

## Arbitration At The Olympics Is A Different Ballgame

By **Caroline Simson**

*Law360 (February 25, 2022, 5:32 PM EST)* -- The job of resolving disputes at the Olympics falls to a cadre of arbitrators who are tasked with making decisions in a span of 24 hours that can make or break an athlete's career, a whirlwind pace that would never fly in other forms of arbitration.

Law360 recently spoke with two arbitrators who have spent years working with the Court of Arbitration for Sport to get a sense of exactly what goes into resolving disputes at athletics' highest level.

David W. Rivkin, former co-chair of Debevoise & Plimpton LLP's international dispute resolution group and co-president of the Court of Arbitration for Sport's anti-doping division at the recent Olympic Winter Games in Beijing, can recall with ease one of the stranger arguments he's heard from an athlete trying to escape a doping charge: a vanishing twin.

It came back in 2005 from pro cyclist Tyler Hamilton, a teammate of Lance Armstrong who claimed he was a chimera with two different sets of DNA due to a rare genetic condition. Rivkin and his fellow arbitrators didn't buy it, and Hamilton was found guilty in early 2006.

"He actually got an expert to testify that his mother had a vanishing twin, that there were two embryos and only one survived: him. But as a result he had some of the vanishing twins' blood markers," Rivkin, whose experience in the broader field of international arbitration goes back some four decades, recalled. "There was not a lot of evidence to support this theory ... obviously we paid attention, but there was really no scientific basis for it."

Although the Hamilton proceeding wasn't related to the Olympics, it does help to illustrate the task undertaken by sports arbitrators, who are charged with resolving some of the sports world's most difficult and high profile disputes.

The disputes are adjudicated by the Switzerland-based Court of Arbitration for Sport, or CAS, which got its start in the 1980s as a means of bringing some uniformity to the handling of international sports disputes. Organizers at the time, which included the International Olympic Committee, turned to arbitration since it offered a flexible, quick and inexpensive procedure for the athletes.

An ad hoc panel of arbitrators from CAS began resolving disputes at the Olympics during the Atlanta Summer Games in 1996. In the past, CAS would send the arbitrators to be on-site for the duration of the Games. This year in Beijing, only six arbitrators for the ad hoc division were on-site, along with two for the anti-doping division, with the rest acting as remote arbitrators.

During the Games, arbitrators are on call 24-7. Once they get a case, they usually have only 24 hours to reach a result – using that time to get a hearing together, read the parties submissions, hear the case, and then come to a decision and write it.

"When you got on a case, that horse was flogged pretty hard," said Jeffrey G. Benz, who sat as an arbitrator on CAS's ad hoc division for the Beijing Games this year. He was on the panel that made headlines earlier this month when they allowed Russian figure skater Kamila Valieva to continue competing even though she had tested positive for a banned substance back in December, though he said he couldn't talk about the case.

An internationally ranked figure skater in his youth, Benz gave it up once he began law school. But he never lost his love for sports, and upon becoming a lawyer, he was elected as an athlete representative in the U.S. Olympic Committee and later became its general counsel.

These days, Benz serves as a CAS arbitrator while also acting as an arbitrator and mediator for JAMS in Los Angeles, where he specializes in cross-border and domestic business/commercial, real estate, employment, intellectual property, public law matters and consumer cases.

He told Law360 that the cases CAS arbitrators are tasked with resolving at the Games are run far differently than any of the commercial cases or regular sports arbitration cases he's done.

"At the Olympic Games, it's a totally different ballgame because of the need for speed," he said.

He recalled one case at the 2002 Olympic Games involving Apolo Ohno, when an ad hoc panel refused to strip the U.S. speed skater of a gold medal he had won following a challenge from South Korean skater Kim Dong-sung, who had been disqualified for blocking Ohno. Kim claimed that the referee had made the decision to disqualify him under pressure from the crowd.

Benz was involved in the case as counsel for the U.S. Olympic Committee. He recalled that they were notified of the case around 3 p.m., filed a motion to dismiss around 8 p.m., appeared at a hearing at 10 p.m. that went until 2 or 3 in the morning, and that they had a decision by the time they woke up at 7:30.

"That's the nature of the beast. Time is important," he said. "I can't even imagine a [commercial] case where you would have to pull it together that fast."

Although anti-doping cases get much of the attention these days, it turns out that many of the cases are brought on a somewhat more mundane basis. Rivkin told Law360 that a significant portion of the cases resolved by the ad hoc division include eligibility cases, meaning disputes that arise when an athlete claims that they should have been chosen by their national federation to compete.

Another major category of cases relates to field of play decisions, such as the Ohno decision. Although CAS doesn't act as a replay official, it got involved in that case amidst allegations that the referee had acted improperly.

The Hamilton, Ohno and Valieva decisions were all highly publicized, but even those cases that don't get a lot of attention are still high stakes, since many have the potential to make or break an athlete's career. That's particularly true with eligibility cases, and that aspect likewise helps to separate these

cases from the commercial cases where he also often sits as an arbitrator, Rivkin said.

"I always found those to be particularly challenging cases because I knew that, whatever I decided, one person was going to get the goal of their lifetime and the other person's dreams were going to be dashed," he said. "When you're handling these cases and they involve individuals and their careers you certainly make sure that you are being as fair as possible to the athlete ... it's very different than deciding a corporate dispute about where a hundred million dollars goes. That's obviously important too, but it's different."

Benz, too, acknowledged that nearly all of the cases he hears involve an athlete whose career may be on the line. He told Law360 that's not something he's allowed to take into consideration when making his decision.

Still, he admitted, "the cases can be hard that way ... in some of the cases there's not a dry eye in the room."

As an example, he cited the case of Norwegian skier Therese Johaug, who had used a lip balm provided to her by the national team doctor that contained a prohibited substance. He and a panel of two other arbitrators determined in 2017 that she was ineligible to compete for 18 months, noting that she had "failed to conduct a basic check of the packaging, which not only listed a prohibited substance as an ingredient but also included clear doping cautionary warning."

"The rules didn't give any flexibility really on how we had to address that," he recalled. "You don't have this sort of level of emotion in a typical commercial arbitration case or even in employment cases. Somebody may have been treated badly in the employment situation, but they're not necessarily facing the inability to go find new work for a period of time like you find in doping cases, for example."

--Editing by Alex Hubbard.