It also took into account extraordinary circumstances in which the IOC had to deliver its position.

However, not everything in the disputed IOC decision was held to be in line with the CAS jurisprudence. In particular, the provision effectively imposing a bar on all Russian athletes ever sanctioned for doping, even if he or she has served the sanction (Rule 3), was characterized as an additional sanction, violating a person’s right of natural justice, being the very right emphasized in the IOC decision itself (*CAS OG 16/13 dated 4 August 2016*). It constituted a simple, unqualified and absolute criterion, that could not be reconciled with the given opportunity to rebut the applicability of collective responsibility. Were it not for the IOC to expressly and voluntarily guarantee such a right, it is not clear whether the CAS would have reached the same conclusion. And the reason for that would once again be the acknowledgement that sporting bodies should be reasonably free to conduct their affairs as they consider right.

Nevertheless, the unenforceability of Rule 3, as recognized by the CAS, did not suffice to give a green light to Russian athletes wishing to compete in Rio 2016, as they were still required to satisfy other criteria. For instance, pursuant to the IOC decision, the World Rowing Federation (FISA) accepted only those Russian rowers who had undergone a minimum of three anti-doping tests analyzed by a WADA accredited laboratory other than the Moscow laboratory from 1 January 2015 for an 18-month period. Apparently, many of them could not possibly satisfy such a condition as it did not exist before the doping scandal broke out in 2016. Russian athletes claimed that the FISA requirement constituted a breach of *venire contra factum proprium* doctrine (similar to the doctrine of estoppel) as the qualification process was changed with retrospective effect. The CAS panel disagreed, reasoning that the cited doctrine referred to rules and regulations whereas the

FISA's approach concerned taking of evidence, i.e. assessing the testing record of the respective athletes (*CAS OG 16/11 dated 5 August 2016*). With all respect, I cannot agree with such interpretation. In my opinion, under the color of the IOC mandate, a new ex-post eligibility criterion was introduced through the back door, the criterion adopted so late in time as to make it almost impossible to meet. After all, in the words of the CAS itself, "regulations that may affect the careers of dedicated athletes must be predictable" (*CAS 94/129 dated 23 May 1995*).

Rio 2016, Story Continues

As Rio 2016 went to an end with the Russian national team finishing fourth, a new chapter began. On 7 August 2016, the International Paralympic Committee (IPC) issued its [decision](#) suspending the Russian Paralympic Committee (RPC) "due to its inability to fulfil its IPC membership responsibilities and obligations, in particular its obligation to comply with the IPC Anti-Doping Code and the World Anti-Doping Code." Unlike the stance of the IOC, the IPC decision contained a blanket ban, precluding the RPC from entering its athletes to the Rio 2016 Paralympic Games.

The RPC challenged the IPC decision in the CAS, which [dismissed](#) its appeal on 23 August 2016 finding no violation of any procedural rules and considering it proportionate under the circumstances. As noted by the CAS panel, when deciding the case, it did not determine the existence of, or the extent of, any natural justice rights or personality rights afforded to individual athletes following the suspension of the RPC. At the same time the panel pointed out that the collective member (RPC) could not hide behind those individuals it represents. We will see how the sports law principles of natural justice, proportionality, fairness and legitimate expectation will play out in individual cases of Russian para-athletes, should they decide to appeal. One way or another, it feels that Russian Rio 2016 saga is not over yet.

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