

FREEDOM OF KEEPING AND EVALUATION OF EVIDENCE BY THE JURISDICTIONAL BODIES OF RUSSIAN SPORTS ORGANIZATIONS**

Ilia A. Vasilyev, Evgeniya G. Vetrova

St. Petersburg University, St. Petersburg, Russia

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The subject. The All-Russian sports federations, professional leagues, and the Russian Anti-Doping Agency (RUSADA) are legally endowed with the rights to create jurisdictional bodies for the mandatory pre-trial settlement of disputes in sports arising between subjects of professional sports and high-performance sports. The listed sports organizations independently develop and approve the procedural rules used in the procedures for the settlement of these disputes, including setting certain standards of proof. The latter can both be literally reflected in the provisions of the regulations of sports organizations without special detail, and expressed in norms that oblige the jurisdictional body to a certain analysis of evidence and justification based on such a decision.

The purpose of the study. To analyze the regulations of the all-Russian sports federations, professional leagues, and RUSADA, and highlight several key features of securing the freedom of collection and evaluation of evidence for jurisdictional bodies, both provided by the parties and received at the initiative of such bodies.

Methodology. The regulatory norms of the Russian Football Union were used as a representative legal experience, as methods of analysis and comparison are used.

The main results of research and the field of their application. Having analyzed the regulations of the all-Russian sports federations, professional leagues, and RUSADA, the authors identified many key features of securing the freedom of collection and evaluation of evidence for jurisdictional bodies, both provided by the parties and received at the initiative of such bodies.

Conclusions. The specifics of regulation by sports organizations and the freedom to collect and evaluate evidence by jurisdictional organizations allow us to see their rule-making approaches regarding the use of standards of proof.

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1. Introduction.

In the works of researchers of branches of procedural law, there are periodic references to “standards of evidence” [1; 2; 3; 4], “standards of proof” [5] and “reasonableness of the charge” [6]. Turning to legal science and practice, we can note two main types of “standards” used in national legal systems: “balance of probabilities” probabilities as “soft” with respect to the requirement of proof and “without any reasonable doubts” doubts as “hard” to such requirements respectively. The third type – “comfortable satisfaction” – is popular¹ for the procedures of considering applications of subjects for establishing a legal fact and resolving disputes in the jurisdictional bodies² of sports organizations³, occupying a middle position between the previously mentioned standards. A prerequisite for the implementation of any of these three standards is the axiom that a law enforcement practice requires a criterion that allows making a conclusion in conditions of probability: this criterion is established by introducing a standard of proof [7, p. 5].

In the Russian legal system today we should not expect an exhaustive legal consolidation of the previously listed “standards of proof” for the jurisdictional bodies of sports organizations. Similarly, there is no uniform distribution of the “standards” referred to in normative legal acts and law enforcement practice between private and public law dispute resolution procedures.

¹ In the note to Article 3.1 of the WADA World Anti-Doping Code, it seems to us that the reason for using the standard of “comfortable satisfaction” in sports disciplinary disputes is more than transparently stated that this standard of proof is comparable to the standard used in most countries of the world when considering cases involving violations of professional duties. // URL: <https://rusada.ru/about/documents/wada-code-and-other-international-standards/> (date of access: 20.09.2024).

² The bodies responsible for the mandatory pre-trial settlement of sports disputes between sports entities that recognize the norms of the sports federation and the professional sports league, as well as the Disciplinary Anti-Doping Committee of the All-Russian Anti-Doping Organization (RUSADA).

³ All-Russian sports federations, professional sports leagues, the All-Russian Anti-Doping Organization (RUSADA).

Arbitration proceedings, civil proceedings, and the settlement of sports disputes by jurisdictional bodies belong to private law, but the actual standards of evidence used in them differ: “balance of probabilities”⁴ [8; 9; 10] and “evidence at an acceptable level, taking into account the seriousness of the charges” (translation about the All-Russian Anti-Doping Organization (hereinafter also referred to – RUSADA) into the Russian language of the standard “comfortable satisfaction”, “sufficient conviction” [11; 12]), “preponderance of evidence”, “clear and convincing evidence”, “beyond reasonable doubt” [13]. On the other hand, the principle of “internal persuasion” for judges’ assessment of evidence is considered in the Russian legal doctrine, if not identical to the “standard of proof”, then as a kind of its equivalent [14].

The specifics of the exercise of the freedom of collecting and evaluating evidence by the jurisdictional bodies in sports are determined by the specific status of sports organizations as private law regulators of the sports sphere which have the right to create bodies for mandatory pre-trial settlement of disputes, adopt norms and powers to bring sports subjects to disciplinary responsibility – the application of sports sanctions to them, as stipulated in the provisions of Federal Law No. 329 on December 4, 2007 (as amended on July 24, 2024) “On Physical Culture and Sports in the Russian Federation”⁵ (hereinafter also referred to as the Law on Sports). The legal guarantee of the right of discretion is fixed in Paragraph 3 of Part 1 of Article 3 of the Law on Sports as a principle of self-regulation of relations in the field of physical culture and sports by subjects of physical culture and sports [15].

2. Freedom of keeping of evidences by jurisdictional bodies.

The judicial review bodies are independent of the sports organizations under which they are

⁴ For example, see Article 5.1 of the All-Russian Anti-Doping Rules. URL: <https://rusada.ru/about/documents/all-russian-anti-doping-rules/> (date of access: 20.09.2024).

⁵ See Paragraph 5 of Part 1 of Article 16 in relation to All-Russian sports federations and Part 1 of Article 26.1 in relation to the All-Russian anti-doping organization. Here and further, all references to regulatory legal acts are provided in accordance with the SPS ConsultantPlus. URL: <http://www.consultant.ru> (date of access: 20.09.2024).

established, and are impartial in making any decision⁶, which may lead to their securing the right to conduct a “judicial investigation” in sports justice – to independently collect and evaluate evidence, regardless of the positions of the parties, while maintaining the adversarial form of the process). For example, “The Chamber or Committee determines which circumstances are relevant to the case, which party should prove them, and brings the circumstances up for discussion, even if the parties did not refer to any of them”⁷.

Cooperative organizations and their jurisdictional instances do not have the authority to collect evidence equivalent to Russian Police and State courts [16; 17; 18]. This status quo becomes particularly important for disciplinary disputes when collecting initial evidence to answer the question of initiating disciplinary proceedings is the burden of the sports organization [19]. At the same time, this problem is also typical for other categories of sports disputes, when one of the parties or both have difficulties in collecting evidence, which cannot be compensated by the activity of the jurisdictional body. For example, a party may be denied access to evidence due to the procedural tactics of the other party in possession of such evidence. At the first view, the behavior of a party that evades providing evidence involves bad faith as obtaining an undue advantage over its procedural opponent. At the same time, defending one’s position in the form of evading the presentation of evidence is an implementation of the adversarial principle and therefore cannot by default be recognized as an inadmissible procedural

means. In order to partially overcome the situation, the jurisdictional body may grant the sports organization the right to request evidence from any sports entity that recognizes its norms. This right corresponds to the duty of the subject to cooperate – to provide evidences⁸. The above construction can be fixed by a sports organization for any category of disputes, including those involving disciplinary liability for misconduct [20]. The logical legal consequence in case of refusal of the sports subject is its disciplinary responsibility if there is a corresponding norm in the act of the sports organization⁹.

Sports organizations can use two-stage procedures to determine whether there are grounds for bringing sports subject to disciplinary responsibility. The first stage is investigation and prosecution, the second stage is dispute resolution. In the structure of sports organizations, special management bodies may be created to investigate possible disciplinary offenses of sports subjects – violations of the norms of acts¹⁰. At the same time, these bodies may or may not have the right to bring charges – to open disciplinary proceedings based on the results of the investigation¹¹. In the latter case, the initiation of such proceedings will fall within the jurisdiction of the first instance level of jurisdiction, which considers materials received from officials of the sports organization. Accordingly, the charge is brought by the appeal body, which has the right to limit itself to the evidence provided to decide whether to open disciplinary proceedings against a sports subject. On the other hand, the procedural rules of a sports organization may prohibit a jurisdictional body from recognizing the pre-

⁶ Here and further, due to the limited scope of the article, we will give examples of the regulatory norms of one of the all-Russian sports federations, the Russian Football Union. See, for example, paragraph 1 of Article 43 of the RFU Disciplinary Regulations. URL: <https://rfs.ru/subject/1/documents> (date of access: 20.09.2024). Here and further, due to the limited scope of the article, we will give examples of the regulatory norms of one of the All-Russian sports federations, the Russian Football Union.

⁷ Paragraph 2 of Article 30 of the RFU Dispute Resolution Regulations. URL: <https://rfs.ru/subject/1/documents> (date of access: 20.09.2024).

⁸ See, for example, Part 1 of Article 60 of the RFU Disciplinary Regulations or paragraph 1 of Article 22 of the RFU Dispute Resolution Regulations.

⁹ See, for example, Part 2 of Article 60 of the RFU Disciplinary Regulations or paragraph 2 of Article 22 of the RFU Dispute Resolution Regulations.

¹⁰ See, for example, the “List of terms and definitions” of the RFU Disciplinary Regulations: “35. The Game Protection Department”.

¹¹ For an example of the second of these competence options, see Paragraph 1 of Article 53 of the RFU Disciplinary Regulations.

established validity of any evidence¹², not excluding that obtained as a result of an investigation by a special body. However, this provision does not interfere with the position of a jurisdictional body, which, due to “internal conviction”, did not use the freedom to collect evidence and, as a result, did not evaluate materials of the investigation for compliance with the stated factual circumstances.

So far, the acts of Russian sports organizations have not secured the literal negative legal consequences for the procedural party that prevents the other party from accessing evidence that is in its access. For example, a jurisdictional body would have the right to consider a fact established or refuted, as if the necessary evidence was actually presented. Understanding the situation of lack of access to evidence, not necessarily related to opposition or inaction of the opponent, is found in the practice of the Court of Arbitration for Sport. In one of the disputes, the arbitral tribunal emphasized the following feature of the law of the country of its location, which is used to resolve disputes in sports: “...Swiss law provides a number of tools in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding (cf. CAS 2011/A/2384 & 2386, no. 255 et seq.), to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter is, e.g., the case if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact”¹³.

3. Freedom of evaluating of evidences by jurisdictional bodies.

The general approach to the freedom of evaluation of evidence in the Russian legal system can be presented as follows: the court, based on internal beliefs formed in accordance with the totality of evidence presented in the process,

undertakes to freely evaluate any of such evidence, taking into account the prohibition on the pre-established force of any of them [21; 22; 23].

The laws of a single sports organization may require using identical or different standards of evidence, depending on the category of disputes.

We will give an example of fixing the requirements that are identical for all jurisdictional bodies: proceedings on disciplinary disputes related to the application of the RFU Disciplinary Regulations¹⁴; proceedings on disciplinary disputes related to the application of the RFU Ethics Regulations¹⁵; proceedings on disputes about obligations or obligations from contracts, on applications for establishing a legal fact related to the application of the RFU Regulations on Status and Transfers of football players, on separate disciplinary disputes related to the application of the RFU Regulations on the Status and Transfers of football players¹⁶.

In comparison, the use of different standards of evidence for sports disputes is quite acceptable due to the specific legal consequences of decisions for the parties. For example, for disciplinary disputes involving the resolution of the issue of sports sanctions, it seems impossible for a jurisdictional body to use the mildest of standards for evaluating prosecution evidence, which is identical or close in content to the balance of probabilities. The criterion of proof in disciplinary disputes is necessary, first of all, to check the version of the violation of the norms of the sports organization imputed to the subject. Obviously, to check the validity of the accusation through the most lenient standard of proof would mean the actual accusatory bias of the jurisdictional body. Global sports practice confirms this conclusion – the WADA World Anti-Doping Code and the All-Russian Anti-doping Rules unified with it prescribe a balance of probabilities only for the defense side¹⁷. This standard is used when an athlete or other sports entity refutes the presumption of guilt or when it

¹² See, for example, Article 67 of the Disciplinary Regulations of the Russian Football Union.

¹³ Arbitration CAS 2020/A/7612 Club Atlético Newell's Old v. AS Roma, award of 23 November 2021, para. 59. URL: <https://jurisprudence.tas-cas.org/Shared%20Documents/7612.pdf> (date of access: 20.09.2024).

¹⁴ Article 67 of the RFU Disciplinary Regulations.

¹⁵ Article 34 of the RFU Ethics Regulations. URL: <https://rfs.ru/subject/1/documents> (date of access: 20.09.2024).

¹⁶ Paragraph 3 of Article 29 of the RFU Dispute Resolution Regulations.

¹⁷ Article 5.1 of the All-Russian Anti-Doping Rules.

fulfills the burden of proof of certain facts, circumstances (primarily, the unintentional violation of anti-doping rules, that is not relate to a particular substance or method)¹⁸. As a result, the category of disciplinary disputes is heterogeneous and should include different criteria of proof, taking into account the possible burden of proof of non-guilt or unintentional violation on the accused sports subject.

Regulatory organizations can give jurisdictional bodies both a limited and flexible approach to assessing the admissibility of evidence.

In the norms of sports organizations, jurisdictional bodies may be directly or indirectly given the right to assess the admissibility of any evidence according to internal conviction, without following the criteria of such in the procedural branches of Russian law. Let us give an example of the literal consolidation of the jurisdictional bodies' assessment of the admissibility of evidence: "Evidence must meet the requirements of... admissibility"¹⁹. Another option is when the assessment of admissibility is implicitly referred to in section as the duties of the jurisdictional authority: "Evidence in a case of a disciplinary violation is any information on the basis of which the Jurisdictional Body determines the existence or absence of circumstances relevant to the case on the basis of which the Jurisdictional Body makes a decision"²⁰.

At the same time, for individual disciplinary disputes, a sports organization may establish a rule for evaluating evidence as inadmissible in common with the procedural branches of Russian legislation: "Evidence that was obtained in violation of the legislation of the Russian Federation... cannot be accepted by the RFU Ethics Committee for consideration"²¹.

Per se, the limits of free assessment of evidence for admissibility by jurisdictional bodies may vary: from checking the "admissibility requirements" (a soft option of discretion) to

single-point recognition of the inadmissibility of evidence "obtained in violation of the legislation of the Russian Federation" (a strict option of discretion).

The consumer has the right to recognize the circumstance as established or refuted against the interests of the procedural party that has evaded providing the evidence necessary for the investigation of such a circumstance. This presumption can be fixed in the rules of a sports organization for some or all jurisdictional bodies, or limited – for specific categories of disputes²². Alternatively, for certain types of disciplinary disputes, the right to rule a decision on the case based on available evidence may be established, if the subjects of sports do not fulfill the duty of cooperation, and there are no legitimate ways to obtain such evidence for evaluation²³. However, for other disciplinary disputes within the jurisdiction of the sports federation, if sports entities do not provide the requested evidence the decision of the jurisdictional body based on the available materials may not be recorded²⁴.

4. Conclusions.

We see the consolidation in the norms of Russian sports organizations of the right to conduct an active investigation by a jurisdictional body as an important decision that allows us to overcome the limitation of the jurisdictional body's argumentation by analyzing the evidence presented by the parties (or a party). However, this will also require binding subjects that recognize the norms of the sports organization to cooperate, which is significantly characterized by two aspects.

First, obstructing the conduct of a procedural party that has evidence against its interest, but does not grant access to it to the other party and (or) a jurisdictional body. The "burden of proof" in the wording of Russian jurisprudence is understood as the need for a party to the process to establish circumstances, the lack of clarity of which may entail unfavorable consequences for it [24, p. 325]. Since mandatory pre-trial settlement of disputes is not an

¹⁸ Article 3.1 of the WADA World Anti-Doping Code.

¹⁹ Paragraph 4 of Article 29 of the RFU Dispute Resolution Regulations.

²⁰ Paragraph 1 of Article 66 of the RFU Disciplinary Regulations.

²¹ Article 33 of the RFU Ethics Regulations.

²² Paragraph 3 of Article 22 of the RFU Dispute Resolution Regulations.

²³ Part 3 of Article 60 of the RFU Disciplinary Regulations

²⁴ An example is a violation of the rules of ethics, see the RFU Ethics Regulations.

administrative or criminal process, it does not extend the right not to testify against yourself, your spouse and close relatives as a guarantee against self-incrimination [25].

Secondly, obtaining the necessary evidence from the point of view of the jurisdictional body from any of the subjects of sports, although not being a party to the process, but unable to evade the request under the threat of disciplinary liability due to the obligation to cooperate. At the same time, the exercise by a jurisdictional body of the right to freely collect evidence in accordance with the purpose of dispute resolution, and not a subjective belief in the sufficiency of the evidence contained in the case is an urgent issue. It seems that an effective solution can be called obliging the jurisdictional body to investigate all the circumstances in the aggregate, which will require not only requesting new evidence, but also evaluating it in comparison with others presented in the dispute.

The combination of these two investigative prerogatives is particularly important for disciplinary disputes, when a special body of a sports organization collects evidence of a disciplinary offence committed by a sports subject for subsequent decision by the jurisdictional body on whether to bring charges. It seems obvious that the mission of the jurisdictional body is not to accept as established fact the conclusion presented to him about the guilt of a misdemeanor, even with the apparent internal conviction, without conducting an active investigation²⁵.

We consider the distribution of standards of proof depending not only on the category of sports dispute, but also on the availability of various options within such a category, to be the correct regulatory decision of sports organizations. It would be difficult to justify the use of the probability balance as the mildest standard in disciplinary disputes for the accused subject, if the

presumption of innocence is applied and the burden of proving the absence of intent in the violation is not imposed on him. In comparison, in the reverse situation, which is demonstrated by disciplinary disputes about anti-doping rule violations, the subject and the anti-doping organization are not initially in the same position in terms of the volume and complexity of proving the facts. Therefore, the standards should also differ, giving the subject of sports the right to use more lenient rules of evidence.

Disciplinary disputes can increase the relevance of the question of the limits of the discretion of the jurisdictional body regarding the admissibility of evidence collected. Despite the limited powers of the sports organization to conduct an investigation, the formulation of its own limits of admissibility for proving a violation of the rules should be understood in terms of the following probability. In sports justice there may be a situation of inequality of the parties in the actual collection of evidence, when a special body, as a result of an investigation, will present a significant set of such evidence to the jurisdictional body in favor of opening disciplinary proceedings and subsequent charges, than the subject of sports in its own defense. Although Russian sports organizations are non-commercial organizations due to their national status and authority they have at least informal access to the subjects under their jurisdiction who can be called and interviewed, recorded their telephone conversations, and requested documents from them. The listed procedural actions can be carried out not only in fact, but also receive legal verification in the norms of the organization, supported by a separate obligation of any subject of sports to cooperate. Therefore, the discussion about the choice of strict or soft approaches to determining the limits of admissibility of proofs given earlier is still far from over.

Finally, we believe that it is important to give the jurisdiction in the settlement of sports disputes the right to establish circumstances against a party that has failed to provide them without good reason, and to make a decision based on the evidence available in the case file. In a situation of evasive procedural behavior of the party, which was not affected by its bringing to disciplinary

²⁵ In the practice of the Court of Arbitration for Sport (CAS), we can find confirmation of our idea – see Arbitration CAS 2018/A/5808 AC Milan v. Union des Associations Européennes de Football (UEFA), award of 1 October 2018, para. 148. URL: <https://jurisprudence.tas-cas.org/Shared%20Documents/5808.pdf> (date of access: 20.09.2024).

responsibility for refusing to cooperate, a presumption of the existence of grounds for concealing evidence and entailing proof of the circumstances against such a subject is necessary. With a different approach, the unfair behavior of the subject in the dispute settlement procedure would increase the chances of the impossibility of a decision in favor of the opposing party, when the jurisdictional body would not receive the evidence that seems necessary for him in response to his request. The question in each particular dispute would be whether the evading party would compare the amount of the claim against it and the amount of the fine imposed as a sports sanction for refusing to cooperate.

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INFORMATION ABOUT AUTHORS

Iliia A. Vasilyev – PhD in Law, Associate Professor;
Associate Professor, Department of Theory
and History of Law; Leading Researcher
St. Petersburg University
7/9, Universitetskaya nab., St. Petersburg, 199034,
Russia
E-mail: i.vasilev@spbu.ru
Scopus AuthorID: 57196348447
ResearcherID: I-7480-2013
RSCI SPIN-code: 7524-7480

Evgeniya G. Vetrova – Research Assistant
St. Petersburg University
7/9, Universitetskaya nab., St. Petersburg, 199034,
Russia
E-mail: ginavet@rambler.ru
RSCI SPIN-code: 3881-0972; AuthorID: 1077378

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