

New Dimension In Olympic Doping Saga: Admissible Evidence

By **Ronald Katz** (April 30, 2018)

The Russian doping scandal that plagued the Rio and Pyeongchang Olympic Games had the feeling of a roller-coaster ride because it was based, in certain critical respects, on inadmissible evidence. That unsteadiness has now been remedied by the publication last week of two lengthy reasoned opinions — one finding doping and one not — by the Court of Arbitration for Sport.

The importance of admissible evidence to a fair process of adjudication is crucial. Through evidentiary rules developed over centuries, courts maintain the confidence of the public by not considering unreliable evidence like speculation, hearsay and uncross-examined testimony.



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Although it should be obvious that determinations about the admissibility of evidence require legal training, many of those making decisions affecting the Rio and Pyeongchang Games did not have such training. For example, the International Olympic Committee Disciplinary Commission, whose decisions that found doping were being reviewed by the CAS, included one person who is untrained in the law but who, as a former IOC president, is politically significant. By contrast, the three members (two German and one French-Iranian) of the two CAS panels deciding the cases in question are distinguished lawyers and/or law professors, mediators and arbitrators with combined legal experience in hundreds of mediations and arbitrations.

The panels' methods are well established. First, both CAS panels made it clear that what they had to consider was evidence that was probative with respect to the individual defendants — cross-country skier Alexander Legkov and bobsledder Aleksandr Zubkov. The panels made it clear in paragraph 718 of the Legkov case and paragraph 686 of the Zubkov case that the proof of a broad, state-sponsored doping conspiracy alone was not sufficient to hold any given individual responsible: "[I]t is incumbent on the IOC to adduce particularly cogent evidence of the Athlete's deliberate personal involvement in ... wrongdoing ... it is insufficient for the IOC merely to establish the existence of an overarching doping scheme." (Because the cases were heard together, general facts and principles of decision are stated by the panels virtually identically; unless otherwise specified, all quotes are from the Legkov case).

Second, the panels went to great pains to set out all of the evidence both supporting and not supporting the Zubkov and Legkov cases, with a 165-page decision in the case of Zubkov and a 154-page decision in the case of Legkov. Being able to see all of the evidence, both pro and con, gives the reader of the decisions confidence that all aspects of the case were carefully considered.

Third, in both CAS cases published last week, the panels identified the crucial inadmissible evidence that had underpinned the IOC Disciplinary Commission decisions to ban Russian athletes. In paragraph 794 of the Legkov case for example, the CAS states "For the IOC DC, the conclusion of the Athlete's involvement was supported by the general proposition that

the scheme could not work effectively without the participation of athletes. Accordingly, the involvement of the athletes, in general, and the Athlete [Legkov] in particular, was the only possible explanation for what had occurred." The Legkov CAS panel ultimately held that such speculation does not and cannot substitute for direct or persuasive circumstantial evidence about the particular accused athlete.

A second example came from the testimony of Dr. Grigory Rodchenkov, the former head of the anti-doping laboratory in Russia, who had become an informant after being revealed as the central player in the alleged doping scheme. Rodchenkov, the main accuser, had not been cross-examined before the CAS hearing. The CAS hearing remedied that void, which was particularly egregious in this case because informants often have ulterior motives and are therefore not as reliable as witnesses who have no interest in, for example, receiving immunity from prosecution. The cross-examination of Rodchenkov revealed, among many other things, that he had no firsthand knowledge of the crucial aspects of the alleged wrongdoing: tampering with the supposedly tamper-proof urine bottles, adding salt to the urine samples, mixing urine samples, giving out-of-competition clean urine samples, and photographing the labels on urine samples. Because of his lack of firsthand knowledge, the panels gave little or no weight to Rodchenkov's testimony on these important subjects. Another problem for Rodchenkov was that, according to paragraph 296 of the Zubkov decision, cross-examination of Rodchenkov revealed a 2017 video in which Rodchenkov said that "I do not give a fuck about fighting the doping."

A third example came from the testimony of professor Richard McLaren, who had written a report crucial to the banning of these athletes. Like Rodchenkov, McLaren had not been cross-examined by the time the IOC DC banned these athletes and was cross-examined only for the CAS hearings. Some of his testimony was rejected by the CAS panels on the grounds that it was speculative and not applicable to the individuals accused in these hearings. As paragraph 321 of the Zubkov decision states: "He [McLaren] confirmed that Dr. Rodchenkov's testimony was that 'most' of the 'protected athletes' were on doping programmes. Prof. McLaren considered it 'reasonable to assume,' therefore, that Dr. Rodchenkov's testimony was that not all 'protected athletes' were on doping programmes. Prof. McLaren was unable to identify which of the athletes were, and which were not, on doping programmes."

The panels methodically examined the key evidence against the athletes. This evidence related to whether the athlete had provided clean out-of-competition urine for swapping with drug-tainted urine, whether the athlete had taken a prohibited substance, whether the athlete had photographed the label on the urine bottle used after the competition, and whether that urine was swapped out. The most crucial evidence regarding whether the urine had been swapped mainly depended on dueling expert testimony about how the supposedly tamper-proof bottles could be opened, whether the salt content of the urine in those bottles was physiologically possible and whether the DNA of that urine showed that it was from more than one person.

After painstakingly going through all of this evidence, the Legkov panel concluded in paragraph 868 as follows: "[F]or all of the reasons outlined in this award, the evidence presented before the Panel does not justify the conclusion to the comfortable satisfaction of the Panel that the Athlete [Legkov], through acts or omissions, individually committed any of the alleged ADRVs [anti-doping rules violations]."

After a similarly painstaking process, the Zubkov panel came out the opposite way: "[T]he Panel, for the reasons set out above, finds that the Athlete [Zubkov] committed ADRVs in the form of the use of a prohibited method, i.e. urine substitution ... and in the form of use

of a prohibited substance."

The two differing conclusions clearly demonstrate that the CAS panels simply went — as they were duty-bound to do — where the admissible evidence led them. The panels' example provides an excellent model for future decision-makers regarding athletic doping: use admissible evidence only; hearsay, speculation and uncross-examined testimony are inherently unreliable.

International athletics have high stakes and stoke the emotions of the public, which is why assuring their fairness is so important. At the level of the game, assuring fairness is the task of the referees. Equally important is what happens before the game, and insuring fairness at that juncture, in an age when doping is not uncommon, ultimately falls to the highest judicial authority in sport, the CAS. The two decisions last week, because of their comprehensive use of the time-tested methods of considering evidence, should serve to increase public confidence that cheaters will be punished and the innocent will not.

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