4 NEW SQUARE
CHAMBERS

Anti-doping

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Investigating potential anti-doping rule violations

ADOs: identifying ADRVs

- Testing / sample collection
- Intelligence from:
  - Other ADOs
  - National governing bodies
  - Whistleblowers
  - Police/authorities
- Obligations to cooperate: handover of electronic devices? Attending interview?

Players: identifying source/cause

- Importance of keeping records
- Testing supplements, medications; food contamination?
- Experts - whether levels and excretion periods can help narrow the window and identify source
- Entourage – can they identify the potential source?
- Caused by issue in sample collection or laboratory?

Prosecuting and defending anti-doping rule violations

Framework: burdens and standard of proof under the WADC

- Art 3.1: burden of establishing an ADRV is on the ADO
  - Standard of proof is the “comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation made” (more than balance of probabilities; less than beyond reasonable doubt)
  - ADRVs can be established “by any reliable means”
- Presence of PS or metabolites/markers in sample is sufficient proof of a breach of Art 2.1 (Presence) (Art 2.1.2)
- Where the burden of proof shifts to the player, the standard is the balance of probabilities

For example:

- Laboratories presumed to have conducted sample in accordance with ISL (Art 3.2.2)
- Player may seek to rebut the presumption by establishing a departure from ISL that could reasonably have caused the AAF
- In the Player succeeds, the burden shifts back to the ADO to show the departure did not cause the AAF

Prosecuting and defending anti-doping rule violations

Two fundamental hurdles facing players:

Critical factual/evidential issue: identifying and proving source

- Practical difficulties and evidential threshold
- Relevant to sanction:
    - Art 10.2: Period of ineligibility is 4 years if (i) the ADRV involves a non Specified Substance and the Player does not establish that the ADRV was not intentional; or (ii) the ADRV involves a Specified Substance/Method and the ADO establishes that the violation was intentional
    - No Fault or Negligence / No Significant Fault or Negligence: reduction in sanction only available if source is established

Central legal hurdle: strict liability principle

- Evident from approach to player support personal and attribution of fault

Prosecuting and defending anti-doping rule violations

Strict liability and player entourage: ***ITIA v Jannik Sinner 2024***

- JS charged with breaches of Art 2.1 (Presence) and Art 2.2 (Use) after clostebol metabolites detected in samples given on 10 and 18 March 2024
- **Source:**
  - JS's physio cut his finger and treated it with a spray (Trofodermin) that contained a Prohibited Substance
  - The spray was given to the physio to use by JS's trainer
  - The spray transferred to JS when his physio gave him massages and bandaged cuts on his feet
  - This was all unknown to JS
- JS argued he acted with No Fault or Negligence (alternatively No Significant Fault or Negligence)
- **Issues:**
  - Whether the fault or negligence of his entourage should be attributed to JS
  - Whether JS personally at fault

Prosecuting and defending anti-doping rule violations

Strict liability and player entourage: *ITIA v Jannik Sinner*; *WADA v Sinner*

Reasons for attribution

- Strict liability means players are responsible for their entourage
- "*…under the Code and by virtue of CAS precedent, an athlete bears responsibility for the entourage's negligence*"
- Said to be necessary to avoid a loophole
- *IIHF v Jeglic* CAS OG AD 18/004
- *Errani v ITF* CAS 2017/A/5301

Reasons against attribution

- Proportionality
- "*the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with*" *FIFA & WADA* 2005/C/976/986
- WADC does not state that fault of third parties is to be attributed to athletes
- CAS jurisprudence does not establish generic principle of attribution

Prosecuting and defending anti-doping rule violations

Strict liability and player entourage: ***ITIA v Jannik Sinner***; ***WADA v Sinner***

- **Comment to the WADA Code:**
  - Scenario in which No Fault or Negligence will not apply: "*the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete…"*
- **Tribunal conclusions:**
  - Comment does not apply where "*the Player was inadvertently cross-contaminated by the Prohibited Substance during a massage by a physiotherapist who had used a spray containing Clostebol to treat his own wound of which the Player was not aware and could not have been aware*"
  - Tribunal also considered that "*personal physician or trainer*" includes a physiotherapist

Prosecuting and defending anti-doping rule violations

Strict liability and player entourage: ***ITIA v Jannik Sinner***

- **Outcome**
  - First instance: tribunal found JS acted with No Fault or Negligence
  - WADA appealed and publicly demanded a ban of 1-2 years; agreed sanction of 3 month ban (Art 10.8.2)
- **2027 WADA Code**
  - NEW Article 10.6.1.2: "*In cases where the Athlete or other Person can establish both No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Source, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Athlete or other Person's degree of Fault*."

Prosecuting and defending anti-doping rule violations

Why it is so difficult for players

Abdelrahman v WADA & Egyptian Anti-Doping Agency (CAS 2017/A/5016 & 5036)

"[…] *it could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, the Panel can envisage the possibility that it could be persuaded by an athlete's assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him*."

There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions."

Contamination

- ***WADA v IWF & Caicedo*** **(CAS 2016/A/4377):**

"*To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question*."

- **Significance of experts**
- Eg Halep: 12 experts
- Types of expertise: pharmacology, toxicology, analytical testing, hair testing, pharmacokinetics, lie detectors
- Availability? Cost of experts?

Contamination

Halep v ITIA CAS 2023/A/10025, 10027

- Player claimed presence of Roxadustat (non Specified Substance) was due to a contaminated supplement
- Panel considered whether the Player must establish that (i) PS was present in the supplement, or (ii) that the use of the supplement caused the concentration of the PS in the sample
    - *USADA v Hardy* 2009: "*no requirement…[to] prove a correlation between the concentration of the PS in her urine and the quantity in her supplements*"
    - *WADA v Roberts* (CAS 2017/A/5296): "*the Athlete must establish the origin of the concentration of probenecid in his system so that what might otherwise be an apparently plausible explanation of origin could be fatally undermined by scientific, in particular pharmacokinetic, evidence*"
    - No legal obligation to prove (ii), but for Player to demonstrate causality between presence in supplement and presence in sample
- First instance: 4 years. Appeal to CAS: found Contaminated Product & reduced to 9 month ban

Contamination

- **Meat contamination cases show difficulties facing players**
- ***Lawson v IAAF*** **CAS 2019/A/6313:** "*In cases of meat contamination, it must - as a minimum - be a requirement that the Athlete sufficiently demonstrates where the meat originated from. For example, where did the butcher buy the Brazilian meat, how was the Brazilian meat imported into Egypt, has any of the other imports of meat been examined or tested for the presence of ractopamine etc. ? But that minimum is not usually enough*."
- ***ITIA v Moore*** **CAS 2024/A/10298, 10589**
  - Not in dispute that the Player ate meat at various restaurants in Colombia
  - Panel determined that nandrolone was rarely used in Colombian livestock farming
  - WADA v Roberts cited
  - Panel found that Player had not established the meat she ate was contaminated with nandrolone or caused the AAF noting (inter alia) that her sample tested positive for 2 Prohibited Substances