CAS 2014/A/3510 Sandra Ristivojevic v. International Skating Union ("ISU")

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Lars **Halgreen**, Attorney-at-law, Copenhagen, Denmark
Arbitrators: Mr Lucas **Anderes**, Attorney-at-law, Zürich, Switzerland
Mr Patrick **Lafranchi**, Attorney-at-law, Bern, Switzerland

In the arbitral proceedings

between

Sandra Ristivojevic, Moscow, Russia
Represented by her mother Ms Yunna Maratovna Ristivojevic, Moscow, Russia

Appellant

and

International Skating Union ("ISU")
Represented by Dr. Beatrice Pfister, Attorney-at-law, Muri b. Bern, Switzerland

Respondent

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I. THE PARTIES

1. Miss Sandra Ristivojevic (hereinafter also referred to as "the Athlete" or "the Appellant") is an ice skater, and a Serbian national and member of the Serbian Skating Association. She was born on 12 July 1996.

2. International Skating Union (hereinafter also referred to as "ISU" or "the Respondent") is the exclusive International Sports Federation recognized by the International Olympic Committee administering sports in the branches of figure skating and speed skating throughout the world. The ISU is constituted as a Swiss association in accordance with article 60 and following of the Swiss Civil Code and has its seatn Lausanne, Switzerland.

I.1. The Dispute between the Parties

3. Below is a summary of the relevant facts based on the Parties' written submissions, pleadings and evidence presented at the hearing. Additional facts found in the parties' written submissions, pleadings and evidence may be set out where relevant in connection with the legal discussion that follows. Whereas the Panel has considered all the facts, submissions, legal arguments and evidence submitted by the parties in the present proceedings, the Panel only refers to the submissions and evidence that it considers necessary to explain its reasoning below.

4. This dispute concerns an alleged violation of the ISU Anti-Doping Rules by the Athlete for having left the ice rink at the 2013 Nebelhorn Throphy in Obertsdorf without having ensured that she was not selected for anti-doping testing.

5. On 23 September 2013, the Moscow City Health Department issued a health certificate releasing the Athlete from school from 23 September until 7 October 2013. The Appellant explained that she was not feeling well, but the reason for her release is not specified in this certificate.

6. The Athlete, however, participated as member of the Serbian Skating Association in the 2013 Nebelhorn Throphy skating competition, which took place in Obertsdorf, Germany

from 25-28 September 2013. The Athlete was 17 years old when the competition took place. Prior to the event the skater and her mother, Ms Yunna Ristivojevic, who acted as team leader for the Serbian team, had signed the "Declaration for competitors and officials entering ISU events". At the accreditation, both the skaters and the team leaders received general information about the event, including an "anti-doping notification" for the Nebelhorn Trophy 2013. The notification stated that skaters may not leave the Arena until after the notice for Anti-Doping Control, has been given to the team leader concerned.

7. On 27 September 2013, the Ladies' Free Skating Event of 35 competitors started at 18:00 hrs. With the starting number 5, the Athlete finished her performance at 18:42 hrs. The ladies' competition did not finish until 23:41 hrs.

8. After her performance, the Athlete first went to the restaurant around ice rink and then turned to her hotel in Oberstdorf within walking distance from the skating rink. Allegedly, the Athlete had not been feeling well up to the competition in Oberstdorf, and after her performance, she fell ill and had a temperature of 38.9 degrees. When she returned to her hotel room, she and her mother allegedly intended to come back for the anti-doping test selection and were confident that if the Appellant was selected for testing, the organizers would immediately notify her accordingly but, she fell asleep after having taken an anti-pyretic medicine and was not notified about her selection.

9. The Athlete's mother, who was also acting as team leader of the Serbian team, also fell ill after having returned to the hotel, and was unable to go back to the ice rink to inform the doping control team about the illness of her daughter. The mother alleges that she did not have any telephone numbers or email addresses of the organizers, and there was no information at the hotel about the time schedules, telephone numbers of the organizer or doping control panel. Thus, she could not make contact to the relevant person at the doping control team. Both the Athlete and her mother allege that neither the organizers nor the doping control team tried to contact them whilst they were in their hotel room in the evening of 27 September or during the night.

10. When the Women's Free Skating Competition had finished close to midnight on 27 September, the Athlete was randomly selected for an in-competition doping control, she was however not aware of this selection before the day after since she was neither found in the arena nor reached by phone. The responsible doping control officer was Mr Juergen Schwartges. He conducted the sample collection together with Ms Claudine Schwartges. According to the hand-written ISU doping control officer report, signed by Mr Schwartges and dated on 28 September 2013, the Chair of the ISU sports directorate Mr Peter Krick was also present during the sample collection. According to the report, the skater had been selected in accordance with the mission order, but the skater had not reported to the doping control station in a timely manner. In the section on the report form named "general comments and suggestions", Mr Schwartges had left the hand-written comment: *"RISTIVOJEVIC, SANDRA (random) did not appear to the doping control!"*.

11. The next morning, the Athlete and her mother were feeling better and learned when they spoke with the Bulgarian athletes that the Appellant had been selected for anti-doping testing. They thus went back to the ice rink where they inquired whether it was possible for the athlete to be tested together with the competitors of the men's event, which finished around 15:00 hrs. Allegedly, they both contacted Mr Schwartges at the doping control, and Mr Krick as the ISU representative, but it remains unclear exactly what happened on 28 September. However, the Athlete was not tested either on 27 or 28 September, and she was reported as having failed to submit a sample for doping control, vis-vis the doping control officer report signed 28 September 2013.

12. Although the exact circumstances of 28 September remain unclear, it is documented in the file that Ms Vasovic of the Serbian Skating Association contacted Mr Peter Krick via email on 28 September at 17:00 hrs. In her email, she explained the circumstances regarding the illness of the Athlete and her mother. In that regard she posed the following question:

"Therefore, I would kindly ask for advice: Who should I address the following question: Can Sandra [can] have the test performed today as they are still in Obertsdorf? Is there anything that can be done to overcome this situation?"

13. The file does not show whether Mr Krick answered Ms Vasovic's mail, but later in the evening at 20:32 hrs Mr Krick forwarded Ms Vasovic's mail and wrote the following email:

"Dear Jane,
Dear Fredi.

The facts are described by the lady from Serbia. No need for me to amend anything.
The Anti-Doping test persons are aware of the situation and will report to you accordingly.

The test procedure and the tasks of the Team Leaders had been explained as usual at the Team Leaders Meeting by me on Wednesday, September 25th, 2013 – 18.00 h. Also the mandatory task to check with the testing person, who has been drawn.

Best regard
Peter."

(The time of the email is set at "8:32 AM", but given the time of the previous email and the following emails the "AM" must have been a mistake.

14. On 28 September at 21:12 hrs, Ms Jane Moran who is the Chair of Medical Commission of the ISU responded to Peter Krick's previous email:

"Hi Peter;

In speaking with the DCO if possible it would be good to see if they can test her if they are still there. Also do they have any indication or record that they have been seen by the medical staff for her illness. A record of her illness would be helpful.

Thanks for the information.

jane"

In his reply later the same evening at 22:39 hrs Mr Krick wrote the following:

"Jane,
I have not seen any document of illness, but I told her to contact the Anti-Doping Control people.

Best regards
Peter".

Except for the report issued on 18 October 2013, there does not appear to be any of the further written documentation relating to the events that took place on 28 September 2013.

15. Probably after her return to Moscow, the Athlete visited the City Health Department, which issued an extract of her medical record with the complete diagnosis "Acute Sinusitis" during a period covering the event of 27 September 2013. The relevant extract in the English translation stated as follows:

"Received medical treatment from 23/09/2013 till 07/10/2013 with diagnosis: acute sinusitis. Fell ill with acute syndromes, complained of rhinopharyngitis, body temperature rise up to 37.8, asthenia, sore throat. Was prescribed to take medicines: Amoksiklav 1000 mg, 1 BID, 7 days; Aqualor according to regimen; Bioparox, 2 inh QID; physiotherapy.
Admitted to school classes with full recovery."

It is unclear when this extract was issued, as it appears undated,however, it must have been issued after 7 October, *id est* after her return to Moscow.

16. On 18 October 2013, a second typed-up doping control officer report was issued. This report is signed by the doping control officer Mr Juergen Schwartges, the findings in the first handwritten report of 28 September are repeated. However, it is not mentioned that Mr.

Peter Krick was present during the sample collection. The following comments were added by Mr. Schwartges in the written report:

"We were told that she has already left the ice stadium. Mr. Krick (ISU) stated that we should only write a unsuccessful attempt report. We don't need to anything else. The next day, the athlete appeared again at the competition site. Mr Krick has said that we shall not take any further measures for yesterdays missed control to be carried out."

17. This case was brought before the ISU Disciplinary Commission and on 1 February 2014, it rendered its decision in the doping violation case against the Athlete ("the Decision"). The ISU Disciplinary Commission held that the Athlete had committed an anti-doping rule violation, but because of the exceptional circumstances of the case, the Disciplinary Commission held that Article 10.05.2 of the ISU Anti-Doping Rules applied, and reduced the regular suspension of two years to one year.

18. Based on the above considerations, the ISU Disciplinary Commission ruled as follows:

"Decision

1. Sandra Ristivojevic is declared responsible for an Anti-Doping violation, committed on September 27, 2013, at the Nebelhorn-Trophy 2013 in Oberstdorf, Germany.
2. A period of ineligibility of one year beginning on February 1, 2014 and ending on January 31, 2015 is imposed on Sandra Ristivojevic.
3. The competitive results of Sandra Ristivojevic obtained from September 26, 2013 (Short Program) to September 27, 2013 (Free Skating Program) at the Nebelhorn-Trophy 2013 in Obertsdorf, Germany, are disqualified with all the resulting consequences, including forfeiture of any medals, points and prices.
4. The Serbian Skating Association has to reimburse the ISU for the costs of these proceedings.
5. The skater bear her own costs."

II. THE ARBITRAL PROCEEEDINGS

II.1 The proceedings before the Court of Arbitration for Sports

19. On 17 February 2014, the Appellant filed a combined statement of appeal and appeal brief with the Court of Arbitration for Sport (the "CAS") against the Decision. In accordance with Article R48 of the Code of Sport Related Arbitration (2013 edition) (the "Code") and further to a request from the CAS Court Office, the Appellant duly completed her appeal on 24 February 2014. The Appellant nominated Mr Lucas Anderes as arbitrator.

20. On 19 March 2014, the Respondent filed its answer in accordance with Article R55 of the Code. The Respondent included a counterclaim in its answer, requesting that a two-year ineligibility period be imposed on the Appellant for violation of the ISU Anti-Doping Rules. The Respondent appointed Mr Patrick Lafranchi as arbitrator.

21. On 30 March 2014, the Appellant filed a reply, which the Respondent protested against on 7 April 2014. Subsequently, by letter of 16 April 2014, the Panel excluded the reply from the CAS file in application of Article R56 of the Code. In the same letter, the Panel declared the Respondent's counterclaim inadmissible.

22. On 4 April 2014, the CAS Court Office informed the Parties that the Panel appointed to decide the matter was constituted as follows:

President: Mr Lars Halgreen, Attorney-at-law, Copenhagen, Denmark
Arbitrators: Mr Lucas Anderes, Attorney-at-law, Zürich, Switzerland
Mr Patrick Lafranchi, Attorney-at-law in Bern, Switzerland

23. Based on an evidentiary request from the Panel, the Respondent submitted the ISU file in relation with the Decision on 23 April 2014.

24. On 19 June 2014, the CAS Court Office, on behalf of the President of the Panel, issued a final order of procedure (hereinafter referred to as "the Order Procedure"), which was accepted and countersigned by both Parties without any objections or remarks.

II.1.1 The hearing

25. A hearing was held on 8 July 2014 at the Court of Arbitration for Sport in Lausanne. The Panel was assisted at the hearing by counsel to the CAS, Ms Pauline Pellaux. The following persons attended the hearing:
The Appellant was present and represented by her mother, Ms Yunna Ristivojevic, and Ms Alexandra Marchenko served as interpreter.

The Respondent was represented by Dr. Beatrice Pfister.

26. The Respondent had called the following witnesses to appear at the hearing:

Mr Peter Krick, Chairman of the ISU Sports Directorate and
Mr Juergen Schwartges, the responsible doping control officer at the 2013 Nebelhorn Throphy (via telephone).

27. In the opening statement of the Appellant, which was made by Ms Yunna Ristivojevic, she summarized the Appellant's position and arguments submitted in the appeal brief. Furthermore, she explained that the coach, which normally accompanied her daughter to competitions, could not represent her in Obertsdorf, and she had to step in as coach and team leader. Her daughter had not been feeling well in Moscow in the week before the competition started, but because of the importance of the competition (qualifying for the Olympics) they decided to leave for Oberstdorf. They stayed at a hotel near the ice stadium, but they were very cold and wet from the rain, when they walked from the hotel in the morning to the ice stadium. Her daughter was one of the first to compete in the Free Skating Program, and after her performance, they decided to go back to the hotel. When they returned to the hotel her daughter was feeling worse, and she took some medicine and fell asleep. She was neither feeling well because of diarrhea and was not able to leave the hotel room. Because they did not have the relevant telephone numbers or email

addresses and the hotel could not help them, she did not try to contact the organizers at the ice stadium to inform them about her daughter's illness. Also they did not receive any telephone calls or email from the organizers or the doping control officers during the evening or night. Her command of the English language is not very well, and it was only when she spoke with the Bulgarian athletes the next day, that she learned that her daughter had been selected for doping control. Subsequently, they tried to find out if her daughter could be tested on 28 September whilst the doping control officers were in the ice stadium for the men's competition. All through the morning of 28 September, they went to many different persons to inquire if her daughter could be tested. They were told that they should contact the doping control officer, and they were also in contact with the main physician of the event. They got the impression that her daughter could be tested whilst the doping control officers were in the stadium for the men's competition. However, after all they were refused by the doping control officers because they had not been informed by the organizers that the Athlete was allowed to perform the test the next day. Thereupon they returned to their hotel and contacted Ms Vasovic of the Serbian Skating Association, who told them that she would try to contact the organizers to see if testing was still possible. Subsequently, she and her daughter waited in their hotel, but they received no information from the organizers or the doping control officers with respect to the possibility of being tested together with the selected skaters from the men's competition.

28. Following the opening statement of Dr. Beatrice Pfister on behalf of the Respondent, which summarized the Respondent's position and arguments submitted in the answer and statement of defense, the Panel went on to hear the testimonies of the witnesses.

(i) The testimony of Mr Juergen Schwartges, Doping Control Officer ("DCO") (via telephone)

29. Mr Juergen Schwartges confirmed that he was the responsible doping control officer at the 2013 Nebelhorn Throphy in Oberstdorf. At the women's competition on the evening of 27 September, he remembered that the testing of the selected athletes took place very late in the night around midnight. He confirmed that he had signed the doping control officer report form stating that the Athlete had not appeared at the doping control. He could not remember exactly who was present at the doping control, but he did not himself

try to contact the Athlete when she did not appear. He was told that another team leader tried to contact the Athlete by mobile phone, but in vain. The next morning, the Athlete contacted him together with her mother. She asked to be tested but he said that was not possible, so no test was conducted. He believed that Mr Krick from the ISU had told him this in person, but he cannot remember the exact details. The men's competition ended at 3 PM in the afternoon on 28 September, and after having conducted the doping test on the ice skaters, he completed the doping sample collection without having tested the Athlete.

(ii) The Testimony of Mr Krick (Chairman of the ISU Sports Directorate)

30. Mr Krick confirmed that he was the responsible ISU officer at the 2013 Nebelhorn Throphy, which was an important ice skating event as it functioned as a qualifying event for the Olympics. Mr Krick stated that he had served as an ISU officer at numerous skating events throughout the years, and approximately, 80-100 times had informed team leaders about the procedures of doping controls. Moreover, he would inform the team leaders, orally and in writing, about the testing procedures, forbidden drugs and over-the-counter medicines, which the athletes and team leaders should be cautious about. The Appellant would have known right after their performance, if she had been selected for doping control. As for the matter at hand, he could not remember the exact details of the event that took place on 27 and 28 September. He recalled that he had been called to the doping control after the women's competition had finished late in the evening on 27 September. When the Athlete had not appeared, they had tried to look for her in the restaurant or around the ice rink. He stated that it was not customary for him to hold the phone numbers of the team leaders, as they would normally contact him. He cannot remember whether the Athlete or the team leader for the Serbian team had been contacted by mobile phone in this case. The next day, he had been approached by the Athlete and her mother, and he believes that he had told them that the Athlete could not be tested today, since in that moment a test would not be in-competition, but out-of-competition, as it was not completed immediately after the competition. He cannot remember exactly when he contacted the doping control officer and what they spoke about on 28 September. For him it was a very busy day as ISU responsible officer.

After the Panel had inquired about the exchange of emails of 28 September, Mr Krick explained that he had contacted Jane Moran who was the medical advisor of the ISU to check what the proper procedure in a case like this would be. He cannot remember if he contacted the representative Ms Vasovic of the Serbian Skating Federation to reply to her email, but he denied that he at any stage had given a permission to the Athlete or at least led her to believe that she could be tested on 28 September.

31. At the end of the hearing, Ms Yunna Ristivojevic requested to submit new evidence. After consultation, the President of the Panel announced that the new evidence would not be allowed in accordance with Article R56 of the CAS Code.

32. The parties confirmed at the conclusion of the hearing that they had no objections to the appointment of the Panel, that they had been treated equally in the arbitration proceedings, and that they had been given the opportunity to fully present their cases.

II.2 The Position of the Parties

33. The following outline of the Parties' decisions is illustrative only, and does not necessarily comprise every contention put forward by the Parties. The Panel indeed has carefully considered all the submissions made by the Parties even if there is no specific reference to those submissions in the following summary.

a) The Position of the Appellant

34. The Appellant's requests for relief as stated in the appeal brief are the following:

"1. that the Impugned Decision of the ISU Disciplinary Commission against Miss Sandra Ristivojevic and the Serbian Skating Association (the case No. 2013-03), of February 1, 2014, be reversed and that the suspension imposed against Miss Ristivojevic be annulled; or,

2. that the Impugned Decision of the ISU Disciplinary Commission against Miss Sandra Ristivojevic and the Serbian Skating Association (the case No. 2013-03), of February 1,

2014, be reversed, that the suspension imposed against Miss Ristivojevic be annulled and that Miss Ristivojevic be reprimanded or, in the alternative, that the suspension imposed against Miss Ristivojevic be reduced in accordance with Article 10.5.5 of the World Anti-Doping Code."

35. In support of its requests for relief, the Appellant has made, in essence, the following submissions and arguments:

(i) The Appellant had no intention of deliberately avoiding the doping test, and the reasons for her leaving the ice stadium after having competed in the skating competition was solely due to her illness.

(ii) The Athlete had not been feeling well before she left from Moscow, and the medical certificate signed by the Russian physician showed signs of Acute Sinusitis, which proofs that the statement about her deteriorating health both before and after the skating competition can be substantiated.

(iii) Given the circumstances, the organizers and the doping control officers could and should have contacted the Athlete and/or her mother who acted as team leader of the Serbian Team. The organizers were in possession of all relevant information concerning the Athlete's accommodation and mobile phone number.

(iv) The Athlete and her mother showed up at the ice rink early the next morning when they felt better and tried all through the day to find out if the Athlete could be tested together with the male skaters who competed until 3 PM in the afternoon of 28 September.

(v) Despite many attempts to be tested on 28 September, including talks with Mr Peter Krick of the ISU and Mr Juergen Schwartges, the doping control officer at the event, the Athlete was not tested. In fact, repeated pleas of the Serbian representatives, the team leader and the Athlete herself remained unanswered despite the seriousness of the consequences for the Athlete for having failed the sample collection.

(vi) The Athlete's record shows that she has never breached any anti-doping provisions or procedures before in her career. Thus, the designated period of ineligibility should under the circumstances be eliminated according to Article 10.5.1 of the Wada Code, alternatively, the period of ineligibility should be further reduced, according to Article 10.5.1 and 10.5.2 of the Wada Code.

(b) The Position of the Respondent

The Respondent's requests for relief as stated in the answer and statement of defense are the following:

"1. To dismiss Appellant's appeal.
2. To find Appellant guilty of violation of the ISU Anti-Doping Rules.
3. To impose upon Appellant a two years ineligibility period.
4. To declare disqualification of the results obtained by the Appellant at the 2013 Nebelhorn Throphy (35th rank).
5. To order the Serbian Skating Association to reimburse to the ISU the costs of the proceedings before the ISU Disciplinary Commission in its case no. 2013-03."

36. In support of its requests for relief, the Respondent has in essence made the following submissions and arguments:

(i) The Appellant does not contest having failed to submit to sample collection on 27 September 2013, and thus according to Article 2.3 of the ISU Anti-Doping Rules failure to submit to sample collection without compelling justification, constitutes an anti-doping rule violation for which the regular sanction according to Article 10.3.1 is a two years sanction of ineligibility.

(ii) Article 10.5.1 and 10.5.2 of the ISU Anti-Doping Rules provide for elimination or reduction of the period of ineligibility in case a skater establishes that he or she bears no fault or negligence or no significant fault or negligence, respectively. The Application of these articles is limited to cases with truly exceptional circumstances, and they are not present in this matter.

(iii) The Respondent rejects the Appellant's explanation that she was unable to show up for the doping control due to a slight fever. She or her mother, acting as team leader, had all possibilities to get in contact with the organizers or the doping control team about her illness in the evening and night of 27 September.

(iv) It is the sole responsibility of the skater not to leave the ice rink, without first ensuring that he or she has not been selected for anti-doping testing. Further, the Respondent submits that skaters not present at the doping control "*are always recalled if possible. But this was not the case at the 2013 Nebelhorn Trophy*". The reason for this being that the selection of skaters to be tested was done immediately after the end of the latest event, which was at 23:41 PM, and that, at that time the Appellant's hotel was closed with no receptionist on duty and without any possibility to contact the hotel or the guests. The Appellant can furthermore not claim no or no significant fault or negligence based on her not having been recalled.

(v) The Decision of the ISU Disciplinary Commission was flawed with respect to the reduction of the ineligibility period from two years to one year. By making this reduction, the ISU Disciplinary Commission did not consider that post-competition testing needs to be done immediately after the end of the competition in order to fulfill its purpose because a test several hours after the end of an event would allow the delusion of many prohibited substances. Therefore, rule A.6.5 if the ISU Anti-Doping Procedures require skaters selected for post-competition testing to appear immediately.

(vi) Reference is also made to Article 2.3.1 of the ISU Anti-Doping Rules according to which the skater, after having been recalled, must return to the ice rink in due time to the competition site in order to comply with the anti-doping testing for the event in which he or she participated. Due time cannot reasonably mean anything else but until the time at which sample collection of the event in which the skater participated is concluded.

(vii) Consequently, what happened after the conclusion of the sample collection for the ladies' event on the evening of 27 September cannot per se be used to construct no or no significant fault or negligence according to Article 10.5.1 or 10.5.2 of the ISU Anti-

Doping Rules. Hence, the Respondent has made the request that the Decision of the ISU Disciplinary Commission be reversed and replaced with the standard sanction of two years ineligibility according to Article 10.3.1 of the ISU Anti-Doping Rules.

(viii) Finally, the Respondent has argued that the consequences of the Athlete's violation of the ISU Anti-Doping Rules according to Article 9 of the ISU Anti-Doping Rules should be disqualification of the result obtained at the 2013 Nebelhorn Trophy with all the resulting consequences. Furthermore, the ISU member i.e. the Serbian Skating Association should reimburse the ISU for all costs related to the violation of the above Anti-doping Rules by the Appellant affiliated with the Serbian Skating Association.

III. LEGAL ANALYSIS

III.1 Jurisdiction

37. The Appellant relies on Article 24 and 25 of the ISU Constitution as conferring jurisdiction on the CAS. The jurisdiction of the CAS has not been contested by the Respondent and has been confirmed by the signature of the order procedure by both Parties. CAS has therefore jurisdiction to decide the present dispute between the Parties.

III.2. Admissibility

38. The Decision was sent to the Appellant by registered mail on 1 February 2014 (against return receipt) and to the Serbian Skating Association and the ISU by email. According to Article 24, paragraph 12 and Article 25 of the ISU Constitution, the Decision may be appealed against before the CAS within 21 days upon receipt of the Decision.

39. It is unclear when the Decision was received by the Appellant, but the appeal brief was submitted by the Appellant to the CAS on 18 February 2014, i.e. within the 21-day time limit, even if the Decision had been notified on the day that the ISU Disciplinary Committee ruled on the matter. Accordingly, the Appellant's appeal is admissible. As announced by the CAS letter of 16 April 2014, the Panel deemed that the Respondent's counterclaim was inadmissible since, as from 1 January 2010, counter-claims are not

allowed in the CAS appeals procedure and since in any event the regular 21-day time limit had already elapsed to consider the counterclaim as a separate appeal.

III.3 Scope of the Panel's review

40. According to Article R57 of the Code: *"The panel shall have full power to review the facts and the more. It may issue a new decision, which replaces the decision challenged or annul the decision and refer the case back to the previous instance..."*

III.4. Applicable law

41. In accordance with Article R58 of the Code, the Panel shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country of which the federation, association or sports related body, which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

42. As a result of this permission in the CAS Code, the Panel considers that the 2012 edition of the ISU Anti-Doping Rules is applicable to these proceedings.

43. The provisions in the 2012 ISU Anti-Doping Rules, which were effected as of 10 October 2012 and which are relevant in this arbitration, include the following:

44. Article 2.3 states the following:
"Refusing, or failing without compelling justification, to submit to Sample collection, after notifications as authorized in these ISU Anti-Doping Rules, or otherwise evading sample collection."

45. Article 2.3.1 states the following:
"Leaving the ice rink after the event in which the skater participated without first ensuring that he or she has not been selected for Anti-Doping testing. After having been recalled,

the skater must return in due time to the competition site in order to comply with the Anti-Doping testing for that event".

46. Article 10.3 states the following:

"Ineligibility for other Anti-Doping Rule Violations

The period of Ineligibility for violations of these ISU Anti-Doping Rules other than as provided in Article 10.2 shall be as follows:

10.3.1 For violations of Article 2.3 (refusing or failing to submit to Sample Collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility period shall be two (2) years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6, are met."

For violations of Article 2.3.1 (leaving the ice rink prior to notification of doping control testing, but complying with testing on recall), the sanctions set forth in Article 10.4 shall apply.

10.3.3 For violations of Article 2.4 (Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Skater's degree of fault."

47. Article 10.4 states the following:

"Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where a Skater or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Skater's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

To justify any elimination or reduction, the Skater or other Person must produce corroborating evidence in addition his or her word, which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of performance enhancing substance. The Skater or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility."

III.5 The Merits

48. The following issues fall to be determined by the Panel in these proceedings:
1. Did the Athlete violate Article 2.3 or 2.3.1 in the ISU Anti-Doping Rules?

2. If the answer to question 1 is affirmative, what is the appropriate sanction for such a violation?

(i) Analyzing question 1:

49. In order to resolve the first question at hand in these proceedings, it is important that the Panel outlines the context in which this matter has to be put.

50. To this Panel, it is of paramount importance today that an effective and credibly functioning anti-doping system is in place in order that the sports community together with the WADA and the National anti-doping agencies around the world may fight one of the greatest challenges to the international sports, namely the use of illegal performance enhancing drugs. Such anti-doping regimes and control systems should, however, always be carried out with appropriate consideration for athletes' expectations that they will be treated fairly. These principles have been established in a number of CAS cases. See for example 2011/A/2499 and 2011/A/2671.

51. In this matter, the Panel is of the opinion that it is necessary to clarify which Article in the ISU Anti-Doping rules, the Athlete may have violated. Article 2.3 is the anti-doping rule, which is known from the WADA Code, and which concerns the instances where an Athlete, without compelling reason, has refused, failed or evaded sample collection.

However, Article 2.3.1 is a specific anti-doping rule, which is found in the ISU Anti-Doping rules, and not in the WADA Code. This rule concerns the situation where a skater has left the ice rink after the event, without first ensuring whether he or she has been selected for anti-doping testing. Having analyzed the ISU Anti-Doping rules, the Panel has reached the conclusion that Article 2.3.1 constitutes a separate anti-doping violation, that is to be determined individually. Article 2.3.1 is thus not a subsection of Article 2.3 in the sense that a violation of Article 2.3.1 automatically leads to a violation of Article 2.3. Therefore, Article 2.3.1 will have to be examined based upon the specific facts of the case. In this matter it is the opinion of the Panel that the violation by the Athlete was indeed that she left the ice rink without first ensuring that she had not been selected for anti-doping testing as provided under Article. 2.3.1 of the ISU doping rules.

52. Even though the Panel is satisfied that she was feeling ill and may have had a slight fever, she was, however, able to participate in the competition and finish her performance. Also she was also feeling better the next day, which indicates that her medical condition was in no significant way deteriorated. In the opinion of the Panel it would have been easy for her or the team leader to find out if she was selected for doping control and to inform the doping control officer of the situation.

53. Although the Athlete was a minor at the time, she was knowledgeable about doping control procedures and had signed the declaration for competitors and officials entering ISU events prior to the 2013 Nebelhorn Trophy. Thus, the Panel does not consider her youth or lack of international experience to be factors which could or should justify her failure to ensure that she had not been selected for Anti-Doping testing before leaving the ice rink.

54. In reaching this conclusion, the Panel has also put emphasis on the fact that her mother, who was acting as team leader for the Serbian team, was with her during the entire competition. As team leader for the Serbian team and coach for her daughter, she was or should have been aware of the doping control procedures, which was explained to the team leaders prior to the competition. The Panel is therefore convinced that it would have at least been possible for the Appellant, or her mother as team leader, to notify the doping control officers of the decision to go back to the hotel because the Appellant was feeling

ill. Hence, the Panel is of the opinion that the Athlete has committed an anti-doping rule violation in accordance with Article 2.3.1 of the ISU Anti-Doping Rules.

(ii) Analyzing question 2.

55. As for the appropriate sanction for the Athlete's anti-doping violation, the Panel has noted that the ISU Disciplinary Commission has reduced the two-year ineligibility sanction to one year. Taken into account, as alleged "exceptional circumstances" the fact that on 28 September 2013, the Appellant and her mother returned to the ice stadium and asked to be tested whilst the doping control was still at the event.

56. In analyzing the question of an appropriate sanction, it is the opinion of this Panel that the proper understanding and interpretation of Article 2.3.1 of the ISU Anti-Doping Rules, in this particular context, is of significant importance.

57. Article 2.3.1. states the following:

"Leaving the ice rink after the event in which the Skater participated without first ensuring that he or she has not been selected for Anti-Doping testing. After having been recalled, the Skater must return in due time to the competition site in order to comply with the Anti-Doping testing for that event." [Emphasis added]

58. The Panel has duly noted that the Respondent in its answer and statement of defense has made the following statement (page 4, last section):

"Of course Skaters not present at the doping control are always recalled if possible. But this was not the case at the 2013 Nebelhorn Trophy."

59. In addition, the Panel has noted that no or at least no sufficient attempts had been made to recall the Athlete at the night of the competition. At least nothing of this kind was mentioned neither in the doping control officer's report signed on 28 September 2013 nor in the typed-up report dated 18 October 2013.

60. In his testimony, Mr Juergen Schwartges only explained that he was told that another team leader would have tried to contact the Athlete by mobile phone, but in vain.

61. The same impression by the Panel seems to be confirmed by the testimony of Mr Krick who was present, or was called upon shortly after the Athlete did not appear for the doping control. There does not seem to be any conclusive evidence that a genuine attempt was made to recall the Athlete after she had left the ice stadium. In its written submissions, the Respondent, who bears the burden of proof in this respect, did not even allege that such attempts were made at the Nebelhorn Trophy and no witness statements or other proof has convincingly been presented in these proceedings to verify that such an attempt has been made by the doping control officer or a person of the organizing committee. On the contrary, the statement of the Athlete and her mother collaborate the impression that no attempts were duly made to recall the Athlete for her to comply with the anti-doping testing.

62. In analyzing the wording and meaning of Article 2.3.1, the Panel has come to the conclusion that this provision has not been properly observed in the case at hand. The Panel interprets the provision as though leaving the ice rink after the event in which a skater has participated without first ensuring that he or she has not been selected for anti-doping testing indeed constitutes an anti-doping rule violation. However, the sentence *"after having been recalled"* clearly shows that the skater under these circumstances may be granted *"a second chance"* to return in due time to the competition site in order to comply with the anti-doping testing for the event. Under these circumstances, the skater will be sanctioned according to Article 10.3.1 subsection 2, and not Article 10.3.1 subsection 1.

63. Given the serious consequences of failing without compelling justification to submit to sample collection, the Panel stresses that, in order to treat an athlete fairly, an attempt to recall her to comply with the anti-doping testing is a necessary and important obligation in accordance with the ISU's own anti-doping procedures.

64. Article 10.3.1, subsection 2, in the ISU Anti-Doping Rules concerning ineligibility for other anti-doping rule violations states the following:

"For violations of Article 2.3.1. (leaving the ice rink prior to notification of doping control testing, but complying with testing on recall) the sanctions set forth in Article 10.4 shall apply."

This provision leaves the Panel with the apparent challenge, namely that the Respondent failed to establish that a proper recall had been made and that the Appellant could therefore not complete the testing on recall. This implies the task of determining what went on, on 28 September 2013, when the Athlete and her mother became aware of having missed the doping test the night before and were asking to be tested the next day.

65. Based on the written evidence and the testimonies at the hearing, the Panel is satisfied in concluding that the Athlete had a genuine desire to be tested the next day together with the male skaters at the competition. The Panel finds no compelling reasons not to believe the statements made by the Athlete and her mother that they on several occasions tried to get in contact with a person who could authorize a doping testing the next day. This understanding of the facts is also collaborated by the email exchange between Miss Vasovic of the Serbian Skating Association and Mr Krick on the one hand and Mr Krick and Ms Jane Moran on the other hand. In this context, the Panel is of the opinion that the Athlete's genuine wish to be tested the next day should not have been rejected despite the fact that this test would have been an out-of-competition test when she had in fact not been recalled the night before vis-a-vis the above discussion regarding the proper understanding of Article 2.3.1. Otherwise, the duty to "recall" loses its legal significance for the Athlete's rights, and the Panel stresses that the violation of the Athlete in this context is to have left the ice rink without first ensuring that she was not selected for testing, not that she has handed in a positive test. Thus, the desire and will to be tested must be the essential issue, not whether it was an in- or out-of- competition.

66. Under these circumstances, the Panel finds that Article 10.3.1, second paragraph, should be construed in such a way that the Athlete shall be deemed to have complied with the testing on recall, as she was in fact not recalled the night before and showed up the next day with the – unsuccessful - attempt to be tested. The Panel finds that this interpretation

of Article 10.3.1, second paragraph, will be appropriate under the specific and special circumstances of this case.

67. According to Article 10.4, a first violation may be sanctioned at a minimum with a reprimand and no period of ineligibility from future events, and a maximum of two years' ineligibility. Given the special circumstances of this case, in particular the Athlete and her mother's repeated attempts to be tested the next day compared with the somewhat reluctant and passive behavior of the ISU representative, Mr Peter Krick, especially when not providing a constructive reply to the very precise question posed by Ms Vasovic of the Serbian Skating Association, the Panel finds that the sanction of the Appellant should be fixed to nine months' ineligibility. In reaching this decision, the Panel believes that it has taken appropriate considerations to the fault of the Athlete and the non-compliance with respect to the duty to recall the Athlete vis-a-vis Article 2.3.1.

68. Accordingly, the Panel rules that the Decision should be partially upheld, and that the sanction should be reduced to nine months' ineligibility, starting from 1 February 2014.

VI. COSTS

69. As this is an appeal against a decision which is exclusively of a disciplinary nature, and which has been rendered by an international federation, Article R65 of the CAS Code governs the allocation of costs.

70. Pursuant to Article R65.2, the present arbitration procedure is free, except for the CAS Code office fee of CHF 1,000 (one thousand Swiss Francs), which has already been paid by the Appellant and is retained by the CAS.

71. Pursuant to Article R65.3 of the Code provides: "*the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties*".

72. In view of the outcome of the present case, the Panel deems that each party shall bear its own costs related to the present CAS proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Sandra Ristivojevic on 21 February 2014 is partially upheld.
2. Point 2 of the Decision issued by the ISU Disciplinary Commission on 1 February 2014 is modified as follows:

   "A period of ineligibility of nine months beginning on 1 February 2014 is imposed on Sandra Ristivojevic".
3. The counter-claim filed by the International Skating Union is inadmissible.
4. Each party shall bear its own legal fees and expenses.
5. All other requests, motions or prayers for relief are dismissed.

Lausanne, 10 September 2014

THE COURT OF ARBITRATION FOR SPORT

Lars **Halgreen**
President of the Panel