Arbitration CAS 2022/ADD/48 International Olympic Committee (IOC) & International Skating Union (ISU) v. Laura Barquero Jimenez, partial award of 10 August 2022

Panel: Mrs Raphaëlle Favre Schnyder (Switzerland), Sole Arbitrator

Skating (pairs skating)
Doping (clostebol metabolite)
Consequences of an ADRV to teams in sports that are not "team sports"

Article 11.3 of the IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022 (IOC ADR) provides consequences to teams in sports which are not "Team Sports". As the pairs skating competition involves a team of two, but not within a "Team Sport", Article 11.3 states that the CAS ADD shall apply the rules of the relevant International Federation to determine the consequences to be imposed on the team. In this respect, Article 11.2.1 of the ISU Anti-Doping Rules provides that the results obtained by the athlete in the teams competition event are disqualified with all resulting consequences. Further, the results obtained by the team in the pairs skating event are disqualified with all resulting consequences.

I. PARTIES

1. The International Olympic Committee (the "IOC" or the "Claimant") is the world governing body for Olympic sport having its registered offices in Lausanne, Switzerland. The IOC is incorporated as an association pursuant to articles 60 et seq. of the Swiss Civil Code. As a signatory of the World Anti-Doping Code ("the Code"), the IOC has enacted the IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022 (the "IOC ADR"). The IOC has delegated some of its responsibilities related to the implementation of the Doping Control in relation to the XXIV Olympic Winter Games Beijing 2022 to the International Testing Agency (the "ITA"), this includes the results management and subsequent prosecution of potential Anti-Doping Rule Violations ("ADRV") to the ITA.

2. The International Skating Union ("ISU") is the International Federation governing competitive ice-skating disciplines, including figure skating, synchronized skating, speed skating, and short track speed skating.

3. Ms Laura Barquero Jimenez (the "Athlete" or "Respondent") is a national of Spain and a team member of the Comité Olímpico Español who participated in the Olympic Winter Games Beijing 2022.

II. FACTUAL BACKGROUND

4. The Athlete, born 21 October 2001, is a Spanish ice-skater who has been competing internationally since at least 2017.

5. The Athlete competed in the pairs skating competition (short programme), with her partner Marco Zandron, in the Beijing Winter Olympics finishing 11th.

6. On 18 February 2022 the Athlete was subject to an In-Competition doping control under the Testing Authority and Results Management Authority of the IOC and urine sample no. A and B 7049023 was collected from her. The Athlete also declared on her Doping Control Form ("the DCF") "Melatonine, Enantyum", when asked to provide information relating to medication or supplements taken in the seven days prior to the doping control. She also confirmed on her DCF that the sample collection was undertaken in accordance with the relevant procedures for sample collection.

7. On 20 February 2022, the WADA-accredited National Anti-Doping Laboratory in Beijing, China ("the Laboratory"), reported an AAF for clostebol metabolite 4-chloro-3α-hydroxy-androst-4-en17-one. Clostebol is a substance prohibited by WADA at all times and is classified as a non-specified substance under Section S1(1) (Anabolic Androgenic Steroids) of the 2022 WADA Prohibited List.

8. Upon receipt of the AAF, the ITA conducted the Initial Review of the result under Article 7.2.2 of the IOC ADR and Article 5.1.1 of the International Standards for Results Management and found that: (a) no applicable Therapeutic Use Exemption had been or was in the process of being granted to the Athlete either by the IOC, ISU or the National Anti-Doping Agency; (b) there was no apparent departure from the International Standard for Testing and Investigations or International Standard for Laboratories that could undermine the validity of the AAF; and (c) the AAF was not caused by the ingestion of the Prohibited Substance through a permitted route insofar as anabolic steroids are banned irrespective of the route of ingestion.

9. On 21 February 2022, the ITA (on behalf of the IOC) notified the Athlete of the AAF, and it informed her that she would have until 23 February 2022 to indicate whether she wished to have the B-sample analysed, failing which she would be deemed to waive her right to B-sample analysis and she would be deemed to not challenge the AAF. On 22 February 2022, the Comité Olímpico Español informed the ITA that it had informed the Athlete of the ITA's correspondence as to notification of the AAF.

10. Also on 22 February 2022, the Athlete signed the B-sample arrangement form, wherein she stated that she did not accept the AAF, that she did request the opening and analysis of the B-sample, and that she did request the laboratory documentation package.

11. Also on 22 February 2022, the ISU imposed a provisional suspension on the Athlete.

12. On 23 February, the ITA informed the Athlete that the B-sample opening and analysis would take place on 2 March 2022.

13. Also on 23 February, the ITA provided the A-sample Laboratory Documentation Package ("LDP") to the Athlete. On 28 February 2022, the ITA informed the Athlete that the estimated concentration in the A-sample was about 0.5 ng/ml.

14. On 2 March 2022, the Athlete attended the opening of the B-sample virtually with her representatives.

15. On 3 March 2022, the Laboratory reported an AAF for clostebol metabolite 4-chloro-3α-hydroxy-androst-4-en17-one in the B-sample, thereby confirming the A-sample results.

16. On 9 March 2022, the ITA provided a Notice of Charge to the Athlete and invited a response by 23 March 2022.

17. On 15 March 2022, the ITA informed the Athlete that the estimated concentration in the B-sample was about 0.5 ng/ml.

18. On 25 March 2022, the ITA provided the B-sample Laboratory Documentation Package to the Athlete.

19. On 22 April 2022, following extensions granted by the ITA, the Athlete provided a written submission, related exhibits, and an expert report of Dr Alberto Salamone.

20. On 25 April 2022, the ITA informed the Athlete that it would proceed to evaluate the explanations and supporting documents provided by the athlete and further information on the next steps with the disciplinary proceedings will be provided in due course.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 13 June 2022, the IOC filed an application pursuant to Article 8.1.1 of the IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022.

22. By letter dated 14 June 2022, the CAS Court Office acknowledged receipt of the Request for Arbitration and informed the Parties that it had been assigned to the Anti-Doping Division of the Court of Arbitration for Sports (the "CAS ADD") pursuant to Article S20 of the Code of Sports related Arbitration. Further, the ISU was invited to inform the CAS ADD by 16 June 2022, whether it intends to join these arbitral proceedings as Co-Claimant and the Athlete to submit her answer as soon as the question of the participation of the ISU would be solved. Also, the Athlete was invited to object against the use of English as language of the arbitration within 3 days.

23. By email dated 17 June 2022, and within the extended deadline, the ISU informed the CAS Court office that it intends to join these proceedings as Co-Claimant and would reserve the

completion of facts and law for the second phase of the procedure (consequences after the OWG).

24. On 17 June 2022, the Athlete requested that the language of the arbitration be Spanish.

25. On 20 June 2022 , the CAS Court office invited the IOC and ISU to comment on the Athletes proposed use of Spanish as language of the arbitration and the Parties to comment by 23 June 2022 on the proposed procedural calendar for the first phase whereby the ISU is granted a 10-day time limit to file its written submissions, if necessary, with respect to the ADRV allegedly committed by the Athlete and the consequences at Olympic level; the Athlete is granted a 20-day time limit to file her Answer strictly limited to the commission of the ADRV the consequences at Olympic level; Holding of a hearing, if necessary; notification of the Arbitral Award limited to the ADRV and its consequences at Olympic level. Further, the Parties were invited to jointly nominate a Sole Arbitrator by 27 June 2022 failing which such Sole Arbitrator will be appointed by the Division President.

26. By email dated 21 June 2022, the ISU informed the CAS Court office that it would not file an own submission for the first phase of the proceedings and joined the application of IOC/ITA. Referring to the language deemed applicable in article 6 of the CAS ADD Rules applicable for the 2022 Olympic Winter Games in Beijing (i.e. English and French), the ISU objected to the use of Spanish as language of the arbitration.

27. Also on 21 June 2022, the IOC stated that it had no objection to the proposed calendar, requested that the procedure be conducted in English and agreed to the appointment of the Sole Arbitrator by the Division President.

28. By letter dated 22 June 2022, the Athlete stated that she had never disputed the existence of an ADRV and fully accepts the requests for relief made by the ITA on behalf of the IOC in its application joined by the ISU and that she would not file any submission related explicitly to the existence of an ADRV. Further, she maintained that at least for the second phase of the arbitration relating to the consequences of the ADRV beyond the Olympic Games, Spanish was the appropriate language for the procedure.

29. By email dated 23 June 2022, the IOC, noting that the Athlete had admitted the ADRV and all of the requests for relief made in the IOC's application, invited the CAS ADD to (1) appoint the Sole Arbitrator and to then (2) immediately proceed (without a hearing) to render a final decision addressing the IOC's application (i.e. phase 1 of the proceedings regarding the Olympic consequences) as there remains no live issue in this phase 1 of the case, and it will be in the Athlete's interest to have a timeous resolution of this phase 1 so that she (and the ISU) can then turn to address the non-Olympic consequences. The ISU confirmed its approval of this suggested procedure.

30. On 25 July 2022, the CAS Court Office informed the Parties that in accordance with Articles A16 and A17 of the Rules of the CAS Anti-Doping Division, and on behalf of the Division President, Ms Raphaëlle Favre-Schnyder, Attorney-at-law in Zurich, Switzerland, had been appointed to act as Sole Arbitrator in this procedure.

31. On 5 August 2022, the Parties were informed that the Sole Arbitrator considered herself to be sufficiently informed to render an award without hearing.

32. On 8 August 2022, the Parties signed and returned the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

A. The Claimants

33. The ITA on behalf of the IOC asserts that of the analysis conducted on a urine sample collected from the Athlete in the scope of an In-Competition Doping Control on 18 February 2022 in Beijing, China, under the Testing Authority of the IOC.

34. The analysis of the A-sample resulted in an Adverse Analytical Finding (an "AAF") for the prohibited substance of the clostebol metabolite 4-chloro-3α-hydroxy-androst-4-en17-one "Clostebol metabolite". The Athlete requested the opening and analysis of the B-sample, which confirmed the results of the A-sample, i.e. the presence of Clostebol metabolite.

35. The IOC therefore asserts that the Athlete as committed an ADRV under Article 2.1 and/or 2.2 of the IOC ADR pursuant to which *"the presence of a Prohibited Substance or its metabolites or markers in an athlete's sample constitutes an ADRV. In particular, sufficient proof of an ADRV under Article 2.1 is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample "where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its metabolites or Markers found in the Athlete's A Sample"* .

36. Accordingly, The ITA, on behalf of the IOC, requests the CAS ADD to grant the following relief:

(i) The Application is admissible.

(ii) Laura Barquero Jimenez is found to have committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympic Winter Games Beijing 2022.

(iii) The result obtained by Laura Barquero Jimenez in the pairs skating competition (short programme) shall be disqualified, with the resulting forfeiture of any and all medals, diplomas, points or prizes.

(iv) The team result obtained by Laura Barquero Jimenez and her partner Marco Zandron in the pairs skating competition (short programme) shall be disqualified, with the resulting forfeiture of any and all medals, diplomas, points or prizes.

(v) The International Skating Union is requested to consider any further action within its own competence.

(vi) The parties are to bear their own legal and other costs.

37. The ISU has stated that it would join the IOC as Co-Claimant and has not filed additional submissions or prayers for relief specifically related to the ADRV.

B. The Athlete

38. The Athlete has expressly stated that while asserting that it was not intentional and reserving all rights accordingly to seek the elimination or reduction of any period of ineligibility based on "No Fault or Negligence" in a second phase before the ISU and CAS ADD, she admits the ADRV and accepts in full the request for relief made by the ITA on behalf of the IOC and that for this reason, she would not file any submission related explicitly to the ADRV.

V. JURISDICTION

39. Pursuant to the Scope of the IOC ADR, the IOC ADR apply *"in relation to the Olympic Games Beijing 2022. They shall, without limitation, apply to all Anti-Doping Activities and Doping Controls over which the IOC has jurisdiction in relation to the Olympic Games Beijing 2022"*.

In particular, the IOC ADR provides that *"these Rules shall, without limitation, apply to […] (b) all Athletes entered in the Olympic Games Beijing 2022 or who have otherwise been made subject to the authority of the IOC in connection with the Olympic Games Beijing 2022 (see below); […]"*.

Where the case was not resolved upon waiver of a hearing or resulting from other consequences as provided for in article 7.8 of the IOC ADR, *"[…] the ITA shall promptly file an application with the CAS Anti-Doping Division, acting as first-instance authority to conduct proceedings and to issue decisions, as per the CAS Anti-Doping Division Arbitration Rules. The application shall be filed in the name of the IOC by the ITA acting on the IOC's behalf"* as provided for in Article 8.1 of the IOC ADR.

Further, Article 8.1.2 states that: *"The composition of the hearing panel and procedures applicable to the CAS Anti-Doping Division shall be as per the CAS Anti-Doping Division Arbitration Rules"*.

40. Rule A1 of the Arbitration Rules of the CAS ADD ("the Arbitration Rules") states:

"The Anti-Doping Division of the Court of Arbitration for Sport (CAS ADD) has been established to hear and decide anti-doping cases as a first-instance authority pursuant to a delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic programme (Olympic IFs), and any other signatories to the World Anti-Doping Code (WADC). These WADC signatories have delegated their powers to CAS ADD to decide whether or not there has been a violation of their anti-doping rules, as well as to decide any sanction, if applicable, in accordance with the WADC. CAS ADD and these procedural rules have been established in conjunction with the applicable anti-doping rules of the WADC signatories concerned".

41. Rule A2 of the Arbitration Rules provides:

"A2 Jurisdiction of CAS Anti-Doping Division - Application of the Present Rules CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any WADC signatory which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions. These Rules apply whenever a case is filed with CAS ADD. Such filing may arise by reason of an arbitration clause in the Anti-Doping Rules of a WADC signatory, by contract or by specific agreement".

42. The Athlete signed the Athlete Information Notice on her Doping Control Form, thereby confirming her understanding of and consent to the following text:

"The ITA will in particular initiate and undertake testing activities on the occasion of the Games, determine whether or not a potential anti-doping rule violation has occurred pursuant to the Rules, and if so, file the case with the Court of Arbitration for Sport for decision".

43. The jurisdiction of the CAS ADD is not disputed by the Parties who have confirmed it by signing and returning the Order of Procedure.

44. Accordingly, the CAS ADD has jurisdiction to hear the dispute.

VI. LANGUAGE OF THE ARBITRATION

45. Pursuant to Article 4 of the CAS ADD Rules,

"CAS ADD working languages are English, French and Spanish. In the absence of agreement between the parties, the President of the Panel or, if not yet appointed, the President or Deputy President of CAS ADD shall select one of these three languages as the language of the arbitration at the outset of the procedure, taking into account relevant circumstances then known. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the President of the Panel otherwise agree".

46. By letter dated 17 June 2022 and reiterated in her letter dated 22 June 2022, the Athlete has requested that Spanish be used as language for the procedure arguing *inter alia* that

- it is the best way to fully guarantee the right of defense of Ms. Laura Barquero, who has difficulty understanding and expressing herself in English;
- Spanish is also an official language of the CAS and the Athlete's mother tongue;
- a hearing in a language other than Spanish, in which the Athlete cannot understand what is being discussed and cannot express herself in her mother tongue, would unnecessarily limit her rights of defense.

47. However, the Athlete did not oppose that the Claimant's file all their submissions and annexed documents in English.

48. The IOC opposed the Athlete's request arguing *inter alia* that

- the sole reason given by the Athlete for her request is that she has difficulty expressing herself in English. As she is legally represented, her level of English is only relevant to the way in which she would give oral evidence (if there were to be a hearing). It is not relevant to the general question of the language of the proceedings.

- as to that general question, the Athlete's lawyers have engaged with these proceedings in English (as have the other two parties). They have also prepared a detailed submission (Exhibit 16 of the Application) in English. They are clearly competent to continue these proceedings in English. That is the key consideration and English is therefore the appropriate language.

- should a hearing be necessary (which the IOC believes would be unlikely), the Athlete could give evidence through an interpreter, like any other witness before CAS in the same situation, and her English-speaking lawyers will be able to explain the events of the hearing to her as they occur.

49. The ISU equally opposed the use of Spanish instead of English as language of the arbitration arguing inter alia that

- article 6 of the CAS ADD Rules applicable for the 2022 Olympic Winter Games in Beijing provides only for English and French as languages before the CAS ADD.

- English is the only official language of the ISU.

50. The Sole Arbitrator, taking into consideration the arguments brought forward by the Parties, notes that a number of submissions, documents and exhibits have already been filed by the Parties in English, that the Athlete's representatives master English perfectly and that for any oral communication or hearing, the Athlete may make use of an interpreter and that therefore her procedural rights would not be curtailed by the use of English.

51. Therefore, the Sole Arbitrator finds that English is the most appropriate language for this arbitration.

VII. MERITS

A. Commission of the ADRV

52. Article 2.1 of the IOC ADR provides that the presence of a Prohibited Substance or its metabolites or markers in an athlete's sample constitutes an ADRV. In particular, sufficient proof of an ADRV under Article 2.1 is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample *"where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its metabolites or Markers found in the Athlete's A Sample"*.

53. Clostebol metabolite was found in the Athlete's A-Sample. Clostebol belongs to Class S1(1) (Anabolic Androgenic Steroids) of the WADA Prohibited List 2022.

54. The analysis of the B-Sample performed at the request of the Athlete confirmed the results of the A-Sample, namely the presence of a Prohibited Substance, i.e. Clostebol metabolite.

55. The IOC submits that it has discharged its burden of proof, pursuant to Article 3.1 of the IOC ADR, of establishing the Article 2.1 and/or Article 2.2 ADRV.

56. The Athlete has expressly accepted the alleged ADRV and admitted an ADRV pursuant to Article 2.1 and/or Article 2.2 of the IOC ADR.

57. Therefore, the Sole Arbitrator finds that the Athlete has committed an ADRV in accordance with Article 2.1 and/or 2.2. IOC ADR.

B. Consequences

58. This case concerns an Athlete who competes in an Individual Sport, as defined in the IOC ADR as *"Any sport that is not a Team Sport"*, where "Team Sport" is defined as *"A sport in which the substitution of players is permitted during a Competition"*.

59. Under the IOC ADR, the Consequences of an ADRV are limited to consequences in connection with the Beijing Winter Olympics.

60. Apart from the establishment of the ADRV itself, the consequences of an ADRV are specifically set out in Articles 9 and 11 of the IOC ADR at set out above.

61. Article 9 of the IOC ADR applies to ADRVs in Individual Sports in connection with an In-Competition test. As a consequence, the Athlete's result obtained in that competition, namely her 11th-place finish in the pairs skating (short programme), must automatically be disqualified.

62. Article 11.3 of the IOC ADR provides consequences to teams in sports which are not "Team Sports". In the present case, Article 11.3 applies as the pairs skating competition involves a team of two, but not within a "Team Sport". Article 11.3 states that the CAS ADD shall apply the rules of the relevant International Federation, being the ISU in the present case, to determine the consequences to be imposed on the team.

63. Article 11.2.1 of the ISU ADR provides: *"11.2 Consequences for Teams 11.2.1 An anti-doping rule violation committed by a member of a team, including substitutes, in connection with an In-Competition test automatically leads to Disqualification of the result obtained by the team in that Competition, with all resulting Consequences for the team and its members, including forfeiture of any medals, points and prizes"*.

64. As a consequence, the results obtained by the Athlete in the Teams competition event at the Olympic Winter Games Beijing 2022 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.

65. Further, the results obtained by the team of the Olympic Athletes from Spain in the pairs skating (short programme) event at the Olympic Winter Games Beijing 2022 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.

66. The Sole Arbitrator notes that the Athlete expressly reserves her right to seek the elimination or reduction of the ineligibility period on the basis of "No Fault or Negligence" in further disciplinary proceedings outside the period of the Olympic Games. Such reservation is the right of the Athlete and more information will follow concerning the next steps in this procedure in due course following the Games.

67. The anti-doping rule violation now having been determined, the IOC is no longer a party to this procedure and with the issuance of this Order, the IOC's participation in these proceedings is hereby terminated.

VIII. CO-APPLICANT ISU

68. Further to the ISU's request to participate as a Co-Applicant in this procedure, the Sole Arbitrator notes the ISU's delegation of power to the CAS ADD during the Beijing Winter Olympics in accordance with Articles 7.1.2 and 10.2.2 of the IOC ADR. In this regard, the ISU's request is granted.

69. In application of Articles 7.1.2, 7.9 and 10.2.2 of the IOC ADR, these proceedings shall continue by and between the ISU, who joined these proceedings as Co-Claimant, and the Athlete, in regard to the consequences of the ADRV which may be imposed on the Athlete. The Sole Arbitrator, after consultation with the Parties, shall determine the procedural directions applicable to the remaining part of the arbitration and shall issue, at the conclusion of these proceedings following the Olympic Games, a final award, all in accordance with Article 20 of the CAS ADD Rules.

IX. COSTS

(…).

X. APPEAL

75. Article 8 of the 2019 ISU ADR provides:

> *8.3 At the end of the hearing, or on a timely basis thereafter, the CAS panel will issue a written decision that includes the full reasons for the decision and for any period of Ineligibility imposed, including (if applicable) a justification for why the greatest potential Consequences were not imposed.*

8.4 The decision may be appealed to the CAS as provided in Article 13. Copies of the decision will be provided to the Athlete or other Person and to other Anti-Doping Organisations with a right to appeal under Article 13.

76. Pursuant to Article A21 of the ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons in accordance with Articles R47 *et seq*. of the CAS Code of Sports-Related Arbitration, applicable to appeals procedures.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Testing Agency on behalf of the International Olympic Committee on 13 June 2022 is upheld.

2. Ms. Laura Barquero Jimenez is found to have committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022.

3. The result obtained by Ms. Laura Barquero Jimenez in the pairs skating competition (short programme) shall be disqualified, with the resulting forfeiture of any and all medals, diplomas, points or prizes.

4. The team result obtained by Ms. Laura Barquero Jimenez and her partner Mr. Marco Zandron in the pairs skating competition (short programme) shall be disqualified, with the resulting forfeiture of any and all medals, diplomas, points or prizes.

5. With the issuance of this Partial Arbitral Award, the IOC's participation in this proceeding is hereby terminated.

6. The award is pronounced without costs, except for the ADD Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the IOC, which is retained by the ADD.

7. (…).

8. (…).

9. All other motions or prayers for relief are dismissed.