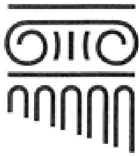

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

COURT OF ARBITRATION FOR SPORT (CAS)
Ad Hoc Division – Games of the XXXIII Olympiad in Paris

CAS OG 24/05 Livia Avancini v. World Athletics
CAS OG 24/06 Max Batista v. World Athletics
CAS OG 24/07 Hygor Bezerra v. World Athletics

sitting in the following composition:

President: The Hon. Dr Annabelle Bennett, Australia
Arbitrators: Dr Hamid G. Gharavi, France/Iran
Prof. Roberto Moreno Rodríguez Alcalá, Paraguay

AWARD

in the arbitration between

Livia Avancini
Max Batista
Hygor Bezerra
....**(the "Applicants")**

and

World Athletics

.... **(the "Respondent")**

and

International Olympic Committee
Brazilian Olympic Committee
Brazilian Athletics Federation
Natalia Duco
Chilean Olympic Committee
Bence Venyercsán
Hungarian Athletics Federation
....**(the "Interested Parties")**

I. PARTIES

1. The Applicants are:

    a. Livia Avancini

    b. Max Batista

    c. Hygor Bezerra

2. The Respondent is World Athletics (WA).

3. The Interested Parties are:

    a. International Olympic Committee (IOC)

    b. Brazilian Olympic Committee (COC)

    c. Brazilian Athletics Federation (CBAt)

    d. Natalia Duco

    e. Chilean Olympic Committee (CHOC)

    f. Chilean Athletics Federation (CHAF)

    g. Bence Venyercsán

    h. Hungarian Athletics Federation (HAF)

II. FACTS

A. Background Facts

4. The facts as set out in this section are intended to provide a summary of the main relevant facts as established by the Panel on the basis of the evidence and submissions of the Parties. Thus, additional facts not mentioned here may be set out, where relevant, in the considerations of the merits below.

5. These consolidated procedures involve three different applications by three athletes – a shot-putter, a race walker and a sprinter (the “Applicants”). The facts relevant to the determination of these Applications are common insofar as they affected the Applicants.

6. On 20 December 2022, the World Athletics Eligibility Rules Road to Paris 2024 were released (”the WA Eligibility Rules”). The WA Eligibility Rules provided that the qualification period for individual events for the Paris Olympic Games 2024 would start on 31 December 2022 (for combined events and relays) and on 01 July 2023 (for individual events), and end on 30 June 2024.

7. On 23 January 2024, the Federal law of Brazil establishing the public budget for the Brazilian government was officially published. The budget of the *Autoridade Brasileira de Controle de Dopagem* ("the ABCD") is provided for in this law.

8. On 29 February 2024, the Athletics Integrity Unit ("the AIU") and WA informed the Brazilian Athletics Federation's ("CBAt") that, in view of the failure of the CBAt to meet its testing obligations for 2022, there had been a decision of the Council of WA ("the Council Decision") that:

   Pursuant to Article 47.2 (aa) of the Constitution and Anti-Doping Rule 15.6.4, Council resolved to impose the following additional testing obligations (as set out in paragraphs 1 and 2 below) on the following Category 'B' Member Federation: Brazil for the period starting from the effective date of this resolution (i.e. 08 March 2024) through to the conclusion of the Paris 2024 Olympic Games (i.e. The XXXIII Olympic Games, Paris-St-Denis, which is currently scheduled to conclude on 11 August 2024). The obligations relate to athletes who are not part of the Athletics Integrity Unit's Registered Testing Pool and are as follows:

   1. Save as otherwise approved in the absolute discretion of the Athletics Integrity Unit's Board in truly exceptional circumstances, no athlete may participate as part of the National Team in the Paris 2024 Olympic Games unless:

   *a. in the 10 months prior to 4 July 2024, they have undergone **at least three no notice out-of-competition tests (urine and blood)** including (if they compete in any of the middle-distance events from 800m upwards, a long distance event, a combined event or a race walk event) at least one Athlete Biological Passport test and one EPO test;*

   b. the three no notice out-of-competition tests have been conducted at least 3 weeks apart;

   c. the first of the three no notice out-of-competition tests has been conducted no later than 19 May 2024; and

   d. all three no notice out-of-competition tests have been conducted under the authority of an Anti-Doping Organization and the results recorded by the relevant entity in ADAMS

   2. The relevant Member Federation shall ensure that all their Athletes are aware of this eligibility requirement.

   (emphasis added)

9. The Council Decision added that it would be in force as of 8 March 2024. The CBAt did not appeal that decision, nor does it challenge it in this proceeding.

10. Following the Council Decision, the CBAt identified a priority group of 102 athletes based on criteria established pursuant to the AIU directives ("the Additional Testing Requirements"), which included two of the Applicants, Ms Avincini and Mr Batista. The ABCD then started testing the athletes included in this group. The testing was conducted based on the ABCD's understanding that the Additional Testing Requirements mandated at least three out-of competition tests of urine and of blood, that is, six tests for each athlete.

11. Several exchanges between WA and CBAt followed, including specific reminders sent to the CBAt by WA concerning testing requirements.

12. On 10 June 2024, following a discussion with a Peruvian National Athletics Federation official, the CBAt consulted the AIU Compliance Manager. The Manager clarified that only three tests were sufficient to meet the requirements, that is, that the relevant parts

of the Council Decision should be understood as requiring "urine or blood" tests not "urine and blood". The question was: "*Are there 3 urine tests + blood tests? (specific analysis)?" The AIU's response was: "No (this goes beyond the requirement)"*.

13. On 17 June and 2 July 2024, the AIU sent testing reminders to CBAt.

14. On 27 June 2024, Mr Batista and Mr Bezerra qualified for the Paris Olympic Games 2024. On 5 July 2024, Ms Avancini qualified for the Paris Olympic Games 2024 by way of the reallocation process.

15. On 3 July 2024 CBA submitted three petitions to WA/AIU in which it applied for an exception to the testing requirements under Rule 15 of the WA Anti-Doping Rules ("the WA ADR", 2024) due to "*truly exceptional and objectively proven circumstances"* citing, *inter alia*, its interpretation of the Additional Testing Requirements and the consequences of that interpretation on the ability to comply with those requirements in the allotted time

16. On 6 and 7 July 2024, the AIU Board rejected the first three applications submitted by the Applicants. The AIU Board determined that the CBAt had not been able to demonstrate that truly exceptional circumstances existed for the three athletes and thus denied all applications for an exemption under Rule 15.5.1(c) WA ADR.

17. On 15 July 2024, CBAt sought a reconsideration of the above decisions of 6 July and 7July 2024, which request was accepted by WA.

18. On 16 July 2024, the CBAt sent an email to all three Applicants, informing them of the 6 July 2024 and 7 July 2024 decisions by the AIU Board, which rejected the requests for an exception based on Rule 15.5.1(c) of the WA ADR.

III. CAS PROCEEDINGS AND ADDITIONAL FACTS

19. On 23 July 2024, between 16h00 and 16h21 (Paris time), the Applicants filed three different Applications with the CAS Ad Hoc Division against the Respondent with respect to the first decisions. Thereafter, the President of the Ad Hoc Division decided to consolidate the three procedures opened by the CAS Ad Hoc Division. Furthermore, the CAS Ad Hoc Division notified the Parties of composition of the Arbitral Tribunal:

President: Dr Annabelle Bennett

Arbitrators: Dr Hamid G. Gharavi

Prof. Roberto Moreno Rodríguez Alcalá

20. On 23 July 2024, the Panel issued the first procedural directions and summons to appear, calling for a hearing on 25 July 2024.

21. Initially, at the first Case Management Conference (CMC), WA informed the Panel that there had not been reallocation of the Applicants' places. However, after the Panel's request for confirmation, WA informed the Panel that the quota places allocated to Ms Avancini and Mr Batista has been reallocated to Ms Ducó and Mr Venyercsan, who were

then joined as interested parties, together with their national federations and national Olympic Committees.

22. Immediately after, WA sent the following communication to the CAS ad hoc Division:

> *World Athletics takes note of the Panel's Procedural Directions. However, as noted by the Applicants, a second application was filed by their national federation on 15 July 2024, and decisions in respect of this second application are due to be issued tomorrow morning. It is unfortunate that the Applicants decided to act against the first decisions without waiting for the outcome of the second application. World Athletics submits that it would be procedurally inefficient for this case to proceed until these new decisions are issued.*
>
> *In the interim, and understanding the Applicants' concern, World Athletics confirms that it would not object to the Applicants' request that the decisions be stayed solely in respect of their participation in the Opening Ceremony, so that there is no urgency with hearing the present matter (given that the Athletics program does not start until 1 August). This is, however, on the condition that the current procedural calendar is vacated. In any event, in the absence of any urgency, World Athletics requests that, if any procedural calendar were to be imposed, its deadline to respond be no earlier than this Sunday, 28 July (bearing in mind that the Applicants waited more than 15 days to file their appeals following the issuance of the relevant decision) with a hearing no earlier than next Monday, 29 July. This would allow a decision sufficiently in advance of the Applicants' competitions.*

23. On 24 July 2024, the AIU Board issued three decisions ("the Decisions") in which it rejected the three second applications for exemption pursuant to Rule 15.5.1(c) of the WA ADR. In each decision the AIU Board expressly stated:

> *For the avoidance of doubt the present decision incorporates by reference the AIU Board's decision of [7 July 2024[1]], which is now without separate force and effect.*

24. In each decision, the AIU Board rejected the claim that there were any *"truly exceptional circumstances"* justifying the application of the exemption and effectively rejected, one by one, all bases advanced for an excuse for failing to meet the Additional Testing Requirements.

25. On 24 July 2024 at 20h57 (Paris time), the Applicants filed an amended, consolidated Application with the CAS Ad Hoc Division against the Respondent with respect to the Decisions.

26. On 25 July 2024 at 14h00 (Paris time), the Panel held a second CMC with the representatives of the Parties. Further to the CMC, the following procedural directions were communicated to the parties and interested parties:

- The Applicants will forward to WA (and all the parties, interested parties and the Panel) all documentary material on which they rely to support the matters set out in the email

[1] For Applicant 1; for Applicants 2 and 3, this should be read as 6 July 2024.

describing the evidence they wished to call at the hearing by **25 July 2024 at 17h00 (Paris time)**.

- All other written submissions to be filed by **25 July 2024 at 20h00 (Paris time)**.

27. The Parties and Interested Parties filed their written submission on time with the exception of Ms Ducó. However, none of the Parties or interested parties contested the admissibility of the submission of Ms Ducó.

28. On 26 July 2024 at 7h30 (Paris time) a hearing was held with the participation of the following persons, in addition to the Panel, as well as Mr Antonio Quesada, CAS Head of Arbitration and Dr Alexandra Veuthey, Counsel to the CAS:

For the Applicants:

- Livia Avancini
- Max Batista
- Hygor Bezerra
- Joana Ribeiro Costa (witness)
- Anthony Rio Cunha Moreira (witness)
- Marcelo Franklin (Counsel)

For the Respondent:

- Tony Jackson
- Laura Gallo
- Nicolas Zbinden
- Louise Reilly
- Huw Roberts

For the International Olympic Committee (IOC):

- Mariam Mahdavi
- Andre Sabbah
- Antonio Rigozzi
- Patrick Pithon

For the Brazilian Olympic Committee

- Luciano Hostin
- Rogerio Sampaio
- Felipe Pestana
- Victor Eleuterio

For the Brazilian Athletics Federation

- Joana Costa
- Claudio Castillo

For Natalia Duco

- Herself
- Enric Ripoll

For the Chilean Olympic Committee

- Ms Loreto Santa Cruz Soublette

For Bence Venyercsán

- Himself
- Gyenes Edina (lawyer)

For the Hungarian Athletics Federation

- Dr Edina Gyenes
- Dr Vaska Ottilia

29. There were no objections to the composition of the Panel. Before the hearing was concluded, the Parties expressly stated that they did not have any objection to the procedure adopted by the Panel and confirmed that their right to be heard and to be treated equally was respected.

IV. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

A. The Parties' submissions

30. The submissions of the Parties will be dealt with in the merits section to the extent necessary to explain the Panel's reasons in determining the appropriate orders to be made. The Panel will consider the orders sought and the submissions advanced with respect to the Amended Application, which represents a consolidation of the three

original Applications filed for the three Athletes and which was filed in respect of the Decisions.

B. The Applicants' requests for relief

31. In the Amended Application, the Applicants sought the following relief:

- That the Application of the athletes is admissible;
- That a stay on the effects of the AIU Board's decision dated 6 and 7 July 2024 (communicated on 16 July 2024 to the athlete) as well as the decision notified on 24 July 2024, is issued, pending the resolution by CAS Ad Hoc Panel;
- That an "exemption" of the AIU-WA 29 February 2024 letter testing requirements is granted by the Panel;
- That the decision of the AIU Board dated 6, 7 July and 24 July 2024 be set aside;
- As the athletes and witnesses came from Brazil to Paris to be heard and to participate in the Paris 2024 Olympic Games, they request that a face-to-face hearing be designated;
- That the Brazilian athletes Lívia Avancini, Max Batista and Hygor Gabriel cases be consolidated, on the grounds of article 11 of the CAS Ad Hoc Procedural Rules;
- That the athletes be allowed to compete in the Paris 2024 Olympics, determining that the AIU and the World Athletics performs all necessary acts to achieve this result;
- That the operative part of the decision is communicated to the parties no later than 25 July 2024 so that the athletes may participate in the Opening Ceremony;
- That the Respondents WA and AIU shall contribute to the Applicants' legal costs.
- By the time of the hearing, orders sought for a stay were no longer relevant. The decision relevant to this proceeding was that of 24 July 2024, by which the decisions of 6 and 7 July were no longer of any effect.

C. The Respondent's requests for relief

32. The Respondent seeks an order that the Amended Application be dismissed.

D. The Interested Parties

33. Submissions were also filed and presented by Interested Parties. Those submissions went to the merits but also asserted a lack of jurisdiction of the ad hoc Division of the CAS on the basis that the dispute had arisen beyond the ten-day period before the Opening Ceremony of the Paris Olympic Games 2024.

V. JURISDICTION

Rule 61.2 of the Olympic Charter relevantly provides as follows:

"61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

34. Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad Hoc Rules") provides as follows:

"*Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)*
The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of 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.*
In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective."

VI. DOES THE PANEL HAVE JURISDICTION?

35. The Panel concludes that it does have jurisdiction. WA did not expressly challenge the jurisdiction of the Panel. It was the IOC and Ms Duco and not the Respondent to the Amended Application, WA, that challenged jurisdiction. The Respondent merely cross referenced the IOC'S challenge at the hearing and declared that it would leave the matter in the hands of the Panel.

36. The basis of the challenge to jurisdiction is that the dispute did not arise within the mandated ten-day period before the Opening Ceremony. This is based on the assertion that the Applicants were well aware of a dispute about their eligibility well prior to 16 July. Reliance was placed on CAS OG/01 of 2024 where the Panel concluded that the dispute arose when the Athlete was aware of the facts and not when the dispute crystallised. The relief sought in that case was in respect of mistakes that were made in the entry of athletes to be sent by the national federation to WA, not against a decision of WA.

37. The situation is different here. There was an ongoing discussion between the CBAt and WA but the Athletes were only informed that WA had rejected their request for an exemption under Rule 15.5.1(c) of the WA ADR in the decisions of 6 and 7 July when that fact was notified to them on 16 July 2024, within the ten-day period. However, that is not the end of the matter. The Amended Application represents an appeal from the

Decisions of 24 July 2024. Thus, the Athletes first took steps to exhaust internal remedies.

38. Moreover, by agreeing to reconsider the earlier decisions and, indeed, by incorporating them and declaring them of no separate effect, WA provided another step in the exhaustion of internal remedies, which acted to bring the relevant decision within the required time. In fact, on 23 July 2024, WA informed the Applicants, after the filing of the original Applications that it was WA's view that any action by the Applicants should not have been taken in respect of the decisions of 5 and 6 July 2024 but should await the reconsideration that resulted in the decisions of 24 July 2024, well within the ten-day time frame before the Opening Ceremony on 26 July 2024. Thus, the situation is more analogous to the facts of CAS OG/02 of 2024 where the Sole Arbitrator upheld jurisdiction.

39. In view of the above, the Panel finds that it does have jurisdiction to hear the Amended Application

VII. Applicable Law

40. Under art. 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute "*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*".

41. The Panel notes that the "applicable regulations" in this case are the World Athletics Anti-Doping Rules (the "WA ADR")

VIII. Discussion

A. Legal framework

42. These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport ("ICAS") on 14 October 2003 (amended on 8 July 2021). They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PILA"). The PILA applies to this arbitration as a result of the express choice of law contained in art. 17 of the Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to art. 7 of the CAS Ad Hoc Rules.

43. According to art. 16 of the CAS Ad Hoc Rules, the Panel has *"full power to establish the facts on which the application is based"*.

B. Merits

1. Introductory observations

44. It is important to note that this case was brought before the ad hoc Division of the CAS as a matter of urgency, in circumstances where there were a number of procedural delays because of, for example, late information as to the need to join Interested Parties

and where the Applicants wished a result before the Opening Ceremony of the Paris Olympic Games.

45. There was, as is not uncommon in such circumstances, much evidence during submissions, without any objection, and little time to respond to evidence produced. There was also no cross-examination on the evidence. Reasonably, the legal representatives all responded to the need for urgency and all parties agreed on the timing of the hearing.

46. This does, however, have some consequences. The Panel necessarily accepts such evidence where it was not challenged or the subject of conflicting evidence; the evidence itself was not as fulsome or complete as would be expected in what might be called a "normal" CAS hearing. Nevertheless, the Panel must make a decision on the evidence available.

47. In order to facilitate the timely delivery of this Award, the Panel will only set out its reasons so far as necessary to determine the matter. Many arguments were raised by the Applicants as to law and fact which are not determinative or do not need to be determined, rejected or allowed.

48. Importantly, the relief sought by the Applicants related only to them, by way of dealing with the application to them of the WA ADR. The Panel well recognises that it is not for the Panel to make decisions, such as the allocation of quotas by the IOC to particular events, or any increase in such quotas, that are incidental to its determination of the case brought – let alone in circumstances where any such question does not arise and is not the subject of proper evidence.

49. The Panel recognises the obligation on the part of a National Federation to comply with testing requirements specifically, as here, pre-testing eligibility requirements. This obligation applies irrespective of subjective matters such as budgetary limitations or the fact that an athlete has unexpectedly, or belatedly, qualified for the Olympic Games. Indeed, the WA ADR provide that this latter factor does not provide an excuse for lack of compliance.

50. However, it is also within the power of the International Federation to provide for circumstances by way of exemption to mandatory compliance. In this case, the WA ADR allowed for such as exemption if "truly extraordinary circumstances" exist. The assessment of what comes within this provision requires, in this case, the determination of whether particular matters that arose from, and together with, what can be described as an extraordinary circumstance does amount to truly extraordinary circumstances. In this assessment, matters that do not themselves enliven the exemption may, as cumulative and cascading events following on from a reasonable difference of construction of the testing requirements, be taken into consideration in the required assessment.

2. The relevant facts

51. There is no dispute in the present proceedings with respect to a number of matters as asserted by the Applicants:

- Each of the Athletes was eligible for the event for which they were selected.
- WA imposed additional testing obligations on the CBAt ("the Additional Testing Obligations) by a decision pursuant to Article 47.2(aa) of the World Athletics Constitution and Rule 15.6.4 of the WA ADR. The making of that decision was not, and is not presently, challenged, other than as discussed below with respect to its application to the Applicants.
- Nevertheless, there were some submissions about this decision during the hearing. The Applicants raised in the Applications a claim of discrimination on the part of WA but, at the CMC convened by the Panel, explicitly stated that they were not pressing that claim. Similarly, some submissions that amounted to a claim of discrimination were advanced by the COB but they also made it clear that they were not advancing such a claim.
- The Additional Testing Requirements, which related to athletes who were not part of the AIU's Registered Testing Pool stated, relevantly, that no athlete may participate as part of the National Team in the Paris 2024 Olympic Games unless:
  - *in the 10 months prior to 4 July 2024, they have undergone "at least three no notice out-of-competition tests (urine and blood) including (if they compete in any of the middle-distance events from 800m upwards, a long-distance event, a combined event or a race walk event) at least one Athlete Biological Passport test and one EPO test;*
  - *the three no notice out-of-competition tests have been conducted at least 3 weeks apart*;
  - *the first of the three no notice out-of-competition tests has been conducted no later than 19 May 2024; and*
  - *all three no notice out-of-competition tests have been conducted under the authority of an Anti-Doping Organisation and the results recorded by the relevant entity in ADAMS.*
- The Additional Testing Obligations were drawn from Rule 15.5.1(c) of the WA ADR 2024. That rule included a provision that *"Save as otherwise provided in its absolute discretion by the Integrity Unit in truly exceptional circumstances, no Athlete may participate as part of a National Team in the Paris 2024 Olympic Games"* unless they complied with the additional testing.
- The Additional Testing Obligations were those applicable to Category A countries; Brazil was a Category B country, not Category A, but there is no dispute that WA had the right to impose additional obligations on a Category B country.
- If Brazil had been categorised as a Category A country, Rule 15.3.3 of the WA ADR stated that such information should have been given to Brazil before the start of the calendar year and time provided for a transition
- By Brazilian law, testing in Brazil is only done by a government body, the ABCD.

- The ABCD is funded by the Brazilian Government and its allocation determined in the Brazilian Budget.
- The Brazilian Government determined its budget for 2024 at the end of January 2024, which included the budget allocation for ABCD.
- The decision to impose the Additional Testing Obligations was rendered, and notified to the CBAt, on 29 February 2024 and effective from 8 March 2024. It applied to testing over a period commencing 10 months prior to 4 July 2024, that is, from 4 September 2023
- The required compliance with the Additional Testing Requirements was over about 4 months, from notification to the deadline of 4 July 2024 and imposed an additional obligation of approximately 500 out-of-competition tests.
- The CBAt identified a priority group of 102 athletes to be tested and the ABCD started testing the athletes.
- In the time available, over a three-month period, over 470 anti-doping tests were carried out to facilitate the participation in the Paris Olympic Games of 43 Brazilian athletes. The only athletes selected for the Paris Olympic Games for whom there was insufficient testing were the Applicants.
- The carrying out of three blood and three urine tests per athlete imposed a greater burden, and cost, than the carrying out of three urine tests only.
- None of the Applicants fulfilled the Additional Testing Requirements.
- There is no suggestion that any of the Applicants was other than a "clean" athlete.
- Each of the Applicants qualified unexpectedly very late in the Olympic Qualification period which concluded on 30 June 2024.

52. The matters raised by the Applicants in support of the orders sought that the Panel considers it necessary to decide can be summarised as falling under the following headings:

- Whether Rule 15.5.1 (c) of the WA ADR, which provided that athletes must "*have undergone at least* three *no-notice out-of-competition tests (urine **and** blood)"* (emphasis added) was reasonably construed as requiring both urine and blood samples, that is, six tests.
- Whether it was so construed by the ABCD.
- If so, the relevance of the fact that this formed the basis for additional testing for three of the four-month relevant period when the requirement, unknown to the Athletes or the CBAt or ABCD, was for urine **or** blood samples where, it is asserted, the need to carry out three urine and three blood tests per athlete imposed significant pressure on the resources of, and additional cost to, the ABCD.

- The applicability of the "*truly exceptional circumstances*" requirement in Rule 15.5.1 (c) of the WA ADR.

3. The construction of Article 15.5.1(c) of the WA ADR

53. The Panel is of the opinion that, on its face, the words of Article 15.5.1(c) of the WA ADR, specifically "*at least three no notice out-of-competition tests (urine and blood)",* can be reasonably construed as requiring at least three no notice out-of-competition tests for urine and three no notice out-of-competition tests for blood. That is, objectively, this construction was available and could reasonably be adopted and applied by the ABCD. It could be said that the availability of this construction of this phrase could have arisen because of the drafting by WA.

4. Was this construction adopted by the ABCD?

54. Apart from written and oral statements from the athletes, the Panel heard detailed oral evidence from Mr Moreira, an officer of the ABCD. Mr Moreira was not cross-examined, nor was his evidence challenged. The Panel accepts his evidence that the ABCD did interpret and understand the Additional Testing Obligations to require six tests per athlete, three of urine and three of blood. The fact that the ABCD obtained an extra US $60,000, apparently from the CBAt, to fund this extra work provides some support for the fact of this interpretation, as significant resources, additional to those available, were considered necessary by the ABCD in order to comply with the requirements.

55. WA and Ms Duco submitted that the ABCD or CBAt could have sought clarification of the interpretation of the Additional Testing Obligations and did not do so. WA points out that the phrase in question was present in numerous communications from WA, so that these communications did not dispel or contradict the ABCD's interpretation. However, the Panel observes that clarification would only reasonably be sought if the ABCD was of the view that there was some ambiguity and there is no evidence that this was the case – rather the evidence supports the conclusion that the ABCD thought that it was clear. On the other hand, WA also thought that its interpretation was clear and so did not offer any clarification prior to the matter being specifically raised after 10 June 2024 following a meeting with a member of the Peruvian Athletics Federation which was also apparently subject to the Additional Testing Requirements. This does not raise any fault on either party – it could be said that, so far as the interpretation was concerned and the reading of the Additional Testing Requirements and the correspondence that referred to them, they were "*like ships passing in the night*".

5. Action following the construction adopted

56. WA submitted that evidence of testing carried out on Brazilian athletes, in evidence as a schedule provided by WA, demonstrates that the ABCD did not in fact carry out six tests per athlete after notification of the Additional Testing Requirements and that the schedule demonstrates that only approximately 50% of athletes tested in the relevant period underwent six tests. This, WA submits, argues against the asserted interpretation as a matter of fact.

57. The Applicants' evidence is that it did act in accordance with its asserted interpretation and that it required significant additional resources to do so. The Applicants' response to the schedule placed in evidence by WA is that it related not only to athletes on the Road to Paris but also to many other athletes who were invited to compete in other WA events and that, accordingly, it does not support the asserted statistic.

58. The Applicants assert, and rely upon the evidence of Mr Moreira to support that submission, to the effect that significant effort was made to carry out the six tests per athlete but that the ABCD faced significant obstacles, including: the availability of doping control officers; the fact that athletes trained and resided over all regions of Brazil; and the extra challenges of utilising scarce resources for the testing of blood samples, compared to those for testing of urine. His evidence was to the effect that these consequences would not have existed on WA's construction of the Additional Testing Requirements.

59. The Applicants point to the fact that testing was carried out on some 102 athletes over a three-month period, with over 470 tests carried out. They assert that the available resources were thus, as it turns out, misallocated and that it was only on 10 June 2024 that they discovered that the requirement was for blood or urine tests. Mr Moreira's evidence is that the resources obtained and applied would have been sufficient to carry out the Additional Testing Requirements on all relevant athletes, including the Applicants, if the ABCD had been aware that it was only necessary to do urine or blood tests.

60. From the evidence before the Panel, it is apparent that a "*priority group for testing"* was established and that this reached the 102 athletes referred to above. Two of the Applicants were in this priority group and underwent two out-of-competition urine tests and one blood test, but WA had apparently questioned whether these tests were fully compliant with the Additional Testing Requirements.

61. The Applicants' submission is that, from the evidence, it is apparent that, in the time frame available with the application of resources to what turned out to be unnecessary tests, there was in effect an inability to conduct the remaining necessary testing. This meant that athletes, such as the Applicants, who were qualified and accepted into the Brazilian team for the Paris Olympic Games later in time, were not reached.

62. There was a question whether the ABCD could have obtained sufficient additional funding from the Brazilian Government to support all of the additional work required to fulfil even the ABCD's understanding of the Additional Testing Obligations. The Applicants were adamant that this could not have been done because the Brazilian Budget had been already set. It was suggested that they could have asked for such additional funding within the time between notification of the Additional Testing Requirements and the date for their completion. The response from the Applicants, and from the ABCD, was that this was not possible and, in any event, not possible to obtain as a practical matter to support the required additional testing by the time limit of 4 July 2024.

63. From the available evidence, the Panel is satisfied that it is more likely than not that the ABCD fully intended to comply with the Additional Testing Requirements for all athletes qualified and accepted into the Brazilian team for the Paris Olympic Games and applied all available resources (including the additional $60,000 obtained from CBAt) to that end. The Panel accepts that the application of available resources to testing based on the

legitimate interpretation of the Additional Testing Requirements was the material reason why full testing was not carried out on the Applicants within the limited period following the construction adopted during which the required further governmental resources could not be secured as the yearly budget had by then been allocated. On the evidence before the Panel, the Panel accepts that it is more likely than not that, were it not for the interpretation by the ABCD, the Additional Testing Requirements would have been completed for the Applicants.

6. Were there truly exceptional circumstances?

64. The Panel notes that the Applicants rely on a number of matters to support their submission that truly exceptional circumstances within the meaning of Rule 15.5.1(c) of the WA ADR exist.

65. The WA ADR includes a Comment to Rule 15.5.1(c) of the WA ADR. It is appropriate to have regard to that comment in assessing whether "truly exceptional circumstances" exist for the purposes of the application of the exemption provided in the rule. That Comment makes it clear that it is only to be applied in circumstances where the Additional Testing Requirements could not be satisfied for an "*extraordinary objective reason*", such as an event of force majeure or where an athlete "*returned to competition early as a result of a wholly unforeseeable event*". The Comment also clarifies that "*the fact that an Athlete has unexpectedly qualified for* [the] Olympic Games *[...] shall not under any circumstances be considered as truly exceptional*".

66. Thus, for example, the fact that the Applicants were only notified of their place in the team late and by way of reallocation is clearly not a truly exceptional circumstance. Moreover, it is specifically excluded from consideration as an independent factor by the Comment in the application of that rule to Category A countries. While Brazil is not a Category A country, the Panel notes the intention of the WA ADR to exclude this fact as a truly exceptional circumstance. This is consistent with CAS OG 20/12. Furthermore, it is important to note that the Panel would not accept that entry by way of reallocation would itself constitute an exceptional circumstance, nor the fact that in the ordinary course the Athletes had simply not been appropriately tested whether for budgetary or other reasons. Simply put, it is the obligation of the national federation to ensure that such testing occurs so that its athletes will be eligible to compete in athletics.

67. The "trigger" for a consideration of whether truly exceptional circumstances exist is the interpretation of the Additional Testing Requirements. Those requirements were to be implemented over a short time period. While the testing could have been carried out over a ten-month period, in that retrospective testing could be included, there were only three months available to complete the testing from the date of notification of the Additional Testing Requirements to Brazil.

68. The Applicants point out that any notification to Brazil that it was to be considered a Category A country, to which the Additional Testing Requirements would apply, would have had to take place prior to the commencement of the calendar year under the WA ADR and that the ABCD could then have sought sufficient funding from the Brazilian Government in order to comply. However, the notification of those additional requirements, which necessitated additional resources, did not occur until after the

Brazilian Budget was determined and allocated. The Applicants point out that the ABCD is the only testing authority permitted to carry out the testing in Brazil.

69. Rule 15.5.1(c) of the WA ADR allows for an exemption in "truly exceptional circumstances". It should be clarified, however, that neither the wording of, nor the Comment to, this rule limits this phrase to what would, legally or practically, amount to a case of impossibility. To the contrary, the phrase "such as" included in the Comment, makes it clear that the examples given are just that – examples – and that it was not intended to confine the circumstances that could amount to truly exceptional circumstances in a particular case. Nor does it require impossibility.

70. The Comment does state that there must be an "objective" reason; thus, a merely "subjective" reason, such as a lack of diligence or due care, is not sufficient for its application. It is manifest, in the ambit of Rule 15.5.1.(c) of the WA ADR that, if the affected party is subjectively responsible for being, for example, negligent or willfully culpable, then it is unlikely, if not impossible, for the exemption to apply. The exemption requires, as a sine qua non, what can be characterised as an objective reason (or reasons) for it to apply.

71. In this case, the interpretation of the Additional Testing Requirements and the consequences of that interpretation constituted, in the view of the Panel, "an extraordinary objective reason" which then, because of the matters referred to above, such as the direction to provide urine and blood tests, the timing of the notification of the Additional Testing Requirements and ensuing resourcing issues, together amounted to "a truly exceptional circumstance". It was this combination of events that led to the fact that these three Athletes were not tested in accordance with those requirements.

72. The Panel accepts that it was not unreasonable for the ABCD to prioritise the athletes to be tested. However, the evidence is that the reason why the testing of the Applicants was not completed was because they were not in the priority group and were not reached in time because the available resources, including the additional resources obtained for this purposed, were allocated to conduct the six tests on other athletes in the priority pool. Two of the Applicants were the subject of a number of tests but not the necessary number in the mandated time. This was a direct consequence of the ABCD's interpretation, made in good faith, of the Additional Testing Requirements.

73. The Panel has accepted that the interpretation adopted by the ABCD was reasonably open and that substantial efforts were made to implement it within the available pre-set Government budget the short period afforded for implementation, both before and after WA's interpretation was clarified.

74. It is the reasonable interpretation of the Additional Testing Requirements together with the consequences of that interpretation which, cumulatively, enliven the exemption. None of the other factors advanced by the Applicants would constitute a truly exceptional circumstance. It is that accumulation of fact-specific circumstances that constitute truly exceptional circumstances which resulted in the failure to complete the Additional Testing Requirements for the Applicants.

75. The factors relied upon by the Athletes include the timing of the notification to the ABCD of the Additional Testing Requirements, which were in effect requirements that applied to a Category A country, after the commencement of the year, rather than prior to the

commencement of the year as provided for in the WA ADR. This, in turn, meant that the funding for the ABCD had already been determined for the year and there was, on the evidence, insufficient time available to obtain more government funding. The Applicants also point out that there is no suggestion that any of the Athletes was other than a clean athlete. They also rely upon their demonstrated good faith in implementing the Additional Testing Requirements, including obtaining US $60,000 from the CBAt and the effort made to implement the six tests across the pool of relevant athletes.

76. None of these matters themselves provide a basis for the exemption sought. However, the inference can be drawn that, were it not for the interpretation of the Additional Testing Requirements, which the Panel accepts the Federation intended to, and did, implement in good faith based on its interpretation, these matters would not have arisen. They did arise and the Panel accepts that, together, and following the interpretation, they collectively amount to truly exceptional circumstances.

77. The Panel notes the submission that this case departs from another award (CAS OG 20/012) as to the characterisation of "exceptional circumstances". However, the Panel observes that a characterisation of what constitutes exceptional circumstances or truly exceptional circumstances necessarily involves an assessment of the particular facts in a particular case. Hence, while analogous reasoning can be helpful, it does not demand unequivocal application to a different set of facts and circumstances, as is provided for in Rule 15.5.1(c) of the WA ADR. While analogous reasoning may be helpful, a determination of the assessment of factual matters requires a case by case analysis of this fact-sensitive rule.

78. The Panel accepts that, as submitted by WA, CAS case law makes it clear that the CAS does not lightly interfere with the exercise of discretion of a sports governing body. There is no suggestion here that the decisions being reviewed were arbitrary or made in bad faith, or contrary to due process being afforded the Athletes in the making of those decisions. However, this is not a case limited to the review of an exercise of discretion but a determination, based upon the evaluation of evidence and submission, concerning the construction, and application, of a Rule, and the Comment to that rule, in the WA ADR.

IX. COSTS

79. According to Article 22 para. 1 of the CAS Ad Hoc Rules, the services of the CAS ad hoc Division "are free of charge".

80. According to Article 22 para. 2 of the CAS Ad Hoc Rules, parties to CAS ad hoc proceedings "*shall pay their own costs of legal representation, experts, witnesses and interpreters*".

81. It was confirmed at the hearing that none of the Parties seek costs. Accordingly, there is no order as to costs.

X. CONCLUSION

82. In view of the above considerations, the Applicants' consolidated application filed on 24 July 2024 shall be upheld.

DECISION

The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The amended application filed by Livia Avancini, Max Batista and Hygor Bezerra on 24 July 2024 is upheld.

2. The decisions rendered by the Athletics Integrity Unit's Board on 23 July 2024 concerning each individual Applicant are set aside.

3. The Applicants are entitled to participate in the Paris 2024 Olympic Games.

Operative part: Paris, 26 July 2024
Award with grounds: Paris, 1 August 2024

THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT

The Hon. Dr Annabelle Bennett
President of the Panel

Dr Hamid G. Gharavi
Arbitrator

Prof. Roberto Moreno Rodríguez Alcalá
Arbitrator