Arbitration CAS 2017/A/5209 Clara Victoria Patrugan v. Romanian National Anti-Doping Agency, award of 28 June 2018

Panel: Mr András Gurovits (Switzerland), Sole Arbitrator

Canoe
Doping (prohibited method; meldonium)
Arbitration agreement
Arbitration agreement conferring jurisdiction to CAS based on a private act incorporating normative statutory act
Athlete Support Personnel

1. **An arbitration agreement conferring jurisdiction to the CAS must be based on a private act between the relevant parties. Such act can either derive from a specific contract or express agreement, or otherwise from membership or other affiliation with a (private) sports organization or sports governing body and reference to an arbitration clause provided in the statutes or regulations of that sports federation. By contrast, a judicial body whose competence is based on a statutory provision enacted by the legislator (only) does not qualify as a court of arbitration under Swiss law, but rather as a special court established by statutory law.**

2. **In case a sports federation, in its statutes or regulations, expresses its commitment to respect and follow the national anti-doping provisions, the respective national provisions are to be understood as incorporated into, or to be applied under the statutes and regulations of the sports federation. If furthermore the respective national anti-doping provisions recognize the CAS as the highest adjudicatory body, an individual affiliated to the sports federation and therefore bound by the latter's rules and regulations may be considered to have concluded, with the respective federation, an arbitration agreement conferring jurisdiction to the CAS. Specifically, the arbitration agreement conferring jurisdiction to the CAS is based on a private act attributable to the parties (*i.e.* the statutes or regulations of the sports federation) which incorporates the normative statutory act (*i.e.* the national anti-doping rules recognizing the CAS as the highest adjudicatory body).**

3. **A medical doctor who, in official correspondence denotes himself "Medical doctor Kayak – Canoe Olympic Pool" and who furthermore renders himself to training camps of athletes affiliated with a national federation in order to perform treatments to the athletes falls into the category of "Athlete Support Personnel" under Appendix 1 to the World Anti-Doping Code (and the respective identic national anti-doping rules), given that he treated and assisted athletes participating in, or preparing for, sports competitions pursuant to said rule. In order to qualify as Athlete Support Personnel it is irrelevant whether the individual in question holds a specific degree (*e.g.* sports medicine) or similar. Furthermore, by participating in the activities of the national**

federation and those of its athletes, the medical doctor consented to the statutes and regulations of the national federation; provided those statutes and regulations foresee the possibility of arbitration of anti-doping rule violations, the consent expressed by means of participation also includes that possibility of arbitration.

I. THE PARTIES

1. Ms Clara Victoria Patrugan (hereinafter the "Appellant") is a medical doctor practicing in Bucharest, Romania.

2. The Romanian National Anti-Doping Agency (hereinafter the "Respondent") is a public institution subordinated to the Romanian government. It is the national anti-doping organization of Romania.

II. FACTUAL BACKGROUND

3. Below is a brief summary of the main facts and allegations based on the parties' written submissions, the CAS case file and the content of the hearing that took place in Lausanne, Switzerland, on 5 January 2018. Additional facts and allegations found in the parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award.

4. The Appellant owns a practice providing, amongst others, so-called "ozone therapy" treatments. The Appellant offered and applied the "ozone therapy" treatments in her daily practice not only to patients not related to sports, but also to members of the Olympic team of the Romanian Kayak and Canoe Federation ("RKCF").

5. As the Appellant had applied this treatment to athletes belonging to the national team of the RKCF, the Hearing Commission of the Respondent (hereinafter the "Hearing Commission") decided to investigate the matter.

6. The Appellant, further, became aware that some athletes had used Meldonium which is a prohibited substance according to the applicable anti-doping regulations. However, the Appellant decided to not report this fact to any anti-doping authority.

7. On 27 July 2016, the Hearing Commission rendered its decision according to which the Appellant was sanctioned with lifetime ineligibilty preventing her, in particular, from participating in any competition or activity authorized or organized by a signatory of the World Anti-Doping Code ("WADC"), from acting in any capacity within a sport body of a signatory of the WADC, from entering any contract relationship and from acting as volunteer in relation to any such entity.

8. The Hearing Commission found that the "ozone-therapy" applied by the Appellant to athletes of the Olympic team of the RKCF is a prohibited method according to the relevant anti-doping

regulations. The Hearing Commission further found that the Appellant had kept secret the fact that certain athletes had used the prohibited substance Meldonium although she should have reported this fact to the competent anti-doping authorities in Romania. The Hearing Commission found that also by witholding this information the Appellant violated the applicable anti-doping rules as set out in Romania in Law no. 227/2006 regarding the prevention and fight against doping in sport (the "Law 227/2006").

9. On 6 January 2017, the Appellant filed an appeal against the decision of the Hearing Commission with the Appeal Commission of the Respondent (hereinafter the "Appeal Commission"). By decision dated 3 April 2017, the Appeal Commission rejected the appeal filed by the Appellant and upheld the decision of the Hearing Commission.

10. The Appellant does not recognize the competence of the Court of Arbitration for Sport ("CAS") to decide on an appeal against the decision of the Hearing Commission as confirmed by the Appeal Commission in its decision of 3 April 2017. This notwithstanding, in order to safeguard her rights, on 12 June 2017, the Appellant lodged an appeal with the CAS requesting that the CAS determines that it is not competent and, alternatively, annuls the decision of the Appeal Commission dated 3 April 2017 (the "Challenged Decision").

11. Already on 6 June 2017, the Appellant had lodged an appeal with the Bucharest Court of Appeal against the Challenged Decision. On 27 November 2017, the Bucharest Court of Appeal rendered a decision according to which it found that it had no competence to hear the appeal lodged by the Appellant. The Appellant explained in the present arbitration proceeding that she would file an appeal against that court decision once she had received said decision with motivated grounds.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 12 June 2017, the Appellant filed her statement of appeal with the CAS directed against the Respondent with respect to the Challenged Decision (the "Statement of Appeal"). In her Statement of Appeal, the Appellant contends, *inter alia*, that the parties had not agreed on arbitration.

13. By letter of 16 June 2017, the CAS Court Office acknowledged receipt of the Statement of Appeal and invited the Appellant to nominate an arbitrator in accordance with Article R48 para. 1 of the Code of Sports-related Arbitration (the "CAS Code"), unless she requested the appointment of a Sole Arbitrator. In addition, the CAS Court Office informed the Appellant that insofar as the Challenged Decision is dated 3 April 2017, she was to provide the CAS Court Office with a proof of such notification as indicated in Article R49 of the CAS Code to demonstrate that the Statement of Appeal had been timely filed.

14. On 22 June 2017, the Appellant submitted her appeal brief (the "Appeal Brief") in which she, *inter alia*, explained that the Challenged Decision had been delivered to her on 23 May 2017 so that the Statement of Appeal had been filed on time. She further requested that this case be examined by a Sole Arbitrator.

15. By letter dated 29 June 2017, the CAS Court Office forwarded the Statement of Appeal and the Appeal Brief to the Respondent granting it a deadline of 20 days from receipt to submit to the CAS its answer pursuant to Article R55 of the CAS Code. In the same letter the Respondent was invited to inform the CAS Court Office, within a time limit of five days of receipt of the letter, whether it agreed to the appointment of a Sole Arbitrator.

16. By letter of 3 July 2017, the Respondent informed the CAS Court Office that it requested that the case be settled by a Panel of three arbitrators and requested that the time limit for the filing of the answer brief be fixed after the payment by the Appellant of the advance of costs in accordance with Article R64.2 of the CAS Code.

17. By letter of 4 July 2017, the CAS Court Office informed the parties that pursuant to Article R55 para. 3 of the CAS Code the time limit set out in the CAS Court Office letter of 3 July 2017 was set aside and that a new time limit would be fixed upon the Appellant's payment of her share of the advance of costs. In the same letter, the CAS Court Office invited the Respondent to indicate on or before 9 July 2017 whether it intended to pay its share of the advance of costs.

18. By letter of 7 July 2017, the Respondent informed the CAS Court Office that it was not in a position to make payments of the advance of costs.

19. By letter of 12 July 2017, the CAS Court Office informed the parties that in light of the disagreement regarding the arbitration panel, the matter was referred to the President of the CAS Appeals Arbitration Division, pursuant to Article R50 of the CAS Code.

20. By letter of 19 July 2017, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the case to a Panel composed of three arbitrators. In the same letter, the Appellant was invited to nominate an arbitrator from the list of CAS arbitrators.

21. By letter of 27 July 2017, the Appellant informed the CAS Court Office of her nomination of Mr Boris Vittoz as arbitrator.

22. By letter of the same day, the CAS Court Office invited the Respondent to nominate an arbitrator from the list of CAS arbitrators.

23. By letter of 3 August 2017, the Appellant asked the CAS to submit the present case to a Panel composed of a Sole Arbitrator in light of the Appellant's financial constraints.

24. By letter of 4 August 2017, the CAS Court Office informed the parties that the Appellant's request would again be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue and that, in the meantime, the Respondent's deadline to nominate an arbitrator was suspended.

25. By letter of 5 August 2017, the Respondent informed the CAS Court Office that it nominated the Hon. Michael Beloff, QC, as arbitrator.

26. By letter of 31 August 2017, the CAS Court Office informed the parties that in view of the renewed application of the Appellant to have a Sole Arbitrator appointed due to her limited financial resources the President of the CAS Appeals Arbitration Division had decided to submit the case to a Sole Arbitrator, and that the Sole Arbitrator would be appointed in due course.

27. By letter of 20 September 2017, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had appointed Dr András Gurovits as the Sole Arbitrator in the present arbitration procedure. The parties did not raise any objection as to the constitution and composition of the Panel.

28. On 6 October 2017, the CAS Court Office granted the Respondent a deadline of 20 days to submit a statement of defense (the "Answer"), including, *inter alia*, the name of experts and witnesses.

29. By letter of 23 October 2017, the Respondent asked for an extension of the time limit that had been set for the Respondent to submit the Answer. By letter of the same day, the CAS Court Office informed the parties that a 5-day extension had been granted in accordance with Article R32 of the CAS Code.

30. By submission of 6 November 2017, the Respondent submitted its Answer.

31. By letter of 6 November 2017, the CAS Court Office invited the parties to inform the CAS Court Office by 13 November 2017 whether they prefer a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the parties' written submissions.

32. By letter of the same day, the Respondent answered that it considered a hearing to be necessary and that it would like to hear witnesses and an expert, either by video conference, phone or in person.

33. On 13 November 2017, the Appellant requested the Sole Arbitrator to issue the award based solely on the parties' written submissions, because she considered that the CAS did not have jurisdiction to try this case.

34. By letter of 15 November 2017, the CAS Court Office informed the parties that the Sole Arbitrator had decided to hold a hearing. In the same letter, the CAS Court Office, on behalf of the Sole Arbitrator, requested the Respondent to submit English versions/translations for any exhibit submitted by it so far in a language other than English or without English translation, respectively. The Respondent was further requested to submit a copy of the Romanian Law 227/2006 (republished) relied upon by it, both in Romanian language and an English translation. The Respondent was granted a deadline of three weeks to provide these documents. The CAS Court Office informed the parties that following receipt of these documents, the Appellant would be granted a deadline of fourteen (14) days to provide, at her discretion, written observations limited to the accuracy of the English translations. Finally, the Respondent was invited to confirm to the CAS Court Office the names of the witnesses it intended to call and to communicate the name of the expert witness it wanted to call for the hearing. The Appellant

was given the opportunity to inform the CAS Court Office of any witness/expert she intended to call in the hearing and to provide an overview of their testimony (if any).

35. Following various correspondence between the CAS Court Office and the parties regarding the hearing date, on 24 November 2017, the Respondent, and on 27 November 2017, the Appellant confirmed availability on 5 January 2018.

36. By submission of 7 December 2017, the Respondent submitted the Romanian Law 227/2006, both in Romanian and in English language. It also indicated the names of the witnesses and the expert it intended to call during the hearing. On 8 December 2017, the CAS Court Office forwarded this submission to the Appellant.

37. By letter of 14 December 2017, the Appellant informed the CAS Court Office that at the hearing the Appellant would be represented by two counsel, Mr Diaconou Silviu-Constantin and Mr Lazar Marius-Constantin. The Appellant further reserved her right to provide her observations as to the accuracy of the English translations submitted by the Respondent by 29 December 2017, if necessary.

38. By letter of 15 December 2017, the CAS Court Office informed the parties that the hearing would be held on 5 January 2018 at the CAS Court Office in Lausanne. The parties were invited to provide the CAS Court Office by 20 December 2017 with the names of all persons who would be attending the hearing.

39. By letter dated 21 December 2017, the CAS Court Office sent the order of procedure to the parties requesting them to return a signed copy by 28 December 2018. The parties were again asked to provide to the CAS Court Office by the same date the names of all persons who would participate at the hearing.

40. On 22 December 2017, both parties returned the signed order of procedure. The Respondent further submitted a new exhibit regarding the decision of Bucharest Court of Appeal to which the Appellant had also lodged an appeal against the Challenged Decision.

41. By letter of the same date, the CAS Court Office invited the Appellant to provide her comments to the Respondent's new exhibit by 28 December 2017.

42. On 23 December 2017, the Appellant submitted her comments to the new exhibit presented by the Respondent.

43. By letter of 3 January 2018, the CAS Court Office asked the parties to confirm who would attend the hearing on their behalf and to clarify whether the witnesses and expert would appear in person or should be heard by skype.

44. On 3 January 2018, the Appellant informed the CAS Court Office that she had no further comments to the English translations submitted by the Respondent on 7 December 2017 and that, further, the Appellant would not be present at the hearing in person, but represented by her counsel.

45. On the same day, the Respondent informed the CAS Court Office that the witnesses would not attend the hearing in person, but should be heard by skype.

46. On 5 January 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Sole Arbitrator was assisted by Ms Carolin Fischer, Counsel to the CAS. On behalf of the parties, the following persons attended the hearing:

    i. for the Appellant: Mr Silviu-Constantin Diaconu, counsel, and Mr Marius-Constantin Lazar, counsel

    ii. for the Respondent: Mr Paul-Filip Ciucur, counsel.

    In addition, the following witnesses (called by the Respondent) were heard:

    Mr Alin Anton and Mr Liviu Dumitrescu.

    However, no expert witness was presented by the Respondent.

47. At the opening of the hearing, both parties confirmed that they had no objections to the composition of the Panel. During the hearing, the parties made submissions in support of their respective case, and the Appellant handed out additional exhibits. At the closing of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and that they had been given the opportunity to fully present their case.

48. By letter, dated 8 January 2018, the CAS Court Office sent to the parties the exhibits that the Appellant had handed out at the hearing. By letter of 16 February 2018, the Respondent submitted its comments to the documents produced by the Appellant at the hearing.

49. By letter dated 20 February 2018, the CAS Court Office requested the Respondent to provide the Statutes and regulations of the RKCF and/or of other sports federations that are relevant in the context of assessing jurisdiction of the CAS. By letter of 2 March 2018, the Respondent made its relevant submission which the CAS Court Office forwarded to the Appellant. She was given the right to comment on such submission by 16 March 2018. The Appellant submitted her response on 7 March 2018.

50. By letter of 23 March 2018, the CAS Court Office requested the Respondent to submit further documentation regarding the Respondent's lists of prohibited substances. The Respondent submitted these documents by letters dated 29 March 2018 and 30 March 2018, which the CAS Court Office forwarded to the Appellant by granting her a seven-day deadline to submit her observations. The Appellant submitted her reply on 30 March 2018.

IV. THE POSITIONS OF THE PARTIES

51. The following is a summary of the parties' written and oral submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered all of the evidence and arguments submitted by the parties, even if no specific or detailed reference is

made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Appellant: Ms Clara Victoria Patrugan

52. In her Appeal Brief the Appellant submitted the following prayers for relief:

> *"1. To deliver a judgment under preliminary ruling procedure finding that CAS does not have jurisdiction over this appeal against the decision no. 1/3rd of April 2017 of the Appeal Commission within the National Anti-Doping Agency;*
>
> *Regarding this head of claim, the reasons why we consider CAS does not have jurisdiction to try the present appeal are developed under paragraphs 8-13 of the notice sent to the CAS on the 12th of June 2017 (statememnt of appeal).*
>
> *2. If found that CAS has jurisdiction over this appeal, we seek:*
>
> *2.1 That the Decision no 1/3rd of April 2017 of the Appeal Commission attached to the National Anti-Doping Agency be annulled and, consequently, that the following be upheld:*
>
> – *The objecion to the general jurisdiction of the committees with jurisdictional powers within NADA as regards the investigation and sanctioning of the appellant;*
>
> – *The objection to the appellant's legal standing as respondent within the trial undertaken by the jurisdictional bodies subordianted to the respondent;*
>
> – *The objection to the appellant's legal standing as respondent within the trial undertaken by the jurisdictional bodies subordinated to the respondent;*
>
> *2.2 In the alternative, if CAS believes that the bodies with jurisdictional powers within NADA had jurisdiction to try his case, I request that the applied sanction be diminished.*
>
> *To force NADA to pay all costs incurred as a result of this litigation".*

53. The Appellant submitted, in essence, the following:

1. Jurisdiction

a. The Challenged Decision erroneously provides that it may be challenged before the CAS. The Appellant lodged her appeal before the CAS only in order to avoid any risk of missing the deadline within which the Challenged Decision may be challenged before CAS.

b. It is, however, clear that CAS has no jurisdiction because the parties have not agreed on conferring jurisdiction to CAS and because Law 227/2006 does not allow for decisions taken by jurisdictional bodies within the Respondent to be challenged before the CAS. In particular, decisions of the Appeal Commission may be appealed before the CAS only by those entities that are expressly mentioned in Article 74 (1) letters c) and f) of Law

227/2006, *i.e.* only by the relevant International Federation, the International Olympic Committee ("IOC"), the International Paralympic Committee ("IPC") and WADA, but not the Appellant.

2. Facts and legal considerations

c. The Appellant is a primary care physician specialised in family medicine and owner of an ozone therapy practice. In this practice she also applies what she calls "ozone therapy" procedures.

d. The jurisdictional bodies of the Respondent suspended her for life because she applied "ozone therapy" treatments. However, "ozone therapy" is a natural curing method for a very wide set of conditions, with no side effects. This therapy aims at eliminating abnormal, immature sick cells that are foreign to the human body, neutralizing toxins accumulated in the body over time, reducing swellings, regulating the pH and activating blood flow. This procedure is recommended to any person who wants to improve his/her health, and is permitted under medical regulations in effect.

e. The Appellant had discussions with the president of the RKCF. She informed him that she could make her medical knowledge available to the RKCF as a primary care physician specialized in family medicine and owner of an "ozone therapy" practice should the RKCF occasionally need guidance.

f. According to the RKCF's president, the Appellant would not enter into a work or collaboration contract with the RKCF, she would get no remuneration and she would not have a full-time program.

g. The medical services offered by her to the RKCF were the same that she addressed to the general public. It was not possible for her to become the coordinating physician of the RKCF as she did not have any certification in sports medicine, the legal procedure of appointing the coordinating physician had not been followed and the Appellant and the RKCF had not concluded any contract with the object of performing the activity of a coordinating physician of the RKCF's canoe-kayak team.

h. The medical procedures that are considered to be doping in sport are permitted treatments in normal daily practice. She administered these medical procedures in her capacity as a primary care physician as she also did to other people having the right to request that treatment.

i. The Hearing Commission suspended her for life from the capacity as coordinating physician of the canoe-kayak lot because she had applied "ozone-therapy" procedures to some athletes and because she had withheld certain information regarding the use of the substance Meldonium. However, given that she never had the capacity of a coordinating physician of the RKCF, she lacked the passive capacity to stand trial and the Hearing Commission had no jurisdiction over her. In addition, the substance Meldonium was not yet prohibited at the time she learned about the use thereof by the athletes.

j. In order for the Hearing Commission and the Appeal Commission to have jurisdiction over the Appellant, she should have been classified as medical or paramedical personnel pursuant to Article 3 para. 38 of Law 227/2006. However, these general provisions under Law 227/2006 must be read in conjunction with the special provisions of other laws, such as (i) the Law 95/2006 on healthcare reform, (ii) the Law 321/2007 regarding the organization and functioning of sport medicine practices, (iii) the Order no. 1109/2016 on the approval of the classification of medical, medical-dental and pharmaceutical specialties for the healthcare network, (iv) the technical regulations of 24 April 2003 on the medical check-up of athletes, sports medicine care in national sports complexes, as well as in training camps of national and Olympic lots, and medical care at sports camps during trainings and competitions, and (v) the CMR code of medical ethics as approved through Government Decision 2/2012.

k. Against the background of these laws, a physician can only qualify as medical support personnel in the sense of Law 227/2006 if he or she is specialised in sports medicine and if he or she has been appointed by the National Institute of Sports Medicine with the agreement of the RKCF by means, e.g., of a work contract or collaboration contract. The Appellant, however, has never been appointed in accordance with these rules and she had no legal relationship with the RKCF.

l. As a consequence, the Appellant cannot become subject to disciplinary sanctions by a jurisdictional body she is not part of. The only body that has jurisdiction over the Appellant is the Romanian College of Physicians.

m. The Appeal Commission held that the Appellant was undoubtedly a coordinating physician of the canoe-kayak team as it found this proven by written documents in which the Appellant figures with this title and in which the Appellant presented herself as such. However, this is unfounded because the procedures for the designation of a coordinating physician of an Olympic team had not been followed: The Appellant had not been designated by the National Institute of Sports Medicine, she had no agreement with the RKCF, she was no member of the medical commission of the RKCF and she had not taken part in the required 4-year residency program in sports medicine. If the RKCF designated her as a coordinating physician of the canoe-kayak team then this was neither based on her request nor on her consent.

n. As regards the allowances that she had received from the RKCF, the Appellant explained that these had been provided to her as a result of the provision of medical services in her position as a primary care physician on an occasional basis. The legal basis for these allowances can be found in Article 4 para. 3 of the Government Decision 1447/2007 which grants a federation the right to remunerate certain persons who provide assistance (on an occasional basis) to the athletes who participate in certain actions of sport training. That is the legal basis for the payments made to the Appellant during the time she provided assistance to the athletes as a general practitioner.

o. The athletes followed the treatments in their capacity as citizens and with their consent. But, the Appellant is not to be considered as Athlete Support Personnel pursuant to Law

227/2006. The law is not applicable to any person, but only to persons who have a contractual relationship with the institution the athlete is part of and who have thus committed to adhere to the anti-doping rules.

p. The Respondent itself makes a clear distinction between physicians who are part of the Athletes' Support Personnel and are specialized in sports medicine, collaborating with sports federations and other physicians who have other specialties such as the Appellant. However, this distinction was not made when she was investigated and suspended although the Appellant had outlined the fact that she could not have known that the "ozone therapy" procedure was forbidden as she was not a physician specialized in sports medicine.

q. Contrary to what the Appeal Commission found, the Appellant did not have to know in detail the prohibited list and, thus, to know that the "ozone therapy" procedure, which is allowed to the general public, is part of the category "M1. Manipulation of Blood and Blood Components" under the prohibited list. Even if she had been diligent enough to research the list in her position as primary care physician she would not have realized that "ozone therapy" is prohibited for athletes as the word "ozone therapy" is not specifically mentioned in the content of the list. Only a physician specialized in sports medicine has the required knowledge to realize that the "ozone therapy" procedure is part of the category "M1. Manipulation of Blood and Blood Components" and represents a doping practice.

r. There was no intention on the part of the Appellant to violate any anti-doping regulation given that she owns a private practice that offers the "ozone therapy" in question. Performing "ozone therapy" was something natural to the Appellant.

s. As regards the use of Meldonium by some athletes, the Appellant found out incidentally that some athletes had used this substance. The coach and the athletes told her about their use in December 2015. She did not conceal this information as the use of this substance was allowed in December 2015, *i.e.* the month when the athletes used the substance. The substance was not part of the prohibited list. It was added to the prohibited list that was effective as of 1 January 2016 only.

t. Further, had she concealed the fact that the athletes had used Meldonium she would have violated her professional secrecy and her patients' rights.

u. The Respondent did not investigate any athlete for undertaking "ozone therapy" procedures, although the athletes have the obligation to know all prohibited methods and substances in detail; a fact that raises a big question mark. The Respondent only took notice of the fact that the Appellant performed certain permitted procedures which are considered to be prohibited by the anti-doping regulations. There is no single evidence that would establish that the Appellant knew that this procedure is prohibited.

v. Even if it was found that the Respondent was competent to sanction the Appellant, one would have to consider CAS' practice regarding life suspension from sporting activities. In light of such practice, a life suspension is only appropriate if one of the following conditions is met: (i) the misconduct is very serious for example, if the health of the athlete is

endangered), (ii) the person who infringed the anti-doping regulations is a repeat offender who has already been suspended for a serious misconduct, or (iii) the suspended person was the one who organized and urged the athletes to dope.

w. In sum, the suspension for life applied to the Appellant is inappropriate and violates the principle of proportionality, because no athlete has been suspended or even investigated, the Appellant did not know and did not have to know that the "ozone therapy" is not allowed, there was no intention on the part of the Appellant to infringe any anti-doping regulation, and ozone therapy is a beneficial procedure so that the health of the athletes was not at risk.

B. The Respondent: The Romanian National Anti-Doping Agency

54. In its Answer the Respondent submitted the following prayers for relief:

"A. to dismiss the appeal lodged by the Appellant against the Decision no. 1 rendered on 3 April 2017 by the RADA Appeal Committee

B. to maintain and consider RADA Appeal Committee's decision undisturbed

C. subsequently, to deny all the prayers for relief made by the Appellant

D. to order the Appellant to pay all costs, expenses and legal fees relating to the arbitration proceedings before CAS encumbered by the Respondent".

55. The Respondent submitted, in essence, the following:

1. As to the facts

a. The Appellant learned from the coach and athletes of the Olympic canoe-kayak team of the RKCF that some athletes had used the substance Meldonium. She hid this information and, instead, she searched for information regarding excretion times of the substance. She did not urge the athletes to declare the truth about the use of the substance, but she only let them know that she did not agree with what they had done.

b. According to a written declaration of 17 June 2016, an athlete (Mr Costea Dan Cristian) reported to the Respondent that in 2015, approximately one and a half month before the World Championships the coach held a meeting with athletes of the kayak team asking them to submit to blood transfusions which would be performed by the Appellant in exchange for a fee of RON 1'500 per person. The treatment would be applied in various sessions over a period of five weeks.

c. In order to perform the treatments, the Appellant went to the training camp, accompanied by her husband, carrying the relevant equipment. During the five weeks of treatment the Appellant invited the athletes two by two into a room and collected approximately 200 ml

of blood which was then centrifuged, processed and administered to the athletes by transfusion.

d. By notification of 28 June 2016, the Hearing Commission informed the Appellant regarding the anti-doping rule violation allegedly committed by her and summoned the Appellant for a meeting of the Hearing Commission to be held on 5 July 2016. At the hearing the Appellant declared that she had administered recovery treatments to athletes by applying a method called "ozone therapy". She further declared that she knows how to do "ozone therapy" because she had a certificate for such therapy. On request of the Hearing Commission the Appellant explained that the method consists of the following: the taking of 15 ml ozone in a syringe of 20 ml; the putting of 2-3 ml of blood over the ozone; the mixing of the blood with the ozone and then the injection of the mixture intra-muscles thus increasing immunity and muscles recovery.

e. At that hearing the Appellant further explained that she conducted the treatments when the athletes were training with the purpose to quickly adapt to difficult trainings and to maintain a better state of health. It was a difficult period for the athletes because the expectations were high and the athletes were about to physically give up. The treatment was a salvation and the thought was to improve the health state as the athletes were physically exhausted. However, at that time the athletes were not competing. The Appellant, on request of the Hearing Commission, disclosed the names of five male athletes and four female athletes to whom she had administered the treatment. Her statements at the hearing revealed that she, the coach and the athletes knew that the treatment was prohibited.

f. On 5 July 2016, also the athlete Costea Dan Christian was heard who maintained his written statement of 17 June 2016. At the occasion of that hearing also the coach of the women's team, Zabet Alexandru was heard as a witness. He declared that the Appellant had administered blood transfusions to the athletes of the women kayak team. In addition, the coach of the men's kayak team was heard who declared that the Appellant had administered the treatment to at least four athletes of the men's team.

g. At the end of the hearing of 7 July 2016, the Appellant provided a written statement explaining that during the summer months of 2015, when the senior men Olympic team was in Bascov and the senior women Olympic team was in Bolboci she conducted treatment sessions with "ozone therapy", both through local infiltrations and autohemotherapy.

h. On 13 July 2016, the Appellant sent a letter to the Hearing Commission explaining that she had been requested by one of the athletes to change her statement. In a second letter of the same day, the Appellant receded from her statements made at the hearing of 5 July 2016. However, subsequently to this correspondence, the Appellant was summoned to another hearing on 15 July 2016, where she was confronted with the fact that on 5 July 2016, after the hearing, the Appellant had read and signed the minutes in front of the president of the RKCF and that she had given the written statement according to which she had gone to the men's and women's training camps in order to apply the treatments.

i. In consideration of the above reasons the Hearing Commission found the Appellant guilty of having violated the anti-doping rules of Article 2, para. 2 letters h) and i) of Law 227/2006 and sanctioned her with lifetime ineligibility.

j. The Appeal Commission ruling deciding on the appeal lodged by the Appellant confirmed the decision of the Hearing Commission in light of (i) the multiple anti-doping rule violations committed by the Appellant, (ii) the seriousness and time frame of these violations, (iii) the initiation and promotion by the Appellant of the prohibited methods, (iv) the ignoring by the Appellant of the effects that these prohibited methods might have on athletes, (v) the dishonest attitude of the Appellant before the sports judicial bodies, and (vi) the Appellant's attitude towards the medical act and professional ethics that she manifested in relation to the athletes in her care.

2. As to the legal aspects

k. The CAS is competent in the present matter. Article 33 of the Regulation for the organization and operation of the Appeal Commission (hereinafter the "Appeal Commission Regulations") provides that a decision of the Appeal Commission can be challenged before the CAS within 21 days from its communication. This is in line with Article 13.2.2 of the WADC which provides that in cases covered by such Article 13.2.2, a national anti-doping organization may elect to provide the right to appeal directly with CAS, as is the case under Article 33 of the Appeal Commission Regulations. Furthermore, the CAS is competent also pursuant to Law 227/2006 as well as in accordance with Article R47 of the CAS Code.

l. The laws applicable to this case are the WADC as well as the national legislation in Romania, including Law 227/2006 and the Appeal Commission Regulations.

m. In light of Appendix 1 to the WADC as well as Article 3 (38) of Law 227/2006 the Appellant does qualify as Athlete Support Personnel as such definition also includes medical personnel working with, treating or assisting an athlete participating in or preparing for sports competitions. The qualification of Athlete Support Personnel does not require any specific legal relationship and it was the legislator's intention to capture all persons who are near athletes with the purpose of protecting the athletes as well as sport in general.

n. In addition, the Appellant presented herself as being the physician of the kayak-canoe national team by using the designation "kayak-canoe Olympic pool physician (medical doctor)", and she was officially recognized by the RKCF as physician of the RKCF.

o. On the merits, the Challenged Decision is lawful and justified. The Appellant violated Articles 2.6 (Possession of a Prohibited Substance or a Prohibited Method), 2.8 (Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition), and 2.9 (Complicity). Further, the prohibited list for 2015 as well as the prohibited list 2016 listed the same in- and out-

of-competition Prohibited Methods: "M1. Manipulation of blood and blood components" as well as "M2. Chemical and physical manipulation".

p. The sanction is justified and proportionate. Pursuant to Article 10.3.3 of the WADC, violations of Articles 2.7 and 2.8 shall be sanctioned with a minimum of four years up to lifetime ineligibility, and according to Article 10.3.4 of the WADC, violations of Article 2.9 of the WADC shall be sanctioned with a minimum of two years up to four years ineligibility depending on the seriousness of the violation.

q. In accordance with the WADC, aggravating circumstances that may justify the imposition of a period of ineligibility longer than the standard sanction include committing the anti-doping rule violation as part of a scheme either individually or involving a conspiracy, using or possessing multiple Prohibited Substances or Prohibited Methods or using those on multiple occasions, or engaging in a deceiving or obstructing conduct to avoid the detection of the anti-doping rule violation. The Appellant fulfilled these criteria by conducting a doping scheme systematically and on multiple occasions and by changing her statements before the Hearing Commission and the Appeal Commission.

r. The conditions under Articles 10.5.1 and 10.5.2 of the WADC that would allow reducing the sanction are not fulfilled so that these provisions are not applicable in the case at hand.

s. It is not accurate for the Appellant to say that she was the only person sanctioned in the context of the RKCF's canoe-kayak team. Rather, two coaches were sanctioned with periods of ineligibility and various athletes were summoned before the RKCF's commissions to give testimonies. Furthermore, the medical assistant of the kayak-canoe national team was sanctioned with a lifetime ban.

t. It is also not accurate for the Appellant to argue that the treatment applied by her is beneficial to any person as well as to the athletes' health and that it caused no risk at all. Ozone therapy can be applied by using different methods. The intramuscular injection method consists of the injection into the muscles of the buttocks of a mixture of oxygen and ozone. In case of autohemotherapy, between 10-15 ml of the patient's blood is removed, treated with a mixture of oxygen and ozone and then reinjected to the patient. And in case of intra-articular injection ozone-treated water is injected into the patient's joints to treat arthritis, rheumatism and other joint diseases. Although the Appellant explains on her own website that "ozone therapy" must be administered in specialized medical facilities, the evidence in this case shows that the Appellant performed the treatments in the training camp rooms, thus violating basic hygiene or medical rules despite her awareness. Furthermore, the Appellant had not made any prior tests or investigations with the athletes although this treatment carries with itself a number of known health and even life endangering side effects.

u. It is obvious that the Appellant departed so much from her duty of care so that her fault is undisputable. The Appellant has no arguments to justify a reduction of the sanction. The evidence shows that she intentionally administered the prohibited method to athletes in a national pool training camp for a world championship.

V. JURISDICTION OF THE CAS

56. The Appellant challenges the jurisdiction of the CAS, while the Respondent submits that CAS is competent on the basis of Law 227/2006 and the Appeal Commission Regulations.

57. The Sole Arbitrator has, therefore, to determine, in a first step, whether CAS has jurisdiction to hear this case or not.

58. The CAS is an arbitral tribunal with seat in Switzerland. As neither the Appellant nor the Respondent have their domicile or habitual residence in Switzerland, pursuant to Article 176 of the Swiss Private International Law Act ("PILA"), Chapter 12 of the PILA applies to the present arbitration.

59. Pursuant to Article 186 PILA, the arbitral tribunal shall rule on its own jurisdiction[1]; and in accordance with Article 178 para. 2 of the PILA, an arbitration agreement is valid if it complies with the law chosen by the parties or if it complies with Swiss law. According to Swiss law, an arbitration agreement must be in writing, by means of telegram, telex, telefax or in any other form of communication that allows evidence of the agreement in text.

60. In the matter at hand, the parties have not presented a specific arbitration agreement and the Respondent does not argue that such separate, specific arbitration agreement would have been entered into. The Respondent rather argues that CAS is competent by virtue of the Law 227/2006 and the Appeal Commission Regulations as well as Article R47 of the CAS Code.

61. In respect of the jurisdiction of the CAS, Article R27 of the CAS Code provides that:

> *"These Procedural Rules* [the ones of the CAS Code] *apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)"*;
>
> and
>
> Article R47 para. 1 of the CAS Code sets out 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".*

62. At the same time, and in addition, the Sole Arbitrator notes that according to standard practice of the Swiss Federal Tribunal, an arbitration agreement can become valid on the basis of an

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1 So-called "competence-competence"; cf. Swiss Federal Tribunal, ATF 141 III 444 et seq.

express agreement, but also by affiliation to a sports federation and reference to an arbitration clause provided in the statutes of that sports federation[2].

63. The Respondent argues that jurisdiction of the CAS in the case under scrutiny is given on the basis of Law 227/2006 and the Appeal Commission Regulations. It is undisputed among the parties that these two acts are in force and are normative acts of the Romanian legislator. The Sole Arbitrator, however, notes that an arbitration agreement conferring jurisdiction to the CAS must be based on a private act between the relevant parties. Such act can derive from a specific contract, but also from membership or other affiliation with a (private) sports organization or sports governing body whose regulations provide for arbitration as the means of dispute resolution. By contrast, a judicial body whose competence is based on a statutory provision enacted by the legislator (only) does not qualify as a court of arbitration under Swiss law, but rather as a special court established by statutory law[3].

64. For this reason, the Sole Arbitrator went on to assess whether there is a private act attributable to the parties that incorporates, or makes reference to, the aforementioned normative statutory acts (*i.e.* Law 227/2006 and the Appeal Commission Regulations). In this context, the Sole Arbitrator notes that Article 84 of the Statutes of the RKCF provides as follows:

> *"The Romanian Kayak-Canoe federation approves and obeys the national and international measures against doping in sport […]".*

65. The Sole Arbitrator concludes that by means of Article 84 of its Statutes the RKCF expresses its commitment to respect and follow the national provisions on the fight against doping which in Romania, as demonstrated by the evidence adduced by the parties, are provided for in Law 227/2006 and the Appeal Commission Regulations. For this reason, the Sole Arbitrator is comfortably satisfied that the rules under Law 227/2006 and the Appeal Commission Regulations are to be understood as incorporated into, or to be applied under, the Statutes and regulations of the RKCF which are clearly private acts.

66. This having been established the Sole Arbitrator then assessed whether, contrary to the Appellant's suggestions, the Appellant appears to be bound by the Statutes and regulations of the RKCF and, as a consequence, Law 227/2006 and the Appeal Commission Regulations. The Sole Arbitrator notes that, indeed, the Appellant in her correspondence with the Hearing Commission denoted herself as "Medic Lot Olimpic Kajak – Canoe" (Medical doctor Kayak – Canoe Olympic Pool). Furthermore, it is undisputed that the Appellant went to the male and female athletes' training camps in order to perform the relevant "ozone therapy" treatments.

67. As a result, the Appellant falls into the category of "Athlete Support Personnel" under Law 227/2006 in accordance with its Article 3 (38). She treated and assisted athletes participating in, or preparing for, sports competitions pursuant to said rule. As a consequence, by participating in the RKCF's and its athletes' activities the Appellant consented to the Statutes of the RKCF

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2 Swiss Federal Tribunal, ATF 4A_460/2008, no. 6.2.

3 Swiss Federal Tribunal, ATF 137 III 37 et seq.; ATF 125 I 389 et seq.; High Court of Zurich, 14 March 2005, ZR 104/2005, no. 47, p. 182 et seq.; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, no. 4: BSK IPRG-PFIFFNER/HOCHSTRASSER, Article 176, nos. 9/10.

and, thus, also to the possibility of arbitration of anti-doping rule violations pursuant to the rules of Law 227/2006 and the Appeal Commission Regulations.

68. Applicability of the rules under Law 227/2006 having been established, in general, the Sole Arbitrator moved on to ascertain whether these rules establish, in fact, competence of the CAS in the case at hand or whether they foresee a different dispute resolution mechanism. In that context the Sole Arbitrator notes the following:

69. Article 73 of Law 227/2006 provides that

> *"The following decisions may be appealed: a) a decision by the Hearing Commission for the athletes and their support personnel who violated the anti-doping rules related to the anti-doping rules violations set forth in art. 2; […]"*, and

Article 74 (1) of Law 227/2006 states:

> *"The decisions set forth in Article 73 letters a)-g) and i)-l) made in connection with a competition within a national sport event or involving national level athletes may be appealed to the Appeal Commission by the following entities, within 21 days from the date of the appeladed decision's notification: a) the national level athlete or other person who is subject to the appealed decision […]".*

70. At the hearing the parties confirmed that the athletes who underwent the treatments by the Appellant are national level athletes so that in accordance with Article 74 (1) of Law 227/2006 the Hearing Commission's decision was to be appealed before the Appeal Commission, as the Appellant did.

71. The Appellant argues that pursuant to Article 76 (1) 1 of Law 227/2006 only the entities mentioned in Article 74 (1) letters c) and f), *i.e.* the relevant International Federation, the IOC, the IPC and WADA, may challenge a decision of the Appeal Commission before the CAS. Contrary to the Appellant's suggestions, however, the Sole Arbitrator holds that also the Appeal Commission Regulation whose binding nature has not been challenged by the Appellant is to be considered. Pursuant to the Appeal Commission Regulation, the Challenged Decision can (only) be challenged before the CAS as Article 33 of the Appeal Commission Regulations provides that:

> *"The Commission decision may be challenged in 21 calendar days from its communication at the Court for Arbitration in Sport in Lausanne".*

72. This is in line with Article 1 (3) of Law 227/2006 which provides that

> *"the sports-related legal bodies hold exclusive jurisdiction applicable to all disputes and the highest adjucatory body is the Court of Arbitration for Sport in Lausanne",*

thus expressing that doping-related disputes are to be resolved, to the exclusion of the state courts, by the CAS as the highest instance[4].

73. This is in line with the principles under the WADC that allows for a national anti-doping organization to provide for the right to appeal before the CAS instead of before an independent and impartial national dispute resolution body pursuant to Article 13.2.2 of the WADC[5]. Article 102 of Law 227/2006 expressly provides, that such Law 227/2006 shall respect and implement the WADC[6].

74. Considering Article 76 of Law 227/2006 in the context of the entire regulatory framework, in particular with Article 33 of the Appeal Commission Regulations as well as Articles 1 (3) and 102 of Law 227/2006, the Sole Arbitrator concludes that the Challenged Decision can (only) be challenged before the CAS.

75. As regards the condition under Article R47 para. 1 of the CAS Code according to which an appellant must have exhausted all internal instances available within the federation in order for the CAS to be competent, the Sole Arbitrator notes that none of the parties has argued that the Challenged Decision would not be final, and that in light of Article 33 of the Appeal Commission Regulations, the Challenged Decision appears, indeed, to be final in the sense of Article R47 of the CAS Code.

76. In light of the foregoing, the Sole Arbitrator concludes that on the basis of Article 84 of the Statutes of the RKCF, the Law 227/2006 and the Appeal Commission Regulations an appeal against a decision of the Appeal Commission must be brought before the CAS and the CAS is competent to hear the present case.

VI. ADMISSIBILITY

77. Article R49 of the CAS Code provides as follows:

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

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4 This is consistent with former CAS practice where Law 227/2206 was equally applied - cf. CAS 2009/A/1766, p. 14, and CAS 2010/A/2220, p. 20.

5 Cf. Comment to Article 13.2.2 of the WADC.

6 Article 102 of Law 227/2006 provides that *"the provisions of the present law are completed by the provisions of the World Anti-Doping Code and they shall be interpreted in commitment to the Code".*

78. According to Article 33 of the Appeal Commission Regulations, a decision of the Appeal Commission may be challenged within 21 days from its communication.

79. The Challenged Decision was rendered on 3 April 2017 and notified to the Appellant on 23 May 2017. The Appellant filed her Statement of Appeal on 12 June 2017. Therefore, the 21-day deadline to file the appeal was respected. Likewise, the Appellant submitted the Appeal Brief on time on 22 June 2017.

80. The Sole Arbitrator, therefore, holds that the appeal is admissible.

VII. APPLICABLE RULES OF LAW

81. Pursuant to Article R58 of the CAS Code, the dispute must be decided

> *"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".*

82. The parties have not expressed themselves on the laws applicable. The case at hand is about a dispute between a Romanian medical doctor and the Romanian National Anti-Doping Agency which are both domiciled in Romania. The "applicable regulations" in the sense of Article R58 of the CAS Code are, therefore, the Statutes and regulations of the RKCF (including, by means of reference, Law 227/2006 and the Appeal Commission Regulations). The Sole Arbitrator thus holds that the dispute is to be determined by applying the Statutes and regulations of the RKCF and, absent any express choice of law by the parties, Romanian law, in particular Law 227/2006[7].

VIII. MERITS OF THE APPEAL

A. Scope of the Sole Arbitrator's review

83. Pursuant to Article R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law. He may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

B. Legal Analysis

B.1 The legal issues at hand

84. The Sole Arbitrator has identified and analysed the following main legal questions.

(i) Does the Appellant have standing to be sued?

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7 Cf. also CAS 2010/A/2220, p. 21.

(ii) In the affirmative, is the Appellant responsible for an anti-doping rule violation?

(iii) In the affirmative, what is the appropriate sanction?

B.2 Does the Appellant have standing to be sued?

85. The Appellant contends that she had no standing to be sued by the Respondent for the alleged anti-doping rule violations. She argues that she does not qualify as Athlete Support Personnel as defined in Article 3 (38) of Law 227/2006, while the Respondent, on the other hand, holds that she has such capacity.

86. Article 3 (38) of Law 227/2006 defines "Athlete Support Personnel" as follows

> *"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 sports competition".*

87. This definition is consistent with the definition provided under Appendix 1 to the WADC.

88. The Appellant argues that the definition under Article 3 (38) of Law 227/2006 is to be read in combination with the requirements under (i) Articles 376, 379, 412 and 471 of Law 95/2006 on health care reform, (ii) Article 23 of Law 321/2007 regarding the organization and functioning of sport medicine practices, (iii) Order no. 1109/2016 on the approval of the classification of medical, medical-dental and pharmaceutical specialties for the healthcare network, (iv) Articles 20 and 22 of the technical regulations of 24 April 2003 on the medical check-up of athletes, sports medicine care in national sports complexes as well as in training camps of national and Olympic lots and medical care at sports camps during training and competitions as well as (v) Article 9 of the Romanian College of Physicians code of medical ethics.

89. These statutory provisions set out requirements under Romanian law that apply to the medical profession in general and to those physicians who want to obtain a special degree as specialists in sports medicine and/or to become a national or Olympic lot physician, in particular. The Sole Arbitrator, however, notes that the term "Athlete Support Personnel" as defined in Law 227/2006 is to be understood broadly and that it does not state that for a physician to qualify as "Athlete Support Personnel" in the sense of Article 3 (38) of Law 227/2006 he or she must have obtained a formal degree in sports medicine. Article 3 (38) of Law 227/2006 rather states that for a person to qualify as "Athlete Support Personnel" it is decisive that she or he is *"working with, treating or assisting an Athlete participating in or preparing for sports competition"*. It is, thus, not relevant whether or not such person holds a specific degree, e.g. in sports medicine. It is rather relevant what such person does.

90. If a person assists an athlete in the sense of Article 3 (3) of Law 227/2006 that person qualifies as Athlete Support Person. If it was relevant that an Athlete Support Person holds a specific degree that person could easily circumvent the anti-doping rules by simply not obtaining the relevant qualification but nonetheless applying a prohibited method which would mean that a physician holding a specific sports medicine degree could be sanctioned if he or she applied a prohibited method, while another physician applying the same method could not be sanctioned

simply because he or she does not hold such additional qualification. This would pervert the entire anti-doping system.

91. In the case at hand, it has been established, and it is not disputed, that the Appellant applied "ozone therapy" to both, male and female, athletes of the RKCF while they were in the training camp preparing for the 2015 World Championship. While the Appellant contends that she has never entered into a written contract with the RKCF, she has admitted that she had received allowances in connection with her assistance provided to the athletes during the training camp. In her Appeal Brief the Appellant explained that she had received these payments on the basis of a Government Decision which provides that *"physicians […] [and] other specialists contributing to carrying out the training […] can benefit during the period of the sport training actions of the same rights as athletes"*. And she explained that, on the basis of said Government Decision, a federation has the right to remunerate certain persons who provide assistance to the athletes who participate in certain actions of sport training. Therefore, according to her, there was a legal basis for the Appellant to receive payments during the time she provided assistance to the athletes when certain training actions were organized.

92. The Sole Arbitrator notes that the Appellant, in her own words, treated the athletes while they were in the training camp preparing for the 2015 World Championship and that she had received allowances from or on behalf of the RKCF in connection with the support provided by her. He further notes that neither Article 3 (38) of Law 227/2006, nor the WADC - with which according to its Article 102 Law 227/2006 shall be compliant - require for a physician to qualify as "Athlete Support Personnel" that a specific written contract has been entered into between the relevant sports federation and the physician, nor that the physician in question has a specific certification in sports medicine.

93. In addition, it has been established that in her correspondence with the Respondent the Appellant denoted herself as a medical doctor of the Olympic kayak-canoe team of the RKCF. Against this background, the Sole Arbitrator holds that the Appellant undoubtedly qualifies as "Athlete Support Personnel" in the sense of Law 227/2006 (and likewise under the WADC). For the above reasons, the Sole Arbitrator does not accept the Appellant's contention that her activities were undertaken only as part of her private practice and were not in any way related to any competition held under the auspices of the RKCF or other sports federations.

94. Accordingly, the Appellant has standing to be sued by the Respondent for anti-doping rule violations under Law 227/2006.

B.3 Is the Appellant responsible for an Anti-Doping Rule Violation?

95. The Appellant admits that she applied "ozone therapy" procedures to athletes of the RKCF and withheld certain information regarding the use of the substance Meldonium by athletes. She argues, however, that she administered the therapies in her capacity as a simple care physician specialized in family medicine and, given the beneficial effects of the therapy, she did not think for one moment that it was forbidden to athletes. In respect of not disclosing the use of Meldonium by certain athletes, the Appellant argues that at the time she learned about the use, *i.e.* in December 2015, the use of the substance was allowed.

96. The Sole Arbitrator, thus, shall separately examine the issues of (i) application of "ozone therapy" procedures, and (ii) withholding information regarding the use of Meldonium.

97. According to the Challenged Decision, the Appellant is charged with the violation of Article 2 (2) letters h) and i) of Law 227/2006 as well as Articles 2.8 and 2.9 of the WADC.

98. Article 2 (2) letter h) of Law 227/2006 prohibits administration to an athlete in- and/or out-of-competition of any prohibited substance and/or prohibited method, while Article 2 (2) letter i) of Law 227/2006 is about complicity by assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation or attempted anti-doping rule violation.

1. "Ozone therapy" procedures

99. It is undisputed that the Appellant applied what she calls "ozone therapy" to male and female athletes of the RKCF while they were in training camps in the summer of 2015 in preparation for the 2015 World Championship. It has been established and is undisputed that this therapy consisted of the following elements: (i) the withdrawal of blood, (ii) its enrichment with ozone, (iii) and its re-injection into the athlete's body.

100. In accordance with the prohibited lists of the Respondent (the "Prohibited List"), and the WADA Prohibited List, prohibited methods regarding "M1. Manipulation of Blood and Blood Components" include:

> *"1. The Administration or reintroduction of any quantity of autologous, allogenic (homologous) or heterologous blood, or red blood cell products of any origin into the circulatory system.*
>
> *2. Artificially enhancing the uptake, transport or delivery of oxygen. […]*
>
> *3. Any form of intravascular manipulation of the blood or blood components by physical or chemical means".*

101. It is undisputed that, as the Respondent brought forward, the "ozone therapy" applied by the Appellant falls under the category of manipulation of blood and blood components. The Appellant, however, contends that even if she had been diligent enough to research the Prohibited List she would not have realized that "ozone therapy" is prohibited for athletes as the word "ozone therapy" is not specifically mentioned in the content of the list. Only a physician specialized in sports medicine (what she is not) has the required knowledge allowing him or her to realize that the "ozone therapy" procedure is part of the category *M1. Manipulation of Blood and Blood Components* on the Prohibited List and represents a doping practise. She further explains that there was no intention on her part to violate any anti-doping regulation, given the fact that she owns a practice that deals with performing this "ozone therapy" procedure. She did not know and did not have the obligation to know that "ozone therapy" is not allowed for athletes, "ozone therapy" being a beneficial procedure in any person to which it is applied.

102. Contrary to the Appellant's suggestions, the Sole Arbitrator holds that the Appellant should have known that the treatment offered by her was a prohibited method. Article 22 of Law 227/2006 clearly provides that

> *"The athletes and their support personnel are bound to be knowledgeable of and comply with all applicable national and international anti-doping rules".*

Further, Article 29 (1) of Law 227/2006 provides that

> *"Doctors, nurses and para-medical personnel shall commit special attention to the medical treatment of the Athletes and shall comply with the following rules: […] b) not to recommend, prescribe or cooperate to the use of Prohibited Methods included in the Prohibited List, unless a Therapeutic Use Exemption has been granted".*

103. Accordingly, the Appellant, a medical doctor supporting athletes of the RKCF had to know that the treatment she was administering was a prohibited method, thus constituting an anti-doping rule violation. Whether or not an anti-doping rule violation occurred is not dependent on the name used by the Appellant for her treatments, but is rather determined by its content. The Appellant should have known that what she calls "ozone therapy" falls under the category *M1. Manipulation of Blood and Blood Components* on the Prohibited List.

104. In conclusion the Appellant committed an anti-doping rule violation pursuant to Article 2 (2) letter h) of Law 227/2006.

2. Not disclosing the use of the substance Meldonium

105. As regards the fact that the Appellant did not disclose that she had heard about the use of the substance Meldonium by certain athletes, the Sole Arbitrator notes that Article 29 (1) letter e) of Law 227/2006 required the Appellant

> *"to inform the relevant national sports federation and the Agency about any suspicion regarding the use of Prohibited Substances and/or Prohibited Methods by an Athlete, in order to submit the said Athlete to Target Testing".*

106. In her defense, the Appellant contends that she learned about the use of Meldonium by the athletes in December 2015, but that Meldonium was prohibited as from 1 January 2016 only. The Respondent, on the other hand, contends that the Appellant learned about the use of the substance when the team returned from the training camp in Portugal which had taken place in the period from 11 February to 11 March 2016. The submissions of the parties do, thus, not match in respect of the time when the Appellant became aware of the use of the substance Meldonium by certain athletes.

107. The Sole Arbitrator notes that the Respondent has not established by any evidence that members of the team informed the Appellant about the use of Meldonium when they returned from said training camp in March 2016. Given that the Respondent has the burden of proof for the anti-doping rule violation, the Sole Arbitrator has based his review of this issue on the

confirmation given by the Appellant according to which she had learned about the use of Meldonium by athletes in December 2015.

108. Both parties acknowledge that Meldonium was not on the Respondent's Prohibited List valid for 2015 and it is undisputed that it was on the Respondent's Prohibited List applicable for 2016. In addition, the Sole Arbitrator notes that Meldonium was on the watch list of the Respondent's Prohibited List for 2015, the last page of which provides

*"World Anti-Doping Agency Monitoring Program for 2015**

The following substances are included in the Monitoring Program for 2015:

[…]

5. Meldonium: during the competition and also outside the competition

**World Anti-Doping Code (Article 4.5) stipulates: 'WADA, in consultation with Signatories and governments, shall establish a monitoring program regarding substances which are not on the Prohibited List, but which WADA wishes to monitor in order to detect patterns of misuse in sport".*

109. In addition, the Appellant confirmed at the hearing of 5 January 2018 held at the CAS Court Office that she had not reported the use of Meldonium by the athletes to the Respondent, but, instead, analyzed the time needed to excrete Meldonium as she did not know how long such excretion would take. In the opinion of the Sole Arbitrator this behaviour demonstrates that she knew about the risk that the athletes could still be tested positive for Meldonium once its ban had come into force. The Appellant, in other words, was actually suspicious that after entry into force of the Prohibited List for 2016 a Prohibited Substance could still have been in the athletes' bodies, but decided not to disclose the use of the substance.

110. Further, had the Appellant informed the RKCF and/or the Respondent they could have submitted the athletes for target testing and could also have warned the athletes that use of Meldonium was prohibited as from 1 January 2016 which could possibly have prevented them from any further use of the substance. This is particularly relevant because, as the Respondent has established, in spring 2016 a number of kayak athletes were tested positive for the use of Meldonium and, for this reason, sanctioned for anti-doping rule violations with ineligibility between two to eight years. In addition, a medical assistant was held responsible for anti-doping rule violations in this context and sanctioned with lifetime ineligibility. All this demonstrates why it is so important for Athlete Support Personnel to inform, in accordance with Article 29 (1) letter e) of Law 227/2006, the sports federations and anti-doping authorities in case of a suspected breach of the anti-doping rules.

111. For these reasons the Sole Arbitrator holds that the Appellant had a duty to inform the RKCF and the Respondent based on Article 29 (1) letter e) of Law 227/2006. By failing to inform the RKCF and the Respondent about what she had heard in December 2015 the Appellant breached Article 29 (1) letter e) of Law 227/2006 and committed an anti-doping rule violation pursuant to Article 2 (2) letter i) of Law 227/2006.

3. Conclusion

112. In light of the above, the Sole Arbitrator concludes that the Appellant is responsible for anti-doping rule violations pursuant to Article 2 (2) letter h) and Article 2 (2) let i) of Law 227/2006.

B.4 What is the appropriate sanction?

113. The Respondent sanctioned the Appellant with a lifetime ineligibility from sporting activities based on Article 2 (2) letters h) and i) in conjunction with Article 58 (4) and Article 58 (6) of Law 227/2006.

114. According to Article 58 (4) of Law 227/2006, the sanction for a violation of Article (2) letter h) of Law 227/2006 shall be ineligibility for a minimum of four years up to lifetime ineligibility, depending on the seriousness of the anti-doping rule violation. Pursuant to Article 58 (6) of Law 227/2006, the sanction for a violation of Article 2 (2) letter i) of Law 227/2006 shall be ineligibility for two years up to four years depending on the seriousness of the anti-doping rule violation.

115. Pursuant to Article 65 (1) of Law 227/2006, the consideration of no significant fault or negligence shall not apply in relation to the provisions set out in Article 2 (2) letter h) and Article 2 (2) letter i) of Law 227/2006 as the sanctions will be imposed depending on the degree of fault.

116. Further, according to Article 72 (4) of Law 227/2006, the first and second violation shall be considered together as one single first violation, and the sanction shall be based on the violation that carries the more severe sanction, if the anti-doping agency cannot establish that the Athlete Support Personnel committed a new anti-doping rule violation after receiving notice of the first anti-doping rule violation. In other words, in such cases the rules regarding multiple violations under Article 72 (1) to (3) of Law 227/2006 shall not apply.

117. The Sole Arbitrator holds that in light of the facts presented by the parties and against the background of Article 72 of Law 227/2006, the sanction in the present case is to be determined on the basis of Article 58 (4) of Law 227/2006. Neither of the parties argued, nor was it established, that the Appellant would have withheld the use of Meldonium by certain athletes after she would have received notice regarding an anti-doping rule violation by applying the "ozone therapy" treatments. Rather, both violations were investigated by the Hearing Commission at the same time.

118. The Respondent holds that the ineligibility for life sanction imposed on the Appellant is appropriate. The Appeal Commission summarized the reasons justifying the sanction as follows:

> *"(i) the multiple breach of anti-doping regulations by the Appellant, (ii) the weight and lifespan of these breaches, (iii) initiation and promotion by the Appellant of methods prohibited by the applicable anti-doping regulations, (iv) the Appellant's ignoring the effects that these prohibited methods could have on the athletes' performance, (v) the insincere behaviour of the Appellant before the sport jurisdiction bodies and (vi) her*

behaviour toward the medical act and professional ethics that, as a physician to the national sports team, she showed in the relation with the athletes under her care".

119. In the Answer, the Respondent further contended that aggravating circumstances that justify the imposition of a period of ineligibility longer than the standard sanction are given. These circumstances include, according to the Respondent, committing the anti-doping rule violation as part of a scheme either individually or involving a conspiracy, using or possessing multiple Prohibited Substances or Prohibited Methods or using those on multiple occasions, or engaging in a deceiving or obstructing conduct to avoid the detection of the anti-doping rule violation. According to the Respondent, the Appellant fulfilled these criteria by conducting a doping scheme systematically and on multiple occasions and by changing her statements before the Hearing Commission and the Appeal Commission.

120. The Appellant, on the other hand, argues in her Appeal Brief that the application of the sanction of life suspension requires that

"- The misconduct is very serious (for example, the health of the athletes is endangered);

- The person who infringed on the anti-doping regulations is a repeat offender, who has already been suspended for a serious misconduct;

- The suspended person was the one who organized and urged the athletes to dope",

and that these conditions are not fulfilled in her case.

121. The Appellant also stresses that (i) no athlete of the RKCF has been suspended or even investigated for performing or undertaking "ozone therapy", (ii) she did not know and did not have to know that "ozone therapy" is not allowed for athletes, (iii) there was no intention on her part to infringe on any anti-doping regulation, given that she owns a private practice that deals with performing this "ozone therapy", and (iv) "ozone therapy" is a beneficial procedure in any person practicing it, so that the health of the athletes was not at risk at any moment.

122. Pursuant to Article 3.1 of the WADC the anti-doping agencies shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping agency has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability, but less than proof beyond any reasonable doubt. This principle is constantly applied by the CAS in cases regarding anti-doping rule violations[8]. Furthermore, according to Article 102 Law 227/2006, *"the provisions of the present law are completed by the World Anti-Doping Code and they shall be interpreted in commitment to this Code"*. The Sole Arbitrator, for these reasons, holds that the standard of proof as set out in Article 3.1 of the WADC shall also apply in the present case.

123. Applying the above standard, the Sole Arbitrator holds that the Respondent established, and the Appellant has not contested, that (i) in the summer of 2015 the Appellant applied what she

8 Cf. e.g. CAS 2016/A/4480, no. 53.

calls "ozone therapy" treatments to five male and four female athletes of the RKCF while they were training in Bascov and Bolboci, respectively, that (ii) such treatments were made at ten sessions in the course of five weeks and that (iii) the Appellant was paid RON 1'500 per athlete for such treatments. The Respondent has not established, however, that the Appellant would have carried out more treatments.

124. As regards the side effects of "ozone therapy", the Sole Arbitrator notes that the Respondent has not established to his comfortable satisfaction that these treatments were dangerous for the health of the athletes, a fact that the Appellant denies. The Respondent has not presented any expert witness or any other evidence that would have established the dangerous side effects of this treatment, and such evidence would have been relevant as it is undisputed that the Appellant applies this treatment in her private practice to her patients and that this treatment is not forbidden in Romania outside the sports' world. In light of the foregoing, the dangerous nature of the treatment remains questionable.

125. Further, according to the Respondent the Appellant received 1'500 RON per athlete, a fact that the Appellant does not deny. Given that nine athletes had received the treatment, the Appellant earned 13'500 RON in total, an amount that is neither insignificant nor excessive.

126. Moreover, in the Sole Arbitrator's opinion it is striking that the Respondent has refrained from sanctioning any athlete for undergoing "ozone therapy" treatments. As has been established, the Respondent did sanction certain athletes (and an Athlete Support Personnel), but not for obtaining a prohibited method, but for using a prohibited substance.

127. The Sole Arbitrator holds that the Appellant committed a considerable offence. However, in light of the number of athletes involved (nine) and the number of treatments established (ten), she cannot be seen as having been involved in, or the mastermind of, a larger anti-doping conspiracy or scheme.

128. CAS jurisprudence makes it clear that a sanction imposed on Athlete Support Personnel (and athletes) must respect the principle of proportionality[9]. This is particularly true where, like in the present case, the applicable rules allow ample scope. In such cases the sanction must be in line with the seriousness of the offence. The Respondent, in the present case, fully exhausted the range of sanctions and imposed the highest possible sanction.

129. The Sole Arbitrator notes that in accordance with the practice of the CAS, in view of the specific circumstances of the respective case, a lifetime ban could, in principle, be justified and proportionate in doping cases even if the ban is imposed for a first violation[10]. However, this is only justified where the seriousness of the offence is extraordinary.

130. The Sole Arbitrator holds that in the present case, applying the principle of proportionality and considering the seriousness of those cases that led to a lifetime ban of Athlete Support Personnel[11], the Appellant's offence has not reached a level of seriousness that would justify the

9 Cf. for instance CAS 2016/A/4480, no. 91.
10 Cf. CAS 2008/A/1513, no. 30.
11 E.g. CAS 2016/A/4480; CAS 2016/O/4575.

highest possible sanction, *i.e.* preventing the Appellant for life from participating in any competition or activity authorized by a signatory of the WADC and from acting in any capacity within a sport body of a signatory of the WADC or entering into any contractual relationship with any such signatory.

131. Taking into account the established facts as well as the sanctions foreseen in Article 58 (4) and Article 58 (6) of Law 227/2006, considering that this was the first anti-doping rule violation of the Appellant, applying the principle of proportionality and considering relevant CAS jurisprudence, the Sole Arbitrator holds that a sanction of 6 (six) years is justified.

C. Conclusion

132. In accordance with Article R57 of the CAS Code, the period of ineligibility of the Appellant shall be reduced to a period of 6 (six) years starting on 3 April 2017 which is the date of the final hearing decision in accordance with Article 60 (1) of Law 227/2006.

133. In light of this conclusion it is not necessary to consider any other request submitted by the parties so that all other prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Clara Victoria Patrugan against the decision rendered on 3 April 2017 by the Appeal Commission of the Romanian National Anti-Doping Agency is partially upheld.

2. The decision rendered on 3 April 2017 by the Appeal Commission of the Romanian National Anti-Doping Agency is amended as follows as far as the period of ineligibility is concerned:

   Ms Clara Victoria Patrugan shall be ineligible for a period of 6 (six) years to participate in any competition or activity authorized or organized by a signatory of the WADC, to act in any capacity within a sport body of a signatory of the WADC, to enter any contract relationship with or to act as volunteer for a signatory of the WADC. The period of ineligibility shall be deemed to have started on 3 April 2017.

(…)

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