CAS 2020/A/6987 Rudolf Verkhovykh v. Russian Anti-Doping Agency RUSADA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Vladimir **Novak**, Attorney-at-law in Brussels, Belgium

in the arbitration between

Rudolf Verkhovykh, represented by Mr. Sergei Lisin and Mr. Sergei Mishin, Attorneys-at-Law, Lisin Mishin & Partners, Moscow, Russia

Appellant

and

Russian Anti-Doping Agency (RUSADA), represented by Mr. Graham Arthur, Liverpool, United Kingdom

Respondent

I. PARTIES

1. Mr. Rudolf Verkovykh (the "Appellant") is a 21-year old track athlete (short distance runner) from Russia. The Appellant is a member of the All-Russia Athletics Federation ("RusAF") and participates in competitions organized, convened, authorized or recognized by RusAF.

2. Russian Anti-Doping Agency ("RUSADA" or the "Respondent") is a Russian anti-doping agency approved by the World Anti-Doping Agency ("WADA") as a national anti-doping organization within the meaning of the WADA Code. RUSADA has its registered seat in Moscow, Russia.

3. The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and evidence adduced. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, his award refers only to the submissions and evidence, which he considers necessary to explain his reasoning.

5. The Appellant is a 21-year-old short-distance runner from Chelyabinsk, Russia. He began practicing athletics at the age of 12. In 2015, the Appellant won the Russian Junior Indoor Cup (200 metres race), and in 2016 the Appellant finished second in the Russian Indoor Championship (200 metres race).

6. In August 2016, the Appellant received an offer to join the group of athletes trained by Mr. Vladimir Semenovich Kazaring (the "Coach") and Mrs. Natalie Khrusheleva. However, due to an injury, the Appellant started training with the Coach in November 2016.

7. Since November 2016, the Appellant was subject to 29 anti-doping tests and had one whereabouts failure in summer 2020.

8. On 7 April 2017, the CAS rendered a decision imposing a life period of ineligibility on the Coach due to his violation of anti-doping rules (*see* CAS award 2016/A/4480).

9. In spring 2017, the Coach had a meeting with his athletes (including the Appellant) and announced that he could no longer train them "officially" and that the athletes should no longer indicate the Coach as their official coach in competition protocols,

applications, and other documents. Thereafter, the Coach repeatedly told the Appellant that the Coach could train him in an "unofficial" capacity.

10. Between 4 May 2018 and 25 May 2018, the Appellant was at the training camp in Kaji-Sai in the Republic of Kyrgyzstan. During this time, the Coach was also present at the camp.

11. On 24 May 2018, the Appellant underwent a doping test. The RUSADA personnel did not question the Appellant about the Coach, nor served any written notice to the Appellant in relation to his association with the Coach.

12. Between 17 October 2018 and 3 November 2018, the Appellant attended a training camp in Kaji-Sai in the Republic of Kyrgyzstan and was trained by the Coach.

13. During the training camp, RUSADA's personnel conducted an investigation. The RUSADA personnel had observed the Coach was present at the training camp and was training athletes. However, RUSADA did not record this activity.

14. On 30 October 2018, a RUSADA official, Mr. Leonid Ivanov, had a private discussion with the Appellant at the training camp. Mr. Ivanov inquired whether the Appellant was aware of the Coach's whereabouts and whether the Coach was training with the athletes in Kaji-Sai. As instructed by the Coach, the Appellant replied that he was not aware of the Coach's whereabouts. According to the Appellant, Mr. Ivanov replied to the Appellant that "*You are all not aware, and later, you will be sanctioned*". Mr. Ivanov then instructed the Appellant to complete a written form. The Appellant personally prepared a written statement by responding to questions that were asked by Mr. Ivanov. During the meeting with Mr. Ivanov, the Athlete denied his association with the Coach. The Appellant completed the form by hand, and among others acknowledged: "*I have been explained that participation of Kazarin Vladimir Semenovich in my sport preparation will be considered as prohibited association and can result in disqualification because it is a violation of All-Russian Anti-Doping Rules*".

15. Between 12 November 2018 and 26 November 2018, the Appellant attended a training camp in the Republic of Kyrgyzstan. During this time, the Coach was also present at the camp.

16. On 27 November 2018, the Appellant received a circular email from RUSADA containing questions regarding his relationship with the Coach.

17. On 29 November 2018, the Appellant completed the questionnaire received from RUSADA as instructed by the Coach.

In January 2019, the Appellant and other athletes had a discussion with the Coach regarding his right to train athletes. According to the Appellant, the Coach ended the

discussion in an aggressive manner, telling the athletes that they were free to avail of other coaches, but such a decision would entail financial and other consequences.

B. Proceedings before the Disciplinary Anti-Doping Committee of RUSADA

18. On 14 June 2019, the Appellant received a notice of charge from RUSADA alleging Prohibited Association with the Coach. According to the Appellant, this was the first official communication from RUSADA that explained the essence of the Prohibited Association Rule and the Consequences thereof.

19. Since the imposition of a provisional suspension under the notice of charge received on 14 June 2019, the Appellant has not participated in any competition nor any prohibited activity.

20. The Prohibited Association Rule is an anti-doping rule violation that was introduced in the 2015 WADA Code. It prohibits athletes from associating with athlete's support personnel (*e.g.*, coaches, trainers, physicians) that are, among other things, serving a period of ineligibility. The relevant parts of the Prohibited Association Rule included in Article 2.10 of the Russian Anti-Doping Rules ("ADR") read as follows:

"*Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support person who:*

If subject to the authority of an Anti-Doping Organization, is serving a period of Ineligibility;

[...]

In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association" (the "Prohibited Association Rule").

21. On 17 December 2019, the Disciplinary Anti-Doping Committee of RUSADA ("DADC") rendered a decision no. 22/2020 (the "Appealed Decision") finding that the Appellant violated Article 2.10 of the ADR by engaging in prohibited association with the Coach on 15 November 2018 and 22 April 2019 in the Republic of Kyrgyzstan.

22. The Appealed Decision concluded as follows:

- The case file did not contain any evidence in relation to an appropriate written notification to the Appellant by an anti-doping organization regarding the

Coach's disqualification status and possible consequences of prohibited association with the Coach.

- On 30 October 2018, the Appellant, when answering questions posed by a RUSADA official, Mr. Leonid Ivanov, confirmed in writing that he had been informed that the Coach's participation in his training activities would be viewed as an ADR violation. However, the Appellant was not aware, and did not understand the specific consequences of the Coach's disqualification and, in particular, his obligation to avoid any association with the Coach. This was due to the lack of appropriate written notice provided to the Appellant.

- Given that the Appellant was not aware of his obligation to avoid any association with the Coach and the specific consequences for violation, the Appellant was sanctioned with a 1-year period of ineligibility (from 17 December 2019 until 16 December 2020) instead of the standard 2 years.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 15 April 2020, the Appellant filed, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Statement of Appeal at the Court of Arbitration for Sport in Lausanne, Switzerland (the "CAS"), against the Appealed Decision (the "Appeal"). The Appellant selected English as the language of the procedure and asked to consolidate his procedure with two other matters pending before the CAS, namely *CAS 2020/A/6986 Anna Knyazeva-Shirokova v. Russian Anti-Doping Agency RUSADA* and *CAS 2020/A/6988 Andrey Isaychev v. Russian Anti-Doping Agency RUSADA*.

24. On 23 April 2020, the CAS Court Office informed the Parties that the three appeals were not against the same decision and accordingly consolidation was not possible. The Parties were asked whether they agree to submit the three appeals to the same Sole Arbitrator.

25. On 27 April 2020, the Appellant, and the other two athletes, Mrs. Anna Knyazeva-Shirokova and Mr. Andrey Isaychev, all consented with the submission of their appeals to the same Sole Arbitrator. The Appellant also requested, in accordance with Article R44.3 of the Code, that the CAS Court Office order RUSADA to produce all documents in its possession related to the Appealed Decision.

26. On 27 April 2020, the Appellant requested an extension to submit the Appeal Brief of three business days after the receipt of the requested documents from RUSADA.

27. On 29 April 2020, the CAS Court Office asked the Respondent to provide the requested documents to the Appellant by 11 May 2020, and to state its position on the Appellant's request for extension by 6 May 2020. Meanwhile, the Appellant's deadline to file the Appeal Brief was suspended. The Respondent did not object within the prescribed

deadline. Accordingly, the Appellant's request was granted and the deadline remained suspended.

28. On 7 May 2020, the CAS Court Office noted that the Respondent did not state its position in relation to the possibility of submitting the three appeals to the same Sole Arbitrator, and informed the Parties that unless the Respondent objected by 11 May 2020, the three appeals would be assigned to the same Sole Arbitrator. The CAS Court Office also informed the Parties that the Respondent did not object to English as the language of the present proceedings within the prescribed deadline. Accordingly, pursuant to Article R29 of the Code, all written submissions should be filed in English and all exhibits submitted in any other language should be accompanied by an English translation.

29. On 1 June 2020, the Appellant requested, pursuant to Article R44.3 of the Code, that the Respondent make available a copy of the regulations of the DADC, which were not publicly available.

30. On 8 June 2020, the CAS Court Office acknowledged receipt of the Appellant's request of 1 June 2020 and informed the Parties that, if the Respondent did not provide the Appellant with the requested documents by 12 June 2020, it would be for the Sole Arbitrator to decide on such request pursuant to Article R44.3 of the Code.

31. On 9 June 2020, the Respondent informed the CAS Court Office that it agreed with the appointment of the same Sole Arbitrator in the three appeals, and had no objections to the selection of English as the language of the proceedings nor to the Appellant's request for extension to submit the Appeal Brief.

32. On 10 June 2020, the Respondent informed the Appellant that the DADC Regulations were available on RUSADA's website and shared with the Appellant the requested documents related to the Appealed Decision.

33. On 10 June 2020, the CAS Court Office informed the Parties that the Appellant's deadline to file the Appeal Brief resumed from 10 June 2020 and the three appeals were submitted to the same Sole Arbitrator.

34. On 12 June 2020, the Appellant requested a further extension to submit the Appeal Brief by 19 June 2020.

35. On 15 June 2020, the CAS Court Office informed the Parties that, in light of their agreement, the Appellant's request was granted.

36. On 20 June 2020, the Appellant filed his Appeal Brief pursuant to Article R51 of the Code (the "Appeal Brief").

37. On 22 June 2020, the CAS Court Office informed the Respondent that, pursuant to Article R55 of the Code, it should submit its Answer within twenty days.

38. On 10 July 2020, the Respondent requested an extension to submit the Answer by 20 July 2020. The Appellant consented thereto and the CAS Court Office accordingly granted the extension.

39. On 13 July 2020, pursuant to Article R54 of the Code, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to appoint Mr Vladimir Novak as the Sole Arbitrator and that the file had been transferred to the Sole Arbitrator on the same day.

40. On 17 July 2020, the Respondent requested a further extension to submit the Answer by 24 July 2020. The Appellant consented thereto and the CAS Court Office accordingly granted the extension.

41. On 24 July 2020, the Respondent filed its Answer pursuant to Article R55 of the Code (the "Answer").

42. On 27 July 2020, the CAS Court Office invited the Parties to inform the CAS Court Office by 3 August 2020 whether they would prefer a hearing to be held in this matter or for the Sole Arbitrator to issue an Award based solely on the Parties' written submissions.

43. On 28 July 2020, the Appellant requested an expedited hearing in view of the forthcoming Russian Athletics Championships on 8 September 2020. The Respondent did not express its view on the Appellant's request for an expedited hearing. The Appellant also objected to the deposition of Respondent's witnesses because the Respondent failed to submit a brief summary of their expected testimony, though noted her willingness to withdraw the objection if such error is corrected before the hearing. In addition, the Appellant objected to the deposition of the Respondent's witness, Ms. Elena Ikonnikova, on the ground that she was charged with anti-doping rule violation of Tampering and Complicity and was provisionally suspended by the Athletics Integrity Unit ("AIU") in November 2019.

44. Following correspondence with the Parties, the oral hearing date was set for 23 September 2020. Due to the prevailing Covid-19 pandemic, and associated travel limitations and safety concerns, the Parties and the Sole Arbitrator agreed to conduct the oral hearing via videoconference (Webex).

45. On 9 September 2020, the CAS Court Office informed the Parties that, pursuant to Article R44.2 of the Code, the Parties should call to be heard by the Sole Arbitrator the witnesses and experts which they specified in their written submissions. The Parties were reminded that they were responsible for the availability and costs of the witnesses to be heard at the oral hearing. Furthermore, as the language of the present arbitration

is English, any person requiring the assistance of an interpreter is obliged to arrange for the attendance of an independent, non-interested interpreter, retained at the expense of the requesting Party. The Parties were also invited to provide, by 14 September 2020, the CAS Court Office with the names, phone numbers and email addresses of all persons attending the hearing.

46. On 14 September 2020, the Appellant submitted the list of its witnesses and their details. The Respondent did not respond within the prescribed deadline.

47. On 23 September 2020, a hearing took place via videoconference. The Sole Arbitrator was assisted by Ms. Andrea Sherpa-Zimmermann, CAS Counsel and Mr. Jon Polanec (with the agreement of the Parties), and joined by the following participants:

- For the Appellant:
  - Mr. Sergei Lisin, Counsel;
  - Mr. Sergei Mishin, Counsel;
  - Mr. Artem Denmukhametov, witness; and
  - Mr. Rudolf Verkovykh, the Appellant.
- For the Respondent:
  - Mr. Graham Arthur, Counsel;
  - Ms. Elena Dronina, Interpreter; and
  - Mr. Leonid Ivanov, witness,
  - Ms. Elena Barabonova, non-participating observer from RUSADA's Results Management department.

48. At the hearing, the Parties agreed to the following schedule of witness examination:

- Mr. Leonid Ivanov, the Respondent's Witness;
- Mr. Artem Denmukhametov, the Appellant's Witness; and
- Mr. Rudolf Verkovykh, the Appellant.

49. The witness testimonies and arguments raised by the Parties during the hearing are, where relevant, discussed in the corresponding Merits section of the present Award.

50. At the end of the hearing, the Respondent confirmed that its right to be heard had been respected. The Appellant's alleged objection with respect to his right to be heard is dealt in section VIII.E of the Award.

51. On 23 September 2020, the Parties returned the signed Order of Procedure.

52. On 28 September 2020, reflecting agreement at the oral hearing, the CAS Court Office informed the Parties that they had until 8 October 2020 to submit their post-Hearing submissions, which were not to exceed 15 pages.

53. On 29 September 2020, the Respondent requested an extension to submit the post-Hearing submissions by 16 October 2020 and indicated that the Appellant consented thereto. The extension request was granted by the CAS Court Office.

54. On 16 October 2020, the Parties submitted their post-Hearing submissions.

IV. SUBMISSIONS OF THE PARTIES

55. The Appellant's Appeal Brief contained the following requests for relief:

"*In light of the above, CAS is asked:*

a. to find that the requirement in 2.10.2 ADR for written notice has not been satisfied;

b. to find that there was no anti-doping rule violation;

c. to award the Athlete ex aequo et bono a compensation for damages sustained by the Athlete as a result of systematic violation by RUSADA of the Athlete's right to fair hearing, intimidation, confidentiality breach and undue interference following submission of this appeal to CAS;

d. to award the Appellant a contribution of his costs, including (i) CAS Court Office Fee, and (ii) reasonable and documented courier and travel costs incurred by the Appellant's representatives, if any."

56. In support of his relief, the Appellant relied on the following principal arguments.

- The Appellant did not dispute that:
    - He learned about the existence of the Coach's ban before 15 November 2018, the date of the first alleged ADR violation, though he was not aware of the allegations against the Coach nor the details of the findings against him. The Appellant believed that the Coach could train him (and other athletes) unofficially.

- On 30 October 2018, the Appellant produced a written statement indicating that he was aware that he was prohibited to associate with the Coach. The written statement was dictated to the Appellant by a RUSADA official, Mr. Leonid Ivanov. However, the Appellant did not receive any written notice from RUSADA.

- He participated in training activities on 15 November 2018 and 22 April 2019 in the Republic of Kyrgyzstan under the Coach's directions.

- The Appellant could not have been sanctioned for violation of Article 2.10 of the ADR because he was not advised in writing by an anti-doping organization with jurisdiction over him, nor by WADA, of the Coach's disqualifying status and the potential consequences of associating with the Coach. In the Appellant's view, a written warning is a necessary condition before finding a violation of the Prohibited Association Rule. If this condition is not satisfied, no ADR violation is committed.

- The written statement prepared by the Appellant on 30 October 2018 does not meet the requirements of a written notice within the meaning of Article 2.10 of the ADR. On 30 October 2018, the Appellant had a meeting with a RUSADA official, Mr. Ivanov. However, during this meeting the Appellant was not provided with any written warning or notice. Rather, the Appellant was instructed to produce a written statement by himself acknowledging that his association with the Coach was prohibited.

- The Appellant requested *ex aequo et bono* compensation for damages sustained as a result of systematic violation by the Respondent of (i) the Appellant's right to a fair hearing; (ii) intimidation; (iii) confidentiality breach; and (iv) undue interference following submission of the Appeal.

57. In the post-Hearing submission, the Appellant reiterated his previous arguments and further submitted that:

- The written notice prepared by the Appellant on 30 October 2018 did not qualify as a written notice pursuant to Article 2.10 of the ADR because the written statement (i) did not provide an explanation as to what the prohibited association meant; (ii) did not elaborate to the full extent possible on the potential Consequences of such association; and (iii) was collected from the athlete rather than delivered to the athlete to convey the message unequivocally and in good faith.

- The Appellant testified that he did not have precise knowledge regarding the nature and the origin of the sanction imposed on the Coach. He was misled, and for a certain period of time genuinely believed that the banned status of the

Coach meant that the Appellant could not indicate the Coach as his coach under the competition protocols.

- The requirement of a written notice in Article 2.10 of the ADR is very clear and does not require a purposive interpretation that completely reverses the clear language of the provision as suggested by the Respondent.

- The Appellant's request for monetary damages is not related to the substance of the disputed ADR violation, though the alleged violations committed by RUSADA cannot be separated from this Appeal. The Sole Arbitrator has full jurisdiction to award the Appellant *ex aequo et bono* damages as a result of systematic violations committed by the Respondent.

58. The Respondent's Answer contained the following requests for relief:

"*For the reasons explained in this Response Brief, RUSADA says that –*

The Appellant has committed an Anti-doping rule violation contrary to ADR Article 2.10;

The Consequences to be applied in respect of the Anti-Doping Rule Violation are that a period of Ineligibility be imposed pursuant to Article 10.3.5;

RUSADA respectfully requests that costs be awarded to RUSADA in accordance with Rule 64.4. and Rule 64.5 of the Code of Sports-related Arbitration."

59. In support of its relief, the Respondent relied on the following principal arguments.

- On 30 October 2018, the Respondent's official, Mr. Ivanov, met with the Appellant. During that meeting, the Appellant prepared a written statement, which, among others, included the following:

  "*I have been explained that participation of Kazarin Vladimir Semenovich in my sport preparation will be considered as prohibited association and can result in disqualification because it is a violation of All-Russian Anti-Doping Rules.*" Accordingly, the Appellant received a written notice as envisaged under Article 2.10 ADR

- The key element for finding an ADR violation under Article 2.10 of the ADR is whether (i) the athlete *knows* that the person with whom he or she associates is serving a period of ineligibility; and (ii) the athlete nonetheless associates with that person.

- Further, the Respondent acknowledged that the Appellant was in a difficult position. On the one hand, he was involved with the Coach and it was difficult

for him to terminate the relationship. On the other hand, the Appellant was aware that he was risking disciplinary action by associating with the Coach. However, these are issues regarding fault and do not alter the fact that an ADR violation was committed.

- The Respondent disagreed with the Appellant's request for damages and submitted that the Appellant should bring his claims before the Russian courts.

60. In the post-Hearing submission, the Respondent reiterated its previous submissions and further submitted that:

- On 30 October 2018 the Appellant met with Mr. Ivanov, who advised him that if he were to continue to associate with the Coach, he would risk committing an ADR violation. This advice was recorded in writing and the Appellant prepared a written statement on 30 October 2018.

- Mr. Ivanov asked the Appellant to prepare a written statement to avoid any subsequent claims of misunderstanding or ambiguity in the document. There is no doubt that the Appellant understood the advice that was given to him during the meeting on 30 October 2018.

- The written statement prepared by the Appellant on 30 October 2018 is very clear and there is no question that the Appellant did not understand that which he signed. The written statement satisfied the requirements of Article 2.10 of the ADR.

- The Appellant's request for damages has nothing to do with the dispute at hand, *i.e.*, whether the Appellant committed an ADR violation.

V. JURISDICTION

61. The Appellant submitted that the CAS has jurisdiction pursuant to Article R47 of the Code and Article 13.2 of the ADR. The Respondent did not contest this.

62. 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 CAS if the statues or regulations of the said body so provide or if the parties have concluded a specific arbitrator agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statues or regulations of that body.*

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned."

63. Article 13.2 of the ADR provides as follows:

"*13.2. Appeals from Decisions Regarding Anti-doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction*

The following decision may be appealed exclusively as provided in Articles 13.2-13.6:

- *a decision that an anti-doping rule violation was committed;*
- *a decision imposing Consequences or not imposing Consequences for anti-doping rule violations;*
- […]."

64. Articles 13.2.1 and 13.2.2 of the ADR provide as follows:

"*13.2.1 Appeals involving International-level Athletes or International Events*

In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.

13.2.2 Appeals Involving Other Athletes or Other Persons

13.2.2.1 In cases where Article 13.2.2. is not applicable, the decision may be appealed exclusively to CAS."

65. Article 1.3.3.2 of the ADR provides as follows:

"*National-Level Athletes are considered as Athletes that participate in the competition included in the Single Calendar Plan of inter-regional, all-Russian and international physical culture events and sport events having "all-Russian" status: Russian Championship, Russian Junior Championship, Russian Cup, and other official national Russian sport events, provided that such Athletes are not classified by their respective International Federations as International-Level Athletes.*"

66. The Sole Arbitrator notes that Article 13.2 of the ADR (applicable to the Appealed Decision), read in conjunction with Article 13.2.2 of the ADR (applicable to the Appellant as a *national-level athlete* per Article 1.3.3.2 of the ADR) explicitly provides for an appeal to the CAS. The Sole Arbitrator therefore concludes that CAS has jurisdiction to entertain the present Appeal.

VI. ADMISSIBILITY

67. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statues or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after any submission made by the other parties."

68. Article R51 of the Code provides as follows:

"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the appellant fails to meet such time limit."

69. Article 13.6 of the ADR provides as follows:

"The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party."

70. The admissibility was not contested by the Respondent.

71. The Sole Arbitrator notes that the Appellant received the Appealed Decision on 30 March 2020. The Appellant filed the Statement of Appeal on 15 April 2020, and therefore within the 21-day time limit prescribed by the ADR. Further, as explained in Section III above, following the suspension of the deadline to file the Appeal Brief and subsequent extensions until 19 June 2020, the Appellant filed the Appeal Brief on 19 June 2020 and was thus timely.

72. Accordingly, the present Appeal is admissible.

VII. APPLICABLE LAW

73. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

74. Article 1.3.3.1 of the ADR provides as follows:

"*1.3.3.1 These Anti-Doping Rules shall apply to the following Persons:*

a) All Athletes who are nationals, residents, license-holders or members of All-Russian Sports Federation in the Russian Federation, including Athletes who are not nationals or residents of the Russian Federation but who are present in the Russian Federation and Athletes that participate in Events organized by a sports organization registered on the territory of the Russia Federation."

75. The Appealed Decision was issued under the ADR, which is not disputed. Accordingly, consistent with Article R58 of the Code and CAS jurisprudence, the Sole Arbitrator concludes that the ADR should apply as the primary applicable law to the present case.[1]

76. On a subsidiary basis, since RUSADA is domiciled in Russia (and absent choice of law by the Parties), the Sole Arbitrator shall resort to Russian laws to fill in any gaps or lacuna stemming from the primary applicable law.

VIII. MERITS

77. As a preliminary remark, the Sole Arbitrator explains why he did not hold an expedited proceeding in this case.

78. Article R52 of the Code provides as follows:

"*With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure.*"

79. The Sole Arbitrator declined to conduct an expedited hearing for the following reasons.

- First, the expedited CAS procedure cannot be imposed on the Parties. It is necessary that both Parties consent to the fast-track procedure. In other words, even if the case is clearly and objectively urgent, it is not possible to have an

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1 The Sole Arbitrator notes that the facts giving rise to the case at hand took place between November 2018 and April 2019. The relevant ADR editions at that time were the ADR as amended on 17 October 2016 and on 17 January 2019, respectively. Given that relevant parts of the ADR related to the issues at hand (in particular Article 2.10) are identical between the 2018 and 2019 versions, the Sole Arbitrator refers solely to the 2019 edition of the ADR. In accordance with the principle of *tempus regit actum*, the 2019 ADR are applicable to procedural terms.

expedited procedure if one of the Parties objects thereto.[2] The Sole Arbitrator notes that the Respondent did not submit its views in this regard.

- Second, the Appellant's request was made almost four months after the submission of the Statement of Appeal, almost two months after the submission of the Appeal Brief, and after agreeing to two additional extensions to the Respondent's deadline to submit the Answer. The Sole Arbitrator notes that it is common to submit a request for an expedited procedure together with the Appeal Brief.[3]

- Third, the Appeal raises novel legal issues that have yet to be addressed by the CAS.

80. The Sole Arbitrator recalls that it is not disputed between the Parties that (i) the Appellant was aware that the Coach had been banned from training athletes; (ii) the Appellant trained with the Coach after the Coach was banned by the CAS in 2017; and (iii) in October 2018 the Appellant had a meeting with a RUSADA official, Mr. Ivanov, during which the Appellant prepared a written statement.

81. However, the following principal issues are disputed between the Parties:

- Is it necessary that an athlete has been previously advised in writing by an anti-doping agency of the athlete support person's disqualifying status and the potential consequences of prohibited association before an athlete could be sanctioned for a violation of Article 2.10 of the ADR?

- If so, did the Appellant's written statement prepared on 30 October 2018 satisfy this requirement?

A. Background

82. The present Appeal does not concern a typical doping case. The Appellant did not fail a doping test (though, he had one whereabouts failure in summer 2020, after the Appealed Decision was adopted) nor is there any indication in the file that he used or witnessed the use of prohibited substances. Instead, he was charged with a Prohibited Association in violation of Article 2.10 of the ADR. In essence, the anti-doping rule

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2 *See* Mavromati and Reeb, "T*he Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

3 *See* CAS 2014/A/3694, para. 31; CAS 2010/A/2216, p. 3; CAS 2013/A/3256, para. 74; and CAS 2014/A/3793, para. 3.1.

offence stems from the Appellant's *association* with the Coach, who was sanctioned with a lifetime period of ineligibility for anti-doping rules violations.[4]

83. As previously stated by the WADA President, Sir Craig Reedie, "*WADA is increasingly of belief that athletes do not dope alone, and that often there is a member of their entourage encouraging them to cheat.*"[5] There have been several high-profile examples where athletes have continued to work with coaches who have been banned or with other individuals who have been criminally convicted for providing performance-enhancing drugs.[6] As a result, a new anti-doping rule violation called "*Prohibited Association*" was introduced in the 2015 WADA Code (Article 2.10 of the ADR mirrors the wording in the 2015 WADA Code).[7] At that time, WADA stated that the newly adopted Prohibited Association Rule sent a clear message to athletes not to associate with individuals that have breached anti-doping rules because such individuals may encourage athletes to cheat the system and "*rob fellow athletes of their right to clean sport.*"[8]

84. Despite being introduced almost 5 years ago, the Prohibited Association Rule is still in its infancy with regard to sanctioning.[9] As publicly stated by the Respondent in relation to the present Appeal and the appeals of the two other athletes, "*the cases of these three athletes, which were considered late last year, were the first cases in world history when athletes were sanctioned for prohibited association.*" Accordingly, the Appeal is the first time that the CAS is considering the Prohibited Association Rule.[10]

85. On 15 June 2020 the 2021 WADA Code was approved, and is set to enter into force on 1 January 2021. In the recently approved 2021 WADA Code, the Prohibited

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4 *See* CAS 2016/A/4480.

5 WADA, "*WADA Publishes Global List of Suspended Athlete Support Personnel*", 14 September 2015, available at: https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-global-list-of-suspended-athlete-support-personnel; *see* also Kingsley Napley, "*The Wrong Crowd – Protecting Athletes from Prohibited Association*" Lexology, 22 November 2017.

6 WADA, "*Athlete Reference Guide to the 2015 World Anti-Doping Code*", 18 September 2014, p. 9.

7 WADA, "*Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0*", 1 September 2013, p. 4.

8 WADA, "*WADA Publishes Global List of Suspended Athlete Support Personnel*", 14 September 2015, available at: https://www.wada-ama.org/en/media/news/2015-09/wada-publishes-global-list-of-suspended-athlete-support-personnel.

9 *See* WADA, "*2015 Anti-Doping Rules Violations (ADRVs) Report*", 3 April 2017, p. 31; WADA, *2016 Anti-Doping Rules Violations (ADRVs) Report*, 26 April 2018, p. 33; WADA, *2016 Anti-Doping Rules Violations (ADRVs) Report*, 19 December 2019, p. 33.

10 The Sole Arbitrator notes that the Sport Resolutions, an independent non-profit dispute resolution service for sport based in the United Kingdom, issued a decision on 21 October 2019 regarding the interpretation of the Prohibited Association Rule included in Article 2.10 of the ADR (*see* SR/Adhocsport/186/2019 in case *International Association of Athletics Federations (IAAF) and Artyom Denmukhametov*, 21 October 2019).

Association Rule is substantially revised. The Sole Arbitrator addresses the revision below.

B. Interpretation of the Prohibited Association Rule

86. Article 2.10 of the ADR provides as follows:

"*Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support Person who:*

2.10.1 If subject to the authority of an Anti-Doping Organization, is serving a period of Ineligibility;

[…]

In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is subject of the notice to the Athlete or other Person that the Athlete Support Person may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her.

The burden shall be on the Athlete or other Person to establish that any association with Athlete Support Personnel described in Article 2.10.1 or 2.10.2 is not in a professional or sport-related capacity."

87. The Sole Arbitrator notes that, based on a plain reading of the wording of Article 2.10 of the ADR, four conditions may be discerned:

- First, the athlete "*has been previously advised in writing.*"
- Second, the notice must be given by "*an Anti-Doping Organisation with jurisdiction over the Athlete* […], *or by WADA.*"
- Third, the notice must be "*of the Coach's disqualifying status*" and "*of the potential Consequence of prohibited association.*"
- Fourth, the athlete "*can reasonably avoid the association.*"

88. At the outset, the Sole Arbitrator notes that the Prohibited Association Rule included in the ADR mirrors Article 2.10 of the WADA Code. Given that WADA is itself a Swiss private law foundation with its seat in Lausanne, its rules should comply with Swiss law

as otherwise the Swiss Courts will declare them to be non-compliant.[11] In accordance with the CAS jurisprudence, the interpretation of the WADA Code (including the Prohibited Association Rule) must be consistent with Swiss law, as the law with which the WADA Code must comply. Such an interpretation ensures that the WADA Code is not subject to the vagaries of myriad systems of law throughout the world, but is capable of uniform and consistent construction wherever it is applied.[12] Furthermore, the Sole Arbitrator emphasizes that the provisions included in the ADR "*shall be interpreted in a manner that is consistent with applicable provision of the* [WADA] *Code.*"[13]

89. The Sole Arbitrator recalls that under Swiss law, "*the starting point for interpreting a legal provision is its literal interpretation.*"[14] As consistently held by the Swiss Federal Tribunal, there is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review.[15] If the provision under review is clear and unambiguous, an authority applying the provision is bound to follow its literal meaning, provided it expresses its true meaning. Only if a text is not clear and if several interpretations are possible, one must determine the true scope of the provision by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of provision (teleological interpretation).[16]

90. According to the well-established CAS jurisprudence, the Sole Arbitrator notes that the interpretation of a rule should indeed begin first and foremost with the text.[17] Moreover, it is not for the Sole Arbitrator, nor the CAS more generally, to question the policy or intent of anti-doping rule makers, in particular given that the WADA Code emphasises that "*when reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature*

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11 CAS 2006/A/1025, para. 15.

12 CAS 2006/A/1025, para. 16.

13 *See* Article 20.6 of the ADR: "*These Rules have been adopted pursuant to the applicable provisions of the* [WADA] *Code and shall be interpreted in a manner that is consistent with applicable provisions of the* [WADA] *Code.*"

14 CAS 2015/A/4345, para. 99.

15 *See* 137 IV 180, 184; *see* also CAS 2013/A/3365&3366, para. 139.

16 CAS 2015/A/4345, para. 99.

17 By way of parallel, the Sole Arbitrator also recalls "*the text is the law, and it is the text that must be observed*", the adage of the late U.S. Supreme Court Justice Scalia, under which 'interpretation' is used only if the statutory language is unclear, and the scrutiny begins with the text but it does not end there. This topic has recently resurrected in connection with the U.S. Senate confirmation hearings for the U.S. Supreme Court Justice nominee, Justice Amy Coney Barrett, a former clerk of late Justice Scalia, who remarked that the "*judge approaches the text as it is written with the meaning at the time*".

of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport" (emphasis added).[18] The Sole Arbitrator therefore must exercise caution when engaging in interpretation of rules that, upon the face of the text, leave little doubt as to their meaning.

91. The Sole Arbitrator notes that the germane part of Article 2.10 of the ADR states as follows: "*In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing* [...]". The Sole Arbitrator observes the following elements of the *text* at issue:

- The use of the wording "*in order for this provision to apply*" makes it abundantly clear that the application of the Prohibited Association Rule is subject to the requirements that follow in the text at issue.

- The use of the wording "*it is necessary that*" leaves little doubt that the satisfaction of the ensuing conditions is not discretionary but in fact *necessary*. The word "*necessary*" is generally understood as "*needed for a purpose or a reason*".[19] Accordingly, the ensuing conditions are effectively "conditions precedent".

- The use of the wording "*previously advised in writing*" unambiguously mandates a previous advice in writing.

- Further, the Sole Arbitrator notes that the wording "*in order for this provision to apply, it is necessary that*" is not used anywhere else in the WADA Code or the ADR. Therefore, the ensuing conditions (*i.e.*, "*previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association*") are arguably inherent in the violation itself.

92. In light of the foregoing, the Sole Arbitrator is convinced that the text of the Prohibited Association Rule unambiguously provides that in order to charge an athlete with the violation of Article 2.10 of the ADR, the athlete ought to be advised in advance, in writing, about the rule in question and the consequences of its breach.

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18 *See* 2015 WADA Code, "*Doping Control, Introduction*", p. 16.

19 https://www.oxfordlearnersdictionaries.com/us/definition/english/necessary?q=necessary.

93. For completeness, the Sole Arbitrator also proceeds with scrutiny of the Prohibited Association Rule that goes beyond its text. The following seven considerations bear emphasis.

94. First, the Sole Arbitrator recalls that in accordance with the well-established CAS jurisprudence, any ambiguous provisions of a disciplinary code must in principle be constructed *contra proferentem*:[20]

> "*The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders*".[21]

> "*Pursuant to CAS jurisprudence, the different elements of the rules of a federation shall be clear and precise, in the event they are legally binding for the athletes (see CAS 2006/A/1164; CAS 2007/A/1377; CAS 2007/A/1437). Inconsistencies/ambiguities in the rules must be constructed against the legislator (here: FIS) as per the principle of "contra proferentem" (CAS 2013/A/3324 & 3369; CAS 94/129; CAS 2009/A/1752; CAS 2009/A/1753; CAS 2012/A/2747; CAS 2007/A/1437; CAS 2011/A/2612)*".[22]

95. Indeed, as expressed by the Sole Arbitrator's esteemed colleagues in another matter, clarity and predictability of the rules are essential for the entire sporting community and athletes in particular should be able to understand the meaning of those rules and the circumstances in which they apply:

> "*The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live,*

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20 The *contra proferentem* principle states, broadly, that where there is doubt with regard to the meaning of the contract or the rule, the preferred meaning should be the one that works against the interests of the party who provided the wording.

21 CAS 94/129, para. 34.

22 CAS 2014/A/3832 & 3833, para. 85.

work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply".[23]

"*It is equally important that athletes in any sport (including Waterpolo) know clearly where they stand. It is unfair if they are to be found guilty of offences in circumstances where they neither knew nor reasonably could have known that they were doing was wrong (to avoid any doubt we are not to be taken as saying that doping offences should not be offences as a strict liability, but rather that the nature of the offences [as one of strict liability] should be known and understood)*".[24]

96. Second, the Sole Arbitrator takes due account of materials that may shed light on the interpretation of the Prohibited Association Rule.[25] These materials overwhelmingly refer to a written advance notification requirement.

- WADA's Result Management, Hearings and Decisions Guidelines (the "WADA Guidelines"),[26] issued in 2014, effective from 2015, recommend the following steps be taken in the application of the Prohibited Association Rule:
  - Step 1: The anti-doping organization advises the Athlete or other Person in writing of the disqualifying status of the Athlete Support Personnel.

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23 CAS 2004/A/725, para. 20.

24 CAS 96/149, para. 31.

25 The Sole Arbitrator is not aware of any commentary issued in relation to the Prohibited Association Rule in the ADR (nor did the Parties refer to one). The commentary to Article 2.10 of the WADA Code provides as follows: "*Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rules violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment of prescriptions; providing any bodily product for analysis; or allowing the Athlete Support Person to serve as an agent or representative. Prohibited association need not involve any form of compensation.*" Accordingly, the commentary does not shed light on the question of whether a written notice is required before an athlete could be found in violation of the Prohibited Association Rule.

26 *See* WADA, "*Result Management, Hearings and Decisions Guidelines*", October 2014. The WADA Guidelines were prepared by WADA in conjunction with several key stakeholders in order to harmonize the practice of anti-doping organizations. Although the WADA Guidelines are not mandatory, they are intended to provide clarity and additional guidance to anti-doping organizations as to the most efficient, effective, and responsible way of discharging their responsibilities in terms of Results Management. The WADA Guidelines are a model for best practice developed as part of the World Anti-Doping Program. They have been drafted to provide anti-doping organizations with Results Management responsibilities with a document detailing in a step-by-step fashion the phases of the Results Management process, hearing and decision processes, and execution.

- Step 2: The anti-doping organization ensures that the Athlete or other Person is provided with the opportunity to explain why he or she cannot reasonably avoid the association.

- Step 3: The anti-doping organization ensures that the Athlete or other Person is provided with the opportunity to explain why the relevant Athlete Support Personnel is not disqualified.

- If the prohibited association continues despite the written warning addressed to the athlete, proceedings shall be instigated.

- The WADA Guidelines include a model template of the first written notice to be provided to the athlete.[27] The template recommends that the relevant anti-doping organization explain in reasonable details the basis for the belief that the athlete has been associating with a disqualified person. The evidence relied upon by the anti-doping organization may be a combination of witness evidence, as well as open source information such as news reports, press articles and so forth. The evidence must support a strong case (*i.e.*, to the "*comfortable satisfaction standard*") that both the "*association*" is taking place, and that the nature of the association falls within Article 2.10 of the WADA Code.

- The model template of the first written notice to the athlete concludes as follows: "*If you fail to cease all association with [Name] within the timeframes stipulated* in the notice, *this matter may result in disciplinary proceedings being brought against you. In particular, you may be charged with committing an ADRV contrary to Article 2.10. the sanction provided in the ADR in respect of such a violation is a period of ineligibility from sport of between 1 and 2 years.*"

- A quiz published on WADA's website includes the following explanation in relation to the Prohibited Association Rule: "*Prohibited Association is an Anti-Doping Rule Violation (ADRV) that athletes can be sanctioned for, if they have previously been advised in writing by an Anti-Doping Organization or WADA of the Athlete Support Person's disqualifying status and the potential consequence of prohibited association*" (emphasis added).[28]

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27 *See* WADA, "*Result Management, Hearings and Decisions Guidelines*", October 2014, Template C: Prohibited Association (first letter), p. 121–124.

28 *See* WADA, *Play True Quiz* available at: https://www.wada-ama.org/sites/default/files/resources/files/english_0.pdf.

- WADA's Athlete Reference Guide to the 2015 World Anti-Doping Code includes the following explanation regarding the Prohibited Association Rule: "*A new feature of the Code taking effect at the start of 2015 makes it an anti-doping rule violation for you to associate with this sort of 'athlete support person' once you have been specifically warned not to engage in that association*" (emphasis added).[29]

- WADA's ADO Reference Guide to the WADA Code, which outlines the changes in the 2015 WADA Code and highlights issues on which anti-doping organizations should focus, explains the following in connection with the Prohibited Association Rule: "*Before an athlete can be found to have violated this Article, he/she must have received written notice from and ADO of both the: Athlete's support personnel's disqualification status, and Consequences of continued association*" (emphasis added).[30]

97. Third, the Sole Arbitrator notes the following guidance provided by leading national anti-doping organizations, which refer to an advance written notification requirement.

- The UK Anti-Doping ("UKAD") agency explains that if an athlete knows that someone is serving an anti-doping ban, and he or she nevertheless continues to associate with that person, then the athlete is at risk of violating the Prohibited Association Rule. The UKAD clarifies that "*before an Anti-Doping Organisation (such as UKAD) can charge you with a breach of Prohibited Association Rule* [...] *you must have been given a written notice of the person's banned status and the potential consequences of prohibited association...*".[31]

- According to Article L 232-9-1 of the French Code of Sports (*Code du Sport*), if the French Anti-Doping Agency ("AFLD") considers that the athlete is seeking assistance from athlete support personnel that is disqualified, it must notify the athlete and give him or her a deadline to present his or her observations.[32] This guarantee is not considered superfluous, but rather a necessary complement.[33]

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29 *See* WADA, "*Athlete Reference Guide to the 2015 World Anti-Doping Code*", 18 September 2014, p. 9.

30 WADA, "*ADO Reference Guide to the Code*", 30 July 2015, p. 23.

31 *See*, UKAD, "*What is "Prohibited Association"?*", available at: https://www.ukad.org.uk/what-prohibited-association.

32 Article L232-9-1 of *Code du sport*.

33 *See* Jean-Paul Costa, "*Legal opinion 2019 (expert opinion on the World Anti-Doping Code*", 26 September 2019.

- The U.S. Anti-Doping Agency ("USADA") explains that "*first and foremost, it is important for athletes to realize that they are not in violation of Prohibited Association rule unless they are notified of the prohibited association and then KNOWINGLY continue on with the professional sport relationship.*"[34]

98. Fourth, the Sole Arbitrator notes that Article 2.10 of the ADR (mirroring Article 2.10 of the WADA Code) establishes different *efforts* standards for the anti-doping organization in relation to an athlete and an athlete support person. This further supports the assertion that there is a strict notification standard when it comes to the athlete.

Notification to an athlete	**Notification to an athlete support person**
"*In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing* [...]" (emphasis added).	*The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is subject of the notice to the Athlete or other Person* [...]"(emphasis added).

99. Fifth, the Sole Arbitrator notes that the Prohibited Association Rule appears to be the only anti-doping rule that requires an advance written notice before finding an ADR violation. If that were not the intention, it is difficult to understand why the authors of the 2015 WADA Code included specific wording requiring that "[i]n *order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing.*"

100. Sixth, the requirement that a written notice be provided to the athlete before the anti-doping organization may find a violation of the Prohibited Association Rule is consistent with the special nature of this rule. The Prohibited Association Rule, when applied to an athlete, is a violation that was added to the list of anti-doping offences not because the athlete in question committed a violation, but because somebody else did. In that sense, the Prohibited Association Rule was added as a new rule to protect athletes further from bad influence, thus imposing on him or her an obligation to act with more prudence. As such, the Prohibited Association Rule is aimed at dissuading athletes from working with athlete support personnel who have committed an ADR violation or who have been convicted of doping-related activities.[35]

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34 *See* USADA, "*Keeping Good Company: Prohibited Association*", 10 May 2016, available at: https://www.usada.org/spirit-of-sport/education/keeping-good-company/.

35 *See* WADA, "*ADO Reference Guide to the Code*", 30 July 2015, p. 22.

101. Seventh, the Sole Arbitrator takes due account of the recent developments in connection with the adoption of the 2021 WADA Code.

- During the 2021 WADA Code consultation process, various stakeholders submitted their observations. The following examples of observations indicate that the version of Article 2.10 of the ADR applicable in this case requires a written notice to an athlete:
  - "*The USOC favoured the advance notice requirement to athletes to protect the innocent or unknowing athlete as the original intent of this provision is not to trap athletes with a violation*" (emphasis added).[36]
  - "*The proposed change of article 2.10 does not require the Anti-Doping Organization to notify the Athlete or other person about the Athlete's Support Person's disqualifying status.* [...] *Out of fairness to the athletes, we therefore propose that the current wording of article 2.10 is upheld, whereby in order for this provision to apply, it is necessary that the Athlete or other person has previously been advised in writing* [...]" (emphasis added).[37]
  - "*Under the 2015 WADA Code, there existed a requirement that an Athlete or other Person have been previously advised in writing of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association, so that the Athlete or other Person can reasonably avoid the association... ADO's will no longer have any obligation or incentive to notify athletes that they are working with coaches who are under sanction* [...]" (emphasis added).[38]
- In June 2020, WADA approved and published the 2021 WADA Code, which is set to enter into force on 1 January 2021.[39] In the 2021 WADA Code, the Prohibited Association Rule has been significantly revised. The new rule provides that, in order to establish a violation of the Prohibited Association Rule, the anti-doping organization must establish that the Athlete or other person *knew* of the Athlete Support Person's disqualifying status. This is supported by WADA commentary to Article 2.10 of the 2021 WADA Code: "*while Article*

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36 WADA, "*2021 Code Review – Third Consultation phase*", Comments received from the United States Olympic & Paralympic Committee ("USOC"), 17 June 2019, p. 12.

37 WADA, "*2021 Code Review – Third Consultation phase*", Comments received from the Anti-Doping Denmark ("ADD"), 17 June 2019, p. 15.

38 WADA, "*2021 Code Review – Third Consultation phase*", Comments received from Law Offices of Howard L. Jacobs, 17 June 2019, p. 16.

39 *See* WADA, "*WADA publishes approved 2021 World Anti-Doping Code and International Standards*", 26 November 2019.

2.10 does not require the Anti-Doping Organization to notify the athlete or other Person about the Athlete Support Person disqualifying status, such notice, if provided, would be important evidence to establish that the Athlete or other Person knew about the disqualifying status of the Athlete Support Person."

Article 2.10 WADA Code – Redline comparison[40]

2.10.2 ~~In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by~~To establish a violation of Article 2.10, an *Anti-Doping Organization* ~~with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is the subject of the notice to the Athlete or other Person that the Athlete Support Person may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her. (Notwithstanding Article 17, this Article applies even when the Athlete Support Person's disqualifying conduct occurred prior to the effective date provided in Article 25.)~~must establish that the *Athlete* or other *Person* knew of the *Athlete Support Person's* disqualifying status.

The burden shall be on the *Athlete* or other *Person* to establish that any association with an *Athlete Support* ~~Personnel~~*Person* described in Article ~~2.10.1~~2.10.1.1 or ~~2.10.2~~2.10.1.2 is not in a professional or sport-related capacity and/or that such association could not have been reasonably avoided.

Anti-Doping Organizations that are aware of *Athlete Support Personnel* who meet the criteria described in Article ~~2.10.1, 2.10.2~~2.10.1.1, 2.10.1.2, or ~~2.10.3~~2.10.1.3 shall submit that information to *WADA*.[13]

- The significant revision of the Prohibited Association Rule, which goes beyond mere clarifications, provides strong indication that the rule has been fundamentally changed.

102. In sum, in light of the foregoing, the Sole Arbitrator notes that (1) the text of Article 2.10 of the ADR unambiguously requires that an athlete be provided with an advance notice in writing explaining the Prohibited Association Rule and consequences of its breach, and, for completeness, (2) secondary sources and developments related to Article 2.10 of the ADR confirm the textual interpretation.

103. The Respondent argued, in essence, that the Prohibited Association Rule ought to be interpreted purposefully, not literally, and that an athlete who actually *knows* that he or she is associating with a banned coach and the ensuing consequences, should not escape liability because a *technical* notification requirement may not have been satisfied.

104. The Sole Arbitrator has sympathy for this argument, including the tension between an athlete's actual knowledge and whether that knowledge has been established via a process outlined in Article 2.10 of the ADR. The Sole Arbitrator also acknowledges

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40 WADA, "*2021 Code – Redline Version – November 2019*", 15 June 2020.

that, absent the interpretation put forward by the Respondent, some athletes who may be aware of their violations could escape liability for their actions if they were not served an advance written notice. However, the Sole Arbitrator is not called upon to form or determine the 'right' anti-doping policy or enforcement practice. The Sole Arbitrator must exercise utmost caution in substituting his views or policy preference for what unambiguously arises from the text of the rule in question, which in this case is further supported by secondary materials shedding light on the rule's background and intent. Finally, for completeness, the Sole Arbitrator notes that any policy concerns in this regard could anyway easily be addressed by simply notifying an athlete in accordance with the requirements of Article 2.10 of the ADR.

105. Accordingly, the Sole Arbitrator concludes that, in order to establish a violation of Article 2.10 of the ADR applicable in this case, the Appellant ought to have first been advised in writing by an anti-doping organization with jurisdiction over the Appellant of the Coach's disqualifying status and the potential consequence of prohibited association therewith. Failing to do so, a violation cannot properly be established.

C. Satisfaction of the conditions of the Prohibited Association Rule

106. The Sole Arbitrator now turns to the factual issue as to whether an advance written notice was served to the Appellant prior to establishing a violation of Article 2.10 of the ADR.

107. The Sole Arbitrator notes that it is undisputed between the Parties that, on 30 October 2018, the Appellant met with a RUSADA official, Mr. Ivanov. During the meeting the Appellant prepared a written statement, which reads as follows:

"EXPLANATION

October 30, 2019

09:00 am

Head of RAA RUSADA Investigation Department Leonid Leonidovich Ivanov (full name, position of the person who compiled the document)

With participation of –

obtained explanation from athlete (athlete support personnel);

1. Full name Verkovykh Rudolf Sergeevich

2. Date of birth September 03, 1998

3. Place of Birth city of Chelyabisk

4. Address [...]

Phone number [...]

5. Passport or other documents [...]

6. Coach Khrushcheleva N.P.

7. Medical worker none

8. Place of work [...]

9. I give a consent to processing my personal data

I can explain the following, answering the questions asked from me: I am staying in Kyryzstan, town of Kaji-Saji, Nur holiday house at the training camp where I was sent by the order of the Center of Sport Preparation of Chelyabinsk region. I am at the training camp by myself, without a coach, in the group of athletes of Vadim Ovchinnikov, I do training by Khrushceleva's plan which I know by hearth. I don't know coach Vladimir Semenovich Kazarin in person, but I know him by sight, I saw his photo in the Internet. I know that Kazarin is disqualified as a coach. I have been at the training camp in the city of Kaji-Sai from October 14 to November 3, during my stay in the city of Kaji-Sai and while I rested, I did not meet with Kazarin.

On October 28, 2018, I didn't see Kazarin at the training session. I have been explained that participation of Kazarin Vladimir Semenovich in my sport preparation will be considered as prohibited association and can result in disqualification because it is a violation of All-Russian Anti-Doping Rules. Up to date, Kazarin has not participated in my sport preparation. I don't use prohibited drugs and methods in my preparation. From May 5 to 25, I was at the training camp in Kaji-Sai, Nur holiday house. I did not see Kazarin at the airport on May 25-26. Written by myself. I have no comments or statements. Verkovykh R.S. /Signature/ October 30, 2018

Explanation was given by Verkhovykh Rudolf Sergeevich /Signature/" (emphasis added).

108. The Appellant testified both in writing and at the hearing regarding the circumstances, and his understanding, of the written statement that he prepared on 30 October 2018. The relevant parts of the Appellant's written witness statement expressed as follows:

"*When we were alone, Ivanov started asking me if I was aware where Kazarin was, if he was present in Kaji-Sai and was working with us as a coach. I said that I was not aware where Kazarin was. Ivanov answered, 'You all are not aware, and later, you will be sanctioned'. Ivanov's manner of talking was sarcastic, not serious, which made me assume that the investigation was just a formality for RUSADA. About five minutes later, he told me that it was necessary write a statement in regard of Kazarin. I wrote the*

statement by myself, it is written by my handwriting, but I did that only after the conversation with Ivanov [...].

Before each sentence in the statement, Ivanov asked me a question, I answered to it. Then he dictated what I had to write, changing my answers in the way so that, as he said, it was more official and appropriate for the statement. As a result, my answers, after they were transferred into the text, became more unambiguous. I was cautious about what I was telling Ivanov because Kazarin had told me to never admit training with him in any written statements.

I want to stress that I wrote, 'I have been explained that participation of Vladimir Kazarin in my sport preparation will be considered as prohibited association and can result in disqualification as it is a violation of All-Russian Anti-Doping Rules' because it was Ivanov who told me to write it. He said that I could be disqualified, but he did not mention any specific rule, and I did not understand what he meant. I did not clarify – I again did what I was told to.

Neither Ivanov nor any other RUSADA employee discussed with me at any stage what exactly would happen if I violated the specific anti-doping rule. No number of the anti-doping legislation articles were mentioned for me, neither the entire set of potential consequences nor the grounds for mitigating them" (emphasis added).

109. The Appellant's principal statements at the hearing may be summarized as follows:

- Direct examination:
  - The Appellant met with Mr. Ivanov on 30 October 2018 in a hotel room. Mr. Ivanov told the Appellant that if he continues to associate with the Coach, he may face problems. However, Mr. Ivanov did not explain that the Appellant may be suspended for up to two years.
  - The meeting with Mr. Ivanov lasted around 40 minutes to one hour. During the meeting, the Appellant felt intimidated as Mr. Ivanov acted aggressively. Mr. Ivanov asked the Appellant to prepare a document and instructed him to write exactly as dictated.
  - After the meeting, Mr. Ivanov did not leave a copy of the document with the Appellant. The Appellant received first notice regarding the prohibited association in June 2019.
- Cross-examination
  - The Appellant explained to Mr. Ivanov that he was not training with the Coach because he understood that he could incur financial consequences as the Coach was an influential person. In addition, the Coach previously

instructed the Appellant not to tell RUSADA that he was training with the Coach.

- Mr. Ivanov did not explain anything to the Appellant about the Prohibited Association Rule, nor that his training with the Coach may constitute an ADR violation that could result in disqualification.

- The following wording was included in the document because Mr. Ivanov dictated it to him: "*participation of Kazarin Vladimir Semenovich in my sport preparation will be considered as prohibited association and can result in disqualification because it is a violation of All-Russian Anti-Doping Rules*". However, the document is not a true record of a conversation the Appellant had with Mr. Ivanov.

- At the end of the meeting, the Appellant understood that if he were to continue working with the Coach, it could be a violation, and he might be sanctioned.

- Sole Arbitrator's questions:

  - The Appellant learned of the Coach's disqualification from the media in 2017. He understood that the Coach was not allowed to participate in competitions and the training process.

  - Based on the meeting with Mr. Ivanov on 30 October 2018, he understood that further collaboration with the Coach could lead to his disqualification, meaning that he would be prohibited from training with the Coach.

  - He understood that if he continued to associate with the Coach, it would lead to the Appellant's 'disqualification', meaning that he would not be allowed to train and compete.

- Re-direct:

  - After the meeting, the Appellant did not remember what exactly was dictated to him. He understood the meaning of the Prohibited Association Rule only after receiving the notice from RUSADA in June 2019.

  - After the meeting with Mr. Ivanov on 30 October 2018 he understood that the term prohibited association meant that he could no longer train with the Coach.

110. The Appellant's written testimony regarding the circumstances of signing the statement on 30 October 2018 was supplemented with a written and oral testimony of Mr. Artem Denmukhametov who also had a meeting with Mr. Ivanov on 30 October 2018.

111. Mr. Artem Denmukhametov's principal statements at the hearing may be summarized as follows:

- Direct examination:
  - On 30 October 2018 Mr. Denmukhametov met with Mr. Ivanov in a hotel room. Mr. Ivanov acted in an aggressive manner and inquired whether Mr. Denmukhametov was associating with the Coach. He denied his association with the Coach and Mr. Ivanov explained to him that he had pictures proving otherwise. Mr. Ivanov dictated him to write an explanation note and asked him to keep their conversation confidential.
  - Mr. Ivanov did not explain to him that he may face ineligibility if he continued to associate with the Coach, but he hinted that he may face serious consequences.
  - The meeting with Mr. Ivanov lasted approximately 30 minutes and there were no other witnesses in the hotel room during the meeting.
- Cross-examination
  - Mr. Denmukhametov denied to Mr. Ivanov that he was associating with the Coach although this was false.
- Sole Arbitrator's questions:
  - Mr. Ivanov did not tell Mr. Denmukhametov that there was a risk of suspension of up to two years. However, Mr. Ivanov did mention that he could have problems.

112. Mr. Leonid Ivanov also gave oral testimony regarding the circumstances of signing the statement on 30 October 2018. His principal statements at the hearing may be summarized as follows:

- Direct examination:
  - In October 2018, RUSADA went to Kyrgyzstan to conduct an investigation. During this investigation, Mr. Ivanov met with the Appellant in a hotel room. He wanted to meet with the Appellant because he thought he was a promising athlete and wanted to convince

him to collaborate with RUSADA and to terminate his association with the Coach.

- The meeting with the Appellant lasted approximately 30 minutes. During the meeting, the Appellant refused to confess that he was training with the Coach even though RUSADA had seen him practicing with the Coach. As a result, Mr. Ivanov had no option but to warn the Appellant of the violation and the potential consequences.

- He told the Appellant that working with the Coach might result in a violation of the Prohibited Association Rule. The Appellant prepared a written statement himself – this was usual practice to avoid any misunderstanding afterwards. In particular, Mr. Ivanov was questioning the Appellant and the Appellant put his answers in the written form. The Appellant then signed the document.

- He was absolutely sure that after the meeting the Appellant understood everything that was in the written statement of 30 October 2018.

- Cross examination:

  - Before working at RUSADA, Mr. Ivanov was working at the law enforcement agency in Russia. However, while working at RUSADA he had no connection with the law enforcement.

  - Back in 2018, similar to other anti-doping organizations, RUSADA did not have a lot of experience with the Prohibited Association Rule.

  - During his visit in Kyrgyzstan in October 2018, Mr. Ivanov met with four athletes, including the Appellant and Mr. Artem Denmukhametov. They both prepared written statements.

  - After the meeting with the Appellant on 30 October 2018, the Appellant did not ask for a copy of the written statement. Mr. Ivanov did not have technical possibilities to make a copy. However, athletes may always ask for the document.

- Sole Arbitrator's questions:

  - Mr. Ivanov is aware that RusAF issued the Order 37. However, he did not serve this notice to the Appellant because it was not a document prepared by RUSADA.

  - During the meeting on 30 October 2018, Mr. Ivanov explained to the Appellant that his further training with the Coach might be considered

as a prohibited association and could lead to his disqualification. He explained to the Appellant that engaging in prohibited association may result in suspension from sporting activities for up to two years.

- The reason that the reference to "*disqualification up to two years*" was not included in the Appellant's written statement might be due to the lack of experience with the Prohibited Association Rule and relatedly that at that time Mr. Ivanov did not consider that he needed to take into account all of the details.

- Re-direct:

  - The Appellant did not ask for a copy of the written statement he had prepared on 30 October 2018.

113. The Sole Arbitrator recalls that the Respondent has the burden of proof to establish that the Appellant has committed a violation of the Prohibited Association Rule, including that the Appellant has received a written notice. The relevant part of Article 3.1 of the ADR states as follows:

"*The RUSADA shall have the burden of establishing an anti-doping rules violation has occurred. The Standard of proof shall be whether the RUSADA has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*" (emphasis added).

114. The Sole Arbitrator recalls that four conditions may be discerned from Article 2.10 of the ADR:

- First, the athlete "*has been previously advised in writing*".

- Second, the notice must be given by "*an Anti-Doping Organisation with jurisdiction over the Athlete* [...], *or by WADA*".

- Third, the notice must be "*of the Coach's disqualifying status*" and "*of the potential Consequence of prohibited association*".

- Fourth, the athlete "*can reasonably avoid the association*".

115. The Sole Arbitrator is convinced that the Respondent established to the Sole Arbitrator's comfortable satisfaction that the written statement prepared by the Appellant on 30 October 2018 satisfied all of these conditions. This reflects the following considerations.

Previous advice in writing

116. The Sole Arbitrator notes that the process adopted by the Respondent in drawing up the written notice may not constitute "best practice". However, the Sole Arbitrator is convinced that there is no room for formalism here, and that the written statement prepared by the Appellant on 30 October 2018 does satisfy the requirement of a notice *in writing*:

- The form of the written notice is not specified in Article 2.10 of the ADR and it may vary depending on the context. While the WADA Guidelines contain a model template, it is not mandatory to use that template and the WADA Guidelines anyway do not explicitly prohibit that the statement be prepared by an athlete upon specific oral instructions from an anti-doping organization.

- Mr. Ivanov testified at the hearing that it was a usual practice that the athletes prepare the documents themselves to subsequently avoid any questions or misunderstanding. He also elaborated that RUSADA did not follow such practice only in exceptional circumstances, *e.g.*, where an athlete was handicapped.

- Mr. Ivanov and the Appellant both testified that Mr. Ivanov dictated every word of the statement written by the Appellant. Accordingly, the content of the statement originated from RUSADA, and was "transcribed" by the athlete. As a result, at the end of this process, the Appellant was advised in a "written" form.

- The text of the written statement prepared by the Appellant on 30 October 2018, reveals that Mr. Ivanov and the Appellant had a conversation about the Appellant's involvement with the Coach and the implications of that involvement. The Sole Arbitrator is convinced that the Appellant would not have signed a document that referred to a conversation that had not taken place.

117. Moreover, the written notification also satisfied the temporal requirement of occurring "*previously*" *i.e.*, prior to establishing the violation of Article 2.10 of the ADR. The written statement was prepared on 30 October 2018, hence, before RUSADA alleged that the Appellant committed a violation of the Prohibited Association Rule by participating in training activities with the Coach on 15 November 2018 and 22 April 2019 in the Republic of Kyrgyzstan, which is not disputed between the Parties.

- The Appellant himself prepared a written statement on 30 October 2018 and signed it. The written statement is written in simple language and the Sole Arbitrator has no reason to believe that the Appellant did not understand what he had written himself. In addition, the Appellant wrote at the end of the written statement: "*Written by myself. I have no comments or statements.*"

- The purpose of the written notice under Article 2.10 of the ADR is to personally inform the athlete concerned that association with suspended athlete's support

personnel is prohibited and that the athlete may commit an ADR violation if he or she continues to associate with that individual.

The Appellant, in the written statement dated 30 October 2018, wrote "*participation of Kazarin Vladimir Semenovich in my sport preparation will be considered as prohibited association and can result in disqualification because it is a violation of All-Russian Anti-Doping Rules.*" At the hearing, the Appellant testified that, after the meeting with Mr. Ivanov on 30 October 2018, he understood that his further association with the Coach may result in an ADR violation. Similarly, Mr. Ivanov testified that he is absolutely sure that after the meeting with the Appellant on 30 October 2018, the Appellant understood everything he wrote in the statement.

Anti-Doping Organisation with jurisdiction over the Athlete

118. Article 2.10 of the ADR requires that the Appellant was previously advised in writing by "*an Anti-Doping Organization with jurisdiction over the Athlete*". It is not disputed between the Parties that RUSADA has jurisdiction over the Appellant, but the Sole Arbitrator nonetheless proceeds with the analysis.

119. RUSADA is the Russian national anti-doping organization that has accepted the WADA Code.[41] As a national doping agency, RUSADA is "*vigorously pursuing all potential anti-doping rules violations within its jurisdiction, including investigating whether Athlete Support Personnel or other Person may have been involved in each case of doping, and ensuring proper enforcement of Consequences.*"[42] Moreover, the Appealed Decision was adopted by the DADC, a disciplinary anti-doping committee of RUSADA.

120. It is not disputed between the Parties that Mr. Ivanov acted as a RUSADA official, when he met with the Appellant on 30 October 2018.

121. Accordingly, the notice requirement was satisfied by an anti-doping organization with jurisdiction over the Appellant.

Notice of the Coach's disqualifying status and the potential Consequence of prohibited association

122. The Appellant testified that the meeting with Mr. Ivanov lasted between 40 to 60 minutes and that most of the time was spent on dictating and writing up the statement. This provides strong indication that the 1.5-page statement was not prepared in a rush. Moreover, the statement was expressed in simple language and was written by the

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41 *See* WADA, "Code Signatories", available at: https://www.wada-ama.org/en/code-signatories#OutsideOlympicMovement.

42 *See* Article 1.3.1 of the ADR.

Appellant himself who added the following at the end of the statement: "*Written by myself. I have no comments or statements.*"

123. At the hearing, the Appellant testified that, at the end of the meeting with Mr. Ivanov, he understood that his continued association with the Coach could amount to a violation and he could be sanctioned. Similarly, Mr. Ivanov testified that he is absolutely sure that at the end of the meeting the Appellant understood everything he included in the written statement. The Sole Arbitrator notes that the text of the document is very clear and there is no question that the Appellant did not understand what he signed nor why he signed it.

124. Accordingly, the Sole Arbitrator is comfortably satisfied that the Appellant understood the meaning of the statement he wrote on 30 October 2018.

125. The Sole Arbitrator is also comfortably satisfied that the written statement of 30 October 2018 contained explanations of the Coach's disqualifying status and the potential Consequence of prohibited association thereof. This reflects the following considerations:

- The written statement of 30 October 2018 mentioned that "*I know that Kazarin is disqualified as a coach.*" The Appellant further explained that, after the meeting with Mr. Ivanov on 30 October 2018, he understood that the Coach's disqualification meant that the Coach was not allowed to participate in competition and training process. The Sole Arbitrator is therefore convinced that the Appellant was properly advised by RUSADA about the Coach's disqualifying status.

- The written statement of 30 October 2018 mentioned that "*participation of Kazarin Vladimir Semenovich in my sport preparation* [...] *is a violation of All-Russian Anti-Doping Rules.*" At the hearing, the Appellant testified that he understood, as a result of the meeting with Mr. Ivanov that working with the Coach (*i.e.*, participating in sport preparation) could result in a violation and that he was accordingly prohibited from doing so. The Sole Arbitrator is therefore convinced that the Appellant was properly advised by RUSADA that prohibited association meant the participation of the Coach in the Appellant's sport preparation.

- Further, the Sole Arbitrator notes that Article 2.10 of the ADR prescribes that the athlete should be previously advised in writing of "*the potential Consequence of prohibited association.*" It is noteworthy that the provision references the word "Consequence" in the singular form, even though the ADR provides for a number of "Consequences" that may ensue from an ADR

violation.[43] However, the Sole Arbitrator is convinced that, in order for the written notification to serve its purpose (*i.e.*, warn the athlete), it ought to refer to the most severe sanction that could be imposed – the sanction of ineligibility.[44]

The written statement of 30 October 2018 provided that "*participation of Kazarin Vladimir Semenovich in my sport preparation* [...] *can result in disqualification.*" The word "disqualification" typically refers to the invalidation of the results achieved by an athlete, and not "ineligibility". However, Article 2.10 of the ADR itself uses the term "*disqualifying status*" when referring to an athlete's support personnel. This is seemingly an unsuitable term, because coaches do not achieve results that could be invalidated. Accordingly, it is obvious that the true intent was to convey the meaning of "ineligibility". Indeed, the sanction the Coach obtained was that of "ineligibility" and not "disqualification".[45]

Moreover, the Appellant testified at the hearing that, at the time of preparing the written statement of 30 October 2018, he understood the term "disqualification" to mean that he would not be allowed to compete and train. Accordingly, the Sole Arbitrator is comfortably satisfied that the Appellant was advised that the association with the Coach may result in the sanction of ineligibility.

- The Sole Arbitrator further observers that the written statement of 30 October 2018 did not include a reference to the maximum "period" of ineligibility that could be imposed on the Appellant (*i.e.*, up to 2 years). However, the Sole Arbitrator is convinced that this does not vitiate the written notification for the following reasons.

    - Article 2.10 of the ADR only requires a notice of a "*potential Consequence*" but otherwise does not explicitly prescribe that there must be a reference to the period of ineligibility.

    - It is generally well-known that the standard sanction of ineligibility for ADR violations is up to 2 years. Moreover, the Appellant is a professional athlete who was subjected to numerous anti-doping tests and therefore ought to have known the anti-doping rules and the general

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43 *See* ADR, "*Definitions – Consequences of Anti-doping Rule Violations (Consequences)*" (an Athlete's or other Person's violation of an anti-doping rule may result in one or more of the following: (a) Disqualification; (b) Ineligibility; (c) Provisional Suspension; (d) Financial Consequences; and (e) Public Disclosure or Public Reporting).

44 The ADR defines Ineligibility as: "*a ban of the Athlete or other Person on account of an anti-doping rule violation for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.12.1.*"

45 *See* CAS 2016/A/4480.

sanctioning regime. As explained above, the Appellant also knew that he could be prohibited from training and competing.

- Mr. Ivanov testified at the hearing that, during the meeting with the Appellant on 30 October 2018, Mr. Ivanov explicitly told the Appellant that he could be sanctioned for up to two years. Mr. Ivanov further testified that he did not include this in the dictated statement due to lack of experience with the written notification process at that time. In contrast, the Appellant testified that Mr. Ivanov did not explain to him that he could be sanctioned with a period of ineligibility of up to two years.[46] In weighing the contradictory testimonies, the Sole Arbitrator notes that Mr. Ivanov's testimony was generally clear and consistent, while the Appellant's testimony was inconsistent and his responses to similar questions varied across the direct, cross, and Sole Arbitrator's examination. Moreover, the Appellant testified that Mr. Ivanov only told him that "*he will face problems*". The Sole Arbitrator does not find this explanation credible. There is no reason why Mr. Ivanov, as a RUSADA official, would only mention to the Appellant that he may face problems rather than expressly lay them out as Mr. Ivanov testified at the hearing. In light of the foregoing, the Sole Arbitrator has no reason not to believe Mr. Ivanov that he explicitly advised the Appellant that he could be sanctioned for up to two years.

The athlete can reasonably avoid the association

126. According to Article 2.10 of the ADR, to find a violation of the Prohibited Association Rule, the athlete must be able to "*reasonably avoid the* [prohibited] *association*". According to the WADA Guidelines, an athlete may be able to claim that the association cannot be avoided if the athlete support personnel is the athlete's father, mother, or child.[47]

127. The Appellant bears the burden of proof that he could not reasonably avoid the association with the Coach.[48] The Appellant did not contest this.[49] And although the

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46 The Sole Arbitrator notes that Mr. Denmukhametov testified that Mr. Ivanov did not explain to him that a sanction of ineligibility of up to two years may be imposed. However, this testimony is not relevant to the question of conversation between Mr. Ivanov and the Appellant because Mr. Denmukhametov was not part of that conversation.

47 *See* WADA, "*Result Management, Hearings and Decisions Guidelines*", October 2014, p. 30.

48 *See* WADA, "*Result Management, Hearings and Decisions Guidelines*", October 2014, Template C: Prohibited Association (first letter), p. 123–124.

49 The Sole Arbitrator further notes that, when approached by RUSADA on 30 October 2018, the Appellant falsely denied his association with the Coach. Further, the Appellant concluded the statement of 30 October 2018 by stating "*I have no comments or statements.*"

Appellant submitted that leaving the Coach could entail financial consequences, this cannot form a *reasonable* justification for continued prohibited association with the Coach. If one were to find otherwise, athletes would always be able to raise this as a defence, which would render the Prohibited Association Rule moot.

Conclusion

128. In light of the foregoing, the Sole Arbitrator is comfortably satisfied that all of the requirements inherent in Article 2.10 of the ADR were fulfilled in the Appellant's case. The Appellant received a written notice under Article 2.10 of the ADR from RUSADA on 30 October 2018. Furthermore, it is undisputed between the Parties that the Appellant nonetheless continued to associate with the Coach – the Appellant participated in training activities with the Coach on 15 November 2018 and 22 April 2019 in the Republic of Kyrgyzstan. Accordingly, the Respondent established to the comfortable satisfaction of the Sole Arbitrator that the Appellant committed an ADR violation under Article 2.10 of the ADR.

D. Alleged procedural irregularities and request for compensation *ex aequo et bono*

129. The Appellant argued that the procedure before RUSADA leading up to the Appealed Decision, and the actions of RUSADA after the Appealed Decision, amounted to systematic violation of certain principles in the WADA Code and WADA guidelines aimed at protecting the athletes' right to a fair hearing. The Appellant raised the following points.

- Even though the Appellant requested the Respondent to conduct an expedited hearing, the Respondent failed to arrange an expedited hearing. The hearing took place almost six months after the Appellant's submission of his statement on the merits. The hearing in the Appellant's case was delayed by at least five months and there were no "*special circumstances*" in the Appellant's case to prolong the hearing.

- The Appellant did not have access to certain documents in the case file until the CAS proceedings. The Appellant's Counsel was only able to review these documents six months after the hearing before the DADC.

- Before the hearing at the DADC, RUSADA had not delivered its written submission, and as a result the Appellant could not understand the nature of the charge.

- On 26 March 2020, the news regarding the Appealed Decision appeared on RusAF's website. A scanned copy of the Appealed Decision was received by the Appellant on 30 March 2020, thus four days after the news was publicly disclosed.

- The Respondent's letter dated 19 June 2019 disclosed confidential information (identity of witnesses) to a third party, *i.e.*, RusAF.

- The Respondent and DADC have engaged in systematic violation of the Appellant's right to a fair hearing, putting him in a disadvantageous position and undermining the adversarial nature of the hearing.

- After filing the Appeal to the CAS, Mr. Andrey Isaychev, who filed an appeal challenging a similar decision as the Appellant, was summoned to the Anti-Drug Division of the Ministry of the Interior of the Orenburg Region to provide a written statement in relation to the ADR violation.

- On 11 June 2020, the Respondent issued a press release announcing that the Respondent "*is contemplating to collect the court fees on the cases lost by athletes in CAS.*" The press release included a statement that "[a]*t the moment, RUSADA is concerned about unreasonable appeals from athletes who put RUSADA in a situation where it is necessary to hire lawyer for representation in CAS and spend budgetary funds.*"

- On 12 June 2020, an interview was published in major Russian news regarding the Appellant's Appeal before the CAS. During this interview, the Respondent's Deputy Director, Ms. Margarita Pakhnotskaya, made a few misleading statements and disclosed confidential information regarding the ongoing Appeal.

130. Based on the above, the Appellant requested *ex aequo et bono* compensation for damages sustained as a result of systematic violation by the Respondent of (i) the Appellant's right to a fair hearing; (ii) intimidation; (iii) confidentiality breach; and (iv) undue interference following submission of the Appeal. In his post-Hearing submission, the Appellant further submitted that although monetary claims brought by the Appellant were not related to the substance of the disputed ADR violation, the Sole Arbitrator has full jurisdiction to grant the Appellant compensation *ex aequo et bono* for the damages sustained by the Appellant.

131. The Respondent disagreed with the Appellant and argued that these points had no bearing on the subject matter of the Appeal, *i.e.*, alleged breach of the ADR. At the hearing, the Respondent noted that, while issues raised by the Appellant are highly important, these arguments were not for the CAS to resolve in the present Appeal. The Respondent also disagreed with the Appellant's claim for damages and submitted that the Appellant should bring his claims before the Russian courts.

132. The Sole Arbitrator dismisses the Appellant's request for compensation. This reflects the following considerations.

133. First, consistent with the CAS jurisprudence, Article R57 of the Code[50] grants CAS Panels full power to examine all facts and legal issue of a dispute and to hold a trial *de novo*.[51] Similarly, Article 13.1.1. of the ADR, the primary applicable law to the Appeal at hand, provides that "*the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker.*" The full power of review has a dual meaning: (i) CAS admits new prayers for relief and new evidence and hears new legal arguments; and (ii) the full power of review means that procedural flaws, which occurred during the proceedings of the previous instances, can be cured by the CAS Panel.[52] This is also supported by CAS jurisprudence:

- "*Pursuant to the first paragraphs of Article R57 of the CAS Code, the Panel has full power to review the facts and the law of cases before it. Numerous Panels have understood this to mean that any procedural defects which occurred in the internal proceedings of a federation are cured by arbitration proceedings before the CAS (cf., CAS 96/156, award of 6 October 1997, p. 61 with reference to the Bundesgerichtsentscheidungen (decision of the Swiss Federal Tribunal) 116 Ia 94 and 116 Ib 37). This Panel agrees with these decisions.*"[53]

- The CAS Panel defined a *de novo* hearing as "*completely fresh hearing of the dispute between the parties, any allegation of denial of natural justice or any defect or procedural error ('even in violation of the principle of due process') which may have occurred at first instance, whether within the sporting body or by the Ordinary Division CAS Panel, will be 'cured' by the arbitration proceedings before the appeal paned and the appeal panel is therefore not required to consider any such allegations.*"[54]

- "[…] *if the hearing in a given case was insufficient in the first instance* […], *the fact that as long as there is a possibility of full appeal to the Court of Arbitration for Sport the deficiency may be cured.*"[55]

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50 Article R57 of the Code: "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".

51 *See* CAS 2014/A/3467, paras. 78-79; CAS 2011/A/2500 & 2591, para. 108; CAS 2008/A/1700 & 1710, para. 66.

52 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

53 CAS 2001/A/435, para. 8.

54 CAS 2008/A/1574, para. 42; *see* also CAS 2012/A/2702, para. 122.

55 CAS 94/129, para. 59.

- According to the well-established CAS jurisprudence, the violations that might be cured by a CAS hearing comprise, *inter alia*, violations of the right to be heard. In case CAS 2012/A/2913, the CAS Panel held: "*Therefore even if a violation of the principle of due process, or of the right to be heard, occurred in the proceedings in respect of which the appeal is brought, it is cured, at least to the extent such violation did not irreparably impair the First Appellant's rights, by full appeal to the CAS (CAS 94/129; CAS 98/211; CAS 2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance 'fade to the periphery' (CAS 08/211. Citing Swiss doctrine and case law)*" (emphasis added).[56]

- The Swiss Federal Tribunal has also confirmed the legality of the curing effects of the CAS *de novo* review. Accordingly, infringements of the parties' right to be heard can generally be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised.[57]

134. Accordingly, the Sole Arbitrator considers that any procedural irregularities which may have occurred in the first instance proceedings were cured by the present CAS arbitral proceedings.

135. Second, *ex aequo et bono* literally means ruling according to what is equitable and good. The parties to an arbitration have their disputes resolved *ex aequo et bono* only as an exception, not as a rule.[58] In principle, arbitration in equity is opposed to arbitration according to a specific law, and an arbitrator in equity has the mandate to issue a decision based exclusively on equity, without regard to legal rules, based on the circumstances of the particular case.[59]

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56 CAS 2021/A/2913, para. 87.

57 *See* ATF 124 II 132 of 20 March 1998, A., 138. See DTF 118 I b 111, p. 120 and ATF 116 Ia 94 of 30 May 1990, J.

58 *See* H. Radke, "*Sports arbitration ex aequo et bono: basketball as a groundbreaker*", CAS Bulletin, 2019/02, 2019, p. 26.

59 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

136. In the CAS Code, other than in Article R45 (applicable law in the *ordinary* CAS procedures),[60] there is no provision in Article R58 authorizing the arbitral tribunal to decide *ex aequo et bono* or in equity, but the arbitral tribunal may apply the law that it "*deems appropriate*" and has to give reasons for such decision. This would be a clarification of the closest connection rather than an expression of *ex aequo et bono* principle, and, in practice, could enable the Sole Arbitrator to apply the law he wants to see applied to the merits of the dispute.[61]

137. In an appeal opposing a player to a sports federation, athletes should be equal in front of the sporting regulation, and ruling in equity is therefore not appropriate for disputes opposing athletes/clubs to a sports federation, and this is all the more so for disciplinary cases.[62] It is however accepted[63] that the arbitral tribunal could decide *ex aequo et bono* also under the appeal procedure (pursuant to Article R58 of the Code), if the parties so agree.[64] According to the unanimous opinion of the Swiss legal doctrine in relation to commercial arbitration in general, if both parties would directly choose *ex aequo et bono* and submit their dispute to CAS appeal arbitration, the direct choice of *ex aequo et bono* would prevail.[65] In the context of CAS appeal procedure, the CAS Panels have held:

"*In substance, it is generally considered that the arbitrator deciding ex aequo et bono receives 'a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead, applying general and abstract rules, he/she must stick to the circumstances of the case'.*"[66]

"*This conclusion is also confirmed by the provision of Article 187(2) PILA which expressly provide that 'the parties may authorize the arbitral tribunal to decide ex*

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60 Article R45 of the CAS Code reads as follows: "*The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The Parties may authorize the Panel to decide ex aequo et bono*" (emphasis added).

61 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

62 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

63 *See* CAS 2005/A/983 & 984, para. 62.

64 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015; this is also the general policy in other arbitration rules: in Article 33 of the Swiss Rules, it is possible to decide "(...) *ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so*". A very similar provision is contained in Article 21 para. 3 of the ICC Rules, which provides that "*3 The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.*"

65 *See* H. Radke, "*Sports arbitration ex aequo et bono: basketball as a groundbreaker*", CAS Bulletin, 2019/02, 2019, p. 36.

66 CAS 2009/A/1952, para. 12; CAS 2010/A/2234, para. 8; CAS 2009/A/1921, para. 10.

aequo et bono.' Such an authorization has taken place in FIBA's adoption of Article 17 of the FAT rules and in the Appellant's recognition of the FAT Rules."[67]

138. In light of the foregoing, the Sole Arbitrator notes that the authority of the arbitral tribunal to rule *ex aequo et bono* may be conferred based on the will of the parties to the dispute.[68] The arbitral tribunal settles a case *ex aequo et bono* not because of the inherent virtue of resorting to such a process, but because the parties have agreed so.[69] However, the Parties did not agree to do so in this case.

139. In any event, the Sole Arbitrator observes that the Appellant did not submit any evidence that he sustained damages due to alleged misconduct by the Respondent. The Appellant did not substantiate in any manner the amount of damages, nor established a nexus between the Respondent's alleged misconduct and any alleged damages incurred by the Appellant. For completeness, the Sole Arbitrator adds that the Appealed Decision was upheld in its entirety. Furthermore, there is no indication in the case at hand that the adoption of the Appealed Decision was manifestly arbitrary, and therefore in and of itself cannot possibly form a basis of damages claims, and certainly not before the CAS.

E. Alleged violation of the right to a fair hearing before the CAS

140. At the hearing, the Appellant's counsel raised an objection that the repeated incorrect translation of the Appellant's testimony by the Respondent's translator compromised the hearing and violated the Appellant's right to a fair hearing. The Appellant's counsel reserved his right to review the recording of the hearing and to make references to the incorrect translations. On 12 October 2020, the CAS Court Office informed the Parties that the recording has suffered an irreparable hardware issue and was thus not available.

141. The Sole Arbitrator considers that the objection brought forward by the Appellant with regards to the alleged breach of the Appellant's right to a fair hearing lacks any merit and must therefore be rejected. This reflects the following considerations:

- First, simultaneous translation is seldom flawless and this applies *a fortiori* to a hearing via a video. Moreover, the Appellant was free to hire his own independent translator.

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67 CAS 2010/A/2234, para. 8 (Article 17 of the FAR rules provides as follows: "*Awards of the FAT* can *only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland* [...]. *The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure*" (emphasis added)).

68 *See* also Article 187 PILA ("*The parties may authorize the arbitral tribunal to decide ex aequo et bono.*"); H. Radke, "*Sports arbitration ex aequo et bono: basketball as a groundbreaker*", CAS Bulletin, 2019/02, 2019, p. 36

69 *See* H. Radke, "*Sports arbitration ex aequo et bono: basketball as a groundbreaker*", CAS Bulletin, 2019/02, 2019, p. 28.

- Second, during the hearing, with the Respondent's consent, the Appellant's counsel was free to correct any imprecise translation of the Appellant's testimony (or the testimonies of the other witnesses) given by the independent translator hired by the Respondent. It is notable in this regard that the Appellant's counsel had on various occasions clarified or supplemented the translation and this was consistently acknowledged by the Sole Arbitrator.

- Third, Article R57 of the Code provides that the hearings are held in camera, unless otherwise agreed. In principle, no minutes of the hearings are taken. Consistent with the jurisprudence of the Swiss Federal Tribunal, the right to be heard does not mean that a transcript of the hearing is made.[70]

- Fourth, on 17 September 2020, the CAS Court Office informed the Parties that CAS' video-conferencing platform (Cisco Webex) is run by an external company and CAS cannot guarantee that there will be no technical difficulties during the hearing.

- Fifth, in the post-Hearing submission, the Appellant submitted that the submission "*has been prepared using the unofficial audio recordings and the transcripts maintained by the law firm Lisin, Mishin & Partners pursuant to their standard internal procedure*." Accordingly, the Appellant *de facto* had an audio recording and had the opportunity to raise any additional objections as to translations in the post-Hearing submission.

IX. COSTS

142. Article R64.4 of the Code provides:

"*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*

- the CAS Court Office fee,

- the administrative costs of the CAS calculated in accordance with the CAS scale,

- the costs and fees of the arbitrators,

- the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,

- a contribution towards the expenses of the CAS, and

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70 *See* Mavromati and Reeb, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015.

- the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

143. Article R64.5 of the Code provides:

"*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, and without any specific request from the parties, 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 outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

144. The Appellant requested that the Respondent be ordered to pay the costs associated with the present proceedings and contribute to his costs, including (i) the CAS Court Office Fee; and (ii) reasonable and documented courier and travel costs incurred by the Appellant's representative, if any. The Respondent requested that all arbitration costs in accordance with Articles R64.4 and R.64.5 of the Code be borne by the Appellant.

145. The Sole Arbitrator notes that the Appealed Decision was upheld in its entirety. In exercising his discretion, and with due account for the outcome of the present dispute, the Sole Arbitrator holds that the Appellant shall bear the costs of the arbitration, to be determined by the CAS Court Office. The Sole Arbitrator further finds it appropriate that each Party shall bear its own legal costs and all other expenses in connection with this arbitration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 15 April 2020, by Mr. Rudolf Verkovykh against the decision no. 22/2020 of 17 December 2019 issued by the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency, is dismissed.

2. The decision no. 22/2020 of 17 December 2019 of the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency is upheld.

3. The costs of this arbitration, to be determined by the CAS Court Office, shall be paid by Mr. Rudolf Verkovykh.

4. Each Party shall bear their own costs incurred in connection with the present proceedings.

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
6 April 2021

THE COURT OF ARBITRATION FOR SPORT

Vladimir **Novak**
Sole Arbitrator