

2015 January 23

iNADO Legal Note #9: 2015 Code and Application of *Lex Mitior*

When should the new World Anti-Doping Code apply to cases started under the old Code?

Article 25.2 of the 2015 Code states:

25.2 Non-Retroactive except for Articles 10.7.5 and 17 or Unless Principle of “*Lex Mitior*” Applies

The retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall only be applied retroactively if the statute of limitation period has not already expired by the Effective Date. Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of “*lex mitior*” appropriately applies under the circumstances of the case.

Here is how this provision should apply in two circumstances identified by questions posed by an iNADO Member:

1. If someone was sanctioned in 2014 for a 2 year period of ineligibility, do we allow them to start training during the last two months of the sanction as per the 2015 Code?
2. Secondly, if the urine sample was taken in 2014 and the hearing is in 2015, are we to apply the Rules in force in 2014 if they favour the Athlete according to the *lex mitior* principle as the ADRV was committed in 2014?

A consensus of NADO legal experts answered:

1. If the athlete already went through his disciplinary proceedings and the decision was already finalized, the athlete has to request (“apply”) the application of the *lex mitior* principle, so that he would be able to start with his training earlier (see 2015 Code Art. 25.3).
2. Whether we would apply the *lex mitior* principle in the second example would depend on what rules were the subject of the dispute. If it were the case that the new sanctioning rules were more favourable we would apply *lex mitior*. If it were other rules

(procedural rules) we would not. The application of the most favorable rules has to happen during the proceedings (see 2015 Code Art. 25.2, last sentence).

David Lech of the CCES added: “It is clear Code Article 25.2 could apply if the sample was collected in 2014 -- whether the case is pending on January 1, 2015 (commenced in 2014 with no hearing yet) or was commenced only in early 2015 after the Effective Date. I understand the Code to mean on these facts that the 2009 rules “shall” apply unless the panel hearing the case determines the 2015 rules are more favourable to the athlete. In Canada we would expect the athlete to make this application to the panel if he or she believed that the 2015 rules were, in fact, more favourable. On such a request, the panel will make a determination so the issue will be resolved as part of the hearing process. I believe it is too late to raise a *lex mitior* claim after a decision is rendered.”

Graham Arthur provided us with two recent UK decisions that consider *lex mitior* in light of the 2015 Code: *UKAD v. Kruk*, <http://www.ukad.org.uk/anti-doping-rule-violations/current-violations/> (look for Vasyl Kruk), and *UKAD v. Warburton*, [http://www.ukad.org.uk/assets/uploads/Files/2015/UKAD vs Warburton Williams 351 352.pdf](http://www.ukad.org.uk/assets/uploads/Files/2015/UKAD_vs_Warburton_Williams_351_352.pdf).

Copies are also posted on the iNADO website at: <http://inado.org/legal-notes.html>.

Darren Mullaly of ASADA provided a longer term perspective of CAS consideration of *lex mitior*:

“We have a case looking at *lex mitior* issues at the moment (I am not sure whether it will go to a hearing). I am happy to share some of the work I have pulled together on the issue in the event anyone else finds themselves having to pull together CAS jurisprudence. We have always used these cases to guide the decisions we make regarding *lex mitior*.

“The original CAS opinion appears to have been a CAS opinion for *UCI and CONI* (TAS 94/128). It is in French and I don’t have an English translation (If anyone does have an English translation I would love to have a copy). There are a few CAS cases that have translated some of the *lex mitior* parts of the CAS opinion (See *Wawrzyniak v Hellenic Football Federation* CAS 2009/A/2019 at para 16 and *AC v FINA* CAS 96/149 at para 28 – both **attached**). The relevance of the opinion is that the Panel thought that the *lex mitior* principle could be applied where:

1. the sanction has not yet been pronounced or appealed; and
2. where the sanction had been decided and ruled upon (i.e. by a hearing panel) but where the sanction had not yet been fully served (See also *WADA & FIFA v Cyprus Football Association & Others* CAS 2009/A/1817 and 1844 – para 134 and 135 – **attached**).

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“The CAS delivered another advisory opinion in 2005 (referring to TAS 94/128) which has a summary of the application of the lex mitior principle (*CONI* 2005/C/841 – see para 52 -53 and 80-81 – **attached**). Apologies for the underlining and highlighting. The later CAS opinion addresses the issue of the application of the lex mitior principle in situations involving substantive rules and procedural rules. See also *S v UCI and FCI* CAS 2002/A/378 at para 6 - **attached**.

“In the event that any of you have an athlete trying to take advantage of lex mitior with respect to the ISL the CAS Award of *E and A v International Biathlon Union* (CAS 2009/A/1931) might be useful. See head note 5 and para 6 and 24 - **attached**.

“*UCI v Jan Ullrich* CAS 2010/A/2083 is also useful on the question whether a violation should be treated as a first violation (in considering a multiple violation sanction) if the rules have changed – see para 69-78 - **attached**.”

Those decisions are all posted on the iNADO website at: <http://inado.org/legal-notes.html>.

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