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BAN ON SHARAPOVA

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One of the most shocking news during the recent times for sports fans and legal fraternity, around the globe, has been Maria Sharapova's admittance towards using the banned endurance-enhancing drug known as 'Meldonium' [added to the World Anti-Doping Agency ("WADA") Prohibited List with effect from January 1, 2016]. The Independent Tribunal ("Tribunal") appointed by the International Tennis Federation ("ITF") [constituted under the rules of the Tennis Anti-Doping Programme 2016 ("TADP")], has imposed a ban on Sharapova for a period of 2 years for committing an anti-doping rule violation under article 2.1 of the TADP, *vide* its decision dated June 6, 2016.

Below is a **detailed** analysis of the facts, key issues, arguments before the Tribunal and its findings:

Factual Background:

- On January 26, 2016, following Sharapova's quarter-final match played against Serena Williams, at the Australian Open 2016, a sample was taken from Sharapova under the TADP rules.
- On March 2, 2016, Sharapova received a letter from the ITF, giving notice of the disciplinary charge that she had committed a contravention of the TADP rules, as her sample contained Meldonium, a substance added to the WADA Prohibited List with effect from January 1, 2016. The charge was admitted by Sharapova, *vide* her letter to the ITF dated March 4, 2016.

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- In 2005, Sharapova was suffering from frequent cold related illnesses, tonsil issues and upper abdomen pain. She was residing in the USA, but her father decided to take her to be examined by Dr. Anatoly Skalny of the Centre for Biotic Medicine in Moscow. Considering the family medical history and conducting a detailed examination, Dr. Skalny concluded that Sharapova had a mineral metabolism disorder, insufficient supply of nutrients from food intake and other abnormalities which made it necessary to boost the immune system. Dr. Skalny proposed a detailed medicinal and nutritional regime which comprised about 18 medications and supplements. Included in the prescribed regime were courses of 'Mildronate', for periods of 7 – 14 days, in doses of 500 mg to 1 g per day. The purpose of the regime, as described in Dr. Skalny's plan, was to develop *"the optimal individual plan of medical and physiological monitoring and targeted correction of functional reserves, and its implementation in the practice of the athlete's preparation and maintain the proper functional regime."*
- Dr. Skalny kept advising Sharapova on her nutritional intake including medications which included the instructions for taking Mildronate before training or matches. The prescribed regime was considered a success in achieving a general improvement in Sharapova's health including reduction in the frequency of inflammatory and cold-related diseases. Sharapova continued under the care of Dr. Skalny from 2006 till 2012, during which period annual checks and requisite tests were conducted and the list of recommended substances and medication had grown from 18 to 30.
- By the end of 2010, Sharapova decided to follow a different approach for her nutritional intake, to avoid taking large number of pills and thus she retained a nutritionist and ceased to follow the regime prescribed by Dr. Skalny. However, she herself decided to continue to use 3 recommended substances, viz. Magnerot (a mineral supplement which contains magnesium), Riboxin (contains inosine, a natural compound which may have some anti-ischaemic benefit) and Mildronate, without seeking any medical advice either from Dr. Skalny or from any other medical practitioner.
- By the end of 2015, Sharapova was continuing to take 500 mg of Mildronate on match days in tournaments, as recommended by Dr. Skalny in 2006.

What is Meldonium?

- Meldonium is prescribed and registered as a drug for human therapeutic use in Latvia, Russia, Ukraine, Georgia and some other eastern European and CIS countries. It is not approved for human use in the USA or the European Union.

- Meldonium is manufactured by JSC Grindeks in Latvia and marketed under a number of brand names including 'Mildronate'.
- Mildronate is promoted as having a positive effect on energy metabolism and stamina, to be taken by athletes shortly before training. The evidence by Dr. Olivier Rabin (senior director for science at WADA) furnished during the proceedings, demonstrated that Mildronate has a positive effect on the performance of athletes. The Tribunal also noted that there has emerged a widespread perception amongst athletes, particularly in Russia and Eastern Europe, that Meldonium does have a performance enhancing effect.

Addition of Meldonium to Prohibited List:

- By 2015, there was evidence of substantial use of Meldonium by elite athletes, which is proven from the fact that (i) at the 2012 London Olympics, 5 national teams had declared that they were using Meldonium; and (ii) scientists at the WADA accredited laboratory in Moscow reported that significant number of athletes were declaring the use of Meldonium on their doping control forms.
- On September 29, 2014, WADA published the 2015 Prohibited List on its website and related documents which included a notice on the 2015 monitoring programme stating that a number of substances were placed on the monitoring programme including Meldonium, both in and out of competition. These documents were also published by ITF on its website.
- Pursuant to analysis of the preliminary results obtained from the monitoring programme, WADA Health Medical and Research Committee, in September 2015, decided to add Meldonium to 2016 Prohibited List, which was published on September 29, 2015. WADA website included a 2 page summary of major modifications which included the statement, "*Meldonium (Mildronate) was added because of evidence of its use by athletes with the intention of enhancing performance*". It is worth noting that it was unusual for WADA to prominently provide the brand name of the medication under which it was marketed, along with the chemical name of the banned substance.
- This summary of modifications was included in the information on the Prohibited List published by the ITF on its website, around December 7, 2015. The 2016 wallet card (annually distributed by ITF to the players) included Meldonium in the list of prohibited substances under the heading of metabolic modulators.

Prejudicatory Facts:

- After Sharapova ceased to be under the care of Dr. Skalny in early 2013, the use of Mildronate was not disclosed to any of the medical practitioners, with one exception, who were consulted by Sharapova between 2012 and 2015. To none of the medical practitioners or specialists who treated her over 3 years did she disclose the fact that she was taking Mildronate. Her explanation in evidence was that none of them had asked what medication she was taking. The one exception was that in 2015 she consulted Dr. Sergei Yasnitsky, the team doctor to the Russian Olympic team, whom she retained for advising on her general health problems which had returned, including a stomach virus and sinusitis.
- Use of Mildronate by Sharapova was not known to any one from Sharapova's team, except for her father and, from 2013, Mr. Eisenbud, her manager. It was not known to her coach, her trainer, her physio who was responsible for recommending recovery drinks during and post-match and her nutritionist who was responsible for her food and supplement intake.
- Sharapova admitted that she did not disclose her use of Mildronate on any doping control form which she completed between 2014 and 2016. The 7 doping control forms were produced in evidence which were completed and signed by Sharapova between October 22, 2014 and January 26, 2016. They did disclose some medications and vitamins, but did not disclose that she had, within the last 7 days, ingested capsules of Mildronate.

Doping control forms require the player to make a declaration as to medication or supplements taken in her own hand. The requirement is headed "DECLARATION OF MEDICATION/SUPPLEMENTS" and requires a "*List of any prescription/non-prescription medications or supplements, including vitamins and minerals, taken over the past 7 days (include substance, dosage and when last taken)*".

- Mr. Eisenbud, Vice President at IMG, the world's leading sports agency stated that he has represented Ms Sharapova exclusively and full time since 1999 under an agreement between IMG and Sharapova. Mr. Eisenbud described the ingestion of Meldonium at the Australian Open as an "*administrative misstep*", for which he bears the fault as her manager. Mr. Eisenbud claimed that he was supposed to check the latest amendments to the Prohibited List, on his annual vacation to the Caribbean, but marital issues intervened and he did not check the latest Prohibited List.

Key Issues:

- The Tribunal noted that the factual puzzle in this case was, how an elite player in the position of Sharapova with the assistance of a professional team including the very best sporting and medical advice obtainable, could have placed herself in the position of taking a prohibited substance, as admitted by Sharapova herself, before each of the 5 matches she played at the Australian Open.

- The main contentious issues on which the Tribunal was required to make findings were:
 - i. Whether Sharapova deliberately failed to disclose her use of Mildronate on doping control forms;
 - ii. What steps Sharapova took, or caused to be taken, to ensure that the substances which she was taking were not on the Prohibited List; and
 - iii. Whether Sharapova took Mildronate for medical reasons, or to enhance her performance in competition.

Arguments, Counter Arguments and Notings of the Tribunal:

- (i) Sharapova primarily argued that she did not know that the active ingredient of Mildronate, a medicine which she had been regularly using for over 10 years, has been added to the Prohibited List with effect from January 1, 2016, and thus she did not intentionally contravene the anti-doping rules by using Mildronate at the Australian Open.

ITF accepted the fact that Sharapova did not know that Mildronate contained a Prohibited Substance but argued that by taking the medication, Sharapova knowingly and manifestly disregarded the risk of contravening the anti-doping rules and thus committed an intentional violation.
- (ii) Sharapova admitted that she could not seek an elimination of the period of ineligibility under article 10.4 of the TADP rules since she did bear some fault, however, she contended that there had not been a significant fault on her part since she had taken due care in her use of Mildronate over a period of 10 years but ITF failed to take reasonable steps to publicize the change in the Prohibited List, which took effect from January 1, 2016.

One of the key arguments, thus, was that the ITF was in breach of its duty to take reasonable steps to publicise any amendments made by the WADA to the prohibited list. The obligation under article 3.1.3 of TADP code is to take reasonable steps to publicise amendments to the Prohibited List and not just to give advice or warnings to the players. The Tribunal noted that the ITF discharged its duty by publishing the WADA summary of modifications on its website, from December 7, 2015, which clearly stated that Meldonium (Mildronate) has been added to the 2016 Prohibited List. ITF also discharged its duty, under article 4.1 of TADP, to take appropriate steps to distribute the 2016 Prohibited List, by publishing the Prohibited List on its website and in its wallet cards (distributed annually to the players).

It was further noted that article 3.1.3 of TADP is to the responsibility of each player and her advisors to be familiar with the most current version of the Prohibited List. Thus, in principle, any failure by the ITF to publicise the changes to the Prohibited List cannot excuse the failure of the player to take any reasonable steps to check whether any substance has been added or not. It was observed that Sharapova knowing that she had a duty to take annual checks of the Prohibited List but did not do so.

(iii) Sharapova also made a submission that ITF is estopped from asserting that she has made any fault, because ITF failed to warn her of the inclusion of Meldonium in the Prohibited List, as she alleged that ITF knew or ought to have known that she had been repeatedly tested positive for Meldonium in 2015.

The first step in this argument was that the ITF knew that 24 samples taken from tennis players tested positive for Meldonium in 2015. It is noteworthy that of the 24 samples which tested positive, 5 samples were from Sharapova. The counsel for the ITF argued that the test results were sent to the ITF in March 2016 and thus ITF could not have known about the test results in December 2015.

The second step in this argument was that the ITF ought to have obtained from WADA laboratories, the identities of tennis players who were tested positive for Meldonium, so that they could be individually warned to cease from taking the medication. Upon hearing the arguments and the counter arguments, it was noted by the Tribunal that article 4.5 of the 2015 WADA Code provides that results from the programme are to be reported only on an aggregate basis and WADA is obligated to implement "*measures to ensure the strict anonymity of individual Athletes is maintained with respect to such reports*". It would have been a serious infringement of a player's right for a WADA accredited laboratory to provide individual results derived from the monitoring of Meldonium, without obtaining the consent of the concerned player. The argument raised by Sharapova's counsel was hence rejected by

the Tribunal stating that the ITF obtaining access to the identity of the players was inconsistent with the WADA code and the legal requirement to respect the players' confidentiality rights with respect to their sensitive personal data.

Thus, the Tribunal rejected the argument that ITF knew or ought to have known in 2015 that Sharapova was using Meldonium and observed that no estoppel can be invoked which prevents the ITF from asserting that the player would face the consequences under the WADA code.

- (iv) Sharapova also argued that under the principle of proportionality in the context of extreme and unique circumstances, the Tribunal has an inherent authority to reduce the sanction and it should do so by imposing no further period of ineligibility beyond that already imposed till date (of the hearing) under the provisional suspension which took effect on March 2, 2016.

The Tribunal observed that this case does not evidence any such unique circumstances in relation to the contravention. Cases where an athlete has failed to exercise any due care in checking the Prohibited List, are common.

Tribunal noted the argument that any period of ineligibility would disproportionately affect Sharapova in causing her a very substantial loss of earnings and sponsorships, exclusion from the 2016 Olympics, and irreparable damage to her reputation. It was, however, observed that there is nothing unfair in the rules being fairly and equitably applied to Sharapova, as to any other athlete subject to the WADA code, whether professional or amateur. The rules provide that:

".....the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

It was thus held that the rules cannot be circumvented by invoking the principle of proportionality. It would be contrary to the principles underlying the WADA code, especially with respect to the rules which would apply equally to all, to allow an unprincipled exception to or waiver from the rules on the grounds of proportionality of sanction as it affects the particular circumstances for Sharapova.

Key Observations:

- The Tribunal, upon noting all the facts and arguments of both the parties, observed that Sharapova was unable to prove that she exercised any degree of diligence to ensure that her ingestion of Mildronate did not constitute a contravention of the WADA Code. On the contrary, concealment of the fact of regularly using Mildronate during competition for performance enhancement, from the anti-doping authorities and her own team, was a very serious breach of her duty to comply with the WADA code. If she had disclosed this fact to the anti-doping authorities, her team, or the doctors she consulted, then there was a probability that she would have been warned about the changes in the Prohibited List and could have avoided a contravention.

Sharapova had no reasonable basis for considering that Mr. Eisenbud had the expertise or the qualifications to give advice on whether particular medicines were covered under the Prohibited List. This completely inadequate manner in which Mr. Eisenbud claimed to have carried out his checks would not come close to discharging the player's duty of utmost caution.

- The Tribunal, thus, observed that Sharapova was unable to establish that she bears 'No Significant Fault or Negligence' (as defined under the WADA code) in relation to the contravention of article 2.1 of TADP, and thus imposed a period of ineligibility of 2 years.
- Under article 10.10.3 (b) of TADP, a player who promptly admits the anti-doping rule violation may seek to have the commencement of the period of ineligibility back-dated so that it is deemed to commence, at the earliest, on the date of the violation. The Tribunal decided that, Sharapova, by letter dated March 4, 2016 to the ITF, promptly admitted that charge and was entitled to the mitigation of sanction allowed by this rule.

Conclusion and Final Decision:

- Sharapova, or her father, made clear to Dr. Skalny that any substances which he recommended must comply with the WADA Code. So, Dr. Skalny caused the substances which he recommended to be reviewed by the Director of the WADA accredited laboratory at the Moscow anti-doping centre. On January 11, 2006 the centre reported that the 18 pharmaceutical preparations listed, including Mildronate, did not contain substances included on the 2006 Prohibited List. On the basis of this evidence, the Tribunal concluded that Sharapova did not seek treatment from Dr. Skalny for the purpose of obtaining any performance enhancing substances, but for the treatment of her recurrent viral illnesses. All the substances recommended by Dr. Skalny did at that time comply with the anti-doping rules.

- The contravention of the anti-doping rules was not intentional as Sharapova did not appreciate that Mildronate contained a substance prohibited from January 1, 2016. However, she does bear sole responsibility for the contravention, and very significant fault in failing to take any steps to check whether the continued use of this medicine was permissible or not. If she had not concealed her use of Mildronate from the anti-doping authorities, members of her own support team and the doctors whom she consulted, and sought advice, then the contravention would have been avoided. She is the sole author of her own misfortune.

- The Tribunal, thus decided that:
 - i. An anti-doping rule violation contrary to article 2.1 of the TADP was committed by Sharapova as a result of the presence of Meldonium in the samples collected from her at the Australian Open on January 26, 2016 and competition in Moscow on February 2, 2016;
 - ii. Under article 9.1 of TADP, Sharapova is automatically disqualified in respect of her results in the 2016 Australian Open Championship, forfeits 430 WTA ranking points and prize money of AUS\$281,633 obtained in that competition;
 - iii. Under article 10.2 of TADP, the period of ineligibility to be imposed is 2 years;
 - iv. Under article 10.10.3(b) of TADP, the period of ineligibility shall commence on January 26, 2016.

Sharapova has filed an appeal in the Court of Arbitration for Sports (“CAS”), against the aforesaid decision of the Tribunal. We will share an update on the decision of the CAS, which is expected sometime in mid-July.

[Feedback](#)

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