

FINA Doping Panel 03/21

comprised of

Robert Fox (SUI) Chairman

In the proceedings against

Mr. Artem Lobuzov (“Athlete”)

and

Fédération Internationale de Natation (“FINA”),

A. THE PARTIES

1. FINA is the world governing body for the sport of Aquatics (meaning swimming, open water swimming, diving, high diving, water polo, artistic swimming and Masters programme). FINA has its headquarters in the city of Lausanne, Switzerland. According to FINA Rule C 5, one of the main objectives of FINA is to provide fair and drug free sport. In furtherance of this goal FINA has adopted and implemented, in accordance with FINA's responsibilities under the World Anti-Doping Code, the FINA Doping Control Rules (Hereinafter the "FINA DC Rules").

2. Mr. Artem Lobuzov (hereinafter the "Athlete" or "Mr. Lobuzov"), born on 24 January 1991, is a swimmer and was affiliated with the Russian Swimming Federation at the time of the relevant facts. He participated in the London 2012 Olympic Games as well as in the FINA World Swimming Championships (25m) in 2012, 2014 and 2016. He also participated in the FINA World Championship in 2011, 2014 and 2015.

3. Mr. Lobuzov's results in Swimming include a bronze medal at the 2014 FINA World Swimming Championships (25m) in the Men 4x200 Freestyle Relay, a silver medal at the 15th FINA World Championships 2014 in the Men 4x200 Freestyle Relay and a silver medal at the 2014 European Championships in the Men 4x200 Freestyle Relay.

4. Mr. Lobuzov has not competed in FINA competitions since April 2019.

5. The Russian Swimming Federation (hereinafter:"RSF") is a member of FINA. RSF is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA DC Rules. The FINA DC Rules are directly applicable to and must be followed by Athletes, Athlete Support Personnel, coaches, physicians, team leaders, and club representatives under the jurisdiction of RSF.

B. WHAT THIS CASE IS ABOUT

6. The present case must be adjudicated by the FINA Doping Panel because Mr. Lobuzov is alleged to have used several prohibited substances in 2014 to prepare for the 2014 FINA World Swimming Championships (25m) and the 2014 European Swimming Championships – where he won medals in the men’s 4 X 200 m relay. Moreover, he is alleged to have provided fifteen clean samples outside the scope of normal anti-doping tests, thus enabling the Moscow Anti-Doping Centre ("Moscow Laboratory") to substitute and/or mix the urine samples he was providing during normal doping control tests. FINA further alleges that no Anti-Doping Rule Violation ("ADRV") was pursued against him, because he was protected by an elaborated doping scheme that went on in Russia at that time.

C. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

7. Following allegations of organized doping practices in Russia which involved the corruption of the Moscow Laboratory, the World Anti-Doping Agency (WADA) recovered the internal database of the Moscow Laboratory. This internal database of the Moscow Laboratory is referred to as the LIMS.

8. Following investigation of these allegations of organized doping practices, and in particular of the LIMS, WADA provided international federations with investigation reports on the athletes implicated in these organized doping practices.

9. In light of this, on 14 April 2021, FINA was provided with the final version of a report from WADA on the Athlete ("WADA Report").

10. More precisely, the WADA Report alleged the following:

- On 27 July 2014, the Athlete provided a urine sample to RUSADA during a competition called “National Cup” and the sample was delivered the same day to the Moscow Laboratory for analysis.
- On 31 July 2014, the Athlete provided a second urine sample to RUSADA during an out-of-competition doping control and the sample was delivered the same day to the Moscow Laboratory for analysis.
- Analysis of the samples by the Moscow Laboratory revealed, in both cases, the presumptive presence (a Presumptive Adverse Analytical Finding) for metabolites of a trilogy of anabolic steroids, namely, Trenbolone, Metenolone and Oxandrolone. These substances are always prohibited (both in-competition and out-of-competition) as per Section S.1.1 of the 2014 Prohibited List and the Athlete does not have a Therapeutic Use Exemption for these substances.
- This trilogy of steroids was developed by former Moscow Laboratory Director, Doctor Grigory Rodchenkov (Doctor Rodchenkov), as part of his responsibility to improve Russian sport performance and conceal evidence of doping. Doctor Rodchenkov named this mixture the “Duchess Cocktail” and asserted that this combination, and its method of administration (“swishing” around the mouth), were designed to minimise the risk of detection.
- In adherence with the Athlete’s ‘protected’ status, the Moscow Laboratory did not conduct the mandated Confirmation Procedure and falsely reported the samples as ‘negative’ following the issuance of a “Save” directive.
- Indeed, on 30 July 2014, the Moscow Laboratory emailed the results of the analysis of the Sample collected on 27 July 2014 to Doctor Rodchenkov and the Liaison, Aleksey Velikodny (“Mr. Velikodny”). In the body of the email Doctor Sobolevsky stated the following:

*“2920461, M, swimming, Russian Cup | 7270/14, RU Ruza, collection
2014-07-27. trenbolone, oxandrolone, methenolone. that’s all for now...”.*

- Although no reply email from the Ministry was recovered in respect of this sample, the fact that the Moscow Laboratory did ultimately

hide the Presumptive Adverse Analytical Finding, and falsely report the sample as 'negative' in ADAMS, demonstrates that a "Save" directive was issued in respect of the Athlete for this sample and that it was communicated to the Moscow Laboratory via means other than email.

- On 4 August 2014, the Moscow Laboratory emailed the results of the analysis of the sample collected on 31 July 2014 to Doctor Rodchenkov and the Liaison, Mr. Velikodny. In the body of the email Doctor Sobolevsky stated the following:

"2920055, M, swimming, training camp | 7271/14, RU Lobnya, collection 2014-07-31 (IIR?) trenbolone, methenolone, oxandrolone (each one is small)".

- The acronym "(IIR?)" in the email was a reference to Irina Rodionova ("Ms. Rodionova"), the then Deputy Director of the Center of Sports Preparation of National Teams of Russia, a subordinate organisation of the Ministry. Moreover, the question mark ("?") signified a question from Doctor Sobolevsky as to whether the Athlete's doping was being coordinated by Ms. Rodionova.

- On 5 August 2014, Mr. Velikodny emailed the Moscow Laboratory and Doctor Rodchenkov and stated, in the body of his email:

"Save. 2920055, Lobyzov, swimming, training camp | 7271/14, RU Lobnya, collection 2014-07-31 (IIR) trenbolone, methenolone, oxandrolone (each one is small). pre-departure control is on the 8 August; everything should be clear by then!"

- In his reply, Mr. Velikodny took the content of Doctor Sobolevsky's original email and in addition to stating "Save", made two other key modifications. Firstly, the question mark ("?") was removed from the "IIR" reference - thereby confirming Ms. Rodionova's role. Secondly, the words "*pre-departure control is on the 8 August; everything should be clear by then!*" were added. This addition revealed (on 5 August 2014) that the Athlete would be subject of a further ("pre-departure") test on 8 August 2014, and that it was assessed, based on the low concentration ("each one is small") of trenbolone, methenolone and oxandrolone in the sample of 31 July 2014, that the Athlete's system should be clear ("everything should be clear") and his use of the Duchess Cocktail would not be detectable on or after 8 August 2014. This was crucial to ensure that Mr. Lobuzov's doping would not be detected at the 2014 European Swimming

Championships which began on 18 August 2014 and where the Athlete won a silver medal in the Men 4x200 Freestyle Relay.

- Moreover, the analytical documents from the analysis of the presumptive adverse analytical results were selectively manipulated and data deleted to the betterment (protection) of the Athlete. In other words, analytical evidence that the Athlete was using the Trenbolone, Metenolone and Oxandrolone was destroyed and evidence that the sample was 'negative' was created.
- The destruction of the analytical evidence and creation of false evidence was unsuccessful. More specifically, WADA recovered evidence of multiple PDF manipulations.

11. FINA then began conducting its internal and external review of this report.

12. On 17 May 2021, FINA notified the Athlete of the start of an investigation into a potential ADRV pursuant to Article 5.3.2.1 of the International Standards for Results Management ("ISRM"). By the same letter, he was provided with the evidence based on which FINA believed he had committed an ADRV pursuant to Article 2.2 of the 2014 FINA DC Rules (Use). Mr. Lobuzov was also given the opportunity to provide any explanation in respect of this potential ADRV by 31 May 2021.

13. Mr. Lobuzov did not reply to this letter.

14. On 25 August 2021, FINA charged the Athlete with an ADRV pursuant to Articles 2.2 and 2.5 of the 2014 FINA DC Rules. By the same letter, Mr. Lobuzov was afforded until 6 September 2021 to either (i) admit that he committed an ADRV or (ii) challenge the assertion of the ADRV.

15. On 31 August 2021, the Athlete informed FINA that he was challenging the assertion of the ADRV but did not provide any further explanations:

"I, Lobuzov Artem Yurievich, stopped my Sports activity in 2018.

At the moment, I do not work as a coach in any State institutions. I deny the charge of violating the rules".

16. Considering the above, on 22 October 2021, FINA referred the case of Mr. Lobuzov to the FINA Doping Panel for adjudication.

17. On 3 November 2021, the Chairman of the FINA Doping Panel wrote to the Athlete informing him of the FINA referral and the prayers contained therein. A deadline to 13 November 2021 was given to the Athlete to allow him to confirm his request for a hearing or not and the possibility to file a defence, should he not request a hearing. There was no response offered within the set deadline.

18. On 29 November 2021, the Chairman of the FINA Doping Panel wrote to the Athlete once again and informed him that that pursuant to art. 14 § 1 of the FINA Doping Panel Procedural Rules (FINA DPPR), he had decided to handle the matter himself. A deadline to 6 December 2021 was set for the Athlete to challenge this decision or provide a motive of recusal of the chosen FINA Doping Panel member. He was also once again provided the opportunity to file a statement of defence or any evidence he wished to rely on for his case.

19. The same day, the FINA Doping Panel also sought the assistance of RSF to obtain an answer from the Athlete.

20. Mr. Lobuzov did not reply.

21. On 30 November 2021, the RSF reminded the Doping Panel in an email that the athlete had challenged the assertion of the ADRV on 31 August 2021.

D. JURISDICTION & APPLICABLE RULES

22. As per Articles 12.3 and 12.5 of the FINA Constitution, the FINA Doping Panel is the responsible body to adjudicate cases relating to violations of the FINA DC Rules.

23. Considering the above, the FINA Doping Panel has jurisdiction to render a decision in this case.

24. This case shall be adjudicated based on applicable FINA Regulations and Swiss law. In particular, the FINA Doping Panel must apply the substantive rules of the 2014 FINA DC Rules (unless the FINA Doping Panel determines the principle of "*lex mitior*" appropriately applies under the circumstances of the case) and the procedural rules of the 2021 FINA DC Rules.

E. LEGAL DISCUSSION

E.1 THE ADRV OF USE (DC 2.2)

25. FINA submits that it has met its burden of proof by establishing - to the required degree of comfortable satisfaction - that the Athlete committed an ADRV (i.e. the Use of the Prohibited Substances Trenbolone, Metenolone and Oxandrolone and the Use of the Prohibited Method of Urine Substitution).

26. FINA relied, in particular, on the WADA Report and its attachments

27. "Use" is defined in the FINA DC Rules as:

"The utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method".

28. In this respect, CAS jurisprudence has consistently allowed tribunals to contemplate the cumulative effect of circumstantial evidence. In CAS 2018/O/5713, the Sole Arbitrator provided the following explanations:

“In the judgment of the Sole Arbitrator, the Athlete’s violations are clearly established, despite her very extensive challenge to each and every separate element of proof against her. Looking at the totality of the matter, there might be some analogy with the logic and common sense of English law, which has recognised for at least 150 years that “Circumstantial evidence might be compared to a rope comprised of several cords: one strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength”.

29. As it fully agrees with this reasoning, the FINA Doping Panel assessed the weight of the evidence submitted by FINA as a whole in order to determine if the ADRV has been established.

30. Moreover, the FINA Doping Panel notes that this is a ‘use’ case not a ‘presence’ case. Therefore, the WADA international Standards for Laboratories (“ISL”) requirements and FINA DC Rules legal standards required to establish a ‘presence’ case do not apply strictly. Here, the Panel is to decide whether the ADRV for ‘use’ has been established by ‘reliable means’, not by way of a formal, typical and standardised AAF test report as in a ‘presence’ case, which would necessarily require that the Moscow Laboratory’s custodial procedures, (Confirmation procedure, B sample analysis, Doc Pack etc.) meet the ISL requirements without failure.

31. The burden of proof that FINA must meet in order to establish the ADRV of Use is “comfortable satisfaction”. The comfortable satisfaction standard is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the World Anti-Doping Code (WADC). The test of comfortable satisfaction must take into account the circumstances of the case. Those circumstances include the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities. A sports body is not a national or international law enforcement agency. Its investigatory powers are substantially more

limited than the powers available to such bodies. The hearing panel's assessment of the evidence must respect those limitations (cf. CAS in CAS 2017/A/5422 Aleksandr Zubkov vs. International Olympic Committee (IOC), award of 23 April 2018).

32. Moreover, the FINA Doping Panel need not contemplate if the Athlete knew he was doping or intended to, because intent or even knowledge of the use of a prohibited substance is not necessary to establish that an ADRV occurred under DC 2.2 of the FINA DC Rules. The mere 'use' of a prohibited substance is sufficient.

33. For the following reasons, the FINA Doping Panel considers that FINA has met its burden of proof to establish that the Athlete used the prohibited substances Trenbolone, Metenolone and Oxandrolone in 2014:

- The FINA Doping Panel considers that the evidence produced by FINA, in particular the evidence from the WADA Report, is highly reliable. In this regard, the FINA Doping Panel finds section H of the WADA Report particularly compelling. The Doping Panel is also comforted by the fact that several other hearing panels recently recognized the reliability of similar evidence arising from LIMS, for example IAAF v. RUSAF & Svetlana Shkolina CAS/O/5667, and CAS ad hoc Division and (OG Rio) 16/009 Russian Weightlifting Federation (RWF) v. International Weightlifting Federation (IWF).
- Two samples provided by the athlete on 27 and 30 July 2014 showed the likely presence of the prohibited substances Trenbolone, Metenolone and Oxandrolone.
- FINA's external scientific expert confirmed that if the samples had been submitted to the confirmation procedure the results would have confirmed the presence of parent/metabolite markers for trenbolone, oxandrolone and methenolone.
- These three prohibited substances are the trilogy of steroids that was developed by former Moscow Laboratory Director, Doctor Grigory Rodchenkov (Doctor Rodchenkov), as part of his responsibility to improve Russian sport performance and conceal evidence of doping. Doctor Rodchenkov named this mixture the "Duchess Cocktail" and asserted that this combination, and its

method of administration (“swishing” around the mouth), were designed to minimise the risk of detection.

- Trenbolone, Metenolone and Oxandrolone simply could not have been found in the Athlete’s samples without him having used, applied, ingested, injected or consumed that substance. These substances cannot be produced endogenously.
- The Athlete was one of the athletes that were part of a protection scheme. There would be no point in protecting an athlete who is not using prohibited substances.
- The Athlete was on a training camp and preparing for a major international competition at the time of the presumptive adverse analytical findings (i.e. the 2014 European Swimming Championships which began on 18 August 2014). Using prohibited substances during this period made perfect sense.
- The Athlete performed very well at the 2014 European Swimming Championships. He won a silver medal in the Men 4x200 Freestyle Relay at this competition.
- An anti-doping control was conducted on Mr. Lobuzov on 8 August 2014, just as it had been predicted by Mr. Velikodny in his email of 5 August 2014 which mentioned that pre-departure doping control would be conducted on 8 August 2014.
- The Athlete did not provide any compelling explanation or defence regarding the evidence adduced against him. He limited himself to a broad denial of the charges. A valid contestation of fact needs to be specific.

34. Moreover, the FINA Doping Panel considers that FINA has met its burden of proof to establish that the Athlete used the prohibited method of urine substitution. This conclusion is based on the following:

- Urine Substitution is a Prohibited Method as per Section M2.1 of the 2014 Prohibited List.
- The CAS jurisprudence already clarified that the provision of clean urine in advance of an event for the purpose of enabling the subsequent swapping of urine samples is an ADRV in connection with M2.1 of the Prohibited List in the form of the use of a prohibited method (cf. CAS 2017/A/5422 Aleksandr Zubkov vs. International Olympic Committee (IOC), award of 23 April 2018 (para 715-717)).

- The CAS Jurisprudence also clarified that this ADRV is established if the Anti-Doping Organization can establish that the athlete provided bottles of his clean urine outside of any doping control process because this is an act necessary to enable the urine substitution and because an athlete doing this either knew or ought to have known that this would directly facilitate the substitution of his urine sample by another person.
- The evidence before the FINA Doping Panel clearly establishes that Mr. Lobuzov provided bottles of his clean urine outside of any doping control process. More precisely, the WADA Report included a copy of the data bank of clean urine samples of the Moscow Laboratory and this data bank listed fifteen samples registered under the name of Mr. Lobuzov. It is clear that these samples were provided by the Athlete because his name is included in the table and the steroidal profile parameter values match the steroidal profile of the Athlete from the samples under his name in ADAMS. This has been confirmed by an external scientific expert report produced by FINA. It is also clear that these samples are not samples which were provided during the course of normal anti-doping controls because the PH and Specific Gravity of the fifteen clean urine samples are different to those of the samples Mr. Lobuzov provided during normal doping controls. Moreover, RUSADA only collected six samples from the Athlete during the course of his career and there are fifteen clean urine samples from the Athlete data bank of clean urine. Also, the McLaren Report confirmed that the clean urine samples were provided by athletes outside the scope of normal doping controls, normally in non-official containers.
- It makes perfect sense for the Athlete to have provided clean urine samples because, as explained in the McLaren Report, this scheme was used especially by the athletes like Mr. Lobuzov who were protected and who were using the Duchess Cocktail.

35. In view of all the above, the FINA Doping Panel is satisfied that FINA has met its burden of proof to establish that the Athlete breached Article 2.2 of the 2014 FINA DC Rules and that the only issues outstanding in the present proceedings are the sanctions and consequences to be applied to the ADRV.

E.2 SANCTION AND CONSEQUENCES

Period of Ineligibility

36. FINA submits that an ineligibility period of 4 years should apply to the Athlete's ADRV. In particular, FINA considers that the standard period of ineligibility of two years should be doubled to four years (pursuant to Article 10.6 of the 2014 FINA DC Rules) because aggravating circumstances are present in this case.

37. Pursuant to Article 10.2 of the 2014 FINA DC Rules, the base sanction for (i) the use of the Prohibited Substances Trenbolone, Metenolone and Oxandrolone, and (ii) the use of the prohibited method of urine substitution is a two-year period of ineligibility, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5 of the FINA DC Rules are met.

38. Under certain conditions, this two-year period of ineligibility can be either eliminated where there is No Fault or Negligence (Article 10.4 of the 2014 DC Rules) or reduced based on No Significant Fault or Negligence (Article 10.5.1.1 of the 2014 DC Rules).

39. For adult athletes, both Articles require that the athlete establish how the prohibited substance entered his or her system. The athlete is required to prove his or her allegations on the "balance of probability", which, according to long established CAS jurisprudence, means that the athlete needs to convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence:

"...for the Panel to be satisfied [...] on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51 % chance of it having occurred". (CAS 2009/A/1926 & CAS 2009/A/1930, ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet, §5.9; CAS 2011/A/2384, WADA and UCI v. Alberto Contador Velasco & RFEC, §209).

40. Mr. Lobuzov merely challenged the assertion of the ADRV without providing any explanations or arguments. Hence Mr. Lobuzov did not

establish the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5 of the 2014 DC Rules.

41. Moreover, the Doping Panel considers that the standard period of ineligibility is to be doubled to four years (pursuant to Article 10.6 of the 2014 FINA DC Rules) because aggravating circumstances are present in this case.

42. The aggravating circumstances in this case come from the fact that Mr. Lobuzov's ADRV was part of a sophisticated doping scheme. This situation is specifically mentioned in the Comment of Article 10.6 of the 2014 FINA DC Rules as an example of what must be considered as Aggravating Circumstances. The Athlete also used several different prohibited substances and a prohibited method.

43. Mr. Lobuzov had the chance to avoid the application of this Article by admitting the ADRV as asserted promptly after being confronted with the ADRV by FINA, but he chose not to do so.

44. In conclusion, FINA Doping Panel considers that a period of ineligibility of 4 years should apply in this case.

Commencement of the Period of Ineligibility and Credit for Provisional Suspension

45. As to the commencement date of the period of ineligibility, Article 10.9 of the 2014 FINA DC Rules provides that, as a general rule, the period of ineligibility shall start on the date of the FINA Doping Panel's decision. The FINA Doping Panel sees no reason to deviate from this principle.

46. Article 10.9 of the 2014 FINA DC Rules also provides for credit for provisional suspensions. In this case, the Athlete has been provisionally suspended since 25 August 2021. The FINA Doping Panel considers that

the time he served under provisional suspension must be credited against the period of ineligibility imposed.

47. In accordance with Article 10.14.1 of the 2021 FINA DC Rules, during his period of ineligibility, the Athlete is not allowed to participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization or a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international or national level Event organization or any elite or national-level sporting activity funded by a governmental agency.

48. If the Athlete violates the period of ineligibility, the results obtained, if any, shall be disqualified and he will be subject to a new period of ineligibility equal in length of the original period of ineligibility and shall be added to the end of his original period of ineligibility in accordance with Article 10.14.3 of the 2021 FINA DC Rules.

49. The Athlete also remains subject to testing throughout his period of ineligibility and can still provide Substantial Assistance.

Disqualification

50. In accordance with Article 10.8 of the 2014 FINA DC Rules, all competitive results of the Athlete obtained from the date an ADRV occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

51. The Athlete has failed to establish any reasons to apply the fairness exception.

52. Moreover, the athlete has not participated in any FINA Competition since 11 April 2019 so the period of results disqualified would effectively be of less than five years.

53. Therefore, all competitive results obtained by Mr. Artem Lobuzov since 27 July 2014 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

Costs

54. According to Article 12.2 of the 2014 FINA DC Rules, Member Federations shall be obliged to reimburse FINA or the designated organization for all costs (including but not limited to interpretation, hearing expenses and travel) related to an ADRV committed by a Person affiliated with that Member Federation.

55. As no such costs appear to have been borne by FINA in this case, the present decision is rendered without costs.

Right of Appeal

56. As per Article 13.6.1 of the 2021 FINA DC Rules, this decision can be appealed by Mr. Lobuzov within twenty-one (21) days from the date of receipt of the decision by email, exclusively to the Court of Arbitration for Sport. The address of the Court of Arbitration for Sport is:

Court of Arbitration for Sport
Av. de Beaumont 2, 1012 Lausanne
Switzerland

F. CONCLUSION

1. Mr. Artem Lobuzov has committed an anti-doping rule violation of Article 2.2 of the 2014 FINA Doping Control Rules.
2. A period of ineligibility of four years is imposed on Mr. Artem Lobuzov, commencing on the date of the decision. The period of ineligibility served by Mr. Lobuzov since 25 August 2021 shall be credited against the four-year period of ineligibility imposed.
3. All results obtained by Mr. Artem Lobuzov since 27 July 2014 with all resulting consequences are disqualified, including forfeiture of any medals, points and prizes.

Done on 11 February 2022

Chairman of FINA Doping Panel

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox