Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2245 Mr. Andrey Plotniy v. International Tennis Federation (ITF)

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: His Honour Judge James Robert Reid QC, Judge in Hampshire, United Kingdom

Arbitrators: Dr Georg Engelbrecht, Attorney-at-law in Hamburg, Germany
Prof. Ulrich Haas, Professor in Zurich, Switzerland

Ad hoc clerk: Mr Roderick Maguire, Barrister-at-law in Dublin, Ireland

in the arbitration

MR ANDREY PLOTNIY
represented by Mr Mario Krogmann, Attorney-at-law in Hamburg, Germany

-Appellant-

and

INTERNATIONAL TENNIS FEDERATION
represented by Mr Jonathan Taylor, solicitor in London, United Kingdom

-Respondent-

1. THE PARTIES

1.1 Mr. Andrey Plotniy (the "Appellant") is a professional tennis player of Russian nationality.

1.2 The International Tennis Federation (the "Respondent" or "ITF") is the international governing body for the sport of tennis, based in London, United Kingdom.

2. FACTUAL BACKGROUND

Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the pleadings and evidence adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

Ineligibility

2.1 A urine sample of the Appellant tested positive for the Prohibited Substance of Carphedon during the ATP Challenger tennis tournament in Astan, Kazakhstan, on 1 November 2009. On 9 March 2010, the Appellant signed an "Acceptance of Sanction" form in which he admitted the commission of a Doping Offence under Article C.1 of the 2009 Tennis Anti-Doping Programme ("the Programme") of the Respondent.

2.2 In the form, the Appellant also acknowledged and accepted the decision of the ITF made pursuant to Article K of the Programme, which included the imposition of a period of ineligibility of fifteen months, beginning on 1 November 2009, and therefore ending on 31 January 2011.

2.3 The form stated at point 3.2 that the Appellant acknowledged that he:

> *"may not play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event organisation (Article M.10 of the Programme); and*
>
> *3.3. If I fail to abide by this prohibition, a new period of Ineligibility may be imposed on me (Article M.10.5 of the Programme)."*

2.4 A press release dated 18 March 2010 was posted on the ITF website indicating that Mr. Plotniy had been suspended from participation for fifteen months, and the reason therefore.

2.5 The Appellant participated in five tennis tournaments in Germany in 2010: Stadtlohn on 19 to 24 May; Dülmen on 1 to 4 July; Hamm on 9 to 11 July 2010; Winnenden on 11 to 15 August and Waging am See on 18 to 22 August.

2.6 On 25 August 2010, Mr Niklas Börger, the organiser of the Dülmen event, contacted the Düsseldorf Sports Academies GMBH & Co. KG ("Düsseldorf Sports Academies"), the agent of the Appellant, attaching a letter from the German Tennis Federation ("DTB") of 24 August indicating that the Appellant had been suspended until 1 February 2011. Mr. Börger sought the repayment of EUR 600 prize money that the Appellant had won at the Dülmen tournament.

2.7 Again on 25 August 2010, the Appellant's legal representative sent an email to the ITF stating that he was not aware that he was ineligible to participate in tennis competitions at a national level that were not hosted by the ITF or the WTA. The email stated that the Appellant had participated in five tournaments, that he had just been informed that his participation may be regarded as an infringement of Article M of the Programme, and that he deeply regretted this error. The email went on to state that the Appellant would return any prize monies which he had received and certainly accepted the forfeiture of any ranking points in relation to the tournaments, and that he would immediately contact the respective tournament organisers and inform them accordingly and apologise to them.

Decision of the ITF

2.8 On 28 August 2010, submissions were requested by the ITF from the Appellant in relation to "*any mitigation that demonstrated that the Appellant bore No Significant Fault or Negligence for his participation in the Events in question.*" These submissions were provided on 9 September 2010 and considered by the ITF. On 20 September 2010, the ITF confirmed that the Appellant had violated the prohibition against participation while ineligible pursuant to Article K of the Programme, that the Appellant could not establish No Significant Fault or Negligence on his own part such as would mitigate the sanction under Article M.10.5, and that the application of the

sanction for the offence listed at Article M.10.4 of the Programme was not disproportionate.

2.9 As a consequence of the above findings, the ITF Anti-Doping Manager Stuart Miller decided, on 20 September 2010, that the original 15-month period of ineligibility imposed on the Appellant would start again as from the date of his last participation in the events listed above at 2.7., being 22 August 2010. This prohibition is therefore to end on 21 November 2011.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 7 October 2010, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondent with respect to the above-referenced decision of 20 September 2010.

3.2 On 28 October 2010, the Appellant filed his Appeal Brief.

3.3 On 29 November 2010 the Respondent filed its Answer to the Appeal of the Appellant.

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

4.1 On 17 December 2010, the parties were informed that the Panel appointed to decide the above-referenced case was constituted as follows:

President: His Honour Judge James Robert Reid QC, Judge in Hampshire, United Kingdom

Arbitrators: Dr Georg Engelbrecht, Attorney-at-law in Hamburg, Germany
Prof Ulrich Haas, Professor in Zurich, Switzerland

The Panel was constituted without objections by the parties.

4.2 A hearing of the case took place on 24 March 2010 at the CAS headquarters in Lausanne, Switzerland. At the close of the hearing, the parties confirmed that they were satisfied as to how the hearing and the proceedings were conducted.

4.3 In addition to the Panel, Ms Louise Reilly, Counsel to the CAS, and Mr Roderick Maguire, ad hoc clerk, the following people attended the hearing:

- Mr. Andrei Plotniy, Appellant
- Dr. Mario Krogmann, Counsel for the Appellant
- Dr. Stuart Miller of the Respondent
- Mr. Jonathan Taylor, Solicitor for the Respondent
- Ms. Anna Blakeley, Solicitor for the Respondent

4.4 The following witness was heard in person by the Panel:

- Ms. Martina Petersen, Managing Director of Düsseldorf Sports Academies

4.5 Though the Appellant had indicated that four other witnesses were to be heard by conference call, the Appellant ultimately chose not to call these witnesses.

4.6 In addition, the Appellant was heard by the Tribunal.

5. THE ORAL EVIDENCE

5.1 Ms Petersen stated in her evidence that she had known the Appellant for approximately six years, since he had been aged 16. She treated the Appellant as more than just a player, and the fact that this whole incident had occurred was a personal problem for her. She had found the first doping offence itself a tough thing to accept, but it had been accepted, and they had tried to keep going for the period of 15 months of the original ban. When the Appellant came to Germany to practice, he came to her office and said that he wanted to play tournaments. She said of course that could be done, as she only had in mind international tournaments as being the subject of the prohibition that had been imposed and accepted on 8 March 2010.

5.2 Ms. Petersen stated that as the Appellant's English was not so good, she had dealt with Mr. Krogmann and the ITF in relation to the initial ban imposed on him. She stated that she did not double check as she was "*one hundred per cent sure*", without a doubt, that he could play in such tournaments.

5.3 The Appellant had subsequently been issued with a Player Identification without objection by the DTB. Only when an objection came in the form of an email from the organiser of the Dülmen Open on 25 August 2010 did Ms Petersen check the Acceptance of Sanction Form that the Appellant had signed and told Dr Krogmann that same day to tell the ITF that the Appellant did something wrong.

5.4 Ms. Petersen said that it was disproportionate in the extreme to have a ban imposed in this case on a young player when it was her fault, and he had trusted her.

5.5 Ms. Petersen agreed that the Appellant had applied for the Player Identification only on 29 June 2009. She indicated that the Appellant trained in Germany, and though he went home to Russia, he practised in Germany and played national tournaments from Germany. She stated, and it was accepted by the Respondent, that the five tournaments in which the Appellant had participated after 8 March 2010 were local tournaments which garnered only German national ranking points for participants, and not ATP international ranking points.

5.6 Ms. Petersen stated that the Appellant was registered automatically with his national federation, the Russian Tennis Federation, which was registered with the ITF. Each player has only one national federation that they are registered with, but can participate in national competitions in other countries. She stated that the DTB had recently altered its rules to require that players had a Player Identification which could be applied for through the internet, without payment. There was now a requirement in that country that each player had to have a Player Identification to take part in tournaments. This was the first time that the Appellant had registered in Germany with the DTB. Prior to his ban in March 2010, the Appellant had only played international tournaments and had used his ITF player identification. By playing in national tournaments in Germany, the Appellant would be able to stay in practice, and have match play. Ms. Petersen was not sure how the Appellant was able to participate in the first tournament in Stadlohn in May 2010 without a Player Identification, but he did have a wild card entry into that tournament, and had been invited to play. She did not know if it was necessary for him to have such an identification.

5.7 Ms. Petersen stated that she only knew of the prohibition after the sanction was imposed by the ITF in September 2010.

5.8 The Appellant stated that he had known Ms. Petersen for over six years, and she had helped him in all aspects of his professional life for that time. After the initial imposition of sanction by the ITF in March 2010, the Appellant stated that he did not practice for an extended period of time. He then approached Ms. Petersen to ask if it was possible to play some tournaments in Germany, and she said that it was possible. Subsequently, he received an invitation to play the tournament in Stadtlohn, and she told him he could play. He had trusted Ms. Petersen because she had never made a mistake. The issuance of the Player Identification in June 2010 had buttressed the Appellant's belief that Ms. Petersen was correct.

5.9 The Appellant stated that he had taken advice prior to signing the initial Acceptance of Sanction Form. Ms Petersen had involved Dr Krogmann in relation to the initial offence, and the Appellant had not talked to Dr Krogmann himself in relation to that.

5.10 The Appellant had become aware in or around the beginning of 2010 that he was on a list of disqualified players maintained by the Russian tennis federation. He was unable to be specific due to the time lapse. He had accessed the website to see the status of his friends in relation to the Russian national championship, and had seen that he was

listed as one of two players that were prohibited from entering the championship which was to be played in October 2010. He said that he had told Ms. Petersen that he could not play in Russia when he approached her to ask if he could play in Germany. He did not read the form that he had signed, nor look at the rules. The Appellant was of the view that as he was a player, if he had an issue with rules, he asked Ms Petersen. He had not specifically asked her to look at the rules, but trusted her advice. He had asked her in the office, or in a restaurant, whether he was able to play in tournaments in Germany. She had taken five minutes to tell him that he could.

6. THE PARTIES' SUBMISSIONS

The following is a summary of the main arguments of each side. It does not purport to be comprehensive, but all submissions made in the written pleadings and orally, were carefully considered by the Panel.

Appellant's submissions

6.1 First, the Appellant argued that there are "*at least strong doubts*" that the interpretation of the Acceptance of Sanction Form includes the five German tennis tournaments in which the Appellant played as "*Prohibited events*." He argued that he had interpreted the term "*event organised by a National Association*" in a way that it would only include national events in the home country of the respective player (in this case, Russia) or if ever in other countries, only larger events, such as the German Masters tournament. He further argued that there was no definition of the scope of the suspension, and the fact that he was disqualified on the basis of a urine sample collected at an international ATP Challenger tournament meant that it was legitimate for him to believe that his suspension outside Russia would be limited events of a similar scale. As the tournaments in which the Appellant played were of a local scale, hosted by small clubs, offering only small prize money and did not attract public attention, it was legitimate for him to believe that they fell outside the Acceptance of Sanction Form.

6.2 Secondly, the Appellant argued that he had relied on his agent, Düsseldorf Sports Academies, and had no cause to doubt their competence to assess the tournaments in which he could play. The registrations for these tournaments were all in German,

which the Appellant does not speak, and if Düsseldorf Sports Academies made any mistake, it did not imply any fault or negligence on the part of the Appellant.

6.3 Thirdly, the Appellant submitted that he had successfully applied for a German Player Identification in June 2010. There was no restriction on this identification, though Düsseldorf Sports Academies were told that the Applicant's regional federation would be informed and had the opportunity to object to the identification being issued and to suspend the player number. Upon the player identification number being issued to the Applicant, and being told that he could "*from now on*" register for tournaments with ranking scores, the Applicant believed that he could register for local German tournaments. This was coupled with the fact that the ITF notification of his suspension on its website led the Appellant to assume that the DTB knew that he had been suspended.

6.4 Fourthly, the Appellant stated that the fact that the Russian Tennis Federation informed all Russian tournament organisers that he was suspended, and the fact by implication that this was not done by the DTB indicated that the Appellant legitimately assumed that he was able to participate in the equivalent events in Germany.

6.5 The Appellant then submitted that even if there was a violation of paragraph 3.2 of the Acceptance of Sanction Form, there was no significant fault or negligence in respect of this violation. A re-start of the period of ineligibility would be too burdensome for the Appellant given that the original offence was minor and the tournaments in question were only local in scale. In addition, it was submitted that the Appellant has never been a prominent tennis player and therefore any sanction going beyond the original suspension would be disproportionate.

6.6 It is submitted on behalf of the Appellant that the fact that the Appellant immediately informed the ITF of his participation in the tournaments when he discovered that he might have acted against the relevant regulations should be taken into account. Ms Petersen, Managing Director of Düsseldorf Sports Academies, had not known that the Appellant was suspended for the Russian Championship when she advised him that he could play domestic German competitions.

6.7 The Appellant further submitted that the question of no significant fault or negligence was too narrow to adequately represent the principle of proportionality. That principle required that there be an enquiry into whether the sanction was necessary to achieve the aim desired, and if there is a less restrictive measure available, such less restrictive

measure should be applied. Secondly, the principle of proportionality required an assessment as to whether there existed a balance between the breach of the relevant clause and the measure imposed in respect of that breach. In this case, a full re-start of the fifteen month suspension was not necessary and did not properly reflect what it is desired to be achieved through the sanction. The Appellant submitted that there is a distinction to be drawn in this case as it does not concern a doping violation itself, but rather the non-compliance with a period of ineligibility and that the Panel should consider applying a flexible approach in the definition of "*significant*" within the meaning of the phrase "*significant fault or negligence*" in the Programme, and display such flexibility in approaching the matter on a case by case basis.

6.8 The Appellant submitted that a fair solution would be to impose a period of ineligibility from the last date of contravention of the sanction by the Appellant, being 22 August 2010, but that such period should be reduced from fifteen months to half of that, as it should be considered that there was no significant fault or negligence. That period of seven and a half months would therefore render the Appellant ineligible until 5 April 2011.

Respondent's submissions

6.9 The Respondent submits that the appeal was completely without merit and should be summarily dismissed.

6.10 The Respondent referred to the Acceptance of Sanction Form and Article M.10.1 of the Programme, submitting that the tournaments that the Appellant played in are "*official DTB tournaments, the results of which count towards the official national ranking in Germany.*"

6.11 The Respondent submitted that the Appellant has misstated the facts because Article M.10.1 of the Programme and Paragraph 3.2 of the Acceptance of Sanction Form do not state that ineligibility prevents a player from playing in "*any event organised by a National Association*" but rather that it covers events authorised, organised or sanctioned by any National Association. Therefore, the submission that the ineligibility only related to the Russian Tennis Federation is untenable.

6.12 The Respondent went on to submit that as the tournaments were official DTB tournaments and are referred to as such by the DTB, as well as being DTB ranking tournaments participation in which earned ranking points contributed to a player's

national ranking in Germany, it was clear that they fall within the scope of ineligibility set out in Article M.10.1 of the Programme.

6.13 The Respondent stated that the regret expressed by the Appellant together with his failure to appeal the ITF's disqualification of the results that he achieved from the five tournaments in issue indicated that he accepted that he breached the prohibition imposed by the ITF.

6.14 The Respondent submitted that Article M.5.2 of the Programme would only apply where the circumstances are truly exceptional and where the evidence provided in support of the plea shows that the degree to which the athlete has departed from the required standard of utmost caution is not significant (citing *CAS 2004/A/690 Hipperdinger v ATP, ITF Independent Anti-Doping Tribunal, ITF v. Neilson, 5 June 2006 and CAS 2005/C/976 & 986, CAS Advisory Opinion, FIFA & WADA*).

6.15 The Respondent rejected the notion that because the Appellant's agency was at fault that this absolved the Appellant himself from responsibility since Article B.3 of the Programme provides that "*it is the sole responsibility of each player*" to acquaint themselves, and ensure that those from whom they take advice are acquainted, with the requirements of the Programme. The Respondent highlights that this was expressed to be a non-delegable duty by the decision of the ITF which is under appeal, and that any other interpretation of the Programme would put an end to any meaningful fight against doping.

6.16 Further, the Respondent argued that in any event, the Appellant personally signed the Acceptance of Sanction Form which clearly set out the extent of his ineligibility. If there was any ambiguity, it would be expected that the Appellant or his agent would clarify with the relevant authority the extent of that ineligibility, and the failure to do so defeats the argument that the Appellant exercised the required "*utmost caution*" under the Programme.

6.17 The Respondent also rejected the argument that the issuing of a Player Identification to the Appellant by the DTB exculpated him from the infringement of his Ineligibility. The Respondent submitted that as the Appellant played in the first of the tournaments in question before the issuing of an identification to him, this argument could not stand. It suggested that the argument it effectively sought to transform the sanction imposed into an obligation on National Associations rather than on the player concerned.

6.18 The Respondent submitted that where there was no demonstration of No Significant Fault or Negligence in relation to a breach of Article M.10.1 of the Programme, there was no other possibility of mitigation and the sanction that must flow from the breach is a re-commencement of the entire term of the ineligibility from the last date of participation in a prohibited event. The Respondent rejected as irrelevant considerations such as the level of the original infraction, its allegedly minor nature, the lack of stature of the particular events, and the fact that the Appellant did not have a high ranking in the sport. The fact that the Appellant notified the violation to the ITF did not, in the submission of the Respondent, affect the sanction, as the fault was still significant within the definition of the Programme.

6.19 The Respondent submitted that the jurisprudence is clear in that the harmonized sanctions set out in the World Anti-Doping Code and incorporated into the Programme respect the principle of proportionality and should only be departed from in the most extreme circumstances (citing *CAS 2004/A/690 Hipperdinger v ATP, ITF Independent Anti-Doping Tribunal, ITF v. Neilson, 5 June 2006* and *CAS 2005/C/976 & 986, CAS Advisory Opinion, FIFA & WADA*). The provision in the World Anti-Doping Code concerning no significant fault or negligence was an expression of proportionality. The particular requirements of each case could be taken into account and if the conditions of no significant fault or negligence were met, the sanction would be reduced. If those requirements were not met, the sanction would not be reduced.

6.20 The Respondent submitted that under the rules of the World Anti-Doping Code, a player cannot generally avoid responsibility by saying that he relied on other people who gave him or her a prohibited substance. To do so would be to undercut personal responsibility. In certain circumstances, where a player has relied upon independent experts, that could go towards discharging responsibility. However, in a situation such as this, the Appellant is relying on his own advisors to inform him of the content of the Programme and the sanction imposed thereunder, and this is not a permissible delegation of his responsibility.

6.21 In this case, the consideration was not a question of whether the Player had relied on an independent scientific expert in relation to taking a substance which contained a prohibited substance, and whether or not that athlete was reasonable in such reliance. Rather, in this case, the athlete relied on his own sports agents to tell him what the

particular rules meant, and relied on their understanding of those rules. However, the Programme states at Article B.3.1 as follows:

"B.3 It is the sole responsibility of each Player:

B.3.1 to acquaint him/herself, and to ensure that each person from whom he/she takes advice (including medical personnel) is acquainted, with all the requirements of the Programme;"

6.22 Thus, it was the responsibility of the Appellant to make himself aware of the requirements of Article M.10 of the Programme. In fact, these had been translated into German and communicated to his lawyer and his advisers.

6.23 While Swiss law and general sports law allowed for taking into account the proportionality of particular provisions, it was submitted that the Programme had a strong and full expression of proportionality, and that, as stated in *CAS 2005/C/976 & 986, CAS Advisory Opinion* at paragraph 143, "*only if the sanction is evidently and grossly disproportionate in comparison with the proved rule violation and if it is considered a violation of fundamental justice and fairness*" should the Panel regard the sanction as abusive and contrary to mandatory Swiss law. Such a high standard is appropriate, for if a broad discretion were to be allowed, without carefully defining the scope of the discretion, there would be an enormous perceived unfairness in the application of rules from sport to sport and from country to country.

6.24 The Respondent further submitted that in considering why the sanction for breaching the suspension by the Appellant should be that the time of the period of ineligibility re-started, both the harmfulness of the offence and the degree of fault of the Appellant should be considered. A period of fifteen months' ineligibility had been imposed. This was to act as a punishment, a deterrent and a vindication of the public interest in having the rules of the Programme complied with. Playing of the sport while ineligible was directly and seriously detrimental to the sport.

6.25 The Programme provides for a sanction and this was accepted and agreed to, being a sanction of ineligibility for a continuous period of fifteen months. These fifteen months of ineligibility have not been observed by the Appellant. A period of consecutive ineligibility of fifteen months had to be observed. The matter has been entirely in the Appellant's hands, yet he had failed to observe the requirements of the Programme.

6.26 Further, there had been a direct and incurable detriment to those who played against the Appellant while he was ineligible, and they have no opportunity to correct that. If

this is allowed to occur without sanction by the Panel, there would be a move towards the situation where a player could be in control of his own sanction, and though he might lose prize money, he could decide that the exposure and match play achieved would be worth the risk of participation in competitions while ineligible.

6.27 The Programme applies the same rules for the breach of a sanction such as at issue in this case, and the offence of doping, in that the fault of the individual was to be considered, and if there was significant fault or negligence, then the sanction is to be imposed. All stakeholders had considered the question of whether it was necessary to have such a sanction, and they had signed up to the World Anti-Doping Code forming the basis of the Programme.

6.28 The Respondent therefore asked that the Appeal should be dismissed in its entirety.

7. JURISDICTION OF THE CAS

7.1 Article R47 of the Code of Sports-related Arbitration ("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."

7.2 Article O.2.1 of the 2009 Programme provide as follows:

"A decision that an Anti-Doping Rule Violation has been committed, a decision imposing (or not imposing) Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation has been committed, a decision that a charge cannot go forward for procedural reasons (including, for example, because too much time has passed), a decision not to record an alleged Filing Failure or Missed Test, a decision under Article M.10.4 in relation to participation while Ineligible, a decision that the ITF lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, a decision by the ITF not to pursue an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, and a decision by the ITF not to bring a charge after an investigation under Article I may each be appealed by any of the following parties exclusively to CAS:

(a) the Participant which is the subject of the decision being appealed;

(b) the ITF;

(c) the National Anti-Doping Organisation(s) of the Participant's country of residence or of countries where the Participant is a national or licence-holder;

(d) the International Olympic Committee, where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games;

(e) the International Paralympic Committee, where the decision may have an effect in relation to the Paralympic Games, including decisions affecting eligibility for the Paralympic Games; and/or

(f) WADA."

The Appellant lodged his Appeal with CAS, and the Respondent acknowledged in its Answer that the CAS has jurisdiction. Further, the Respondent signed the Order of Procedure dated 1 February 2011 which also confirmed that the CAS has jurisdiction. It is accordingly undisputed that the CAS has jurisdiction over the Appellant's appeal.

8. APPLICABLE LAW

8.1 Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and 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 whichhas issued the challenged decision is domiciled or according to the rules of law, theapplication of which the Panel deems appropriate. In the latter case, the Panel shallgive reasons for its decision."

8.2 In their submissions, the parties make reference to and rely on provisions of the 2009 and 2010 Programmes.

8.3 **Article M.10.1** of the 2010 Programme states as follows:

"*Prohibition Against Participation During Ineligibility:*

No Participant who has been declared Ineligible may, during the period of Ineligibilty, play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by

any professional league, or any international or national-level Event or Competition organisation."

8.4 **Article M.10.5** of the 2010 Programme states as follows:

"*If a Participant who has been declared Ineligible participates in any capacity, during such period of Ineligibility, in a Covered Event or any other Event or Competition, or other function, event or activity (other than authorised anti-doping education or rehabilitation programs) of the type referred to at Article M.10.1(a) or Article M.10.1(b), the period of Ineligibility that was originally imposed shall start over again as of the date of such participation. The new period of Ineligibility may be reduced under Article M.5.2 if the Player establishes that he/she bears No Significant Fault or Negligence for such participation. The determination of whether a Player has violated the prohibition against participation while Ineligible, and whether a reduction under Article M.5.2 is appropriate, shall be made by the ITF, and such decision shall be subject to appeal in accordance with Article O. In any case, any results obtained by the Participant in such Event(s), with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize Money obtained in such Event(s), shall be automatically Disqualified.*"

8.5 **Article M.5.2** of the 2010 Programme provides that

"*If a participant establishes in an individual case that he/she bears No Significant Fault or Negligence in respect of the anti-doping rule violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight (8) years. When the anti-doping rule violation is an Article C.1 offence (presence of Prohibited Substance or any of its Makers or Metabolites), the Player must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced.*"

8.6 "*No Significant Fault or Negligence*" is defined in Appendix 1 to the 2010 Programme as "*The Participant establishing that his/her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation in issue.*"

8.7 "*No Fault or Negligence*" is in turn defined in Appendix 1 to the 2010 Programme as "*The Participant establishing that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method.*"

8.8 **Article M.10.1** of the 2009 Programme states as follows:

"*Prohibition Against Participation During Ineligibility:*

No Participant who has been declared Ineligible may, during the period of Ineligibilty, play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event organisation."

8.9 **Article M.10.5** of the 2009 Programme is identical to the provision in the 2010 Programme. **Article M.5.2** of the 2009 Programme is identical to the provision in the 2010 Programme, except that the phrase "*Doping Offence*" is replaced with the phrase "*anti-doping rule violation.*" The definitions of these two phrases are the same at Article C respectively in the two Programmes, except for variations in relation to intention in respect of attempted use in the 2010 Programme, which is not relevant in this case. The definition of "*No significant fault or Negligence*" in the 2009 Programme is identical to the 2010 Programme, and the definition of "*No fault or Negligence*" in the 2009 Programme is identical to the 2010 definition, except that the term "*Doping Offence*" is used instead of "*anti-doping rule violation.*"

8.10 While the Appellant submitted that the applicable Programme for the purpose of the case was the 2009 Programme under which the Appellant was originally sanctioned in March 2010, the Respondent submitted that the Programme applicable was the revised Programme that came into force on 1 January 2010. The Panel finds that the relevant provisions of the two versions of the Programme are not substantially different. The phraseology of Article M.5 is the same, bar the fact that the phrase "*Doping Offence*" is replaced in the 2010 Programme with the phrase "*anti-doping rule violation.*" Similarly, the provisions of Article M.10 in the two versions of the Programme are identical, bar that in the later Programme, there is a further prohibition on players who

have been deemed ineligible participating in any capacity in events or competitions organised by competition organisations under Article M.10.1(b). As there was agreement between the parties that there was a breach of the prohibition under Article M.10.1(a), and that the only matter for consideration was whether the Panel should reduce the sanction for such participation under Article M.10.5 and M.5.2, the Panel does not consider that it is necessary to determine which version of the Programme is applicable. However, as the Acceptance of Sanction Form that the Appellant signed used the terms of the 2009 Programme, and as his original offence was an offence under that Programme, the Panel finds that it is the 2009 Programme that is applicable.

9. THE PANEL'S FINDINGS ON THE MERITS

9.1 The Panel finds that the five events in which the Appellant played were all, at the very least, "*any other kind of function event or activity....authorised, organised or sanctioned....by a National Association or member of a National Association*" under Article M.10.1 of the Programme, given that it was agreed by the parties that national ranking points of the DTB were awarded in respect of these events.

9.2 The Panel considers that in the particular circumstances of this case, it cannot be said that the result of the application of the provisions of the Programme is disproportionate. The Appellant made, on his own admission, no enquiry into the nature and extent of his sanction other than asking his own representative. At the time he made that enquiry, he knew himself to be ineligible to play in international tournaments, and in the national Russian Championship.

9.3 The Appellant had consented in writing, with legal and agent representation, to a sanction in respect of his original doping offence. The Acceptance of Sanction Form that he signed clearly set out the parameters of his ineligibility. Despite this, he entirely abdicated his responsibility to inform himself of the provisions of the Programme, when the ability to understand the nature and extent of those provisions was reasonably within his control. He abdicated this fundamental responsibility in respect of the nature of his sanction to his own agent, not because he considered that she had a technical or scientific expertise that he did not, but rather because he considered that he had no responsibility as a player to inform himself of this.

9.4 The Panel accepts the submission of the Respondent that the applicable standard in respect of the definition of "*No significant fault or Negligence*", as laid down in the

Programme, is illuminated by *CAS 2005/C/976 & 986, CAS Advisory Opinion* at paragraph 75 where it states that only where "*the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction.*" The Panel does not consider that the actions of the Appellant had No significant fault or Negligence such as to bring him within the provisions of the exception. The latter would only be the case had the Appellant taken at least all clear and obvious precautions which any human being would have taken in the same set of circumstances (cf. *CAS 2005/A/847 Hans Knauss v/ FIS*, paragraph 7.3.6). Furthermore, the Panel cannot find that there is either any implied term within the Programme, or any over-riding aspect of the principle of proportionality, that requires the provisions of the Programme to be altered, amended or not to be applied in the specific circumstances of this case.

9.5 If the Panel had considered that the sanction applicable should be reduced because the Appellant had established No significant fault or Negligence within the meaning of the Programme, the Panel considers that the Programme envisages that any reduced sanction would run concurrently with the original sanction imposed, as any other interpretation of the Rules in Article M.10.5 and M.5.2 could result in a player having a lengthy sentence in effect reduced through breaching the sanction of ineligibility, in circumstances where they breached their sanction early in their period of ineligibility with No significant fault or Negligence, and therefore restarted a period of ineligibility now reduced by up to half.

Conclusion

9.6 The Panel accordingly upholds the Respondent's decision dated 20 September 2010 and dismisses the Appeal of the Appellant in its entirety.

9.7 The present award is rendered by majority, pursuant to Article R59 of the Code.

10. COSTS

10.1 Articles R65.1 and R65.3 of the Code provide that, subject to Articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share

them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

10.2 As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. However, in the light of all of the circumstances and of the financial resources of the parties, the Panel concludes that it is reasonable for the parties to bear their own costs and other expenses incurred in connection with this arbitration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 October 2010 by Mr Andrey Plotniy is dismissed.
2. The decision rendered by the ITF Anti-Doping Manager on 20 September 2010 is confirmed.
3. The award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) paid by Mr Andrey Plotniy, which is retained by the CAS.
4. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.
5. All other prayers for relief are rejected.

Lausanne, 11 April 2011

THE COURT OF ARBITRATION FOR SPORT

Judge James Robert Reid Q.C.
President of the Panel