CAS 2017/O/5218 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation & Vasiliy Kopeykin

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

Sole Arbitrator: Mr Ken E. Lalo, attorney-at-law in Gan-Yoshiyya, Israel

in the arbitration between

International Association of Athletics Federations, Monaco
represented by Mr Ross Wenzel and Mr Nicolas Zbinden, attorneys-at-law, Kellerhalls Carrard, Lausanne, Switzerland

Claimant

and

Russian Athletic Federation, Moscow, Russia

First Respondent

and

Vasiliy Kopeykin, Saransk, Russia
represented by Mr Artem Patsev, attorney-at-law, Clever Consult, Moscow, Russia

Second Respondent

I. THE PARTIES

1. The International Association of Athletics Federations ("IAAF"), is the international federation governing the sport of Athletics worldwide. It has its registered seat in Monaco.

2. The Russian Athletic Federation ("RUSAF"), is the national governing body for the sport of Athletics in Russia and has its registered seat in Moscow, Russia. RUSAF is a member federation of the IAAF but is currently suspended from membership.

3. Mr Vasiliy Kopeykin (the "Athlete"), is a Russian athlete specialising in the Athletics discipline of long jump, a member of RUSAF and part of the IAAF Registered Testing Pool. The Athlete was born on 9 March 1988. The Athlete won the 2016 Russian Outdoor Championships and is a two times (in 2015 and in 2016) winner of the Russian Indoor Championships.

II. FACTUAL BACKGROUND

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

5. On 6 December 2016, the Athlete underwent an out-of-competition doping test in Novogorsk, Russia.

6. On 20 December 2016, the WADA-accredited Karolinska Unversity Anti-Doping Laboratory (Stockholm, Sweden) (the "Stockholm Laboratory") analysed the Athlete's urine A sample and reported that the sample revealed the presence of trimetazidine, a prohibited substance (section S4. Hormone and Metabolic Modulators of the 2016 WADA Prohibited List).

7. On 3 January 2017, the Athlete was notified by the IAAF of the Adverse Analytical Finding ("AAF"), as well as of his right to request a B sample analysis and provide an explanation for the positive finding.

8. On 5 January 2017, the Athlete denied having doped and requested the analysis of the B sample to be conducted.

9. On 20 March 2017, the Athlete's B sample was analysed and confirmed the finding of the A sample and the presence of trimetazidine. On the same day, the IAAF informed the Athlete of the result of the B sample analysis and granted him a deadline until 27 March 2017 to provide further explanations for the AAF.

10. On 28 March 2017 and following the Athlete's request, the IAAF forwarded to the Athlete a letter from the Stockholm Laboratory indicating that a quantification of the concentration of the prohibited substance was not required since trimetazidine was not

a threshold substance, but, for information purposes, estimated the concentration of trimetazidine in the Athlete's sample at approximately 8 ng/mL. The IAAF extended the Athlete's deadline to provide an explanation until 4 April 2017.

11. On 4 April 2017, the Athlete sent his explanation to the IAAF alleging that he had been prescribed and using Migsis for many years in order to relieve migraine pains from which he suffered since 2004. Trimetazidine could have come from a metabolisation of lomerizine, a non-prohibited substance, which is contained in Migsis. The Stockholm Laboratory failed to look for the other metabolites of lomerizine and, therefore, the positive finding was faulty and cannot lead to an AAF.

12. On 4 May 2017, the IAAF informed the Athlete that, after consultation with the Stockholm Laboratory, his explanation could not be regarded as adequate. The Stockholm Laboratory indicated that it had looked for the substance lomerizine in the Athlete's sample and it was not found. Therefore, the metabolite found could not come from an intake of lomerizine. Moreover, based on the literature, the Stockholm Laboratory confirmed that there was no requirement to analyse the metabolites of lomerizine to support a finding of trimetazidine. However, this analysis could be conducted, if requested, on the basis of the data of the B sample analysis.

13. Further to the IAAF's request, the Stockholm Laboratory analysed the data of the B sample analysis and concluded that there was no trace of other metabolites, which should have been present following an administration of lomerizine. Therefore, the finding for trimetazidine was confirmed.

14. As a consequence and on 4 May 2017, the IAAF confirmed the charges brought against the Athlete and provisionally suspended him with immediate effect. The IAAF further informed the Athlete of his right to a hearing. Due to the suspension of the RUSAF, the Athlete was given a choice to have the case heard by the Court of Arbitration for Sport ("CAS") either on the basis of Rule 38.3 of the 2016-2017 IAAF Competition Rules (the "IAAF Competition Rules)" – before a Sole Arbitrator of the CAS sitting as a first instance hearing panel, or on the basis of Rule 38.19 of the IAAF Competition Rules – before a CAS Panel at a single hearing, with the agreement of the World Anti-Doping Agency ("WADA") and any other anti-doping organisations with a right of appeal, but the decision rendered would not be subject to an appeal (other than to the Swiss Federal Tribunal).

15. On 18 May 2017, the Athlete informed the IAAF that he wished to have a single hearing before a CAS Panel under Rule 38.19 of the IAAF Competition Rules.

16. By emails of 8, 15 and 23 June 2017, respectively, WADA, RUSAF and the Russian Anti-Doping Agency ("RUSADA") have accepted that this case be referred to CAS as a sole instance on the basis of Rule 38.19 of the IAAF Competition Rules.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. In accordance with Articles R47, R48, and R51 of the CAS Code of Sports-Related Arbitration (the "Code"), the IAAF filed its Request for Arbitration on 29 June 2017. The Request for Arbitration with its exhibits was received by the Athlete by courier on 11 August 2017.

18. The matter is being heard by CAS as a sole instance body and the provisions applicable to the CAS Appeal Arbitration Procedure apply *mutatis mutandis* to this case, except as explicitly varied by the IAAF Rules (2016/A/4486; CAS 2016/A/4487 or CAS 2016/A/4480).

19. This Request for Arbitration which includes the IAAF's requests, arguments and evidence in connection with the Athlete's case should be considered also as IAAF's Statement of Appeal and Appeal Brief for the purposes of Articles R47 and R51 of the Code.

20. In accordance with Rule 42.15 of the IAAF Competition Rules (providing a deadline of thirty (30) days from receipt of the Request for Arbitration to file an Answer) and Article R55 of the Code and following a granted extension, the Athlete timely filed his Answer to the request for arbitration, on 15 September 2017. RUSAF did not file an Answer.

21. On 28 September 2017, following an exchange of correspondence in which, inter alia, the IAAF suggested that the case be heard by a sole arbitrator and the Athlete suggested a panel of three arbitrators, the President of the CAS Ordinary Arbitration Division decided, pursuant to Article R 54 of the Code, to submit the matter to a Sole Arbitrator.

22. On 10 October 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division and in accordance with Article R54 of the Code, confirmed the panel in this procedure as follows:

Sole Arbitrator: Mr Ken E. Lalo, attorney-at-law in Gan-Yoshiyya, Israel

23. In accordance with the Sole Arbitrator's instructions of 17 October 2017, the IAAF filed its Reply on 27 October 2017 and the Athlete filed his second Response on 17 November 2017.

24. On 30 November 2017, the Athlete and the IAAF, respectively, signed and returned the Order of Procedure to the CAS Court Office. The RUSAF neither signed the document nor objected to its contents. In signing the Order of Procedure the Parties accepted, inter alia, the appointment of the Sole Arbitrator to decide this matter.

25. In accordance with Article R57 of the Code, an oral hearing was held in Lausanne, Switzerland, on January 10, 2018. The Sole Arbitrator was assisted by Ms Andrea Zimmermann, CAS Counsel. The following persons appeared for the Parties:

For the IAAF:

- Mr Ross Wenzel, Counsel
- Mr Nicolas Zbinden, Counsel

For the Athlete:

- Mr Artem Patsev, Counsel
- Mr Vasiliy Kopeykin, Athlete
- Mr Pavel Lebedev, interpreter

26. The Sole Arbitrator heard the testimony of the following witnesses:

- Dr Magnus Ericsson, expert-witness (in person)
- Dr Masato Okano, expert-witness (by telephone)
- Dr Arthur Kopylov, expert-witness (in person)
- Prof Mats Larsson, expert-witness (by Skype)
- Dr Olga Kiseleva, expert (by telephone)
- Dr Olga Konstantinycheva, witness (by telephone)
- Mrs Nadezhda Kopeykina, witness (by telephone)

27. Before the hearing was concluded, all Parties expressly stated that they did not have any objection to the constitution and conduct of the panel or to the procedure adopted by the Sole Arbitrator and that their procedural rights, including their right to be heard, have been respected.

28. On 6 February 2018, the Athlete filed a request to admit into the case file and for the Sole Arbitrator to consider the recent CAS award in case CAS 2017/A/5296 (the "Roberts' Award"), referring to Article R56 of the Code. On 9 February 2018, the IAAF submitted an email questioning the relevance of the Roberts' Award, but indicating that the Roberts' Award is part of the non-confidential CAS case law that the Sole Arbitrator is, in principle, entitled to consider. The Sole Arbitrator has considered the Roberts' Award and the arguments made by both Parties in reference to such award.

29. The Sole Arbitrator has carefully taken into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. JURISDICTION

30. The IAAF Competition Rules are applicable to these proceedings since these rules govern anti-doping rule violation ("ADRV") cases committed before 3 April 2017. The IAAF regulations currently governing anti-doping matters are the IAAF Anti-Doping Rules which entered into force on 3 April 2017, but these rules only apply to ADRVs committed on or after 3 April 2017. Pursuant to Articles 21.3 and 1.13 of the IAAF Anti-Doping Rules, ADRVs committed prior to 3 April 2017 are subject to the rules (including procedural rules) in place at the time of the alleged ADRV; namely the relevant provisions of the IAAF Competition Rules.

31. The jurisdiction of CAS in this appeal derives from Rule 38.19 of the IAAF Competition Rules, which expressly permits ADRV cases to be filed directly with the CAS as a sole instance adjudicatory body.

32. Rule 38.19 of the IAAF Competition Rules stipulates that "*Cases asserting anti-doping rule violations may be heard directly by CAS with no requirement for a prior hearing, with the consent of the IAAF, the Athlete, WADA and any Anti-Doping Organisation that would have had a right to appeal a first hearing decision to CAS.*"

33. The IAAF, the Athlete, WADA, RUSAF and RUSADA all expressly consented to the Athlete's case being heard directly by CAS without a prior hearing in accordance with Rule 38.19 of the IAAF Competition Rules.

34. Consequently, CAS has jurisdiction over the present case.

V. ADMISSIBILITY

35. Neither the Code nor the IAAF Competition Rules provide a specific time limit within which to file this first instance appeal procedure or identify the date on which it could have been filed.

36. Rule 38.3 of the IAAF Competition Rules provides:

> *"If the Member fails to complete a hearing within two months, or, if having completed a hearing fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with the CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal)."*

37. Rule 38.19 of the IAAF Competition Rules establishes that *"[c]ases asserting anti-doping rule violations may be heard directly by CAS with no requirement for a prior hearing, with the consent of the IAAF, the Athlete, WADA and any Anti-Doping Organisation that would have had the right to appeal a first hearing decision to CAS."*

38. The Sole Arbitrator notes that, pursuant to Rule 42.15 of the IAAF Competition Rules, the standard time-limit for an appeal to CAS is 45 days from receipt of the decision to be appealed. An additional time limit of 15 days is granted to the appellant to file its appeal brief, which gives a total of maximum 60 days to refer a case in full to the CAS.

39. On 4 May 2017, the IAAF informed the Athlete of his right to a CAS hearing, which the Athlete requested pursuant to Rule 38.19 of the IAAF Competition Rules on 18 May 2017. The IAAF filed its Request for Arbitration with the CAS on 29 June 2017 (six days after receipt of the last of the required consents for the referral of these proceedings to CAS as a sole instance pursuant to Rule 38.19) which the Sole Arbitrator finds to be a reasonable and timely period for purposes of the admissibility of this Request for Arbitration.

40. Finally, pursuant to Rule 47 of the IAAF Competition Rules, the statute of limitation for anti-doping rule violation proceedings is *"ten years from the date on which the anti-doping rule violation is asserted to have occurred."*

41. As a result, the Sole Arbitrator concludes that the Request for Arbitration is admissible, because the anti-doping control that resulted in the Athlete's positive A sample test was notified on 3 January 2017 and the IAAF filed its Request for Arbitration on 29 June 2017.

VI. APPLICABLE LAW AND REGULATIONS

42. These proceedings are governed by the regulations in force at the time of the alleged ADRV; namely, the IAAF Competition Rules which, in regard to ADRVs, reflect the 2015 WADA Code.

43. Article R58 of the Code provides:

> *"The panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

44. Rule 42.23 of the IAAF Competition Rules provides:

> *"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations)."*

45. Rule 42.24 of the IAAF Competition Rules further provides:

> *"In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise."*

46. Rule 30.1 of the IAAF Competition Rules also states that:

> *"The Anti-Doping Rules shall apply to the IAAF, its Members and Area Associations and to Athletes, Athlete Support Personnel and other Persons who participate in the activities or Competitions of the IAAF, its Members and Area Associations by virtue of their agreement, membership, affiliation, authorisation or accreditation."*

47. In accordance with Article R58 of the Code, and recent CAS precedents, it is clear that the IAAF Competition Rules provide for the application of the IAAF Constitution, Rules and Regulations, including the Anti-Doping Regulations to any CAS disputes involving the IAAF. Moreover, the Athlete is an International-level Athlete under the IAAF Competition Rules and part of the IAAF Registered Testing Pool, thus bound by the IAAF Anti-Doping Regulations.

48. Consequently, the Sole Arbitrator considers that the IAAF Competition Rules apply to the present matter and Monegasque law should apply on a subsidiary basis.

VII. SUBMISSIONS OF THE PARTIES

A. IAAF's Submissions and Requests for Relief

i. Submissions

Anti-Doping Rule Violation

49. The IAAF submits that the Athlete has infringed Rule 32.2(a) of the IAAF Competition Rules, which states that the presence of a prohibited substance or its metabolites or markers in an athlete's sample constitutes an ADRV.

50. Pursuant to Rule 32.2(a)(ii) of the IAAF Competition Rules, sufficient proof of an ADRV under Rule 32.2(a) of the IAAF Competition Rules is established by the "*presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample [...] where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample*".

51. The analysis of the Athlete's A and B samples revealed the presence of trimetazidine. Trimetazidine is a substance prohibited under S4.5.4 of the Prohibited List. It is a non-specified substance prohibited at all times. Therefore, it was established that the Athlete committed an ADRV.

Period of Ineligibility

52. According to Rule 40.2(a) of the IAAF Competition Rules, the period of ineligibility shall be four years where the ADRV does not involve a specified substance, unless the athlete can establish that the ADRV was not intentional.

53. Rule 40.3 of the IAAF Competition Rules sets out that the term "*intentional*" is meant to "*identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

54. The Athlete bears the burden of establishing that the violation was not intentional. A whole series of CAS cases have held that it follows that he/she must necessarily establish how the substance entered his/her body (CAS 2016/A/4377, at para. 51; CAS 2016/A/4662, at para. 36; CAS 2016/A/4563, at. Para. 50; CAS 2016/A/4626; CAS 2016/A/4845).

55. The IAAF could accept that exceptional cases may exist in which an athlete need not establish the source of the substance in order to establish that the violation was not intentional. However, the IAAF submits that such circumstances would have to be truly exceptional.

Establishment of origin

56. The Athlete is required to prove the origin of the prohibited substance on the "*balance of probability*", which entails that the Athlete has the burden of convincing the Sole Arbitrator that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence (CAS 2008/A/1515).

57. With respect to establishing the origin of the prohibited substance, it is not sufficient for an athlete merely to make protestations of innocence and suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

58. The Athlete's explanation that the positive finding came from an intake of Migsis between the 23 - 24 and 28 - 29 November 2016, which he has been taking on occasion from 2004 to relieve his migraine headaches, is wholly unsubstantiated. The Athlete does not provide any evidence of purchase (at any time) of Migsis, or any prescription by a doctor. It appears that Migsis is only available in Japan.

59. The IAAF considers the Roberts' Award to be "*unhelpful and irrelevant*" as it "*bears no relevance to the instant case whatsoever*".

60. Even had the Athlete demonstrated his use of Migsis, this would not have explained the positive finding since Migsis does not contain trimetazidine. Migsis does contain lomerizine, but the Stockholm Laboratory, in its report of 27 April 2017, excluded that the positive finding could have come from an intake of lomerizine. None of the metabolites, which should have been detected had lomerizine been administered, were found in the Athlete's sample. It is therefore clear that the positive finding came from an intake of trimetazidine.

61. The Stockholm Laboratory's second, more detailed version of the retrospective investigation report dated 20 October 2017, including full-plot and zoom-in plot versions of the relevant chromatograms, demonstrated the absence of any indications of lomerizine or its metabolites. This retrospective analysis was done with an excretion study for lomerizine sample supplied by the World Association of Anti-Doping Scientists ("WAADS").

62. The IAAF does not dispute that trimetazidine, as well as being a prohibited parent compound, may also result from the ingestion of lomerizine, which is not a prohibited substance. More particularly, trimetazidine is one of the metabolites of lomerizine, known as the M7 metabolite. However, the IAAF's position is that the retrospective investigation reports show that the analytical results are not consistent with lomerizine being the source.

63. The analytical results of the Athlete's doping control sample were compared to the analytical results of a WAADS excretion sample for lomerizine.

64. In order to compare the results of the excretion and doping control samples, it is necessary to take into account the differences in retention time ("RT") between the two samples (the "RT Differential"). The RT Differential is calculated by comparing the RT for a specific reference compound that is present in both samples. The same calculations can be performed in respect of lomerizine and all of its metabolites, which are present in the excretion sample.

65. As can be seen from the chromatograms for the Athlete's sample, there are no peaks within the relevant retention windows for lomerizine or any of its metabolites. This demonstrates that neither lomerizine nor its metabolites were present in the Athlete's doping control sample.

66. Migsis is only marketed and available in Japan. Dr Masato Okano, the director of the WADA- accredited laboratory in Tokyo and one of the leading experts in this area worldwide, has specific and unique experience of this issue. He has reviewed the two retrospective investigation reports of the Stockholm Laboratory and also the two reports

by Professor Dr Larsson and Dr Kopylov. In his report dated 25 October 2017, his clear and firm opinion is that "*the AAF for trimetazidine was correctly reported by the Karolinska Laboratory and that the analytical results are not consistent with lomerizine being the source of such prohibited substance.*"

67. Dr Okano confirmed that there were no peaks at the expected retention times for lomerizine or its metabolites in the Athlete's sample and that with respect to the M6 metabolite there was only a background signal, which does not evidence its presence. Dr Okano's laboratory has, since 2014, detected trimetazidine in four doping control samples. All four athletes declared the use of Migsis on the doping control form. In all four cases the concentrations of the M6 metabolite were significantly higher than the concentration of the trimetazidine (M7) metabolite. Dr Okano testified that this was the experience of their laboratory, and, while he cannot say that it is scientifically impossible, he believes in his expert opinion that it is unlikely and he is not aware of any case in which lomerizine was consumed and the M7 metabolite was higher than the M6 metabolite.

68. Unlike these samples, in the Athlete's sample the trimetazidine metabolite is present and there is no presence of the M6 metabolite notwithstanding the presence of 8 ng/mL of trimetazidine, demonstrating that it does not result from an ingestion of Migsis/lomerizine.

69. Dr Okano confirmed the findings of the Stockholm Laboratory and concluded that there was no evidence in the analytical data that the Athlete ingested lomerizine.

70. Therefore, the trimetazidine in the Athlete's sample does not result from an ingestion of Migsis/lomerizine and the Athlete has failed to establish the origin of the prohibited substance and, consequently, to discharge his burden to demonstrate that the ADRV was not intentional. The Athlete failed to identify the origin of the prohibited substance in his system and, as there are no exceptional circumstances that might otherwise negate the presumed intentionality of the violation, he must be sanctioned with a four year period of ineligibility.

Disqualification

71. Pursuant to Rule 40.9 of the IAAF Competition:

> "*In addition to the automatic Disqualification of the Athlete's individual results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained by the Athlete from the date the positive Sample was Collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred, through to the commencement of any Provisional Suspension or Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money*".

72. As the positive finding followed a doping control on 6 December 2016, all the results obtained by the Athlete from such date must be disqualified through to his provisional suspension on 4 May 2017.

ii. Requests for Relief

73. The IAAF requests the Sole Arbitrator to rule as follows:

1) CAS has jurisdiction to decide on the subject matter of this dispute;

2) The Request for Arbitration of the IAAF is admissible.

3) The Athlete is found guilty of an anti-doping rule violation in accordance with Rule 32.2(b) and/or 32.2(e) of the IAAF Rules.

4) A period of ineligibility of four years is imposed upon the Athlete, commencing on the date of the CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the CAS Award shall be credited against the total period of ineligibility to be served.

5) All competitive results obtained by the Athlete from 6 December 2016 through to his Provision Suspension on 4 May 2017 are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).

6) Any arbitration costs are borne entirely by RUSAF or, in the alternative, jointly and severally by the Respondents.

7) The IAAF is awarded a contribution to its legal costs."

B. The Athlete's Submissions and Requests for Relief

i. Submissions

Standards of Proof

74. The Athlete submits that the IAAF has not met its burden of proof in showing that the Athlete had committed an infringement of Rule 32.2(a) of the IAAF Competition Rules.

75. The IAAF's claims against the Athlete are very serious and the IAAF must thus meet a heightened standard of proof. The doping allegations are indisputably serious by the very nature of ADRVs, taking into account the intrinsic values of sport – ethics, fair play, honesty, health, respect for rules and laws and respect for self and other athletes. Pursuant to Rule 33.1 of the IAAF Competition Rules, the standard of proof should be much greater than a mere "balance of probability" but a little less than "proof beyond a reasonable doubt". The standard of proof to be applied must be very close to that of "beyond a reasonable doubt" as the ban sought by the IAAF is of four years (and may end the Athlete's career).

76. The standard of "clear and convincing evidence" (which strongly resembles the "comfortable satisfaction" standard) which is applied by the US courts, imposes a greater burden of persuasion on the accusing party than "balance of probabilities" standard. The Athlete provides that according to the Supreme Court of Oregon in the United States, the standard of "clear and convincing evidence", "*that is, free from confusion, fully intelligible, distinct and establish to the jury that the defendant*

intended to deceive the plaintiff or did so with a reckless disregard for the truth" (*Riley Hill General Contractor, Inc. v Tandy Corp*), imposes a higher burden of persuasion than a "balance of probabilities" standard. Accordingly, mere allegations or inferences, not being supported by clear and direct evidence, are insufficient to meet the "comfortable satisfaction" standard required. It would be insufficient to infer that something may have happened or that a violation may have been committed, or that an individual's unidentified actions may constitute a violation.

Merits of the Case

77. The Athlete has strongly denied and denies now that he was doping (he never ingested any prohibited substances and/or never applied any prohibited methods).

78. Trimetazidine may not in any way be considered as having some detrimental effects to a human (or athlete's) system, like anabolic steroids, since it only helps the cardiac muscle to recover, preventing some internal adverse processes.

79. Trimetazidine can be used by athletes to improve physical efficiency, especially in the case of endurance sports (long distance running, swimming, etc.). However, there is no evidence of any significant usage of trimetazidine amongst athletes in other types of sport, and none were identified in respect of long jumpers.

80. Trimetazidine does not really help to enhance sport performance, the level of its administration among athletes decreased remarkably from 2014 and there were only 11 occurrences of trimetazidine detection in athletes' samples around the world in 2015.

81. The Athlete had been suffering from migraines since around 2003. A doctor in a local hospital prescribed him Migsis in 2003 to ease the migraine pain and he has been ordering it online and using it ever since. According to the Athlete, it is the only effective remedy against the migraines. The Athlete always carries Migsis with him (or keeps it at home), in case of a "*sudden migrainous attack*". The Athlete suffered from a severe headache on 23 or 24 November 2016 and therefore used three tablets of Migsis a day for five days.

82. The Athlete provided a report issued by Ms Olga Kiseleva in respect of the B sample analysis, concluding that: "*it is obvious that de facto the test for identifying the origin of trimetazidine, found in the sample (in particular, to exclude the possibility of trimetazidine formation in the athlete's body to the lomerizin metabolisation, i.e. the analysis to identify the presence of other lomerizine metabolites), was not performed*".

83. The Stockholm Laboratory failed to look for the other metabolites of lomerizine and, therefore, the positive finding for trimetazidine could have come from a metabolism of lomerizine, a non-prohibited substance, which is contained in Migsis.

84. A recent publication of Dr Masato Okano (M. Okano, M. Thevis, M. Sato, S. Kageyama, "Analytical detection of trimetazidine produced by metabolic conversion of lomerizine in doping control analysis", Drug Test. Anal. 2016, 8, 869. DOI: 10.1002/dta.1893) states in its abstract as follows:

> *"The identification of trimetazidine in urine samples might result from administration of the permitted drug lomerizine. Laboratories are therefore urged to carefully investigate suspicious cases where trimetazidine is detected. Differentiation of abuse of the banned substance trimetazidine from use of the permitted drug lomerizine would be supported by analysis of the intact drug lomerizine and/or specific metabolites".*

85. The same is confirmed by other well-known and highly respected scientists from the Cologne and Lausanne anti-doping laboratories (M.Thevis, T.Kuuranne, H.Geyer, W.Schänzer, "Annual banned-substance review: analytical approaches in human sports drug testing", Drug Test. Anal. 2017, 1, pp.19-20. DOI 10.1002/dta.2139), indicating that "*the identification of the anti-migraine drug lomerizine as a precursor of trimetazidine was reported by Okano et al., alerting athletes, physicians, and predominantly doping control laboratories and anti-doping organizations of the possibility of AAFs concerning trimetazidine caused by the licit use of lomerizine*".

86. Trimetazidine may appear in a urine sample not only after an intake of the prohibited substance, but also as a result of metabolism of the permitted drug lomerizine in a human system.

Source of Trimetazidine in the Athlete's Sample

87. The Athlete had never used doping substances, and he had always been extremely careful when administrating any nutritional supplements and/or medications, drugs, etc. Therefore, he has requested his B sample to be opened and analysed in the presence of his representative.

88. The Athlete conducted a thorough check of all his medications ingested long before the date of an allegedly positive sample (6 December 2016), and there was no hint of any medication even potentially containing trimetazidine.

89. After the B sample opening and analysis, conducted in the presence of Dr Olga Kiseleva, the Athlete learned that he had to check all his medications not only for trimetazidine, but also for lomerizine.

90. The Athlete was shocked since he knew that he sometimes used Migsis, a Pfizer drug containing lomerizine, in order to relieve his migraine pains. He has been using Migsis since at least 2004, but his samples never returned a positive finding for trimetazidine.

91. Migsis was prescribed to the Athlete on 20 August 2003 by Dr Olga Konstantinycheva, then a young practicing physician in a small clinic in the town of Bor, interested in brand-new approaches and treatments. It was prescribed in order to, and indeed assisted in, relieving migraine headaches.

92. The Athlete has usually been purchasing Migsis via different online pharmacy stores specializing in delivery of foreign medications into Russia. Payment was typically made in cash to the courier/ delivery person. Thus, the Athlete could not provide a record or receipt of such purchases, other than a purchase made following the positive finding.

93. The Athlete's wife, Mrs Nadezhda Kopeykina, shares the same apartment with the Athlete since 2012, and she confirmed that the Athlete suffers from migraines and has been purchasing and using Migsis.

94. The Athlete was unable to locate Dr Shishmarev, who had conducted the search regarding the product and confirmed to the Athlete, years ago, that Migsis did not contain prohibited substances.

95. The Athlete has never bought any medication containing trimetazidine and was not aware of anyone trying to harm him or to spike his food or beverages, so a positive resulting from the consumption of Migsis was the only plausible explanation for the positive finding.

96. The ingestion of any prohibited substance (let alone a modulator like trimetazidine) in November or in early December 2016 did not make any sense because the Athlete's right ankle was injured on 12 November 2016 while training, and he was not allowed to train and compete since that date and until the very end of March 2017.

97. Dr Yegor Kochergin, the Russian athletics team doctor in November 2016, and Mr Georgy Goroshansky, the Athlete's coach, provided written testimony confirming the Athlete's injury, which occurred on 12 November 2016, and the fact that such injury prohibited the Athlete from training and competing.

98. The Athlete did not knowingly ingest trimetazidine; Migsis was prescribed to him by his doctor in order to relieve migraines; he was taking Migsis not on a regular basis, but over a long period of time, without any incident, and with no adverse analytical findings after his samples' analyses in all prior tests; he has carefully checked the product's ingredients, and he asked another professional doctor to assist him and confirm that he could use Migsis and freely compete afterwards; he had no intent to cheat; he could not train (still less to compete) at the time in which his urine sample was taken, so he had no reason whatsoever to administer any prohibited substance, and definitely could not have benefitted from such administration; he has an impressively good "doping history"; his sport results indicate that he never used prohibited substances.

99. The Athlete refers to the Roberts' Award, indicating that "*it is the most recent award with the analogous general circumstances: scientific unclarities and ambiguities, and the allegations of lying made by the IAAF against the athlete's version. The other circumstances are different, however the main approach demonstrated by the CAS Panel of three very experienced arbitrators (Hon. Hugh Fraser, Hon. Michael Beloff, Mr Jeffrey Benz) is absolutely clear and talks for itself, that is why the Roberts award may be relevant for this matter*".

100. The Athlete discharged his burden of proving lack of intent. The totality of the evidence presented is sufficient to establish, on the balance of probabilities, that he had no intention to cheat whatsoever.

101. Establishment of the source of the prohibited substance in an athlete's sample is not a sine qua non of proof of absence of intent.

No violation committed

102. An ADRV has not been committed by the Athlete. The Stockholm Laboratory erred in concluding that lomerizine was not detected in the Athlete's sample, and that, therefore, the metabolite found (trimetazidine) could not come from an intake of lomerizine.

103. The Stockholm Laboratory erred in concluding that there was no trace of other metabolites, which should have been present following an administration of lomerizine, and, therefore, confirming the finding for trimetazidine.

104. The data in the retrospective analysis of the B sample analysis report of the Stockholm Laboratory was adapted or changed by someone within the laboratory, and such changes were not recorded in due order by the laboratory staff as prescribed by par. 5.4.4.4.1.5 of the International Standard for Laboratories, 2016 Edition ("ISL"), which is a clear departure from the ISL. Furthermore, this departure could have reasonably caused the AAF reported by the Stockholm Laboratory.

105. Both Dr Arthur Kopylov, of the Institute of Biomedical Chemistry of Russian Academy of Sciences, an expert in biochemistry and in mass spectrometry, and Professor Dr Mats Larsson, a Member of the Nobel Committee for Physics, Member elect of the Royal Swedish Academy of Sciences and a world-known scientist with a wide experience in mass spectrometry, concluded that the Stockholm Laboratory failed to correctly record and report the findings and ignored signals evidencing that the M6 metabolite of lomerizine was present in the sample. Thus, the Stockholm Laboratory should have reported the sample as negative.

106. The ingestion of lomerizine is not prohibited under the existing anti-doping rules and thus the Athlete has not committed an ADRV.

107. Dr Okano's report analysing four cases in which lomerizine was detected and in which the M6 metabolite had a much higher concentration than trimetazidine (referred to as M7 metabolite) is not indicative since it is not an empiric large study and not a peer - reviewed publication. The reference sample offered by WAADS and later used by the Stockholm Laboratory for an additional analysis, has shown that trimetazidine (M7 metabolite) had a much higher concentration than the M6 metabolite. This does not mean that the reference sample does not evidence an ingestion of lomerizine but rather that there must be a large number of individual variations. It is impossible to draw conclusions when the detailed and complete data for lomerizine pharmacokinetics are still absent.

108. The Stockholm Laboratory has not done a measurement of the product ions and compared it with a product ion spectrum obtained from the WAADS' sample. A simple comparison at the MS1-level does not suffice to prove the presence of trimetazidine in a sample, since it is not possible to confirm scientifically the proposed metabolite without its fragmentation. The Stockholm Laboratory made a simple retrospective comparison of the WAADS' sample and Athlete's sample by using MS1-level only. It should have continued to compare MS2 in the Athlete's sample with MS2 in the newly obtained WAADS' sample. An MS2 (fragmentation) is always needed to check the ion's fragment structure.

109. Dr Okano's professional experience and expertise is not disputed, but his position heading a WADA- accredited laboratory raises questions regarding his independence.

According to Swiss jurisprudence, experts are held to high standards and are not impartial if they have some form of dependence on a party. Whilst WADA- accredited laboratories are independently funded, without such accreditation, laboratories could not have anti-doping testing authorities as clients. The laboratories' indirect financial dependency on their WADA accreditation, and consequently their loose organizational links, could build a financial predisposition and a duty of loyalty towards the organization, thus placing doubts on the ability of Dr Okano to provide an independent and absolutely impartial expert opinion.

110. Trimetazidine does not really help to enhance sport performance. It can be used by athletes to improve physical efficiency, especially in endurance sports. However, there is no evidence of any significant usage of trimetazidine amongst athletes in other types of sport, and none were identified in respect of long jumpers. Therefore, disqualification cannot be justified under an argument of fair competition, since it does not constitute an adequate means of re-establishing a level playing field. As a result, disqualification should be eliminated for lack of proportionality.

Conclusions

111. The evidence demonstrates that the Athlete did not engage in a practice of doping using trimetazidine. On the contrary, administration of any prohibited substance, and trimetazidine in particular, made absolutely no sense for the Athlete due to his injury of 12 November 2016 and follow-up period of non-involvement in any jumping activity (training or competing).

112. The Athlete ingested the medication Migsis by Pfizer Japan containing the non-prohibited substance lomerizine. Lomerizine is quickly metabolized in a human system into trimetazidine and some other indicative metabolites, including M6 (according to recent publications).

113. The scientific evidence presented by the IAAF and the expert opinions of Dr Kopylov and of Professor Dr Larsson prove far beyond the "*balance of probabilities*" standard that the Stockholm Laboratory departed from the ISL and interpreted the results obtained by retrospective analysis of the B sample analysis in a wrong way, which led to the wrongful AAF. The analysis should have yielded a "negative" result, since the presence of (at least) M6 metabolite of lomerizine should have been confirmed.

114. As the IAAF has obviously failed to submit clear and convincing evidence to the comfortable satisfaction of the Sole Arbitrator in support of the ADRV, the case should be dismissed.

ii. Requests for Relief

115. The Athlete requests the Sole Arbitrator to rule as follows:

i. This answer is admissible.

ii. The claims raised by the IAAF are dismissed.

iii. The IAAF shall bear the entirety of the arbitration costs.

iv. The IAAF is ordered to pay Mr Vasily Kopeykin a contribution towards the legal and other costs incurred by him in the framework of this proceeding, in an amount to be determined at the discretion of the Panel."

VIII. MERITS

Main Issues

116. The following are the main issues which arise in these proceedings:

(i) Has the Athlete committed an ADRV?

(ii) Did the Athlete meet his burden of proof to show that the Stockholm Laboratory departed from the ISL which resulted in the report of an AAF?

(iii) Did the Athlete consume Migsis (containing lomerizine), which is not a prohibited substance, and thus the Stockholm Laboratory reported a wrong positive?

(iv) If there is an ADRV, what is the appropriate period of ineligibility to be imposed on the Athlete?

(v) Is an establishment of the source of the substance needed in order to prove lack of intent?

(vi) What are the other consequences to the Athlete?

Has the Athlete Committed an Anti-Doping Rule Violation?

117. Pursuant to Rule 32.2 of the IAAF Competition Rules:

> *"The following constitute anti-doping rule violations:*
> *(a) Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.*
> *(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a)."*

118. Under Rule 32.2(a)(ii) of the IAAF Competition Rules, sufficient proof of an ADRV is established by the "*presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample [...] where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample*".

119. Under Rule 33.1 of the IAAF Competition Rules, "*[t]he IAAF....shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof*

shall be whether the IAAF....has established an anti-doping rule violation to the comfortable satisfaction of the relevant 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". Rule 33.3(b) of the IAAF Competition Rules continues to state that "*WADA-accredited laboratories and other laboratories approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the international Standard for laboratories*".

120. The analysis of the Athlete's A and B samples by the Stockholm Laboratory revealed the presence of trimetazidine, which was reported by the Stockholm Laboratory as an AAF. Trimetazidine is a substance prohibited under S4.5.4 of the Prohibited List. It is a non-specified substance and is prohibited at all times. It does follow from Rules 32.2(a)(ii) and 33.3(b) of the IAAF Competition Rules that, in the absence of a proof by the Athlete regrading a departure from the ISL as will be discussed below, the IAAF has met its burden of proof to show that the Athlete committed an ADRV.

Did the Athlete meet his burden of proof to show that the Stockholm Laboratory departed from the ISL which resulted in the report of an AAF?

121. Pursuant to rule 33.2 of the IAAF Competition Rules, "*[w]here these Anti-Doping Rules place the burden of proof upon the Athlete .....to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability*".

122. Rule 33.3 of the IAAF Competition Rules reads in its pertinent part:

> "*(b) WADA-accredited laboratories and other laboratories approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the IAAF, Member or other prosecuting authority shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding.*
>
> *(c) Departures from any other International Standard or other antidoping rule or policy set out in these Anti-Doping Rules or the rules of an Anti-Doping Organisation which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the IAAF, Member or other prosecuting authority shall have the burden of establishing that such departure did not cause the*

Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

123. The Athlete argues that the Stockholm Laboratory did not conduct the analysis and interpreted and reported its results in accordance with the ISL. The Athlete argues that based on the scientific evidence and the expert opinions of Dr Kopylov and of Professor Dr Larsson he has proven "*far beyond the balance of probabilities standard*" that the Stockholm Laboratory had committed a departure from the ISL and interpreted the results obtained by the retrospective analysis of the B sample analysis in a wrong way, thus resulting in an AAF. The Athlete claims that since the departure from the ISL could reasonably have caused the AAF, it is then up to the IAAF to establish that such departure did not cause the AAF.

124. Professor Dr Larsson, in his expert opinion of 11 September 2017 and in the oral testimony presented indicated that:

> "*The critical question in this case is not whether trimetazidine was present or not in the athlete's sample 4053309B. It was and this follows unambiguously from the chromatogram on page 2. The critical question is the origin of trimetazidine, whether it was present in the athlete's sample because of exogenous administration of trimetazidine, as claimed by the Doping Control Laboratory in Huddinge, or whether it derived as a metabolite from intake of lomerizine, which is perfectly possible according to Okano et al., "Analytical detection of trimetazidine produced by metabolic conversion of lomerizine in doping control analysis", Drug Test. Analysis 8, 869 (2016). The understanding that intake of lomerizine for medical purposes (migraine symptoms) can result in the presence of trimetazidine in urine is thus of a very recent date.*
>
> ---
>
> *To summarize: the athlete uses lomerizine against migraine symptoms. This is a known fact. It is also known that licit administration of lomerizine results in the occurrence of trimetazidine in the urine sample. In addition to trimetazidine, Thevis et al. advocate the M6 metabolite as a marker that the precursor of trimetazidine is lomerizine. As shown by the athlete's chromatogram on page 6, M6 is present in the sample. Thus, the Doping Control Laboratory should have reported the sample as negative.*"

125. The Athlete claims that the scientific evidence presented on his behalf establishes that the Stockholm Laboratory should have confirmed the presence of (at least) M6 metabolite of lomerizine, thus concluding that trimetazidine was merely detected as a result of the administration of the permitted drug lomerizine, being an ingredient of the migraine medication Migsis which he had been prescribed and was taking when needed, and should have thus reported a "negative" result.

126. The IAAF does not dispute that trimetazidine, as well as being a prohibited parent compound, may also result from the ingestion of lomerizine, which is not a prohibited substance. The IAAF indicates that Migsis is the only drug containing lomerizine. More particularly, the IAAF highlights that trimetazidine is one of the metabolites of lomerizine, known as the M7 metabolite, which is only contained in Migsis.

127. The IAAF highlights, however, that the Stockholm Laboratory, in its report of 27 April 2017, excluded that the positive finding could have been the result of an intake of lomerizine, highlighting that none of the metabolites, which should have been detected had lomerizine been administered, were found in the Athlete's sample. The IAAF thus concludes that it is clear that the positive finding came from an intake of trimetazidine.

128. Furthermore, the IAAF's position is that the retrospective investigation reports show that the analytical results are not consistent with lomerizine being the source. Differentiation of abuse of the banned substance trimetazidine from use of the permitted drug lomerizine would be supported by analysis of the intact drug lomerizine and/or specific metabolites. The Stockholm Laboratory's second, more detailed version of the retrospective investigation report dated 20 October 2017, including full-plot and zoom-in plot versions of the relevant chromatograms, demonstrated the absence of any indications of lomerizine or its metabolite (the peak around the M6 position being only a "background noise" or "background peak").

129. On the other hand, the expert witnesses presented by the Athlete testified to numerous mistakes in the analysis conducted by the Stockholm Laboratory. The expert witnesses presented by the Athlete testified that had the tests been done and reported correctly, they should have established the presence of certain metabolites (at least the M6), which are detectable following an administration of lomerizine, thus possibly establishing that trimetazidine was detected as a result of the consumption of Migsis which contains lomerizine. They mentioned that the Stockholm Laboratory retrospective reports are reports made after the fact, that certain data was amended by hand and further referred to the width, shape and height of the M6 metabolite indicating that it should have been investigated. They also highlighted that that there is insufficient data to conclude that in all cases in which the parent compound lomerizine is ingested the M6 metabolite should peak higher than the M7 metabolite, being trimetazidine, which was not the case here.

130. The Athlete and his expert-witness, Dr Arthur Kopylov, appear to have abandoned at the hearing any arguments which may have been interpreted as shedding doubt on the integrity of the Stockholm Laboratory or claiming any deliberate action to manipulate or falsely present partial or wrong data.

131. Relating to the question of the establishment of the AAF, the Sole Arbitrator need not necessarily decide on the scientific questions which arise in this case and the conflicting testimonies and evidence presented by the numerous expert witnesses, since the Athlete's position, including that of his expert witnesses, and in particular of Professor Dr Larsson, is that the evidence regarding the consumption of Migsis which contains lomerizine combined with the presence of certain signals of lomerizine metabolites (as suggested by the Athlete's experts) establishes on the balance of probabilities, that the positive finding was not as a result of the consumption of the prohibited substance trimetazidine.

132. The Sole Arbitrator notes that once the IAAF produced the Stockholm Laboratory report the burden shifted to the Athlete. The Athlete in this case cannot meet his burden on the balance of probability merely based on science, but should a priori establish that he consumed Migsis, which is also a factor relied upon by his own experts in concluding that the Stockholm Laboratory departed from the ISL and that such departure resulted

in a wrongful report of an AAF. Therefore, the evidentiary question regarding the alleged ingestion of Migsis will be reviewed.

Did the Athlete consume Migsis (containing lomerizine), which is not a prohibited substance, and thus the Stockholm Laboratory reported a wrong positive?

133. The Athlete is required to prove the origin of the prohibited substance on the "balance of probability". The "balance of probability" standard entails that the Athlete has the burden of convincing the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence (CAS 2008/A/1515, para. 116). The "balance of probability standard" requires the Athlete to prove that his scenario is more likely than not to be correct; namely, that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence.

134. Establishing the origin of the prohibited substance requires substantiated, supported and corroborated evidence by the Athlete. It is not sufficient for the Athlete merely to make protestations of innocence, provide hypothesis or suggest that the prohibited substance must have entered his body inadvertently from some supplement, medicine or other product which the Athlete was taking at the relevant time. Rather, the Athlete must provide concrete, persuasive and actual evidence, as opposed to mere speculation, to demonstrate that a particular supplement, medication or other product that he took contained the prohibited substance. (see CAS 2010/A/2230; CAS 99/A/ 234 and CAS 99/A/235; CAS 2014/A/3820; CAS 2006/A/1067; CAS 2014/A/3615; CAS 2006/A/1032).

135. The ITF Anti-Doping Tribunal held in the matter ITF v Beck that this "*is necessary to ensure that the fundamental principle that the player is responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases*".

136. The Sole Arbitrator reminds that it is not pivotal whether or not the scenario put forward by the Athlete (ingestion of Migsis) is more likely than or the most likely of other scenarios which were or may be advanced as alternatives. The Sole Arbitrator does not need to decide which is the most likely between two or more competing scenarios but rather the Athlete must prove that the events presented by him did happen, more likely than not. The IAAF does not have the burden of proving the prevailing likelihood of a different scenario or is even obliged to put forward any other competing scenarios.

137. The Athlete provided what he claims to be "*details of the most probable scenario of how trimetazidine appeared in his sample, including the indication to Migsis by Pfizer, Japan*". The Athlete testified that he has administered Migsis following a professional doctor's advice, in order to relieve migraine headaches.

138. Dr Olga Konstantinycheva testified that on 20 August 2003, as a young practicing physician having graduated from university in May 2003, in a small clinic in the Russian town of Bor, she was visited by the Athlete. The Athlete was then fifteen years old.

139. Dr Konstantinycheva performed an "*express-diagnosis*" of the Athlete, and concluded that his headaches were likely migraine headaches, since the teenager did not have an

intracranial pressure elevation or spikes of arterial tension and since glaucoma was also not diagnosed.

140. Dr Konstantinycheva testified that throughout her career she was interested in innovative approaches and treatments and tried to stay abreast of innovations in the medical field including those appearing in foreign medical journals. She was thus made aware that Pfizer started to produce in Japan a new drug for migraine headache treatment – Migsis, which received good reviews from patients. She advised the Athlete to order this drug from Japan and use it according to the manufacturer's instructions.

141. In response to questions, Dr Konstantinycheva testified that she heard about this new drug from a Pfizer company representative in some gathering in 2003. The representative brought with him a magazine in English in which the drug was mentioned. Dr Konstantinycheva could not explain why a drug available since 1999 would be mentioned as a "*new drug*" in 2003. Dr Konstantinycheva further stated that she thought that the Athlete was a young man and did not check his ID or enquired about his age, since this was not the practice in Russia. Dr Konstantinycheva recommended to the Athlete to use Migsis in accordance with the instructions in the pack, but did not prescribe the drug. She could not recall if it was a prescription drug. She also did not know whether the instructions were only in Japanese.

142. Dr Konstantinycheva testified that she did not know how the Athlete obtained this drug, but that after a short period of time the Athlete visited her again and showed her the package of Migsis indicating that the drug helped him to get rid of his headaches. According to her she explained to the Athlete that it appears that this drug was suitable for him and could be used in case of the re-occurrence of symptoms. About one and a half or two years later she accidentally met the Athlete in the town of Bor. The Athlete reintroduced himself, reminded her of the suggested method of treatment using Migsis and thanked her for prescribing Migsis, which produced very good results.

143. In response to questions from the IAAF's counsel, Dr Konstantinycheva indicated that the medical treatment in Russia is not as organised as in the West. She did not find it peculiar that she treated the Athlete when he approached her as a young under aged teenager, not accompanied by his parents. She prescribed a drug not formally available in Russia, without conducting additional tests and did not have electronic records or official records of the visit issued by the clinic nor any prescription. She did have her own notes indicating that the Athlete's visit to the clinic occurred on 20 August 2003.

144. In response to questions put forward by the Sole Arbitrator, Dr Konstantinycheva confirmed that in connection with these proceedings and her evidence including the witness statement provided by her, she was visited by the Athlete during late summer 2017. She could not remember the date within August of 2017. In response to questions, she indicated that she does remember the exact 20 August 2003 date because she was a young doctor just out of school without many patients or vast experience and thus she vividly remembers those early days noting that the Athlete had made an impression upon her. While she sees about 300 patients a year, she remembers only a few.

145. The Athlete testified that when having migraines the symptoms are severe, he is not able to be in a lighted room or hear loud voices, he hardly gets out of bed and he is nauseated and vomits. The severity of these attacks was further supported by the Athlete's wife.

146. The Athlete testified that Migsis was manufactured by the Japanese branch of Pfizer and was primarily available in Japan. The drug is expensive but according to the Athlete most effective and thus worth the price. The only way to purchase the drug in Russia is to order it online and have it delivered from Japan. There were and are a great number of companies in Russia which offer the delivery of medications from Japan and some other countries. The Athlete was using such services when he needed to buy a new pack of Migsis. Each time he ran the online search (two times a year, at most), a new set of companies appeared, and he just called the first or the second company in order to place an order, and within 7-15 days a Migsis pack was usually delivered to his home address by a courier. The payments were usually made in cash, as is allowed in Russia. In the rare cases when he got receipts, he was not eager to keep these receipts for years. When he was younger the Athlete may have used relatives to obtain Migsis.

147. The Athlete also provided evidence of the purchase of Migsis at the beginning of July 2017, after this case was filed, from the on-line shop of "Japan Health Shop" (bio.trade-jp.net) for USD 109 for the medication and USD 29 for the delivery (a total USD 138), an amount paid through PayPal using the Athlete's debit card.

148. Mrs Nadezhda Kopeykina, the Athlete's wife who shares the same apartment with him since 2012, confirmed his migraine attacks, keeping the Migsis at home and its occasional purchase. The drug was always delivered to the Athlete and never to her when she was at home.

149. The Athlete indicated that he uses this drug on occasion whenever he has migraines and, since it is effective, he ensures that he always has some in case of need.

150. The Athlete indicated that he did not indicate on the test form the use of this drug because he did not suspect it to contain prohibited substances, having used it for many years with so many tests done and always coming out negative.

151. The Sole Arbitrator is not persuaded by Dr Konstantinycheva's testimony. The Sole Arbitrator questions: (i) her ability to remember an examination conducted on a specific date in 2003 but not the Athlete's visit in mid-2017; (ii) maintaining personal notes of an examination of a patient in 2003; (iii) not having an official record from the clinic regarding such visit; (iv) recommending but not prescribing a drug; (v) suggesting to a young teenager to purchase an expensive medicine available only in Japan; (vi) not insisting to meet with the parents before suggesting a new drug which she cannot officially prescribe and is not available in Russia; (vii) not suggesting first other locally available medications which can be officially prescribed; and (viii) not conducting additional tests or having follow on appointments.

152. The Sole Arbitrator is also not persuaded by the evidence of the Athlete and his wife on point. The Sole Arbitrator questions: (i) the ability of a young teenager in Russia to spend large amounts of money on such medication; (ii) not trying to find other more accessible and cheaper alternatives; (iii) not consulting with other professionals regarding his very severe headaches for so many years; (iv) not having any records of other tests and examinations of his condition as he grew up and over some 14 years; (v) not having evidence of any purchase of Migsis, either receipts or mails, save for the purchase made after the case was initiated; (vi) not having any doctor's prescription to any other drug against migraine headaches; (vii) not having any corroborating evidence

regarding the purchase or delivery of Migsis prior to the initiation of these proceedings; (viii) no communication to drug or delivery companies trying to obtain record of purchases and not having old boxes of used drugs; (ix) not listing Migsis on the test form.

153. The Sole Arbitrator did not find the testimony of Dr Konstantinycheva and the testimony of the Athlete on this point to be transparent, forthright and credible.

154. The Panel in the Roberts' Award (paras. 83 & 84), referred to by the Athlete, in dismissing the appeal, concluded that:

> "*83. The Panel finds itself faced with compelling factual evidence and, at best, conflicting scientific evidence that acts as a double-edge sword in determining the truth. Put simply, in its assessment, the scientific evidence fails to take this storyline below the requisite Gasquet threshold. Therefore, the Panel reverts to the non-expert evidence and finds itself sufficiently satisfied that it is more likely than not that the presence of probenecid in the Athlete's system resulted from kissing his girlfriend Ms. Salazar shortly after she had ingested a medication containing probenecid.*
>
> *84. In consideration of the foregoing, and in contemplation of the evidence put before the Panel in both written and oral form, the Panel concludes that the Athlete has established the origin of the prohibited substance on a balance of probabilities. Furthermore, the Panel finds that even with the exercise of the utmost caution, the Athlete could never have envisioned that kissing his girlfriend of three years would lead to an adverse analytical finding for trace amounts of a banned substance that he was not familiar with. The Panel finds, therefore, that the Athlete acted without fault or negligence.*"

155. The Sole Arbitrator finds the Robert's Award irrelevant and unhelpful to the present proceedings. In the Roberts' Award, the Panel found the witnesses to be credible; whereas in the present case the Sole Arbitrator was not persuaded by the testimony of the Athlete, his wife and Dr Konstantinycheva regarding the use of Migsis. Additionally, and as indicated by IAAF, "*whereas the lack of contemporaneous evidence of the purchase of the product in the Gil Roberts case made sense (it was a one-off purchase in a shack-pharmacy in semi-rural India), the Second Respondent was simply unable to explain the total lack of contemporaneous evidence for his alleged (online) purchases of Migsis over the course of years*".

156. The Sole Arbitrator is not persuaded by the scenario put forward by the Athlete. The Sole Arbitrator having considered all of the evidence holds that the Athlete has not met his burden of proof and could not establish that the occurrence of the circumstances on which the Athlete relies regarding the consumption of Migsis as the reason for the presence of trimetazidine (or lomerizine for that matter) in his systems is more probable than their non-occurrence.

157. Even if the Athlete's arguments may be interpreted as suggesting that, independent of any evidence regarding the consumption of Migsis, the Stockholm Laboratory had to call a "negative" result because there was sufficient evidence consistent with lomerizine itself being the source of the trimetazidine, the Sole Arbitrator is not, in the absence of

the establishment of the consumption of Migsis, persuaded that the scientific evidence (which is conflicting at best) on point is sufficient to meet the burden of proof which is on the Athlete. The Sole Arbitrator is more persuaded by Dr Okano's expert-witness statement dated 25 October 2017, concluding that "[*n*]*o evidence of lomerizine intake by the athlete was obtained from the related analytical data*".

If there is an ADRV, what is the appropriate period of ineligibility to be imposed on the Athlete?

158. According to IAAF Competition Rule 40.2:

> "*the period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markets), 32.2(b) (Use or Attempted Use of a Prohibited Substances or Prohibited Method)* [...] *shall be as follows, subject to potential reduction or suspension pursuant to Rules 40.5, 40.6 or 40.7:*
>
> *(a) The period of Ineligibility shall be four years where:*
>
> - *The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*"

159. Thus and pursuant to Rule 40.2(a) of the IAAF Competition Rules, the period of ineligibility shall be four years since the ADRV in the present proceedings does not involve a specified substance, unless the Athlete can establish that the ADRV was not intentional.

Is an establishment of the source of the substance needed in order to prove lack of intent?

160. Rule 40.3 of the IAAF Rules sets out that the term "*intentional*" is meant to "*identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

161. The Athlete bears the burden of establishing that the violation was not intentional. A line of CAS cases have held that it follows that in order to meet such burden the Athlete must necessarily establish how the substance entered his/her body (CAS 2016/A/4377, at para. 51; CAS 2016/A/4662, at para. 36; CAS 2016/A/4563, at. para. 50; and 2016/A/4845).

162. The IAAF further cites a recent Canadian decision in which CAS arbitrator Yves Fortier was sitting as a Sole Arbitrator for the Sport Dispute Resolution Centre of Canada in the matter of Taylor Findlay. In that case, the Athlete claimed that the substance "clenbuterol" entered her system from the consumption of contaminated horse meat in a restaurant. On the basis of the evidence before him, Mr Fortier found that this explanation was "*highly improbable*". He held that a failure to explain the concrete origin of the prohibited substance necessarily meant that the athlete could not prove a lack of intention:

> *"It appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says, contained the Clenbuterol. With respect for the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body."*

163. The Panel in CAS 2016/A/4534 held differently, relying in particular on the wording of the new version of the WADA Code of 2015 whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent:

> *"The WADC does not refer to any need to establish such source for the purposes of establishing lack of intent while specifically requiring it when an athlete seeks to prove no fault or negligence (WADC 10.4) or no significant fault or negligence (WADC 10.5.1 and 10.5.2) under the definitions of "No Fault or Negligence" and "No Significant Fault or Negligence". "This engages the principle inclusio unius exclusio alterius: if such establishment is expressly required in one rule, its omission in another must be treated as deliberate and significant". Stating that: "The omission in FINA DC modelled on WADC 2015 of the need to establish source as a precondition of proof of lack of intent must be presumed to be deliberate.*
>
> *Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history. That said, such a situation would inevitably be extremely rare. ..... Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him."* (See also CAS 2016/A/4676).

164. In the present proceedings the IAAF stated that it "*would in principle be willing to accept that such exceptional cases may exist. However, the IAAF submits that the circumstances would have to be truly exceptional; in particular but without limitation, a lack of intention cannot be inferred from e.g. protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, apparently diligent (but unsuccessful) attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record*".

165. The Panel in CAS 2016/A/4534 also agreed that "*[i]t is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample (a fortiori though use of such substance) if s/he cannot even establish the source of such substance*".

166. The Sole Arbitrator follows the reasoning of the CAS cases 4676 and 4534, but accepting that an athlete, in order to meet such burden of proving lack of intent without establishing source cannot merely rely on protestations of innocence, lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or the athlete's clean record. Supporting lack of intent without establishing the origin of the prohibited substance requires truly exceptional circumstances.

167. In the present proceedings the Sole Arbitrator did not accept that Migsis was consumed by the Athlete and there is not even a sliver of any exceptional circumstances to establish that the violation was not intentional. Other than the statements regarding the use of Migsis we are left only with protestations of innocence, the Athlete's clean record and the lack of incentive to dope when the Athlete was not competing due to an injury and when, according to the Athlete, the substance could not provide any sporting advantage to the Athlete in the discipline which he practices. Consistent with CAS case law this is far from being sufficient to establish lack of intent.

168. Regarding the alleged lack of intent, the Athlete tried to establish that the positive finding resulted from the consumption of Migsis. The Sole Arbitrator did not accept the Athlete's arguments and testimony on point, as detailed above.

169. The Athlete further provided evidence regarding an injury to his right ankle sustained by him on 12 November 2016 while training. The Athlete indicated that he was not allowed to train and compete since that date for an unpredictable period. This was confirmed not only by the Athlete but also by Dr Yegor Kochergin, the Russian athletics team doctor who examined the Athlete immediately following the injury and on 12 November 2016. All of the Athlete's trainings were immediately stopped. This was further confirmed by Mr Georgy Goroshansky, the Athlete's coach, and by the Athlete's whereabouts information input into the ADAMS system. Evidence was given that the trauma consequences worsened and that the treatment was over only at the very end of March 2017 following medical treatment in Moscow. This evidence is accepted by the Sole Arbitrator but is not sufficient to show lack of intent.

170. The Athlete denies that he was doping. The Athlete claims that he had never doped; that he had always been extremely careful when administrating any nutritional supplements and/or medications; that trimetazidine may be used by athletes to improve physical efficiency, especially in the case of endurance sports (long distance running, swimming, etc.), but not in other types of sport, and that it does not really help to enhance sporting performance of long jumpers. Moreover, the Athlete argues that ingesting a prohibited substance when his sporting season was over due to his injury was highly unlikely to happen.

171. The Athlete argues that he has an impressively good "doping history": since July 2013 he has provided 15 urine samples, 2 blood samples, and 2 blood samples for ABP. All of them were negative, save for the test of 6 December 2016 which was the only positive test in the Athlete's career; his sport results do indicate that he never used prohibited substances.

172. The Athlete insists on the fact that he has discharged his burden of proving the source of the substance being Migsis used by him to relieve his migraines, and thus the lack of intent. The Athlete argues that the totality of the evidence presented is sufficient to establish on the balance of probabilities that he had no intention to cheat whatsoever. However, the Sole Arbitrator concludes that based on the case law, the Athlete's arguments in paras. 169 and 170 are not indicative of exceptional circumstances that might negate the presumed intentionality of the violation.

173. As the Athlete has clearly failed to identify the origin of the prohibited substance in his system and as there are no exceptional circumstances that might otherwise negate the

presumed intentionality of the violation, he must be sanctioned with a four year period of ineligibility, starting from 4 May 2017.

What are the other consequences to the Athlete?

a) Disqualification

174. Rule 40.9 of the IAAF Competition Rules provides:

> "*In addition to the automatic Disqualification of the Athlete's individual results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained by the Athlete from the date the positive Sample was Collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through the commencement of any Provisional Suspension or Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money.*"

175. The ADRV occurred on 6 December 2016, the date of the doping control which resulted in a positive finding. Consequently, all the results obtained by the Athlete from such date must be disqualified through to the date of his provisional suspension on 4 May 2017, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).

b) Period of Ineligibility Start and End Date

176. With respect to the sanction start date, the Sole Arbitrator is guided by Rule 40.11 of the IAAF Competition Rules which provides as follows:

> "*Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed.*"

177. Rule 40.11 (c) of the IAAF Competition Rules is titled "*Credit for Provisional Suspension or Period of* Ineligibility" and states as follows:

> "*If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on the appeal.*"

178. In this case, the sample collection was made on 6 December 2016, and the Athlete was provisionally suspended on 4 May 2017. The Sole Arbitrator finds that for practical reasons, and in order to avoid any eventual misunderstanding, the period of ineligibility shall start on 4 May 2017, the date of commencement of the provisional suspension, and not of the date of this Award, thus giving him full credit for time already served in

accordance with Rule 40.11 of the IAAF Competition Rules. Consequently, the period of ineligibility starts from 4 May 2017.

IX. COSTS

179. Taking into account the special nature of this arbitral procedure, which constitutes a single first instance arbitration proceeding conducted through the Code's appeal procedural rules, the Panel considers that the present arbitration procedure is subject to the provisions on costs set out in Article R64 of the Code.

180. In particular, Article R64.4 of the Code provides that:

> "*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*
> - *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.*"

181. Article R64.5 of the Code provides that:

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

182. Taking into account the outcome of these proceedings, in which the IAAF's requested relief has been fully granted, and the Athlete's failure to admit his anti-doping violations while failing to offer any credible defenses to the IAAF's allegations, the Sole Arbitrator considers that it is fair and reasonable that RUSAF and the Athlete should, jointly and severally, bear the full costs of this arbitration, which will be communicated separately by the CAS Court Office to the Parties at a later date.

183. Regarding the legal fees and other expenses incurred by the Parties in connection with this proceeding, the Sole Arbitrator has considered the respective financial resources of

the Parties, the nature of this case (which required a hearing and experts' testimony) and decides that it is fair and reasonable that the RUSAF and the Athlete contribute, jointly and severally, the amount of CHF 5,000 (five thousand Swiss Francs) towards the IAAF's legal fees and other expenses incurred in connection with these proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1) The claim filed by the International Association of Athletics Federations against the Russian Athletic Federation and Mr Vasiliy Kopeykin on 29 June 2017 is upheld.

2) Mr Vasiliy Kopeykin has committed an anti-doping rule violation pursuant to Rule 32.2(a) of the 2016-2017 IAAF Competition Rules.

3) Mr Vasiliy Kopeykin is sanctioned with a four-year period of ineligibility starting from 4 May 2017.

4) All the competitive results obtained by Mr Vasiliy Kopeykin between 6 December 2016 through the commencement of his suspension period on 4 May 2017 are disqualified, with all the resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

5) The costs of the arbitration, to be determined and served separately to the Parties by the CAS Court Office, shall be borne, jointly and severally, by the Russian Athletic Federation and Mr Vasiliy Kopeykin.

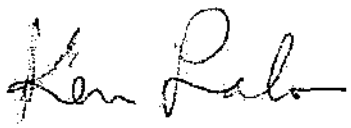
6) The Russian Athletic Federation and Mr Vasiliy Kopeykin are ordered to pay, jointly and severally, to the International Association of Athletics Federations a total amount of CHF 5,000 (five thousand Swiss Francs) as contribution towards its legal fees and expenses incurred in connection with this arbitration procedure.

7) Any other motions or prayers for relief are rejected.

Seat of arbitration: Lausanne, Switzerland

Date: 12 July 2018

THE COURT OF ARBITRATION FOR SPORT



Ken E. Lalo
Sole Arbitrator