Arbitration CAS 2020/A/6781 Andrus Veerpalu v. Fédération Internationale de Ski (FIS), award of 21 July 2020

Panel: Prof. Jan Paulsson (France), President; Mr Benoît Pasquier (Switzerland); Mr Patrick Lafranchi (Switzerland)

Skiing (cross-country skiing)
Doping (suspected anti-doping rules violation)
CAS Jurisdiction
Consequences of a provisional suspension
Taking into account of irreparable harm in favour of a provisonally suspended athlete

1. **The FIS Anti-Doping Rules (ADR) provides for an appeal to the CAS against decisions to impose a provisional suspension. Pursuant to Article R27 of the CAS Code, the parties' agreement to refer a sports-related dispute to CAS may arise out of an arbitration clause contained in a contract *or regulations*. Similarly, pursuant to Article R47 of the Code, an appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes *or regulations* of the said body so provide. Accordingly, the arbitral clause contained in the FIS ADR is sufficient to confer jurisdiction to the CAS to rule on an appeal. It would run counter to the fundamental aim of avoiding the fragmentation of international sports which aspire to, and indeed require, uniform application of the law, if statutory references to CAS would be binding, but the same would not be the case if CAS is referred to in a "mere" regulation – no matter how clearly spelled out, no matter how well notified to participants in the internationally regulated sport. In any case, a statutory basis for CAS jurisdiction is present as well, in the form of Article 57.4 of the FIS Statutes, which provides that: *"Decisions of the Council and the Doping Panel which concern violations of the doping rules may be appealed to the Court of Arbitration for Sport (CAS) within twenty one (21) days"*. The jurisdictional foundation of CAS is therefore fully supported by both regulatory and statutory references.**

2. **Provisional suspensions have the consequence of ineligibility to compete, with the result that the suspended individual is excluded from competitions which will not be repeated. This rule fulfills the goal of protecting participants who are *not* under the cloud of a "reasonable possibility" of having committed a doping violation. True enough, such is also the effect of definite suspensions. But the latter are established for a fixed period of time, and that makes all the difference; a provisional suspension may be overturned as soon as a CAS panel can reach a decision to that effect. It therefore makes sense that the hurdle to overturning provisional suspensions is higher than that of definite suspensions.**

3. **The factor of irreparable harm may be taken into account in favor of a provisionally**

suspended athlete, but the appellant must then demonstrate that the requested measures are necessary in order to protect him from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage. The mere allegations of irreparable harm, without corroborating proof, fail to satisfy the appellant's burden of proof to show substantial damage if the appealed decision is not set aside and if the provisional suspension thus remains.

I. THE PARTIES

1. Mr Andrus Veerpalu (the "Appellant") is a former international-level cross-country skier of Estonian nationality who retired in February 2011. He currently acts as a service staff member and skiing coach, as well as mentor to his children, who compete in national and international cross-country skiing events at the junior level.

2. The Federation Internationale de Ski (the "FIS" or the "Respondent") is the world governing body responsible for the administration and regulation of skiing. Its seat is in Oberhofen am Thunersee, Switzerland.

II. FACTUAL BACKGROUND

3. The Appellant seeks to set aside a decision made on 31 January 2010 by the FIS Independent Anti-Doping Delegate which had the effect of confirming the prior decision taken by FIS to suspend the Appellant provisionally on the grounds of a suspected anti-doping rules violation ("ADRV").

4. The substantive submissions of the Appellant were made in his Statement of Appeal of 21 February 2020 as supplemented by his letter of 23 March 2020. FIS responded by its Answer of 5 May 2020, which expressly incorporated its prior letter of 3 March 2020.

5. In that letter of 3 March 2020 which set out its position with regard the Appellant's challenge, FIS described the background of this case as follows:

On 27 February 2019, at the 2019 Nordic World Ski Championships in Seefeld AUT, the Austrian police raided several cross-country athletes on suspicion of violation of the Austrian anti-doping laws. Among them were several members of the privately sponsored "Team Haanja", a group of athletes and coaches mainly from Estonia, including the Appellant's son Andreas Veerpalu, Karel Tammjärv and Alexey Poltoranin from Kazakhstan. "Team Haanja" was completed by further athletes, who later voluntarily confessed blood doping, and Mati Alaver and Andrus Veerpalu as their coaches.

The athletes admitted that they had blood taken from their circulatory system and later, immediately before certain competitions, re-injected into their system. That is a prohibited method under the WADA Prohibited List.

Coach Mati Alaver also admitted having been part of the systematic blood doping scheme, which was actually performed by Dr. Mark Schmidt from Erfurt, Germany, and his assistants.

The discovery of the illegal blood doping scheme led to several decisions by Anti-Doping Organizations (ADO), which sanctioned athletes and athlete support personnel from various sports and countries with periods of ineligibility. The FIS Independent Anti-Doping Delegate (IADD) sanctioned four cross-country skiers and coach Mati Alaver with periods of ineligibility of four years. These decisions have not been challenged by the sanctioned athletes or Mr. Alaver.

In addition, the responsible Public Prosecutor in Innsbruck, Austria, has initiated criminal proceedings against a number of Austrian and Estonian cross-country skiers and coaches, including Andrus Veerpalu.

The Appellant was a coach of meanwhile banned Alexey Poltoranin and his son Andreas Veerpalu. On 28 September 2019, the FIS opened a disciplinary case also against the Appellant, imposed a provisional suspension, and invited him to respond to the allegations within 10 days. Appellant confirmed receipt but did not provide any explanation or comments on the FIS letter of 28 September 2019.

6. This provisional suspension was confirmed on 30 November 2019, at the time that FIS communicated its formal Notice of Charge to the Appellant. On 18 December 2019, the Appellant requested the immediate lifting of the provisional suspension. On 31 January 2020, the FIS Independent Anti-doping Delegate dismissed his request.

7. On 21 February 2020 the Appellant filed his Statement of Appeal in the present case, in which he once more sought the lifting of the suspension as a *"Provisional Measure pending the CAS's final decision on the present appeal"*.

8. Under the applicable Article R37 of the Code of Sports-related Arbitration (the "Code"), such applications are dealt with by the President of the CAS Appeals Arbitration Division, or her Deputy.

9. On 6 March 2020, the Deputy President of the CAS Appeals Arbitration Division (the "Deputy President") issued an Order denying the application.

10. All decisions made to date concern provisional measures. There has been no finding of an ADRV, and the arbitrators do not exercise first-instance jurisdiction. Whether the Appellant has committed an ADRV is a question which is pending before a separate CAS panel. In the present case, the Panel's mandate is therefore limited to deciding whether the provisional suspension should be upheld. The Appellant contends that the suspension should be annulled either because FIS and CAS *"have no jurisdiction over the Appellant"*, or in any event because it is not well founded.

11. The Deputy President considered the jurisdictional objection and concluded that on a *prima facie* basis CAS did have jurisdiction to hear the application. She noted (para 32): *"The final decision on jurisdiction will be made by the Panel in its award"*.

12. The Panel observes that in parallel to the proceedings before FIS and CAS, the Appellant has sought the intervention of the Swiss courts to annul his suspension, as have three of his

children. His own case is still pending. As for the case of his children, by a judgment of 18 February 2020 the Regional Court of Oberland (Thun) rejected a petition on behalf of X., Y., and Z. Veerpalu, aged 18, 14, and 9 years, respectively, who were seeking the lifting of their father's suspension in their own interest. It was submitted on their behalf that they were not subject to the FIS Statutes. The court considered that CAS had mandatory exclusive jurisdiction with respect to precautionary measures in relation to ADRVs, and that the Swiss courts are *"obviously not competent"*. It accordingly dismissed the petition. For the sake of completeness, the Panel notes that the Court added that the application would in any event have been rejected for lack of urgency, since the children had been active in training and competition since September 2019 even without the coaching support of their father, and had not taken any immediate initiative to challenge the suspension all the while their father was pursuing internal appeals within FIS and ultimately to CAS.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. The Order of the Deputy President issued on 6 March 2020 contains an account of the proceedings as of that date. In summary:

14. The Appellant filed his Statement of Appeal on 21 February 2020, including a request for provisional measures according to Article R37 of the Code.

15. On 25 February 2020, the Respondent was invited to file its position on the Appellant's request for provisional measures and the production of documents.

16. On 2 March 2020, the CAS Court Office granted the Appellant's request for a twenty-day extension of the deadline to file his Appeal Brief.

17. On 3 March 2020, the Respondent submitted its position regarding the request for provisional measures.

18. On 4 March 2020, the Parties were informed that the President of the CAS Appeals Arbitration Division, or her Deputy, would render an Order in response to the Appellant's application for provisional measures.

19. On 6 March 2020, the Respondent submitted another letter in which it requested that the Appellant's disclosure requests be dismissed.

20. The request for provisional measures was rejected by the Deputy President on 6 March 2020. She considered *inter alia* that *"the Appellant's children had not been barred from participating in Competitions, that the Appellant's career as a coach was not considered to be "finite and brief" such as the career of an athlete, and that the Appellant had not actively pursued the challenge to his provisional suspension for almost five months"*.

21. On 23 March 2020, the Appellant submitted a letter which notably made clear that his Statement of Appeal of 21 February 2020, along with its enclosures, as supplemented by the 23 March letter should be considered as his Appeal Brief.

22. On 24 March 2020, the Respondent was requested to file an Answer within 20 days upon receipt of such letter by courier. The Respondent's time limit to file the Answer was subsequently extended until 30 April 2020.

23. On 22 April 2020, the Parties were informed that the Panel had been constituted as follows:

President:	Prof. Jan Paulsson, Professor in Manama, Bahrain
Arbitrators:	Mr Benoît Pasquier, Attorney-at-Law in Zurich, Switzerland
	Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland

24. On 28 April 2020, the Respondent requested another extension of the time limit to file its Answer. The Appellant objected by letter on 29 April. On 30 April 2020, the request for an extension of the time limit was granted until 5 May 2020.

25. On 5 May 2020, the Respondent filed its Answer, stating that it did not consider it necessary that a hearing be held.

26. On 5 May 2020, the Appellant was invited to inform the CAS Court Office whether it preferred a hearing to be held and, if so, whether it would agree to conduct the hearing by video-conference, if necessary.

27. By letter of 12 May 2020, the Appellant confirmed that he did not consider a hearing necessary, adding that he would agree to conduct a hearing by videoconference if the Panel should deem it necessary.

28. On 25 May 2020, the CAS Court Office informed the Parties that the Panel deemed itself sufficiently well-informed to decide the case based solely on the Parties' written submissions, without the need to hold a hearing. Furthermore, the Parties were requested to sign and return the Order of Procedure in this case.

29. The Order of Procedure was signed by the Respondent on 25 May 2020 and likewise by the Appellant on 29 May 2020, subject to the latter's jurisdictional objection.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

30. The Appellant's submissions, in essence and without regard to his unsuccessful requests for provisional measures, may be summarised as follows:

- There is no arbitral clause to submit FIS IADD decisions to the CAS. In this regard, a provision on regulatory (and not statutory) level is not sufficient to qualify as valid arbitral clause.

- The Appealed Decision is null and void because the FIS and the CAS do not have jurisdiction over the Appellant.

- The requirements for an option provisional suspension are not met. In particular, there is no "reasonable possibility" of an ADRV. The report issued by the Austrian police is completely unverified and was issued without the Appellant having had the opportunity to present his views. Separately, bans for an indefinite period are inadmissible under Swiss law. The Appellant was unaware of any blood doping treatments. He did not engage in assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intention complicity involving an ADRV.

- The Appealed Decision does not take into account the fact that the provisional suspension is optional. There is no reason to apply an automatic suspension to coaches like the Appellant. FIS should have exercised its discretion and not imposed a provisional suspension.

- The Appellant was not heard before the Provisional Suspension was imposed and FIS refused to provide him with any documents about his case.

31. The Appellant took the following prayers for relief:

1. *The CAS shall hold that the Respondent and the CAS have no jurisdiction over the Appellant, leading to the Resolution by the FIS Independent Anti-Doping Delegate of 31 January 2020 and the Provisional Suspension imposed on the Appellant by the Respondent on 28 September 2019 being null and void;"*

2. *Alternatively to no. 1: The Resolution by the FIS Independent Anti-Doping Delegate of 31 January 2020 shall be set aside and the Provisional Suspension imposed on the Appellant by the Respondent on 28 September 2019 shall be lifted with immediate effect;*

3. *Alternatively to no. 2: The Resolution by the FIS Independent Anti-Doping Delegate of 31 January 2020 shall be set aside and the Provisional Suspension imposed on the Appellant by the Respondent on 28 September 2019 shall be lifted with immediate effect to the extent that the Appellant's three minor children X., Y. and Z. Veerpalu are concerned (i.e. all competitions they participate in);*

4. *The Respondent shall be ordered to pay all costs and fees relating to these proceedings, including, but not limited to, the entire costs for the Appellant's lawyers, witnesses and experts, which the Appellant reserves the right to produce in due course; […].*

32. Finally, the Appellant requests disclosure by the Respondent of the complete case file and all files connected to the Appellant's case.

B. FIS

33. The Respondent's submissions may be summarised as follows:

- Article R47 of the Code accepts that the arbitration clause is contained in the regulations of an international federation and the CAS therefore has exclusive jurisdiction to review the provisional suspension imposed on the Appellant.

- The Appellant has been in possession of a FIS accreditation to the FIS World Cup Events and to the 2019 FIS Nordic World Ski Championships in Seefeld, Austria, and is therefore subject to the rules and regulations of the FIS, in particular the FIS Anti-Doping Rules (the "FIS ADR").

- With respect to provisional suspensions, the standard of "comfortable satisfaction" does not apply; the Respondent must demonstrate the "reasonable possibility" that the Appellant committed an ADRV.

- The Final Report of the Austrian police is a high credibility piece of evidence. The police investigations revealed that the Appellant was involved in the forbidden practices of Dr Mark Schmidt, who applied autologous blood infusions on a large number of athletes, including the athletes trained and cared for by the Appellant.

34. The Respondent took the following prayers for relief:

1. *to dismiss the Appeal of the Appellant and confirm the decision under appeal;*

2. *to upheld the provisional suspension imposed on the Appellant by the Re-spondent on 28 September 2019 during the pending proceedings before the CAS ADD;*

3. *to order that the Appellant shall bear the costs of these arbitration proceedings if such costs are imposed based on Art. R65.2 or R65.4 of the CAS Code;*

4. *to grant the Respondent a contribution to its legal fees and other expenses incurred in connection with these proceedings.*

V. JURISDICTION

35. Article R47 of the Code provides as follows:

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

36. Given that CAS has its seat in Switzerland and that the Appellant does not have his domicile there, this is an international arbitration governed by Chapter 12 of the Swiss Private International Law Act ("PILA"). In accordance with Article 186 PILA, CAS has the power to determine its own jurisdiction (*Kompetenz-Kompetenz*).

37. Although the Deputy President found jurisdiction on no more than a *prima facie* basis, the Panel agrees upon full consideration that her reasoning and conclusions, as set down as follows in paras. 34-43 of her Order, are well founded in substance:

Article R47 of the Code states that "An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.

The Appellant submits that the CAS does not have jurisdiction on the grounds that the FIS Statutes do not contain an arbitration agreement to submit FIS IADD decisions to the CAS. Only the FIS ADR contain such a provision (Article 13.2.3); however, according to the Appellant, such provision is invalid because it is contained in the FIS' Regulations, whereas a provision in the Statutes would be necessary. In any case, the Appellant would not be covered by Article 13.2.3 of the FIS ADR. Indeed, the mere participation in the 2019 World Championships is not sufficient to conclude that the Appellant submitted himself to the FIS ADR. There cannot be a tacit or implied arbitration agreement, which requires express consent of the parties.

The Respondent submits that the FIS ADR apply to all athletes and any Athlete Support Personnel (i.e. any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other Person working with, treating or assisting an athlete participating in or preparing for a sports competition) participating in any event under the control of FIS. The Appellant has been accredited with the FIS since the 2014/2015 season. He was accredited for the Kazakh team at the 2019 World Championships. Accordingly, Article 13.3 of the FIS ADR is applicable and the CAS has jurisdiction over decisions relating to provisional suspensions. In addition, Article 57.4 of the FIS Statutes provides for an appeal to the CAS against the decisions of the Doping Panel, which has been replaced by the FIS IADD with regard provisional suspensions. Finally, it was the Appellant who filed an appeal against the decision of the FIS IADD with the CAS, and the FIS accepts the jurisdiction of the CAS, "despite the fact that the [appeal] was manifestly late".

The Deputy Division President notes that it is not disputed by the Parties that the FIS ADR provides for an appeal to the CAS against decisions to impose a provisional suspension.

Furthermore, pursuant to Article R27 of the Code, the parties' agreement to refer a sports-related dispute to CAS "may arise out of an arbitration clause contained in a contract or regulations" (emphasis added). Similarly, pursuant to Article R47 of the Code, "[a]n appeal against the decision of a federation, association or sports-related body may be filed ·with CAS if the statutes or regulations of the said body so provide" (emphasis added). Accordingly, the arbitral clause contained in the FIS ADR is sufficient to confer jurisdiction to the CAS to rule on the present appeal.

In addition, the legal authorities relied upon by the Appellant do not appear to support his contention that an arbitral clause in the Respondent's statutes would be necessary. RIEMER addresses the opposability of a newly introduced arbitration agreement to existing members of the association based on the former international Concordat on Arbitration of 27 March 1969 (which has since been replaced by the provisions of the Swiss Code of Civil Procedure). However, RIEMER does not address the issue whether a regulatory basis is sufficient or whether a statutory basis is necessary (Hans Michael RIEMER, Berner Kommentar, Berne 1990, Article 70 N 254 f.). SCHERRER/BRAGGER merely state that a valid arbitration agreement "may" be

contained in the association's statutes, without excluding its regulations (Urs SCHERRER/Rafael BRAGGER, Basler Kommentar -Zivilgesetzbuch I, 6th ed., Basel 2018, Article 70 N 31).

With regard to the applicability of the FIS ADR to the Appellant, the Deputy Division President notes that it is well-established in CAS case law that, by requesting their registration or accreditation, athletes and their support personnel accept the application of the relevant federation's rules and regulations (CAS 2014/A/3832 & 3833).

Finally, the Deputy Division President notes that the Appellant filed his appeal "for the sake of procedural precaution only and in order to have CAS confirmed [sic] that the Respondent and CAS itself have no jurisdiction in this case". Nevertheless, the Appellant has requested that the Deputy Division President rule on his request for urgent provisional measures, which requires the CAS to have at least primafacie jurisdiction.

In view of the above, the Deputy Division President considers that CAS has prima facie jurisdiction in the present proceedings, without prejudice to any final decision the Panel might take in this respect, once constituted.

38. These considerations are fatal to the arguments put forward in the Appellant's Statement of Appeal. He had the occasion to rebut them in his submission of 23 March 2020. He sought to do in Section 1.5. His argument there focused entirely on fact that *"the FIS Statutes do not provide for decisions of the FIS AIDD to be appealable to CAS"*. He noted that FIS's letter of 3 March 2020 contends that such jurisdiction was based on the FIS ADR, and inferred that this is an *"acknowledgment … that the FIS Statutes do not contain any basis for decisions of the FIS ADD to be appealed to CAS"*. This conclusion, so he submits, is confirmed by the fact that Article 57.4 of the FIS Statutes refer to the FIS Council and Doping Panel only, and it follows that:

"Whether or not the FIS IADD is "actually fulfilling the tasks of the former FIS Doping Panel relating to provisional suspensions" is therefore not relevant because the FIS IADD is simply not mentioned there (and nowhere else in the FIS Statutes neither). It would have been an easy task for the Respondent to mention the FIS IADD there. The fact that it has not is to the detriment of the Respondent ("contra proferentem" rule). As a matter of Swiss association law, bodies of an association pursuant to art. 54 et seq. of the Swiss Civil Code (SCC) must be mentioned in the Statutes; otherwise, they have no legal power to issue resolutions for the association ("Vereinsbeschlüsse") within the meaning of art. 66 of the SCC.

39. The Appellant's arguments thus in essence essentially repeat his contentions in the Statement of Appeal and were dismissed by the Decision on Provisional Measures. They were nevertheless addressed by FIS in its Answer, which noted that Article R47.1 of the CAS Code of Sports-related Arbitration explicitly provide that appeals to CAS may be lodged if they are stipulated as applicable in the statutes *or regulations* of a "federation, association, or sports-related body". FIS added as follows, in Paragraphs 17-22 (references omitted):

The Swiss legal literature supports this understanding: According to BERGER/KELLERHALS, GRÄNICHER and KREN KOSTKIEWICZ an arbitration clause can be contained either in the statutes or in the regulations of a legal entity. Not even the authors quoted by the Appellant are of the view that only a statutory provision be sufficient to establish jurisdiction of the CAS: As mentioned in the CAS Decision on Provisional Measures, RIEMER does not address the issue whether a regulatory basis is also sufficient. Furthermore, the Appellant's lawyer states in his comments in the Basel Commentary

(SCHERRER/BRÄGGER) that a valid arbitration agreement "may" be contained in the association's statutes, without excluding regulations as a sufficient basis for an arbitration clause.

Art. 7.9.3 together with Art. 13.2.1 FIS ADR 2019 provide for the jurisdiction of the CAS to hear appeals against decisions of the IADD12 concerning a provisional suspension.

Art. 7.9.3 FIS ADR 2019 says:

"Where a Provisional Suspension is imposed pursuant to Article 7.9.1 or Article 7.9.2, the Athlete or other Person shall be given an opportunity to have the Pro- visional Suspension reviewed by the Independent Anti-Doping Delegate either before or on a timely basis after imposition of the Provisional Suspension based on a written submission. The Independent Anti-Doping Delegate may conduct an in-person hearing at the timely request of the Athlete or other Person and if the specific circumstances so demand. The Athlete or other Person has a right to appeal from the decision of the Independent Anti-Doping Delegate in accordance with Article 13.2 (save as set out in Article 7.9.3.1)". [Emphasis added]

Art. 13.2.1 FIS ADR 2019 declares that decisions on provisional suspensions are subject to appeal to the CAS "in cases arising from participation in an International Event or in cases involving International-Level Athletes". An International Event is defined by the FIS ADR 2019 as "an Event or Competition where the International Olympic Committee, the International Paralympic Committee, an Inter- national Federation, a Major Event Organisation, or another international sport organisation is the ruling body for the Event or appoints the technical officials for the Event".

The present case concerns not only the Appellant's participation in an International Event, i.e. the 2019 FIS Nordic World Ski Championships in Seefeld, as an Athlete Support Personnel but also the Appellant's collaboration with Alexey Poltoranin and Andreas Veerpalu, who are International-Level Athletes.

Decisions concerning incidents at the 2019 FIS Nordic World Ski Championships are appealable to the CAS (Art. 13.2.1 FIS ADR 2019) and the decisions of the IADD concerning a provisional suspension are appealable based on Art. 13.2.1 FIS ADR 2019 (Art. 7.9.3 FIS ADR 2019). The CAS is therefore competent to hear the present appeal".

40. In the alternative, FIS argues that if the present Panel nevertheless would require a statutory basis for CAS jurisdiction in this case, that foundation is present as well, in the form of Article 57.4 of the FIS Statutes, which provides that:

"Decisions of the Council and the Doping Panel which concern violations of the doping rules may be appealed to the Court of Arbitration for Sport (CAS) within twenty one (21) days".

41. In FIS's view, this is an adequate foundation for jurisdiction because (as it contends in Paragraph 24):

In 2019, the FIS Doping Panel was replaced by the CAS Anti-Doping Division ("CAS ADD"), with the exception of decisions on provisional suspensions and ADRV-Resolutions Without a Hearing, which have been assigned to the IADD. The IADD is therefore the successor of the FIS Doping Panel with respect to provisional suspensions, and its decisions are subject to the same remedies as those of the former FIS Doping Panel.

42. This contention is amplified as follows in footnotes 13 and 14 of the same Paragraph 24:

The FIS Doping Panel consisted of members of the FIS Council whereas the IADD is a person unrelated to the FIS. It was the WADA, which demanded a stronger independence of this body. The function of the IADD is currently executed by a member of the CAS who is completely independent from the FIS.

A comparison between the FIS ADR 2016 and the FIS ADR 2019 shows that the IADD is fulfilling the tasks of the former FIS Doping Panel relating to provisional suspensions. Based on the FIS ADR 2016, the FIS Doping Panel was competent to decide a doping case as a first instance and an appeal against a provisional suspension imposed by the FIS. In summer 2019, the FIS signed an agreement with the CAS, delegating adjudicatory powers for the determination of anti-doping rule violations and the resulting sanctions to the CAS ADD (see https://www.fis-ski.com/en/international-ski-federation/news-multime- dia/news/fis-signs-agreement-with-court-of-arbitration-anti-doping-division). As a consequence, the CAS ADD replaced the first instance decisions of the FIS Doping Panel. To maintain the system of a "Resolution Without a Hearing" and the possibility of the athletes to have the provisional suspension imposed by the FIS reviewed by a separate body, the FIS has introduced the IADD in the new FIS ADR 2019. It is therefore not the FIS Doping Panel anymore who is competent to review the provisional suspension is- sued by the FIS, but - since summer 2019 - the FIS IADD.

43. In the present Panel's view, the jurisdictional foundation of CAS is fully supported by each of these two alternative arguments made by the Respondent. The Panel notes that it is also consonant with the judgment dated 18 February of the Regional Court Oberland (see Paragraph 12 above). Moreover, the Panel observes that the Appellant's contention would lead to the unattractive result that while statutory references to CAS would be binding the same should not be the case if CAS is referred to in a "mere" regulation – no matter how clearly spelled out, no matter how well notified to participants in the internationally regulated sport, and as a consequence the Appellant in this case would be entitled to bring his complaint to the courts of Estonia. This would run counter to the fundamental aim of avoiding the fragmentation of international sports which aspire to, and indeed require, uniform application of the law.

44. Based on the applicable legal provisions and the reasoning set out above, the Panel is satisfied that CAS has jurisdiction to adjudicate the present dispute.

VI. ADMISSIBILITY

45. According to article R49 of the Code, *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".* Art. 13.7.1 FIS ADR correspondingly states that *"the time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party".*

46. The decision subject to the appeal was passed by the Respondent on 31 January 2020 and notifed to the Appellant on the same day. The Appellant submitted his Statement of Appeal

with a request for provisional measures on 21 February 2020. The Panel is therefore satisfied that the time limit has been complied with by the Appellant and that the Appeal is admissible.

47. As for the request for discosure of the complete case file, the Panel is of the view that it falls to be decided by the Panel appointed in the separate arbitral proceeding initiated by the Respondent before CAS ADD on 5 May 2020.

VII. APPLICABLE LAW

48. Article R58 of the Code reads as follows:

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

49. The Respondent states that the dispute shall be resolved according to the FIS regulations. The Appellant does not disagree. The federation is domiciled in Switzerland. Accordingly, Swiss law applies.

VIII. MERITS OF THE CHALLENGE TO PROVISIONAL SUSPENSION

50. Although it should be obvious to all, it merits recalling that the outcome of the present arbitration does not involve a prediction, and even less an assessment, of the ultimate decision as to whether there has been a ADRV. The mandate of the present arbitrators is limited to the ascertainment of a proper basis for the measure impugned, i.e. the provisional suspension ordered by FIS on 28 September 2019 and confirmed by the FIS IADD on 31 January 2020. For the reasons set out in Section V above, the Panel is satisfied that these provisional measures were ordered by FIS IADD within the scope of its jurisdiction.

51. The Appellant argues that *"the **consequences** of a provisional suspension are … in any and all aspects **identical to the ones of a definite suspension**"* (emphasis in the original). From this premise he draws the conclusion that it would be *"**completely inconsistent**"* for two measures having the identical effect to be governed by two different standards of proof. It follows, so he asserts, that the validity of a provisional suspension should be examined against the test of the "comfortable satisfaction" of the Tribunal (which is applicable in cases of definitive judgments of ineligibility) rather than that of a *"reasonable possibility of an anti-doping rule violation"* defined as applicable to "provisional suspensions" by Art. 7.9.4.2 FIS ADR 2019.

52. The premise of this argument is in the Panel's view incorrect. Provisional suspensions have the consequence of ineligibility to compete, with the result that the suspended individual is excluded from competitions which will not be repeated. This rule fulfills the goal of protecting participants who are *not* under the cloud of a "reasonable possibility" of having committed a doping violation. True enough, such is also the effect of definite suspensions. But the latter are established for a fixed period of time, and that makes all the difference; a provisional

suspension may be overturned as soon as a CAS Panel can reach a decision to that effect. It therefore makes sense that the hurdle to overturning provisional suspensions is higher than that of definite suspensions.

53. The full text of the relevant Article 7.9.4.2. of FIS ADR 2019 reads as follows:

The Provisional Suspension shall be lifted if the Athlete or other Person establishes that: (a) there is no reasonable possibility that the assertion of an antidoping rule violation will be upheld, e.g., because of a patent flaw in the case against the Athlete or other Person; or (b) the Athlete or other Person has a strong arguable case that he/she bears No Fault or Negligence for the antidoping rule violation(s) asserted, so that any period of Ineligibility that might other- wise be imposed for such a violation is likely to be completely eliminated by application of Article 10.4; or (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes.

54. FIS concedes that no direct evidence is existant at the present time that established that the Appellant committed an ADRV in the 2019 Championship in Seefeld, but goes on to assert that since indirect and circumstantial evidence may be sufficient in cases where the test of the "comfortable satisfaction" of the relevant Panel (*"in view of the nature of the alleged doping scheme and the sport body's limited investigative powers"*, as the Panel put it in CAS 2017/A/5379 [Finding 2]), such evidence may a fortiori suffice when the criterion is "reasonable possibility".

55. The present Panel concurs. The evidence submitted by FIS in this case simply does not come close to allowing the conclusion advocated by the Appellant that there is "no reasonable possibility" that he committed an ADRV. A retired skier in international competitions, he was a member (coach and manger) of the privately sponsored sports team "Haanja", which consisted of a number of Estonian athletes. Five of the other members of this team have already been sanctioned on account of the doping scheme that came to light in Seefeld, including Mati Alvaer, the team manager who was reportedly assisted by the Appellant and who had been the Appellant's coach. Alvaer did not contest FIS's imposition of four years' liability, and was sentenced to a suspended one-year prison sentence (with 18 months of probation) by an Estonian court in application of the Estonian anti-doping law. Nor did the Appellant's son Andreas contest a four-year sanction of ineligibility pronounced by FIS. Moreover, there was evidence of a direct witness (Karel Tammjärv) to the effect that the Appellant was well aware of the scheme carried out within Team Haanja.

56. These circumstances alone make it plausible that the Appellant was aware of the organized blood doping scheme being carried out by persons with whom he was so actively involved. But there is more. An Austrian police report records the testimony of one of the sanctioned individuals (Alexey Poltoranin, an athlete coached by the Appellant) that a room occupied by the Appellant was used to carry out blood transfusions. The same report records the discovery of prohibited substances in that room. The pleadings of the Appellant's four children in the Swiss court (see Paragraph 12 above) reflect his close involvement in their athletic endeavors and also make it likely that he was aware of his son's admitted ADRVs.

57. The details of the events that took place in connection with the alleged doping offense have given rise to a number of contradictory contentions which by their nature are not suitable to full investigation and determination in the context of provisional measures, whether as a matter of initial decisions or their review by CAS. Nor is this arbitration, given its exclusive focus on provisional measures, the proper forum to make a detailed examination of whether the Appellant is right in raising incidental issues of due process. The central question is not whether he was properly found guilty of an ADRV (which as noted – see Paragraph 10 above – is the subject of separate proceedings), but whether he has satisfied the burden of demonstrating "no reasonable possibility". The Panel's conclusion is that the Appellant is far from having satisfied that test.

58. Nor is the provisional suspension subject to invalidation by reference to either of the other two reasons set out in Art. 7.9.4.2. FIS ADR 2019, as they do not apply here. The Panel notes that the Appellant does not even claim that he bears no fault or negligence and therefore entitled to the reduction if not elimination of any period of ineligibility that would otherwise be merited. The Appellant fails to demonstrate the existence of other facts that would make it clearly unfair to impose a provisional suspension prior to a final hearing, as this ground is only applied in truly exceptional circumstances. The Panel finds that this is not the case here. The Appellant did not cooperate with FIS and filed his protest against the provisional suspension more than two months after the came to know that he would be suspended.

59. Contrary to what the Appellant argues, the Panel therefore finds that the FIS IADD exercised its discretion in the context of optional provisional suspensions and taken into account all the arguments elaborated above.

60. In accordance with CAS jurisprudence, and indeed as a general rule, it is necessary to consider whether appellants are unduly exposed to irreparable harm, the likelihood of success on the merits of the appeal, and whether the interests of appellants outweigh those of the organ which has imposed provisional measures.

61. The factor of irreparable harm may be taken into account in favor of a provisionally suspended athlete, but the appellant must then demonstrate that the requested measures are necessary in order to protect him from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage.

62. In this particular case, the Appellant invokes that he is not able to work with, assist, cheer on and simply be with his children during competitions. In addition, due to his provisional suspension, he states that his childrens' performances have consistently deteriorated. Finally, the Appellant argues that the provisional suspension is an attack on his honor and reputation as he is labeled as a cheater and criminal and that he is now (as a coach) separated from his children against his will.

63. The Panel holds that the mere allegations of irreparable harm, without corroborating proof, fail to satisfy the Appellant's burden of proof to show substantial damage if the appealed decision is not set aside and if the provisional suspension thus remains. On this basis alone, the Appellant's request must be rejected.

64. As for the balancing of interests, it is clear that the relatively approximate nature inherent in decisions relating to provisional measures involve consideration of fairness to the entire community represented of individuals whose sporting activities are subject to regulation by international sports federations such as FIS. The federation makes assessments that reflect the self-evident general interest in provisionally preventing individuals who appear to have committed violations from continuing to compete. The Appellant invokes distress caused to his family, but the possibility of such subjective adverse consequences are inherent in the environment of international sports competitions that take place in the public eye. In any event, challenges to the federation's findings of ADRVs must find their ultimate resolution, one way or the other, in plenary determinations on appeal. There is no basis on which to exempt the Appellant from his provisional suspension with respect to particular events in which his children may compete.

65. Consequently, the Appellant's request to set aside the FIS IADD resolution of 31 January 2020 and to lift the provisional suspension imposed on the Appellant on 28 September 2019 is denied.

66. With respect to the Appellant's alternative prayer for relief that impugned measures should be set aside specifically insofar as they affect his three minor children are concerned (i.e. competitions in which they may be participants), it too fails for reasons already given above. More speficially, the Panel notes that the Appellant's children are still allowed to compete as usual. Furthermore, no relevant regulation contemplates exceptions from provisional suspensions in case of a family relationship between the suspended person and an athlete. Indeed, the Appellant does not have a valid coaching licence at the moment. Partially setting aside the Resolution of the IADD and lifting the provisional suspension of 28 September 2019 would thus not alter his eligibility to coach his three minor children in any case.

67. Accordingly, the alternative prayer for partially setting aside the resolution of the IADD of 31 January 2020 and partially lifting the provisional suspension of 28 September 2019 is dismissed as well.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has jurisdiction to decide the appeal filed by Mr Andrus Veerpalu on 21 February 2020.

2. The appeal filed by Mr Andrus Veerpalu on 21 February 2020 is dismissed.

3. The Resolution issued by the FIS Independent Anti-Doping Delegate on 31 January 2020 is confirmed and the provisional suspension imposed on Andrus Veerpalu on 28 September 2019 is upheld.

4. (…).

5. (…).

6. All other and further motions or prayers for relief are dismissed.