



Arbitration CAS 2016/A/4558 Mitchell Whitmore v. International Skating Union (ISU), award of 29 September 2016

Panel: Prof. Martin Schimke (Germany), President; Mr Christopher Campbell (USA); Prof. Luigi Fumagalli (Italy)

Skating (speed skating)

Disciplinary sanctions against an athlete for misconduct

Scope of application of the ISU Code of Ethics

Standard of proof in disciplinary cases and comfortable satisfaction

Sanctions in the context of disciplinary cases

1. Article 2 of the ISU Code of Ethics, stipulating that the code is *“intended to apply broadly when an ISU interest is involved”*, allows the conclusion that it is the intention of the code to ensure that the persons subjected to its provisions do not bring the sport of speed skating into disrepute. Particularly the inclusion of the word *“broadly”* indicates that even a remote interest of the ISU may trigger the application of the ISU Code of Ethics. Therefore, an incident happening *e.g.* two days prior to an official ISU event, even if not occurring on the premises of an ISU event but in the close proximity of the location where the ISU event is set to take place, may be considered as having occurred during the participation in an ISU activity. This is irrespective of the fact that the athlete involved in the incident is not competing in the ISU event in question but is only present in the city where the event takes place as member of a team and has not yet received his accreditation at the time of the incident.
2. In disciplinary proceedings before CAS, in the absence of any standard of proof being set out in the applicable regulations, the general standard of proof applied is to be applied, *i.e.* comfortable satisfaction. According to consistent CAS jurisprudence regarding disciplinary cases the standard of comfortable satisfaction has been defined as being greater than a mere balance of probability but less than proof beyond a reasonable doubt. In particular, CAS jurisprudence clearly established that to reach this comfortable satisfaction, the panel should have in mind *“the seriousness of the allegation which is made”*.
3. According to consistent CAS jurisprudence CAS panels shall give a certain level of deference to decisions of sports governing bodies in respect of the proportionality of sanctions; those sanctions can only be reviewed when they are evidently and grossly disproportionate to the offence. An exception to this rule may however be made where the appealed decision lacks any reasoning as to how the sanction imposed by the first instance body was arrived at. Particularly when a sanction may vary from a warning to an exclusion for life from all sporting activities governed by the sports governing body in question, a first instance body, in order to benefit from the deference usually applied

in CAS jurisprudence, is required to explain why the sanction imposed should be considered proportionate.

I. PARTIES

1. Mr Mitchell Whitmore (the “Appellant” or the “Athlete”) is a professional long track speed skater who competed for the United States of America at the 2010 and 2014 Winter Olympic Games. The Athlete is registered with United States Speed Skating (“USS”), which in turn is affiliated with the International Skating Union.
2. The International Skating Union (the “Respondent” or the “ISU”) is an association under Swiss law and has its registered office in Lausanne, Switzerland. The ISU is the global governing body of speed skating. It exercises regulatory, supervisory and disciplinary functions over national federations, athletes and officials at worldwide level.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the parties’ written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings and the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. On 4 to 6 December 2015, an ISU World Cup event took place in Inzell, Germany.
5. The Athlete was not competing at the ISU World Cup event due to a hamstring injury. The Athlete, however, was in Inzell receiving rehabilitation support from a USS team physical therapist, who was there for the ISU World Cup event as well.
6. After dinner on 2 December 2015, the Athlete met with some friends at a bar in Inzell. After leaving the bar, the group (the Athlete, Mr Reyon Kay, Mr Kierryn Hughes and Mr Peter Michael, three speed skaters from the New Zealand team) brought Mr Reyon Kay to his hotel in Inzell. Upon arrival to the hotel, the Athlete, Mr Kay and Mr Hughes got out of the car and were conversing and laughing in the driveway. Mr Michael remained in the vehicle.
7. When Mr Kay entered the hotel, Mr Stefano Donagrondi, coach of the commercial team “Team Corendon” and the Royal Dutch Skating Union (*Koninklijke Nederlandse Schaatsenrijders Bond – “KNSB”*), came outside.
8. As from this moment, the recollections of the persons present at the altercation that would follow (the Athlete, Mr Hughes and Mr Donagrondi) divert from each other. Mr Michael and

Mr Kay did not witness the incident.

9. Although the recollections of the witnesses will be discussed in more detail below, it is clear that the Athlete and Mr Donagrandi got involved in an altercation, that the Athlete finally hit Mr Donagrandi by which the latter was knocked to the ground and that Mr Donagrandi sustained certain injuries from this, among which a dislocation of his shoulder and a concussion, the later only being diagnosed a few weeks after the incident.
10. At 8:40 a.m. and at 1:30 p.m. on the following day, USS coach Mr Matt Kooreman met with Mr Donagrandi. Mr Donagrandi admitted that he insulted the Athlete, that he was angry and that his tone was abrasive. During the second meeting that day, the Athlete was also present and he apologized to Mr Donagrandi, the two of them hugged, shook hands and, according to Mr Kooreman, Mr Donagrandi *“expressed his satisfaction with the fact that [the Athlete] had apologized and that he only wanted to keep it among the individuals in that room”*.
11. USS sent the Athlete home for the remainder of the ISU World Cup event, which resulted in the Athlete missing the ISU World Cup event in Heerenveen, the Netherlands, which was set to take place the following week. The Athlete further submitted an undated and unsigned USS Notice of Code of Conduct Violation (the “Notice”), according to which he was also required to complete 30 hours of community service as part of the penalty handed down to him by USS.
12. On 6 December 2015, Mr Kooreman and Mr Donagrandi met again at the latter’s request and Mr Donagrandi stated that *“he had no intentions of making more of the incident”*.
13. On 5 January 2016, after having been informed of the disciplinary measures imposed on the Athlete by USS, Mr Donagrandi felt that such measures were not harsh enough and subsequently filed a police report in the Netherlands over the incident. Such report was never notified to the Athlete or followed up on by the Dutch authorities.
14. On 18 January 2016, the Athlete apologized to Mr Donagrandi, this time by email.

B. Proceedings before the ISU Disciplinary Commission

15. On 26 January 2016, the KNSB filed a complaint with the ISU on behalf of Mr Donagrandi.
16. On 22 February 2016, upon invitation of the ISU Disciplinary Commission, the Athlete and USS filed a joint written submission to the ISU Disciplinary Commission, including three statements of eye witnesses of the incident and a report of the USS national sprint team coach.
17. On 29 February 2016, the ISU Disciplinary Commission received reports from the medical doctor, the physiotherapist and the team leader of the KNSB regarding the incident.
18. On 29 March 2016, the ISU Disciplinary Commission rendered its reasoned decision (the “Appealed Decision”), with the following operative part:
 1. [The Athlete] *is guilty of misconduct and of violation of the ISU Code of Ethics 2012.*

2. *A suspension of one year from participation in all ISU activities is imposed on [the Athlete], beginning on April 1st, 2016, and ending on March 31, 2017.*
3. *Each party shall bear their own costs.*

19. The grounds of the Appealed Decision determine, *inter alia*, the following:

- (1) *The offence against the Complainant is a violation of the ISU Code of Ethics (ISU Communication No. 1717).*

Code of Ethics No. 4 b) Paragraph 2 states:

“Fair play is defined as much more than playing within the rules. It incorporates issues concerned with the elimination of cheating, the use of violence (both physical and verbal)

- c) *I will not cause damage to persons or property, or engage in illegal activity, recognizing that all such activities bring disrepute to the skating sports and the ISU, and, in certain cases, may result in criminal charges and ISU action against me”.*
- (2) *[USS] raised the question of how this incident could be a violation of the Code of Ethics, as the Alleged Offender was unaware of the Complainant’s affiliation to speed skating and was defending himself against an unknown aggressor outside the field of play. The Panel is of the opinion that the status of the Alleged Offender as team member of [USS] and not the status of the victim is crucial for the application of the ISU Code of Ethics. Even if the victim had been a person who did not belong to the ISU family, the ISU Code of Ethics would be applicable, because the assault was committed by a member of the [USS] team during an ISU event.*
- (3) *The offence against the Complainant constitutes a malicious injury. According to German criminal law – which would be applicable to the site of the crime in Inzell, Germany – the Alleged Offender fulfilled § 223 StGB (Strafgesetzbuch, German Criminal Law). The Alleged Offender has caused bodily injury and damaged the health of the Complainant.*
- (4) *The eye witness Mr. Hughes testified that the Complainant moved towards the Alleged Offender screaming at him, then initiated physical contact towards him with both of his hands. It was then the Alleged Offender who responded in what looked like self-defense.*
Self-defense can be an affirmative defense, § 32 StGB, but only if carried out in an appropriate way. During the course of defending himself a person cannot use force greater than that which is required to stop an immediate attack on them. Even if this defense had been raised, in the opinion of the Panel, the Alleged Offender has exceeded the line of self-defense and turned to a counter attack by using excessive force. This would not be considered as acting in self-defense.
- (5) *The bodily injury was culpable. The Alleged Offender has confessed to have visited a bar in Inzell prior to the incident, but neither he nor the witnesses have claimed a diminished responsibility due to consumption of alcoholic drinks.*
- (6) *The Alleged Offender has violated the ISU Code of Ethics by committing a malicious bodily injury.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 18 April 2016, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”), pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the “Code”). The Athlete nominated Mr Christopher L. Campbell Esq., Attorney-at-Law in San Francisco, United States of America, as arbitrator. The Athlete directed his appeal against the ISU, but identified the KNSB and USS as interested parties.
21. On 21 April 2016, the CAS Court Office asked the KNSB and USS whether they wished to participate as a party in the arbitration.
22. On 29 April 2016, the KNSB informed the CAS Court Office that it did not wish to participate as a party, but expressed its desire to be an observer and to share its vision through a so-called *amicus curiae* brief and to file an additional witness statement of Mr Donagranti.
23. Also on 29 April 2016, the ISU nominated Mr Luigi Fumagalli, Professor and Attorney-at-Law in Milano, Italy, as arbitrator.
24. On 29 April 2016, the Athlete filed his Appeal Brief, in accordance with Article R51 of the Code. The Appeal Brief contained a statement of the facts and legal arguments and included the following requests for relief:
 - 6.1.1 *Declare that Appellant’s appeal should be upheld;*
 - 6.1.2 *Declare that the one year sanction issued by the ISU DC be set aside; and*
 - 6.1.3 *Award Appellant a contribution towards his legal costs in this Appeal.*
25. On 24 May 2016, the ISU filed its Answer, pursuant to Article R55 of the Code, requesting CAS to decide as follows:
 - To dismiss Appellant’s appeal.*
 - To confirm the decision of the ISU Disciplinary Commission of March 29, 2016.*
26. On 15 June 2016, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:
 - Prof. Dr. Martin Schimke, Attorney-at-law in Dusseldorf, Germany, as President;
 - Mr Christopher L. Campbell Esq., Attorney-at-Law in San Francisco, United States of America; and
 - Prof. Luigi Fumagalli, Professor and Attorney-at-law in Milano, Italy, as arbitrators.
27. On 29 July and 12 August 2016, respectively, the ISU and the Athlete signed and returned the Order of Procedure to the CAS Court Office.
28. On 31 July 2016, upon being invited by the CAS Court Office to express their opinion on the

- KNSB's request to submit an *amicus curiae* brief, the Athlete objected to the filing thereof, whereas the ISU did not respond.
29. On 5 August 2016, the CAS Court Office, on behalf of the Panel, advised the KNSB that its request to file an *amicus curiae* brief was denied in accordance with Article R41.4 of the Code.
 30. On 30 August 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing both parties confirmed not to have any objection as to the constitution and composition of the Panel.
 31. In addition to the Panel, Mr Brent J. Nowicki, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:
 - a) For the Athlete:
 - Mr Mitchell Whitmore, the Athlete;
 - Mr Howard L. Jacobs, Counsel.
 - b) For the ISU:
 - Dr. Béatrice Pfister, Counsel.
 32. The Panel heard evidence of the following persons in order of appearance:
 - Mr Mitchell Whitmore, the Athlete;
 - Mr Stefano Donagrandi, coach of "Team Corendon" and the KNSB, witness called by the ISU;
 - Mr Matt Kooreman, USS coach, witness called by the Athlete, by video conference;
 - Mr Ted Morris, USS Executive Director, witness called by the Athlete, by video conference;
 - Mr Kierryn Hughes, speed skater from the New Zealand team, witness called by the Athlete, by video conference.
 33. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses.
 34. The Athlete initially announced to hear also Mr Peter Michael and Mr Reyon Kay, speed skaters from the New Zealand team, as witnesses, but voluntarily renounced to do so during the hearing.
 35. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

36. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

37. The Athlete provided the following summary of his submissions:

“This case arises from an altercation started by [KNSB] coach Stefano Donagrandi, late at night in a hotel parking lot. It did not occur during participation in any ISU activity, did not occur on the premises of an ISU event, and in fact, occurred well before any such event had even started. Furthermore, the Appellant [the Athlete] was not even scheduled to participate in the ISU World Cup event that was to start 2 days later. Nevertheless, the ISU Disciplinary Commission (hereinafter “ISU DC”) – responding to a complaint filed by Mr. Donagrandi nearly 2 months prior, issued an unprecedented sanction of a one-year suspension to [the Athlete] from participation in any and all ISU activities. [The Athlete] was also disciplined by [USS] (his own National Governing Body), a fact that the ISU DC ignored in reaching its unprecedented sanction.

Appellant contends that the ISU DC lacked jurisdiction to sanction [the Athlete] at all, as the “altercation” did not occur during participation in an ISU activity. Appellant submits that the ISU Code of Ethics provision that was relied upon by the ISU DC in sanctioning [the Athlete] only applies to conduct that occurs during participation in an ISU activity. Because Appellant was not participating in any ISU activity at the time of the “altercation”, the ISU lacked jurisdiction, and its sanction must be set aside.

Furthermore, Appellant submits that even if the ISU DC had jurisdiction, Appellant cannot be found to have violated the ISU Code of Ethics rule that was relied upon. The sanction that was issued by the ISU DC is unsupported by the facts or the rules, and is inconsistent with prior sanctions issued by the ISU DC. For these reasons, Appellant submits that the sanction issued by the ISU DC must be set aside, or alternatively, must be reduced”.

38. The submissions of the ISU, in essence, may be summarised as follows:

- The ISU maintains that the Athlete was clearly a participant in the Inzell ISU activity, regardless of whether he actually competed. The Athlete should at least be considered as a team attendant, in accordance with article 1 of the ISU Code of Ethics. After all, the Athlete kept his ISU accreditation for the event, stayed at one of the official hotels together with his teammates and also spent the evening of 2 December 2015 with them and other competitors.
- As to the alleged violation, the ISU argues that the scope of the ISU Code of Ethics is applicable to all participants in ISU activities at all times, at the occasion of ISU activities as well as in civilian life; the concepts of sport ethics and the respective way of thinking cannot be confined by the barriers of an ice rink.
- The ISU maintains that, contrary to the position of the Athlete, the altercation was not started by Mr Donagrandi but by the Athlete, as he and his friends disrupted the night silence in the parking lot of the hotel where Mr Donagrandi and his KNSB skaters were staying. Even if the Athlete should have perceived the alleged physical contact by Mr

Donagranti as a real threat at all, his reaction – as the ISU Disciplinary Commission properly held – would have been in clear excess of permissible self-defence and is therefore inexcusable.

- The Athlete violated article 4(b) paragraph 2 of the ISU Code of Ethics by having maliciously injured Mr Donagranti and article 4(c) by breaking his commitment to not cause damage to persons. It is not disputed that the Athlete in the course of the altercation hit Mr Donagranti, thereby knocking him to the ground. From the statements of Mr Willem Jan Koops, KNSB physiotherapist, and Ms Mirjam Steunebrink, KNSB team doctor, corroborated by photographs, the ISU considers it to be sufficiently established that Mr Donagranti suffered from injuries on his face and throat, substantial bleeding, dislocation of his shoulder and a state of shock. Significantly, the Athlete does not challenge any of these factual representations.
- The ISU submits that the one-year suspension imposed on the Athlete is justified and in proportion with the seriousness of the infringement and his fault and fully respects the principle of proportionality. Attacks against the physical integrity of a human being doubtlessly belong to the most serious category of violations of the ISU Code of Ethics. The ISU denies that the sanction imposed on the Athlete was disproportionate in comparison with sanctions imposed for other violations. It has to be taken into account that speed skating has a substantial summer break, the 12-month suspension in practice has an effect of merely 8 months. It needs to be taken into account that the Athlete was found guilty of a (minor) anti-doping rule violation on 31 May 2012 by leaving the ice rink before checking whether he was selected for anti-doping testing (which he actually was). The ISU maintains that it was taken into account that the Athlete had no history of behavioural problems of the kind demonstrated in Inzell.
- The ISU argues that the Athlete failed to evidence that he had actually been sanctioned by USS. The Notice neither bears a date nor a signature and the receipt of service affirmation is left blank. In addition, to suggest that the ISU would have to take into account sanctions already imposed by its member federations would completely undermine the principle of autonomy. By quickly sanctioning misbehaviour of their competitors (by very mild sanctions) before the ISU Disciplinary Commission issues its decision, the member federations could effectively undermine the ISU's sanctioning power and estop the ISU from applying the sanction it considers appropriate for the misbehaviour in question. Thus, at least as far as different sanctions are concerned, the ISU as well as its member federations are, within their respective jurisdiction, free to apply them without violating the *ne bis in idem* principle.

V. JURISDICTION

39. 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.

40. The jurisdiction of CAS, which is not disputed, derives from article 24.12 in conjunction with article 25.1 of the ISU Constitution, determining respectively the following:

Appeals against the decisions of the DC [...] may be filed in accordance with Article 25.

Appeals against decisions of the DC [...] may be filed with the Appeals Arbitration Division of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland.

41. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.
42. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

43. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

44. The appeal was filed within the deadline of 21 days set by article 25.4 of the ISU Constitution. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fee.
45. It follows that the appeal is admissible.

VII. APPLICABLE LAW

46. Article R58 of the Code provides the following:

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.

47. The Panel observes that neither of the parties made any submissions on the law to be applied and is satisfied to accept the application of the various regulations of the ISU to the matter at hand, including the ISU Constitution (edition 2014) and the ISU Code of Ethics (edition 2012).

VIII. MERITS

A. The Main Issues

48. In view of the above, the main issues to be resolved by the Panel are:

- i. Was the ISU Disciplinary Commission competent to adjudicate and decide on the matter in dispute?
- ii. If so, did the Athlete violate article 4(b) second paragraph and (c) of the ISU Code of Ethics?
- iii. If so, is the sanction imposed on the Athlete by the ISU Disciplinary Commission proportionate to the offence committed?

i. Was the ISU Disciplinary Commission competent to adjudicate and decide on the matter in dispute?

49. The ISU Disciplinary Commission based its competence on the ISU Declaration for Competitors and Officials entering ISU Events (the “ISU Declaration”) signed by the Athlete on 15 October 2015, which provides, *inter alia*, as follows:

I/we, the undersigned,

- I) *accept the ISU Constitution, which establishes an ISU Disciplinary Commission (Article 24) and recognises the Court of Arbitration for Sport (CAS), in Lausanne, Switzerland as the arbitration tribunal authorised to issue final and binding awards involving the ISU, its Members and all participants in ISU activities, excluding all recourse to ordinary courts (Articles 25 & 26); and [...].*
- VI) *am familiar with the ISU Code of Ethics (ISU Communication 1717 or any update of this Communication) [...] and I declare that I will fully comply with such Rules.*

50. The ISU Disciplinary Commission sanctioned the Athlete for a violation of article 4(b) second paragraph and (c) of the ISU Code of Ethics, which provide the following:

All who involve themselves with the ISU in any capacity shall be deemed to agree that this Code is a commitment to be observed and honored as if expressed in a written document, solemnly signed by the involved person, and containing the following provisions:

[...]

- b) *I further agree to advocate and practice “sports ethics” and “fair play”, as defined below:*

[...]

Fair play is defined as much more than playing within the rules. It incorporates the concepts of friendship, respect for others and sportsmanship. Sports ethics is defined as a way of thinking, not just a way of behaving. It incorporates issues concerned with the elimination of cheating, the use of unfair strategies whilst respecting the rules, doping, misuse of nutritional supplements, violence

(both physical and verbal), sexual harassment and abuse of children, young people and woman, trafficking in young sportspeople, discrimination, exploitation, unequal opportunities, excessive commercialisation and corruption.

c) *I accept that my participation in any ISU activity is an honor and privilege that carries important responsibilities. I will not use or possess illegal drugs, or directly or indirectly participate or aid in illegal drug use or drug rule violations, cause damage to persons or property, or engage in illegal activity, recognizing that all such activities bring disrepute to the skating sports and the ISU, and, in certain cases, may result in criminal charges and ISU action against me.*

51. The Athlete submits that, contrary to the interpretation applied by the ISU Disciplinary Commission, this provision must be read to mean that the ISU Code of Ethics allows the ISU Disciplinary Commission to penalize an athlete who causes damage to persons “*during participation in an ISU activity*”. The 2 December 2015 altercation occurred well before the start of the ISU World Cup event in Inzell, which took place from 4-6 December 2015.
52. The Athlete further argues that, even if the 2 December 2015 altercation could be construed as occurring during the ISU World Cup event in Inzell, he was not a participant in the event and, as a result, cannot be considered to have been involved in an altercation “*during participation in an ISU activity*”.
53. The ISU maintains that the Athlete was listed on the preliminary entry form of USS as of 28 October 2015. Upon his arrival in Inzell, the Athlete received a skaters’ accreditation and was not officially withdrawn from the competition. Thus, the Athlete was clearly a participant in the Inzell ISU activity, whether he actually competed or not.
54. The ISU further maintains that, more importantly, the Athlete’s arguments show his fundamentally wrong perception of the concept and meaning of the ISU Code of Ethics. The personal scope of application of the ISU Code of Ethics is of course limited to participants in ISU activities. The addressees of the ISU Code of Ethics are however committed to observe the rules of conduct contained therein at all times, at the occasion of ISU activities, as well as in civilian life. Improper behaviour can impair the values of the ISU and its reputation regardless of whether it happens within or outside of an ISU activity.
55. The ISU also maintains that the scope of application of the ISU Code of Ethics is not limited to competitors and officials, but rather extends to all kinds of participants in ISU activities, such as coaches, doctors, team attendants, etc. If by not competing the Athlete lost the status of skater for the purposes of the Inzell event at all, which is contested, he would still have been a participant in the respective ISU activity, at least as team attendant.
56. The Panel commences its analysis from the starting point that the Athlete was *ratione personae* subjected to the ISU Code of Ethics by having signed the ISU Declaration on 15 October 2015. This is not contested by the Athlete.
57. The question is rather how broad the scope of application of the ISU Code of Ethics is in respect of time and location, *i.e.* are athletes continuously subjected to the ISU Code of Ethics or only during and/or at ISU events. Furthermore, if athletes are only subjected to the ISU

Code of Ethics during ISU events, at what moment does such event start?

58. First, the Panel notes that neither article 4(b) second paragraph nor (c), or any other provision of the ISU Code of Ethics, use the wording “*during participation in an ISU event*” let alone define its scope of applicability. The ISU Code of Ethics, in particular article 4(c), only states that the participation in “*any*” ISU activity results in increased responsibilities. Contrary to the Athlete’s interpretation, the Panel observes that the behaviour that is incriminated by means of article 4(b) second paragraph and (c) of the ISU Code of Ethics may lead one to believe that not only behaviour “*during participation in an ISU activity*” is culpable, but, indeed, also behaviour that is not related to participation in ISU activities. For example, the ISU Code of Ethics reproaches behaviour such as “*harassment and abuse of children, young people and woman, trafficking in young sportspeople, discrimination, exploitation, unequal opportunities, excessive commercialisation and corruption*” and that persons subjected to the ISU Code of Ethics can be sanctioned if they “*use or possess illegal drugs, or directly or indirectly participate or aid in illegal drug use or drug rule violations, cause damage to persons or property, or engage in illegal activity*”, despite the fact that such behaviour and infringements would normally not be seen *during* sports events, but rather in an athlete’s private life.
59. The Panel is intrigued by the question as to how far the competence of an international federation such as the ISU over its athletes goes, but does not deem it necessary to answer this question in the matter at hand as the Panel considers it clear that the Athlete in question was subject to the ISU Code of Ethics at the moment and location of the altercation in the matter at hand.
60. As maintained by the ISU, the Athlete was at the very least in Inzell as a team attendant and was subjected to the ISU Code of Ethics in such capacity. The Athlete was listed on the preliminary entry form of USS dated 28 October 2015, as well as on the final entry form of USS dated 30 November 2015, although it is clear from the latter form that the Athlete would not participate in the ISU World Cup in Inzell.
61. Whereas the ISU maintains that the Athlete received a skater’s accreditation, as confirmed by an email from an ISU employee dated 12 May 2016, the Athlete denies having received an accreditation. The Panel finds that this can be left open, because it is satisfied, on the basis of the declarations heard, that the Athlete, even though he had not yet received an accreditation at the time of the altercation, he would have been granted one if he had not been sent home by USS before the competition started.
62. In any case, since the altercation occurred in Inzell two days before the start of an ISU World Cup event, the Panel finds that the altercation occurred *during participation in an ISU activity*. The Panel finds that this definition should not be given a narrow interpretation, which would render it entirely ineffective. The intention of the ISU Code of Ethics, in fact, is to ensure that the persons subjected to its provisions do not bring the sport of speed skating into disrepute. This derives from article 2 of the ISU Code of Ethics, which states that it is “*intended to apply broadly when an ISU interest is involved*”. Particularly the inclusion of the word “*broadly*” indicates that even a remote interest of the ISU may trigger the application of the ISU Code of Ethics.

63. Contrary to the view expressed by the Athlete, the Panel does not find the scope of application of the ISU Code of Ethics ambiguous or unclear as a consequence of which it has to be interpreted against the author (*contra proferentem*). The Panel finds that in the situation at hand, where the Athlete allegedly committed a violation of the ISU Code of Ethics by having caused physical harm to a person during his stay at a location in the near proximity of the place where an ISU event is about to take place, certainly concerns an ISU interest and thereby triggers the application of the ISU Code of Ethics. The reason why the Athlete was in Inzell is clearly related to the ISU event.
64. Consequently, the Panel finds that the ISU Disciplinary Commission was competent to adjudicate and decide on the matter in dispute.

ii. *If so, did the Athlete violate article 4(b) second paragraph and (c) of the ISU Code of Ethics?*

65. As already set out above, article 4(b) second paragraph and (c) of the ISU Code of Ethics, determines the following:

All who involve themselves with the ISU in any capacity shall be deemed to agree that this Code is a commitment to be observed and honored as if expressed in a written document, solemnly signed by the involved person, and containing the following provisions:

[...]

- b) *I further agree to advocate and practice “sports ethics” and “fair play”, as defined below:*

[...]

Fair play is defined as much more than playing within the rules. It incorporates the concepts of friendship, respect for others and sportsmanship. Sports ethics is defined as a way of thinking, not just a way of behaving. It incorporates issues concerned with the elimination of cheating, the use of unfair strategies whilst respecting the rules, doping, misuse of nutritional supplements, violence (both physical and verbal), sexual harassment and abuse of children, young people and women, trafficking in young sportspeople, discrimination, exploitation, unequal opportunities, excessive commercialisation and corruption.

- c) *I accept that my participation in any ISU activity is an honor and privilege that carries important responsibilities. I will not use or possess illegal drugs, or directly or indirectly participate or aid in illegal drug use or drug rule violations, cause damage to persons or property, or engage in illegal activity, recognizing that all such activities bring disrepute to the skating sports and the ISU, and, in certain cases, may result in criminal charges and ISU action against me.*

66. In this context, the Athlete basically reiterates his arguments mentioned above in respect of the competence of the ISU Disciplinary Commission, as he submits that the ISU Code of Ethics would only be violated where an athlete causes damage to a person *during participation in an ISU activity*. However, the 2 December 2015 altercation occurred well before the start of the ISU World Cup event in Inzell. Also because the Athlete was not a participant in the ISU World Cup, he cannot be considered to have been involved in an altercation *during participation in an*

ISU activity. As a consequence, the Athlete requests the Appealed Decision to be set aside in its entirety.

67. The ISU maintains that it follows clearly from the Appealed Decision that the sanction was imposed on the Athlete for having maliciously injured Mr Donagrandi, thereby violating article 4(b) second paragraph of the ISU Code of Ethics. Based on the statements of the Athlete and Mr Donagrandi, which in this respect are mutually consistent, the ISU Disciplinary Commission correctly considered as evidenced the fact that the Athlete in the course of the altercation hit Mr Donagrandi, thereby knocking him to the ground. The ISU further submits that it is sufficiently established by the plausible statements of Mr Willem Jan Kooops, KNSB physiotherapist, and Ms Mirjam Steunebrink, KNSB team doctor, that Mr Donagrandi suffered from injuries on his face and throat, substantial bleeding, dislocation of his shoulder and a state of shock. In this respect it was later added during the hearing that Mr Donagrandi had also sustained a concussion, which was only detected several weeks after the altercation.
68. The Panel finds that, as already set out above in respect of the competence of the ISU Disciplinary Commission, the application of the ISU Code of Ethics is governed by article 2 thereof, determining that it is “*intended to apply broadly when an ISU interest is involved*”. The Panel finds that the ISU’s allegations in respect of the Athlete, if proven, certainly constitute a violation of the ISU Code of Ethics as there is clearly an ISU interest involved in the matter at hand, as the altercation took place in the close proximity of the location where an ISU event was set to take place in a few days.
69. Turning its attention to the substance of the alleged offence, the Panel finds that it is for the ISU to prove that the Athlete infringed the ISU Code of Ethics, *i.e.* the burden of proof lies with the ISU.
70. In the absence of any standard of proof being set out in the applicable regulations, the Panel finds that the general standard of proof applied in disciplinary proceedings before CAS is to be applied, *i.e.* comfortable satisfaction. The standard of comfortable satisfaction has been consistently upheld in CAS jurisprudence regarding disciplinary cases and has been defined as being greater than a mere balance of probability but less than proof beyond a reasonable doubt (CAS 2014/A/3625, with further reference to CAS 2009/A/1920, CAS 2013/A/3258, CAS 2010/A/2267, CAS 2010/A/2172). In particular, CAS jurisprudence clearly established that to reach this comfortable satisfaction, the Panel should have in mind “*the seriousness of the allegation which is made*” (CAS 2014/A/3625, with further reference to CAS 2005/A/908, CAS 2009/A/1902).
71. The Panel observes that it is not disputed that the Athlete hit Mr Donagrandi and thereby knocked him to the ground, which caused Mr Donagrandi’s shoulder to dislocate and through which he sustained a concussion. The Panel is not convinced of the long-term injuries sustained by Mr Donagrandi, as, besides his own testimony, no corroborating medical reports or other evidence is presented in this respect.
72. This aggression of the Athlete in itself cannot, however, automatically be considered a violation of the ISU Code of Ethics without having due regard to the circumstances under which such

action took place.

73. As a consequence, the Panel deems it necessary to have a complete picture of the altercation, having due regard for the fact that the burden of proof in this respect lies with the ISU.
74. As indicated *supra*, the Panel observes that the persons present at the altercation (the Athlete, Mr Donagrandi and Mr Hughes) have different recollections as to how the altercation came about.
75. The Athlete provided the following witness statement:

After dinner on December 2, I met some friends at a bar in the village of Inzell. After leaving the bar, our group drove to the [...] Apartments to drop off Reyon Kay, a skater from the New Zealand team. Once we arrived at the hotel, we got out of the car and were conversing and laughing in the driveway. Shortly thereafter, we were approached by a man (Stefano Donagrandi whom I did not know at the time) who proceeded to yell something at us. I retorted in an equal manner and he went back inside. No more than a minute later, Stefano came back outside and approached me, yelling insulting statements. We yelled back and forth at each other and then he pushed me. I responded by hitting him which knocked him to the ground. I then followed him to the ground in hopes of calming the situation. I asked him several times "are we done here?" After a few more seconds of me holding him down, I got up and went into the car to avoid escalating the situation. Stefano approached the car slamming the hood and kicking the door before we drove away.

76. During the hearing, the Athlete's witness testimony was largely confirmed, with the slight nuance that it transpired during testimony that Mr Donagrandi made only one insulting statement to the Athlete, being that better speed skaters than the Athlete were asleep.
77. Mr Hughes provided the following witness statement:

Reyon, Mitch and myself exited the vehicle and we talked outside briefly, Peter stayed in the car. Reyon went into the hotel and as he did, a disgruntled man staying at the hotel came from his room and started yelling at Mitch and myself because we were apparently talking too loud outside. He then went back inside his room for about a minute and then came out again, this time raising his voice and advancing towards us in a very aggressive manor [sic].

As he approached us he moved towards Mitch screaming at him, he then initiated physical contact towards Mitch with both of his hands. It was then Mitch who responded in what looked like self-defense and that resulted in a fight between the two of them.

After about 5-10 seconds the altercation ended. We decided it was best to leave the premises as quickly as possible to limit any further physical confrontation between the man and ourselves so we got into the car. This man then proceeded to damage the vehicle we were driving on the driver side door leaving a dent. We then left and drove back to where we were staying and dropped Mitch at his hotel.

Mitch and myself were unaware of who the man involved in the incident was. Peter knew him, but he was in the car and wasn't aware of the situation happening outside of the vehicle until the man approached, then damaged the driver side door as we were leaving.

78. During the hearing, Mr Hughes' witness testimony was largely confirmed. Mr Hughes admitted, however, to have omitted explicitly mentioning in his witness statement that the Athlete punched Mr Donagrandi knocking him to the ground.
79. Mr Donagrandi testified during the hearing that he came outside the hotel to ask the Athlete and Mr Hughes to stop yelling and screaming in the middle of the night. He went back to the hotel when they stopped screaming, but turned around when the Athlete started screaming again. Mr Donagrandi asked the Athlete to stop the noise and made an insulting statement. The Athlete then provoked him by shouting as loud as he could. About a minute after the insulting statement, the Athlete suddenly jumped on top of him and he was thrown to the ground, which dislocated his arm from his shoulder. Mr Donagrandi denied having pushed the Athlete before he attacked him. According to Mr Donagrandi, his insulting statement did not directly trigger the violence from the side of the Athlete, but admitted that it was not smart to make this statement. When Mr Donagrandi was knocked to the ground, the Athlete pressed his face into the gravel. Mr Donagrandi was beaten on the left side of his face and blood was coming out of his mouth. The Athlete then asked him: "*are we done, yes or no?*".
80. After having considered all the evidence on file, and in particular the testimonies of the witnesses and the Athlete himself at the hearing, the Panel is satisfied that Mr Donagrandi initiated physical contact towards the Athlete by pushing him. The Panel also finds that there is sufficient evidence on file to prove that the Athlete engaged in physical violence, caused damage to a person and thereby brought the skating sport and the ISU into disrepute.
81. Notwithstanding the fact that Mr Donagrandi was the one that initiated physical contact by pushing the Athlete, the Panel finds that this in no way exculpates the Athlete from his disproportionate reaction to such a push. Insofar as the Athlete maintains that he acted out of self-defence, this argument is rejected by the Panel because even though Mr Donagrandi initiated physical contact by pushing the Athlete first, the Athlete's violent response was disproportionate.
82. First of all, the altercation transpired in an open area (a parking lot), which makes it difficult to believe that the Athlete felt threatened in such a way that an attack was justified.
83. Second, the Athlete was also accompanied by Mr Hughes (outside) and Mr Michael (inside the car), which in the view of the Panel make the argument of self-defence implausible as these two persons would most likely have protected the Athlete if he was really in danger.
84. Third, although Mr Donagrandi admitted to having made an insulting remark about the Athlete's sporting capabilities, the Panel finds that this remark also cannot justify the Athlete's violent response.
85. Accordingly, since the argument of self-defence is dismissed and because the Athlete's actions clearly caused physical harm to Mr Donagrandi, the Panel has no doubt that the Athlete committed a violation of the ISU Code of Ethics whereby he brought the sport of skating into disrepute.

86. Consequently, the Panel is comfortably satisfied that the Athlete violated article 4(b) second paragraph and (c) of the ISU Code of Ethics.

iii. If so, is the sanction imposed on the Athlete by the ISU Disciplinary Commission proportionate to the offence committed?

87. The Athlete maintains that the one-year suspension imposed on him by the ISU Disciplinary Commission is wildly disproportionate. There is no reasonable balance between the kind of the misconduct and the sanction. Also in comparison with the jurisprudence of the ISU Disciplinary Commission, the sanction is not proportionate. In this respect, the Athlete refers to the case regarding short track skater Mr Knecht, who, despite i) making an obscene gesture towards a competitor; and ii) making an aggressive kick towards this competitor, was not excluded from participating in the Olympic Games that started three days later, but only received a warning.

88. The Athlete argues that the sanction imposed on him is further disproportionate because i) the ISU Disciplinary Commission failed to provide any reasoning for how it arrived at the one-year sanction; ii) the failure to take into account the significant disciplinary measure already imposed upon him by USS; iii) the failure to take into account that Mr Donagrandi could easily have acted in a more reasonable manner in addressing the noise issues, in which case any altercation would have been entirely avoided; and iv) the failure to take into account that the Athlete had no history of behavioural problems.

89. The ISU maintains that attacks against the physical integrity doubtlessly belong to the most serious category of violations of the ISU Code of Ethics and that the inflicting of these injuries was not only a violation of the ISU Code of Ethics, but even a criminal offense. This was duly taken into account in determining the sanction imposed on the Athlete.

90. The ISU submits that the present matter cannot be compared to the one of Mr Knecht, because in the latter case there was no risk of bodily injury. The Athlete did not only put up with the risk that his aggression towards Mr Donagrandi could result in bodily injury, but actually caused such injury. Also the length of the one-year suspension is not unprecedented as the ISU Disciplinary Commission imposed on the speed skater Mr Cho a suspension of two years for having tampered with and thereby damaged the skates of a competitor. Two-year suspensions were also imposed on Mr Toigo, a figure skating judge, for having looked at the marking screens of his neighbouring judges, thereby conveying the impression of not marking independently and manipulating the independent evaluation of skaters' performance, and on Ms Kruglova for having tried to incite another judge to give higher marks than deserved. A one-year suspension had been imposed on Mr Petukhov for having violated the duty of the referee to conduct the draw for the starting order of a figure skating competition.

91. The ISU argues that it took into account that the Athlete had no history of behavioural problems of the kind demonstrated in Inzell. As to the sanction imposed on the Athlete by USS, the ISU argues that there is no conclusive evidence that the Athlete has actually been sanctioned by USS. The Athlete also failed to argue for what reason and in what way this should have been taken into account. The ISU submits that having to take into account sanctions already imposed by its member federations would completely undermine the principle of

autonomy.

92. The ISU finally submits that the Athlete's argument that Mr Donagrandi could easily have acted in a more reasonable manner cannot be taken into account, as it was the Athlete that disturbed the night silence, which provoked Mr Donagrandi. According to the ISU, it does not matter whether it was Mr Donagrandi or the Athlete who finally initiated physical contact, because there is no indication whatsoever that there was any sign that Mr Donagrandi would use any physical violence. Violence was however applied by the Athlete, who, in any event, acted in clear excess of permissible self-defence.
93. The Panel observes that it is consistent jurisprudence of CAS that Panels shall give a certain deference to decisions of sports governing bodies in respect of the proportionality of sanctions:

"In this latter respect, this Panel agrees with the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see, e.g. the awards of: 24 March 2005, CAS 2004/A/690, § 86; 15 July 2007, CAS 2005/A/830, § 10.26; 26 June 2007, 2006/A/1175, § 90; and the advisory opinion of 21 April 2006, CAS 2005/C/976 & 986, § 143)"
(CAS 2009/A/1817 & CAS 2009/A/1844).
94. However, the Panel observes that the Appealed Decision lacks any reasoning as to how the ISU Disciplinary Commission arrived at a suspension of one year. This makes it impossible for the present Panel and, importantly, for the Athlete, to know which circumstances influenced the severity of the sanction imposed on the Athlete. Particularly when a sanction may vary from a warning (article 24(9)(a)(i) of the ISU Constitution) to an exclusion for life from all ISU activities (article 24(9)(a)(iv) of the ISU Constitution), a first instance body is required to explain why the sanction imposed should be considered proportionate in order to benefit from the deference usually applied in CAS jurisprudence.
95. Since the ISU Disciplinary Commission failed to do so in the matter at hand, the Panel finds that it is not appropriate to apply the usual deference in assessing the proportionality of the one-year suspension from all ISU activities imposed in the present case.
96. In determining the length of the suspension in the matter at hand, the Panel deems it relevant that the ISU Disciplinary Commission has issued suspensions of up to two years in the past and considered a one-year suspension apparently reasonable in the matter at hand.
97. On the basis of the evidence on file, the Panel deems it proven that Mr Donagrandi pushed the Athlete before the Athlete attacked Mr Donagrandi. Despite the fact that Mr Donagrandi's behaviour was undoubtedly triggered by the noise of the Athlete and his companions in the parking lot in the middle of the night and that the Athlete is therefore certainly more responsible for the emergence of the altercation than Mr Donagrandi, the Panel finds that it must be taken into account in imposing an appropriate sanction on the Athlete that it was Mr Donagrandi who initiated the physical contact. Moreover, the Panel does not omit to notice that Mr Donagrandi, as an experienced and well-educated coach, is expected to be able to appropriately deal with the sometimes quick-tempered and emotional character of athletes and therefore

could have been expected to react in a more rational way than he did.

98. Although the ISU expressed doubts in this respect, the Panel is convinced that the Athlete was disciplined by USS (as testified by the Athlete, Mr Kooreman, Mr Morris and Mr Donagrandi) and that the Athlete completed his 30 hours of community service (as testified by the Athlete and Mr Morris). Since the ISU argued that there was no conclusive evidence that the Athlete had actually been sanctioned by USS, the Panel understands that this was not taken into account by the ISU Disciplinary Commission in determining the suspension to be imposed on the Athlete. Although the sanction of USS does not prevent the ISU Disciplinary Commission from imposing a sanction on the Athlete, as it has a legal interest of its own, the Panel finds that the sanction imposed on the Athlete by USS shall be taken into account as a mitigating factor in determining an appropriate sanction, particularly because this at least prevented the Athlete from participating in the ISU World Cup event in Heerenveen in the week after the Inzell event and only became active again around 6 January 2016, *i.e.* about one month after the altercation. The Athlete therefore already served some sort of provisional suspension of one month.
99. The Panel further notes that in its submissions the ISU put a very strong emphasis on the disrepute to the skating sport that the Athlete allegedly caused through his behaviour. When confronted with the comparably mild sanction the ISU Disciplinary Commission sentenced in the *Knegt* case, the ISU claims these cases not to be comparable as they crucially differ regarding the risk of bodily injury (see *supra* para. 90). The Panel finds that this argumentation is not convincing and, above that, rather inconsistent. The disrepute to the skating sport that was brought about by Knegt's behaviour surely was of far greater scope than an altercation between two people on a parking lot in the middle of the night, as it took place right at the end of an official competition and was witnessed by numerous people and, most importantly, cameras.
100. On the basis of the evidence at its disposal, and contrary to the findings of the ISU Disciplinary Commission in the *Appealed Decision*, the Panel is not convinced that a criminal offense was committed by the Athlete. It seems like even Mr Donagrandi himself – injured party of the altercation – did not consider the Athlete's behaviour as a criminal offense that needed to result in official criminal proceedings but rather a bagatelle. During the course of the hearing it became obvious that Mr Donagrandi primarily filed a police report in the Netherlands in order for the ISU to have an official report on the incident as basis for further measures. Besides the fact that it would be for the relevant criminal authorities to decide whether a criminal offense was committed by the Athlete, the Panel finds that the witness statements in the matter at hand divert from each other in certain important aspects and that this shall be taken into account in determining the length of the suspension to be imposed on the Athlete.
101. Lastly, the Panel finds that the ISU Disciplinary Commission failed to sufficiently take into due consideration the altercation's direct aftermath and to appropriately assess the concerned parties' behaviour therein. While during the hearing Mr Donagrandi reasonably explained why he finally reported the incident to the Dutch police (see *supra*), the Panel notes that he never informed the Athlete about this step, although they both had hugged, shaken hands and declared the issue to be resolved after the Athlete had apologized for his behaviour.
102. Consequently, on the basis of all the above and realizing that imposing a sanction without any

clear regulatory guidance as to the range of sanctions available and without guiding precedents is necessarily somewhat arbitrary, the Panel agrees with the Athlete that the sanction imposed on him by the ISU Disciplinary Commission was indeed disproportionate and, in light of the mitigating circumstances set out above, finds that a suspension of six months from participation in any ISU activities is just and fair.

B. Conclusion

103. Based on the foregoing, and after having taken into due consideration both the regulations applicable and all the evidence produced and all arguments submitted, the Panel finds that:
- i. The ISU Disciplinary Commission was competent to adjudicate and decide on the matter in dispute.
 - ii. The Athlete violated article 4(b) second paragraph and (c) of the ISU Code of Ethics.
 - iii. The sanction imposed on the Athlete by the ISU Disciplinary Commission was disproportionate and shall be reduced to six months, beginning on 1 April 2016 and ending on 30 September 2016.
104. All other and further prayers or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Mitchell Whitmore on 18 April 2016 against the decision issued on 29 March 2016 by the Disciplinary Commission of the International Skating Union is partially upheld.
 2. A suspension of six months from participation in all ISU activities is imposed on Mr Mitchell Whitmore, beginning on 1 April 2016 and ending on 30 September 2016.
- (...)
5. All other and further motions or prayers for relief are dismissed.