

LKK

LÉVY KAUFMANN-KOHLER

Recent SFT Jurisprudence: The Valieva case

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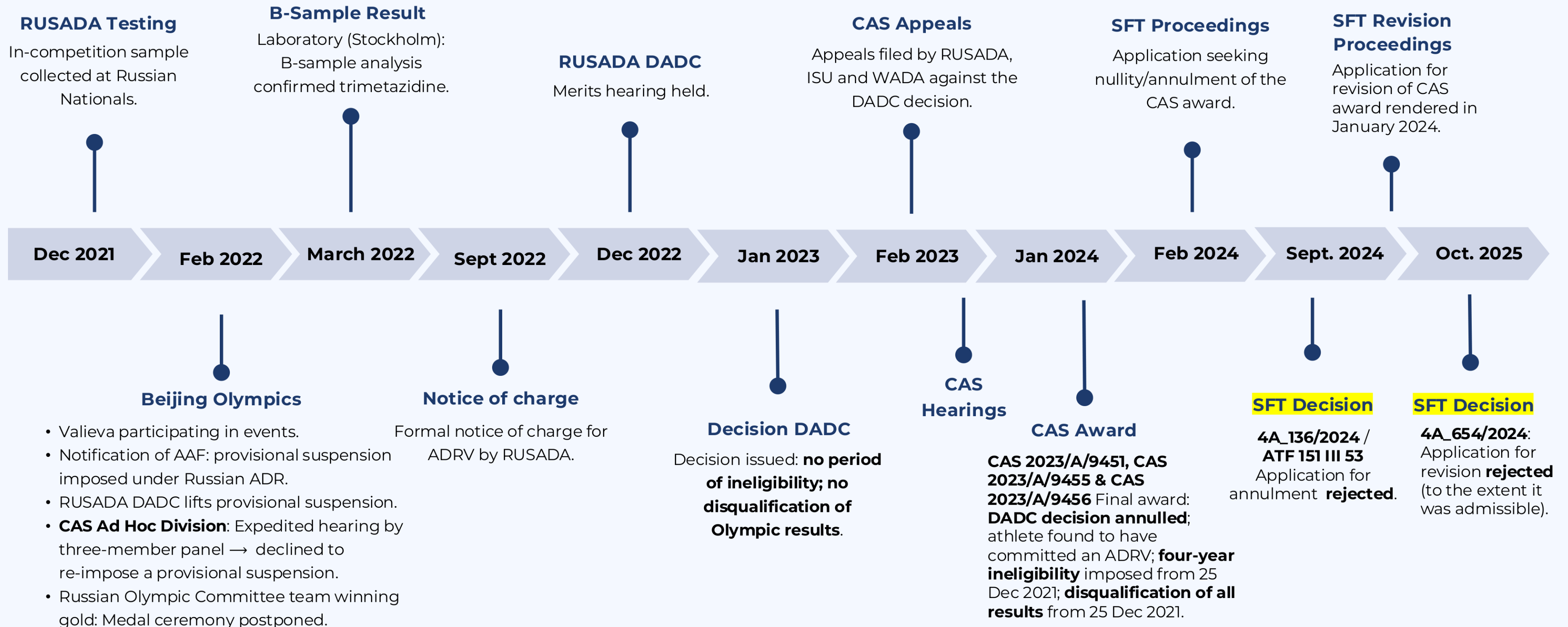
NAPLES SPORTS LAW INTERNATIONAL CONFERENCE

21 NOVEMBER 2025



Timeline

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4A_136/2024 (ATF 151 III 53)

Grounds invoked before the SFT

- 1. Action to set aside¹⁸⁸

¹⁸⁸ Amended by No 1 of the FA of 19 June 2020, in force since 1 Jan. 2021 (AS 2020 4179; BBI 2018 7163).

- Art. 190

¹ The award is final from the time when it is communicated.

² An arbitral award may be set aside only:

- a. where the sole member of the arbitral tribunal¹⁸⁹ was improperly appointed or the arbitral tribunal improperly constituted;
- b. where the arbitral tribunal wrongly accepted or declined jurisdiction;
- c. where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;
- d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated;
- e. where the award is incompatible with public policy.

³ As regards preliminary awards, setting aside proceedings may only be initiated on the grounds of the above paragraphs 2(a) and 2(b); the time-limit runs from the communication of the award.

⁴ The deadline for filing the appeal amounts to 30 days from the award being communicated.¹⁹⁰

¹⁸⁹ Term in accordance with No 1 of the FA of 19 June 2020, in force since 1 Jan. 2021 (AS 2020 4179; BBI 2018 7163).

¹⁹⁰ Inserted by No 1 of the FA of 19 June 2020, in force since 1 Jan. 2021 (AS 2020 4179; BBI 2018 7163).

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Lack of CAS jurisdiction

- ❑ **Validity of the Russian ADR arbitration clause**
 - The RADR (*lex specialis*) expressly provides for exclusive appeal to CAS for international-level athletes
 - Valid form of “forced” arbitration compatible with Swiss law and ECHR standards
- ❑ **Consent by conduct (good faith)**
 - Valieva’s position during the Beijing 2022 CAS Ad Hoc proceedings was and express acknowledgement of jurisdiction

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Pleading in the CAS ad hoc Division

"[a]lthough Article 15.2 Russian ADR [RAR] provides that 'a decision to apply or lift a provisional suspension based on a preliminary hearing' can be appealed before CAS, there is no provision in the Russian ADR granting jurisdiction to the CAS Ad Hoc Division; therefore the CAS Appeals Division should be the competent body [...] The expedited procedure before the CAS Ad Hoc Division does not allow sufficient time to safeguard the Athlete's due process rights; while the Athlete would have more possibilities to defend her case before the CAS Appeals Division [...] : 'Had the Applicants filed their applications before the CAS Appeals Arbitration Division, as they should have, [Valieva] would at least then have had the right to appoint an arbitrator and would have had sufficient time to prepare her defense, including by presenting medical science based detailed expert evidence".

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Lack of arbitrability **(Art. 190(2)(b) PILA)**

- ❑ **Forfeiture:** The SFT found the inarbitrability objection was not raised before CAS and was therefore procedurally barred.
- ❑ **Merits (in any event):** Codifying WADC principles in national public law does not render a dispute inarbitrable.
Anti-doping sanctions are disciplinary measures confined to sport, not criminal or administrative penalties in the sense that would preclude arbitration.

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Substantive public policy
(Art. 190(2)(e) PILA)

- ❑ **Limited review:** only whether the outcome is manifestly unjust or shockingly inequitable.
- ❑ **Protected person status:**
 - Age alone does not mandate a lesser sanction.
 - CAS Panel considered age, experience, and education on food safety; no objective basis required a different result.
- ❑ **Deterrence and fairness:** Automatically lighter sanctions for minors risk undermining anti-doping's deterrent aims and sporting fairness.

4A_654/2024 – Application for revision

Ground invoked before the SFT

– 2. Review

– Art. 190a¹⁹¹

¹ A party may request a review of an award if:

- a. it has subsequently become aware of significant facts or uncovered decisive evidence which it could not have produced in the earlier proceedings despite exercising due diligence; the foregoing does not apply to facts or evidence that came into existence after the award was issued;
- b. criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner;
- c. a ground for a challenge under Article 180 paragraph 1 letter c only came to light after conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available.

² The request for a review must be filed within 90 days of the grounds for review coming to light. A review may not be requested more than ten years after the award becomes legally binding, except in the case of paragraph 1 letter b.

¹⁹¹ Inserted by No 1 of the FA of 19 June 2020, in force since 1 Jan. 2021 (AS 2020 4179; BBl 2018 7163).

4A_654/2024 – Application for revision

Nature of revision

It's a real exception to the finality of decisions

- ❑ *Ex post* developments showing that the decision was based on wrong premises
 - New facts or new evidence; late discovery of ground for challenge
 - Criminal proceedings establishing fraud in the decision
- ❑ So shocking that substantive truth must prevail over judicial truth
- ❑ As it affects legal certainty, revision is a “*weapon that should be handled carefully*” and the requirement must be examined rigorously

4A_654/2024 – Application for revision

**Discovery of new decisive facts or conclusive evidence
(Art. 190a(1)(a) PILA)**

☐ New evidence:

- expert report commissioned by RUSADA, allegedly supporting her contamination hypothesis

☐ New fact:

- WADA and RUSADA allegedly concealed this report during the proceedings

☐ Revealed by Media reports (AP, 12 Sept 2024)

4A_654/2024 – Application for revision

AP article of 12 September 2024

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“Upon learning of the experiment, C._____ [WADA’s director general] texted D._____, the head of I&I [head of WADA’s I&I]. Parts of the message read:

<D._____ we have a big issue. How come we have (former anti-doping lab director) B._____ doing an opinion for A._____, super favorable to her.... If it is a RUSADA (Russian Anti-Doping Agency) opinion, we should absolutely not be involved in anyway.... this is a big issue on our side to get involved in such an opinion that will be used in court. We have to stop that urgently>”.

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Findings

- ❑ Does the report qualify as “evidence”? doubtful
 - There was no obligation to produce it in the CAS proceedings
 - The mere fact of breaching an order to produce evidence is not enough
- ❑ Is the report “conclusive”? No
 - It admitted the possibility of contamination but still found that use was the most likely scenario
 - Would not have changed the outcome
 - The athlete’s claim that WADA asked to “change the report” were not established

Thank you for your attention

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