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The CAS landmark decisions of 1 February 2018 and subsequent CAS rulings on the Russian winter sport “doping cases”

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Introduction

On 23 April 2018, the Court of Arbitration for Sport (hereinafter: “CAS”) published two long-awaited reasoned awards regarding their landmark decisions from 1 February 2018 in the matter of 39 Russian athletes (hereinafter: the “Sochi Appellants”) against the International Olympic Committee (hereinafter: “IOC”).² These 39 athletes challenged the decisions taken by the Disciplinary Commission of the International Olympic Committee (hereinafter: “IOC DC”) sentencing 43 Russian athletes to have committed anti-doping rule violations (hereinafter: “ADRV”) during the Olympic Winter Games in Sochi 2014 and banning them to participate in the 2018 Pyeongchang Winter Games. On 1 February 2018, the CAS upheld 28 appeals and partly upheld 11.³ This decision came merely a week before the opening ceremony of the 2018 Pyeongchang Olympic Winter Games. However, the CAS did not decide on each athlete’s individual right to participate in the 2018 Winter Games on subsequent rulings on 9 February 2018.

The two now published extensively reasoned decisions by the CAS include “high-profile cases”; one being Aleksandr Zubkov, a now retired Russian bobsledder and flag bearer of Russia for the opening ceremony at the Sochi 2014 Winter Games, and the other Alexander Legkov, gold medal winner of the 50 km cross-country skiing freestyle competition in Sochi.

In the case of Aleksandr Zubkov⁴, the appeal was partly upheld but an ADRV was established before the CAS, whilst in the case of Alexander Legkov⁵ no ADRV was established. Both of these awards contain around 160 pages and expose all facts and evidence presented before the CAS arbitration process in great detail. In both of these awards, the panel extensively deals with the applicable standard of proof which will be discussed in more detail below.

Earlier, on 5 December 2017, the IOC Executive Board (hereinafter: “IOC EB”) suspended the Russian Olympic Committee (hereinafter: “ROC”) following the findings on the systematic manipulation of the anti-doping system in Russia with immediate effect and established a two-stage process to allow “clean” Russian athletes to compete at the Olympic Winter Games in Pyeongchang under the Olympic flag as “Olympic Athletes from Russia” (hereinafter: “OAR”) notwithstanding the suspension of the ROC.⁶

Background facts

Between 7 and 23 February 2014, the XXII Olympic Winter Games took place in Sochi, Russia, where the Russian national team achieved a huge success: Russian athletes ended up first in the overall medal table and won a grand total of 33 medals including 13 gold medals. This represented a massive improvement from the national team’s performance in the previous Olympic Winter Games in Vancouver in 2010, where Russia finished only eleventh in the medal table. Each of the athletes affected by the “landmark decisions” of 1 February 2018 competed at the Sochi Olympic Winter Games and provided urine samples as part of the mandatory doping checks carried out during the Sochi 2014 Games. None of these athletes were tested positive for the presence of any prohibited substances.

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² See CAS Media Release at http://www.tas-cas.org/fileadmin/user_upload/Media_Release__reasoned_awards_RUS_IOC__FINAL...pdf (accessed on 30 May 2018).

³ See CAS Media Release at http://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf (accessed on 30 May 2018).

⁴ CAS 2017/A/5422. The reasoned award can be found at http://www.tas-cas.org/fileadmin/user_upload/Award__5422__internet.pdf (accessed on 30 May 2018).

⁵ CAS 2017/A/5379. The reasoned award can be found at http://www.tas-cas.org/fileadmin/user_upload/Award__5379__internet.pdf (accessed on 30 May 2018).

⁶ <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/Decision-of-the-IOC-Executive-Board-05-12-2017.pdf> (accessed on 30 May 2018).

Later the same year, on 3 December 2014, the German television channel ARD aired a TV documentary *Top Secret Doping: How Russia makes its Winners*.⁷ The documentary alleged the existence of a sophisticated, extensive and well-established secret system of state-sponsored doping within the governing body for the sport of athletics, the All-Russia Athletics Federation, and claimed Russian athletes, coaches, national and international sport federations, the Russian Anti-Doping Agency and the Moscow WADA-accredited laboratory to be part of the system.

In direct response to the broadcast, the World Anti-Doping Agency (hereinafter: "WADA") created an Independent Commission to conduct an investigation into, among other things, doping practises and corrupt practices around sample collection and results management as well as the ineffective administration of anti-doping processes in Russia and the accredited laboratory based in Moscow (hereinafter: "Moscow laboratory") and the Russian Anti-Doping Agency. On 9 November 2015, the Independent Commission reported that it had identified systemic failures within Russia that prevented or diminished the possibility of an effective anti-doping program and recommended that WADA withdraw its accreditation of the Moscow laboratory.⁸ The accreditation was withdrawn and to date, the Moscow laboratory has not been reinstated.

On 8 May 2016, the American CBS newsmagazine *60 Minutes* aired a story alleging doping during the 2014 Olympic Winter Games in Sochi. Based on interviews with Dr. Grigory Rodchenkov, former head of the Moscow laboratory, the *New York Times* published the article "Russian Insider Says State-Run Doping Fueled Olympic Gold" regarding doping at the 2014 Olympic Winter Games in Sochi on 12 May 2016.⁹ As a consequence of these newest revelations, WADA appointed Professor Richard McLaren (hereinafter: "Prof. McLaren") to conduct an independent investigation into the allegations made by Dr. Rodchenkov. After fearing for his life, Dr. Rodchenkov fled Russia to the U.S.A. in 2015 and made a series of widely publicised allegations concerning the existence of a sophisticated doping scheme before, during and even after the 2014 Sochi Olympic Winter Games. Dr. Rodchenkov is in a witness protection program in the U.S.A. and testified from a secret location.

On 16 July 2016, Prof. McLaren issued the first part of his report (McLaren Report #1). He found evidence of systematic, state-sponsored manipulation of the doping control process that occurred before the 2014 Olympic Winter Games in Sochi and leading up to the 2016 Olympic Summer

Games in Rio de Janeiro.¹⁰ The second part of the McLaren Report (McLaren Report #2) was published on 9 December 2016 and confirmed the existence of an institutional conspiracy across summer and winter sports and identified athletes who participated with Russian officials within the Ministry of Sport and its infrastructure for the purposes of manipulating doping controls. Prof. McLaren concluded that the athletes were not acting individually but within the organized infrastructure. He identified over 1000 Russian athletes competing in summer, winter and Paralympic sport as being involved in or benefitting from manipulations to conceal positive doping tests.¹¹

To bring ADRV-cases against individual athletes, the IOC established two disciplinary commissions.

- The first, chaired by Samuel Schmid, former President of Switzerland (hereinafter: "The Schmid Commission") confirmed the involvement of government officials in, among other things, cheating in the reporting mechanism in the Anti-Doping Administration & Management System (ADAMS), creating false biological profiles and tampering with urine samples by swapping "dirty" urine with "clean" urine. The Commission recommended the IOC to take appropriate measures to effectively sanction the existence of a systemic manipulation of the anti-doping rules and system in Russia while protecting the rights of the individual Russian clean athletes.¹²
- The second commission, chaired by IOC member Professor Denis Oswald, was responsible for investigating ADRVs committed by individual Russian athletes who participated at the 2014 Olympic Winter Games in Sochi. The Oswald Commission (or: the IOC DC) re-analysed all of the samples collected from Russian athletes at the 2014 Olympic Winter Games in Sochi that were available to the IOC. In late 2016 and in 2017, the IOC DC initiated formal disciplinary proceedings against a number of Russian athletes, alleging that those athletes "*knowingly and actively engaged in an elaborate state-orchestrated doping and cover-up scheme*" at the Sochi Games.

In November and December 2017, the IOC DC delivered its final decisions containing findings that several Russian athletes committed ADRVs "solely through their alleged participation in such a scheme but with no proof of individual actions of omissions of the Athletes". The IOC DC retrospectively disqualified each of those athletes from the relevant events they had participated in at the Sochi

7 <http://www.ardmediathek.de/tv/Sportschau/Geheimsache-Doping-Wie-Russland-seine-/Das-Erste/Video?bcastId=53524&documentId=39633380> (accessed on 30 May 2018; accessible only from Germany for legal reasons).

8 <https://www.wada-ama.org/en/resources/world-anti-doping-program/independent-commission-report-1> (accessed on 30 May 2018).

9 <https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html> (accessed on 30 May 2018).

10 https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf (accessed on 30 April 2018).

11 https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf (accessed on 30 April 2018).

12 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/IOC-Disciplinary-Commission-Schmid-Report.pdf> (accessed on 30 April 2018).

Games and declared each athlete ineligible to participate in any future editions of the Games of the Olympiad or the Olympic Winter Games. Among those, 39 athletes have appealed (the “Sochi-Appellants”) against the Decision of the IOC DC before the CAS. As noted in the introduction, the CAS decided on these cases on 1 February 2018 (“the landmark decisions”). Furthermore, as also noted, the IOC EB suspended the Russian Olympic Committee following the above findings of the Schmid Commission and established a two stage process to allow “clean” Russian athletes to compete at the Olympic Winter Games in Pyeongchang under the Olympic flag as “Olympic Athletes from Russia” upon invitation of the IOC. Against these “invitation criteria”, 47 athletes and coaches have appealed before the CAS ad hoc division. All of these appeals were dismissed as a whole on 9 February 2018, exactly the day the opening ceremony was held, by the Ad Hoc Division of the CAS at the site of the Winter Games in Pyeongchang.¹³

The CAS decisions of 1 February 2018 by the example of the “Legkov case”¹⁴

This appeal was upheld by the CAS on 1 February 2018. In the following, the key aspects of the now extensively reasoned decision are briefly illuminated hereinafter.

Regarding the standard of proof, the Panel carefully addresses the relevant provision in the World Anti-Doping Code (WADC). Art. 3.1 reads as follows:

*“The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to **the comfortable satisfaction** of the hearing panel, bearing in mind **the seriousness of the allegation** which is made. This standard of proof in all cases is **greater than a mere balance of probability but less than proof beyond a reasonable doubt**. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.”* (emphasis by the authors)

The Panel then expressly states that it “has to bear in mind the seriousness of the allegation which is made” and that the test of comfortable satisfaction “must take into account the circumstances of the case”.¹⁵

The IOC DC found that “a wide-ranging and orchestrated scheme of doping and concealment of positive doping tests” was conducted during the Sochi 2014 Olympic Winter Games. On the basis of that finding, the IOC DC then went on to conclude that the athlete had personally committed various ADRV’s, namely:

- violations of art. 2.2¹⁶ of the WADC in the form of using a prohibited substance, i.e. the Duchess Cocktail, and using a prohibited method, i.e. urine substitution;
- a violation of art. 2.5¹⁷ of the WADC, viz. tampering with any part of the doping control; and
- a violation of art. 2.8 of the WADC, viz. cover-up of and complicity in the commission of an ADRV.

Before assessing these alleged ADRVs separately and in detail, the Panel noted that the IOC DC was comfortably satisfied that a sample-swapping scheme existed during the 2014 Sochi Winter Games and, on the basis of that finding, concluded that “it was not possible that the athletes were not fully implicated” and that “the scheme could not work without the personal implication of the athletes”. The IOC DC then went on to conclude that the athlete “was a participant in, and a beneficiary of, the cover-up scheme”. The Panel, however, stated that the IOC DC did not clearly explain how particular acts and omissions gave rise to particular ADRV findings.¹⁸

This IOC DC finding is followed by the Panel’s own careful approach. It considers that:

*“in the circumstances of this case, **individual actions or omissions by the Athlete must be established to its comfortable satisfaction in order to find him guilty of a specific ADRV**”.*

The Panel does not – in complete contrast to the IOC –:

*“consider it possible to conclude that the existence of a general doping and cover-up scheme **automatically and inexorably leads to a conclusion that the Athlete committed the ADRVs alleged by the IOC DC**”.*

The Panel further states that it must instead:

“carefully consider the ingredients of liability under each of the relevant provisions of the WADC that the Athlete is alleged to have contravened”.

Moreover, the Panel:

“must then consider whether the totality of the evidence presented before the Panel enables it to conclude, to the requisite standard of comfortable satisfaction, that the Athlete personally committed the specific acts

¹³ See CAS, Media Release 9 on http://www.tas-cas.org/fileadmin/user_upload/Media_Release_AHD9_DecisionOG18_o2_o3.pdf (accessed on 30 May 2018).

¹⁴ *Alexander Legkov v. IOC*; CAS 2017/A/5379.

¹⁵ CAS 2017/A/5379 *Alexander Legkov v. IOC* – p. 127 (accessible at http://www.tas-cas.org/fileadmin/user_upload/Award_5379_internet.pdf (accessed on 30 May 2018).

¹⁶ Art. 2.2 WADC: “Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method”.

¹⁷ Art. 2.5 WADC: “Tampering or Attempted Tampering with any part of Doping Control”.

¹⁸ CAS 2017/A/5379 *Alexander Legkov v. IOC* – p. 131, par. 726 (available at http://www.tas-cas.org/fileadmin/user_upload/Award_5379_internet.pdf (accessed on 30 May 2018).

or omissions necessary to constitute an ADRV under each of those separate provisions of the WADC”.¹⁹

The Panel then proceeded to examine in detail whether or not the elements of each of the relevant ADRVs existed in the present case. The Panel, under each of the relevant ADRV allegations, and finally, concluded that it is not comfortably satisfied that the athlete committed an ADRV under art. 2.2, 2.5 or 2.8 of the WADC.²⁰ Therefore, no sanction was applied in the athlete’s case and the findings and sanctions imposed against the athlete by the IOC DC were set aside. All individual results earned by the athlete upon the occasion of the Sochi Games were reinstated.

The “CAS Ad Hoc Division decisions” of 9 February 2018²¹

On 5 December 2017, the Russian Olympic Committee was suspended with immediate effect after the findings and upon respective recommendation of the Schmid Commission (see above). Once suspended, the ROC no longer had formally any right to enter athletes and support staff into the Olympic Games. It is, to begin with, noteworthy that the ability of the IOC to suspend the ROC was not challenged.

The IOC nevertheless chose to offer individual, “clean” Russian athletes, the opportunity to participate in the 2018 Pyeongchang Winter Games and established a two-stage process to allow Russian athletes to compete in Pyeongchang under the Olympic flag as “Olympic Athletes from Russia (OAR)”: The first step was to install an independent panel (the Invitation Review Panel (hereinafter: “IRP”)) which had to determine the “invitation list” of athletes at its absolute discretion. This panel shall be guided in its decisions by certain principles.²² The IRP then submitted the list the IOC’s Olympic Athlete from Russia Implementation Group (hereinafter: “OAR IG”), to determine which athletes would be issued an invitation from the initial invitation list. In the course of that process, on 1 February 2018, two CAS panels issued several awards²³ (the CAS “landmark decisions”) which – although no reasons were given at that moment – reportedly concluded that there was not sufficient evidence that the respective athletes had committed ADRVs. In response to these decisions, a number of athletes and coaches filed an application to be invited to the 2018 Pyeongchang Winter Games which was declined on 5 February 2018.

19 CAS 2017/A/5379 *Alexander Legkov v. IOC* – p. 131, par. 727 (available at http://www.tas-cas.org/fileadmin/user_upload/Award__5379__internet.pdf (accessed on 30 May 2018)).

20 CAS 2017/A/5379 *Alexander Legkov v. IOC* – p. 131-151 par. 729-861 (available at http://www.tas-cas.org/fileadmin/user_upload/Award__5379__internet.pdf (accessed on 30 May 2018)).

21 The reasoned decisions in the CAS OG 18/02 and CAS OG 18/03 cases can be found on the CAS website under recent decisions: <http://www.tas-cas.org/en/jurisprudence/recent-decisions.html> (accessed on 30 May 2018).

22 See footnote 6 above.

23 See footnote 3 above.

On 6 and 7 February 2018, in total 47 Russian athletes and coaches challenged this decision refusing to invite them to participate in the 2018 Pyeongchang Olympic Winter Games and requested the CAS Ad Hoc Division to overturn the IOC decision of “non-invitation”. The proceedings were conducted on site at the Games in Pyeongchang before the CAS Ad Hoc Division on an expedited basis. The hearing of both cases concerned (CAS OG 18/02 by 32 Russian athletes and CAS OG 18/03 by 15 Russian athletes and coaches) was held together as the arguments raised by all 47 applicants were in a large part similar. The Panel was faced with the mere question and applicants’ key argument: was the IOC established invitation process a sanction?

In the Panel’s view, the process established by the IOC to invite Russian athletes and support staff as OAR cannot be described as a sanction, but rather, “it is more properly characterized as an eligibility decision”. With this process to provide individual athletes and staff with the opportunity to be invited to participate, the IOC did not deprive the applicants of any “right” they may have had to participate, according to the CAS Ad Hoc Panel.²⁴ Furthermore, the Panel refers to art. 44 par. 3 of the Olympic Charter:

“Any entry is subject to acceptance by the IOC, which may, at its discretion, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games.”

After the suspension of the ROC and the process initiated by the IOC to determine which athletes would be offered an invitation, which was left to the full discretion of the IRP and the OAR IG, no Russian athlete could, under normal circumstances, be entered into the Games. The latter process in the basis of an invitation was designed to balance the IOC’s interest in the global fight against doping and the interests of individual athletes from Russia.

The Panel further concluded that there is no evidence that the IRP and the OAR IG acted in an arbitrary, unfair or unreasonable manner and noted that almost 80% of the athletes put forward for invitation by the ROC were accepted by the IRP and the OAR IG. That a number of athletes failed to meet the criteria suggests that there was some evidence that there were suspicions they were implicated in, or protected by, the Russian doping scheme notwithstanding the CAS decisions of 1 February 2018.²⁵

The panel then acknowledged that:

“It may be that non-sanctioned individual athletes, including the Applicants, are prevented from participating in the Olympic Winter Games simply because they are citizens

24 CAS OG 18/03 *Alexander Legkov et al. V. IOC*, p. 10, par. 7.4 (available at http://www.tas-cas.org/fileadmin/user_upload/Award_OG_18-03.pdf, accessed on 30 May 2018).

25 CAS OG 18/03 *Alexander Legkov et al. V. IOC*, p. 12, para. 7.16 - 7.17 (accessible at http://www.tas-cas.org/fileadmin/user_upload/Award_OG_18-03.pdf, accessed on 30 April 2018).

*of a country that has been found to have engaged in a systematic manipulation of the anti-doping rules. However, in the light of the IOC's overall objective to balance the interests of clean athletes and the fight against doping against the interests of individual Russian athletes, the Panel concludes that any unfairness was a consequential effect of the suspension of the ROC and that the process was neither discriminatory nor unfair [...].*²⁶ (emphasis by the authors)

Criticism of the independence of the CAS Ad Hoc Panel and its decisions of 9 February 2018

In general, the independence of the CAS itself has been upheld in a series of decisions by the Swiss Supreme Court since its landmark decision "Lazutina" of 2003.²⁷ The Swiss Supreme Court held on that occasion that the CAS in essence is sufficiently independent from the IOC as well as any other party using its services and that CAS awards are to be considered as genuine decisions, comparable to those of state courts. This judgement has been confirmed repeatedly by the Swiss Supreme Court,²⁸ most recently in its decision of 20 February 2018²⁹ where it held that the CAS is sufficiently independent from the FIFA despite its annual contribution of CHF 1.5 million to the CAS. Whereas these previous cases since 2003 were primarily focused on the closed list of arbitrators and the predominant position of the international federations and the role of international institutions in promoting arbitrators to such closed list, this most recent case focuses on the alleged financial dependence of CAS on FIFA (and the IOC!). From this decision, we learn that FIFA contributes CHF 1.5 million to the CAS' total budget of CHF 16 million, whereas the IOC contributes as much as CHF 7.5 million, which represents 47% of the total budget of the CAS. Certainly, these are interesting facts; however, the Swiss Supreme Court reaffirmed the independence of the CAS despite these fundamental financial contributions. And, for all clean Russian athletes not admitted to the 2018 Olympic Winter Games, this definitely means little comfort.

More interesting in this context is the fact that the independence of the CAS Ad Hoc Panel has apparently never been challenged before the Swiss Supreme Court up to the present day. For this purpose, it is quite interesting to learn how the CAS Ad Hoc Division arbitrators are selected for these ad hoc proceedings such as those on 9 February 2018 at the Games in Pyeongchang: according to art. 2 of the Arbitration Rules applicable to the CAS Ad Hoc Division for the Olympic Games³⁰, the Ad Hoc Division

consists of arbitrators on a "special list". Art. 3 of these rules states that the ICAS, acting through its Board, shall draw up the "special list of arbitrators" referred to in art. 2. This "special list" consists only of arbitrators who appear on the CAS general list of arbitrators³¹ and who are present at the Olympic Games (par. 2 of art. 3). From the official Pyeongchang 2018 Games website, we learn that Michael Lenard, vice president of the ICAS and CAS board member, was acting as the Ad Hoc Division's president, and South Korean lawyer Park Jin-won was one of nine arbitrators present at the Games.³² There are no further names, rules or information mentioned on how this list is compiled. What we do know, however, is that all these arbitrators are present at the Olympic Games (see above). What means to be present in this context? There is reason to believe that these present arbitrators are invited by the IOC to the Games including two accompanying persons and all equipped with an all access pass; such package is not sold on the free market and has therefore to be qualified as "priceless". However, there is no evidence for this, but certainly such arbitrator will not rule against the IOC without good necessity. The circumstances of the selection of these arbitrators for the "special list" and the above suspicions alone do strongly question the independence of the arbitrators on the "special list" for the Ad Hoc Panel at the Olympic Games. Therefore, a ruling by the Swiss Federal Court on this question in particular is strongly awaited.

Regarding the decisions of 9 February 2018 on the merits, the Panel characterised the invitation process initiated by the IOC for "clean" Russian athletes an "eligibility decision" rather than a sanction and concluded that this invitation process did not deprive the applicants of any "right" they may have had to participate, also with reference made to art. 44 par. 3 of the Olympic Charter. Furthermore, in a balance of interests of the "fight against doping in the light of the IOC's overall objective" against the interests of individual Russian athletes to participate in the Games, the Panel concluded that any unfairness was a consequential effect of the suspension of the ROC. According to several provisions of Swiss civil law and previous landmark decisions, this reasoning must be qualified as at least controversial.

For most athletes, without doubt, a participation in Olympic Games signifies the highlight of their career. To be excluded from the Games without objective reason (e.g. obvious ADRV) may hence constitute a deprivation of several rights.

- First and most important, the right of personality according to art. 28 Swiss Civil Code may be infringed as the athletes are practically prevented from successfully practising their sport discipline (which is also their profession!) when not allowed to participate in the

²⁶ CAS OG 18/03 Alexander Legkov et al. V. IOC, p. 12, para. 7.18 (accessible at http://www.tas-cas.org/fileadmin/user_upload/Award_OG_18-03.pdf, accessed on 30 April 2018).

²⁷ BGE 129 III 445.

²⁸ See decisions 4P.149/2003; 4P.172/2006; 4A_548/2009; 4A_612/2009; 4A_640/2010; 4A_246/2011.

²⁹ Decision of 20 February 2018, BGE 4A_260/2017.

³⁰ See <http://www.tas-cas.org/en/arbitration/ad-hoc-division.html> (accessed on 30 May 2018).

³¹ This list can be seen at <http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html> (accessed on 30 May 2018).

³² <https://www.pyeongchang2018.com/en/news/top-sports-tribunal-to-set-up-temporary-offices-at-pyeongchang-winter-olympics#> (accessed on 30 May 2018).

Olympic Games. According to the Swiss Civil Code, athletes may claim for participation and for respective damages in case participation is unlawfully prevented. Such general exclusion of Russian athletes may also constitute a so called “boycott” on which the Swiss Federal Court rendered a landmark decision back in 1960³³ and which is not allowed in case a balance of interests results in an unlawful intervention in personal rights of the professionals. In the present case, this certainly may be quite a fair claim for athletes.

- Second, apart from personal rights of athletes, competition law can also be infringed as such law in general prohibits anticompetitive agreements. Such restrictions may be justified by the specificity of sport and for “legitimate business reasons”. These can be for example a restriction of the number of participants in a specific event and objective performance criteria. Regarding the decisions of 9 February 2018, it can be argued that the IOC has exploited its market-dominant (monopolistic!) position and has refused “clean” Russian athletes their participation in the Olympic Games without any legitimate business reasons, but only by a consideration of interests.
- Finally, in a landmark decision by the Swiss Federal Court dated 27 March 2012,³⁴ the question of “public policy” was widely discussed. According to art. 190 of the Swiss Federal Act on Private International Law (PILA), an appeal against an arbitral award is upheld in case a violation of public policy is found. In the referred decision, the Swiss Federal court held that such violation of public policy exists in case a sportsman was imposed an in terms of time and place virtually unlimited professional ban which violates art. 27 par. 2 of the Swiss Civil Code in terms of an excessive and therefore not permitted personal legal obligation. In the light of this decision it could be argued with good reasons the above personal rights of Russian athletes are violated by not being admitted to the Olympic Games in Pyeongchang.

To conclude, the CAS Ad Hoc Panel in its decisions of 9 February 2018 has not dealt with any of the above rights of athletes but has only weighted higher the fight against doping in the light of the IOC’s overall objective than the interests of individual “clean” Russian athletes. A challenge of these decisions would therefore have been highly desirable to learn how the Swiss Federal court deals with such justifiable arguments.

33 BGE 86 II 365 of 20 December 1960.

34 BGE 138 III 322 of 27 March 2012.

Conclusion

The extensively reasoned decisions regarding the cases of Aleksandr Zubkov and Alexander Legkov are greatly appreciated and demonstrate the seriousness and the competence of the CAS in general. In particular, the panel has extensively dealt with the applicable burden and standard of proof in these specific cases individually and concluded that, in the circumstances of these cases, individual actions or omissions by the athlete must be established to the Panel’s comfortable satisfaction in order to find him or her guilty of a specific ADRV. It is to be hoped that the Panel works in that manner with every single case, not only in so-called “high-profile cases” such as Aleksandr Zubkov and Alexander Legkov.

Moreover, the Panel did not consider it possible to conclude that the existence of a general doping and cover-up scheme, even if established, would inexorably lead to a conclusion that the athletes committed any of the alleged ADRVs. That was exactly what the IOC DC found. The Panel finally emphasised that it did not make a ruling on whether and to what extent the alleged doping scheme during the 2014 Sochi Olympic Winter Games existed and how it operated even though it recognises that there is significant evidence that such was in place.

However, it is deeply worrisome that the CAS Ad Hoc Division has prohibited the athletes on 9 February 2018 to participate at the Games in cases where no individual ADRV’s have been established and the invitation criteria have been fully met. Rather, the cases were not assessed individually but only as a whole. It is feared, unfortunately, that also personal entanglements within the IOC and the CAS³⁵ impeded any fair dealing with each athlete’s separate case and that the CAS Ad Hoc arbitrators present at the Olympic Games in Pyeongchang were not as independent as they should have been. Thus, it is simply bad luck for absolutely clean Russian athletes to be a citizen of a country that has been found to have engaged in a systematic manipulation of the anti-doping rules. Utterly contrary to the reasoning of the CAS Ad Hoc Division, this must be considered as discriminatory

35 If one takes a closer look at the responsibilities of the institutions concerned, we note that the Australian John Coates is the ICAS President, who is also the President of the CAS and responsible for the ordinary administrative tasks pertaining to the ICAS, also including the “CAS Court Office” which is in charge of reasoning the CAS-Awards. John Coates has also been an IOC Member since 2001 and acted as IOC Vice President from 2013 until 2017, when the IOC carried out the extensive investigations on the Russian doping scheme. Therefore, it cannot be excluded that the CAS Ad Hoc Division and the CAS Court Office was affected in one way or another by personal entanglements while rendering and reasoning the two awards that upheld the lawfulness of the IOC “invitation process”.

as well as unfair.³⁶ Eventually, such decisions can also never be “in light of the IOC’s overall objective”. A ruling by the Swiss Federal Court on the independence of the CAS Ad Hoc Panel therefore would be highly appreciated. Unfortunately, there has not been any such challenge so far. As the latest update on the case, it revealed only on 3 May 2018 that the IOC has filed 28 appeals to the Swiss Supreme Court regarding the CAS “landmark decisions” of 1 February 2018 in cases where the athlete’s appeals were upheld and cleared of any ADRVs by the CAS. After an IOC executive board meeting, IOC President Bach said that the Olympic body is “not satisfied at all” by the verdicts and the written explanations by the CAS.³⁷ However, art. 190 of the Swiss Federal Act on Private International Law (PILA) allows an appeal on very limited grounds only, including lack of jurisdiction, violation of the right to be heard, violation of the principle of equal treatment or violation of public policy. It is therefore questionable what reasons the IOC can argue before the Swiss Supreme Court, in particular on account of the fact that the two now published decisions were comprehensive and detailed reasoned by the CAS. This part of the whole matter, however, is completely in contrast to the decisions of the Ad Hoc Panel on 9 February 2018 which unfortunately have not been contested so far.

³⁶ CAS OG 18/03 Alexander Legkov et al. v. IOC, p. 12, par. 7.18, available at http://www.tas-cas.org/fileadmin/user_upload/Award_OG_18-03.pdf (accessed on 30 May 2018).

³⁷ www.apnews.com/b7c8bc79f41548159dd50ee2e8fdc279/IOC-to-challenge-Russian-doping-cases-at-Swiss-supreme-court (accessed on 30 May 2018).