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“Unless Fairness Requires Otherwise”

A Review of Exceptions to Retroactive Disqualification of Competitive Results for Doping Offenses

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I. Introduction

Retroactive disqualification of competitive results is a vital part of a credible anti-doping regime for various reasons. It has a deterrent effect on doping, particularly when combined with increased use of Athlete Biological Passports (“ABP”) and re-testing of samples. Moreover, from the clean athletes’ point of view, retroactive re-rankings and re-allocation of medals may have intangible significance and considerable economic effects as successful athletes are awarded substantial amounts of monetary compensation based on their results.

This article focuses on the most common legal challenges relating to the retroactive disqualification of an individual athlete’s competitive results under Article 10.8 of the World Anti-Doping Code (2015) (the “WADC”). In particular, this article provides an overview of the requirements for the disqualification of results affected by an anti-doping rule violation (“ADRV”), and further

examines the grounds for exceptionally upholding an athlete’s results under certain factual scenarios.

II. Disqualification of Competitive Results

A Panel’s determination of the consequences of an ADRV may be broken down into two distinct considerations. First, a Panel must decide on the imposition of a period of ineligibility. The consideration (i.e. the “ban”) is the principle sanction for an ADRV and is rigid in its application. It is aimed at *inter alia* punishing the offending athlete and deterring other athletes from cheating.¹ Second, a Panel must decide on the disqualification of an athlete’s competitive results. This consideration, while maintaining the automatic disqualification of results in accordance with Article 9 of the WADC, provides for discretion when the ADRV affects an athlete’s results over a certain period of time. As set forth below, it is this

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¹ See Lewis & Taylor, *Sport: Law and Practice*, 3rd Ed., Bloomsbury Professional Ltd., Croydon, 2014, p. 545, sec. C2.168 (noting that the purpose of an imposition

of a period of ineligibility is to “*punish the transgressor, to prevent him re-offending during the period of the ban, to deter him and others from cheating (or indeed from failing in their responsibility to do everything in their power to keep themselves clean of prohibited substances and methods, and to maintain public confidence in the integrity of sports and in the readiness, willingness and ability of its governing bodies to keep sport clean*”). (internal citations omitted).

discretion which makes way for varying applications in CAS jurisprudence.

A. Mandatory Disqualification

Any assessment of the disqualification of results begins with Art. 9 of the WADC, which provides as follows:

Article 9 Automatic Disqualification of Individual Results

An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

The consequence of this rule is automatic and applies whenever there is a “presence” violation of Art. 2.1 of the WADC in connection with an in-competition test. There is no room for any discretion or alternative explanation.² Indeed, an athlete’s intent or degree of fault in the commission of the ADRV is of no importance in this evaluation.³ Moreover, Panels have routinely

held that it is not relevant whether the prohibited substance in question enhanced the athlete’s sporting performance in the competition that produced the positive sample.⁴ Instead, a Panel is simply tasked with correcting the results of the competition in question to ensure that the record reflects a clean and fair sporting event.⁵

B. Discretionary Disqualification

Following the mandatory disqualification of results in a particular competition that produced the positive sample, further consideration must be given by a Panel as to whether (1) other results obtained during the event (i.e. results earned in competitions taking place at the same event before or after the ADRV occurred) (Art. 10.1 of the WADC) and (2) results obtained after the ADRV through the commencement of any provisional suspension or period of ineligibility shall be disqualified (Art. 10.8 of the WADC). Each consideration is addressed in turn below.

1. Art. 10.1 of the WADC

² *Misba Aloyan v. IOC*, CAS 2017/A/4927, para. 71 (stating clearly that “Article 9 of the IOC ADR leaves no room for any form of discretion to verify whether a finding of an anti-doping rule violation should not trigger the ‘Automatic Disqualification of Individual Results’”).

³ See *Id.* at para. 76 (“[T]he disqualification of the individual results obtained in the competition in connection with which an anti-doping rule violation was found to follow [is] an unavoidable consequence of that finding, without any scope for the hearing body to avoid its imposition, even in those exceptional cases where no sanction was inflicted, because the athlete bore no fault or negligence. It was underlined that when an athlete wins a medal with a prohibited substance in his or her system, this is held to be unfair to the other athletes in that competition, regardless of whether the medallist was at fault in any way”); See also *UCI v. Jack Burke and Canadian Cycling Association*, CAS 2013/A/3370, para. 184 (results in connection with an in-competition test disqualified despite the Panel’s finding of no fault); *Filippo Volandri v. International Tennis Federation*, CAS 2009/A/1782, para. 100 (results in connection with an in-competition test disqualified despite the Panel’s issuance of a reprimand).

⁴ *Mariano Puerta v. ITF*, CAS 2006/A/1025, para. 11.7.16, pt. 3 (disqualifying individual results from the competition producing the positive sample regardless of whether the ingestion of the substance in question was “negligible and had no performance-enhancing effect”);

Alain Baxter v. IOC, CAS 2002/A/376, para. 3.29 (“[T]he disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels”).

⁵ See WADC (2009), Art. 9 Commentary (“When an Athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Athletes in that Competition regardless of whether the gold medalist was at fault in any way. Only a “clean” Athlete should be allowed to benefit from his or her competitive results”); See also *Aloyan*, CAS 2017/A/4927 at para. 76 (“[O]nly a clean athlete is allowed to benefit from his or her competitive results”); *Andreea Raducan v. IOC*, CAS OG 2000/11, para. 7.24 (supporting the strict consequence of an automatic disqualification of a gold medal winner as a matter of fairness to all other athletes); *IAAF v. ARAF & Ekaterina Sharmina*, CAS 2016/O/4464, para. 194; (one of the main purposes behind the disqualification of results is to remove any tainted performances); *Baxter*, CAS 2002/A/376, para. 3.29 (disqualification of result is required to ensure the integrity of the results); *Fritz Aanes v. Fédération Internationale de Lutttes Associées*, CAS 2001/A/317, pg. 17 (stating that the interests of a doped athlete gives way to the fundamental principle of sport that all competitors must have equal chances).

Art. 10.1 of the WADC provides discretion as to whether disqualification of an athlete's results obtained in a "Competition"⁶ that occurred prior to and after an ADRV in a single "Event"⁷ is warranted. Article 10.1 of the WADC provides as follows:

10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

As an initial matter, it is noted that the wording of this provision is clear: Art. 10.1 of the WADC addresses all Events of a Competition. As such, the provision does not differentiate between Events prior to or after the ADRV. To the contrary, Art. 10.1 of the WADC explicitly refers to "all of the Athlete's individual results obtained" in the Competition during which an ADRV occurs.⁸

When this happens, discretion is given (interestingly) to "the ruling body of the Event" – not to an independent hearing body or anti-doping organization – to decide what consequences, if any, should be given to the results earned on the front and back side of an ADRV in any given Event. In this regard, Article 10.1 of the WADC goes on to provide that "[f]actors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions". In other words, has the context of the ADRV "contaminated" all other results in the Competition?⁹

⁶ Defined as a "single race, match, game or singular sport contest". See WADC Appendix 1, Definitions.

⁷ Defined as a "series of individual Competitions conducted together under one ruling body (e.g. the Olympic Games, FINA World Championships, or Pan-American Games)". See WADC Appendix 1, Definitions.

The two criteria for "contamination" (i.e. the seriousness of the ADRV and whether the athlete tested negative in other Events in the Competition) are considered in Art. 10.1.1 of the WADC as follows:

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

Therefore, an athlete's results in the other Events shall not be disqualified if the athlete bears no fault or negligence for the ADRV and the results in the other Events were not likely to be affected by the prohibited substance. Otherwise, the "ruling body" and/or Panel shall utilize its discretion in Art. 10.1 of the WADC in deciding whether to disqualify such other results within a Competition.

2. Art. 10.8 of the WADC

Art. 10.8 of the WADC provides an explicit rule regarding the retroactive disqualification of competitive results: all results from the ADRV until the commencement of the provisional suspension or ineligibility period shall be disqualified. There are no quantitative or temporal limitations to the disqualification.¹⁰ Therefore, in an individual case, the rule could invalidate a significant number of results covering a considerable period of time.

There is, however, one important exception to this rule, according to which the results may remain untouched if "fairness requires otherwise". As shown below, this discretionary

⁸ See *Mads Glasner v. FINA*, CAS 2013/A/3274, para. 73.

⁹ *Id.*, para. 82.

¹⁰ See *WADA v. ASADA, Australian Weightlifting Federation & Aleksan Karapetyan*, CAS 2007/A/1283, para. 55.

exception has resulted in significant discussion and challenges for hearing panels.

Article 10.8 of the WADC reads as follows:

“10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes”.*¹¹ (Emphasis added.)

III. “Unless Fairness Requires Otherwise”

Art. 10.8 of the WADC does not stipulate from whose standpoint “fairness” should be evaluated. This, of course, has great significance on the outcome of the consideration – both from a public perception and burden of proof perspective.

The provision refers to “fairness” at a general level and gives rise to different interpretations. But this issue has not been addressed in detail in the arbitral awards of the CAS. The implied starting point seems to be that fairness should be primarily assessed from the point of view of the athlete having

committed the ADRV.¹² This is a well-established approach. The athlete is a party to the disciplinary proceedings and it is his or her achievements that are primarily at stake.

The viewpoint shall not, however, be categorically restricted to the athlete in question. Indeed, as noted by the Sole Arbitrator in *Chernova*¹³, “*not to disqualify results that have been achieved by using a prohibited substance or prohibited method cannot be considered as fair with regard to the other athletes*” that competed against the sentenced athlete.¹⁴

A. Interpretation

When considering the application of “fairness”, CAS Panels have undoubtedly taken a broad approach.¹⁵ This was quite clearly explained in *Glasner*¹⁶ where the respondent, the Fédération Internationale de Natation (FINA), argued for a narrow interpretation of the term and submitted that fairness required results obtained after the ADRV be maintained only in cases where disciplinary proceedings were delayed.¹⁷

The Sole Arbitrator, however, rejected FINA’s position and confirmed that the term “fairness” should be interpreted broadly and cover a variety of situations to justify the retention of otherwise disqualified results. In doing so, the Sole Arbitrator highlighted CAS jurisprudence interpreting this notion¹⁸ and noted that the systematic interpretation of the rules supports such a view. Put simply, it

¹¹ Article 10.8 of the Code substantively corresponds with its predecessors (i.e. the 2009 and 2003 versions of the WADC). Therefore, relevant legal praxis is not limited to cases adjudicated under the 2015 version. None of the versions contains comments that would be relevant for the purposes of this article.

¹² See e.g., *UCI v. Alex Rasmussen & The National Olympic Committee and Sports Confederation of Denmark*, CAS 2011/A/2671, paras. 83-84; *Ryan Napoleon v. FINA*, CAS 2010/A/2216, para. 17; *Volandri*, CAS 2009/A/1782, paras. 55-56; and *Guillermo Cañas v. ATP Tour*, CAS 2005/A/951, paras. 9.8-9.9.

¹³ *IAAF v. ARAF & Tatyana Chernova*, CAS 2016/O/4469.

¹⁴ *Id.* at para. 176; See also Marjolaine Viret, *Evidence in Anti-Doping at the Intersection of Science and Law*, T.M.C. ASSER PRESS, The Hague, 2016, p. 494 (noting that “*retroactive Disqualification is detrimental to fair competition since it creates an uncertainty for other Athletes as to the definitive rankings*”); and *IAAF v. RUSAF & Anna Pyatykh*, CAS 2017/O/5039, para. 132.

¹⁵ See *IAAF v. ARAF, Sergey Kiryapkin & RUSADA*, CAS 2015/A/4005, para. 121; *Glasner*, CAS 2013/A/3274, para. 85 (citing *UCI v. Monika Schachl & ÖRV*, CAS 2008/A/1744).

¹⁶ CAS 2013/A/3274.

¹⁷ *Id.*, para. 84.

¹⁸ *Id.*, para. 85 (citing *Schachl*, CAS 2008/A/1744, para. 74).

is clear that when approaching this exception, general principles of fairness must prevail.¹⁹

B. Burden of Proof

The burden of establishing that “*fairness requires otherwise*” is on the athlete. Art. 10.8 of the WADC establishes that – as a principle matter – all results obtained from the date a positive sample was collected through the commencement of any Provisional Suspension or Ineligibility period shall be disqualified. This is, in essence, the rule (i.e. the disqualification).

To negate the rule (i.e. establish that fairness requires otherwise such that the results should be maintained), the party seeking to dislodge this rule (i.e. the athlete) should carry the burden to prove otherwise on the balance of probabilities. After all, it is in the athlete’s interest to maintain the results which the rule otherwise requires be disqualified.²⁰ To interpret differently would, in essence, rewrite Art. 10.8 of the WADC to require the anti-doping authority to not only establish the ADRV but also establish that fairness requires the remaining results not be maintained. This would up-end the intent of the article.²¹

C. Assessing “Fairness”: The Applicable Factors

It is often difficult to determine whether all results between an ADRV and a ban should be disqualified or whether fairness dictates a deviation from this principle (after all, the disqualification of all results is the main rule

which Panels should follow). Each case must be judged on its own merits. Based on CAS jurisprudence, it is, however, possible to extrapolate several factors that hearing panels may take into consideration when assessing the principle of fairness. No one particular factor is determinative on the issue. Instead, Panels consider an overall evaluation of the evidence in support of “fairness”.²² These factors are discussed below.

1. Delays in Results Management

Depending on the nature of the ADRV at issue, Art. 10.8 of the WADC could capture results achieved by an athlete over a lengthy period of time.²³ If the proceedings on the ADRV have taken a particularly (and, perhaps, unexplainably) long time to adjudicate and the delay is not attributable to the athlete, fairness may dictate that only some of the athlete’s results be invalidated. This has been confirmed in various CAS awards,²⁴ including for example, in *Volandri*,²⁵ as follows:

“Although the ITF knew of the adverse analytical findings, it chose not to inform Mr Filippo Volandri and to let the latter take part in 19 tournaments before formally charging him with a doping offence. Such a long period is unacceptable and incompatible with the intention of the anti-doping regime that matters should be dealt with speedily. (...) Based on the above considerations, the Panel is of the opinion that fairness requires (...) that his individual result in respect of the 2008 Indian Wells tournament only is disqualified (...).”

¹⁹ See *IAAF v. ARAF & Mariya Savinova-Farnosova*, CAS 2016/O/4481, para. 195 (the “*general principle of fairness must prevail in order to avoid disproportional sanctions*”).

²⁰ Although, one could envisage a situation where a governing body may prefer that the results be maintained. In such a case, these arguments could assist the athlete in meeting his or her burden.

²¹ See Lewis & Taylor, p. 542 (noting that “*And it is the athlete’s burden to show (...) that ‘fairness requires otherwise’*”). *Contra*, Viret, p. 495 (noting that “*Until the burden of proof is explicitly placed on the Athlete, it is submitted that the burden of proof should stay on the ADO, consistent with the general statement in Article 3.1 of the WADC that the Code will ‘place’ the burden of proof upon the Athlete*”).

²² See e.g. *IAAF v. ARAF, Yuliya Zaripova & RUSADA*, CAS 2015/A/4006, para. 102; *Kirbyapkin*, CAS 2015/A/4005, para. 121; *IAAF v. ARAF, Sergey Bakulin & RUSADA*, CAS 2015/A/4007, para. 121.

²³ Lewis – Taylor, p. 542.

²⁴ See e.g. *IAAF v. ARAF & Kristina Ugarova*, CAS 2016/O/4463 (criticizing delays in results management such that fairness required a portion of the athlete’s results to be retained by the athlete); *ASADA v. Daniel Nisbet*, A2/2009 (permitting athlete to maintain results earned prior to notification of ADRV, which was caused by the seizure of prohibited substance by government officials two months prior to such notification); *Volandri*, CAS 2009/A/1782.

²⁵ *Volandri*, CAS 2009/A/1782, para. 99.

It should be noted that the impact of a long delay in notifying an athlete of an ADRV or adjudicating an ADRV is particularly complex in cases involving retesting²⁶ and as addressed below, in ABP cases. In such cases, the delays may be significant and it may be debatable whether the anti-doping organisation in question could or should have operated quicker in commencing the disciplinary proceedings, considering that the athlete has obviously endeavoured to conceal the ADRV.

2. Athlete's Degree of Fault

If the athlete's degree of fault is low and he or she is successful in obtaining a reduced period of ineligibility, fairness may require that only some results be disqualified. In *Cañas*,²⁷ for example, the Panel ruled as follows:

*9.9 Since the [CAS] Panel has found that Appellant bears No Significant Fault or Negligence, the [CAS] Panel deems that fairness dictates that other than with respect to the [Mexican] Tournament, none of Appellant's results shall be disqualified.*²⁷

But such a finding is not absolute. In *Karapetyan*,²⁸ the CAS Panel rejected the view that a finding of no (significant) fault or negligence is a necessary pre-condition for the exercise of its discretion to find fairness under Art. 10.8 of the WADC. In that case, WADA argued that an athlete's results must be disqualified unless the athlete shows exceptional circumstances (i.e. that he bore No Significant Fault or Negligence). Moreover, WADA further asserted that fairness required the disqualification of the athlete's results because he negligently ingested the prohibited substance without

reading the label of the product he ingested or conducting other due diligence prior to ingestion. The Panel, however, disagreed with WADA and maintained that the fairness provision²⁹ "stands on its own" with no one specific condition as to a determination of fairness. So long as discretion is exercised in good faith, without bias, error, or undue influence, "Art. 13.8³⁰ extends to the decision-maker discretion to determine what fairness requires". In other words, an athlete's degree of fault is not a decisive factor, but an element to consider when assessing fairness and the disqualification of results.

Moreover, it is worth noting that while Art. 10.8 of the WADC provides that all results shall be disqualified between the ADRV and the commencement of the provisional suspension or ineligibility period, an argument naturally follows that results should not be disqualified at all if no period of ineligibility is finally imposed on an athlete. This has been confirmed in the case of *Volandri* in which the Panel sanctioned the athlete with a reprimand and only disqualified the athlete's results in respect of the tournament in which he had given a positive sample.³¹

On the contrary, to the extent the ADRV is intentional or the athlete's degree of fault is high, it is arguable that the disqualification of all results - even over a fairly long period of time - is justified.³² This said, the longer the period of time under scrutiny, the harsher the disqualification of all results could be, in which case Panels may find that fairness requires some of the results be upheld.

3. (Un)affected Sporting Results

tournaments following the ADRV in question when the athlete was sanctioned with a reprimand and the results were earned before the athlete was charged with a doping offence).

³² See *Sergei Tarnovschi v. International Canoe Federation*, CAS 2017/A/5017 (disqualifying all results from date of ADRV through provisional suspension as "no elements of "fairness" can be invoked given the Appellant's failure to disprove the legal presumption of intent".)

²⁶ See e.g. decision of Anti-Doping Hearing Panel of the IBU concerning Mr Alexander Loginov on 30 June 2015.

²⁷ *Cañas*, CAS 2005/A/951, paras. 9.8-9.9.

²⁸ *Karapetyan*, CAS 2007/A/1283.

²⁹ *Id.* at 31 & 55.

³⁰ Art. 13.8 of the Australian Weightlifting Federation's 2004 Anti-Doping Policy is the equivalent of Art. 10.8 of the WADC.

³¹ *Volandri*, CAS 2009/A/1782 (finding that an athlete could maintain the results he obtained in 19

To the extent an athlete is able to establish that the results obtained between the ADRV and the conclusion of his/her ban and/or period of provisional suspension were not affected by the prior administration of the prohibited substance, fairness may require that such results should be retained by the athlete. This abides by the principle of fair play and is indeed expressly recognised as a potential factor to be included in the consideration of whether to disqualify results in multi-competition events.³³

A negative doping control analysed between the test leading to the ADRV and the commencement of the ineligibility period is an indication that the use of a prohibited substance has not affected the results. This factor has been accepted by various CAS Panels.³⁴ For example, in *Rasmussen*, the Panel noted as follows:

*“(...) the Panel finds it important to emphasize the circumstance that, as conceded by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen. Therefore, the Panel sees no reason to disqualify them”.*³⁵

Although this particular part of the fairness test appears rather straightforward at first glance, the issue can be complex. Indeed, depending on the substance and other

circumstances of the case, it could be persuasively argued that the past administration of a banned substance has indirectly affected the results in the form of the athlete's enhanced ability to practice harder or recover faster.

On the other hand, it is obvious that continuous use of a prohibited substance or a prohibited method during the infringement period should lead to the disqualification of all results. For example, in the cases of *Sharmina*³⁶ and *Chernova*³⁷ the athlete's continued use of prohibited substances, as evidenced through the biological passport program, resulted in complete disqualification of results earned during the entire period of blood doping practices. In these cases, Panels indicated that while the disqualification may be excessive³⁸ in terms of proportionality, the fairness to the other athletes and the removal of tainted performances from the record supersedes such a principle.³⁹

4. Significant Consequences of the Disqualification of the Results

Significant negative financial or competitive consequences resulting from the disqualification of results may support the view that no or only a limited annulment of results should be imposed. In the case of

demonstrated through the athlete's biological passport and noting while *“the fact that such period of disqualification, seen only from the perspective of the sanction of disqualification of the results, must be deemed excessive in terms of proportionality”*, *“not to disqualify results that have been achieved by using a prohibited substance or prohibited method cannot be considered as fair with regard to other athletes that competed against the Athlete during this period”*.

³⁸ See *I. v. Fédération Internationale de l'Automobile (FLA)*, CAS 2010/A/2268 at para. 141, *Puerta*, CAS 2006/A/1025, and *Giorgia Squizzato v. FINA*, CAS 2005/A/830 (all affirming that excessive sanctions are prohibited).

³⁹ In Lance Armstrong's case, the disqualification period was even longer. All his results were disqualified from 1 August 1998 onwards because he was shown to have used prohibited substances at least from 1998 to 2005. See USADA Press Release dated 24 August 2012.

³³ See Article 10.1 of the WADC.

³⁴ See *Rasmussen*, CAS 2011/A/2671, para. 84; *Volandri*, CAS 2009/A/1782, para. 98; *UCI v. Valjavec v. Olympic Committee of Slovenia*, CAS 2010/A/2235, para. 117; *WADA v. UCI & Valverde*, CAS 2007/A/1396 & 1402, para. 19.14; *Karapetyn*, CAS 2007/A/1283, para. 54.

³⁵ See *Rasmussen*, CAS 2011/A/2671, para. 84.

³⁶ *Sharmina* CAS 2016/O/4464, para. 190 (disqualifying results achieved during the entire period during which the athlete used prohibited substances as demonstrated through the athlete's biological passport and noting that *“the application of a fairness exception will strike a balance of proportionality between the legitimate aims of deterrence and the fight against doping and the means used for such purpose”*).

³⁷ *Chernova*, CAS 2016/O/4469, para. 176 (disqualifying results achieved during the entire period during which the athlete used prohibited substances as

Schachl, the Panel took into account that disqualifying the athlete's results following the ADRV would have included the disqualification of results achieved in the Olympic Games.⁴⁰ Similarly, in the case of *Napoleon*, the Panel noted that by disqualifying all the results between the ADRV and the commencement of the ineligibility period, the athlete would have lost the opportunity to participate in the Commonwealth Games.⁴¹ Therefore, the panel disqualified results over two separate periods:

*"These periods of disqualification equate to the ban imposed by FINA but take account of the undue delay which would have otherwise precluded the Appellant from fair participation in future competitions."*⁴²

But not all Panels are as forgiving. In *Tarnovschi*,⁴³ the athlete committed an ADRV on 8 July 2016. Both WADA and the International Canoe Federation were notified of the ADRV on 4 August 2016. The athlete alleged that he was not notified of the ADRV until 18 August 2016. The athlete proceeded to compete in the Rio Olympics where he finished in third place and was subsequently tested following the event. The results of his test were clean. Nevertheless, despite these clean results, the Panel found that no elements of "fairness" could be invoked as the athlete failed to disprove the legal presumption of intent as to the ADRV in question (committed over month before the Olympics).⁴⁴ As a result, the Panel disqualified the athlete's bronze medal – the only medal won by his home country of Moldova at the Olympics that year.

On its face, considerations of results for "major" events could raise significant objection by other athletes on the basis of proportionality. In other words, why are one athlete's results more important than another athlete's results? Notwithstanding the foregoing jurisprudence, it should be reemphasized that the significance of a competition is not the sole consideration when determining fairness.⁴⁵ An overall evaluation of all such factors is absolutely necessary⁴⁶ and Panels should not be merely swayed by sympathy due to the significance of an event.

5. "Gaps" in a Blood Doping Scheme

The literal reading of Art. 10.8 of the WADC requires the disqualification of competitive results as from the moment a positive sample is collected. Determining this "start date" is, of course, easy when the ADRV is a result of an in- or out-of-competition doping control on a specific date. But complications arise when an ADRV is established on the basis of an ABP, which is not determined based on a specific doping control but instead on a series of doping controls taking place over a certain time period.

Complications further rise when, during this time period, there are "gaps" in the ABP where there is no evidence of doping use or methods. In this regard, Panels must decide whether it is appropriate to disqualify (a) all results obtained during the entire period of the ABP; or (b) only the results earned in the period where a scheme of doping is confirmed (i.e. the "doping scheme");⁴⁷ or (c) only those results directly impacted by evidence of doping.⁴⁸

⁴⁰ *Schachl*, CAS 2008/A/1744 paras. 76-78 (maintaining results earned after ADRV when there was no suggestion or evidence to indicate that the athlete has ever ingested performance-enhancing substances, or that her results at the Olympic Games were affected in any way by her ADRV).

⁴¹ *Napoleon*, CAS 2010/A/2216.

⁴² *Id.*, paras. 7.9-7.10.

⁴³ *Tarnovschi*, CAS 2017/A/5017.

⁴⁴ *Id.*, paras. 71-72.

⁴⁵ *Id.* (noting that significant delays attributed to Panel's decision to allow the athlete to maintain results).

⁴⁶ *Kirdyapkin*, CAS 2015/A/4005, para. 121.

⁴⁷ See e.g., *Savinova-Farnosova*, CAS 2016/O/4481; *Sharmina*, CAS 2016/O/4464; *IAAF v. ARAF & Petr Trofimov*, CAS 2016/O/4883; *Chernova*, CAS 2016/O/4469; *WADA v. Vladislav Lukanin & IWF*, CAS 2014/A/3734.

⁴⁸ See e.g., *IAAF v. RUSAF & Svetlana Vasilyeva*, CAS 2017/O/4980.

Historically, Panels have applied a literal application of Art. 10.8 of the WADC when considering the disqualification of results. In other words, all results earned from the inception of the ABP through the provisional suspension or period of ineligibility were disqualified. This can be seen in varying CAS jurisprudence.⁴⁹

Recently, however, some Panels have taken a “selective approach” and looked more closely within the ABP when deciding whether all, or some, of an athlete’s results should be disqualified. For example, in *Savinova-Farnosova*,⁵⁰ the IAAF sought the disqualification of the athlete’s results as from 15 August 2009 (i.e. Sample 1 on her ABP) through 24 August 2015 (i.e. the date of her provisional suspension).⁵¹ The athlete, however, argued that there was no evidence of doping in Sample 1 and using such date as the “start date” for the disqualification of results would be unfair. She also argued that her blood values during the 2012 Olympic Games (i.e. Sample 13 on her ABP) fell within her normal range and therefore disqualifying such results would also be unfair.

In consideration of the ABP, the Sole Arbitrator determined that the athlete’s blood values confirmed the use of prohibited substances as from 26 July 2010 (i.e. Sample 3 – the eve of the European Championship), not Sample 1 as requested by the IAAF. Based on a literal reading of Rule 40.8 of the IAAF Rules (which are synonymous with

Article 10.8 of the WADC), therefore, all results earned by the athlete as from Sample 3 through the date of the provisional suspension would have to be disqualified despite there being no evidence of doping use by the athlete after Sample 21 on the ABP (i.e. 19 August 2013).

In consideration of the fairness exception, however, the Sole Arbitrator found it unfair to disqualify the athlete’s results between Sample 21 (i.e. 19 August 2013) and the date of the provisional suspension (i.e. 24 August 2015) considering that the ABP did not evidence doping use or methods during this “gap” period and moreover, that the athlete could not be blamed for the delay in the results management process (which only started long after the relevant ABP samples became known to the IAAF).⁵² As a result, only those results earned by the athlete within the “doping scheme” (Sample 3 to Sample 21) were disqualified on the basis of fairness.⁵³

The case of *Savinova-Farnosova* does not stand alone. Several other cases also share the position that disqualifying all results earned by an athlete during the entire period of the ABP is disproportionate and unfair.⁵⁴ Indeed, such is the case even when the athlete, by using a sophisticated plan and scheme in order to hide the use of prohibited substances, is responsible for the disproportionality of the disqualification.⁵⁵ In such cases, only the results earned within the actual doping scheme are disqualified and the

⁴⁹ See e.g. CAS 2014/A/3614 & 3561 *IAAF v. WADA v. Real Federación Española de Atletismo v. Marta Domínguez Azpeleta* (disqualifying all results as from the collection of Sample 1 (5 August 2009) through to the commencement of her provisional suspension (8 July 2013)); *Kirdyapkin*, CAS 2015/A/4005; *IAAF v. ARAF, Yuliya Zaripova v. RUSADA*, CAS 2015/A/4006; *IAAF v. ARAF, Sergey Bakulin v. RUSADA*, CAS 2015/A/4007; *IAAF v. ARAF, Olga Kaniskina v. RUSADA*, CAS 2015/A/4008; *IAAF v. ARAF, Valeriy Borkin v. RUSADA*, CAS 2015/A/4009; *IAAF v. ARAF, Vladimir Kanaikin v. RUSADA*, CAS 2015/A/4010.

⁵⁰ CAS 2016/O/4481.

⁵¹ A total of 28 Samples were collected over a period from 15 August 2009 to 22 March 2015.

⁵² CAS 2016/O/4481, para. 197.

⁵³ It is noted that the athlete’s results earned during the 2012 Olympic Games fell within this period and were therefore disqualified.

⁵⁴ CAS 2016/O/4464, paras. 189-190 and CAS 2016/O/4883, para. 66.

⁵⁵ See CAS 2016/O/4464, para. 190 (“Even considering that the Athlete herself, by using a sophisticated plan, scheme, and tactics in order to hide the use of a prohibited substance or prohibited method, was responsible for this disadvantage as to the application of [Art. 10.8 of the WADC], the Sole Arbitrator, nevertheless, holds that only the application of a fairness exception will strike a balance of proportionality between the legitimate aims of deterrence and the fight against doping and the means used for such purpose”).

results earned in the “gaps” before or after the scheme are maintained.

This said, in at least one case a Sole Arbitrator permitted an athlete to maintain her results earned in the “gaps” within a doping scheme. In *Vasilyeva*,⁵⁶ the Sole Arbitrator determined that the athlete took part in a repetitive and sophisticated blood doping scheme from 2011 to 2016. As a result, the IAAF submitted that all results obtained by the athlete between the collection of Sample 2 (i.e. 18 October 2011) to the starting date of the provisional suspension (i.e. 13 December 2016) be disqualified.⁵⁷ In other words, like the case of *Savinova-Farnosova*, the IAAF asserted that all results earned within the actual doping scheme be disqualified and that any results earned before the scheme (i.e. Sample 1) or after the scheme be maintained.

The Sole Arbitrator, however, disagreed in part with the IAAF. While it was found that the athlete engaged in “*continuous, intentional, and several violations of the anti-doping regulations with an aim to gain advantage of her unlawful practice,*” the athlete’s ABP only showed abnormalities indicating that the athlete engaged in blood doping cycles in 2011, 2012, 2013, and 2016.⁵⁸ There was no proof that the athlete used prohibited substances or methods in 2014 and 2015. As a result, despite considering the years 2014 and 2015 for the establishment of the overall doping scheme, the results earned during these two specific years were not disqualified.⁵⁹ So, contrary to *Savinova-Farnosova*, the Sole Arbitrator did not disqualify all results earned within the scheme, but instead looked at the results within the scheme to determine

whether they were affected by the athlete’s doping practices. And as a result, the Sole Arbitrator permitted the athlete to maintain the results earned in the “gaps” within the doping scheme.

6. Re-Testing and Non-Analytical Violations

Re-testing cases and ADRVs based on non-analytical evidence may cover a considerable period of time between the commission of an ADRV and the imposition of a provisional suspension or an ineligibility period.⁶⁰ In such cases, a strict application of the main rule of Art. 10.8 may lead to an unjust result.

In *Pyatykb*⁶¹, the athlete provided a sample on 31 August 2007. It was re-tested in December 2016 (i.e. nine years and three months later) and then found positive for a prohibited substance. In addition, the athlete had committed another ADRV in 2013, evidenced by non-analytical evidence. The Panel did not consider it fair to disqualify any of the athlete’s results between 1 September 2007 and 5 July 2013 because there was no proof that the athlete used prohibited substances or methods during this period. The athlete’s results, however, were disqualified between 6 July 2013 and the commencement of the provisional suspension on 15 December 2016 (i.e. not from the first ADRV onwards). The disqualification period did not equal the length of the ban (here four years) either, which appears to have been the philosophy in at least some of the IAAF re-test cases.⁶² The logic behind such approach is that had the athlete immediately been found to have committed an ADRV, he or she would not

⁵⁶ *Vasilyeva*, CAS 2017/O/4980.

⁵⁷ *Id.*, para. 93.

⁵⁸ *Id.*, para. 96.

⁵⁹ *Id.*, para. 97.

⁶⁰ See Viret, p. 491 (noting that “Article 10.8 of the WADC retains its importance where a Provisional Suspension is non-mandatory, e.g. for Specified Substances and for non-analytical violations, where the discovery (and thus the possibility of investigating the case) may occur a long time after the commission of a doping offence”), See also Paul David, *A Guide to the World Anti-Doping Code, The Fight for the Spirit of Sport*, CAMBRIDGE UNIVERSITY PRESS, Cambridge, 2013, p. 312.

⁶¹ CAS 2017/O/5039.

⁶² See *Ugarova*, CAS 2016/O/4463, para. 138, according to which “the policy of the IAAF in retesting cases is that the disqualification is for such period as the disqualification would have been if the sanction would have been pronounced at the time of the anti-doping rule violation, the rationale being that the athlete would not have been able to achieve these results had the result management process started immediately”. See also IAAF news “Revision of Results Following Sanctions of Tsikhan and Ostapchuk” 27 April 2014.

have been eligible to obtain the disqualified results.⁶³

The period between the sample collection and the re-test was significantly shorter in *Loginov*, a case adjudicated by the IBU Anti-Doping Hearing Panel.⁶⁴ The sample was re-analysed after 11 months' storage. The Panel acknowledged that the rule enshrined in Art. 10.8 may, together with the imposition of the ban, *de facto* considerably extend the period of ineligibility. However, the Panel observed that refraining from disqualifying the results in the circumstances of the case would run against the rationale of re-testing stored samples, including disqualifying the results of cheating athletes.

7. Additional Ineligibility Period in the Second Instance

One of the special situations in which Panels must carefully consider the fairness exception is a scenario in which an athlete has fully served an ineligibility period imposed by the first instance, has regained eligibility and then is subjected to a longer ban at the appellate level.⁶⁵

A review of CAS case law shows that the Panels have applied divergent interpretations in these situations. In *Abdelfattah*,⁶⁶ the athlete refused to submit to sample collection, which led to a six-month ineligibility period imposed by the FILA Federal Appeal Commission. WADA appealed to the CAS four days after the athlete's initial ineligibility period lapsed. The Panel ordered an additional ban of eighteen months and disqualified all results achieved by the athlete during a period of five months between the date when the six-month sanction expired and the date from which the remaining part of the ineligibility was served. It seems that

when assessing fairness, the Panel gave significant weight to the nature of the athlete's ADRV and the relatively short duration of the disqualification period.

Other Panels have emphasized, in particular, the responsibility of the first-instance tribunal as the culprit of the gap between two bans. In *Keisse*,⁶⁷ the athlete was subjected to a provisional suspension in December 2008. 11 months later, the athlete was acquitted of an ADRV by the first-instance tribunal. At the same time, the provisional suspension became void. WADA took the matter to the CAS. The Panel upheld the appeal and imposed the standard two-year ineligibility period. However, the Panel deemed that it would have been unfair to disqualify the athlete's results because he was able to compete due to the erroneous decision by the first-instance tribunal.⁶⁸

The anti-doping organisation's responsibility was highlighted in *Alvarez*⁶⁹ as well. In addition to the athlete's legal right to compete, the Panel paid attention to the language of Art. 10.8 by noting that it entitles disqualifying results "*through the commencement of any Provisional Suspension or Ineligibility period*". According to the Panel, it was ambiguous whether the language of Art. 10.8 contemplates the gap in the athlete's suspension. The Panel added that disqualifying results "*would work an injustice, effectively increasing the four years effect of her suspension in a manner not expressly contemplated*" in the applicable rules and left the results undisturbed.⁷⁰

IV. Concluding Remarks

The disqualification of the results deserves careful consideration by a Panel. After all, such disqualification not only affects the

⁶³ See David, p. 312.

⁶⁴ Decision of the Anti-Doping Hearing Panel of the IBU concerning Mr Alexander Loginov on 30 June 2015.

⁶⁵ See David, p. 312-313 (referring to *Agence Mondiale Antidopage (AMA) c. ASBL Royale Ligue Vélocipédique Belge (RLVB) & Iljo Keisse*, CAS 2009/A/2014, without analysing the case).

⁶⁶ *WADA v. FILA & Mohamed Ibrahim Abdelfattah*, CAS 2008/A/1470.

⁶⁷ *Keisse*, CAS 2009/A/2014.

⁶⁸ *Id.*, para. 159.

⁶⁹ *WADA v. International Weightlifting Federation and Yenny Fernanda Alvarez Caicedo*, CAS 2016/A/4377.

⁷⁰ *Id.*, para. 70-71.

athlete in question, but aims to rectify the record books for the benefit of all athletes. Decisions on disqualification should be made through the lens of fairness, having regard to the various factors applicable to each case. It is clear, however, that although

the prerequisites for upholding, in exceptional cases, the results between the ADRV and a ban have been clarified by the CAS, the application of Article 10.8 of the WADC remains a challenging task.