

CAS 2016/A/4708 Belarus Canoe Association & Belarusian Senior Men's Canoe and Kayak team members v. International Canoe Federation (ICF)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Dr. Michael **Geistlinger**, Professor in Salzburg, Austria
Arbitrators: Mr. Romano F. **Subiotto** Q.C., attorney-at-law in Brussels, Belgium, and London, United Kingdom
Prof. Dr. Martin **Schimke**, attorney-at-law in Düsseldorf, Germany

in the arbitration between

Belarus Canoe Association, Minsk, Belarus
Represented by Mr, Vasili Volozhinets, Danilevich Volozhinets Law Office, Minsk, Belarus

&

Belarusian Senior Men's Canoe and Kayak team members, Minsk, Belarus
Represented by Mr Jean-Marc Reymond, Reymond & Associés, Lausanne, Switzerland.

Appellants

and

International Canoe Federation (ICF), Lausanne, Switzerland
Represented by Mr Jorge Ibarrola and Mr Claude Ramoni, Libra Law Ibarrola & Ramoni, Lausanne, Switzerland

Respondent

I. PARTIES

1. The Belarus Canoe Association (“BCA”) is the national governing body for the sport of Canoe and Kayak in the Republic of Belarus with its headquarters in Minsk. It is affiliated to the International Canoe Federation. The BCA includes the members of the Belarusian senior men’s kayak team (Mr. Raman Piatrushenka, Mr. Vitaliy Bialko, Mr. Aleh Yurenia, Mr. Pavel Miadzvedzeu, Mr. Vadzim Makhneu, Mr. Taras Valko, Mr. Aliaksandr Liapeshka, Mr. Andrei Tsarykovich, Mr. Ihar Baicheuski, Mr. Ivan Tsuranau, Mr. Dzmitry Khilchanka, Mr. Spartak Bazhkou, Mr. Mikita Borykau, Mr. Stanislau Daineka, Mr. Dzimtry Tratsiakou), the Belarusian senior men’s canoe team (Mr. Aliaksandr Bahdanovich, Mr. Andrei Bahdanovich, Mr. Dzianis Harazha, Mr. Dzmitry Rabchanka, Mr. Dzmitry Vaitsishkin, Mr. Artsem Kozyr, Mr. Maksim Piatrou, Mr. Hleb Saladukha, Mr. Dzianis Makhlai, Mr. Aliaksandr Vauchetski), the coaches (Mr. Uladzimir Shantarovich, Mr. Mikalai Banko, Mr. Ihar Radomski, Mr. Henadzi Halitski), and the medical staff of these male teams (Mrs. Elena Kallaur, Mr. Aliaksei Roik) (the BCA and all persons named: “the Appellants”).
2. The International Canoe Federation (“ICF” or “Respondent”) is the international governing body for the sport of Canoe and Kayak, recognized by the International Olympic Committee (“IOC”). It has its seat and headquarters in Lausanne, Switzerland.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 12 April 2016, French Police and Customs raided the rooms and personal belongings of the male Belarusian canoe athletes at the training camp in Le Temple-sur-Lot (France). They confiscated various substances, medication, material and medical equipment, including meldonium, needles and other equipment for transfusions, Actovegin and iron supplements. The meldonium (16 capsules of Mildronate) were found in the room of Mr. Henadzi Halitski, the coach of the Belarusian women’s kayak team.
5. Seventeen athletes from the Belarus canoe team underwent a doping control and urine samples were taken from them. Meldonium was found in five of these samples.
6. On 20 May 2016, the Belarusian team participated in the World Cup Stage in Germany. No police raid took place there.
7. On 15 June 2016, the BCA updated the ICF on the cases of the five athletes found with meldonium and wrote as follows:

“All our athletes have been informed by the National Anti-Doping Organization (NADABelarus) and the Belarus Canoe Association of the inclusion of Meldonium on the 2016 Prohibited List.

As you probably know, the National Anti-Doping Agency of France (AFLD-NADO) and the “Agence Francaise de lutte contre le dopage Paris Lab” have tested in March and April this year the Belarus Canoe Sprint Team members.

In urine samples, taking [sic] out of competition in France, the Adverse Analytical Findings (AAF) were detected for the substance of meldonium (8 [sic] 4. Hormone and Metabolic Modulators) and this is to be considered as an anti-doping rules violation (ADRV).

In accordance with the Article 14.1.2 of the World Anti-Doping Code AFLD-NADO (the Anti-Doping Organization with results management responsibility) notified the NADA Belarus (the Athlete’s National Anti-Doping Organization) of the assertion of an anti-doping rule violation simultaneously with the notice to the athletes.

All five athletes established that they used Meldonium prior to 1 January 2016. As it came to our knowledge, the concentration of meldonium in four samples causing such pre-investigation anti-doping check is below 1000 ng/ml, which means that results management may be stayed in accordance with NOTICE – MELDONIUM statement issued by WADA.

The NADA Belarus informed our four athletes and the Belarus Canoe Association about the Result Management Authority (AFLD-NADO) decision as follows: their provisional suspensions are lifted.

However the athletes were informed that if it is later established based on the results of the excretion scientific studies that they did take the drug on or after 1 January 2016., (i) all the results during the period in which the provisional suspension is lifted may be cancelled and prizes returned, and (ii) the ineligibility period ultimately imposed is likely to start on the date of the decision (with a credit for the provisional suspension already served).

Best of our knowledge, one sample is between 1000 ng/ml and 15000 ng/ml and result management shall proceed. The Belarus Canoe Association suspended that athlete from any competitions.

Due to the fact that WADA issued a Notice to Stakeholders regarding meldonium as well as guidance regarding the results management and adjudication process NADA Belarus with assistance of the Belarus Canoe Association conducts its own investigation regarding to meldonium cases.

[...]”

8. On 30 June 2016, WADA released a Notice on meldonium to its stakeholders concerning cases where athletes claim that the substance was taken before 1 January 2016, when the 2016 WADA Prohibited List including meldonium entered into force. According to this Notice, for samples taken on or after 1 March 2016 and showing a urinary concentration

of meldonium below 1000 ng/ml, in the absence of other evidence of use of meldonium on or after 1 January 2016, a finding of no fault could be made.

9. As to disqualification of results, WADA in this guidance explained as follows:

“given the results of the studies, it cannot be excluded that, at very low dosages, as indicated in the above table, the use of meldonium could have occurred before the Prohibited List was published by WADA on 29 September 2015. In these circumstances, WADA would consider it acceptable that the athlete’s results not be disqualified or be reinstated in the absence of any evidence that meldonium was used after 29 September 2015.”

10. On 11 July 2016, the ICF wrote to the BCA as follows:

“WADA has recently released information on acceptable levels of meldonium for athletes on 30th June 2016. In most cases athletes would be deemed “clean” under 1.0 µg/ml, except where other evidence could be applied to these cases.

The ICF is holding an emergency Executive Board Meeting on Wednesday 13th July regarding doping issues with Belarus. Your case will be discussed and analysed at this meeting. According to the ICF Anti Doping rules 2015, misleading, hiding or being found to breach the rules of the Sport can lead to sanctions (e.g. athletes, NFs, officials and financial penalties.)

The French Minister of Justice and the Tribunal of Agen have this week provided us with concrete information and indications that your athletes and officials have offences regarding doping irregularities, misuse of medication, possession of substances and equipment, application of medical substances and administration of forbidden methods in the frame of sport performance.

This is now a criminal case in France and the ICF is a part of this case. The ICF now proceeds with its own investigation and we give you 24 hours (until Tuesday night) to respond to the allegation in regard to contravening the ICF anti-doping rules as outlined in the French case.

When I discussed the topic of your athletes at the training camp in France and the seriousness of the situation, you provided no information regarding the additional issues that have been outlined to us by the French police which could lead to sanctions of your federation, officials and athletes.

It is important that your Federation can provide its point of view before the ICF makes any decision at the Executive Committee meeting Wednesday 13th July.”

11. On 12 July 2016, the BCA explained to the ICF as follows:

“In the frames of the ICF Anti-Doping Control Rules, the Belarus Canoe Association continues to pursue strongly its Zero tolerance policy against doping issues.

During the training camp on April 12, 2016 in Le Temple-sur-Lot NADA representatives of France carried out urine sampling to 17 athletes of the national canoe team for anti-

doping control purposes. At the same time on April 11, 2016 WADA published official information with provisional data on allowable concentration of Meldonium in the body of athletes.

Biomaterial sampling procedure was carried out under strong pressure by the representatives of the special police and gendarmerie of France. At the same time the search of place of accommodation and inspection of personal belongings of athletes and coaches was held. A survey of athletes and officials was carried out using methods of psychological pressure. During the search, the laptops were confiscated, returned in a damaged condition with the loss of confidential information, including the training program of athletes for the Olympic Games in Rio de Janeiro.

Finally, the team members were not accused for alleged offenses. So far, the French party did not provide any legal or other procedural decisions or other information on the situation, and did not cause any members of the team to carry out any action. In addition, we were not given the opportunity to use the legal defense, i.e., denied the legal right to be heard.

Moreover, after the above-mentioned incident, on May 20 – 22, 2016, the Belarusian team participated at the World Cup Stage in Duisburg (Germany), without any questions from the law enforcement authorities.

In view of these circumstances, the Belarusian side rightly believed that the incident was settled. Especially because the French party represented by the France's Ambassador to Belarus has repeatedly apologized in connection with the incident.

Nevertheless, having analysed the results of the internal investigation conducted by the National Federation in Minsk with members of the national team, we declare the following:

- 1. We may assume that certain medicines could have been unintentionally imported into the customs territory of France without corresponding registration in view of the lack of reliable information on the existing rules of their customs clearance. Undoubtedly, it can be regarded as a violation of customs rules.*
- 2. They found and seized Mildranat (16 capsules) from the coach Henadzi Halitski¹ and the coach Leonid Shkumatov – Asparkam (potassium and magnesium salts). Both medicines have been prescribed by a doctor in the Republic of Belarus in connection with existing diseases of the cardiovascular system (recipes attached). After providing explanations and doctor's health prescriptions on the use of these pills, coaches were released without presenting any claims and accusations from the French authorities.*
- 3. The use of the found by the French NADA, but not prohibited by the Anti-Doping legislation, medications (aktovegin, asparkam, carbonat, kokarnit, reamberin, cytoflavin, ferrum-lek) are foreseen for the treatment and prevention of pathological conditions and the quantity of medications is calculated by the doctor of the national team taking into*

¹ Coach of the Belarus' women's team.

account the duration of the training camp, the results of dynamic medical observation, state of health of team members (mainly coaches), and only for emergency medical care.

4. Transfusion systems were purchased and intended only for emergency treatment of critical pathological conditions (dehydration, heart disease, and others.). These transfusion systems are not intended for transfusion of blood and its derivatives, or other means.

5. Not prohibited for use Aktovegin, which was found in athlete Volha Khudenko, is assigned by a doctor for therapeutic purposes to treat sports over-strain (muscles, heart and others). On April, 8, 2016 Volha Khudenko was officially diagnosed a myocardial dystrophy physical overexertion by the team doctor Elena Kallaur. The diagnose is also noted in the individual athlete's medical card. The amount used for the treatment did not exceed a volume of 50 ml per day (maximum therapeutic dose set by the Aktovegin manufacturer, 20-50 ml).

6. Medical products containing iron – Fe (like found “Ferrum Lek”) are the non-prohibited WADA medications in the treatment of iron deficiency for professional athletes, described by FIMS as the female athlete triad. The other seized drugs are also not prohibited by anti-doping legislation, as there is a written conclusion of the Republican Sport Medicine Center (enclosed).

7. There was no any written information addressed to the National Federation from the French NADA and other organizations on any violations of anti-doping regulations by athletes. The athletes of the national team did not use prohibited by the anti-doping legislation substances and prohibited methods.

Also we would like to note that athletes of the national canoe team actively participate in educational programs of Belarus NADA by WADA program “Clean Sport”.

From our side, in the frameworks of “clean” athletes support, we are ready to impose appropriate punishment to athletes or officials, whose guilt in the anti-doping rules violation will be proved based on lawful court decision about which we still do not know.

Moreover, our efforts to clarify the situation through official channels from the French side have not been successful.

According to information received by our lawyer in Agen court, at the moment, there are no any court decisions made on any assumed violations of French law. Nobody so far was prosecuted. Accordingly, investigations assumptions have no power without judicial confirmation and cannot be the basis for making by someone else, including the International Federation of the decisions.

Once again, the Belarus Canoe Association express [sic] its intention to support doping free sport and the clean athletes.”

12. On 12 July 2016, a Belarusian delegation headed by the Secretary General of the Belarusian Olympic Committee and the Secretary General of the BCA together with a lawyer arrived in Krakow for the hearing by the ICF Executive Committee.

13. On 13 July 2016, a hearing before the ICF took place and was attended by the BCA.
14. The BCA disclosed that the BCA Secretary General, Mr. Siarei Shablyka, was in sms contact with the ICF Secretary General, Mr. Simon Toulson, from 12 July onwards until 16 July 2016. The sms recorded that the Belarusian delegation was waiting for the ICF Executive Committee decision in Krakow until 15 July 2016. The ICF Secretary General, having been informed that the BCA would appeal the decision to CAS, involved a lawyer for the drafting of the decision and stated in the last reported sms:

“Ok then as you will be aware with these threats we will request even stronger penalties should we win or find more evidence. ...”

15. On 15 July 2016, the ICF informed the BCA of the ICF Executive Committee decision following the hearing of 13 July 2016 (“Appealed Decision”), which states as follows:

The ICF Executive Committee concludes that for the Belarus athletes:

Under 2.1.1 of the ICF Anti-doping rules states “It is each athlete’s personal duty to ensure that no prohibited substance enters his or her body”.

Proof of Meldonium in the analysis of samples collected from the athletes were consistent with the use of the medication and a banned substance by WADA since 1 January 2016.

The French police recovered tablets of Meldonium (Midranat) in the possession of the Belarus contingent. Under article 2.6.2 of the ICF Anti Doping Rules this constitutes an anti-doping rule violation.

The Belarus National Federation in a hearing before the ICF Executive Committee on 13th July 2016 stated that all Meldonium had been destroyed on 29th August 2015 and all athletes had been told not to take this drug after 1 January 2016. The Belarus NF gave a copy of a letter stating the destruction of the medication to the ICF. However, they could not answer why one of their athletes had over 1.0µg/ml in his body from the tests conducted and the response to why Meldonium tablets were confiscated by the French police at the training camp were unsatisfactorily answered.

From the training camp there was also the confiscation of transfusion equipment, needles and medical equipment of the same design that would be used for blood doping. Again under article 2.6.2 of the ICF Anti-doping Rules the possession of prohibited methods without a TUE constitutes a violation of the anti doping rules of the ICF.

In addition, various drugs such as Actovegin, in solution were located which are restricted under WADA rules in terms of their application in humans undertaking sport activities.

Other confiscated such as Cytoflavan at the training camp in France also indicate the intent or actual doping processes being carried out by these athletes.

Further release of information from the French Police is due in the coming days and the ICF is working with the authorities to process this evidence.

The ICF Executive Committee elected to use Article 12.3 of the ICF Anti-doping rules to “take additional disciplinary action against National Federations with respect to recognition, the eligibility of its officials and athletes to participate in international events”.

Four or more violations of the ICF Anti-Doping rules (Article 12) are committed by athletes from Belarus within a 12 month period and in fact at one defined training period which is a serious breach of the ICF rules.

The ICF Executive Committee affirms that they are satisfied that there is enough evidence and proof to issue sanctions against the athletes, coaches and entourage of the Belarus delegation.

The ICF Executive Committee imposes a one year suspension of the SENIOR men’s Canoe and Kayak teams including coaches, medical staff and entourage for all international competitions. The starting date for this sanction would be 13 July 2016.

All Olympic athlete and boat places won by Belarus Senior Men’s team for the Olympic Games in 2016 will be redistributed by the ICF.

The Belarus Senior Women’s team are free to compete as so far insufficient evidence against them has been found. Should new information or evidence come to light then further sanctions could be imposed by the ICF.

The ICF Executive Committee found so far no evidence to suggest the National Federation was implicated in the actual doping activities or the intent to dope during the training camp, therefore, no action is taken against the National Federation administration or management.

The ICF requires that the Belarus National Federation prove that their athletes undergo Anti-Doping education in the next 12 months and also that doping tests are undertaken at least 3 times before they compete at International Competitions.

However, as the French Ministry of Justice has opened a criminal case and this hearing is likely to last several months the ICF reserves the right to impose further sanctions on the National federation, athletes or entourage involved.

The ICF Executive Committee rendered this judgement with impartiality and made the decision based on the all evidence that was available at the time.”

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 18 July 2016, the Appellants filed a Statement of Appeal and declared that the statement of appeal was to be considered as its appeal brief. The Appellants requested the matter to be expedited. The Appellants applied for a stay of the Appealed Decision.
17. On 20 July 2016, the Respondent objected to the expedited procedure, because the deadline for entering athletes for the Rio Olympic Games had already expired and because of the involvement of French authorities in the case.

18. On 20 July 2016, the Respondent submitted its Answer to a request for a stay.
19. On 21 July 2016, the Appellants submitted further evidence which was commented on by the Respondent on 22 July 2016.
20. On 22 July 2016, the President of the CAS Appeals Arbitration Division dismissed the Request for a stay of the Appealed Decision, because the Appellants only referred to the criterion of irreparable harm, but not also to the criteria of the likelihood of success of the appeal and of the balance of interests.
21. On 9 August 2016, the Respondent was granted an extension of the deadline to file its answer by five days.
22. On 15 August 2016, the Respondent filed its answer.
23. On 14 September 2016, the parties were informed that the Panel appointed by the President of the CAS Appeals Arbitration Division to decide the appeal was as follows:
 - Prof. Dr. Michael Geistlinger, as President
 - Mr. Romano F. Subiotto Q.C. nominated by the Appellants, and Prof. Dr. Martin Schimke, nominated by the Respondent, as arbitrators.
24. On 7 November 2016, a hearing took place at the CAS Court office in Lausanne. In addition to Mr. Fabien Cagneux, Counsel to the CAS, the following persons were present in person:

For the Appellants:

Mr. Uladzimir Shantarovich, Appellant;
Mr. Artsem Kozyr, Appellant;
Mr. Aliaksandr Bahdanovich, Appellant;
Mr. Maksim Piatrou, Appellant;
Mr. Jean-Marc Reymond, Counsel;
Mrs. Delphine Deschenaux-Rochat, Counsel;
Mr. Nicholas Petroff, interpreter;
Mr. Anatol Kotau, Representative of BCA;
Mr. Sergei Beliaev, expert on anti-doping issues;
Dr. Alexander Bulgak, expert cardiologist.

For the Respondent:

Mr. Simon Toulson, ICF Secretary General;

Mr. Jorge Ibarrola, Counsel;

Mr. Claude Ramoni, Counsel;

Mr. Nel Jan, Intern at Counsel as observer;

25. The Panel heard evidence of the following persons in order of appearance:

Mrs. Elena Kallaur, BCA team doctor, witness called by the Respondent;

Mrs. Natalia Shaban, doctor of the Centre of Sport Medicine of the Ministry of Health of the Republic of Belarus, witness called by the Respondent;

Mr. Henadzi Halitski, coach of the BCA women's team, witness called by the Appellants and the Respondent;

Prof. Dr. Ivars Kalvins, Chemist who invented meldonium, expert witness called by the Appellants, by video- and experts' conference;

Mrs Irene Mazzoni, WADA, expert witness on meldonium called by the Respondent, by video conference;

Prof. Dr. Dan McKenzie, chair of the ICF Anti-Doping Committee, expert witness on prohibited methods called by the Respondent, by video conference.

26. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses.

27. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

IV. SUBMISSIONS OF THE PARTIES

28. The Appellants' submissions, in essence, may be summarized as follows:

(1) Article 42 ICF Statutes defines which disciplinary measures can be imposed by the ICF Executive Committee. These are a caution, a reprimand, and exclusion of some or all members of a National Federation from participation in international and ICF competitions. Suspension falls within the competence of the ICF Board of Directors.

(i) The Appealed Decision imposes "*a one year suspension of the Senior men's Canoe and Kayak teams*". The wording and the legal nature of the measure imposed point at a suspension.

(ii) Due to the fact that the ICF Statutes and the ICF Anti-doping Rules ("ICF ADR") do not define the terms "*suspension*" and "*exclusion*", the Appellants refer to the Oxford dictionary which calls a "*suspension*" "a temporary prevention from continuing or being in force or effect" and "*exclusion*" the

“removal from something”. Thus, whether a measure is restricted by time (“suspension”) or by object (“exclusion from particular competitions”) is decisive.

(iii) In the case at hand, a “suspension” was imposed. Such disciplinary measure did not fall within the competence of the ICF Executive Committee.

(2) If CAS, nevertheless, acknowledges the competence of the ICF Executive Committee as having had the authority to impose the disciplinary measure, the ICF Executive Committee has exceeded its authority under Article 12 ICF ADR.

(i) Reading Article 12.1 and Article 12.3 ICF ADR together, Article 12.1 ICF ADR assigns to the ICF Executive Committee the competence to withhold some or all funding or other non-financial support, whereas Article 12.3 by only referring to “ICF” in general under the *estoppel* and *in dubio contra stipulatorem* principles must be understood as assigning to the supreme ICF body, which is the Congress, the competence to take additional disciplinary action against National Federations,

(ii) If CAS, nevertheless, recognizes that the ICF Executive Committee was competent to impose a measure like in the Appealed Decision, the ICF Executive Committee did not have legal grounds to take the Appealed Decision.

(a) Whereas Article 12 ICF ADR entitles the Respondent to take disciplinary actions against National Federations, National Federations’ officials or affiliated Athletes, the Respondent imposed a one year suspension on the BCA “*Senior men’s Canoe and Kayak teams including coaches, medical staff and entourage*”. This contradicts the principle of legality, because of the following reasons:

(b) The ICF ADR are based on the WADA Code. It follows from the signatories’ obligations under Article 23.4 WADA Code for being Code compliant that they accept and implement the sanctions on individuals (Article 10) and consequences to teams (Article 11) without substantive change (Article 23.2 WADA Code). As to sporting bodies under the ICF authority, the Appellants refer to Article 12 WADA Code.

(c) It follows from the wording of the Appealed Decision that the ICF Executive Committee has not imposed sanctions against the BCA, because there was no evidence that the BCA was implicated in the actual doping activities.

(d) Besides, the text of Article 12.3 ICF ADR, calling the disciplinary action against a National Federation “*additional*”, must be understood as additional to the measure comprised in Articles 12.1 – 12.2 ICF ADR.

(e) There were no measures as stipulated by Articles 12.1 – 12.2 ICF ADR taken against the BCA.

(f) The measures were imposed on the senior men's canoe and kayak teams, but based on the ICF ADR' and the WADA Code's understanding, Canoe and Kayak sport is not a team sport. Thus, sanctions with regard to teams cannot be imposed on the BCA's canoe and kayak teams. However, the measures imposed embrace the teams as such and were not taken in relation to the individual athletes. The measures do not comply with the principle of legality.

(g) As to the understanding of the principle of legality, the Appellants refer to CAS 2014/A/3765, CAS 2007/A/1363 and CAS 2011/A/2670, which require that the offences and sanctions must be clearly and previously defined by law. The sanctions must be based on proper rules and regulations and must be predictable. There must be a clear connection between the incriminated behavior and the sanction. The respective provision must be interpreted narrowly.

(h) Even if CAS finds that the Appealed Decision was made in accordance with the WADA Code, the principle of legality was violated, because Article 12.3 ICF ADR is not applicable to Athletes.

(i) The ICF Executive Committee fails to specify to which accurate paragraph of Article 12.3 ICF ADR it refers to. None of the provisions of Article 12.3, 12.3.1. – 12.3.3 entitles the ICF Executive Committee to impose a one year suspension on the BCA's senior men's canoe and kayak teams.

(j) The text of the Appealed Decision seems to refer to Article 12.3.1 ICF ADR, but this provision only allows to ban officials and not athletes. This view is supported by the different wording of Articles 12.3.1 and 12.3 ICF ADR.

(j) The use of the term "*official*" in the WADA Code makes it clear that the terms "*officials*" and "*Athletes*" do not coincide or overlap.

(k) If the Panel finds that it is not clear enough, that the terms do not coincide or overlap, it has to apply the *contra proferentem* principle. As to the understanding of this principle, the Appellants refer to CAS 2013/A/3274, where the panel based on previous awards held that "*an unclear wording is to be interpreted against the author of the wording.*"

(3) The Appealed Decision violated the procedural rights of the Athletes:

(i) It violated the procedural norms of the ICF ADR and the WADA Code by:

(a) The proof of individual anti-doping rule violations did not comply with the provisions in the above-mentioned sets of rules as to testing, investigation, analysis of samples, results management and right to a fair hearing.

(b) There were no hearings of the ICF Anti-Doping Control Panel held, which should have dealt with these individual anti-doping rule violations. The decision of the ICF Executive Committee instead was in fact done by the ICF

Secretary General together with lawyers and not transparently for the Appellants. The Appellants were not supplied with clear explanations.

(c) The Appealed Decision was not based on proper methods of establishing facts and presumptions, laid down by Article 3.2 ICF ADR, but on vague information. In particular, there were no reliable means, no court decision, and no evidence provided by the French police or courts. Nine athletes sanctioned were not even present at the training camp in France.

(ii) The Appealed Decision violated basic procedural principles:

(a) The right to be heard was violated, because only the BCA was invited to the hearing before the ICF Executive Committee, but no athletes.

(b) Besides, as to the BCA, it could not consult the case files and was not provided with any of the documents the Appealed Decision was based upon. It only received a press article in “Le Monde” from May 2016, which even contained wrong information (two positive tests). Thus, Article 53 of the Swiss Civil Code was violated.

(c) The Appellants refer to CAS 2012/A/2740, CAS 91/53 and CAS 2001/A/317 in order to underline the importance of the right to be heard as an element of natural justice and due process, which has to be respected by all sport entities also during their internal proceedings.

(d) Based on CAS 2009/A/1781, the violation of this right cannot be considered cured by the CAS proceedings since the Athletes of the BCA’s senior men’s canoe and kayak teams as a consequence of the Appealed Decision could not take part at the Rio Olympic Games which started on 5 August 2016.

(iii) The Appealed Decision violated the principle of equal treatment and proportionality, both recognized by CAS with reference to CAS 2013/A/3297 and CAS 2014/A/3793. In its press release of 16 July 2016, the ICF mentions that four Kazakhstan athletes were banned for two (2) years after submitting tests for an oral anabolic steroid. The principle of equal treatment was violated, because the BCA’s athletes were banned without proof or evidence or established court decision of France, whereas, the anti-doping rule violations of the Kazakh athletes were corroborated by positive Sample tests. The principle of proportionality was violated, because in the Kazakhstan case only the athletes were banned while in the Belarusian case also clean athletes, coaches, medical staff and entourage were banned.

(iv) The Appealed Decision was made in violation of the principles of good faith and *venire contra factum proprium*, which are binding under Swiss law as recognized by CAS in CAS 2008/O/1455 with reference to previous jurisprudence. After the training camp in France, the BCA team competed at the World Cup Stage in Duisburg without any objections from the Respondent’s side. Furthermore it is still not clear, why the Appealed Decision was taken less than a month before the start of the Rio Olympic Games, given the fact that

irrespective of the letter of notification, the Appealed Decision itself indicated that evidence was only to arrive from the French authorities “*in the forthcoming days*”. No evidence was presented to the Appellants and none of the Athletes was summoned to appear before French courts.

29. The Appellants submits the following Prayers for Relief:

- “1) *to upheld the appeal filed by the Belarusian Association;*
- 2) *to annul and set aside the Appealed decision issued by International Canoe Federation Executive Committee on 13-15 July 2016 on a 1 (one) year suspension of the Belarusian Senior men’s Canoe and Kayak team including coaches, medical staff and entourage for all international competitions;*
- 3) *to order the International Canoe Federation to bear all costs incurred with the present appeal procedure.”*

30. The Respondent’s submissions may be summarized as follows:

(1) The ICF Executive Committee was competent to render the Appealed Decision based on Article 42 lit c) ICF Statutes (Exclusion of some or all Members of a National Federation from participation in the international competitions and ICF Competitions). The fact that the ICF Executive Committee used the word “*suspension*” instead of “*exclusion*” is not decisive and does not change the nature of the Appealed Decision.

(i) Focus must not be on words used but on the effect of the Appealed Decision.

(ii) The effect is not the suspension/exclusion/prohibition from all canoeing activities of individual members of the BCA in their entirety as would be the effects of a blanket suspension by the ICF Board of Directors. The effect is to prevent the Athletes and their Entourage belonging to the BCA’s senior men’s canoe and kayak teams from taking part in international competitions. This is precisely what Article 42 lit c) ICF Statutes contemplates.

(2) The ICF Executive Committee has not exceeded its competence. The reference to the “*ICF*” in Article 12.3 ICF ADR must be considered against Article 42 ICF Statutes, which outlines the disciplinary competence of each body. Even if the rules may be improved, they are understandable and clear on their face.

(3) Article 12.3 ICF ADR foresees the imposition of (i) additional disciplinary measures, (ii) on national federations, (iii) with regard to participation of athletes and officials in international events and (iv) for the reasons described by the ICF.

(i) “*Additional disciplinary action*” includes “*the eligibility of its officials and Athletes to participate in International Events*”. The measures are “*additional*” and discretionary. Beyond the withdrawal and funding of financial support and the obligation to reimburse for all costs related to anti-doping violations, the disciplinary measures under Article 12.3 apply to the whole federation or part of it for four (4) or more violations of the ICF ADR. “*Additional*” means also that

each individual concerned will be punished in accordance with the ICF ADR. “*Additional*” means in addition to financial measures and in addition to individual sanctions. There is consequently no requirement for the ICF Executive Committee to have firstly imposed disciplinary measures pursuant to Articles 12.1 and 12.2 ICF ADR.

(ii) Article 12.3.1 ICF ADR does not limit the imposition of a ban only to officials. It must be understood in the context of Article 12.3 ICF ADR, which provides for the imposition of disciplinary action on the National Federations and not on the Athletes and officials themselves. Such decision affects the Athletes and officials indirectly, but the decision is imposed on the BCA. This is the reason why the Respondent has accepted the Athletes and Entourage as interested parties in the proceedings before the CAS. The reference to “*team*” in the Appealed Decision did not mean to refer to a team sport in the sense of the WADA Code and does not violate the principle of legality, therefore, but wanted to address the Athletes and Entourage as a collective group of individuals for the purposes of succinctly stating which members of the BCA are included in the scope of the Appealed Decision. To limit the sanction to ban imposed on officials under Article 12.3.1 ICF ADR would totally empty and devoid of substance the content and scope of Article 12.3 with regard to the eligibility of the officials and athletes to participate in international events.

(iii) The disciplinary action imposed is based on more than four (4) anti-doping violations. All members of the senior men’s canoe or kayak teams, *i.e.* the Athletes and their Entourage have committed anti-doping violations during the training camp, *i.e.*, during a 12-month period of time and the testing took place by the French NADO. The requirements of Articles 12.3.1 and 12.3.1.1, thus, have been met.

(a) An anti-doping violation is defined by Article 2.1.1 ICF ADR (emphasis laid on the second sentence) and read together with Article 2.1.2, as well as by Article 2.6.1 and 2.6.2 ICF ADR.

(b) The mere presence of a Prohibited Substance in an athlete’s body is an anti-doping violation. This is given for five (5) Belarusian senior male canoeists/kayakers based on adverse analytical findings from their samples given at the training camp. Four (4) of them, based on the applicable WADA Notice, could be considered as having No Fault/No Negligence, but, nevertheless, for all of them an anti-doping violation was established. This was also recognised by the BCA in its letter to the ICF dating 15 June 2016.

(c) Furthermore, the BCA possessed prohibited substances and methods, as found by the French police and not disputed by the BCA. The BCA’s explanation that the meldonium was in the coach’s possession because of diseases of the cardiovascular system is not plausible, because it was prescribed by a doctor of the Centre of Sport Medicine of the Ministry of Health of Belarus and not by his personal cardiologist. Besides, this doctor (Ms Natalia Shaban) is not professionally qualified for such prescription. In view of so many Belarusian Athletes found with this substance at the training

camp the BCA's explanation is not credible. The justification that the transfusion systems found were for intended for emergency treatment is not plausible. In France adequate emergency treatment by medical facilities is provided. The fact that Actovegin, which can aid in blood doping, has been found is further evidence of the possession of the transfusion system as a prohibited method. BCA's justification that the female athlete Volha Khudenska was diagnosed by the team doctor a myocardial dystrophy physical overexertion as justification for the possession of Actovegin just four (4) days before the French raid is not credible. The ICF, thus, considers it established that members of the BCA connected to the senior men's canoe and kayak team committed further anti-doping violations. Art. 12.3.1 ICF ADR has been validly applied by the ICF Executive Committee. It could have and might in future impose a suspension of the BCA's membership for up to four (4) years.

(4) There were no violations of procedural rights, because the ICF was not responsible for results management, but the French NADO. It was not the duty of the ICF to grant each individual athlete a hearing for the anti-doping violation assertion. Besides, the BCA by letter dated 15 June 2016 admitted the anti-doping violations. Moreover, Article 12 ICF ADR does not grant any hearing or procedural rights to the Athletes and their Entourage. The Athletes have not been punished as a direct consequence of their individual anti-doping violations, but because of their affiliation to the BCA's banned team. In any event, the BCA was summoned to a hearing on 13 July 2016. The ICF Executive Committee based its decision on all evidence available. It was recognized a "*civil party*" in the criminal procedure, but had to sign a confidentiality agreement.

(5) The Appealed Decision is entirely proportionate. It is capable of achieving the purpose of the ICF ADR to ensure the integrity and fairness of competitions. Given that prohibited substances and methods have been found at the BCA training camp and the refusal of the BCA to acknowledge any wrongdoing, the exclusion was necessary to reach the above goals. These goals override the BCA's interest in having its senior men's team participate in international competition and outweigh the detriment suffered by the team members concerned.

31. The Respondent submits the following Prayers for Relief:

"1. The appeal of the Belarus Canoe Association et al. is dismissed.

2. The decision of the International Canoe Federation Executive Committee, dated 15 July 2016, is upheld.

3. The Belarus Canoe Association at al. shall be ordered to pay, jointly and severally, the International Canoe Federation a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the Panel."

V. JURISDICTION AND ADMISSIBILITY

32. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.”

33. Article 13.6 ICF ADR reads as follows:

Appeal from Decisions Pursuant to Article 12

Decisions by the ICF pursuant to Article 12 may be appealed exclusively to CAS by the National Federation.

34. The Appealed Decision has been issued based on Article 12.3 ICF ADR, which states as follows:

“12.3 The ICF may elect to take additional disciplinary action against National Federations with respect to recognition, the eligibility of its officials and Athletes to participate in International Events and fines based on the following:

12.3.1 Four or more violations of these Anti-Doping Rules (other than violations involving Article 2.4) are committed by Athletes or other Persons affiliated with a National Federation within a 12-month period in Testing conducted by the ICF or Anti-Doping Organisations other than the National Federation or its National Anti-Doping Organisation. In such event the ICF may in its discretion elect to: (a) ban all officials from that National Federation for participation in any ICF activities for a period of up to two years and/or (b) fine the National Federation in an amount up to € 15.000 Euros. (For purposes of this Rule, any fine paid pursuant to Rule 12.3.2 shall be credited against any fine assessed.)

12.3.1.1 If four or more violations of these Anti-Doping Rules (other than violations involving Article 2.4) are committed in addition to the violations described in Article 12.3.1 by Athletes or other Persons affiliated with a National Federation within a 12-month period in testing conducted by the ICF or Anti-Doping Organisations other than the National Federation or its National Anti-Doping Organisation, then the ICF may suspend that National Federation’s membership for a period of up to 4 years.

12.3.2 More than one Athlete or other Person from a National Federation commits an Anti-Doping Rule violation during an International Event. In such event the ICF may fine that National Federation in an amount up to € 15.000 Euros.

12.3.3 A National Federation has failed to make diligent efforts to keep the ICF informed about an Athlete's whereabouts after receiving a request for that information from the ICF. In such event ICF may fine the National Federation in an amount up to € 5.000 Euros per Athlete in addition to all of the ICF costs incurred in Testing that National Federation's Athletes.”

35. The Respondent, based on justice and fairness, accepted the Appellants N° 2 – N° 32 as having been indirectly affected by the Appealed Decision and, therefore, as interested

parties together with the BCA, being entitled to submit an appeal to CAS according to Article 13.6 ICF ADR.

36. Both parties confirmed the jurisdiction of the CAS by having signed the Order of Procedure.
37. The Panel, thus, finds having jurisdiction to decide on the appeal and, since all deadlines have been met, the appeal as admissible.

VI. APPLICABLE LAW

38. Article R58 of the Code provides as follows:

“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 in 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.”

39. The Panel holds that the applicable rules are the ICF Statutes and ICF ADR. Swiss law, being the law of the seat of the ICF, shall apply on a subsidiary basis.

VII. MERITS

40. The issues in dispute in the present proceedings are:

- (A) whether the ICF Executive Committee was entitled to issue the Appealed Decision,
- (B) whether the ICF Executive Committee, when adopting the Appealed Decision, violated the relevant rules and procedural rights of the Athletes.

A. Entitlement to Issue the Appealed Decision

41. The ICF Executive Committee bases the Appealed Decision on Article 12.3 ICF ADR. This article mentions the “*ICF*”, but does not specify which ICF body is entitled to issue a respective decision. The decision is by its nature a disciplinary decision.
42. The disciplinary sanctions known by the ICF and the ICF bodies authorised to impose them are listed in Article 42 ICF Statutes. The relevant parts of this provision read as follows:

ARTICLE 42 - DISCIPLINARY MEASURES

The disciplinary measures of the ICF are:

- a) Caution*
- b) Reprimand*

c) Exclusion of some or all Members of a National Federation from participation in the international competitions and ICF Competitions

d) Suspension

e) Expulsion

f) The imposition of a fine.

These disciplinary measures can be taken against individual Members of a National Federation or National Federations in their entirety for breach of the ICF Statutes and Competition Rules or for having harmed the interest of the ICF or for the non-payment of Membership Fees and any other financial obligations to the ICF arising from contractual agreements or any other duties.

[...]

Disciplinary measures a) - c) and f) are taken by the ICF Executive Committee, measure d) by the ICF Board of Directors and e) by the Congress with a two thirds majority of the National Federations represented at the Congress and entitled to vote.

43. According to the wording of the Appealed Decision, the “*ICF Executive Committee imposes a one year suspension of the SENIOR men’s Canoe and Kayak teams including coaches, medical staff and entourage for all international competitions.*” The Appellants understand that, accordingly, the measure of suspension (Article 42 (d) ICF Statutes) has been applied, whereas the Respondent considers the wording of the decision misleading and argues that, by its very effect, the Appealed Decision imposes an exclusion of some or all members of a National Federation from participation in the international competitions and ICF Competitions (Article 42 (c) ICF Statutes).
44. A suspension may be decided by the ICF Board of Directors, a (partial) exclusion by the ICF Executive Committee. Since the Appealed Decision does not refer to one of the reasons given by Article 42 paragraph 2 ICF Statutes for taking also the measure of “*suspension*” against individual members of a National Federation, the Panel holds that it was not a suspension that was applied, but an exclusion. The Panel follows the arguments of the Respondent in that the ICF Executive Board erred in choosing the word “*suspension*”, but, in fact, wanted to apply and applied the measure of exclusion (Article 42 (c) ICF Statutes) and, thus, - in principle - used the competence assigned to it by Article 42 ICF Statutes.
45. The Panel finds that, absent any particular explanation in the ICF Statutes and Bylaws themselves, “*suspension*” must be understood to have the meaning generally used by many international sports federations. “*Suspension*” in such understanding means that use of all membership rights by the respective National Federation or individual shall be prohibited for a certain period of time. “*Exclusion*”, as follows directly from the text of Article 42 (c) ICF Statutes, is restricted to particular rights, the participation at international competitions and ICF Competitions. This is exactly what the ICF Executive Committee has imposed on the BCA’s senior men’s canoe and kayak teams, including *coaches, medical staff and entourage*. The words “all international competitions” means obviously “*international competitions and ICF Competitions*”. “*ICF Competitions*” is

understood in most provisions of the ICF Standing Bylaws as “*World Championship and World Cups*”, which by their nature are international.

B. Legality of the Appealed Decision

46. The Appealed Decision refers to Article 12.3 ICF ADR as legal basis. Article 12.3 ICF cannot stand alone. This follows from the words “*based on the following*” and the colon at its end pointing to the following Sub-Articles. Article 12.3 ICF ADR, thus, has to be read and applied together with either Sub-Articles 12.3.1, 12.3.1.1, or 12.3.2, or 12.3.3 ICF ADR. Each of these Sub-Articles defines particular conditions, which differ from one another.
47. In the case at hand, the ICF Executive Committee, as confirmed by the Respondent, considered the conditions laid down by Sub-Article 12.3.1 ICF ADR. This provision requires “*Four or more violations of these Anti-Doping Rules (other than violations involving Article 2.4) are committed by Athletes or other Persons affiliated with a National Federation within a 12-month period in Testing conducted by the ICF or Anti-Doping Organisations other than the National Federation or its National Anti-Doping Organisation.*”
48. The Panel finds that the conditions, laid down by the above first sentence of Sub-Article 12.3.1 ICF ADR have not been met for two reasons: i) Unsatisfactory establishment of facts; and ii) lack of decisions of the competent hearing body on violations of the ICF ADR by Athletes or other Persons affiliated with the BCA. The decision of the ICF Executive Committee, thus, was premature. In addition, the second sentence of Sub-Article 12.3.1 was violated by the decision of the ICF Executive Committee by not having restricted the exclusion (ban) to officials only and disregarding two further restrictions.

i) Unsatisfactory Establishment of Facts

49. The Appealed Decision refers to five Athletes of the BCA senior men’s canoe and kayak teams having been found with meldonium in their urine samples given at an out-of-competition control ordered and executed by the French NADO at the Belarus training camp in France. In addition, 16 capsules of Mildronate, which contains meldonium, were found by the French police in the room of the coach of the BCA women’s team, Mr. Henadzi Halitski at the same training camp. This fact was obviously taken by the ICF Executive Committee in order to assume that all five Athletes have taken meldonium after the moment, when its intake became forbidden, which was 1 January 2016. On that date, the WADA Prohibited List 2016 entered into force. The 2016 List for the first time included meldonium as a prohibited substance (Class S4 Hormone and Metabolite Modulators: 5.3).
50. At the hearing, Mr. Halitski could explain to the Panel on a balance of probability that he suffered from health problems since 2012 and has started using meldonium based on the prescription of various medical doctors since then. Since October 2015 he has been under treatment of his cardiologist, who also prescribed meldonium to him. When he returned from France to Minsk after the first training session, he needed new courses of Mildronate, because he did not feel well. There was, however, no time to ask his cardiologist for a prescription, because of a queue of people waiting for treatment. Thus, he asked Mrs. Shaban, who is a doctor of sports medicine at the Centre of Sports Medicine

of the Belarus Ministry of Sport and Tourism, for a prescription. As a coach he has easy access to this centre. Dr. Shaban confirmed to the Panel that she issued such prescription based on the previous prescription of Mr. Halitski's cardiologist. She knew that Mildronate contained the prohibited substance meldonium and that Mr. Halitski was travelling with his Athletes. But she relied on his cardiologist and prescribed 40 tablets for 20 days. It is not forbidden for Mr. Halitski to use meldonium for medical reasons. Mr. Halitski presented the prescription to a pharmacy in Minsk on 15 March 2016 and did the first course of 2 tablets per day from 16 – 26 March 2016. Knowing from his doctor that he can interrupt the treatment, he waited with the start for the second course after a period of flights until 10 April 2016. Thus, on 12 April 2016, the French police found two empty packages and 16 tablets left at him. The Respondent, bound by a confidentiality agreement towards the French authorities, did not disclose to the Panel any information deviating from the above.

51. The ICF did not establish to the Panel's comfortable satisfaction that the five (5) BCA Athletes took meldonium after 1 January 2016. This is also true for Mr. Maksim Piatrou, the only BCA athlete, who has been found with an amount of meldonium above the WADA Notice threshold of $1\mu\text{g/mL}$. His values of the 24 March 2016 test showed $1,252\mu\text{g/mL}$. The athlete assured the Panel that he did not train with the team in late autumn 2015 and was not under control of the team doctor, Mrs. Kallaur, after August 2015. Dr. Kallaur confirmed the BCA's submission that, on 29 August 2015, all meldonium for the BCA athletes under her control was withdrawn. At the hearing, the Respondent's expert on meldonium, Dr. Mazzoni, explained to the Panel that WADA only established a contact with the inventor of meldonium, Prof. Dr. Ivars Kalvins, in September 2016, a year after the decision relating to its inclusion on the WADA List of Prohibited Substances and a considerable time after WADA had found out that there were problems with the excretion period of the substance. Only on that occasion could Prof. Kalvins explain to WADA that it was wrong to place meldonium on the Prohibited List. According to Dr. Mazzoni's state of knowledge, "*it was likely*", that Mr. Piatrou took meldonium after 1 January 2016. Balancing this assumption to the explanation given by Prof. Kalvins, who invented the molecular structure of meldonium in 1976, and received its approval for medical use in 1984, the Panel does not feel comfortably satisfied by the ICF that the explanation given by Mr. Piatrou was wrong.
52. At the hearing, Prof. Kalvins explained to the Panel that meldonium is constructed as a drug, which prevents the lack of oxygen. The use of one gram per day protects against lesion. As for the excretion of meldonium, according to Prof. Kalvins, the peculiarity of meldonium is linked to the fact that it uses a natural substance for its transport. Two phases of elimination must be differentiated: a fast phase, depending on the amount of meldonium that has been taken; and a slow phase, which can last for many months due to the fact that the body tries to recapture it. The living and training conditions, the consumption of food, the loss of weight, the duration of its use, etc., have an influence on the wash-out period of meldonium from the human organism. Meldonium was the most sold medicine in the former Soviet Union. It is very safe and has very mild side effects. There were less than 90 serious events. According to Prof. Kalvin's knowledge, meldonium has been used by athletes in order to avoid damage to their heart after intense sport exercise. This was confirmed by the BCA Athletes present at the hearing. Meldonium cannot be used as an acute treatment. It needs at least ten (10) days, probably

2 weeks in order to reduce the carnitine level. Prof. Kalvins considers as optimal an application for 1 – 3 months.

53. The explanations given by Prof. Kalvins to the Panel correlate to the results of a scientific study described by Dr. Kallaur, who reported that, according to the results of this study, all athletes, who showed any concentration of meldonium, had a genetic mutation. Dr. Kallaur also mentioned that most of the BCA Athletes that showed traces of meldonium come from the Gomel region which was most affected by Chernobyl. Dr. Mazzoni was sceptical that radionuclides might have an influence on the excretion of meldonium.
54. Irrespective of the above controversy, having not been provided with evidence by the ICF to its comfortable satisfaction that the BCA Athletes took meldonium after 1 January 2016, the Panel holds that there was no anti-doping rule violation committed by the athletes as to meldonium. The reference to the WADA Notice of 30 June 2016 does not exculpate the ICF from its obligation under Article 3.1 ICF ADR to demonstrate to the Panel's comfortable satisfaction, which standard of proof is more than a mere balance of probability, that the prohibited substance entered the body of five BCA athletes after 1 January 2016, when meldonium became prohibited. The athletes fulfilled their obligation under Article 2.1.1 ICF ADR to make sure that no prohibited substance entered their body after 1 January 2016. The substance meldonium became prohibited on that date (entry into force) and not on the date of publication of the 2016 WADA Prohibited List. Given the fact, that the ICF was aware of problems that arose as to the excretion period of meldonium, at least through WADA's Notice, and at the same time alarmed by WADA stating in footnote 1 of this Notice that "*As a matter of course, for reasons of efficiency, WADA does not conduct excretion studies before including a substance on the Prohibited List. This information is generally provided by the manufacturer. In the case of meldonium, no information was provided as it relates to urinary excretion.*", the ICF had an obligation to demonstrate the intake of meldonium by the five BCA Athletes after 1 January 2016. The ICF failed to do so. Dr. Mazzoni informed the Panel that WADA changed its policy as to excretion studies for meldonium only in 2016 and started to perform its own studies.
55. Besides, the ICF Executive Committee erred in the Appealed Decision in holding that meldonium was in the possession of the Belarus contingent, which, thus, committed a violation of Article 2.6.2 ICF ADR. Mr. Halitski could explain to the Panel on a balance of probability and even to its comfortable satisfaction that the meldonium was in his possession for personal medical reasons. Since there is no obligation for a Therapeutic Use Exemption for coaches in place under the WADA Code and the ICF ADR, the Panel finds that Article 2.6.2 ICF ADR has not been violated by such possession.
56. The Appealed Decision further considered a violation of Article 2.6.2 ICF ADR by possession of prohibited methods resulting from the confiscation of transfusion equipment, needles and medical equipment of the same design that would be used for blood doping and by the presence of Actovegin and Cytoflavan indicating the intent or actual doping processes carried out at the BCA's training camp in France.
57. At the hearing, Dr. Kallaur, who declared being a general medical doctor, who had practised in a children's hospital (children in the age of 14 – 20 years) for more than 20 years and is team doctor for the BCA canoe team since January 2012, explained to the

Panel that infusion kits are taken only for training sessions, not for competitions, and only for emergency cases. Her first aid kit, which was hermetically sealed and not opened, was not confiscated by the French police, but only photographed. The infusion systems were carried by separate groups. Only homemade Belarusian transfusion systems had been bought. Dr. Kallaur stated that she, herself, carried 30 systems and 55 needles of different diameters. Confronted with the statement of the Respondent that the French police found 230 syringes of different diameters, Dr. Kallaur replied that she had no information on such amount. If such amount was found, this must have been leftovers from previous training sessions. She regularly used and uses butterfly needles. There are blood tests of her athletes every Monday and biochemical tests every Thursday. She did not use infusion kits in France. In her whole career, there was only one case, where she needed to use the kit in a clinical death situation in an Olympic village. The emergency kit is destined for the worst case in order to open access to veins, *e.g.* in case of heavy trauma. Dr. Kallaur described the contents of her emergency kit, the purpose of the anti-allergic and injection water and where the police found these items and in which amount. When confronted with the statement of Prof. Dr. Donald McKenzie, team physician of the Canadian team for 25 years and chair of the ICF Anti-Doping Committee, that he never carried or used an emergency kit containing transfusion equipment and that such kit is certainly not needed in France, which provides an excellent supply with ambulances and clinics all over the country, Dr. Kallaur replied that Belarus' legislation requires a standard quantity of transfusion equipment, which has to be carried by a team doctor, and that the distance of the next hospital to the training site in France was 20 – 25 km. Dr. Kallaur stated that she was not involved in the BCA's letter submitted to the ICF. She had submitted an oral and written statement in the BCA's internal review process, but saw the official letter only at the end of August.

58. As to medications, Dr. Kallaur explained to the Panel that there is a scientific advice team in Belarus who decided collectively which medicine was to be taken to the training camp in France. Actovegin is given to athletes in form of tablets in case of strength training with high weight. During the training session in France she had one package with her which was prescribed to the female athlete Volha Khudenko who was preliminarily diagnosed with a myocardial dystrophy physical overexertion by Dr. Kallaur on 8 April 2016. At 11 am, on that day, the athlete underwent an EKG test. Dr. Kallaur described the EKG equipment, which was available to her at the training camp in France. Mrs. Khudenko returned to Belarus on 21 April 2016. Dr. Kallaur reported on previous multiple requests of the BCA to the ICF to have the use of Actovegin allowed, but that BCA never had received an answer to these requests. Dr. Kallaur gave one intramuscular injection of Actovegin to Mrs. Khudenko. According to her diary, she further registered 7 intramuscular injections of Cocarnit, which reduces high levels of lactate and contains a pain killer, and one intramuscular injection of Ferrumbil at a female athlete for anaemia.
59. The Panel finds the explanations given by Dr. Kallaur plausible and consistent. The fact that Prof. McKenzie did not see a need for an emergency kit and never used such kit does not convince the Panel that Dr. Kallaur, bound to a different legislation and medical culture, possessed such equipment for legitimate medical use. The ICF could not establish to the comfortable satisfaction of the Panel that the transfusion equipment and medication found at the raid of the BCA's training camp in France, as far as disclosed to the Panel, served the aims of prohibited methods. Thus, the Panel finds that no violation of Article 2.6.2 ICF ADR took place. There was no possession of prohibited methods, regardless of

the question whether Article 2.6.2 ICF ADR is clear and precise enough at all because it does not determine under which conditions and from when a person has possession of a prohibited method (see *i.a.* CAS 2007/A/1437, para. 8.1.7.).

60. Since there were not four or more violations of the ICF ADR (other than violations involving Article 2.4) committed by Athletes or other Persons affiliated with the BCA within a 12-month period in testing conducted by the ICF or Anti-Doping Organisations other than the BCA or BCA's National Anti-Doping Organisation, the Panel finds that Article 12.3 ICF ADR, read together with Sub-Article 12.3.1 could not be applied on the BCA, based on the established facts. As a result, the Appealed Decision of the ICF Executive Committee is set aside.

ii) Lack of decisions of the competent hearing body on violations of the ICF ADR by Athletes or other Persons affiliated with the BCA

61. Even assuming the facts were established correctly by the ICF Executive Committee, in the opinion of the Panel, the premature nature of the ICF Executive Committee's decision follows from the fact that there is no previous decision of the ICF Doping Control Panel on the alleged anti-doping rule violations of the BCA's Athletes or their entourage.

62. The Respondent argues with reference to the wording of Article 2.1.1 ICF ADR and Article 12.3 ICF ADR that the mere presence of a Prohibited Substance in an athlete's body is an anti-doping rule violation. There is no requirement for the ICF Executive Committee to have first imposed disciplinary measures pursuant to Articles 12.1 or on the individual Athletes.

63. The Panel finds that to follow such argumentation would empty the competence of the ICF Doping Control Panel, circumvent the system of distribution of powers laid down by the ICF Statutes and ICF ADR and deprive the individual persons concerned of all procedural guarantees laid down by the WADA Code and implemented properly for the ICF by the ICF ADR.

64. To follow such argumentation, in the view of the Panel, would prejudice the decisions of the ICF Doping Control Panel and assign to the ICF Doping Control Panel the role of merely executing decisions already taken by the ICF Executive Committee through own decisions. It would lead to a disaster, if the ICF Doping Control Panel would find that no individual anti-doping rule violation has been committed after the ICF Executive Committee had imposed already a sanction based on the assumption that four or more anti-doping rule violations have been committed.

65. The Panel holds that the arguments of the Respondent would reverse one of the essential achievements of the WADA Code, namely the establishment of independent judicial bodies as replacement of political bodies to decide on anti-doping rule violations.

66. The Panel finds that Article 12.3 read together with Sub-Articles 12.3.1, 12.3.1.1 or any of the other Sub-Articles can be applied only once a decision of the ICF Doping Control Panel based on Articles 10 and/or 11 ICF ADR has been made. The award in CAS 2016/A/4745, referred to by the Respondent at the hearing, does not contradict such finding. The wording of Article 2.1.1 IPC Constitution, which is the relevant legal provision in that procedure is not comparable to the wording of Article 12.3 ICF ADR.

The IPC Constitution is drafted in a broad manner, whereas Article 12.3 ICF ADR cannot be detached from the remaining articles of the ICF ADR, since it is part of them. The discussion led on the McLaren Report in CAS 2016/A/4745 cannot be separated from the sworn affidavit he gave in that procedure for the Respondent and from lack of counter-evidence provided by the Appellant.

67. The Panel does also not see a contradiction with CAS OG 16/009, referred to by the Respondent at the hearing. In CAS OG 16/009, the wording of Article 12.4 IWF ADP had to be evaluated by the Panel. This provision – in contrast with Article 12.3 read together with Sub-Article 12.3.1 ICF ADR – does not only refer to anti-doping rule violations, but to “*conduct connected with or associated with doping or anti-doping rule violations*”. The panel in that case found consequently that it suffices that there was conduct connected or associated with doping in order to apply Article 12.4 IWF ADP (see at para. 7.9). In the case at stake, neither this Panel, nor the ICF Executive Committee are offered such option by the text of Article 12.3 read together with Sub-Article 12.3.1 ICF ADR.
68. The Panel also finds that the reference of the Respondent to CAS 2007/A/1286 at the hearing is not relevant for the present case. The Respondent argued that in that case as well as in CAS 2006/A/1102 & 1146 little evidence was sufficient in order to ban the athletes. The issue at stake in the case of the athlete Eder, referred to by the Respondent, was evidence from the police having seen the athlete concerned self-infusing saline and throwing the equipment he was using under the bed in his room. In the present case, no evidence from the police has been shown to the Panel and the Respondent even did not argue that any BCA Athlete was found self-infusing or immediately thereafter. In CAS 2007/A/1286, at para. 52, the panel stated particularly as follows:
- “The Panel is of the view that Possession of a Prohibited Method is proved where it can be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a Prohibited Method. Accordingly, the Panel finds that the Appellants were indeed each in possession of a Prohibited Method: namely, “intravenous infusions” as specified in Article M (2) (b) of the WADSA 2006 Prohibited List.”*
69. The Panel was not provided by the Respondent with any such and also not with comparable evidence.
70. At the hearing, the Respondent finally introduced the argument that Article 42 paragraph 2 ICF Statutes in any event allows the imposition of a sanction because of violation of the interests of the ICF. Indeed, the provision would offer such option. The Panel states that the fact is, however, that the ICF Executive Committee in the Appealed Decision did not refer to this option and consequently did not provide any argument to allow the Panel to consider whether the Appealed Decision could properly be based on Article 42 paragraph 2 ICF Statutes. In the Panel’s view, issuing a decision first and thereafter searching for a possible legal basis does not confirm to the principle of legality.
71. In conclusion, the Panel finds that the Appealed Decision is also set aside as premature because there were no previous decisions taken by the ICF Doping Control Panel on violations of the ICF ADR by Athletes or other Persons affiliated with the BCA.

iii) Exclusion only of officials and other restrictions by the rule

72. Article 12.3 read together with Sub-Article 12.3.1 provides that in case of four or more anti-doping rule violations within a twelve month period, the ICF (Executive Committee) has two options: a) to ban all officials from the BCA for participation in any ICF activities for a period of up to two years and/or to fine the BCA in an amount up to 15.000 Euros.
73. The Appealed Decision deviates from the above legal basis in three ways: it includes athletes, it does not ban all officials of the BCA and it does not ban all officials for participation in any ICF activities, but from participation at “*all international competitions*”.
74. In its submissions the Respondent argues that Sub-Article 12.3.1 must be read together with Article 12.3 ICF ADR, which provides for the imposition of a disciplinary action on the BCA and only indirectly to its Athletes and officials. To limit the sanction to a ban on officials would totally empty and devoid of substance the content and scope of Article 12.3 ICF ADR with regard to the eligibility of the officials and athletes to participate in international events.
75. The Panel, comparing the wording of Article 42 ICF Statutes to the wording of Articles 12.1 – 12.3 including Sub-Articles 12.3.1 – 12.3.3 ICF ADR understands that the difference in wording in these provisions obviously was intentional and with good reasons in order to create a well-balanced disciplinary system. Article 42 paragraph 2 ICF Statutes allows the ICF to impose any of the disciplinary measures enumerated in this article (including the here relevant exclusion) on individual members of a National Federation or on a National Federation in its entirety. The reasons for such measure are: breach of the ICF Statutes and Competition Rules; having harmed the interests of the ICF; and non-fulfilment of financial obligations, contractual commitments or other duties.
76. In the opinion of the Panel, the provision of Article 42 paragraph 2 ICF Statutes opens up the largest discretion for the ICF as to whom to address a disciplinary measure and which measure to impose. It expresses the understanding that the breaches mentioned in this article are considered by the ICF as the most serious ones. This provision was, however, not applied in the present case.
77. Article 12.1 ICF ADR allows only for financial sanctions and only on such National Federations that are in non-compliance with the ICF ADR. Article 12.2 ICF ADR establishes an obligation of a National Federation to reimburse the ICF for all costs in connection with an anti-doping rule violation, which was committed by one of its athletes or other affiliated person. None of these provisions was applied or is applicable in the present case.
78. Article 12.3 ICF ADR provides generally that the ICF may take additional (meaning the action contemplated in Article 12.1 and 12.2 ICF ADR) disciplinary action with respect to National Federations. This disciplinary action may refer to recognition, eligibility of its officials and athletes to participate in international events and fines. Through the link “*based on the following*” the Sub-Articles specify as *leges speciales* to whom to apply which measure. Sub-Article 12.3.1 (fourfold violation) provides for a ban of all officials from the respective National Federation for participation in any ICF activity and/or fine to the National Federation. Sub-Article 12.3.1.1 (fourfold violation and four or more

additional violations) contemplates the more severe suspension of the respective National Federation for a period of up to four (4) years. Sub-Article 12.3.2 (several anti-doping rule violations of one National Federation during one International Even) allows for the imposition of a higher fine to the respective National Federation than based on Sub-Article 12.3.1, but allows only a fine. Sub-Article 12.3.3 (whereabouts failure) provides for a minor fine on the National Federation and bearing of costs.

79. In the view of the Panel, the restriction of the sanction of Sub-Article 12.3.1 to officials makes sense given that the four (4) or more Athletes concerned were previously declared ineligible by the ICF Doping Control Panel. It is only for the more severe case of four or more further anti-doping rule violations (Sub-Article 12.3.1.1) that clean Athletes may be affected through the suspension of the respective National Federation. On the other hand, the text of Sub-Article 12.3.1 requires that all officials must be banned, including from any ICF activities.
80. The Panel, thus, holds that by applying Article 12.3 read together with Sub-Article 12.3.1 ICF ADR on other persons than officials on the one hand, and by not addressing all BCA officials on the other hand, and finally by banning them, but not from any ICF activities, the Appealed Decision violated its legal basis.
81. For all reasons given above the Panel decides to set aside the Appealed Decision. Accordingly, the sanction imposed by the ICF Executive Committee is not only lifted but fully cancelled. The Appellants could have potentially obtained that the sanction be lifted at an earlier stage in this procedure but the request for a stay that had been lodged together with the statement of appeal was clearly incomplete and could objectively not allow the CAS to grant the stay. After the request for a stay was dismissed by the President of the CAS Appeals Arbitration Division on 22 July 2016, the Appellants did not file any further request for a stay before the end of the present arbitration procedure.
82. In view of its decision and considering that by such decision some arguments of the Appellants have been dealt with indirectly and some others have become moot, the Panel considers it not necessary to treat them in addition to what has already been said. As to the alleged violation of further procedural rights, the Panel refers the parties to established CAS jurisprudence holding in light of Article R57 of the Code that the effect of the *de novo* hearing before the CAS is that procedural flaws, which occurred in the previous procedure are cured by the CAS procedure, because the CAS completely re-hears the case (see CAS 2016/A/4745 at para. 69 with reference to previous CAS awards and legal literature).

VIII. COSTS

83. This case emanates from an appeal against the decision of an international federation. Thus, Article R65 of the Code shall apply.
84. Article 65.1 of the Code reads as follows:

“This Article applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of

objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the panel on the issue.”

85. Article R65.2 of the Code provides as follows:

“Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.-- without which CAS shall not proceed and the appeal shall be deemed withdrawn.”

[...]

86. Article R65.3 of the CAS Code provides:

“Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, 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.”

87. The procedure is free, except for the Court Office fee of CHF 1,000 (one thousand Swiss francs).

88. (...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Belarus Canoe Association and the Belarusian senior men's canoe and kayak team members against the decision rendered on 15 July 2016 by the ICF Executive Committee is upheld.
2. The decision of the Executive Committee of the International Canoe Federation rendered on 15 July 2016 is set aside.
3. The present award is rendered without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss francs), which has already been paid by the Belarus Canoe Association and is retained by the Court of Arbitration for Sport.
4. (...).
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 23 January 2017

THE COURT OF ARBITRATION FOR SPORT

Michael Geistlinger
President of the Panel

Romano F. Subiotto
Arbitrator

Martin Schimke
Arbitrator