TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

Arbitration CAS 2023/ADD/60 International Weightlifting Federation (IWF) v. Dmitry Chalyy, award of 5 October 2023

Panel: Mr Murray Rosen KC (United Kingdom), Sole Arbitrator

Weightlifting
Doping (oxandrolone, drostanolone)
Aggravating circumstances
Fairness exception with regard to disqualification of results

1. **The fact that an athlete used multiple prohibited substances on more than one occasion whilst protected by a state anti-detection scheme are aggravating circumstances justifying a period of ineligibility greater than the standard period for a first violation.**

2. **Where the anti-doping rule violations are severe, repeated and sophisticated, there is no reason not to disqualify the results obtained by an athlete for a substantial period commencing on the date when a positive sample was first collected from the athelte. However, if, due to the date on which the ineligibility of the athlete will start, the period of disqualification of results would thus amount to almost 10 years, and there is no evidence of further doping by the athlete after a period that is well within these 10 years, fairness requires that the period of disqualification of results be reduced to a duration that is proportionate to achieve a just sanction in the case.**

I. PARTIES

1. The International Weightlifting Federation ("IWF" or the "Claimant") is and was at all material times the international governing body for the sport of weightlifting. It is subject to the World Anti-Doping Code ("WADC") and in relation to its anti-doping responsibilities, assisted by the International Testing Agency ("ITA").

2. Mr. Dmitriy Chalyy ("Respondent" or "Athlete"), born on 23 March 1988, was at all material times an international Russian weightlifter and a member of the Russian Weightlifting Federation ("RWF"), and is now charged with doping violations.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced. Additional facts and allegations may be set out,

where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

4. The Athlete competed as a member of the Russian team at international events including London in September 2012 and Moscow in November 2013, and provided samples of his urine for in-competition testing at the request of the Russian Anti-Doping Agency ("RUSADA") including (a) on 22 September 2012, sample no. 2728463 and (b) on 29 November 2013, sample no. 2867518. Both samples were reported as negative in the Anti-Doping and Administration Management System ("ADAMS") by RUSADA's Moscow laboratory.

5. On 16 July and 9 December 2016, Professor Richard McLaren published two independent reports into allegations of a systemic doping scheme in Russia which concluded that Russian athletes had been protected for some years by anti-detection methods involving, among other things, the reporting as negative of positive urine samples collected and tested on behalf of RUSADA.

6. In 2017 and 2019, the World Anti-Doping Agency ("WADA") obtained, first from a whistle-blower and then from its selected experts who were allowed access to RUSADA's Moscow laboratory (as part of its reinstatement process after having been declared non-compliant with WADC) copies of data from its Laboratory Information Management System ("LIMS") for the years 2011 to 2015 and underlying analytical material reported therein which contained chromatograms indicating whether a particular substance was or was not present in a given sample.

7. That data and other material was provided to the IWF and reviewed by Professor Martial Saugy, Anti-Doping Scientific Advisor of the University of Lausanne, former Director of the WADA-accredited laboratory in Lausanne. He reported that the chromatograms were consistent with the LIMS to the following effect, namely that (a) in the Athlete's sample no. 2728463 of September 2012, Oxandrolone was present and (b) in the Athlete's sample no. 2867518 of November 2013, Oxandrolone and Drostanolone were present. Oxandrolone and Drostanolone are both anabolic androgenic steroids prohibited under S1.1 of the 2012 WADA Prohibited List and every WADA Prohibited List since.

8. Moreover, the Athlete's name appeared in the LIMS in relation to one of his samples, although, according to Article 9.3.3 of the 2012 International Standard for Testing ("IST") *"Documentation identifying the Athlete shall not be included with the Samples or documentation sent to the WADA-accredited laboratory"*.

9. On 14 September 2022, the ITA on behalf of the IWF notified the Athlete through the Russian Weightlifting Federation that it had decided to allege anti-doping rule violations against him, giving him a deadline of 28 September 2022 to request a hearing before the CAS Anti-Doping Division ("CAS ADD") and informing him that he was provisionally suspended from that date, that is, 14 September 2022.

10. On 19 September 2022, the RWF confirmed that the Athlete had been duly notified; on 27 September 2022, the Athlete returned his signed Athlete Rights Form indicating that he did not admit the alleged anti-doping rule violations or accept their consequences; and on 28 September 2022, the ITA noted that and informed the Athlete that the matter would be submitted to the CAS ADD for adjudication.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 10 May 2023 the IWF submitted its Request for Arbitration under Article A13 of the Rules of the CAS ADD 2021 ("the 2021 Rules").

12. By letter dated 11 May 2023 the CAS ADD, by its Managing Counsel, notified WADA under Article A14 of the 2021 Rules and by an email of the same date WADA replied that it did not wish to participate.

13. By a further letter dated 11 May 2023 the CAS ADD notified the parties that pursuant to S20 of the Code of Sports-related Arbitration, the matter would be dealt with under the 2021 Rules and among other things, required the Athlete to file an Answer to the Request for Arbitration. The Athlete did not respond with an Answer or at all.

14. By further letter dated 5, 22 and 30 June 2023 the CAS ADD asked the parties to indicate whether they deemed a hearing necessary and intimated the proposed appointment of Mr. Murray Rosen KC as sole arbitrator. The IWF replied that it did not deem a hearing necessary. The Athlete did not reply at all and there was no challenge to Mr Rosen's appointment, which was duly confirmed under Article A17 of the 2021 Rules.

15. On 3 July 2023, the CAS ADD wrote again to the Parties to notify them that the Sole Arbitrator had received the file and granted the Athlete a final opportunity to dispute the matter if he wished within 10 days. No communication was received from the Athlete in response and the Sole Arbitrator considered himself sufficiently well informed to proceed without a hearing.

16. On 28 August 2023, the CAS ADD Office confirmed that no hearing would be held in the matter at hand and invited the Parties to sign and return the Order of Procedure by 1 September 2023.

17. On 31 August 2023, the IWF returned a signed copy of the Order of Procedure, while the Athlete failed to do so.

IV. SUBMISSIONS OF THE PARTIES

A. The Claimant

18. In the Request for Arbitration, the IWF set out the evidence as regards the alleged violations by reference to the attached exhibits including the reports of Professor Saugy aforesaid and Mr Aaron Walker and Dr. Julian Broséus of WADA's Intelligence & Investigations

Department, and indicated that it would call them as witnesses to speak to their reports and any issues relating thereto at any hearing, which in the event was unnecessary.

19. The IWF submitted that the violations alleged under the applicable 2012 IWF Anti-Doping Policy ("the 2012 IWF ADP") were proved by that evidence and that the Athlete should be sanctioned by the maximum four years period of Ineligibility on the grounds of aggravated circumstances and that his competitive results should be disqualified (without any exception required by fairness) for the period from the date of his first violation, 22 September 2012, to the date of his provisional suspension, 14 September 2022, in all nearly 10 years.

20. The IWF therefore requested by way of relief that the CAS ADD rule that:

(1) The International Weightlifting Federation's request for arbitration is admissible.

(2) Mr. Dmitriy Chalyy is found to have committed anti-doping rule violations under Article 2.2 of the IWF ADP.

(3) Mr. Dmitriy Chalyy is sanctioned with a period of ineligibility of up to four years starting on the date on which the CAS Anti-Doping Division decision enters into force. Any period of provisional suspension effectively served by Mr. Dmitriy Chalyy before the entry into force of the CAS Anti-Doping Division decision shall be credited against the total period of ineligibility to be served).

(4) All competitive results obtained by Mr. Dmitriy Chalyy from and including 22 September 2012 until 14 September 2022 be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(5) The costs of the proceedings (if any) be borne by Mr Dmitriy Chalyy.

(6) The IWF is granted an award for its legal and other costs.

B. The Athlete

21. The Athlete failed to respond to any communications from the CAS ADD, to file any Answer to the Request for Arbitration, or to provide any evidence or submissions.

V. JURISDICTION

22. As a member of the RWF, the IWF's anti-doping rules were and are applicable to the Athlete. Based on the principle *tempus regis actum*, the version of those rules currently in force, that is, the 2021 IWF Anti-Doping Rules ("2021 IWF ADR") govern the procedural aspects of this matter.

23. As stated in Article 8.1.1 of the 2021 IWF ADR, *"IWF has delegated its Article 8 responsibilities (first instance hearings, waiver of hearings and decisions) to the CAS ADD as an appropriate independent arbitration forum. The procedural rules of the arbitration shall be governed by the rules of the CAS ADD".*

24. Under Article 8.1.2.1 of the 2021 IWF ADR, *"When IWF sends a notice to an Athlete or other Person notifying them of a potential anti-doping rule violation, and the Athlete or other Person does not waive a hearing in accordance with Article 8.3.1 or Article 8.3.2, then the case shall be referred to CAS ADD for hearing and adjudication, which shall be conducted in accordance with CAS ADD's procedural rules and the principles described in Articles 8 and 9 of the International Standard for Results Management"*.

25. Under the heading "Waiver of Hearing", Article 8.3.1 of the 2021 IWF ADR provides that *"An Athlete or other Person against whom an anti-doping violation is asserted may waive a hearing expressly and agree with the Consequences proposed by IWF"*. The Athlete did not waive a hearing and the CAS ADD thus has jurisdiction to hear the present matter.

VI. APPLICABLE LAW

26. Under Article A20 of the CAS ADD Rules, *"The Panel shall decide the dispute according to the applicable ADR or the laws of a particular jurisdiction chosen by agreement of the parties or, in the absence of such a choice, according to Swiss law"*.

27. Under Article 24.7.2 of the 2021 IWF ADR, anti-doping rules violations are governed by the substantive anti-doping rules in effect when the alleged anti-doping rule violations occurred. The alleged anti-doping rule violations in this case occurred in September 2012 and November 2013, and are accordingly governed (subject to the principle of *lex mitior*) by the 2012 IWF ADP as the rules in force at that time.

VII. MERITS

A. The Anti-Doping Rule Violations

28. Pursuant to Article 2.2 and 2.2.1 of the 2012 IWF ADP, *"Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method"* is prohibited and *"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method"*.

29. According to the comment to Article. 2.2, *"Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1"*.

30. In the present case, the evidence – in particular the LIMS data and Professor Saugy's review of the underlying Analytical Data – comfortably satisfies the Sole Arbitrator that the samples collected from the Athlete in September 2012 and November 2013 contained prohibited substances, Oxandrolone, and in the case of the November 2013 sample, Drostanolone. The samples were initially reported by RUSADA as negative, contrary to its own Moscow

Laboratory data, can be explained as part of the Russian anti-detection scheme. Thus, it is clear that the Athlete breached Article 2.2 of the 2012 IWF ADP.

B. Period of Ineligibility

31. Under Article 10.2 of the 2012 IWF ADP, the standard period of Ineligibility imposed for a violation of Article 2.2 is two years. However, Article 10.6 of the 2012 IWF ADP provides that *"if the IWF establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule. An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the IWF"*.

32. The comment to Article 10.6 of the 2012 IWF ADP states that *"Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete tested positive for a substance which appears on the Prohibited List under class S.1 "Anabolic agents" (the intake of anabolic agents, which are widely spread in the sport of weightlifting, have long term effects and justify increased sanctions); the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person Used or Possessed multiple Prohibited Substances or Prohibited Methods or Used or Possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation"*.

33. There are obvious aggravating circumstances as exemplified in that comment present in this case, namely: the Athlete used multiple prohibited substances, that is Oxandrolone and Drostanolone, anabolic agents which are specifically mentioned in the comment to Article 10.6, on multiple occasions over thirteen months, whilst protected by the Russian anti-detection scheme.

34. In those circumstances, the Athlete should receive an increased period of Ineligibility: the Sole Arbitrator considers that the maximum of four years is manifestly appropriate. For the avoidance of doubt the long delay between the violations and their discovery and prosecution should not tend against the maximum sanctions prescribed. That delay resulted from the anti-detection scheme and false reporting of the sample test results and it is important that doping cheats and their victims know that violations, even if undetected at the time, will always be vulnerable to later remedy.

C. Disqualification

35. According to Article 10.8 of the 2012 IWF ADP: *"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".

36. In the present case the date when a positive sample (that is, sample no. 2728463) was first collected from the Athlete was 22 September 2012, and all results obtained by him from such date until the date of his provisional suspension on 14 September 2022 should be disqualified, "unless fairness requires otherwise", in particular, unless the period of disqualification is disproportionate.

37. Taking account of the seriousness of the anti-doping rule violations, as summarised above, and the fact that the Athlete has not sought to demonstrate why any of his results in that period should be saved, there is no reason not to disqualify results obtained by the Athlete for a substantial period commencing on 22 September 2012.

38. However, a disqualification of results through to the start of the ineligibility period, given that there is no evidence of further doping by the Athlete after 29 November 2013, may constitute excessive punishment and would not be fair, considering that such period of almost 10 years would include the delay in the anti-doping procedure, even though that resulted in part from the concealment of the positive samples of 22 September 2012 and 29 November 2013.

39. Accordingly, based on the fairness exception, and having also considered previous decisions including CAS 2018/O/5712, the Sole Arbitrator finds in the present case that the disqualification of all the Athlete's competitive results over a period of time of four years since 22 September 2012, i.e. the same duration as the subsequent period of ineligibility, is proportionate to achieve a just sanction is to be achieved in this case.

VIII. COSTS

(…).

IX. APPEAL

43. 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 this final award with reasons, in accordance with Articles R47 ff. of the CAS Code, applicable to appeals procedures.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Weightlifting Federation on 10 May 2023 is partially upheld.

2. Mr. Dmitriy Chalyy is found to have committed an anti-doping rule violation under Article 2.2 of the 2012 IWF Anti-Doping Policy.

3. Mr. Dmitriy Chalyy is sanctioned with a period of ineligibility of four (4) years starting on the date of this Award. Any period of provisional suspension effectively served by Mr Dmitry Chalyy before the date of this Award shall be credited against the total period of ineligibility to be served.

4. All competitive results obtained by Mr. Dmitriy Chalyy from and including 22 September 2012 until 21 September 2016 be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

5. (…).

6. (…).

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