



Arbitration CAS 2017/A/4927 Misha Aloyan v. International Olympic Committee (IOC), award of 16 June 2017

Panel: Prof. Luigi Fumagalli (Italy), President; Mrs Rabab Yasseen (Iraq); The Hon. Michael Beloff QC (United Kingdom)

Boxing

Doping (tuaminoheptane)

Interpretation of the statutes and rules of a sport association

Discretion with regard to automatic disqualification of results

Withdrawal of medals

1. Under Swiss law, the interpretation of the statutes and rules of a sport association has to be rather objective and should always start with the wording of the rule, which falls to be interpreted. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entire regulatory context in which the particular rule is located.
2. The wording of Article 9 of the IOC Anti-Doping Rules (ADR) leaves no room for any form of discretion to verify whether a finding of an anti-doping rule violation should not trigger the “*Automatic Disqualification of Individual Results*”: it refers to the “*automatic*” disqualification of results and does not mention any way to avoid such “*automatic*” consequence of an anti-doping rule violation. Automatic meaning “*following necessarily*”, what follows “*necessarily*” is not by definition subject to any discretionary evaluation or flexibility. This conclusion is supported by the entire regulatory context in which Article 9 of the IOC ADR operates. Indeed, the “*Automatic Disqualification of Individual Results*” appears to be nothing else than an objective consequence of an objective fact, *i.e.* of the finding of an anti-doping rule violation, and an effect of a retroactive assessment of a condition of ineligibility: no athlete using a prohibited substance (unless authorized on the basis of a valid TUE) can compete; if an athlete is later found having competed while a prohibited substance was in his/her body, his/her individual results are disqualified. The disqualification is not a sanction, but only the reinstatement of an objective condition, which explains why its application is “*automatic*”. On the other hand, the other consequences deriving from the finding of an anti-doping rule violation have the character of a sanction, and therefore engage consideration of the athlete’s fault, which falls to be assessed by the adjudicating body according to the rules.
3. It is not possible to allow an athlete to keep a silver medal (and all related honours) on

the basis of the argument that the medal was secured following his/her victory in the Semi-final, and therefore that the disqualification of his/her result at the Final would not entail the withdrawal of the medal already won. Medals are awarded only after a competition has been concluded so that disqualification from the Final carries with it as a necessary concomitant loss of any medal which would otherwise have been awarded as a result of victory in the Semi-final.

I. THE PARTIES

1. Misha Aloyan (the “Athlete” or the “Appellant”) is a flyweight (-52 kg) boxer of Russian nationality born on 23 August 1988. The Athlete has been of international level since 2010: in his career, he won the bronze medal at the 2012 Olympic Games in London, and became world champion in Baku, Azerbaijan, in 2011, and in Almaty, Kazakhstan, in 2013.
2. The International Olympic Committee (the “IOC” or the “Respondent”) is the supreme authority of the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the Olympic Charter (the “OC”).

II. BACKGROUND FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.
4. In April 2016, the IOC, in the exercise of its responsibilities under the OC, adopted the anti-doping rules (the “IOC ADR”), based on the World Anti-Doping Code (the “WADC”), applicable to the Games of the XXXI Summer Olympic Games, held in Rio de Janeiro, Brazil, in 2016 (the “Rio OG”), and, pursuant to Article 59.2.4 of the OC, delegated to an Anti-Doping Division of the Court of Arbitration for Sport (the “CAS ADD”) its power to decide upon any violation of the IOC ADR arising upon the occasion of the Rio OG (Article 8.2.2 IOC ADR).
5. The Athlete was entered into the Rio OG as a representative of the Russian National Olympic Committee (“ROC”).
6. From 15 August to 21 August 2016 at the Rio OG, the Athlete took part in the Men’s -52 kg boxing event (1/8, 1/4, Semi-Final and Final), in which he finished 2nd and was awarded the silver medal.

7. On 21 August 2016, on the occasion of the Final, the Athlete underwent an in-competition doping control.
8. On 7 September 2016, the IOC notified the Athlete through the ROC that the results of the analysis of his A sample had revealed the presence of Tuaminoheptane (the “Substance”), a specified stimulant, prohibited in-competition under S6 of the list of prohibited substances and methods published by the World Anti-Doping Agency (“WADA”) for 2016 (the “Prohibited List”).
9. The Athlete waived his right to request the opening and analysis of the B sample.
10. On 12 September 2016, the IOC filed an application with the CAS ADD asserting that the Athlete had committed an anti-doping rule violation and seeking the disqualification of his results at the Rio OG. More specifically, the IOC sought the following relief:
 - “1. *The Athlete is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC ADR and/or Article 2.2 of the IOC.*
 2. *The results obtained by the Athlete in the Men’s -52kg boxing event at the Olympic Games Rio 2016, in which he ranked 2nd and for which he was awarded a silver medal, are disqualified with all Consequences, including forfeiture of the medal, Olympic diploma and medallist pin.*
 3. *The Athlete is ordered to return the medal, the diploma and the medallist pin.*
 4. *The International Boxing Association is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*
 5. *The Russian Olympic Committee is requested to ensure full implementation of this decision ... and notably to secure the return to the IOC, as soon as possible, of the medal, the medallist pin and the diploma awarded in connection with the Men’s -52kg boxing event”.*
11. On 14 September 2014, a sole arbitrator within the CAS ADD (the “Sole Arbitrator”) was appointed to hear the case of the Athlete in accordance with Article 11 of the Arbitration Rules applicable to the CAS ADD (the “CAS ADD Rules”).
12. By order of 16 September 2016, the Sole Arbitrator, exercising his discretion according to Article 14 of the CAS ADD Rules and to Article 7.6.2 of the IOC ADR, decided not to impose a provisional suspension on the Athlete, considering that the Rio OG had concluded and that accordingly the issuance of any provisional suspension would not serve any useful purpose.
13. On 13 October 2016, after various deadline extensions agreed by the parties, the Athlete filed his written submission, requesting the Sole Arbitrator:

“not to disqualify the results achieved by the Athlete at the OG 2016”.
14. On 19 October 2016, the IOC requested that the procedure be bifurcated and that the Sole Arbitrator decide, on a preliminary basis, whether the relief sought by the Athlete (namely, whether an athlete is entitled to retain his medal despite admitting an anti-doping rule violation) could be granted under Article 9 of the IOC ADR. Additionally, the IOC sought leave to file a

written reply submission.

15. On 20 October 2016, the Sole Arbitrator denied the IOC's request to bifurcate the procedure before him, but granted the IOC's request to file a written reply submission.
16. On 1 November 2016, the IOC submitted its written reply submission.
17. On 3 November 2016, a hearing before the Sole Arbitrator was held at the CAS Court Office in Lausanne.
18. On 8 December 2016, the Sole Arbitrator issued the award CAS AD 16/011 (the "Challenged Award"), holding that:
 - “1. *The Athlete is found to have committed an anti-doping rule violation pursuant to Article 2.1 of the IOC ADR.*
 2. *The results obtained by the Athlete in the Men's -52kg boxing event at the Olympic Games Rio 2016, in which he finished 2nd and for which he was awarded a Silver medal, are disqualified with all consequences, including forfeiture of the medal, Olympic diploma and medallist pin.*
 3. *The Athlete is ordered to return the medal, the diploma and the medallist pin.*
 4. *The International Boxing Association is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*
 5. *The Russian Olympic Committee is requested to ensure full implementation of this decision and secure the return to the IOC, as soon as possible, of the medal, the medallist pin and the diploma awarded in connection with the Men's -52kg boxing event”.*
19. In support of his decision, first the Sole Arbitrator noted that the Athlete had admitted having committed an anti-doping rule violation: he had not asked the opening of his B sample and had not disputed the results of the analysis of his A sample. Therefore, the Sole Arbitrator found that the Athlete had committed a violation under Article 2.1 of the IOC ADR [*“Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample”*].
20. Next, dealing with the consequence of such finding under Article 9 of the IOC ADR [*“Automatic Disqualification of Individual Results”*], the Sole Arbitrator stated the following:
 - “23. *The Athlete argues that Art. 9 IOC ADR, which provides for the automatic disqualification of his results at Rio 2016, shall not apply, because he had No Fault or Negligence and the amount of substance found in his body did not have a performance enhancing effect. He used the medication Rhinofluimucil out-of- competition for medical reasons and relied on the advice of his team doctor with regard to the elimination period of the prohibited substance Tuaminoheptane, contained in this medication from his body. His team doctor was not aware of the latest stage of respective science and, thus, inaccurately advised him.*
 24. *The Sole Arbitrator, based on the evidence presented to him by the parties, gives the Athlete the credit of having demonstrated to the Sole Arbitrator's comfortable satisfaction that Rhinofluimucil was the origin of the prohibited substance, and that the Athlete used the substance out-of-competition in the misled conviction that it would have been eliminated from his body by the start of the in-competition-period. He*

used Tyzine during the in-competition-period and indicated as such on his Doping Control Form.

25. *The Sole Arbitrator understands that the expertise of Dr. de Boer on the one hand and of Professor Saugy on the other hand contradict each other as to whether a repeated dosage of Tuaminoheptane could prolong the detection window beyond 24 hours after stoppage of the intake. Dr. de Boer bases his conclusion widely on assumptions and extrapolations based on two studies. Professor Saugy, by stating “Based on literature and notably the study of Theris et al to which the expert refers, the approximate concentration found of 200 ng/ml is not consistent with the result expected from a repeated intake of 4 mg stopped 7 days before the test”. limits his finding to an analysis of the studies used by Dr. de Boer and draws conclusions opposite to the ones of Dr. de Boer. Professor Saugy, however, does not provide the Sole Arbitrator with a clear statement that the Athlete took Rhinofluimucil in-competition. Professor Saugy even neither confirms that Rhinofluimucil might have been the origin of the Prohibited Substance, nor does he exclude such possibility. Thus, on a balance of probability, the Sole Arbitrator accepts the explanation given by the Athlete.*
26. *The Sole Arbitrator does not consider necessary, however, to find whether the Athlete’s explanation leads to No Fault or Negligence or to No Significant Fault or Negligence or whether the dosage of Rhinofluimucil taken could have a performance enhancing effect. Considering the limited relevance of the jurisprudence of national bodies and internal tribunals of International Federations, the Sole Arbitrator points to the established jurisprudence of CAS in CAS 2007/O/1381 that the Athlete can neither invoke the absence of a performance enhancing effect of the prohibited substance, nor the absence of fault or negligence as to the automatic disqualification of results. The respective Panel in CAS 2007/O/1381, at paras 21 – 23 CAS found as follows:*
21. *La sanction du résultat sportif, notamment la disqualification, est motivée en premier lieu par la nécessité d’assurer l’égalité de chances entre compétiteurs. Ce type de mesure n’existe pas seulement pour réprimer les infractions aux règles antidopage, mais d’une manière plus générale pour sanctionner la violation de toute règle qui vise à éviter qu’un athlète obtienne un avantage indu sur ses concurrents.*
22. *Dans le cadre des règles antidopage, son cas d’application le plus fréquent est celui où le fait de dopage est établi par l’existence d’un contrôle positif en compétition.*
23. *La disqualification est alors dite “automatique”, en ce sens que le sportif ne peut ni invoquer l’absence d’effet du produit interdit sur sa performance ni se disculper en apportant la preuve de son absence d’intention et de négligence.*
27. *Art. 9 IOC ADR reflects Art. 9 of the World-Anti-Doping Code (2015 edition) (“WADC”), whose wording is substantially the same as was Art. 9 of the 2013 WADC. Thus, the decision in CAS 2007/O/1381 is also valid under the 2015 WADC and the IOC ADR. The wording of Art. 9 IOC ADR is strict. It is not open for arguments based on “No Fault or Negligence” or “No Significant Fault or Negligence”. Besides, the question, whether the prohibited substance taken could enhance sport performance, has no relevance for this provision. Since the Athlete sees the “specific facts” of the decision of the IOC Disciplinary Commission in the Backstrom case linked to No Fault or Negligence on the Athlete’s side and to the issue of no performance enhancing effect, the Sole Arbitrator does not see a necessity to discuss this case given the finding in CAS 2007/O/1381. For the same reasons, the Sole Arbitrator finds that no discussion of the WADA Notice on Meldonium dated 30 June 2016 is necessary”.*

21. In such framework, the Sole Arbitrator also considered the consequence set by Article 9 of the

IOC ADR in the light of the “*Principle of Proportionality*”, holding that:

- “28. *The Athlete refers to CAS 2006/A/1025, which at para. 90 found that any sanction must be just and proportionate. Indeed, the IOC ADR are subject to Swiss law. This award, once final, is subject to review by the Swiss Federal Tribunal. The Sole Arbitrator, thus, is bound to observe the Swiss public policy, which includes the European Convention on Human Rights (the “ECHR”). ...*
30. *Established CAS jurisprudence is aware of this obligation and holds that the principle of proportionality requires an assessment of whether a sanction is appropriate to the violation committed in the case at stake. Excessive sanctions are prohibited (see e.g. CAS 2005/A/830, at paras. 10.21 – 10.31; 2005/C/976 & 986, at paras. 139, 140, 143, 145 – 158; 2006/A/1025, at paras 75 – 103; TAS 2007/A/1252, at paras. 33 – 40, CAS 2010/A/2268 at paras. 141 f, all of them referring to and analysing previous awards and doctrine).*
31. *The Sole Arbitrator considers as essential and continuously applicable also under the 2015 WADC, which, by the way, e.g. in Article 10.10 explicitly refers to the principle of proportionality, as stated in CAS 2005/C/976 & 986, at para. 143:*
- To find out, whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender.*
32. *In the present case, the Sole Arbitrator asked the parties at the hearing for arguments as to the disproportionality or proportionality of the sanction of disqualification of results in the specific circumstances of the case. Whereas the IOC was not ready to enter such debate at all, the Athlete provided arguments, which, however, related exclusively to No Fault or Negligence and to the non-existence of a performance enhancing effect of the substance in the given circumstances of the case.*
33. *The Sole Arbitrator refers to CAS 2006/A/1025, at para. 96, where the panel underlined the exceptional circumstances of the case before it, by stating as follows:*
- There may be other circumstances in which a tribunal would be tempted to find a gap or lacuna in the WADC, but the Panel has found it difficult to imagine that such case will frequently arise. Indeed, the Panel repeats its view that in all but the very rarest of cases the sanction stipulated by the WADC is just and proportionate. There are unlikely to be many cases in which, as in the present case, the combination of circumstances of the two offences convinces the Panel that the WADC does not produce a just and proportionate result.*
34. *The Sole Arbitrator sees the unfortunate conditions of the Athlete suffering from a chronic disease, which effectively can be combatted only by a medication containing a prohibited substance forbidden in-competition. The Athlete relied on the advice of his team doctor as to the excretion period and his team doctor erred in his advice not having followed the latest development of respective science.*
35. *The Sole Arbitrator points, however, at the basic obligation of the Athlete under Article 2.1.1 IOC ADR, which states:*
- It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body.*
36. *This obligation includes the responsibility of the Athlete for the people surrounding him and giving him advice and whether to follow such advice. Even if he as a member of the Russian Boxing Team certainly could not choose the team doctor, he, nevertheless, had the choice to follow the team doctor’s advice or not.*

The Athlete must have been aware of the risk of using a substance prohibited in- competition, out-of-competition, but at a moment immediately close to the start of the in-competition-period. He should have calculated a reserve period for being absolutely safe. This, the Athlete did not.

37. *The Sole Arbitrator, thus, does not find that the circumstances of the present case can be considered as one of the “rarest cases” in the understanding of CAS 2006/A/1025, allowing him not to apply Article 9 IOC ADR”.*

III. THE PROCEEDINGS BEFORE THE CAS

22. On 29 December 2016, pursuant to Article R47 of the Code of Sports-related Arbitration (the “Code”) and in accordance with Articles 12 of the IOC ADR and 21 of the CAS ADD Rules, the Player filed a statement of appeal with the CAS against the Challenged Award.
23. The statement of appeal contained, *inter alia*, the appointment of Ms Rabab Yasseen as an arbitrator. In addition, the Appellant indicated that the statement of appeal was to be considered as his appeal brief under Article R51 of the Code.
24. On 11 January 2017, by letter the Respondent appointed The Hon. Michael J. Beloff M.A. Q.C. as an arbitrator.
25. On 6 February 2017, pursuant to Article R54 of the Code, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that the Panel appointed to hear the dispute between the parties was constituted as follows: Professor Luigi Fumagalli, President; Ms Rabab Yasseen and The Hon. Michael J. Beloff M.A. Q.C., Arbitrators.
26. On 6 February 2017, the Respondent lodged its answer to the appeal, pursuant to Article R55 of the Code.
27. On 7 February 2017, the Respondent indicated its preference for the Panel to render an award based only on the parties’ written submissions.
28. On 22 February 2017, the Appellant indicated his preference for an oral hearing to be held in this case.
29. On 24 February 2017, the parties were advised by the CAS Court Office that the Panel had decided to hold a hearing.
30. On 18 April 2017, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the “Order of Procedure”), which was accepted and signed by the parties.
31. On 4 May 2017, the Respondent lodged with the CAS Court Office copy of an award rendered on 6 April 2017 by a sole arbitrator of the CAS ADD (CAS AD 16/009 & 16/013).
32. On 5 May 2017, the Appellant filed with the CAS Court Office copy of a consent award adopted on 9 February 2017 (in CAS 2016/A/4842) in a dispute involving the International Cycling

Federation (Union Cycliste Internationale – “UCI”).

33. On 9 May 2017, a hearing was held in Lausanne. The Panel was assisted by Mr Daniele Boccucci, Counsel to CAS. The following persons attended the hearing for the parties:
- i. for the Appellant: Mr Artem Patsev, counsel, and Ms Daria Malova, interpreter; as well as the Appellant himself (by video link)
 - ii. for the Respondent: Ms Viola Maerz, IOC Legal Department, assisted by Mr Jean-Pierre Morand and Mr Nicolas Zbinden, counsel.
34. At the opening of the hearing, both parties confirmed that they had no objection to the appointment of the Panel and to their reciprocal filings of 4 and 5 May 2017. The Panel, then, indicated to the parties that, on the basis of a review of the parties’ submissions and requests for relief, two main questions appeared to deserve primary consideration: the first is whether Article 9 of the IOC ADR leaves any room for discretion, *i.e.* whether there are situations in which a finding of an anti-doping rule violation does not trigger the “*Automatic Disqualification of Individual Results*” under Article 9 of the IOC ADR (the “First Issue”); the second, to be addressed only in the event the answer to the first question is positive, is whether the Athlete’s situation is such as to avoid the triggering of the mentioned “*Automatic Disqualification of Individual Results*” (the “Second Issue”). As a result, the Panel invited the parties initially to make submissions in respect of the First Issue only.
35. In that context:
- i. the Appellant confirmed that the sole issue to be decided in this arbitration concerns the disqualification of the Athlete’s results at the Rio OG, since the commission of an anti-doping rule violation is admitted. In that regard, the Appellant referred to proportionality as a general principle to be applied in all situations in which a sanction is imposed, even when there is no reference to it in the rule providing for the sanction. Since Article 9 of the IOC ADR imposes a sanction, its application is subject to a proportionality test. This conclusion is confirmed, in the Appellant’s opinion, by the situations in which no automatic disqualification of results was applied, even though the athlete in question competed with a prohibited substance in his body;
 - ii. the Respondent disputed the characterization of the consequence imposed by Article 9 of the IOC ADR as a sanction, and submitted that this rule provides for a condition of eligibility to compete retroactively assessed, intended to avoid any discussion on a case-by-case basis of the advantages induced by a prohibited substance, present in the athlete’s body at the time of the competition. In addition, the Respondent underlined that it is not for any adjudicating body to create new rules: a discretion has to be exercised, pursuant to the principle of proportionality, only in the cases in which the rules so allow;
 - iii. the Athlete insisted that his case be considered on the basis of its particularities.
36. After hearing submissions on the First Issue, the Panel informed the parties that it did not wish to hear submissions on the Second Issue until such time as it had determined the First Issue. If, having resolved the First Issue in favour of the Appellant, it became necessary to consider

the Second Issue, the Panel informed the parties that it would be consulted on the best way to ensure a fair hearing on it.

37. At the conclusion of the hearing, the parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

IV. THE POSITION OF THE PARTIES

38. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellant

39. The statement of appeal contained the following requests for relief:

"The Appellant respectfully requests the CAS Panel to rule that:

- *the appeal of Mr Misha Aloyan is admissible;*
- *the appeal of Mr Misha Aloyan is upheld;*
- *the CAS Anti-Doping Division decision of 08 December 2016 with respect to the case of Mr Misha Aloyan is amended: the Appellant's result obtained at the 2016 Rio Olympic Games in Rio de Janeiro, Brazil, on 21 August 2016 (Silver medal in Men's -52kg boxing event) shall not be disqualified, and therefore shall be reinstated in full, including Mr Misha Aloyan's Silver medal, Olympic diploma and the medallist pin;*
- *Mr Misha Aloyan is granted an award for his legal costs and other expenses pertaining to these appeal proceedings before CAS;*
- *IOC bears the costs of the arbitration".*

40. The Appellant notes by way of introduction that it is "*undisputed that the anti-doping rule violation has occurred*", and that he had "*duly demonstrated how the prohibited substance ... entered into his system, not enhancing his sporting performance at all*". As a result, in his opinion, the only issue to be determined in this appeal is whether "*the automatic disqualification of the result obtained by the Appellant [is] proportionate or disproportionate in the unique circumstances of the specific case*", and not about whether the Appellant has committed an anti-doping rule violation or about the other circumstances of the case identified by the Sole Arbitrator, "*like the origin of the prohibited substance, its way into the Appellant's system, the Appellant's own possible and reasonable efforts to avoid an anti-doping rule violation, the lack of substance's influence on the Appellant's sporting performance, etc*".
41. The Appellant, then, considers the text of Article 9 of the IOC ADR and observes that "*one might jump to the conclusion*" that its wording does not leave any room for discussion whether the results of the athlete in question have to be disqualified or not. However, the Appellant submits that such interpretation cannot be followed and that in exceptional circumstances the hearing body is entitled not to apply Article 9 of the IOC ADR and its consequences.

42. In support of his position, the Appellant refers to the purpose of Article 9 of the IOC ADR (and of Article 9 of the WADC which it reproduces). In the Appellant's opinion, such rule sets a sanction based upon the presumption that an athlete had an unfair advantage compared to other competing athletes simply by reason of the fact that he had a prohibited substance in his body, which might have enhanced his sporting performance. However, the Appellant submits any athlete should have the opportunity to rebut this presumption, by providing corroborating evidence that the prohibited substance in his body at the moment of the competition did not enhance his performance, and that the disqualification of the results obtained would be unfair and disproportionate to the violation in the specific circumstances.
43. As a result, in the Appellant's opinion, the crucial point is whether the automatic disqualification of the result obtained at the Rio OG is proportionate in the unique circumstances of the case. The Appellant submits that the disqualification of his result (second place and the silver medal) is evidently and grossly disproportionate to his actual offence.
44. In support of this conclusion, the Appellant describes the principle of proportionality, to be applied under the WADC, international conventions, Swiss law and CAS jurisprudence. This principle suggests that there must be a reasonable balance between the nature of the misconduct and the sanction, reflecting the extent of the athlete's guilt, and requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal. As a result, *"any sanction (including the automatic disqualification of the individual result) could be reduced if it were impeachable under Swiss law, or in the exercise of the Panel's powers if, in the Panel's opinion, the sentence imposed was disproportionate to the offence"*.
45. At the same time, and in further confirmation of his conclusion, the Appellant refers to the position, that the automatic disqualification of results rule may be not applied in *"unique circumstances"*, taken:
 - i. by the IOC in the case of Mr Nicklas Backstrom. Mr Backstrom tested positive in-competition during the Olympic Winter Games 2014 in Sochi for "pseudoephedrine". The IOC Disciplinary Commission (the "IOC DC"), in a decision of 13 March 2014, after careful examination of the specific facts related to the athlete, decided not to impose any sanction on him (allowing Mr Backstrom to keep his individual medal), although it was found that he had committed an anti-doping rule violation, and decided the *"the Athlete should not be disqualified from, or rendered ineligible in respect of, the Sochi Olympic Winter Games"*;
 - ii. by WADA in the *"meldonium case"*. In its Notice of 30 June 2016, WADA indicated that, *"given the results of the studies, it cannot be excluded that, at very low dosages, as indicated in the above table, the use of meldonium could have occurred before the Prohibited List was published by WADA on 29 September 2015. In these unique circumstances, WADA would consider it acceptable that the athlete's results not be disqualified or be reinstated in the absence of any evidence that meldonium was used after 29 September 2015"*;
 - iii. by the UCI, which in the consent award entered into in CAS 2016/A/4842 accepted not

to disqualify the athlete's results at the competition in which he tested positive.

46. In addition, the Appellant notes that an athlete's results are not to be disqualified (even if a prohibited substance is detected in his/her sample) if such athlete has a valid Therapeutic Use Exemption ("TUE").
47. Within the confines of such framework, the Appellant refers to the following elements regarding the disproportionality of the disqualification of the result in his specific case, which would allow a *"justified an reasonable departure"* from the rule of automatic disqualification, namely:
 - i. an Olympic medal is a *"pinnacle of success"* for any athlete around the world, to which only a few best athletes may make their way of years of hard training and competing;
 - ii. the Appellant demonstrated that he had been under strict control of the anti-doping organizations for years, providing his whereabouts for anti-doping purposes and providing samples which always proved negative for any prohibited substances while simultaneously training hard to achieve the best results;
 - iii. the Appellant had already guaranteed himself the silver medal, as he had won his Semi-Final bout (after which he had not been tested). Therefore, the prohibited substance found in the test taken after the final could not have affected its result;
 - iv. both boxers who lost their Semi-Final bouts received their bronze medals, and would never get a silver medal: the second place at the Rio OG in the flyweight boxing event would be forever considered as "vacant" in the event of disqualification of the Athlete's result;
 - v. stripping the Athlete of an Olympic medal because of traces of a harmless substance may not be considered proportionate (taking into account that it has only local – nasal – effects, and that there are no examples of use of the Substance by athletes to enhance their sport performance, or of Tuaminoheptane's presence in any prohibited nutritional supplements);
 - vi. stripping the Athlete of an Olympic medal in these circumstances would reflect hard on the Appellant's image as one of the best and most honest boxers in the world, because the people and the media would never be able to study thoroughly his particular circumstances, but instead would declare him a "cheater" or a "doper". Being so labelled would be devastating for an athlete, especially of Orient origin (the Appellant is a proud member of the Yazidis ethnical minority which came to Russian Empire (now in the territory of Armenia and Georgia) during the 19th and early 20th centuries to escape religious persecution by the Ottoman Turks).
48. In the light of the particularities of the present case and of the principle of proportionality, the Appellant therefore considers that the automatic disqualification of his individual result obtained at the Rio OG imposed by the CAS ADD is disproportionate and thus unfair. As a result, he suggests that the very specific facts of this case should lead to the opposite conclusion: namely, that the Appellant's result achieved at the Rio OG on 21 August 2016 (silver medal in Men's -52kg boxing event) should not be disqualified, and his silver medal should be reinstated.

B. The Position of the Respondent

49. In its answer to the appeal, the IOC requested the Panel to issue an award holding that:

I. *The Appeal filed by Mr. Misha Aloyan is dismissed;*

II. *The IOC is granted an award for costs”.*

50. In its submissions, in essence, the IOC requests that the disqualification of the Athlete’s results at the Rio OG, with all ensuing consequences, be confirmed. At the same time, however, the IOC criticizes part of the reasoning offered by the Sole Arbitrator in the Challenged Award: the IOC, having prevailed in its request for relief, lacked standing to directly file an appeal against such reasoning, but welcomes the opportunity offered by the Athlete’s appeal to correct the findings of fact made by the Sole Arbitrator. Such facts can be reviewed by the Panel in the exercise of its power pursuant to Article R57 of the Code.

51. More specifically, the IOC submits, contrary to the finding of the Sole Arbitrator, that the Athlete’s explanations do not establish the source of the Substance, *i.e.* that the reason of its presence in the Athlete’s sample would be the therapeutic use of *Rhinofluimucil*, ceased 7 days before the test. As a result, the Athlete, who carries the burden of proof in this respect, failed to establish the necessary basis for invoking a plea of the absence of any (or significant) fault or negligence. Therefore, his submissions that the disqualification of the results obtained at the Rio OG would be disproportionate for such reason is bound to fall *in limine*.

52. In this respect, the IOC criticizes the Challenged Award to the extent it found otherwise on the basis of an opinion provided by the Appellant’s expert asserting that the conclusions reached by the Appellant’s expert are patently wrong and are not supported by the scientific study on which he is relying.

53. At the same time, the IOC contends that the appeal is bound to fail in any case, even if the Athlete could establish absence of fault or negligence. In fact, the disqualification under Article 9 of the IOC ADR only depends on the establishment of an objective anti-doping rule violation, without allowing any scope for its disapplication on the basis of exceptional circumstances.

54. Such conclusion is confirmed by a plain reading of Article 9 of the IOC ADR, which does not provide for any flexibility at all, and is consistent with the nature of the rule, which does not impose a sanction *stricto sensu*, but rather establishes a “*condition of eligibility retroactively assessed*”. Sanctions are in fact rather provided for by the IOC ADR at Article 10, and in their respect a measure of flexibility (implementing the principle of proportionality) is allowed. Since Article 9 contains a condition of eligibility, there is no scope for the application of proportionality: sporting bodies are entitled to regulate the conditions under which athletes may validly participate in their events; and a reasonable requirement is that participants have no prohibited substance in their body. In addition, the automatic nature of disqualification is justified by the interest to reach a rapid decision of sporting results.

55. The Respondent underlines that automatic disqualification has been consistently applied in all CAS precedents, even when the Panel found that the athlete concerned did not bear any fault

or negligence and did not benefit from a performance-enhancing effect. At the same time, the Respondent submits that the precedents invoked by the Appellant do not support his case, because:

- i. The *Backstrom* case does not meet the present case, because it concerned disqualification of results not in an individual sport, but in a team sport, and because there were no rules providing for disqualification of results in such a case;
 - ii. the WADA Notice on Meldonium referred to by the Athlete confirms *a fortiori* that the intake of a listed prohibited substance must lead to disqualification of results, irrespective of any fault;
 - iii. the consent award in CAS 2016/A/4842 is irrelevant, since it merely amounts to an application of the WADA Notice on Meldonium;
 - iv. the case of an athlete competing on the basis of a valid TUE is completely different, and is subject to strict requirements, which include the verification of the absence of any advantage granted to the athlete. The very existence of a TUE means that no anti-doping rule violation is committed by the athlete who has one and Article 9 of the IOC ADR is accordingly irrelevant.
56. In summary, according to the Respondent, there is neither room nor discretion not to apply the automatic disqualification on the basis of exceptional circumstances. So to hold this would be inconsistent with the essential character of an anti-doping rule violation, which occurs, according to its definition, without fault or negligence. No matter the circumstances of the case, the athlete's absence of any fault or of any significant fault, the nature of the substance, or the fact that an Olympic medal is at stake, the results obtained by an athlete following the finding of an in-competition anti-doping rule violation must be disqualified under Article 9 of the IOC ADR.

V. JURISDICTION

57. CAS has jurisdiction to decide the present dispute.
58. In fact, the jurisdiction of CAS is accepted by the Respondent, is confirmed by the Order of Procedure, signed by the parties without any reservation, and is contemplated by Article 12.2 of the IOC ADR.

VI. ADMISSIBILITY

59. The statement of appeal was filed within the deadline set in Article 12.5 of the IOC ADR and complied with the requirements of Articles R48 and R64.1 of the Code, including the payment of the CAS Court Office fee. The admissibility of the appeal is not challenged by the Respondent. Accordingly, the appeal is admissible.

VII. SCOPE OF THE PANEL'S REVIEW

60. According to Article R57 of the Code,

“the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...”

VIII. APPLICABLE LAW

61. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

62. 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”

63. In the present case the “*applicable regulations*” for the purposes of Article R58 of the Code are, indisputably, those contained in the IOC ADR because the appeal is directed against decisions issued by the Sole Arbitrator, which was passed applying the IOC ADR.

64. In fact, Article 17 of the CAS ADD Rules provides as follows:

“The Panel shall rule on the dispute pursuant to the IOC ADR, the applicable regulations, Swiss Law and general principles of law”

65. As a result, the IOC ADR shall apply primarily. Swiss law and general principles of law apply subsidiarily.

66. The provision of the IOC ADR which is key to this case is Article 9 [“*Automatic Disqualification of Individual Results*”]. It reads as follows:

“An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in the Competition in question (and any other subsequent Competitions in the same Event for which the Athlete only qualified as a result of his participation in the Competition in question) with all resulting Consequences, including forfeiture of any medals, points and prizes”

IX. THE MERITS

67. This dispute concerns the Challenged Award, rendered by the Sole Arbitrator, which found the Athlete responsible for an anti-doping rule violation and disqualified the results he had obtained at the Rio OG, with all ensuing consequences. The Athlete disputes this conclusion, and requests that the Panel set aside the Challenged Award and declare that the results he obtained at the Rio OG shall not be disqualified.

68. In support of his contention, in essence, the Appellant submits that his case, in light of its peculiarities, can be considered as one of the “*rarest cases*” which, as recognized by the Sole Arbitrator, would allow a departure from the rule of automatic disqualification contemplated by Article 9 of the IOC ADR. The Respondent submits that Article 9 of the IOC ADR does not leave any room for discretion and that the Appellant’s case is not unique, since, *inter alia*, his explanations of the adverse analytical finding are not credible.
69. The Panel notes, on the basis of the parties’ contentions, that it is undisputed that the A sample collected from the Athlete on 21 August 2016 returned an adverse analytical finding for the presence of the Substance. Therefore, since the Athlete did not request the analysis of the B sample, the anti-doping rule violation contemplated by Article 2.1 of the IOC ADR is established. The disputed issue of this appeal is whether the effect provided for by Article 9 of the IOC ADR [“*Automatic Disqualification of Individual Results*”] is triggered as a result of such anti-doping rule violation.
70. As a result, the Panel would have in principle to answer two questions, already mentioned at the hearing (§ 36 above): the First Issue is whether Article 9 of the IOC ADR leaves any room for discretion, *i.e.* whether there are situations in which a finding of an anti-doping rule violation does not trigger the “*Automatic Disqualification of Individual Results*” under Article 9 of the IOC ADR; the Second Issue, to be addressed only in the event the answer to the First Issue is positive, is whether the Athlete’s situation is such as to avoid the triggering of the mentioned “*Automatic Disqualification of Individual Results*”.
71. The Panel, however, finds that Article 9 of the IOC ADR leaves no room for any form of discretion to verify whether a finding of an anti-doping rule violation should not trigger the “*Automatic Disqualification of Individual Results*”. As a result, there is no need to consider the Second Issue, and more specifically whether the Athlete’s situation is such as to avoid the triggering of the mentioned “*Automatic Disqualification of Individual Results*”.
72. The Panel is compelled to this conclusion by a number of reasons.
73. First of all, the Panel notes the wording of Article 9 of the IOC ADR: it refers to the “*automatic*” disqualification of results and does not mention any way to avoid such “*automatic*” consequence of an anti-doping rule violation. As indicated by a Panel in CAS OG 00/011 with respect to a rule of comparable content, the text is “*clear and unambiguous*” and “*automatic means «following necessarily» (Oxford Advanced Learner’s Dictionary, 1995)*”. What follows “*necessarily*” is not by definition subject to any discretionary evaluation or flexibility. As a result, this Panel’s conclusion is supported by a literal interpretation of Article 9 of the IOC ADR.
74. In that respect, the Panel remarks that under Swiss law (which applies to the IOC ADR) the interpretation of the statutes and rules of a sport association has to be rather objective and should always start with the wording of the rule, which falls to be interpreted. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which

illuminates its derivation, as well as the entire regulatory context in which the particular rule is located (CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811; see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of the Swiss Federal Tribunal of 3 May 2005, 7B.10/2005, consid. 2.3; decision of the Swiss Federal Tribunal of 25 February 2003, consid. 3.2).

75. The Panel underlines further that the conclusion it reaches is supported by the entire regulatory context in which Article 9 of the IOC ADR operates. The Panel in fact notes that the IOC ADR (and the WADC) distinguishes (i) the “*Automatic Disqualification of Individual Results*” obtained at the competition at which an athlete tested positive from (ii) the other consequences deriving from such finding: they are mentioned in different provisions (the first at Article 9, the others at Article 10); they are subject to different regimes; they appear to have a different nature. Indeed, the “*Automatic Disqualification of Individual Results*” appears to be nothing else than an objective consequence of an objective fact, *i.e.* of the finding of an anti-doping rule violation, and an effect of a retroactive assessment of a condition of ineligibility: no athlete using a prohibited substance (unless authorized on the basis of a valid TUE) can compete; if an athlete is later found having competed while a prohibited substance was in his/her body, his/her individual results are disqualified. The disqualification is not a sanction, but only the reinstatement of an objective condition, which explains why its application is “*automatic*”. On the other hand, the other consequences deriving from the finding of an anti-doping rule violation have the character of a sanction, and therefore engage consideration of the athlete’s fault, which falls to be assessed by the adjudicating body according to the rules.
76. The interpretation advanced by the Panel, in addition, is confirmed by a consistent CAS practice, starting from the early cases. The CAS jurisprudence shows that the disqualification of the individual results obtained in the competition in connection with which an anti-doping rule violation was found to follow as an unavoidable consequence of that finding, without any scope for the hearing body to avoid its imposition, even in those exceptional cases where no sanction was inflicted, because the athlete bore no fault or negligence. It was underlined that when an athlete wins a medal with a prohibited substance in his or her system, this is held to be unfair to the other athletes in that competition, regardless of whether the medalist was at fault in any way; only a “clean” athlete is allowed to benefit from his or her competitive results. For instance:
- i. in CAS OG 00/011 (§ 27), the CAS Panel considered the applicable rules providing for an automatic disqualification of results and supported them “*as a matter of fairness to all other athletes*”;
 - ii. another CAS Panel in CAS 2002/A/376 (§ 3.29) indicated that: “*disqualification is the minimum sanction that automatically follows a doping offence, in accordance with Article 3.3 of the OMAC [Olympic Movement Anti-doping Code]. ... the disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS Panels. It is reasonable for the IOC to have determined that it may not always be possible to prove or disprove fault or performance-enhancing effect, but that in order to ensure the integrity of results the mere presence of a prohibited substance requires disqualification*”;

- iii. in CAS 2001/A/317 (p. 17), the Panel underlined that *“it is ... perfectly proper for the rules of a sporting federation to establish that the results achieved by a ‘doped athlete’ at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete. This conclusion is the natural consequence of sporting fairness against the other competitors. The interests of the athlete concerned in not being punished without being guilty must give way to the fundamental principle of sport that all competitors must have equal chances”*.
77. The Appellant’s counsel conceded in fairness at the hearing that he could not identify any case hitherto in which a CAS Panel had departed from the rule of automatic disqualification, while the Respondent referred to a number of awards in which Article 9 of the IOC ADR (or of the WADC) was applied without hesitation and/or exceptions.
78. In addition, the Panel notes that the legality and nature of the rule of *“Automatic Disqualification of Individual Results”* was confirmed by the Swiss Federal Tribunal in at least two occasions:
- i. in the decision of 4 August 2006, 4P.105/2006, consid. 8.2, distinguishing the automatic disqualification from actual sanctions (*“Art. 9 WADA-Code sieht eine entsprechende Folge vor. Damit wird das sportliche Resultat wegen der Tatsache eines positiven Dopingbefunds korrigiert. Davon zu unterscheiden ist eine eigentliche Bestrafung des Sportlers, wie Sperrung oder Busse, mit der ein fehler- und schuldhaftes Verhalten sanktioniert wird”* – translation by the Panel: *“Art. 9 WADC provides for a corresponding consequence [of an adverse analytical finding]. On its basis the sporting results will be corrected because of the factual circumstance of a positive finding of doping. From it has to be distinguished an actual sanction of the athlete, such as an ineligibility or a fine, by which a faulty or reproachable behaviour is sanctioned”*);
 - ii. in the decision of 23 August 2007, ATF 134 III 193, consid. 4.6.3.2.2, in which the Federal Tribunal underlined that the purpose of the rule is to avoid endless discussions as to the potential enhancing effects of the prohibited substance detected.
79. In that regulatory context, therefore, no discretion is left to the disciplinary body (or the CAS Panel) to evaluate on a case-by-case basis, for instance, whether an actual competitive advantage was gained by the athlete as a result of the use, even though inadvertent, of a prohibited substance: as the rules now stand, the results achieved in the given competition shall always be disqualified.
80. As a result, there is no room for the application of the principle of proportionality or any other general principles. In that respect, the Panel notes that all CAS precedents in which discussions were conducted as to the relevance of the principle of proportionality and actually applied it to a sanction, made no mention of the proportionality when applying the automatic disqualification of results: see CAS 2006/A/1025, § 11.9.1.
81. In any case, this Panel fully endorses the finding made, also with regard to the question of the reach of the principle of proportionality, in the award rendered in CAS AD 16/009 & 16/013, at § 85:

“The Sole Arbitrator is of the opinion that within the framework of Art. 9 IOC DRC [sic], and as part of the anti-doping system and the need of the fight against doping in sports, the issue of proportionality has already been

taken into account. Indeed, within this system the possibility exists that an athlete who bears no fault or negligence, nor she or he had a known intention to enhance the sportive performance will be automatically disqualified for an established anti-doping rule violation in connection with an In-Competition test. However, it is not a question of culpability, but a consequence of circumstances in which an athlete did not meet the equal standards applicable to all the participants in the competition. The mere participation of the athlete in a competition while a prohibited substance was present in his or her body by itself establishes a situation of non-equality between him or her and the other participants in the competition, regardless of the question of culpability or intention”.

82. The Panel recalls in this context that the WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim. At the request of WADA, Jean-Paul Costa, former President of the European Court of Human Rights, wrote a Legal Opinion regarding the draft World Anti-Doping Code, which examines the issue of the compatibility of several provisions of the draft revision of the WADC 2015 with the accepted principles of international law and human rights (published in June 2013) and found them in harmony with those principles. Article 9 of the IOC ADR, even if considered in form, if not in law, a sanction is no exception to that overall compatibility.
83. In the same way, also the other examples adduced by the Athlete do not assist his case that a measure of discretion is given to the deciding body in the application of the automatic disqualification of results:
 - i. the *Backstrom* case arose under different rules, adopted (for the Winter Olympic Games in Sochi in 2014) on the basis of an edition of the WADC preceding the edition taken as a reference for the IOC ADR applied at the Rio OG: in addition, it concerned a team sport at a time there were no rules for return of individual medals;
 - ii. the WADA Notice on Meldonium dealt with a specific situation in which a doubt could exist as to the moment of intake of a substance, *i.e.* whether the substance, prohibited at the time of the doping control, had been ingested prior to its listing as a prohibited substance;
 - iii. the consent award in CAS 2016/A/4842 merely amounts to an application of the WADA Notice on Meldonium;
 - iv. the finding of a prohibited substance in the samples of an athlete competing with a valid TUE does not constitute an anti-doping rule violation: therefore, no automatic disqualification of results comes into play.
84. In addition, it is not possible, in the Panel’s opinion, to allow the Appellant to keep the silver medal (and all related honours) on the basis of the argument, advanced by the Appellant, that the medal was secured following his victory in the Semi-final, and therefore that the disqualification of his result at the Final would not entail the withdrawal of the medal already won. The Panel affirms in fact that medals are awarded only after a competition has been concluded so that disqualification from the Final carried with it as a necessary concomitant loss of any medal which would otherwise have been awarded as a result of victory in the Semi-final. The Panel would also observe that, in any event, if traces of the substance resulting from a

product taken prior to the competition were found in a test taken after the Final, they must inevitably have been present in the Appellants body in the Semi-final in at least the same, if not greater, quantities.

85. This conclusion makes it unnecessary for the Panel to consider the Second Issue: since there is no possibility to deviate from the automatic disqualification of the Athlete's results at the Rio OG, there is no need to verify whether peculiar circumstances mark as exceptional the Athlete's case. Much of the argument advanced by the Appellant purportedly on the First Issue (see § 47 above) in fact related to the Second Issue, *i.e.* why, if Article 9 of the IOC ADR was subject to any exception, such exception should be invoked in his case. Given that the Panel has concluded that there is no such exception, those arguments inevitably fell on stony ground in the context of a discussion regarding the ambit of Article 9 of the IOC ADR. As a result, all issues related, for instance, to the "route of ingestion" of the Substance, or to the existence of Fault or Negligence (as defined by the WADC) and its degree are deliberately left open: any finding made in this respect by the Sole Arbitrator in the Challenged Award is not binding in any subsequent proceeding that the relevant International Federation might start against the Athlete.
86. At the same time and conversely, the Panel underlines that the disqualification of the Athlete's results confirmed by this award does not mean *per se* that the Athlete has to be considered as a "cheater". The Athlete happened to have in his body (for whatever reason) a prohibited substance when he competed on 21 August 2016. As a result, his results have to be disqualified as an automatic consequence: the Panel is aware of the consequences, in terms of loss of honour, advanced by the Appellant. However, sympathetic with the Athlete this Panel might be, this provides no reason to deflect it from the strict and consistent application of the law.
87. Based on the foregoing, the Panel finds that the appeal brought by the Athlete against the Challenged Award has to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 29 December 2016 by Mr Misha Aloyan against the award rendered on 8 December 2016 by the Sole Arbitrator of the CAS Anti-Doping Division for the Rio 2016 Olympic Games is dismissed.
- (...)
4. All other motions or prayers for relief are dismissed.