

Article

Case Analysis on the CAS Ad Hoc Division Decisions for the 2022 Beijing Winter Olympics

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Abstract: Whether it is the Summer Olympics or the Winter Olympics, in order to resolve potential sports disputes, the Court of Arbitration for Sport (CAS) sets up a special ad hoc tribunal in the host city of the Olympic Games. Although CAS ad hoc rules have many similarities with ordinary procedures, they are different in terms of the legal basis, legal remedies, and certain procedural rules. During the Beijing 2022 Winter Olympics (Beijing 2022), the CAS Ad Hoc Division and the CAS Anti-Doping Division heard a total of seven cases. These cases involve issues such as provisional suspension of games, protection of minors, unreasonable delays in test results, cancellation of award ceremonies, and the timing of disputes. The CAS Ad Hoc Division decisions on the above issues can be regarded as the latest developments in the application of international sports arbitration rules.

Keywords: international sports arbitration; Beijing 2022; CAS; ad hoc division; anti-doping division

1. Introduction

The CAS was officially established in 1984. After nearly 40 years of development, it has exerted a huge influence in resolving international sports disputes. It seems to be recognized as “the highest court in the sports world” (McLaren 2010). CAS has developed a set of relatively mature systems and norms, including the *Olympic Charter* and *Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games* (rules). It has also formed a large number of widely recognized arbitration precedents, laying a foundation for the unification of international sports arbitration rules. Originally, there are ordinary arbitration proceedings and appeal arbitration proceedings in CAS. Later, in order to quickly and efficiently resolve sports disputes during the Olympic Games, CAS set up the Ad Hoc Division (AHD) and Anti-Doping Division (ADD) in the Olympic host city.

At the Atlanta Olympic Games in 1996, CAS set up AHD for the first time. Since 1996, the AHD mechanism has operated at every Summer and Winter Olympic Games and other important sporting competitions such as the European Football Championship, Commonwealth Games, Asian Cup, FIFA World Cup, and Asian Games.

According to the Rules, the AHD has jurisdiction to resolve any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games. Its jurisdiction covers any related disputes during the Olympic Games, such as qualification to participate, commercial restrictions on uniforms, disciplinary issues, unsportsmanlike issues, various penalties during competitions in various sports, technical referees, dispute on winner and loser, etc. (McLaren 2001). In view of the growing number of anti-doping cases and their special features, since the 2016 Rio Olympic Games, the CAS has decided to set up a separate ADD during each Olympic Games to deal with issues related to the World Anti-Doping Code (WADC). Since then, the ADD has also become part of the ad hoc tribunal for the Olympic Games (Mavromati 2016).

The AHD undertake a task to resolves disputes that are not resolved through the internal procedures of the national and regional Olympic Committees, the Olympic Organizing



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Committee, the Executive Committee of the International Olympic Committee, or sports organizations (McLaren 1998). It is worth noting that the locus arbitri under the Rules is regarded as Lausanne, Switzerland, although it takes place at the city that holds the Olympic Games. As a result, these proceedings are governed by Swiss arbitration law. In addition, the Swiss Supreme Court has exclusive jurisdiction over any action to set aside an arbitral award made during the Olympic Games.

The hearing shall be conducted in English, French, or Spanish (the three official languages of CAS). Once the application is registered by the tribunal office, a panel of arbitrators is assembled by the president of the AHD. The panel usually consists of three arbitrators. However, if circumstances permit, the president may, at his/her discretion, appoint only one sole arbitrator. According to Article 18 of the Rules, in principle, the panel shall give a decision within 24 h of the lodging of the application. The panel has the discretion to organize the arbitration procedure and formulate the proof procedure in consideration of the needs of special disputes, and the panel only holds one hearing in principle. Nevertheless, the panel may decide not to hold a hearing and make a ruling based only on written statements. The arbitration procedure of CAS is totally free of charge. CAS assigns a pool of pro bono attorneys to athletes, but parties of the disputes usually bear the costs of engaging counsels, experts, witnesses, and translators during the arbitration.

So far, during the past 14 Summer and Winter Olympic Games, the AHD has successfully arbitrated 130 cases, and the ADD has successfully arbitrated 11 cases, including 6 cases of the former and 1 case of the latter during the Beijing 2022 games.

2. The Legal Application by the Ad Hoc Tribunal in the Beijing 2022 Games

On 18 January 2022, CAS announced that it would open two ad hoc tribunals in China to provide fast and high-quality dispute resolution services during the Beijing 2022 games. One was the AHD, and the other was the ADD. The working time of the two ad hoc tribunals was from 25 January 2022 to 20 February 2022 (CAS 2022). The ad hoc tribunals have many similarities in arbitration procedures and rules but differ in terms of jurisdiction, arbitration time, application of rules, etc.

2.1. AHD

AHD has one chairman, two co-chairs and nine arbitrators. Most of the arbitrators are senior athletes, law professors, and lawyers to ensure the efficiency of the arbitration. According to Article 61 of the *Olympic Charter* and Article 1 of the Rules, any dispute arising or related to the Olympic Games shall be submitted to an arbitration tribunal for adjudication in accordance with the sports-related arbitration rules. During Beijing 2022, under normal circumstances, upon receipt of an application, the president of the AHD shall constitute a panel composed of three arbitrators under Article 11 of the Rules. For procedure issues, the panel applies Chapter 12 of the *Swiss Federal Rules of Private International Law*.

In addition to general provisions, characteristics of AHD include: (1) the dispute accepted by AHD must also have arisen during the Olympic Games or not earlier than ten days before the Opening Ceremony. For the Beijing 2022 games, the opening ceremony was held on 4 February 2022, which means that disputes that happened earlier than 25 January 2022 were not subject to the jurisdiction of the AHD; (2) applicants of AHD need to comply with the provisions of the *Olympic Charter*, i.e., the sports association to which the applicant belongs must be an official member of a national Olympic committee; (3) the decision of AHD is final; (4) the Rules apply exclusively to the AHD and other provisions of the sports arbitration are not applicable; (5) the parties of the arbitration do not have the right to choose an arbitrator. This rule is different from the ordinary procedure of CAS, under which parties can choose an arbitrator independently. Such arrangement is mainly to save time and reduce the risk for parties to challenge the arbitrator to withdraw; (6) The main legal basis for AHD Decisions includes: *Olympic Charter*, applicable legal norms, general legal principles, and norms it deems appropriate; (7) AHD should make a decision within

24 h after the application is submitted, and only in special circumstances can the time limit be extended by the president of AHD, as necessary; (8) The AHD shall have jurisdiction only if the applicant has exhausted all internal remedies available under the statute or regulations of the relevant sports organization unless the time required for the exhaustion of internal remedies would preclude submission to the AHD; (9) the arbitration process and results of AHD are public. The predictability and consistency of its rulings contribute to its authoritative credibility (Li and Xiang 2019); (11) the official languages of AHD are English, French, and Spanish.

Because of COVID-19, hearings of the AHD and ADD during Beijing 2022 were held virtually. Of the six cases ruled by AHD during Beijing 2022, one involved the jurisdiction of the AHD, four were related to qualification and selection disputes, and one *Valieva* case caught the world's attention.

2.2. ADD

ADD has six arbitrators, mainly consisting of experts experienced in anti-doping matters. During the 2022 Beijing games, the ADD applied anti-doping policies, rules, and regulations to regulate any doping-related incidents that may have arisen during the Olympic Games. Doping-related controversies are investigated by the International Testing Agency (ITA) in accordance with the *Arbitration Rules Applicable to the CAS Anti-Doping Rules for the 2022 Beijing Olympic Games* (Anti-Doping Rules) and then submitted to the ADD. According to Article 7 of the Anti-Doping Rules, Chapter 12 of the *Swiss Federal Rules on Private International Law* is applicable to the procedural issues of the ADD.

The characteristics of ADD include: (1) ADD is an institution that arbitrates the allegations of the violation of anti-doping rules during the Olympic Games. If the parties are not satisfied with the ruling, they can appeal to the CAS after the Olympic Games; (2) the laws applicable to ADD are the *International Olympic Committee Anti-Doping Rules* (IOC ADR), the WADC, applicable regulations, provisions of Swiss law, and general principles of law; (3) ADD applies the principle of strict liability in anti-doping cases. The discovery of prohibited drugs in the athlete's body is considered to be doping, regardless of the athlete's subjective intention or other factors; (4) according to the IOC ADR, the ADD shall make a decision within 24 h after the end of the hearing or the end of the evidence hearing. The final determination of ADD can be made during or after the Olympic Games. The panel may make part of the award during the Olympic Games and decide on the remaining issues in a final award after the Olympic Games. This feature, which differs from the AHD, is determined by the complexity of anti-doping cases; (5) ADD's decisions are not "final". Those who are dissatisfied with the ADD ruling during the Olympic Games can appeal to AHD. After the Olympic Games, they can appeal to CAS; (6) the languages used by ADD are only English and French.

During the Beijing 2022 games, there was one published case heard by ADD (2022/ADD/43(OG) 2022). In that case, ITA issued a violation report and the athlete involved requested a ruling by the ADD. The ADD, in the end, disqualified the athlete in accordance with the Anti-Doping Rules.

3. Rulings of the Ad Hoc Tribunals for Beijing 2022

3.1. *International Olympic Committee and World Anti-Doping Agency and International Skating Union v. Russian Anti-Doping Agency and Kamila Valieva and Russian Olympic Committee*

Respondent Kamila Valieva is a famous Russian women's figure skating athlete. She participated in the 2022 Russian Figure Skating Championships in St. Petersburg and underwent an in-competition doping control test by the Russian Anti-Doping Agency (RUSADA) on 25 December 2021. Two samples (A and B) were then sent to Karolinska University Hospital Laboratory (WADA-accredited laboratory) in Stockholm, Sweden for testing. The test report shows that the laboratory received the sample on 29 December 2021, but it did not announce the adverse analytical finding due to the presence of trimetazidine

until 8 February 2022. The laboratory explained that the delay resulted from the shortage of personnel due to COVID-19.

According to the *All-Russian Anti-Doping Regulations* (ARADR), RUSADA imposed a provisional suspension on Valieva from 8 February 2022. Before that, she participated in the team event in women's free skating—free style as a member of the Russian Olympic Committee team and won the gold medal in the Beijing 2022 Olympic Games. On 9 February 2022, Valieva filed a complaint, and the Disciplinary and Anti-Doping Committee (DADC) of the Russian Olympic Committee held a provisional hearing and lifted the provisional suspension.

On 11 February 2022, the International Skating Union (ISU), the IOC, and the World Anti-Doping Agency (WADA) filed an application to the AHD, requesting the revocation of RUSADA's 9 February 2022 decision to lift Valieva's provisional suspension. (CAS OG 22/08 2022; CAS OG 22/09 2022; CAS OG 22/10 2022) The panel rejected the application after considering all aspects and allowed Valieva to continue to participate in the Beijing 2022 games. On 17 February 2022, Valieva won fourth place in the women's singles free skating event at Beijing 2022.

3.2. *Evan Bates and Karen Chen and Nathan Chen and Madison Chock and Zachary Donohue and Brandon Frazier and Madison Hubbell and Alexa Knierim and Vincent Zhou v. IOC*

The applicant was a member of the U.S. figure skating team (CAS OG 22/11 2022). In the figure skating team competition of the Beijing 2022 games on 7 February 2022, the applicant's U.S. team won second place, the Russian Olympic Committee team won first place, and the Japanese team won third place. However, the awards ceremony was not held on the same day or the next day as pre-agreed. On 8 February 2022, the RUSADA made a decision to postpone the suspension on athletes involved in the doping incident in December last year so that they could participate in the figure skating team competition of the Beijing 2022 games. On the same day, the IOC announced that the medal award ceremony for the figure skating team competition was postponed due to "legal reasons", without giving specific explanations. On 17 February 2022, the executive body of the IOC stated that in consideration of fairness and other factors, the awards ceremony shall not be held because some athletes in the Russian Olympic Committee figure skating team were involved in adverse analytical finding. In view of this, the American figure skater filed an arbitration request with the AHD, requesting an award ceremony for the U.S and Japanese teams. The applicant believed that the applicant had nothing to do with the doping incident and was an "ignorant bystander". Article 56 of the *Olympic Charter* and the agreement on hosting the Winter Olympics signed by China and the Olympic Organizing Committee clearly mention that the Olympic Committee has no right to deprive the athletes of their legal right to receive awards in award ceremonies. There is also no precedent to show that the Olympic Games can only give awards when the ranking is final.

The final ruling of the AHD held that the agreement between China and the Olympic Organizing Committee to host the Winter Olympics was a contract that only bound the contracting parties and did not have any effect on a third party. In addition, it was within the power of the Olympic Organizing Committee to decide on the award ceremony and its method. Therefore, the AHD did not find a sufficient legal basis to overturn the decision of the Olympic Organizing Committee.

3.3. *Andrei Makhnev and Artem Shuldiakov and ROC v. International Ski Federation and IOC*

Applicants Andrei Makhnev and Artem Shuldiakov were freestyle skiers of the Russian Olympic Committee, and the respondent was the International Ski Committee and the IOC (CAS OG 22/02 2022). The two athletes pointed out that due to COVID-19 and the fact that the United States and Canada did not recognize vaccines from Russia, they did not receive the visas to participate in four World Cup matches held in the United States and Canada in late 2021. As a result, they did not have enough points to participate in the Beijing 2022 Olympic Games. The athletes claimed that they were invited by the Organizing

Committees of the United States and Canada, but they were unable to participate in the competitions due to changes in political policies. This was a violation of the sixth basic principle of the *Olympic Charter*, the principle of non-discrimination. In terms of time, on 9 January 2022, the Russian Olympic Committee sent a letter to the IOC to express its concern about this matter again. It was not until 17 January 2022 that the International Ski Committee announced the list of qualifications (the two athletes were not selected). The applicants requested that two more spaces be allocated to them, but the respondent believed that the correspondence of the athletes with the Olympic Committee could not change the time of the dispute. According to the Rules, only disputes that occur within 10 days before the opening ceremony of the Olympic Games fall within the jurisdiction of the AHD. Thus, the AHD had no jurisdiction over the case. In the end, the panel accepted the respondent's point of view, i.e., the time of the dispute shall be the time when it first occurred. Therefore, the time of dispute for this case was the beginning of the 2021 World Cup, not meeting the 10-day standard under the Rules.

3.4. *Megan Henry v. International Bobsleigh and Skeleton Federation*

On 16 January 2022, the International Bobsleigh Federation (IBSF) announced the athlete quotas for each National Olympic Committees (NOCs). On 24 January 2022, the "Qualification System for the Beijing 2022" was published. It revised the qualification standards, expanded the scope of eligible female athletes from the original top 45 to the top 55, and reduced the number of games an athlete needs to participate in for ranking during a ranking period. On the same day, the IBSF reassigned the quota previously rejected by France and Sweden to the U.S. Virgin Islands NOC, and Ms. Tannenbaum, who ranked 49th, finally qualified. Megan Henry from the United States applied to the IBSF Appellate Tribunal to replace Ms. Tannenbaum for this public quota allocation. Her application was dismissed by the IBSF Appellate Tribunal on 25 January 2022. Subsequently, Megan Henry appealed against this decision, and the AHD accepted the case ([CAS OG 22/03 2022](#)).

Henry contended that the amendments to the eligibility system were enacted after the IBSF deadline for reallocating all unused slots, which resulted in the 15th-ranked self-qualification being taken by Ms. Tannenbaum, who was ranked lower than her. She also cited other "more reasonable" quota allocation systems. However, in the end, the AHD rejected Ms. Henry's application. The panel pointed out that the panel only needed to determine the distribution of the entry quota based on what it considered as a "clear" qualification system and should not discuss the reasons behind it and whether there was a better system. The qualification system stipulated that quota places should be allocated to the NOCs, and then NOCs would allocate among the athletes themselves. If a quota place needed to be reassigned, it would not be reassigned to an individual athlete in the higher-ranked NOC but to the next lower-ranked NOC. In this case, the USNOC already had a maximum of two allotted spots, and if Henry was allowed to take this spot, it would exceed the maximum quota that an NOC could have.

3.5. *Adam Edelman and Bobsleigh and Skeleton Israel v. IBSF*

On 17 January 2022, IBSF announced the ranking list of the 2-person bobsleigh event for the Beijing 2022 games. According to the leaderboard, the Israel Bobsleigh Management Association (BSI) did not qualify for the event but topped the list of potential NOC candidates for reallocation. Applicants Adam Edelman and BSI had a dispute with IBSF over the reallocation of places. On 24 January 2022, Edelman stated to IBSF that there was a discrepancy between the number of quotas allocated to athletes and the number of athletes participating in the event. There were 124 quota spots for males. However, 117 countries qualified. Therefore, there were seven vacancies, which was enough to add two-men and four-men teams to fill the remaining places. BSI backed Edelman's position and asked for two additional quota spots. However, on 27 January 2022, the IBSF secretary-general stated that the IBSF executive committee had made a decision to reject his request. The decision was made based on the maximum number of allowed athletes and the total number of

qualified teams. On 29 January 2022, Edelman and BSI appealed to the AHD ([CAS OG 22/04 2022](#)).

The AHD held that although Edelman and BSI had not exhausted all internal remedies when filing their application for arbitration, according to Article 1 of the Rules, if “the time needed to exhaust the internal remedies would make the appeal to the AHD ineffective”, the AHD can obtain jurisdiction. Furthermore, the panel held that since the same male athlete may participate as a driver in both 2-man and 4-man bobsleigh events, the final number of male athletes participating in the bobsleigh race may be different from the quota of 124. The existing 19 qualified NOCs had taken up the full quota of 1, 2, or 3 team members in the 2-man bobsleigh competition. Therefore, although there were gaps in the numbers, there was no “unused quota” in reality.

3.6. Irish Bobsleigh and Skeleton Association v. IBSF and IOC

The Irish Snowmobile Federation (IBSA) also expressed dissatisfaction with the IBSF’s decision regarding the number of entries and the allocation of quotas. On 22 January 2022, the IBSA filed a complaint with the IBSF appeals tribunal and the AHD, requesting four additional quota spots for the men’s steel frame snowmobile event. ([CAS OG 22/05 2022](#)) IBSA believed that changes to the bobsleigh eligibility system in December 2019 unfairly harmed the interests of some NOCs in terms of quota allocation, especially for smaller countries with only one male athlete. It also advocated for increasing the upper limit of the number of NOCs with one quota spot in the men’s event to 11, which would be equal to the quota for women’s events, so as to ensure that athletes of different NOCs and different genders could participate in the Beijing 2022 games with equal opportunity.

In this case, the applicant, IBSA, argued that the eligibility system was discriminatory in accordance with the 4th and 6th principles of the Olympic Charter. However, the panel held that the concept of “discrimination” did not exist in Swiss law, so it was insufficient to change the existing qualification system, which was established by due process. During the Beijing 2022 games, the efforts made by IBSF to ensure gender equality were only at the policy level and could not be used as a legal basis for asserting the existence of discrimination. At the same time, the panel found that there was no evidence that male athletes and countries with only one male athlete were not treated equally under the existing standards.

3.7. Jazmine Fenlator-Victorian v. IBSF

On 17 January 2022, IBSF announced the rankings of the women’s double bobsleigh competition in the 2022 Winter Olympics, among which, the applicant Jazmine Fenlator-Victorian was tied with Frenchman Margot Boch with 674 points. Based on the ranking and the qualification system for the Beijing 2022 games, IBSF finally allocated the quota to the French National Olympic Committee (CNOSF) instead of the Jamaica Olympic Committee (JOA), to which the applicant belonged. The applicant expressed dissatisfaction with the result and believed that the 674 points she had obtained were the result of her seven best results in the eight North American Cup games. However, Boch only participated in five games, and the rest of the games were canceled due to bad weather and could not be rescheduled. IBSF double-counted the points Boch scored in the European Cup on 5 December 2021. On 5 February 2022, Victorian submitted an application for appeal to the AHD against the IBSF ruling ([CAS OG 22/07 2022](#)).

The core issue in this case was the calculation of points. The applicant argued that the double-counted grades of Boch should be deleted because the inclusion of grades achieved “without actual participation” in the ranking violated Article D.2.1 of the qualification rules. Furthermore, there was nothing in the IBSF Statutes that allowed it to award points for a game that was not actually held based on the performance of another game. However, the panel held that Article 10.6.12 of the IBSF rules states that if a match is canceled, the executive committee may decide to re-run a match, and re-running of the match is not compulsory. Article 22 of the IBSF Constitution stipulates that the executive committee

has the right to make decisions on circumstances not foreseen by the constitution. Since the cancellation of the game on December 4th did not meet the conditions for re-running, the executive committee must give a solution so that the European Cup and the North American Cup could have the same number of events. Additionally, the applicant was fully able to participate in all the above-mentioned events, including the repeatedly scored events. The decision to double score was a compromise to compensate for the cancellation of the game due to force majeure and its adverse effects, which was in line with the discretionary situation stipulated in Article 22 of the IBSF statutes, and Victorian's application was, therefore, dismissed.

4. Case Analysis and Thoughts

This essay does not intend to provide a comprehensive overview of all cases, nor does it intend to repeat discussions on routinely discussed or generally accepted issues such as jurisdiction, eligibility, calculation methods, etc. Rather, only certain controversial issues are discussed herein.

4.1. The Decision of Provisional Suspension

According to Article 7.4.1 of the ADR, "If an Adverse Analytical Finding or Adverse Passport Finding is received (upon completion of verification of an Adverse Passport Finding) which revealed the presence of a Prohibited Substance or the Use of a Prohibited Method not pertaining to a Specified Substance or Specified Method, including Team Sports, Provisional Suspension shall be imposed immediately after reviewing the Adverse Analytical Finding and providing the notification stipulated by Clause 9.2 hereof." However, Article 9.4.3 also states that "Mandatory Provisional Suspension may be eliminated if an Athlete provides evidence that the violation was most likely caused by the use of a Contaminated Product or pertains to a Substance of Abuse Use and proves the right to reduction of the period of Ineligibility pursuant to Clause 12.2.4.1 of the Rules. The decision not to eliminate mandatory Provisional Suspension based on the Athlete's statement on the Use of a Contaminated Product may not be appealed."

In the *Valieva* case, the panel of AHD found that the English translation of the ARADR used the expression "most likely" in Article 9.4.3, while in WADC 2021, which it referred to, there was no adverb "most" before "sibility". Thus, ARADR adopted a higher standard than WADC in terms of semantics. In the absence of any specific comments from the parties, the panel assumed it was a mistake in the Russian translation and did not advocate for a higher standard of proof than the WADA rules. In another case in the past, *Aanes v. FINA*, the panel also noted the confusion among different norms and definitions on doping issues and held that the relevant inconsistency in legal provisions shall be interpreted in favor of athletes (Fitchen 2002).

However, WADC 2021 revised the provisional suspension rules. According to Article 7.4.1 of WADC 2021, a mandatory provisional suspension may be eliminated if the athlete demonstrates to the hearing panel that the violation is likely to have involved a contaminated product. Therefore, Valieva's case may not belong to the category of mandatory provisional suspension. The above-mentioned provisions also provided a basis for Valieva's subsequent claim of "contaminated product impact" and the AHD decision to uphold RUSADA's previous decision to eliminate Valieva's provisional suspension.

For many athletes, participation in the Olympics can affect their lifetime sporting career and may be a chance for the highest honor. In the *Valieva* case, the panel took into account the "mistakes" in the semantics of the text and different options for penalties. It, in the end, ruled that the mandatory provisional suspension was inapplicable and not in line with CAS' practice in dealing with such matters.

In particular, (1) AHD is essentially a mechanism for the quick resolution of disputes, and there is a requirement to make a ruling within 24 h. While it is not always possible to make a final decision under such time limits, the AHD will make certain decisions about the fate of the athlete. Furthermore, if the issue is of extreme urgency, such as disqualification,

the athlete will be allowed to compete first, and the results of the competition will be adjusted, if necessary, afterward (McLaren 2010); (2) the purpose of AHD is to strengthen rather than weaken the rights of athletes (Huang 2004). The advisory opinion of CAS also pointed out that the principle of natural justice could be applied when dealing with doping disputes to ensure that the basic rights of athletes are respected (Reeb 1998). When hearing such cases, AHD tends to protect athletes' right to participate in the competition as much as possible. Within the reasonable limits of AHD decision, supporting the removal of mandatory bans on athletes is understandable; (3) even in sports qualification disputes adjudicated by domestic courts, domestic courts generally recognize that the right to participate is a basic right of athletes (Guo 2020). For instance, the athlete's right to participate was protected by law in the following cases, *Nagle v. Feilden* (Heenan 1965), *Behagen v. Intercollegiate Conference of Faculty Representatives* (D. Minn 1972), and *Farrel v. Royal King's Park Tennis Club (Inc.)* (WASC 2006).

4.2. Status of "Protected Person"

As a minor athlete under the age of 16, Valieva is a "protected person" stipulated under ARADR and WADC, and may benefit from special rules of evidence and lower punishment standards. Therefore, on the issue of final sanctions, if it could be determined that Valieva had no major fault or negligence in causing the use of a contaminated product, she could be subject to the minimum sanction of public condemnation.

Undoubtedly, the sanction is a very effective weapon in the fight against doping. The honesty and purity of the sports field can only be protected by such severe measures (McLaren 2010). Nevertheless, even if the principle of strict liability exists, CAS also believes that doping should be analyzed on a case-by-case basis. Additionally, when considering the penalty standard, specific circumstances of the specific dispute should be considered, and the results of the penalty need to be commensurate with the doping behavior (Reeb 2002). Thus, the athlete's subjective intention may still constitute a factor for determining the degree of punishment. For example, if an athlete admits that he/she is at fault, this factor can be considered when deciding his/her punishment (Reeb 1998). In the 1994 Advisory Opinion (No. 93/109) of the Federation Francaise de Triathlon and International Triathlon Union, CAS pointed out that Article 7, paragraph 2, of the European Council Anti-Doping Convention and A.1.3 of the International Olympic Committee Charter require the respect for the principles of natural justice, recognition of the basic rights of athletes, and ensuring that athletes can receive fair rulings. These provisions mean that the panel is allowed to take into account the special circumstances of a specific dispute when imposing penalties on athletes with doping. Then, it seems reasonable that the status of the protected person can also be considered in the AHD decision on the degree of punishment. The panel held that given Valieva's status as a protected person, the balance of interests favored Valieva's position (Ross et al. 2022).

Additionally, the evidence at the hearing of the *Valieva* case indicated that the drafting committee of WADC 2021 clearly failed to consider the possibility of a provisional suspension on a "protected person" and whether a different criterion should be applied for the provisional suspension of a "protected person". Based on the existing facts and circumstances, and in line with WADC's intention to give special treatment to protected persons, the panel decided to lift the provisional suspension of Valieva.

Since many athletes participating in the Olympic Games are minors, special protection of the rights and interests of minors has become increasingly important. In fact, the ability of minors to contract was already discussed in the past when the registration system for the Olympic Games was established. Due to the special nature of sports, many athletes have not reached the legal age of majority when they sign the entry form or registration license contract. Whether the contracts signed by minors are valid depends on the legislation of different countries. Compulsory arbitration clauses signed by underage athletes are all deemed valid. This arrangement may conflict with certain local laws (Huang 2004). For example, the 1996 U.S. Olympic Games code of conduct and appeal procedures required

the signatures of both athletes and the parents or guardians of underage athletes (Bitting 1998), showing that additional protection for minors has been recognized in state practice.

Fair treatment of athletes is the basic standpoint of CAS in adjudicating Olympic eligibility cases because the interests and needs of athletes are the core of the Olympic Games (Xie 2016). If CAS wants to become the most trustworthy institution for athletes to resolve eligibility disputes, athlete protection should become an important part of its good governance. In the *Valieva* case, for the protection of minors, it was justifiable for the panel to give more consideration to some specific issues such as the age of the athlete.

4.3. Unreasonable Delay of Notifying Test Results

In doping sample testing or sample re-testing, there can be long delays for the sample testing agency or the arbitration agency to notify the athlete of the test results. As a result, the athlete under investigation can participate in the competitions and may obtain excellent competition results. In this context, it may be unfair to cancel the competition results obtained by athletes during the period when their suspected violation is being investigated. It seems that the consequences of such delayed notification should not be borne by athletes (CAS arbitration 2009/A/1782 2009). CAS arbitration tribunal also made a similar statement in the *Filippo Volandri* case. However, as mentioned above, in the *Valieva* case, the AHD's arbitration took place at the "interim stage" of Valieva's suspected doping case, and the scope of the ruling that could be made was limited to the issue of the provisional suspension, not the cancellation of competition results.

In the *Valieva* case, the applicant, WADA, argued that the *International Laboratory Standards* only made the 20-day period a recommended timeline for issuing the test results. It was not compulsory. However, the panel found that this opinion was not convincing. On the contrary, the flexibility of the standards applicable to WADA-accredited laboratories contrasts with the strictness of the provisional suspension rules, and WADA and its accredited laboratories should process samples quickly when the samples come from important pre-competition activities such as Olympic trials. At the same time, the laboratory blamed COVID-19 for the unreasonable delay in the results. Thus, athletes who were not at fault for this should not bear the risk of such delay. Furthermore, the panel in the *Valieva* case found that the harm or inconvenience Valieva would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures (Ross et al. 2022).

In this case, the panel is more open and flexible in dealing with the attribution of responsibilities in anti-doping cases, especially the inversion of the burden of proof. Due to the principle of strict liability, the standard of proof and the inversion of burden of proof stipulated in the international anti-doping regulations, the test results of anti-doping agencies often have an overwhelming decisive effect. In most cases, anti-doping agencies can rely on an adverse analytical finding issued by a laboratory to charge or sanction an athlete (Yang and Wang 2018). This procedure is necessary for the fight against doping. However, at the same time, we should also note that there are very limited measures for athletes to challenge the decisions on doping. They can only prove that the anti-doping agency has violated the list of prohibited substances or methods, international testing standards, international laboratory standards, or international standards for exemption of therapeutic drugs, etc. Additionally, the athletes' challenge is often more difficult to succeed in reality, as reflected in cases such as *USADA v. Landis* in 2007 and *Hanson v. Federation Equestre Internationale* in 2009. Article 3 of the WADC stipulates that anti-doping agencies generally apply the "comfortable satisfaction" standard of proof, while athletes apply the "balance of possibility" standard. In fact, due to the inversion of the burden of proof and the higher standard of proof borne by the athletes, it is very difficult for athletes to challenge their unfavorable test results. However, this kind of rule obviously cannot deal with various situations in anti-doping cases, and the one-size-fits-all application will only bring greater risks to athletes. Therefore, in this case, the panel, based on the actual circumstances of the case, ruled that the athletes who were not at fault should not bear the

consequences of difficulty in proof. This undoubtedly further explores the protection of the rights and interests of athletes.

4.4. Cancellation of Awards Ceremony

In the *Valieva* case, the IOC unilaterally made a decision that if Valieva won the top three in the Beijing 2022, there would be no award ceremony (CAS OG 22/11 2022). The U.S. women's figure skating team believed that this decision violated the rights of other winning athletes to receive their medals and participate in the awards ceremony. They argued that the issue of the Russian figure skating team should not affect the U.S. team and Japan team's award ceremony. The AHD for the Winter Olympics did not support this request.

The consideration of the AHD was not unreasonable, but it may have violated the basic rights of athletes. This ruling was unfair to some extent. Athletes receiving medals and participating in award ceremonies is a custom that has been passed down since the Athens period, even though there are no specific legal provisions stipulating that award-winning athletes must have award ceremonies. If athletes from other sports can participate in the award ceremony, it may be an unfair treatment for athletes to be deprived of the award ceremony because a team affected by doping has also won the game. Therefore, although the panel cautioned that there was no sufficient legal basis to overturn the decision of the IOC, the decision of the panel did potentially affect the personal reputation and commercial value of the athletes receiving awards.

Regarding this issue, the AHD could consider using the method of "suggestion" to balance the rights and interests involved in the dispute. In past cases, "suggestion" was often used in cases related to the right to participate. For example, in *Australian Olympic Committee v. Fédération Internationale de Bobsleigh et de Tobogganing*, the AHD emphasized that the increase in the number of participants was only applicable to this case and had no binding effect on future situations (CAS OG10/001 2010). In the *Daniela Bauer* case, in order to avoid similar disputes in the future, the AHD strongly recommended that the Austrian Ski Federation create and publish clear selection criteria so that athletes can understand them in a timely manner (CAS OG14/01 2014). This method can also be applied in other issues. Moreover, AHD can use "suggestion" when they want to respect traditional practices but at the same time need to express strong concerns about certain issues to achieve a more fair and equitable effect in existing and future cases. In the *Valieva* case, the panel followed the past practice and respected the administrative power of the IOC in deciding whether to hold the medal ceremony. However, considering the rights and significance of the medal ceremony for the U.S. team and the Japanese team, the panel could have made flexible "suggestions" in its ruling, such as holding a separate award ceremony or holding a traditional ceremony without the "champion". Such measures can not only protect the rights of innocent athletes but also serve as a "highlighted" warning for those that violate anti-doping rules.

4.5. Time of the Dispute

In *Andrei Makhnev, Artem Shuldiakov and Russian Olympic Committee v International Ski Federation and International Olympic Committee*, the two athletes applied for the opportunity to participate in the competition, but the panel dismissed their application based only on the time of the dispute, neglecting the letter correspondence among the applicants, the Ski Committee, and the IOC.

Looking back at the AHD decisions in the past ten years, it can be found that AHD has not formed a completely consistent standard for determining the time of disputes. Rulings of AHD on this issue have been capricious. In the *Andrea Schuler* case in 2006, AHD used the date when the claimant filed an arbitration application as the time of dispute (CAS OG06/02 2006). This criterion was followed by two cases in 2008 and 2010. However, in the *Joseph Ward* case in 2012, AHD established a new standard, arguing that the actual date of the dispute should be used as the starting point, even though how to determine the

“actual date of the dispute” still needs to be further clarified (CAS OG12/02 2012). In the 2014 *Maria* case, AHD believed that the “actual date of the dispute” in most cases should be “the date when the applicant decided not to agree with the decision from the authority” (CAS OG14/03 2014). However, in three cases in 2018 (CAS OG18/02 2018; CAS OG18/04 2018; CAS OG18/05 2018), AHD adopted a different standard on “time of dispute”, i.e., “date of dispute” is the date when applicants were notified that they could not participate in the competition. The lack of clarity on the “date of dispute” results from the scarcity of legal provisions on the date of disputes in the Olympic Games (Li and Xiang 2019). The inconsistency in the rulings of AHD undoubtedly adds to the uncertainty of AHD’s exercise of jurisdiction, and it is easy to cause the parties to question AHD’s arbitrary decision.

Based on facts from the *Andrel Makhnev* case, we may shift our focus and use the “exhaustion of international remedy” as the means to understand the time of limitation. According to Article 1 of the Rules, if the athlete initiates the arbitration after exhausting internal remedies, the 10-day limit can be exempted. First of all, the two athletes never gave up pursuing their own right to compete in the game. Letter correspondence may prove the exhaustion of internal remedies, thus, the 10-day limit in this case can be waived. Alternatively, if letter correspondence cannot be treated as the exhaustion of internal remedies, AHD can possibly regard it as an extension of the time of dispute so that it can exercise jurisdiction on the dispute. If AHD refers to the traditional practice of civil law, the last time that the parties seek remedy could be used to determine the date of the dispute. These considerations can serve as breakthroughs in future similar cases.

4.6. Political Factors Involved in the Principle of Non-Discrimination

In *Andrei Makhnev, Artem Shuldiakov and Russian Olympic Committee v International Ski Federation and International Olympic Committee*, the two athletes repeatedly raised the changes in US and Canadian policy and the principle of non-discrimination. The United States and Canada adopted a ban on entry for those who were not vaccinated with vaccines recognized by the two countries. This policy discriminated against the two athletes. (CAS OG 22/02 2022) The two athletes were vaccinated with domestically approved vaccines but their visas were denied because the vaccines were not recognized. AHD did not comment on this in its ruling. Nevertheless, the COVID-19 control policies of some countries have inevitably affected the AHD’s consideration of facts.

In the current case, AHD did not exercise jurisdiction on the grounds that the dispute did not occur during the Olympic Games so no substantive trial was conducted. However, the appellants in this case, as well as those in the *Irish Bobsleigh* case, pointed to the “principle of non-discrimination” and believed that the decision of the relevant agency violated the provisions of the *Olympic Charter*. Regarding the practice of AHD on the “principle of non-discrimination”, we can see that: (1) the AHD tends to respect the rights of international sports federations to formulate the qualification system and standards for special sports, unless there is sufficient evidence showing that such a qualification system and standards violate the “principle of non-discrimination”. In fact, this is the usual position that AHD has gradually formed; (2) the AHD should strictly interpret the “non-discrimination” principle in selecting athletes. In the two decisions of CAS OG18/02 and CAS OG18/03, the AHD held that a strict interpretation of the “principle of non-discrimination” could guarantee the IOC’s discretion in this issue (CAS OG18/02 2018; CAS OG18/03 2018). The grounds constituting discrimination are racial, religious, political, or other factors mentioned in the *Olympic Charter*. In the case of *Andrel Makhnev*, the applicant believed that a change in political policy prevented him from participating in the competition. However, in fact, the COVID-19 control policy is not a “political factor” in the narrow sense of the usual understanding. Many policies of IOC or international sports federation would be challenged if “politics” is interpreted expansively, which is not conducive to the stability of sports rules and policies. Moreover, countries impose various border control measures in the face of COVID-19. It is hard to infer that these prevention and control policies are made for specific countries or races. Even non-athletes need to abide

by these border control measures. However, the case of *Andrel Makhnev* challenged the “principle of non-discrimination” because of political factors. When encountering similar situations in the future, AHD may need to further clarify the boundaries of political factors, especially in the context of political discrimination on athletes’ legal right to compete.

5. Conclusions

The AHD and the ADD established during the Beijing 2022 games made rulings on seven cases under their jurisdiction. In the aforementioned controversial cases, the AHD not only ruled on traditional issues (such as the jurisdiction and applicable law) but also on novel issues (such as provisional suspension of games, cancellation of an award ceremony, quota allocation, COVID-19 control measures). Generally speaking, the tribunals have successfully fulfilled the functions of a dispute settlement institution. Their professionalism is commendable, and their application of laws is basically rigorous and appropriate.

With the continuous development of international sports arbitration, the functions and limitations of AHD and ADD are becoming clearer in reality, which also results in constant controversies. On the one hand, we appreciate the irreplaceable and important role of AHD and ADD in resolving sports disputes in major sports events such as the Olympic Games. They play an important role in promoting the unification of sports arbitration rules. On the other hand, the rules of contemporary competitive sports are increasingly sophisticated. The continuous development of sports technology and methods, the increasingly concealed use of doping, and the expectation of fairer and more just arbitration rulings, all make the arbitration practice of AHD and ADD more and more challenging. For example, during 2017–2018, it was suspected that the Russian government engaged in large-scale and organized doping violations. The *Valieva* case arbitrated by AHD in the Beijing 2022 can also be seen as part of this incident. More powerful and effective means on anti-doping are required to prevent the recurrence of similar large-scale violations. AHD comprehensively considered the status of the protected person, the protection of athletes’ rights, etc., reflecting the spirit of “good governance” under the *Basic University Principles of Good Governance of the Olympic and Sports Movement*, the *2014 Olympic Agenda 2020*, *20+20 Recommendations*, and the *2018 Athletes’ Rights and Responsibilities Declaration*.

However, we should also note that on certain issues, the AHD decisions are controversial and have caused different responses from society, including the impact of the cancellation of the award ceremony, the identification of the time when the dispute occurred, and the interpretation of the concept of “discrimination”. However, in any case, these latest arbitration practices have undoubtedly accumulated useful experience for the development of international sports arbitration rules.

Additionally, we can pay more attention to the following issues:

(1) The AHD’s review of the internal legality and rationality of sports organizations. Generally speaking, the AHD mainly examines the legality of the decision made by the IOC or international sports federations, that is, whether the IOC or international sports federation has committed “discriminatory and unfair” behavior; as for the reasonableness, the AHD fully respects the decision of the IOC (Li and Xiang 2019). However, in fact, the AHD’s review of the legality of decisions by the international sports federations often implies a review of their reasonableness and appropriateness. In more and more cases, the AHD’s review of reasonableness is conducive to urging international sports organizations to exercise their discretion in a more open and transparent manner;

(2) The protection of human rights, especially the protection of athletes’ rights. As mentioned above, the IOC pays attention to the protection of human rights and enacts corresponding documents. The human rights protection clause was even added to the *2024 Olympic Host City Contract* under Article 13.2 (b). However, the increasing attention to human rights from the public, athletes, and even the judiciary has put forward higher requirements for the protection of human rights in sports arbitration. Higher human rights protection standards, on the one hand, protect the rights of athletes, such as eligibility, non-discrimination, and fair hearing, and on the other hand, continuously improve the

legal self-consistency of sports arbitration in the dispute settlement mechanism. In addition to relevant documents developed by the IOC, it is recommended that the arbitration process be more open to considering internationally recognized human rights standards and documents such as the United Nations Guiding Principles on Business and Human Rights;

(3) The “suggestion” method can be more widely used under certain circumstances. When the AHD gives an award under existing laws but cannot fully achieve equity for the protection of athletes’ rights, it can provide “suggestions” according to its own understanding of the spirit and purpose of the Olympic Games. Although these suggestions are only case-by-case, they can, to a certain extent, make up for the harm caused to athletes. Such suggestions may also provide guidance to CAS in the formulation or implementation of rules in the future.

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