Tribunal Arbitral du Sport Court of Arbitration for Sport

Arbitration CAS 2018/A/6069 André Cardoso v. Union Cycliste Internationale (UCI), award of 10 February 2021

Panel: Mrs Carine Dupeyron (France), President; The Hon. Michael Beloff QC (United Kingdom); Mr Sven Nagel (Germany)

Cycling
Doping (recombinant EPO)
Application of the CAS rules in case of a dispute before the CAS
Dinstinct means of establishing an ADRV
Confirmation by a B sample in "use" cases
Hierarchy of norms
Burden and standard of proof in "use" cases

1. **By agreeing to hold a UCI licence, a rider consents to the jurisdiction of the CAS, which necessitates the application of the CAS rules in case of dispute. Within the CAS Code, it is not possible for a person not on the mandatory list of arbitrators to be appointed as an arbitrator in a CAS panel or for CAS rules not to apply.**

2. **Both the World Anti-Doping Code (WADC) and the UCI Anti-Doping Rules (ADR) differentiate, deliberately, between "presence" cases and "use" cases in their provisions. While not infrequently responsible bodies may bring charges of an anti-doping rule violation (ADRV) under both provisions, it does not follow that a charge cannot be made good under one, but not the other.**

3. **There is no indication in the language of Article 2.2 of the UCI ADR that confirmation of the presence of a prohibited substance in the A sample by analysis of the B sample is essential in a charge of "use". In addition, the comment to Article 2.2 (i) indicates that such a charge may be established by 'any reliable means' and (ii) expressly states that *"Use may be established based upon the reliable analytical data from the analysis of an A Sample" (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample".* The provision in which the parenthesis appears is clear both in its intent and in its effect. Where the analysis of the A sample provides reliable analytical data to establish the use, there is no need for confirmation by a B sample assuming that the lack of confirmation is sufficiently explained by the Anti Doping Organization.**

4. **When creating new rules and regulations, the relevant organs are bound by the limits imposed on them by higher ranking norms, in particular the association's statutes. This follows from the principle of legality. According to this principle, regulations of a lower level may complement and concretize higher ranking provisions, but not amend nor**

contradict or change them. The WADC is a regulation of a higher ranking than the International Standard for Laboratories; accordingly it is not possible to allow any provision of the latter to trump a provision of the former.

5. Where only a "use" case can be advanced, the anti-doping authority has to prove both that: (a) the A sample positive result is reliable; and (b) there is a satisfactory explanation for the lack of confirmation in the B sample and (c) on both issues to the standard of *"comfortable satisfaction"*.

I. THE PARTIES

1. André Cardoso (the "Appellant" or "Mr. Cardoso" or the "Rider"), was born on 3 September 1984 in Porto, Portugal. Since 2006, he has been a professional road racing cyclist and has participated to various major cycling events. In 2017, at the time of the doping control, he was riding for the UCI WorldTeam Trek-Segafredo l, and was affiliated to the *Federaciò Andorrana de Ciclisme*. The Appellant appeals the decision (the "Appealed Decision") of the UCI Anti-Doping Tribunal in the case ADT 01.2018 dated 15 November 2018, according to which he was found guilty of having committed an anti-doping rule violation ("ADRV") and sanctioned in the amount of EUR 56'000.

2. The Union Cycliste Internationale (the "Respondent" or "UCI") is the international federation for cycling. The UCI is the world governing body for the sport of cycling recognized by the International Olympic Committee (the "IOC"). The UCI is headquartered in Aigle, Switzerland.

II. SUMMARY OF THE MAIN RELEVANT FACTS

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Mr. Cardoso

4. The Appellant became a professional rider in 2006 with the Paredes Rota dos Móveis cycling team. He competed with both this team and the Caja Rural team for a number of years before joining the Garmin Sharp (later Cannondale) cycling team in 2014 and riding with them until 2016 until he was recruited by the Trek-Segafredo team.

B. The Doping Control and the Laboratory findings

5. On 30 May 2017, on the basis of a targeted testing strategy, the Cycling Anti-Doping Foundation ("CADF") mandated an officer to test the Appellant out-of-competition.

6. On 18 June 2017, the doping control took place and the Appellant was asked to produce urine and blood samples.

7. On 27 June 2017, the laboratory rendered its report and the analysis of the A-sample n°4121328 indicating the *"presence of rhEPO"* (A-sample). Thereafter, the UCI notified the Appellant about the Adverse Analytical Finding (the "AAF") on his A-sample and informed him that he had *"the right to request the opening and analysis of the B-Sample which was collected at the same time as* [his] *A-Sample"*. The UCI also indicated that the presence of recombinant human erythropoietin ("rhEPO") required imposing a provision suspension on him, effective from the date of the notification. On the very same day, the Appellant requested the opening and the analysis of his B-sample and the Documentation Package relating to the analysis of his sample.

8. The Respondent offered a date for such opening to take place, i.e. on 3 or 4 July 2017, and rejected the Appellant's request that his blood sample be analyzed. Alternatively, the Respondent offered that the opening take place on 25 July 2017, which was agreed upon by the Appellant, due to the unavailability of his experts on the first dates.

9. On 25 July 2017, the B-sample was opened and analyzed at the presence of the Rider, his agent and his expert, Dr. de Boer.

10. On 8 August 2017, the Laboratory transmitted an Analytical Report of B-sample indicating that the B-sample was *"doubtful but inconclusive regarding the presence of recombinant EPO"* and was thus reported as an *"ATF – Atypical Finding"*.

11. On 9 August 2017, the UCI informed the Rider that his B-sample had been reported as an Atypical Finding and charged the Appellant with an ADRV for *"Use or Attempted Use"* of a Prohibited Substance pursuant to Article 2.2 of the UCI Anti-Doping Rules (the "UCI ADR"). The UCI indicated that the ADRV had been asserted *"[a]fter review of all the facts and in particular the Laboratory's assessment of the testing results"* and invited the Rider to provide an explanation for the ADRV within 14 days. The UCI further informed the Appellant that his provisional suspension would remain in force until it would have been determined whether or not he had committed an ADRV.

C. The first request to lift the provisional suspension

12. On 23 August 2017, the Rider, together with its expert Dr. de Boer, filed a request to lift the provisional suspension before the UCI Disciplinary Commission (the "UCI DC") pursuant to Article 7.9.5.3 of the UCI ADR.

13. On 1 September 2017, the UCI DC forwarded the request to lift the provisional suspension to the UCI, and on 8 September 2017, within the time limit fixed by the President of the UCI DC, the UCI submitted its written observations on the Appellant's request to lift his provisional suspension.

14. On 12 October 2017, the UCI DC rejected the Rider's request to lift his provisional suspension.

D. The Appellant's refusal of an Acceptance of Consequences

15. On 16 January 2018, the UCI informed the Appellant that it did not accept his explanation for the ADRV. In short, the UCI explained that it had reviewed all of his submissions and evidence, and had sought scientific input on all of Dr. de Boer's points, but had come to the conclusion that the Appellant had failed to explain the ADRV. The UCI therefore proposed the terms of an Acceptance of Consequences ("AoC") to the Appellant.

16. While the UCI noted that Mr. Cardoso was not obliged to accept the AoC, it enclosed the scientific advice on which it had based its decision, namely: (i) a report of Dr. Tiia Kuuranne from the Laboratory, dated 12 January 2018, which addressed and rejected the Rider's claims of a potential swapping of samples and the alleged conflict of interest of the Laboratory (the "Laboratory Second Report"); (ii) a second report of Dr. Günter Gmeiner and Dr. Christian Reichel, dated 7 January 2018, which set out the EPO analytical process, addressed and rejected the Rider's allegation that microbial degradation could have caused his AAF, addressed the reasons behind the lack of confirmation of the presence of EPO in the Rider's B-sample and addressed the fact that his blood serum sample had not tested positive for EPO (the "Second Seibersdorf Opinion"); and (iii) a report by Prof. Hugues Henry and Dr. Martial Saugy, dated 11 January 2018, which addressed Dr. de Boer's developments on possible glycosylation disorders and ruled them out as a possible cause for his positive A-sample (the "Henry/Saugy Report").

17. Two weeks later, on 30 January 2018, the Rider rejected the AoC, and stated that he would *"make use of all the legal means possible to establish his innocence"*.

E. The second request to lift the provisional suspension

18. On 13 April 2018, the Rider filed his second request to lift his provisional suspension with the UCI DC. On 4 May 2018, the UCI DC rejected the Rider's suspension.

F. The Appealed Decision

19. On 15 March 2018, the UCI filed its Petition with the UCI Anti-Doping Tribunal requesting four years of ineligibility against Mr. Cardoso for committing an ADRV.

20. On 15 November 2018, the Single Judge of the UCI ADT rendered his judgment, finding that Mr. Cardoso had committed an ADRV and condemning him to a four-year Period of Ineligibility and a fine of 56,000 €.

21. On the merits, the Single Judge held as follows:

"[…] the Single Judge finds that, in order to establish a Use ADRV, UCI needs to prove the violation (namely that the Rider has utilized, applied, ingested, injected or consumed by any means whatsoever any Prohibited Substance or Prohibited Method) to the comfortable satisfaction of the ADT by any reliable means. In the absence of an exhaustive list of "means", the Single Judge is required to examine any and all evidence provided by UCI as the prosecuting authority, within the broad scope of Article 3.2 of the UCI ADR and the guidance provided by the Comments to Article 2.2 and 3.2 and, to the extent he is comfortably satisfied they are "reliable" within the meaning of the aforementioned provisions and the Rider is not able to successfully oppose them, to find that a violation of Article 2.2 of the UCI ADR has been established.

At the same time, the Single Judge acknowledges that when the means of proof submitted to establish a Use ADRV are reliable analytical data from either an A- or B-sample that is however not sufficient to establish a Presence ADRV, said data is naturally not to be regarded per se as sufficient proof of a Use ADRV, as is the case under Article 2.1.2. In Use ADRV cases, the prosecuting authority that relies on analytical data from an A- or B-sample bears the burden of proving to the comfortable satisfaction of the Tribunal that an anti-doping rule violation has occurred and the defending party may rebut such presumptions.

In particular, the issue of analytical data is dealt with in the provisions of the Comment to Article 2.2 of the UCI ADR […] *This provision expressly allows the use of analytical data from either an A- or B-sample to establish an ADRV under Article 2.2 of the UCI ADR, but in no way implies that any A- or B-sample analytical data enjoy special status in Use ADRV doping proceedings. They are to be treated just like any other means of proof under Article 3.2 of the UCI ADR,* […].

In this context, it follows that the Rider's argument according to which in the absence of the AAF confirmation in his B-sample, no ADRV can be possibly established as the analysis of urine samples is conclusively regulated at Article 2.1 of the UCI ADR, shall be dismissed. Whereas it is true that, in principle, under Article 2.1 of the UCI ADR the analysis of the B-sample is required to confirm the presence of the Prohibited Substance found in the athlete's A-sample, the Single Judge cannot help but note that UCI in the present case asserted an ADRV under Article 2.2 of the UCI ADR and not under Article 2.1. In this respect, the provisions of UCI ADR expressly allow the establishment of an ADRV under Article 2.2 on the basis of, inter alia, reliable analytical data from one sample alone, without confirmation from the second sample".

22. The Single Judge further addressed and rejected each of the Rider's explanations for the presence of EPO in his A-sample and the lack of confirmation in the B-sample:

"The accidental swap scenario

[…]

The Single Judge allocates an important evidentiary value to the Second Laboratory report in that it describes the sequence and combination of mistakes required for the swapping of samples to take place; it confirms that

the CP batch contained only this particular urine sample; and asserts that the images of the EPO profiles are remarkably similar. These factual items of the report are not challenged by the Rider. The Single Judge is convinced that these elements suffice to arrive at the conclusion that sample swapping in this case was, at best, extremely unlikely, and can rebut neither the UCI´s argument that the A-sample belonged to the Rider nor the presumption of Article 3.2.2 of the UCI ADR.

[…]

The Single Judge observes that the grounds for the Rider's defence are constructed solely around his perception of an "inherent" conflict of interest that allegedly taints every report and opinion of the Laboratory staff relied upon by UCI. The Single Judge has no reason to doubt the findings of the Internal Assessment Report and the Second Laboratory Report, unless the Rider offers a justifiable and scientifically sound challenge as to the arguments, methodology or conclusions of the relevant expert opinions and reports submitted by UCI. The conflict of interest argument does not fall within that scope.

The endogenous production scenario

[…]

The Single Judge notes that, while it is obvious that both the Rider's and UCI's experts agree that a glycosylation disorder (i) may either be congenital or result from chronic alcohol consumption and (ii) leads to a decrease in the complexity of the glycan moiety of the glycoproteins (such as EPO), the UCI experts dispute that the results of the analysis of the Rider's A-sample can be explained by any kind of types of disorders relating to glycosylation, be it congenital or secondary.

The Single Judge finds the latter statement of the UCI experts crucial since it provides a scientific explanation (reducing the glycosylation of EPO would reduce the Mw but would not produce an EPO with a higher Mw as in the A-sample of the Rider) which entirely disconnects the alleged glycosylation disorder with the A-sample result. This explanation has not been rebutted by the Rider.

In addition, the Single Judge notes that the Rider provides no other evidence whatsoever to support his alleged chronic alcohol consumption or that he actually suffers by any such congenital- or ethanol-induced disorder and relies merely on the fact that these are conditions that may provide an explanation for the presence of rhEPO in his A-sample, a conclusion which is anyway disputed by the UCI experts.

Moreover, for the sake of completeness, the Single Judge notes that there was no evidence provided that would link the findings of the De Boer Opinions to the historical analysis data of the Rider and, thus, the UCI was entitled to deny disclosure of all such information requested by the Rider and the latter's right of defence was not violated. Also, the Rider did not file such a disclosure request with the Single Judge although such right is provided for under the ADT Procedural Rules (article 19 paragraph 6).

For the reasons stated above, the Single Judge finds that the Rider´s "endogenous production" scenario is not scientifically and factually proven, and shall therefore be rejected as unfounded.

The microbial activity scenario

[…]

The Single Judge is of the opinion that the Second Seibersdorf Opinion provides a convincing assessment of the question at hand, which has not been rebutted by the Rider since his expert did not discuss the microbial activity scenario in any of his opinions. The Single Judge notes that there is no plausible explanation under which microbial activity could have created rhEPO in the Rider´s sample. Thus, the Rider's argument shall be rejected as unfounded.

The UCI should be held responsible for any alleged degradation of the Rider's B-sample

[…] *the Single Judge shall address this argument of the Rider even though it is clearly not directed to challenge or refute any of the UCI arguments and findings of its experts and, in addition, the analysis of the sample in question was inconclusive and therefore not held against the Rider by UCI.*

The Rider essentially blames the discrepancy between the A- and the B-sample analysis to the dates proposed by the UCI for the B-sample opening and analysis. However, the Single Judge cannot see how UCI is to blame, considering that it had already proposed two alternative (earlier) dates to the Rider for the B-sample opening and analysis which were only 5 and 6 days respectively after the Laboratory had reported the AAF in the A-sample.

Negative blood tests

To further support his position that his A-sample analysis result is not reliable means of proof of an ADRV, the Rider has pointed out that his blood test results did not confirm the presence of rhEPO. The Second Seibersdorf Opinion […] shows to the comfortable satisfaction of the Single Judge that the existence of a blood sample negative for rhEPO does not exclude the possibility that a urine sample collected by the same rider on the same day may test positive for rhEPO.

Therefore, the Rider's argument that the result of his blood test directly challenges the reliability of the A-sample result, is rejected as unfounded.

Conclusion

On the basis of all of the above, the Single Judge is comfortably satisfied by the assessment of the evidence at hand that the conditions established by Article 2.2 of the UCI ADR (and the comment thereto) which allow a Use ADRV to be established based upon
(a) reliable analytical data from the analysis of an A-sample alone (without confirmation from an analysis of a B-sample) and
(b) where the prosecuting authority provides a satisfactory explanation for the lack of confirmation in the other sample, are satisfied in this matter.

Moreover, the Rider has failed to substantiate that the presence of rhEPO in his A-sample resulted from an accidental swap of samples or a congenital/ethanol-induced disorder or a microbial activity.

Therefore, the Single Judge finds that the Rider has committed an ADRV under Article 2.2 of the UCI ADR.

[…]

The Single Judge further notes that UCI argues that since the source of rhEPO has not been established by the Rider, his ADRV is presumed to be intentional within the meaning of Article 10.2 of the UCI ADR. In this respect, the Single Judge observes that the Rider denies that he knowingly used a Prohibited Substance, stating that there is a number of possibilities that could have led to the rhEPO finding in his A-sample (the accidental swap scenario, the endogenous production scenario or the microbial activity scenario). As explained in detail in the relevant parts of the present Judgment, the Single Judge found that the Rider failed to convince this Tribunal that one of the scenarios proposed by him explains the presence of rhEPO in his A-sample or that the violation was not intentional.

The Rider did not seek to benefit from the application of Article 10.4 of the UCI ADR ('No Fault or Negligence') in order to have his period of Ineligibility eliminated or reduced. The application of such provision is anyway based on the prerequisite that a rider has established how the prohibited substance entered his/her body. Therefore, no reduction is possible under Article 10.4 of the UCI ADR. Furthermore, the Single Judge notes that no reduction was sought under Article 10.5.2 either. Consequently, there are no fault-related reductions applicable to the case of the Rider".

23. Lastly, with respect to the mandatory fine and the costs, the Single Judge held as follows:

"The Rider has not contested the […] *figures and has not put forward any arguments for reduction of the fine.*

The Single Judge finds, therefore, that a fine in the amount of EUR 56'000 shall be imposed on the rider.

Lastly, and as provided for in article 10.10.2, the Single Judge finds that the Rider shall bear the following costs:

- *the costs of the results management incurred by the UCI (CHF 2'500);*
- *the costs of the B-sample analysis (CHF 510);*
- *the costs of the A and B Sample Laboratory Documentation Packages (CHF 600); and*
- *the costs of the out-of-competition testing (CHF 1'500)".*

III. PROCEDURAL HISTORY

A. The Statement of Appeal

24. On 14 December 2018, the Appellant filed a statement of appeal (the "Statement of Appeal") against the UCI's Anti-Doping Tribunal's decision rendered on 15 November 2018 and notified on 16 November 2018. In the same brief, the Appellant requested legal aid (the "Request for Legal Aid"), appointed Dr Sven Nagel as arbitrator pursuant to Article R48 of

the Code of Sports-related Arbitration (the "CAS Code") and asked that the following documents be produced by the UCI:

"1. *An overview of all urine and blood tests ever performed on the Appellant.*
2. *All the raw data for EPOETINS (i.e. the raw data like on page 29 LDP) of all the urine samples ever analysed of the Appellant, to learn whether atypical results were also observed in the past.*
3. *All testing results for ethylglucuronide of all the urine samples ever analysed of the Appellant.*
4. *All concentration results for endogenous steroids of all the urine samples every analysed of the Appellant.*
5. *All the information contained in the biological blood passport, to oversee the long term development of the blood values and comparing them with the present testing results.*
6. *Full information on the validation of the applied EPO testing procedure (validation package including proof of suitability of the method).*
7. *The original gel data of the analysis of the Appellant's urine samples.*
8. *Scan of the important lanes (densitometric scans of the results, both urine samples and positive samples) of the Appellant's urine samples.*
9. *The detailed results of all the blood analysis of the Appellant's blood samples in the past*".

B. The Constitution of the Panel and the Challenge against Mr. Beloff

25. On 17 January 2019, the Respondent appointed the Hon. Michael J. Beloff QC as arbitrator in the present case.

26. By email dated 7 February 2019, the Appellant filed a petition for challenge against Mr. Beloff pursuant to Article R34 of the CAS Code on the basis that there had been inadequate disclosure of the collaboration between the UCI's Counsel and Mr. Beloff's Chambers in the Contador case which raised severe doubts as to Mr. Beloff's independence and impartiality in the present case.

27. On 13 February 2019, the Respondent and Mr. Beloff submitted their comments regarding the Appellant's challenge.

28. On 1 March 2019, the Challenge Commission of the Board of the International Council of Arbitration for Sport ("ICAS") rejected the challenge against Mr. Beloff. The Appellant immediately objected to the decision of the Challenge Commission and asked which ICAS-members were involved in the decision making process.

29. On 4 March 2019, the CAS Court Office provided the Appellant with the names of the ICAS members who were part of the Challenge Commission.

30. On 12 March 2019, the President of the CAS Appeals Arbitration Division constituted the Panel deciding this case as follows: Ms. Carine Dupeyron (President); Dr. Sven Nagel (Arbitrator); and the Hon. Michael J. Beloff M.A. Q.C. (Arbitrator).

31. By email dated 25 March 2019, the Appellant communicated its intention to file an appeal against the Order on challenge issued by the Challenge Commission on the petition for challenge filed against Mr. Beloff. The same day, the CAS informed the Appellant of the

finality of the Challenge Commission's decision and of the absence of any provision for appeal.

32. By email dated 3 April 2019, the Respondent objected to the Appellant's allegations regarding Mr. Beloff.

C. The two Orders for Legal Aid, the request for its reconsideration and the Appellant's statement on the annulment of the arbitration clause

33. By letter dated 25 January 2019, the Court Office of the Court of Arbitration for Sport (the "CAS Court Office") informed the Parties that an Order on Legal Aid had been notified to the Appellant. It also invited the Appellant to file his appeal brief within 30 days. The first Order of Legal Aid provided as follows:

- The Appellant was granted legal aid in the amount of CHF 1'500 for his and his counsel, witnesses, experts and interpreter's travel and accommodation costs;

- The Appellant's request for assistance for CAS arbitration costs was denied on the basis of the free nature of the disciplinary proceedings at CAS;

- The Appellant's request for assistance for a *pro bono* counsel was also denied on the basis that the Rider was already represented by a counsel who was not on the CAS' list of pro bono counsels; and

- The Appellant's request for at least the same number of experts as the UCI was denied, on the grounds that Article 6 of the Guidelines on Legal Aid before the CAS does not include the payment of the fees of experts hired by the parties.

34. By email dated 3 February 2019, the Appellant asked for his Request for Legal Aid to be reconsidered. The Appellant further added that should the CAS refuse to reconsider his Request on Legal Aid, he would cancel the arbitral clause due to a fundamental error and his being deceived by the UCI about the fairness of the CAS proceedings and that he would turn to the state courts.

35. On 4 February 2019, the CAS Court Office acknowledged receipt of the Appellant's request for reconsideration of his Request for Legal Aid and advised the Appellant that his request had been submitted to the ICAS President.

36. By email dated 5 February 2019, the Respondent requested to be provided with a copy of the ICAS Order on Legal Aid of 25 January 2019.

37. On 6 February 2019, the CAS Court Office acknowledged receipt of Respondent's request for the ICAS Order, and advised the Respondent that legal aid procedures are confidential.

38. On 7 February 2019, the Appellant informed ICAS that *"in the lack of any remuneration from the ICAS, Thomas Wehrli's mandate is at the moment resting. However, he will immediately resume his work*

as my lawyer once the ICAS has granted proper legal aid or once I have taken my decision to turn to state courts".

39. On 18 February 2019, in an email addressed directly to the Respondent, the Appellant declared that he annulled the CAS arbitration clause for various reasons, including *inter alia* the inability to defend himself properly without sufficient legal aid and lack of consent to CAS arbitration.

40. On the same date, the Respondent forwarded the email to the CAS Court Office and requested that the latter asked the Appellant to confirm his withdrawal from the proceedings.

41. The Appellant then informed the CAS Court Office that he *"upheld all [his] challenges"* and explained that he would annul the arbitration clause if he were not granted legal aid. The CAS Court Office immediately acknowledged receipt of the Appellant's correspondence and advised the Appellant that his request for reconsideration of the Order on Legal Aid was being reviewed by the ICAS Board. The CAS Court Office thus invited the Appellant to clarify his intention to *"annul the arbitration clause(s) which foresee the CAS as dispute resolution mechanism"* by 21 February 2019.

42. By email dated 21 February 2019, the Appellant informed the CAS Court Office that he was not withdrawing his appeal and suggested that the CAS was biased in favor of the UCI. On the same day, the CAS Court Office acknowledged receipt of the Appellant's email and rejected the Appellant's allegations of any potential bias on its part in favor of the UCI.

43. By email dated 25 February 2019, the Appellant indicated to the CAS Court Office that his request for reconsideration of Legal Aid had been denied and that, in the absence of any legal representation, he had no choice but to declare that his Statement of Appeal of 14 December 2018 be considered as his appeal brief. In this email, the Appellant further clarified that he was not withdrawing his appeal.

44. On 25 February 2019, the CAS Court Office acknowledged receipt of the Appellant's email of the same day and duly noted that the Statement of Appeal was to be considered as the Appellant's appeal brief. In the same letter, the CAS Court Office invited the Respondent, pursuant to Article R55 of the CAS Code, to submit its Answer within 20 days from receipt of the letter.

45. On 1 March 2019, the Respondent requested that its deadline to file its Answer be suspended until a decision from the CAS on the UCI's request to be informed about all factual circumstances surrounding the Appellant's jurisdictional challenge is decided. In this light, the Respondent requested the CAS to proceed with the appointment of the Panel without delay so that it could formally submit its document production requests and be provided with (i) a copy of the Appellant's request(s) for legal aid; and (ii) the ICAS decision(s) in this respect.

46. On 4 March 2019, in a second Order on Legal Aid, the ICAS reconsidered the Appellant's request and granted him the assistance of a *pro bono* counsel.

D. The appointment of a *pro bono* counsel, the request to submit a revised Appeal Brief, the numerous delays and requests for extensions of the Parties

47. By email of 5 March 2019, the Respondent asked again for a suspension of the deadline to file its Answer.

48. On 6 March 2019, the CAS Court Office invited the Appellant to comment on the Respondent's request for a suspension by 8 March 2019.

49. On 8 March 2019, the Appellant objected to the Respondent's request for a suspension to file its Answer, and did so again on 19 March 2019.

50. The Respondent's request was nonetheless granted by the Panel on 20 March 2019, until 26 March 2019. Thereafter, due to the Parties' respective requests for production of documents and response thereto, this deadline was suspended and postponed several times, see §95 hereinafter, until 2 December 2019.

51. By email dated 10 April 2019, the Appellant informed the CAS Court Office that he had instructed Mr. Yasin Patel of Church Court Chambers as his *pro bono* counsel and requested the opportunity to submit a full appeal brief due to exceptional circumstances.

52. By email dated 16 April 2019, the Respondent objected to the Appellant's request to submit a full appeal brief and requested the Panel to invite the Appellant to clarify his position on jurisdiction.

53. On 23 April 2019, the Panel granted the Appellant the opportunity to produce a full appeal brief by 8 May 2019 and requested him to clarify his position on jurisdiction within said brief.

54. On 24 April 2019, the Appellant requested an extension of the deadline to submit his appeal brief.

55. On 26 April 2019, the Respondent objected to the Appellant's request for an extension of the deadline to file his appeal brief.

56. On 6 May 2019, the Panel inquired as to the Appellant missing the deadline for response to the Respondent's document requests, and clarification of his representation in these proceedings, and requested answers on these matters by 9 May 2019.

57. On 7 May 2019, due to these pending questions and given the continuing issues over document production, the Panel suspended until further notice the Appellant's deadline to file the appeal brief.

58. On 9 May 2019, the Appellant provided his answers to the Panel's questions. By email dated 14 May 2019, the Panel (i) noted that the Appellant was represented by Mr. Yasin Patel appointed as *pro bono* counsel from the ICAS list, (ii) granted the Appellant (a) a new deadline to comment on the Respondent's request for documents, within three days; and (b) a 10-day extension of the deadline to file his appeal brief.

59. On 17 May 2019, the Appellant requested a suspension of the deadline to file his appeal brief until the decision on his request for production of documents was made.

60. By email from his personal account dated 19 June 2019, the Appellant expressed his concerns about the case, criticized his *pro bono* counsel, Mr. Yasin Patel, and requested to be granted funds to re-hire his former counsel. On the same day, the CAS Court Office invited the Appellant to clarify whether he was still represented by Mr. Yasin Patel.

61. By email from his personal account dated 21 June 2019, the Appellant asked that its last email be only forwarded to the Panel and the ICAS and not to the UCI or Mr. Yasin Patel. He also confirmed that Mr. Yasin Patel was still acting as his counsel in these proceedings.

E. The Parties' Document Production Requests

1. Procedural Chronology of the Appellant's and the Respondent's respective Document Production Requests

62. Following the document production request in the Statement of Appeal, by way of which the Appellant requested the Respondent to produce a number of documents, and after the constitution of the Panel, on 20 March 2019, the Respondent also submitted a request for document production directed to the Appellant. It requested the Appellant to disclose (i) any request for legal aid in relation with the present case; (ii) any supporting documentation for this request for legal aid; (iii) any further correspondence between the Appellant and the CAS or ICAS; and (iv) all ICAS orders on legal aid.

63. On 24 April 2019, the CAS Court Office noted that the Appellant did not provide its position on the Respondent's request for document production within the due time limit.

64. By email dated 26 April 2019, the Appellant then requested an extension of his deadline to comment on the Respondent's request for documents.

65. On 30 April 2019, the Respondent objected to the Appellant's request for an extension of his deadline to comment on the Respondent's request for documents.

66. On 6 May 2019, the Panel submitted 5 questions to the Appellant regarding his request for an extension of time limit, the missing of the deadline on the Respondent's document requests, and his representation in these proceedings, and requested answers by 9 May 2019. This was answered by the Appellant on said deadline (see §58 *supra*). By letter of 14 May 2019, the Panel granted 3 days to the Appellant with respect to the Respondent's request for the production of documents.

67. On 17 May 2019, the Appellant submitted such comments together with the following document production request: (i) all documents outlined and mentioned in the Appeal Statement and requested by him; (ii) all expert material in the UCI's possession; (iii) all expert reports, testing results, briefs and instructions, summary reports, interim reports, samples, conclusions and any other such documentation that had either materialized from, been

produced by or used by any or all experts used by UCI; (iv) a list of all exhibits used by experts or produced by experts; and (v) all documents and information that undermined the UCI's case and/or supported his own case.

68. On 20 May 2019, the CAS Court Office invited the Respondent to comment on the Appellant's request for documentation and suspension of the deadline by 23 May 2019. The Respondent was also granted an extension of the time limit until 27 May 2019 to comment on the Appellant's document production request.

69. On 27 May 2020, the Respondent submitted his response to the Appellant's request for document production. In this response, the Respondent noted that the majority of the documents requested by the Appellant were already in his possession or had already been requested and dismissed in the results management process of the case and before the UCI ADT.

70. On the same day, the Parties were advised that the Respondent's Document Production Request was partially granted by the Majority of the Panel in so far as it concerned the following documents:

    i. The Order on Legal Aid dated 25 January 2019,

    ii. The Order on Legal Aid dated 4 March 2019;

    iii. The Appellant's requests for reconsideration dated 3 February, 11 March, 2 May and 15 May 2019; and

    iv. The ICAS letters of 28 March 2019 and 20 May 2019.

71. The requests relating to additional requests for legal aid and additional supporting documentation were deemed to be moot in the absence of such requests and supporting documentation other than what had been submitted with the Appellant's Statement of Appeal, while the request regarding all correspondence with the ICAS was rejected but for the above-mentioned documents.

72. In the same correspondence, the Parties were informed that the reasons for the Majority of the Panel's decision would be included in the final award, and are set forth below in subsection II.E.2.

73. By email dated 31 May 2019, the Appellant submitted a request for an extension until 6 June 2019 of the deadline to transmit the requested documentation.

74. On 3 June 2019, the Respondent submitted his comments on the Appellant's request for an extension of deadline. The Respondent raised doubts as to the purpose of the Appellant's request. On the same day, the CAS Court Office invited the Appellant to clarify whether he requested an extension of the time limit to produce the documents or whether he only requested the opportunity to comment to Respondent's letter of 27 May 2019.

75. On 6 June 2019, the Respondent was provided with the requested documents for disclosure. It became then known that, in light of the fact that the Appellant was no longer represented by his former legal counsel, on 4 March 2019, the ICAS granted the Appellant the assistance of a *pro bono* counsel, Mr. Yasin Patel.

76. By email dated 11 June 2019, the Appellant clarified that it requested an extension of the deadline to respond to the UCI's comments on his request for document production.

77. On 13 June 2019, the Respondent commented on the Appellant's request for an extension of the deadline. The Respondent noted that the Appellant requested a new deadline for a response that he had not been invited to submit and alleged that the Appellant's requests were nothing but dilatory tactics.

78. The Panel authorized comments to be filed and on 16 June 2019, the Appellant submitted such comments on the Respondent's comments on his request for document production.

79. On 9 August 2019, with respect to the Appellant's requests for document production, the Panel granted the Appellant's Requests no. 1 (vii), (viii) and (ix), and rejected the Appellant's Request no. 1 (i), (ii), (iii), (iv), (v), (vi) and the Appellant's requests no.2. Therefore, the Respondent was invited to produce:

    i. The original gel data of the analysis;

    ii. The scan of the important lanes of the Appellant's urine samples at stake in these proceedings; and

    iii. The detailed results of all the blood analysis of the Appellant's blood samples at stake in these proceedings.

80. The reasons supporting the Panel's decision were set forth in the same correspondence.

81. On 13 August 2019, the Respondent expressed its disagreement with respect to the Panel's decision on the Appellant's request for document production. Moreover, the Respondent invited the Panel to conclude that the Appellant was in fact, if not in form, advancing a challenge under Article 3.2.1 of the UCI ADR and requested the Panel inform the World Anti-Doping Agency ("WADA") of the existence of such challenge. The Respondent nonetheless confirmed that it would abide by the Panel's order and produce the requested documentation.

82. On 30 August 2019, the Respondent requested an extension of the time limit to produce the requested documentation.

83. On 9 September 2019, the Panel responded to the Respondent's request to inform WADA of a challenge and informed the Parties that it considered that it had no reason to do so in the absence of any such challenge being expressly made by the Appellant.

84. On 9 September 2019, the Respondent produced the requested documents.

2. Reasons supporting the Majority of the Panel's decision on the Respondent's document production request

85. As recorded at §62 above, on 20 March 2019, the Respondent requested the production of the following documents:

- Any request for legal aid in relation to the present proceedings that has not already been provided to the UCI with Mr Cardoso's Statement of Appeal;

- Any supporting documentation to Mr. Cardoso's request(s) for Legal Aid that has not already been provided to the UCI with Mr. Cardoso's Statement of Appeal;

- Any further correspondence between CAS and/or the ICAS and Mr. Cardoso in relation to his request(s) for legal aid and/or the ICAS Order(s) on Legal Aid that has not already been forwarded to the UCI; and

- All ICAS Orders on Legal Aid that have been notified to Mr. Cardoso in relation to these proceedings.

86. The Respondent based its requests on Article R44.3 of the CAS Code, which reads as follows: *"A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant"*.

87. The Respondent essentially argued that the requested documents were likely to exist, were in the custody or control of the Appellant and that they were clearly relevant as the Appellant's challenge to the jurisdiction of the CAS was partly based on the absence or insufficiency of the legal aid granted by the ICAS and accordingly that it would not be in a position to defend itself without knowing what had been requested and what had been granted in that respect.

88. In anticipation of the Appellant's defense, the Respondent underscored that Article 22 of the Legal Aid Guidelines only applied to the CAS Court Office and that, in any event, the Appellant had waived the confidentiality of these documents by submitting a request for legal aid and supporting documents with its Statement of Appeal.

89. On 20 May 2019, the Appellant stated its objections against the Respondent's requests for the production of documents. The Appellant's position could be summarized as follows:

i. the procedure for legal aid is confidential and the CAS shall not disclose information related to it to third parties, as per article 22 of the Legal Aid Guidelines; moreover, these documents were submitted by the Appellant under the assumption that the confidentiality clause would apply;

ii. the requested documents are not relevant to decide on the merits of this case, which is an alleged anti-doping violation;

iii. the requested documents are not necessary to respond to the Appellant's submission on jurisdiction.

90. Having carefully considered the Parties' respective submissions, the Majority of the Panel decided, based on the criteria set forth in Article 44.3 of the CAS Code, that:

 i. the existence and possession by the Appellant of the requested documents is obvious and has not been challenged by the Appellant;

 ii. the relevancy of some of the documents requested, in particular the submissions for legal aid to the ICAS in full, as opposed to the ICAS orders only, could be debated; however, the Majority of the Panel noted that Mr. Cardoso disclosed in his Statement of Appeal his full submission for legal aid to the CAS, including supporting documentation; the natural conclusion of this spontaneous submission is that the Appellant himself considered that this information, in that specific degree of detail, is relevant to the present case and the Majority of the Panel agreed with this view;

 iii. as to confidentiality, the Majority of the Panel again considered the production made by the Appellant with his Statement of Appeal and concludes that the disclosure made by the Appellant is either an admission that these documents are not confidential or an unambiguous waiver of the confidentiality attached to them; stated it differently, the Majority of the Panel determined that the potential confidentiality of legal aid documents could not be used as a sword and a shield by the Appellant.

91. Accordingly, on 27 May 2019, the Parties were informed of the decision of the Majority of the Panel as follows (emphasis in original):

 i. The Respondent's request for production of "All ICAS Orders on Legal Aid that have been notified to Mr. Cardoso in relation to these proceedings" is granted.

 ii. The Respondent's request for production of "Any further correspondence between CAS and/or the ICAS and Mr. Cardoso in relation to his request(s) for legal aid and/or the ICAS Order(s) on Legal Aid that has not already been forwarded to the UCI" is partially granted. The Appellant's requests for reconsideration of the Orders on Legal Aid together with the decisions issued by the ICAS on such requests for reconsideration shall be provided to the Respondent. The remaining correspondence between the Appellant and the CAS Court Office shall remain confidential.

 iii. The Respondent is advised that the Appellant did not file any other request for legal aid than the initial request for legal aid which was included in the Statement of Appeal. Accordingly, the Respondent's request for production of "Any request for legal aid in relation to the present proceedings that has not already been provided to the UCI with Mr Cardoso's Statement of Appeal" is moot.

 iv. The Respondent is advised that the Appellant did not file any other supporting documentation than the documents filed with the Statement of Appeal. Accordingly, the Respondent's request for production of "Any supporting documentation to Mr. Cardoso's request(s) for Legal Aid that has not already been provided to the UCI with Mr. Cardoso's Statement of Appeal" is moot".

F. The filing of the Appellant's revised Appeal Brief and the Respondent's Answer

92. On 23 September 2019, following numerous extensions of time which had been granted by the Panel to both Parties due to their respective requests for document production and/or for legal aid and for various other reasons, the Appellant filed his appeal brief (the "Appeal Brief") and an addendum to the Appeal Brief together with its supporting exhibits.

93. By email dated 4 October 2019, the Respondent brought to the Panel's attention that various exhibits were missing from the Appeal Brief, which were then submitted by the Appellant on 18 October 2019.

94. On 18 November 2019, the Respondent requested an extension of the time limit to file its Answer, to which the Appellant objected on 21 November 2019.

95. On 29 November 2019, the Panel granted the Respondent an extension of the deadline to file its Answer until 2 December 2019.

96. On 2 December 2019, the Respondent filed its answer to the Appeal Brief (the "Answer") together with the supporting exhibits.

G. The Hearing and the decision to exclude expert's notes submitted during the hearing

97. On 9 December 2019, the Appellant requested that a hearing be held.

98. On 20 December 2019, the CAS Court Office advised the Parties that the Panel was available for the hearing on 24 February 2019.

99. On 2 February 2020, the Panel granted the Appellant's request for a public hearing.

100. The hearing took place on 24 February 2020 at the Court of Arbitration for Sport, Avenue de Beaumont 2, 1012 Lausanne, Switzerland. In addition to the Panel and Ms Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons attended the hearing:

a) For the Appellant:

- Mr. André Cardoso (via videoconference);
- His counsel Mr. Yasin Patel;
- Dr. Eric Boye (via videoconference);
- Dr. de Boer.

b) For the Respondent:

- Its counsels Mr. Rigozzi and Ms. Quinn;
- Dr. Gunter Gmeiner;
- Dr. Hugues Henry;
- Dr. Martial Saugy;

- Dr. Tiia Kuuranne.

101. No objection was made to the composition of the Panel at the outset of the hearing and no criticisms as to its fairness at its conclusion.

102. During the hearing, Dr. Boye presented his oral expert testimony, during which he mentioned the possibility that the A-sample has become degraded since it was stored for about two days in an unknown temperature and asserted that this theory was supported by the fact that the scan he undertook showed a faded line higher up in the gel. Since no evidence to this effect had been previously produced, the Panel inquired as to whether Dr. Boye had undertaken his own digital scanning and Dr. Boye confirmed he had done so. The Respondent contended that this digital scan constituted new evidence. The Respondent further added that Dr. Boye had had ample to address the Respondent's experts' arguments and did not do so at the appropriate stage. Thus, the Respondent objected as to having this new evidence on the record as it was being submitted contrary to CAS rules and, as such, should be disregarded by the Panel.

103. After hearing the Appellant's response to the Respondent's objection, the Panel ruled that the oral evidence offered by Dr. Boye would be admitted but that no further fresh evidence would be accepted in the proceedings. Accordingly, the notes of Dr. Boye supporting his oral testimony sent to the Panel during the hearing, would be disregarded, as submitted too late according to the CAS Code and in disrespect of a principle of adversarial arbitration.

104. At the end of the hearing, the Panel invited the Appellant and the Respondent to submit in writing any comments in rebuttal to the other side's closing statement. On 5 March 2020, the Parties filed their Rebuttal submissions.

H. Post-hearing events

105. On 18 May 2020, the Panel asked the Parties to address in written submissions the following questions:

> *"1. Could the Parties confirm that the WADC International Standard for Laboratories (WADC ISL) of June 2016 apply to this case, as opposed to the WADC ISL of November 2019?*
>
> *2. Could the Parties address the content of Article 5.2.4.3.2.3 of the WADC ISL of 2016, which provides that "If the B-Sample confirmation proves negative the entire test shall be considered negative" and the consequences that could be drawn as to the A-Sample, with specific respect to any case law or commentary on how this standard has been interpreted? The same question applies with respect to Article 5.2.4.3.2.10, which states that "If the "B" Sample confirmation proves negative, the Sample shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding".*
>
> *3. Could the Parties specifically explain the relationship between these two WADC ISL provisions and Article 2.2 UCI ADR.*

> 4. *Could the Parties comment the other sources referred to by the Panel, namely the WADA Athlete Reference Guide and the two sources in German enclosed to the present letter?*
>
> 5. *Could the Parties provide the Panel with their views on the hierarchy of norms in case of any inconsistency between the WADC ISL and the UCI ADR (or the WADA Code)?*
>
> 6. *Could the Parties provide the Panel with their views as to what significance the B Sample has in the procedure of taking evidence where a sportsperson has been charged with an ADRV, and as to whether a charge under Article 2.2 can ever be made good in the absence of a valid B Sample?"*

106. On 11 June 2020, the Parties filed their respective answers to the Panel's questions.

107. On 18 June 2020, the President of the Panel made one additional disclosure, which was sent to the Parties on the same day. No challenge was filed within the 7-day period contemplated in the Rules.

IV. THE PARTIES' POSITIONS

108. The Panel has taken into consideration all the Parties' written submissions and has weighed the arguments made by the Parties in the light of all the evidence presented. The Panel sets out below a summary of the Parties' positions relevant to its decision, which does not attempt to be an exhaustive account of all the evidence and arguments put forward before this Panel (all of which, it repeats, it has fully evaluated but only of the most relevant facts and legal arguments.

A. The Appellant's position

109. On 14 December 2018, the Appellant filed a Statement of Appeal with the CAS seeking, *inter alia*, the following relief on the merits:

> *"1. The Judgment of the UCI Anti-Doping Tribunal in the case ADT 01.2018 dated 15 November 2018 shall be annulled.*
>
> *2. The CAS shall acquit the Appellant of any violation of the Anti-Doping Rules.*
>
> *3. The Respondent shall be ordered to pay an adequate sum as damages and an adequate compensation for the reputational harm done for the suspension until today.*
>
> *4. The Respondent shall be ordered to pay all costs and fees relating to the preparation and conduct of this arbitration, including, but not limited to, those of Appellant's attorneys, experts and advisors, which the Appellant reserves the right to produce in due course".*

110. On 23 September 2019, the Appellant filed his Appeal Brief wherein he maintained the relief previously sought in its Statement of Appeal. In his submissions, the Appellant raised procedural claims regarding the CAS legal aid system and process (1.), as well as substantive claims regarding the Appealed Decision (2.).

1. *The Appellant's position regarding the nature of the proceedings before the CAS*

i. The Appellant's Request for Legal Aid

111. In the Appellant's submissions and at the hearing, the Appellant explained that since he had exhausted all his financial resources during the proceedings before the UCI, he submitted a Request for Legal Aid in the present proceedings which was to include (i) the waiver of the Court Office Fee; (ii) the payment of fees for adequate legal representation; (iii) the employment of the same number of experts that the Respondent could avail itself of, i.e., six; and (iv) the payment of all costs and expenses for the witnesses', experts' and the Rider's attendance at the hearing at CAS. The Appellant requested that Dr. Thilo Pachmann represent him in the proceedings before the CAS.

112. According to the Appellant, the ICAS refused to grant the Appellant's Request for Legal Aid and the Appellant objected to such refusal alleging that such a decision was in violation of his rights under article 6 of the European Convention of Human Rights ("ECHR"), as there would have been unbalanced proceedings and, in consequence, his right to be heard would be significantly violated.

113. Notwithstanding this decision, the Appellant requested ICAS to be granted a *pro bono* counsel and filed a form to this end in order to get all possible legal assistance for his case. The Appellant specifically submitted that his request for a *pro bono* counsel could not be interpreted as in implicit acceptance of the system and as a waiver to his objection that his right to be heard has been violated and the equality of arms has not been guaranteed.

ii. The Appellant's Complaint regarding the Composition and Functioning of the Panel

114. The Appellant raised a complaint regarding the composition and functioning of the Panel of arbitrators deciding this case. In particular, the Appellant claims that since arbitrators on the arbitrator's list have been appointed by ICAS, which, in turn, is controlled by international sport federations, CAS tribunals would lack impartiality and independence.

115. In this respect, the Appellant requested ICAS that the Panel be composed only of arbitrators that are not members of the CAS list of arbitrators and that the President of the Panel be determined by the two arbitrators appointed by the parties or, in default of an agreement, by the President of the Cantonal Court of the Canton of Vaud or by another arbitration institute, so as to exclude any influence from ICAS.

116. The Appellant states that the appointment of Sven Nagel as arbitrator in the present proceedings has only been made in order to comply with the appeal requirements and can, in no circumstances, be understood as an implicit acceptance of the closed list of arbitrators provided by ICAS.

iii. The Appellant's position regarding the Applicable Rules

117. In his submission, the Appellant explicitly reserves his right to challenge the application of the CAS Code insofar as the CAS provides insufficient legal protection to the Appellant. Specifically, the Appellant objects to the application of the Respondent's rules, which are set up by the sport federations, without application of the mandatory and non-mandatory laws of Switzerland and Portugal and contends that the application of such rules would also represent a violation of article 6 ECHR.

iv. The Appellant's position regarding Disclosure's Requests

118. The Appellant submits that throughout the proceedings, the Respondent intentionally did not disclose important evidence that the Appellant requested and that would have been of fundamental importance to confirm, for example, the presence of ethyl glucuronide.

119. According to the Appellant, alcohol consumption, rather than the intake of any prohibited substance, is the cause of the AAF in the A-sample. The Appellant also submits that there are at least two different reasons that could explain the AAF in the A-sample: (i) a mild congenital disorder of glycosylation (CDG) syndrome; or (ii) a transient disorder of glycosylation (TDG). The CDG would come in 2 types:

a) Type I: disorders involving disrupted analysis of the lipid-Linked oligosaccharide precursor or its transfer to the protein;

b) Type II: disorders involving a malfunctioning trimming/processing of the protein-bound oligosaccharide chain.

120. According to the Appellant, the Respondent has conveniently mentioned only Type I disorder and has not addressed TDG and/or Type II disorders.

121. The above explains why the Appellant filed disclosure requests before the CAS Panel which were granted only with respect to the Appellant's Requests no. 1 (vii), (viii) and (ix).

122. At the hearing, the Appellant stated that he was undoubtedly entitled to have access to all the information requested and should have been granted all his Requests under article 29(2) of the Swiss Constitution, Article 6 ECHR as well as article 8 of the Swiss Data Protection Act. Thus, the Appellant affirmed that appropriate disclosure has not been maximised because it has been limited by the application of CAS rules and UCI Rules.

123. In light of the complaints described above, the Appellant upholds that he was denied legal aid in breach of the principle of equality of arms, which is a facet of Article 6 ECHR and in consequence, he has been deprived of his right to have a fair hearing. Moreover, the Appellant complained that the system overall lacks integrity and is dominated by ICAS, which is controlled by sport federations such as the UCI.

2. *The Appellant's position regarding the Appealed Decision*

i. The proceedings in front of the UCI ADT violated Article 6 ECHR

124. According to the Appellant, the proceedings in front of the UCI ADT also violated Article 6 ECHR.

125. *First*, the Appellant claims that the Respondent did not provide the Appellant with any possibility to defend himself in front of its ADT. According to the Appellant, he had exhausted all his financial means by seeking to have the provisional suspension lifted and this, in turn, severely undermined his case, particularly, his right to be adequately represented in the present proceedings and to avail himself of experienced experts.

126. *Second*, the Appellant submits that the application of Article 2.2 of the UCI ADR (instead of mandatory and non-mandatory Swiss and Portuguese laws) is in violation of the Appellant's right to be heard as the application of these rules has been unilaterally decided by a body dominated by sports federations such as the Respondent.

127. *Third*, the Appellant alleges that the Respondent could not choose to establish the ADRV based on the A-sample only. The use of the findings on the A-sample by the Respondent to reach an adverse decision notwithstanding the findings on the B-sample violates the Appellant's right to be heard.

128. *Fourth*, the Appellant states he has been excluded. The Appellant explains that he had a constitutional right to be present at the analysis of the A-sample from which he was excluded and that his exclusion violated his right to be heard and his procedural rights under Article 6 § 1 and § 2 ECHR.

ii. The analysis of urine samples is conclusively regulated in Article 2.1 of the UCI ADR

129. According to the Appellant, the way to establish an AAF through the analysis of urine samples is conclusively regulated by Article 2.1 of the UCI ADR.

130. The Appellant argues that there is no possibility that the A-sample analysis qualifies as an *"establishing of the use by any reliable means"* according to Article 2.2 of the UCI ADR. Indeed, according to the Appellant, the reference in the comment of Article 2.2 of the UCI ADR according to which the "use" may be established on reliable analytical data from the A-sample's analysis only applies to cases, unlike the present, in which no B-sample analysis was carried out.

131. It follows that, according to the Appellant, the A-sample analysis by itself is, under the current rules, not sufficient to establish the proof of an ADRV and that there needs for that purpose to be both positive A and B-sample results. The Appellant underlined that the purpose of having double sample analysis is precisely that of providing additional security that no false positive finding is established.

132. Thus, in the Appellant's view, Article 2.2 of the UCI ADR may only be applied in exceptional circumstances, for example, when the B-sample was tampered with by the athlete or when the athlete destroys the B-sample during its analysis or, again, in cases in which the athlete delayed the B-sample analysis in bad faith provoking a degradation of the B-sample. In the case at hand, the Appellant submits that he participated in good faith in the proceedings and did not cause any damage and/or intentionally provoke the degradation of any sample.

133. To further strengthen its position, the Appellant submits that in all the CAS case law available, an AAF has never been based on the analysis of the A-sample only.

134. Lastly, the Appellant contends that, as he had no possibility to be present at the opening of the A-sample analysis, whereas he was present at the opening of the B-sample analysis, the A-sample findings should be disregarded and the B-sample findings alone should be considered, as this represents the only instance in which the Rider's right to be heard was respected in the proceedings.

iii. The A-sample analysis is not reliable enough to justify the overturn of the B-sample analysis

135. In his submissions, the Appellant provides an alternative explanation of the A-sample analysis results to that provided by the UCI. He alleges that, in light of the inconsistent results between the samples, the A-sample's analysis may not be reliable enough to form the base of an ADRV.

136. In particular, the Appellant claims that the A-sample is not reliable enough on the basis of the arguments contained in Dr. de Boer's report. According to Dr. de Boer, the Appellant's chronic alcohol consumption may have caused endogenously the adverse analytical finding. A transient disorder of glycosylation (CDG) if ascertained, may also have caused endogenously the Epoetins and this, in turn, would have prevented the proper functioning of the applied test. This would also explain why the B-sample analysis was found not to be conclusive.

137. The possible existence of a transient glycosylation disorder is also supported by data of his Athlete Biological Passport ("ABP"). According to the Appellant, it is obvious from his ABP that the mean corpuscular volume ("MCV") in the period of May-June 2017 was elevated, which is known to be as an effect of a chronic alcohol intake.

138. At the hearing, Dr. de Boer confirmed that the Rider's ABP shows that his MCV was elevated and that, while this is not per se fully conclusive, it is still the reason why the A-sample should not be treated as reliable. According to Dr. de Boer this is not surprising if one considers that the Rider has declared that he used to drink more than half a bottle of wine per day, which is a considerable amount in light of his body weight. Dr. de Boer further explained that in a context in which there is a biological evidence for possible alcohol consumption, obtaining the requested documentation to prove or disprove it by the UCI would have been key.

139. Besides, the Appellant submits that, according to Dr. de Boer, there are many other reasons that could explain these atypical findings and that that there is no reason why the result of the B-sample analysis should be less reliable than those of the A-sample analysis, such as, *inter alia*:

(i) there is no evidence that the A-sample analysis is actually the result of the Rider's A-sample as opposed to someone else's sample; (ii) there was no independent witness watching the A-sample opening and analysis; and (iii) the urine samples analyzed together with the alleged A-sample of the Rider could have been accidentally swapped.

140. Finally, the Appellant states that another explanation of the adverse findings could be the microbial activity increase due to the following circumstances:

a) the weather was extremely hot in Portugal during the period in which the samples were transported;

b) the transport of the samples took long time (*"19 hours in the possession of the DCO and additional 38 hours in the possession of the commercial courier"*); and

c) there is no evidence whatsoever of the temperature at which the samples were transported.

iv. The Lausanne laboratory is in conflict of interest and thus, its report cannot be trusted

141. The Appellant suggests that the Lausanne laboratory is under particularly extreme public pressure in connection with alleged premature destruction of Russian doping samples. He alleges that due to this pressure, the Lausanne Laboratory would not be willing to admit that it has not operated properly with regard to his analysis, since it would risk an immediate suspension and loss of its accreditation as WADA approved laboratory.

142. Therefore, the Appellant contends that any reports based on the information provided by the Lausanne laboratory are affected by its conflict of interest and must be disregarded.

v. According to the Appellant's experts, the A-sample should not be reported as positive

143. The Appellant provided a conjoint expert opinion of several experts in the present case. According to Prof. Eric Boye, Prof. Jon Nissen-Meyer, Prof. Bjarne Osterud and Tore Skotland, the A-sample should not be reported as positive, for the following reasons:

"The band patterns obtained in the laboratory demonstrate serious problems with the analyses. Sample B does not show the same pattern as sample A and, above all, not the smear that WADA uses as a diagnostic. The failure to see any hEPO in AC's sample moving with the same mobility as control HEPO suggests some quality problems. In these analyses – or requires an extraordinary explanation of these findings. Furthermore, it appears that the laboratory claims there is some variability in the method and that this suggestion makes sample A more reliable than sample B. The basis for this hypothesis is not given, except that it might support their own conclusion. It is equally likely that is the A-Sample that is suffering from variability. The lab report states pretty clearly that the A-Sample is NOT confirmed by the B-Sample. If a "suspicious" A-Sample is sufficient evidence for doping, the reasons for having a B-Sample in addition to the A-Sample is dramatically reduced, together with the athlete's right of law […]".

144. In the opinion of those experts, the data provided by the Lausanne laboratory were not complete and the following relevant ones were missing:

a) the original gel data: the documents only shows the results/gel lanes that have been cut out from the original gel and realigned;

b) the scan of the important lanes: the densitometric scan of the results, both urine samples and positive samples were not available;

c) the results of the blood analysis: a blood test would have permitted the analysis of the results that led to information regarding the natural migration of the Appellant's own EPO.

145. At the hearing, Dr. Boye suggested that it is the A-sample, rather than B-sample, that should be considered "inconclusive" and that it is not logical to consider "inconclusive" the B-sample only because it does not produce the same result of the A-sample.

146. According to the Appellant, the above matters would show that there is not sufficient evidence in the file to prove an ADRV.

vi. Constant CAS Jurisprudence confirms the necessity of the B-sample analysis – anything else violates the right to be heard

147. The Appellant's contends that consistent CAS jurisprudence holds that the confirmation of the A-sample analysis through the B-sample analysis is without exception necessary. In particular, the Appellant submits the following cases as relevant examples:

a) the Award CAS 2002/A/385, of 23 January 2003;

b) the Award CAS 2010/A/2161, of 23 February 2011;

c) the Award CAS 2015/A/3977, of 31 March 2016; and

d) the Award CAS 2008/A/1607, of 13 March 2013.

148. The Appellant alleges that a pattern of strict interpretation of the requisite formalities of the B-sample confirmed by this case law has not been followed in the present case.

vii. In the Appellant's view, this proceeding is an abuse of process and contains procedural impropriety

149. The Appellant alleges that, while there is no directly applicable case law from CAS that deals with abuse of process, there are clear distinctions between the treatment he received and the treatment received by other high-profile riders. In particular, the Appellant compares his case to that of Christopher Froome and submits that, unlike in Mr. Froome's case, (i) the Appellant did not benefit from WADA data, and these data were not disclosed to him along the

procedure despite his requests; and (ii) the initial findings in his own led straight to disciplinary action by UCI without any prior consultation with WADA.

150. In particular, Mr. Froome was informed that his A-sample had resulted positive for an amount of Salbutamol above the limits prescribed by WADA. But Mr. Froome had a therapeutic use exception for this substance because of his asthmatic condition. Mr. Froome requested specific information from WADA regarding Salbutamol testing. Having obtained this information, Mr. Froome wrote to the UCI to explain the abnormal results. Both WADA and UCI concluded that they could not proceed against Mr. Froome.

151. According to the Appellant, among the factors that contributed to WADA and UCI's decision were Mr. Froome's fame, the strength of his professional backers, the financial resources available to the rider, and the media pressure.

152. The Appellant notes that, unlike in Mr. Froome's case, the submissions to the UCI DC in the Appellant's case did not benefit from WADA data, and the relevant evidence he sought during the proceedings was not disclosed to him. Moreover, the original findings led straight to a disciplinary action without UCI consulting WADA.

viii. Damages

153. In his prayer for relief, the Appellant asked the Panel that the Respondent be ordered to pay an adequate sum as damages and an adequate compensation for the reputational harm done for the suspension until today. Said material damages are fixed by the Appellant at EUR 219.20 per day (EUR 80.000 per year), moral damages excluded.

ix. The Appellant's position regarding the Panel's questions after the Hearing

154. In relation to the <u>first</u> question of the Panel i.e., whether the World Anti-Doping Code International Standard for Laboratories (the "WADC ISL") of June 2016 applies to this case, as opposed to the WADC ISL of November 2019, the Appellant submits that the former applies.

155. In relation to the <u>second</u> question of the Panel, i.e., whether the Parties can address the content and the consequences of Articles 5.2.4.3.2.3 which provides that: *"If the B-Sample confirmation proves negative the entire test shall be considered negative"* and 5.2.4.3.2.10 of the WADC ISL of 2016 which states: *"If the "B" Sample confirmation proves negative, the Sample shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding"*, the Appellant presents several cases (Marion Jones case, Bernard Lagat case and the Jockey Club case) in which where the result of the B-sample differed to the A sample (by way of a negative or simply different result), the A-sample's results were rejected and proved negative.

156. In relation to the <u>third</u> question of the Panel, i.e., whether the Parties could explain the relationship between Article 5.2.4.3.2.3 and Article 5.2.4.3.2.10 of the WADC ISL and Article 2.2 of the UCI ADR, the Appellant submits that Article 2.2 of the UCI ADR must be compliant with the WADC ISL 2016 and if not, the ISL 2016 shall take precedence, as these

standards are mandatory. Therefore, according to the Appellant, since the ISL makes the position perfectly clear with regards to B samples, where the UCI ADR 2.2 is not compliant, with the WADC ISL 2016, the UCI regulations must be disregarded.

157. In relation to the fourth question of the Panel, i.e., whether the Parties could comment on the WADA Athlete Reference Guide and the two sources in German, the Appellant submits that these sources only support its contention that if the B sample does not confirm the analysis of the A sample, no further action shall be taken against the athlete. In particular, according to the Appellant, the Athletes Guide is very clear in this respect: if the B sample does not confirm the A sample's results, the athlete is cleared and the suspension is lifted. Moreover, the two German books (i.e., Rössner and Sports Law in Practice) further strengthen the Appellant's conclusion that the B sample is the binding final evidence that can eliminate the suspicion and the conditional probative value of a positive A sample.

158. In relation to the fifth question of the Panel, i.e., on the hierarchy of norms in case of any inconsistency between the WADC ISL and the UCI ADR (or the World Anti-Doping Code 2015 (the "WADC")), the Appellant submits that the WADC ISL takes precedence over the UCI ADR and the latter must be compliant with the WADC ISL and the Code. This is further confirmed by the fact that, according to the Appellant's reading, key provisions of the UCI Regulations (i.e., section 5.5 on Testing Requirements, section 6.4 on Standards for sample Analysis and Reporting and Section 7.5 on Review of Atypical Passport Findings and Adverse Passport Findings) emphasise the importance of the WADC ISL and the fact that the UCI will conform with the WADC ISL 2016.

159. Lastly, in relation to the sixth question of the Panel, i.e., whether the Parties could provide their view as to what significance of the B-sample in the procedure of taking evidence where an athlete has been charged with an ADRV and as to whether a charge under Article 2.2 can ever be made good on the absence of a valid B sample, the Appellant submits that the B sample test is there to ensure confirmation of the athlete's guilt or innocence. According to the Appellant, if an athlete has been charged of an ADRV and the authorities are correct in their findings, the results of the B sample should be no different to the A sample. Moreover, the presence of the athlete in the B sample testing and investigation process protects the athlete's rights to a fair and just treatment.

160. Conclusively, according to the Appellant, the WADC ISL, the Athlete's Guide and the UCI ADR under its Article 2.2, all support the point that if the B sample's finding differ from the A sample's finding, the latter shall be considered invalid.

B. The Respondent's position

161. The Respondent filed its Answer on 2 December 2019. In its prayer for relief, the Respondent requests the Panel to rule as follows:

"(i) Denying jurisdiction with respect to Mr. Cardoso's claim for damages.

(ii) Dismissing Mr. Cardoso's Appeal and all prayers for relief.

(iii) Upholding the Decision of the Single Judge of 15 November 2018.

(iv) Condemning Mr. Cardoso to pay a contribution towards the UCI's legal fees and other expenses".

1. The Respondent's position on jurisdiction

162. The Respondent contends that the Appellant initiated this arbitration without challenging the jurisdiction of the CAS. According to the Respondent, Article 186(2) of the Swiss Private International Law Act (PILA) provides that *"a plea of lack of jurisdiction must be raised prior to any defence on the merits"* and therefore, he would be in any event estopped from challenging the jurisdiction of the Panel as, under Swiss law, a party addressing the merits without objecting to jurisdiction is deemed to have submitted to the jurisdiction of that arbitral tribunal in question.

163. As to the Appellant's purported unilateral annulment of the arbitration agreement, the Respondent emphasizes that the question to be answered is whether he validly annulled the relevant arbitration agreement.

164. The Respondent submits that, having reviewed the Legal Aid Orders and the communications between the ICAS and the Appellant about his request for legal aid, his annulment of the arbitration agreement was not valid.

165. Under Swiss arbitration law, it is generally acknowledged that, like any other kind of contracts, arbitration agreements can be affected by a so-called defect in consent (*"vices du consentement"*). The annulment of an arbitration agreement for defects in consent is a substantive matter. As to the substance, the Respondent submits that the arbitration agreement will be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law. In the present case, the Parties did not enter into any choice of law agreement concerning the validity of the arbitration agreement, which means that the substantive validity of the arbitration agreement (and in particular its unilateral annulment by the Appellant) must be governed by Swiss law.

166. In the present case, the defects in consent relied upon by the Appellant, are that of *"fundamental error"* and *"fraud"* (as he claims that he was *"defrauded"* by the UCI). However, the Respondent alleges that there is no defect of consent, neither a fundamental error nor a fraud that has been demonstrated in the present case by the Appellant.

167. It follows from the above that according to the Respondent, the CAS has jurisdiction in the present matter based on the relevant provisions of Swiss law.

2. The Respondent's position regarding the Appellant's procedural complaints

168. The Respondent's position with respect to two procedural complaints raised by the Appellant, notably (i) the length of the proceedings and the alleged abusive behavior of the UCI DC; and (ii) the breach of Article 6 ECHR is set out below.

169. With respect to the first complaint, the Respondent submits that the Appellant rejected all offers made by UCI ADT to speed up the resolution of his case.

170. With respect to the second complaint, the Respondent submits that the Appellant's arguments are misconceived, for two main reasons namely: (i) Article 6 ECHR is not applicable before internal tribunals like the UCI ADT, the decisions of which can be challenged either in court or, as in the present case, in CAS arbitration; and (ii) given that CAS appeals are *de novo*, the alleged breaches are cured by the present proceedings.

3. The Respondent's position regarding the present CAS proceedings

171. Regarding the complaint raised by the Appellant about the composition of the Panel, the Respondent contends that the Panel is impartial and independent. The Respondent recalls that in the ECHR 324 (2018) *Mutu and Pechstein v. Switzerland* case, the European Court of Human Rights held that, despite the fact that sports organizations may have a preponderant influence on the mechanism of appointing arbitrators, such influence does not mean that the CAS system cannot be regarded as independent and impartial. Additionally, the Respondent alleges that the Appellant has not adduced any evidence of the way in which the Panel has been appointed has any impact on the discharge of its functions.

172. Regarding the equality of arms' argument, the Respondent recalls the various extensions of deadlines that have been granted to the Appellant, the fact that he has filed dozens of submissions, petitions and challenges and was therefore shown to be fully able to present its case. Moreover, the Respondent notes that even during the short period when he was (allegedly) not represented by professional counsel, his letters clearly indicated that he had access to proper legal advice.

173. With respect to legal aid, unlike Article 6 par. 3 ECHR applicable to criminal proceedings, Article 6 par.1 ECHR does not guarantee the same full equality of arms between the assisted person and his opponent. Moreover, the Appellant also benefited before the state court from legal aid but has not submitted a single piece of technical evidence in the proceedings before that court which was not already submitted in this arbitration. Hence the Appellant cannot complain of a breach of Article 6 par. 1 ECHR.

174. At the hearing, the Respondent clarified that the Appellant has been treated in a similar way to every other athlete in the sports' world and that nothing has been done inconsistent with the applicable rules and regulations on the subject, in the following terms:

"According to the WADA Code, the athlete must go to CAS. The WADA Code is only asking for a fair hearing not for a full legal aid system. The UCI does not offer legal aid as any other federation. And it is not required by the WADA code or the law. This is precisely the reason why there is a possible appeal before a CAS Panel. What the UCI did is reminding the Rider the possibility he had to request for legal aid at CAS. Never did the UCI judge promises Mr. André Cardoso that he would have legal aid before the CAS. All that has been said to Mr. André Cardoso is that the UCI does not provide legal aid and the CAS might".

175. Additionally, the Respondent denies any analogy between Mr. Froome's and Mr. Cardoso's cases. Nevertheless, it contends that even if one compares the two cases, the Appellant has not been treated differently from Mr. Froome.

176. Regarding the disclosure requests, the Respondent notes that, despite the Panel's Second Order on Document Production, the Appellant has continued to seek document production. However, because of that Order, the Respondent considers the issue to be moot.

177. Regarding the applicable law, the Respondent explains that, in its opinion, these proceedings are governed by Article R58 of the CAS Code and therefore the Appellant's assertion that the mandatory and non-mandatory laws in Portugal not envisaged by that Article in a case such as the present one must be dismissed.

178. At the hearing, the Respondent stated clearly that this is not the right forum to discuss issues of fair treatment and that, in this light, the jurisdictional challenge brought by the Appellant is both artificial and self-serving, as its main purpose is that of seeking to create a ground for appeal. According to the Respondent, considering the entirety of the jurisdiction argument in the appeal brief the only part relating to jurisdiction is that which addresses whether the Appellant has cancelled the arbitration clause due to the legal aid order. However, the Respondent asserts that there is no explanation, or ground adduced to justify this purported cancellation.

4. The Respondent's position on the merits

179. The Respondent develops various arguments on the merits, namely: (a) that the ADRV has been established in accordance with the UCI ADR and relevant CAS jurisprudence; (b) that the ADRV is based on reliable evidence and there is a satisfactory explanation for the lack of confirmation in the B-sample; and (c) that the Rider failed to provide an explanation for the presence of rhEPO in his A-sample.

i. The ADRV has been established in accordance with the UCI ADR and relevant CAS jurisprudence

180. The Respondent first notes that the Rider's position is that an ADRV on the basis of the analysis of urine is exclusively governed by Article 2.1 of the UCI ADR, which concerns the presence of a Prohibited Substance in an athlete's sample.

181. According to the Respondent, this position is misconceived, insofar as Article 2.2 of the UCI ADR at stake here expressly provides for an ADRV for use, which is based solely on the analytical data of the analysis of the A-sample. The Respondent relies upon Article 2.2 of the UCI ADR in contending that, simply on the basis of the literal wording of this provision, even in cases, such as the present case, where the B sample did not confirm the analysis of the A sample, an ADRV can be found.

182. Indeed, according to the Respondent, where the two express conditions required in the Comment to Article 2.2 of the UCI ADR are satisfied (i) the analytical data from the A-sample analysis is reliable; and (ii) the Anti-Doping Organization, which in this case is the UCI ADT,

is able to provide a satisfactory explanation for the lack of confirmation in the B-sample that Article can be relied on to found an ADRV.

183. Moreover, the Respondent submits that the CAS decisions relied on by the Rider to allege that the B-sample analysis is necessary, without exception are not relevant in the present case and do not support the Rider's own position.

ii. The ADRV is based on reliable evidence and there is a satisfactory explanation for the lack of confirmation in the B sample

184. According to the Respondent, the UCI has established to the required degree of comfortable satisfaction, that Mr. Cardoso has used rhEPO. Indeed, as accepted by the Single Judge in the UCI ADT proceedings, in this case (i) the analysis of Mr. Cardoso's A-sample constitutes reliable analytical evidence; and (ii) there is a satisfactory explanation for the lack of confirmation in Mr. Cardoso's B-sample.

185. To this end, Respondent submits that: (1) there is no evidence that Mr. Cardoso's A-sample was swapped; (2) the fact that the Rider's blood sample tested negative for the presence of ESAs is irrelevant; (3) the presence of rhEPO was clearly and validly identified in the Rider's A-sample; and (4) the UCI's experts have provided a satisfactory explanation for the lack of confirmation in the B-sample.

a. Sample swapping can be ruled out

186. As to the allegation of possible swapping of Mr. Cardoso's A-sample, the Respondent contends that this scenario is very unlikely:

a) the Laboratory has treated this case with seriousness and taken all possible measures to rule out the possibility of a false positive,

b) the evidence on file shows that there was no swapping of samples in this case as the negative serum sample does not detract from the reliability of the AAF in relation to the A-sample: the Laboratory correctly and reliably identified the presence of rhEPO in the A-sample, and there is a satisfactory explanation for the absence of confirmation in the B-sample.

b. The Rider Negative Blood Test is Irrelevant

187. The second Expert Opinion from Dr. Günter Gmeiner and Dr. Christian Reichel of the Seibersdorf WADA-accredited Laboratory, dated 7 January 2018 (the "Second Seibersdorf Opinion"), confirmed that the negative analysis of the Rider's serum sample does not impact upon the reliability of the presence of rhEPO in the Rider's urine. It explains that substances which have left the blood stream via renal elimination may be detectable in the urine sample, while no longer be detectable in the corresponding blood/serum/plasmA-samples, even if these samples are taken at the same time, as follows:

"[11] Is it possible for a Rider's blood sample to test negative for recombinant EPO on the same day as the same Rider's urine tests positive for recombinant EPO ?

Yes, this is possible. This does not invalidate in any way our conclusion that the rider's A sample contained rec. EPO. Nor does it explain why the B sample is inconclusive.

12: If so, how can this be explained?

If the rec. EPO in the urine sample has already left the blood stream, it is consequently no longer present in this bodily liquid, representing the final stage of elimination of rec. EPO from the body.

Urine is considered a reservoir, where excreted substances are collected till urine delivery (micturition). Consequently substances which have left the blood stream via renal elimination are detectable in the urine sample, but might no longer be detectable in the corresponding blood/serum/plasmA-samples, even if these samples are taken at the same time.

An indication of the low concentration of rec. EPO in urine is the low intensity of the rec. EPO band comparison to the endogenous band. This does not unequivocally prove the final step of elimination, but is compatible with this assumption".

c. Presence of rhEPO was clearly and validly identified in the A-sample

188. The Respondent contends that, according to Article 3.2.1 of the UCI ADR, analytical methods or decision limits approved by WADA are presumed to be scientifically valid and a rider seeking to rebut such presumption must first notify WADA of a challenge to it and the basis of said challenge. However, in the present case, the UCI emphasizes that despite the Rider's various challenges to the reliability of the A-sample, he has neither challenged the underlying method used, nor alleged, that any departure from international standards / anti-doping regulation occurred.

189. According to the Respondent, given that there is no challenge of the underlying method, results from the EPO analytical methodology are, *prima facie*, reliable evidence.

190. Moreover, the UCI submits that the Laboratory Documentation Package, the four additional reports submitted during the UCI ADT proceedings, and the supplementary joint expert report issued by the Lausanne and the Seibersdorf laboratories in these proceedings (the "Joint Expert Report") clearly establish the reliability of the analytical results which confirmed the presence of rhEPO in the Rider's A-sample.

191. In this Joint Expert Report, the UCI experts have confirmed that the analysis of Mr. Cardoso's samples was conducted in accordance with the relevant regulation, i.e. the TD2014EPO. In particular, the experts confirmed that the *"diffuse or faint area"* above the corresponding endogenous band, as provided for under Article 4.2.2 of the TD2014EPO, was correctly identified in Mr. Cardoso's A-sample, but not in his B-sample.

192. The confirmation procedure carried out on the Rider's A-sample resulted in the same conclusion, namely that the acceptance and identification criteria set out in the relevant Technical Document for the analysis of EPO (TD2014EPO) were met, which is why the Rider's A-sample was submitted to an external expert for a second opinion. This second opinion was provided by Dr. José A. Pascual, who confirmed that Mr. Cardoso's A-sample *"unequivocally shows the presence of recombinant EPO"*.

193. In addition to the Internal Assessment, the UCI had obtained an additional expert report from another WADA accredited Seibersdorf laboratory (the "First Seibersdorf Opinion"), in which Drs Gmeiner and Reichel confirmed that: *"The sample shows a mixed band profile as described in WADA TD2014EPO, page 11 (section 4.2.2.2). A faint smear above the endogenous band is present and indicative for recombinant erythropoietin of the EPO alfa/beta type. No such smear is detectable for the band of the negative control sample.* […]*"*.

194. The Respondent further notes that Mr. Cardoso did not positively rebut the validity of these A-sample testing results in the UCI ADT proceedings, but has simply suggested that such results are unreliable.

195. Based on the above, the UCI's experts concluded as follows:

"Our own concluding remarks are:
i. Nothing in the Scientific Report indicates that the TD2014EPO was not applied correctly or that EPO was not identified in the A Sample in full accordance with the criteria in that document.
ii. Certain criticisms in the Scientific Report (e.g. that the "presence of a smear by itself is not a good diagnostic criterion for the presence of rEPO") are criticisms relating to the analytical method, not to its application in this case.
iii. Degradation is an evident and satisfactory explanation for the B Sample results.

We therefore reconfirm our prior opinions that:
i. EPO was correctly identified in the A-Sample in accordance with the TD2014EPO.
ii. Sample swapping can be excluded (see in particular the report of Dr. Kuuranne from 12 January 2018).
iii. Degradation is a satisfactory explanation for the B Sample results".

iii. The UCI has provided a satisfactory explanation for the absence of confirmation of the presence of rhEPO in the Rider's B-sample.

196. In accordance with the comment to Article 2.2 of the UCI ADR, the UCI is required to establish that there is *"a satisfactory explanation for the lack of confirmation in the other sample"*. In this respect, the Respondent submits that on the basis of the Internal Assessment, the First and Second Seibersdorf Opinions and the Final Joint Expert Report submitted with its Answer, it has satisfied this burden.

197. The Laboratory's Internal Assessment ultimately concluded that *"immunopurification and/or degradation of EPO are highly likely phenomena as a source of the inconsistence in analytical result between A- and B-sample 4121328"*.

198. In the First Seibersdorf Opinion, Dr. Gmeiner and Dr. Reichel concluded that: "[…] *the conclusion of the laboratory is shared by the experts of this report. Especially the elevated pH as a consequence of possible microbial degradation is regarded as the main contributor to analyze lability in the sample. As already indicated above, this assumption is strengthened by the decrease in band intensity from A- to B-sample confirmation analysis"*.

199. In addition, the conclusion of the Second Seibersdorf Opinion was:

"[6] In your professional opinion, what is the most likely cause of the difference between the results of the A sample and the results of the B sample?

The most likely cause of the difference is a degradation of the EPO in the B-sample. [...]

[9] […]

As explained above, there are at least two clear indications of degradation (drastic decrease of the signal intensity and elevated pH).

The only two other possible explanations in the present case are theoretical and are not supported by the documentation.

Of course, if such alternative explanations were established, they would also constitute a satisfactory explanation. In the present case however, based on the documentation and evidence that we have reviewed, degradation constitutes a satisfactory explanation for the lack of confirmation in the B-sample.

[10] Do the results of the B-sample in any way detract from the validity of the Adverse Analytical Finding for the presence of recombinant EPO in the A-sample?

No.

The A-sample result is clear and conclusive for the presence of rec. EPO in the urine sample. The B-sample analysis does not confirm this A-sample finding, which means that the final result is inconclusive under the WADA TD2014EPO.

There is no analytical evidence arising out of the B-sample that would indicate that the results of the analysis of the A-sample were inaccurate. Up to our opinion the B-sample result does not detract from the validity of the A-sample finding. […]".

200. In light of the above, the Respondent submits that evidence has established that: (i) there was no swapping of samples in this case; (ii) the negative serum sample does not detract from the reliability of the AAF in relation to Mr. Cardoso's urine A-sample; (iii) the Laboratory correctly and reliably identified the presence of rhEPO in that urine A-sample; and (iv) there is a satisfactory explanation for the lack of confirmation in the B-sample.

201. Therefore, according to the Respondent, the only remaining question that needs to be determined is whether the Rider has provided an acceptable explanation for the presence of rhEPO in his A-sample.

iv. The Rider failed to provide an explanation for the presence of rhEPO in his A-sample

202. The Respondent notes that the Appellant has maintained that the AAF was caused by a Glycosylation Disorder. In order to address the Rider's argument that a glycosylation disorder may have caused his AAF, the UCI sought the opinion of Dr. Martial Saugy and of Prof. Hugues Henry.

203. In their report, Dr. Saugy and Dr. Henry explained that even if Mr. Cardoso had suffered from a glycosylation disorder, this could not in any event explain the presence of rhEPO in the A-sample as it *"would have no influence on the glycosylation of EPO"*.

204. At the hearing, Dr. Saugy was called to testify as to whether, in his opinion, the Rider was abusing of alcohol at the time of the test. In this respect, Dr. Saugy clarified that an abuse would result in a decrease of the molecular mass of the protein instead of an increase, as occurred in the case of Mr. Cardoso:

"We know that the major factory of the EPO is the kidney and not the liver. What we know about alcoholism is that the protein is made by the liver only where there is certainly more than half a bottle a day for many days.

The effect of such chronic use is that the molecular mass of the protein would decrease. So it would never happen that a chronic use would cause the increase of the molecular mass. All the publications are showing that even the ones quoted by Dr. De Boer. I can tell you that it is impossible that an ethical committee allows an experience that is based on a theory that is simply impossible.

With respect to MCV it is a good marker for alcoholism but it also could be caused by other elements. As to ethylglucuronide it is not a marker of alcoholism but a marker of alcohol consumption. If you drink a beer an hour before the test, you will have ethylglucuronide".

205. Moreover, in relation to the suggestion of the Appellant that the AAF might have been caused by microbial activity, Dr. Gmeiner and Dr. Reichel emphasised the following:

"Microbiological activity causes enzymatic degradation of EPO. Both, recombinant and endogenous EPO are affected similarly. Degradation by sialidases will lead to a decrease in molecular mass by removal of neuraminic acids, which are part of the glycans on EPO. Sialidases do not affect the amino acid backbone of EPO. Contrary to that, proteases will lead to a partial or complete degradation of EPO, which results in a decreased EPO signal on Western blots. An adverse analytical finding due to microbial activity would require de novo syntheses of e.g. glycans on human EPO-processes, which are too complex to occur in urine. There is no indication from the analytical data presented that the presence of rec. EPO in the A-sample is caused by microbial activity".

206. In light of the above, the Respondent submits that microbial activity can be ruled out as an explanation for the presence of rhEPO in the Rider's A-sample.

207. At the hearing, the Panel asked Dr. Gmeiner to give his expert opinion as to the B sample. which, Dr. Gmeiner expressed as follows:

"It is clear that the B sample does not show the same result as the A sample. If it was for the B sample alone we would have reported the sample as negative. We were asked to give our opinion on the possible reason for the differences in the B sample. The signal in the B sample has decreased a lot in intensity. The PH of the Sample is at 8. And from my observation only 2.5% of the samples have such PH. A possible explanation is microbial activity.

There are two possible microbial activities that could have caused this decreased in intensity:

- *[inaudible] activity (so called S activity), and*
- *Proteolysis activity (so called P activity).*

The difference between the two is that the S activity is going into the sugar. This has the consequence that you should still see the signal intensity but going down on the gel. What we see is not that. We see a decrease in intensity. The P activity results to a decrease of the signal.

So giving that, the explanation for the B sample is that if you decrease the intensity by 70%, since there is a lot of endogenous EPO and less Exogenous EPO, the endogenous will remain and the exogenous will still be there.

From my experience as a Laboratory director, I can say that there are differences between the A and B sample. We are talking about biological materials that are not always homogenous. One of the most probable reasons for the difference between the two is the fact that the B sample has to be stored and frozen and that can caused a decrease on the concentration. So the predominant reason for the decrease and the defect is the P activity".

208. As to the Rider's suggestion that the UCI would be responsible for the degradation of the rhEPO in its sample, the Respondent contends that it should not be held responsible for the delay that occurred between the analyses of the A- and B-samples and, thus, the degradation of the rhEPO in the Rider's B-sample, as these delays are entirely attributable to the Rider's postponement of the B-sample analysis until 25 July 2017 so that his expert could attend the analysis.

209. Lastly, the Respondent addressed the Appellant's allegation that any expert from a WADA-accredited laboratory has an inherent conflict of interest. In this respect, according to the Respondent, it would be absurd to think that any expert from a WADA-accredited laboratory has an inherent conflict of interest such that his or her opinion must be disregarded as, on the contrary, the Laboratory has an interest in preserving its reputation for unbiased scientific evaluation.

210. The Director of the Laboratory, Dr. Tiia Kuuranne, when asked to address the allegations raised against the Lausanne Laboratory, stated as follows:

"In my capacity as the current director of the LAD, I can confirm that neither my staff nor myself ever felt to be "under public pressure" as claimed by the Rider's defense. The suggestions of wrongdoing related to sample

destruction made in the report mentioned by the Rider's defense, which have also been proven wrong in the meantime, have never affected the LAD work in general and had not influence whatsoever on the routine in which urine sample 4121328 was analyzed.

I must also contest the insinuation that the evaluation matrix of WADA external quality assessment scheme (EQAS) would have induced the LAD to provide a false explanation for the B-sample not confirming the A-sample result in fear of losing the WADA accreditation status. I can confirm that I have drafted the "Internal Assessment" with the only purpose of following our quality management system to identify "any internal or external factor(s) which could have contributed to the observed differences between the A- and B-sample analysis".

211. Moreover, the Respondent submits that the findings of Dr. Kuuranne in the Internal Assessment were confirmed by other experts working for other WADA-accredited laboratories, notably Dr. Gmeiner and Dr. Reichel.

212. At the hearing, Dr. Kuuranne confirmed that it suffered no type of public pressure while providing the results and that, in any event, the fact that it dealt with anonymous samples prevented the laboratory from making any comparison between their results:

"With respect to the pressure that we as a Laboratory would have experienced, I deeply disagree with this statement. We have 200 independent scientists whose findings have been confirmed by an exterior scientist doctor Pasqual. The final conclusion with respect to the B sample has to be made by considering the existence of the A sample. And because of the existence of the A sample the result of the B sample is an atypical finding.

As to why the B sample has not been repeated, we have a positive and negative control process. And in this case the quality criteria for the analysis were met. We did not have the trigger for the repeat. On the contrary, if we had repeated the analysis, we would have been accused of targeting the athlete and not being fair in our analytical process. Furthermore there would be no further urine left for further analysis if we had repeated the analysis.

Finally, we deal with anonymous sample so it is not possible for us to compare the results. We only repeat our standard procedures for A and B sample".

213. Moreover, when the Panel asked her whether she agree with Dr. Gmeiner on the potential degradation of the B-sample, Dr. Kuuranne answered in the affirmative and further agreed with Dr. Gmeiner's opinion with respect to the explanation of the cause of the difference between the samples i.e., degradation of the B-sample due to microbial activity.

214. Based on the above, the Respondent submitted that (i) the UCI has established the ADRV for Use against Mr. Cardoso in accordance with the relevant regulations and CAS jurisprudence; (ii) the results of the A-sample are reliable; (iii) Mr. Cardoso has failed to validly rebut the UCI's experts' explanation that degradation is the likely cause of the lack of confirmation of the presence of rhEPO in the Rider's B-sample; and (iv) Mr. Cardoso has equally failed to provide an explanation for the presence of rhEPO in his A-sample.

215. In conclusion, the Respondent submits that given the presence of rhEPO in Mr. Cardoso's A-sample and the satisfactory explanation, provided by the UCI, for the lack of confirmation in the B-sample, Mr. Cardoso has committed an ADRV for Use in accordance with Article 2.2 of the UCI ADR.

v. Sanctions and consequences

216. The Respondent seeks to uphold the Appealed Decision and, in particular, the four-year period of ineligibility imposed on Mr. André Cardoso.

217. Pursuant to Article 10.2.1.1 of the UCI ADR, the Period of Ineligibility for an ADRV of Use for a non-Specified Prohibited Substance shall be four years, unless the Rider can establish that the ADRV was not intentional. The Respondent submits that in this case the Rider has neither argued nor established that his ADRV was not intentional with the result that the 4-year ineligibility period shall be confirmed and the Rider should not benefit from any reduction of sanction.

218. Regarding the fine, the Respondent upholds that, while Mr. Cardoso claims that he is allegedly losing EUR 219.20 per day since the start of his suspension, he has not submitted any argument justifying a reduction of a fine. Therefore, the decision of the UCI ADT to impose a sanction in the amount of EUR 56'000.- (i.e. 70% of EUR 80'000.-) on the Rider should be upheld.

vi. The Respondent's request to reject the Appellant's claims for damages

219. With respect to the damages allegedly suffered by the Appellant on the ground that, during his provisional suspension, he did not receive his salary, the Respondent submits that as the jurisdiction of the Panel is limited to the scope of the arbitration agreement, the Panel cannot to address this claim as in the present case, the arbitration agreement is limited to the appeal against the Appealed Decision

220. On the merits, the Respondent alleges that any claim for damages has not been substantiated and must, in any event, be dismissed.

vii. The Respondent's position regarding the Panel's questions after the Hearing

221. In relation to the <u>first</u> question of the Panel i.e., whether the WADC ISL of June 2016 apply to this case, as opposed to the WADC ISL of November 2019, the Respondent confirms that the WADC ISL of June 2016 apply to the present case.

222. In relation to the <u>second</u> question of the Panel, i.e., whether the Parties can address the content and consequences of Articles 5.2.4.3.2.3 which provides that: *"If the B-Sample confirmation proves negative the entire test shall be considered negative"* and 5.2.4.3.2.10 of the WADC ISL of 2016 which states: *"If the "B" Sample confirmation proves negative, the Sample shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding"*, the

Respondent submits that these provision are neither decisive nor relevant to the dispute at stake for the following reasons:

a) *first*, in the present case, the B-sample confirmation was not reported as "negative" but as an atypical finding (ATF), hence, Articles 5.2.4.3.2.3 and 5.2.4.3.2.10 of the ISL are inapplicable;

b) *second*, Article 5.2.4.3.2 of the ISL regulates the "B sample Confirmation" and the reference to "Confirmation" in and of itself necessarily applies to an ADRV of Presence (Article 2.1 of the UCI ADR or WADC) and not to an ADRV of Use (Article 2.2);

c) *third*, the position that a negative finding (or unconfirmed AAF) in an athlete's B sample does not prohibit an Anti-Doping Organisation from proceeding with an assertion of a Use ADRV, is supported by Article 7.3.4 of the WADA Model Rules, as well as in legal commentary expressly dealing with the interplay between the Comment to Article 2.2 of the WADC and the relevant provisions of the ISL. In particular, the Respondent believes it is required to proceed with an assertion of Use where there is reliable analytical evidence from the A-sample as well as a satisfactory explanation for the lack of confirmation in the B-sample. According to the Respondent, if it did not pursue an ADRV of Use in a situation where there is no explanation for the identification of EPO in a rider's A sample, the Respondent would have been acting in a manner that is non-compliant with the WADC.

223. Therefore, the Respondent submits that, with respect to the present case, Articles 5.2.4.3.2.3 and 5.2.4.3.2.10 of the ISL are: (i) inapplicable to the Rider's ATF sample; (ii) not relevant to an ADRV of Use in any event; and (iii) not inconsistent with the comment to Article 2.2 of the UCI ADR. Thus, no consequences shall be drawn from them.

224. In relation to the third question of the Panel, i.e., whether the Parties could explain the relationship between Article 5.2.4.3.2.3 and Article 5.2.4.3.2.10 of the WADC ISL and Article 2.2 of the UCI ADR, the Respondent submits what follows:

a) there is no inconsistency between the WADC and the ISL when these provisions are considered in their proper context and within the hierarchy of norms in the World Anti-Doping Program;

b) the WADA Model Rules (Article 7.3.4) expressly address the interplay between the comment to Article 2.2 and the ISL provisions and demonstrate that even where a sample has been declared negative an International Federation can elect to proceed with a Use violation under Article 2.2;

c) the Panel's assessment must be made on the basis of the express comment to Use in Article 2.2 of the UCI ADR, namely, whether there is: (i) reliable evidence of the use of EPO; and (ii) a satisfactory explanation for the lack of confirmation in the B-sample.

225. In relation to the <u>fourth</u> question of the Panel, i.e., whether the Parties could comment on the WADA Athlete Reference Guide and the two sources in German, the Respondent submits that:

a) the WADA Athlete Reference Guide is not a binding document and makes clear at the very outset that it is not intended to substitute the WADC;

b) the German source *"Sportrecht in der Praxis, 2018"* may include other extracts which have not been completely translated and that are relevant and/or the author may have simply not considered the impact and relevance of the comment to Article 2.2 of the WADC and UCI ADR in forming his conclusions on this provision in the ISL;

c) the German source *"Die Bedeutung der B-Probe für den Nachweis eines Dopingvergehens, Sport und Recht 2/2009"* does not refer, in the translated passage, to the comment to Article 2.2 of the WADC, and thus it appears that this provision has not been taken into account by the author in forming his conclusions on the decisiveness of a B-sample confirmation. This suggests, according to the Respondent, that the author was exclusively discussing the issue in the context of an ADRV of "Presence" under Article 2.1. Also, the Respondent points out that the reference to the Lagat case should be disregarded since this case took place before the very existence of the WADC (and thus before the comment to Article 2.2).

226. In relation to the <u>fifth</u> question of the Panel, i.e., on the hierarchy of norms in case of any inconsistency between the WADC ISL and the UCI ADR (or the WADC), the Respondent submits that the WADC is at the top of the hierarchy, followed by (i) the International Standards (and Technical Documents) and (ii) the Models of Best Practices and other Guidelines. Thus, the Respondent contends that neither Articles 5.2.4.3.2.3 / 5.2.4.3.2.10 of the ISL nor the WADA Athlete Reference Guide can limit - or include additional requirements - in a manner inconsistent with the definition of Use and how it can be established in the UCI ADR. Moreover, according to the Respondent, differently to the Code (and the UCI ADR) which sets out the fundamental elements of the possible ADRVs (Article 2), and the precise "Methods of Establishing Facts and Presumptions" in relation to those ADRVs (Article 3), the *"main purpose"* of the ISL is not to directly regulate the relationship between the UCI and its riders, but rather the relationship between WADA and its Laboratories and the specific technical and operational elements that such Laboratories are required to meet in order to produce reliable evidence. Thus, the Respondent submits that the ISL can in no way override the fundamental concepts in the WADC (or the UCI ADR).

227. Lastly, in relation to the <u>sixth</u> question of the Panel, i.e., whether the Parties could provide their view as to what significance of the B-sample in the procedure of taking evidence where an athlete has been charged with an ADRV and as to whether a charge under Article 2.2 can ever be made good on the absence of a valid B-sample, the Respondent contends that:

a) the significance of the B-sample in the present case is that it (a) does not detract from the reliability of the A-sample (b) assists in ruling out sample swapping and (c) supports the *"satisfactory explanation for the lack of confirmation"*; and

b) an ADRV of Use can be *"made good in the absence of a valid [quod non] B sample"*.

228. Conclusively, the Respondent submits that the relevant issue for the Panel to determine is whether it is satisfied that there was: (i) reliable evidence identifying EPO in the Rider's A-sample; and (ii) a satisfactory explanation for the lack of confirmation in the B-sample.

V. JURISDICTION

A. Applicable Rules

229. According to Article R47 of the CAS Code:

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

230. Article 13.1 and 13.2 of the UCI ADR provide as follows:

"13.1 Decisions Subject to Appeal

Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in these Anti-Doping Rules. […]

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction
- a decision that an anti-doping rule violation was committed,
- a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, […]
may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving International-Level Riders or International Events In cases arising from participation in an International Event or in cases involving International-Level Riders, the decision may be appealed exclusively to CAS".

231. Subject only to the Appellant's objections, discussed below, these provisions on their clear language confer jurisdiction upon the Panel to determine this appeal

B. The Appellant's objections to the proceedings

232. In his various correspondence, written submissions and at the hearing, the Appellant contended that he was denied legal aid in breach of the principle of equality of arms, which is a sub-component of Article 6 ECHR and resulted in the Appellant being deprived of his right to have a fair hearing. Moreover, the Appellant complained that the CAS system overall lacks of integrity and is dominated by ICAS, which is controlled by sport federations such as the

UCI and is subject to rules chosen by the sport federations, thereby being inherently biased against athletes.

233. The Respondent's general position put forward in its written submission and at the hearing is that the Appellant's so-called "jurisdictional" challenge was *"both artificial and self-serving"* and constructed in order to create a ground to appeal to the European Court of Human Rights if an appeal to the Swiss Federal Tribunal against any adverse order by this Panel did not succeed.

234. At the outset, this Panel cannot but notice that, technically, the Appellant's main line of argument seemed to be directed to whether the proceedings before this Panel are *"fair proceedings"*, which is not itself an argument challenging the Panel's jurisdiction. The sole exception was the argument based on the Appellant's unilateral annulment of the arbitration clause for defect of consent, ("the annulment argument") which was, it accepts, truly a jurisdictional argument. Curiously, it was not elaborated at the hearing but since it had previously been advanced in correspondence – the Panel will address it hereinafter at §254.

235. Indeed, the Panel, at the hearing, asked the Appellant to clarify the basis of his objection to jurisdiction and whether this was properly classified as a jurisdictional as opposed to a fair process issue. The Appellant in response simply restated his position that, by having had his requests for Legal Aid granted to a limited extent or denied (see Legal Aid Orders dated 25 January 2019 and 4 March 2019), the Appellant was not able to have the proper financial support needed for costs relating to CAS proceedings, in terms of having his representative of choice, specifically his counsel, Mr Thomas Wehrli and/or Dr. Thilo Pachmann, his preferred experts for the required scientific experiments, or the opportunity for the Appellant and for his expert witnesses to be physically present at the hearing before the UCI ADT, all of which violated his rights under Article 6 ECHR.

236. The Panel notes here that this objection from the Appellant appears to relate both to the proceedings below before the UCI ADT and to the current proceedings. The Panel need not consider whether the proceeding before the UCI ADT violated Article 6 ECHR if only because the proceedings before this Panel are *de novo* proceedings pursuant to Article R57 of the CAS Code.

237. With the reservation expressed at above as to the proper classification of the Appellant's several objections, the Panel will nonetheless address those relating to the present proceedings, namely (i) the CAS appointment process both generally and in relation to Mr. Cardoso, (ii) the application of CAS rules, and (iii) the extent of Mr. Cardoso's opportunities to defend himself.

238. *First*, the Panel will analyze whether the CAS appointment system of arbitrators can be regarded as independent and impartial and whether Mr. Cardoso brought sufficient evidence that the way in which arbitrators have been appointed could have an impact on the Panel's independence and impartiality.

239. As a starting point, the Panel notes that in the ECHR 324 (2018) *Mutu and Pechstein v. Switzerland* case, the European Court of Human Rights held that, despite the fact that sports organizations may have a preponderant influence on the mechanism of appointing arbitrators to a closed list, such influence does not mean that the CAS system cannot be regarded as independent and impartial. It therefore would, in the Panel's view, require compelling reasons not to apply this authoritative ruling.

240. At the hearing, the Panel asked the Appellant whether he could distinguish his argument from the argument rejected in the above-cited case. His response was that the link between the selections of the arbitrators from the ICAS closed list and the appointment by the sport federation of those arbitrators present on the list severely undermines the independence of the Panel and that, despite the Pechstein ruling, Mr. Cardoso lacked confidence in the independence of the proceedings and the Panel. In the Panel's view, this response did not distinguish, but only evinced the Appellant's dislike of the reasoning in ECHR 324 (2018) *Mutu and Pechstein v. Switzerland* case.

241. In this context, at the hearing, the Panel also asked whether a challenge against this Panel as a whole had been filed by the Appellant, pursuant to Article R34 of the CAS Code on the basis that there were legitimate doubts as to the independence or impartiality of its members. The Appellant conceded that he had not filed such a collective challenge but only against Mr. Beloff, which had been dismissed by the ICAS, as noted at III.B above.

242. For those reasons the Panel accordingly concludes that the Appellant has not made good any argument as to the lack of independence and impartiality of the Panel.

243. *Second*, with respect to the application of the CAS rules to the proceedings generally and the mandatory list in particular, the Appellant argued that this violated Article 6 ECHR as the laws of both Portugal and Switzerland should have been applied for the proceedings to be considered fair.

244. At the hearing, the Panel pointed out that in putting forward these complaints, the Appellant was essentially asking for a Panel to be constituted and the case to be conducted in a manner inconsistent with the CAS Code inasmuch as, within the CAS Code, it is not possible for a person not on the mandatory list of arbitrators to be appointed as an arbitrator in a CAS panel or for CAS rules not to apply. When asked about this point, the Appellant replied only that *"the CAS Code is certainly not an immovable object"* and that an alternative fairer to the athlete could have at least been considered.

245. The Panel must reject this revolutionary argument, which invites it to disregard the very Code under which it was appointed and within whose confines it must operate. Indeed, by agreeing to hold a UCI licence (subject only to the annulment argument to be dealt with later), the Appellant has himself consented to the jurisdiction of the CAS, which necessitates the application of the CAS rules in case of dispute.

246. *Third*, on the question of the absence of sufficient legal aid, the Panel asked the following pragmatic question at the hearing:

"At least for the legal aid or for the lack of sufficient funding to the Appellant defense, how would that be solved before another forum? Why is this forum particularly inappropriate? You are raising a jurisdictional defense therefore you are planning to go before another forum. How would this difficulty be solved somewhere else?".

247. No satisfactory answer has been provided by the Appellant in this respect.

248. In this context, the Majority of the Panel also highlights that, until March 2019, the Appellant was represented by Mr Thomas Wehrli of Pachmann AG in Zurich, Switzerland, which prepared and filed the Statement of Appeal. The Appellant has then had the benefit of an experienced *pro bono* counsel since early March 2019, has had all of his experts testifying, whether in person or by video conference at the hearing and was himself present by video conference for its entire duration.

249. Moreover, the Panel reminds itself that the Appellant was repeatedly granted additional time for his submissions when, in March and April 2019, he raised difficulties in coordinating his efforts with those of his *pro bono* counsel and notes that the latter did not make any objection as the way the procedure was to be conducted in the accordance with the Procedural Order or to the conduct of the hearing itself.

250. For all those reasons, the Majority of the Panel concludes that the Appellant has failed to establish that the legal aid that was granted to him by the ICAS was insufficient to ensure that his claims were properly presented before this Panel or that any of the same difficulties would not have arisen in any other proceedings, before a different forum. In short, the principle *audi alteram partem* was fully respected in his case, he had a fair hearing and hence there was no violation of any Article 6 ECHR rights even assuming that Article 6 applies to domestic disciplinary proceedings of a sport's governing body.

251. As to any jurisdictional objection at stake here, the Panel refers to Article 186(2) of the PILA: *"A plea of lack of jurisdiction must be raised prior to any defense on the merits"*.

252. Hence, the Panel needs to determine whether Mr. Cardoso's objection to jurisdiction has been raised *in limine litis*.

253. The Panel, after review of the Statement of Appeal of 14 December 2019, i.e. the first formal step in Mr. Cardoso's appeal, concludes that the Appellant did not raise in it any objection to jurisdiction, and hence that it is now too late for the Appellant to mount any challenge to the Panel's jurisdiction.

254. The second and alternative "annulment" argument raised by the Appellant is his "cancellation" of the arbitration agreement by his letter of 18 February 2019, which he claims removes the basis for the Panel's jurisdiction.

255. The Panel is of the view - not itself disputed by the Appellant - that Swiss law applies to the question of the consent to the arbitration agreement and that, under Swiss law, to annul an agreement:

– the ground would be a *"vice du consentement";*

– the Appellant bears the burden of establishing the existence of such a defect.

256. To discharge that burden, the Appellant states that he was induced by UCI to believe that he would be granted adequate legal aid, and that the legal aid in fact granted was so inadequate as to amount to a fraud by the UCI in causing him to agreeing to submit the present dispute to CAS arbitration.

257. The provision of legal aid for CAS proceedings is set out in guidelines which are published. There is no evidence before the Panel that UCI misrepresented to the Appellant the circumstances in which he could obtain legal aid or the amount thereof, let alone evidence that would support a serious allegation of fraud. If the Appellant was in error about the legal aid he might receive for CAS proceedings, it was his own error. The Panel rejects the Appellant's annulment argument on the basis that the *"vice du consentement"*, a necessary basis for annulment under the applicable Swiss law has not been established by him.

258. The Panel therefore rejects the Appellant's argument regarding the overall fairness of the CAS proceeding and CAS rules and that it has jurisdiction over the appeal.

VI. ADMISSIBILITY

259. Pursuant to Article 13.2.5.1 of the UCI ADR: *"Unless otherwise specified in these rules, appeals under Article 13.2.1 and 13.2.2 from decisions made by the UCI Anti-Doping Tribunal or UCI Disciplinary Commission shall be filed before the CAS within 1 (one) month from the day the appealing party receives notice of the decision appealed".*

260. The Appealed Decision was handed down on 16 November 2018. The Statement of Appeals as filed on 14 December 2018, i.e. within the one-month time limit cited above. It complies with all the other requirements set forth by Article R48 of the CAS Code. The Respondent did not contest the admissibility of the appeal.

261. The Panel therefore finds the appeal admissible.

VII. APPLICABLE LAW

262. Article R58 of the CAS Code provides as follows:

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

263. This provision is in line with Article 187(1) of the PILA, which, in its English translation, states as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

264. Based on the above and considering that the UCI ADT, i.e. the sports-related body which issued the Appealed Decision within the meaning of Article R58 of the CAS Code, has applied the UCI ADR in adjudicating the present case, the Panel will decide this dispute in accordance with the UCI ADR. To the extent necessary, the Panel will subsidiarily apply Swiss law, the law of the country in which the UCI is domiciled.

VIII. MERITS

265. The Panel will commence by stating the Relevant Articles of the UCI ADR at stake and the applicable standards (A.) and will subsequently convey its Analysis in the present case (B.).

A. Relevant Articles of the UCI ADR at stake and applicable standards

266. Article 3.1 of the UCI ADR expressly states that:

"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".

267. Accordingly, the UCI bears the burden of proving the ADRV. In this respect, Articles 2.1 of the UCI ADR set out what is required in terms of proving an ADRV of "Presence":

"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously"

268. In this respect also Article 2.2 of UCI ADR sets out what is required in terms of proving an ADRV of "Use":

"2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be used for an anti-doping rule violation to be committed".

269. The comment to Article 2.2 of UCI ADR expressly states that:

"It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. ***For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample)*** *or from the analysis of a B Sample alone* ***where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample"*** (emphasis added).

270. Article 3.2 provides that *"Facts related to anti-doping rule violations may be established by any reliable means, including admissions".* The comments of this Article provide:

"[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, such as data from the Athlete Biological Passport]".

271. The Appellant did not dispute that these articles were the articles applicable to his case, but rather, as appears below, their interpretation and whether pursuant to their correct interpretation, the UCI has established an ADRV to the comfortable satisfaction of the Panel, on the facts of the case.

B. Analysis of the Panel

272. The Panel must determine whether the UCI has established that the Appellant committed an ADRV within the meaning of Articles 2.1 or 2.2 of the UCI ADR. The Parties' respective positions including in their post hearing briefs have been set out above in detail supra at §109-160 and 161-228.

273. In short, the Appellant's position is that an ADRV on the basis of the analysis of urine is exclusively governed by Article 2.1 of the UCI ADR, which concerns the presence of a Prohibited Substance in an athlete's sample and that, on the facts of the case, the conditions set forth in Article.2.1 to conclude to an ADRV are not satisfied. The Appellant also denies that the requirements of Article 2.2 UCI ADR (even if applicable, *quod non*) are met.

274. The Respondent's position is that the UCI ADR expressly provides for an ADRV for use, which is based solely on the analytical data of the analysis of the A-sample governed by Article 2.2 of the UCI ADR, and that, on the facts of the case, Article 2.2 is satisfied.

1. Shall the ADRV be analyzed under Article 2.1 or 2.2 of UCI ADR?

275. At the outset, the Panel notes that (i) the UCI ADR are derived from the WADC so that CAS jurisprudence on the WADC or other decisions also derived therefrom are relevant; (ii) both instruments differentiate, deliberately, between presence cases and use cases in their provisions (see CAS 2015/A/4059 §99-102) and (iii) while not infrequently responsible bodies may bring charges of an ADRV under both provisions, it does not follow that a charge cannot be made good under one, but not the other.

276. The Panel concludes, after review of the Respondent's Answer that was confirmed at the hearing and in post hearing briefs, that UCI has unambiguously brought a case for Use but not a Presence case. It follows, in the Panel's view, that the Appellant's argument that *"the analysis of urine samples is conclusively regulated at Article 2.1 of the UCI ADR"* must be dismissed.

2. The Athlete's ADRV under Article 2.2 UCI ADR

277. The Appellant's threshold argument is that the absence of confirmation of the presence of a prohibited substance in the A-sample by analysis of the B-sample itself disqualifies reliance on the analysis of the A-sample alone. The argument is founded on what is asserted to be the mandatory provisions of the ISL, which, according to the Appellant, provide that the absence of confirmation of the A-sample by the B-sample invalidates the entire test of the Athlete's samples, both A and B.

278. If that argument were correct, it would be dispositive in favour of the Appellant. The Majority of the Panel, however, rejects the Appellant's argument for the reasons set out below.

279. The Majority of the Panel prefers to start its discussion by considering the provisions of the WADC, as transposed into the UCI ADR in strictly identical terms, before turning to the provisions of the ISL. For that purpose it makes the following points.

a) *First*, there is no indication in the language of Article 2.2 of the UCI ADR that confirmation of the presence of a prohibited substance in the A sample by analysis of the B-sample is essential in a charge of 'Use' rather than of 'Presence' where, the Panel recognizes, the express position in Article 2.1 of the UCI ADR is that such confirmation **is** required. The Appellant's argument blurs the boundary between the two distinct means ("Presence" and "Use") of establishing an ADRV. Proof of such confirmation would, of course, be sufficient proof of reliable means; *non sequitur* that it is necessary.

b) *Second*, in the Panel's view, that confirmation of the presence of a prohibited substance in the A sample by analysis of the B sample is **not** required to sustain a charge of use is supported by the comment to Article 2.2, which, (i) indicates that such a charge may be established by 'any reliable means' and (ii) expressly states *"Use may be established based upon the reliable analytical data from the analysis of an A Sample"* (***without confirmation from an analysis of a B Sample***) *or from the analysis of a B Sample alone* ***where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample"*** (emphasis added).

c) *Third*, Article 24.2 provides that *"The comments annotating various provisions of these Anti-Doping Rules shall be used to interpret these Anti-Doping Rules"*; in CAS 2009/A/1912 & 1913 (§36), the Panel *"observes that the official comments to the anti-doping rules are very valuable interpretative tools, in the sense that they put forward an authoritative explanation and an authentic construction of the commented rules, even if they are not rules per se"*. The present Panel accepts that if there were any inconsistency between the text of the rules itself and the comment thereon, in principle primacy would be given to the text. However, no such inconsistency has been detected between the text and the comment in respect of Article 2.2.

d) *Fourth*, none of the case law cited by the Appellant is to contrary effect; three of the four cases cited concern an ADRV of "Presence", and not "Use". In the other CAS 2015/A/3977 case where an ADRV was discussed in very different factual circumstances under Article 2.2 of the UCI ADR the Panel observed that at §174, the decision noted that *"While there may well be cases where analytical evidence which does not meet the criteria to support a Presence Violation case can be an important ingredient in establishing a Use Violation case, there must be additional supporting evidence rather than mere speculation"*. This dictum, albeit obiter, supports the Majority of the Panel's view that a valid B sample is **not** a *sine qua non* of a sustainable charge under Article 2.2.

e) *Fifth*, the Appellant's submission that UCI cannot rely upon the parenthesis in the commentary to Article.2.2 i.e. (*"without confirmation from an analysis of the B sample"*) because that only applies if **no** B sample had been tested and not where, as is indisputably the case here, the Appellant's B-sample **had** been tested. The flaw of the Appellant's construction is that it requires reading in to the parenthesis words which are simply not there. The provision in which the parenthesis appears is clear both in its intent and in its effect. Where the analysis of the A sample provides reliable analytical data to establish the use, there is no need for confirmation by a B sample assuming that the lack of confirmation is sufficiently explained by the Anti Doping Organization.

280. The question then posed is whether, if the provisions of the ISL contradict the provisions of the WADC (an issue which the Panel will discuss later), which would take precedence. The Appellant argues that it must be the ISL. He points to Article 6.4 of the UCI ADR which provides, the *"International Standard for Laboratories, and related Technical Documents, are integral part of these anti-doping rules"* and the self-description of the ISL in its opening words as *"a mandatory international standard"*. The Majority of the Panel considers that the Appellant's argument inverts the hierarchy of the two documents.

281. The Majority of the Panel accepts the following description of the hierarchy of norms in sports arbitration:

"In principle, sports federations can freely establish their own provisions (cf. ZEN-RUFFINEN, Droit du Sport, 2002, marg. no. 161). However, there are limits to this autonomy. In particular the relevant organs when creating new rules and regulations are bound by the limits imposed on them by higher ranking norms, in particular the association's statutes. This follows from the principle of legality ("Le principe de la légalité implique l'exigence de la conformité aux statuts des textes réglementaires inférieurs et des décisions des organes sociaux", cf. BADDELEY M., L'association sportive face au droit, Les limites de son autonomie, 1994, p. 208). ***According to this principle regulations of a lower level may complement and concretize higher ranking provision[s], but not amend nor contradict or change them. This principle is also well established in CAS jurisprudence*** *(cf. CAS 2006/A/1181, no. 8.2.2; CAS 2006/A/1125, no. 6.18; 2004/A/794, no. 10.4.15)"* (emphasis added).

282. The introduction to the WADC itself states, *inter alia*,

*"**The Code***
The code is the fundamental and universal document upon which the World Anti- Doping Program in sport is based.

The World Anti-Doping Program
The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs.
The main elements are:
***Level 1**: The Code*
***Level 2**: International Standards*
***Level 3**: Models of Best Practice and Guidelines"* (emphasis in original).

283. The Majority of the Panel therefore concludes that the WADC is the primary, the ISL the secondary document, and that to allow any provision of the latter to trump a provision of the former would be impermissibly to allow the tail to wag the dog. Furthermore, if possible, the provisions of each should be read in harmony. While the UCI ADR did not restate this hierarchy, the Panel deems it sufficient that the UCI ADR refers in its *"Introduction and Scope"* to the WADC (Preface A) and to the World Anti-Doping Program (Section E entitled *"Documents adopted by the UCI in connection with these anti-doping rules"*) to consider that the above hierarchy of norms is incorporated and must be respected when interpreting the UCI ADR.

284. Finally, the Majority of the Panel sees force in UCI's argument that the ISL is designed to regulate the relationship of WADA and its laboratories rather than of – in a cycling case – the UCI and its riders (see Part 1 Article 1.0 of the 2016 Edition so describing its *"main purpose"*), thereby reinforcing the need for complying with the intended prevalence of certain norms over others.

285. The Majority of the Panel accepts that the ISL, which the UCI has adopted (see Part 14 of the UCI Cycling Regulations), is not a model of clarity but, for reasons which it sets out below, cannot find that it assists the Appellant's case.

286. Article 5.2.4.3.2.3 of the ISL on which the Appellant relies contains the sentence *"If the B-Sample confirmation proves negative, the entire test shall be considered negative"*. The Appellant submits, as noted above, that the reference to the *"entire test"* (hereinafter referred to as the "key phrase") is a reference to the test of both samples. In the Panel's view, to evaluate that submission, it is necessary to consider the terms and the context in which the key phrase occurs. It sets this out (so far as material) below.

"5.2.4.2 Urine Initial Testing Procedure

The Initial Testing Procedure(s) shall be documented, as part of the Sample (or Sample batch) record, each time it is conducted. […]

> *5.2.4.2.1 Unless otherwise approved by WADA after consultation with a Testing Authority, the Initial Testing Procedure(s) shall be capable of detecting the Prohibited Substance(s) or Metabolite(s) of Prohibited Substance(s), or Marker(s) of the Use of a Prohibited Substance or Prohibited Method for all substances covered by the Prohibited List for which there is a method that is Fit-for-purpose. […]*
>
> *5.2.4.2.2 The Initial Testing Procedure shall be performed with a Fit-for-purpose method for the Prohibited Substance or Prohibited Method […]*
>
> *5.2.4.2.5 Irregularities in the Initial Testing Procedure(s) shall not invalidate an Adverse Analytical Finding when the Confirmation Procedure adequately compensates for such irregularities. […]*

5.2.4.3 Urine Confirmation Procedure

Confirmation Procedures shall be documented, as part of the Sample (or Sample batch) record. The objective of the Confirmation Procedure is to accumulate additional information to support the reporting of an Adverse Analytical Finding. The Confirmation Procedure shall have equal or greater selectivity than the Initial Testing Procedure.

> *5.2.4.3.1 "A" Sample Confirmation*
>
> > *5.2.4.3.1.1 A Presumptive Adverse Analytical Finding from an Initial Testing Procedure of a Prohibited Substance, Metabolite(s) of a Prohibited Substance, or Marker(s) of the Use of a Prohibited Substance or Prohibited Method shall be confirmed with an "A" Confirmation Procedure using an additional Aliquot(s) taken from the original "A" Sample. […]*

5.2.4.3.1.4 The Laboratory shall have a policy to define those circumstances where the <u>Confirmation Procedure</u> for an "A" Sample may be repeated (e.g., batch quality control failure) and the first test result shall be nullified. Each repeat confirmation shall be documented and be performed on a new Aliquot of the "A" Sample and new quality control samples. […]

5.2.4.3.2 "B" Sample Confirmation

5.2.4.3.2.1 The "B" Sample analysis should occur as soon as possible and should take place no later than seven working days starting the first working day following notification of an "A" Sample Adverse Analytical Finding by the Laboratory, unless the Laboratory is informed that the Athlete has waived his/her right to the "B" confirmation analysis and therefore accepts the findings of the "A" confirmation analysis.

5.2.4.3.2.2 The "B" Sample confirmation shall be performed in the same Laboratory as the "A" Sample confirmation.

5.2.4.3.2.3 If the "B" Sample confirmation proves negative, the entire test shall be considered negative. […]

5.2.4.3.2.10 If the "B" Sample confirmation proves negative, the Sample shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding" (emphasis in original).

287. At the outset regarding the language of the relevant sections 5.2.4.3.2.3 and 5.2.4.3.2.10, the Majority of the Panel highlights that, as rightfully raised by the Respondent, the ISL requires the B sample test to be *"negative"*, whereas, in the present case, the analysis of the B sample resulted into an *"atypical finding"*.

288. This in itself could suffice to discard the application of the above cited provisions of the ISL in the present circumstances.

289. The Panel however also turns to the other explanations advanced by the Parties to interpret the consequence of a negative B sample confirmation.

290. UCI submits here that the confirmation procedure is only relevant to a "Presence" case and therefore that the *"entire test"* sentence has no application to a "Use" case. The suggestion takes some colour from Article 5.2.4.3.2.1 which does appear, in its reference to an athlete waiving his/her right to a B sample confirmation analysis, to focus on a "Presence" case rather than a "Use" case.

291. The Panel recognizes the force of the submission that the key phrase refers to the sample provided by the Appellant before its division into 'A' and 'B' samples (see Article 5.2.4.3 above which uses the word sample in that sense). However, according to the Majority of the Panel, another plausible reading is that the "key phrase" refers to the initial and confirmation test of the B sample alone. This reading takes colour from the following facts:

a) For urine samples, the test of each of the A sample and B sample appears to be composed of two stages: an "Initial Testing Procedure", followed by a "Confirmation Procedure" (Article 5.2.4.3).

b) The A sample and B sample are thereafter separately dealt with.

c) The reference to the *"entire test"* (singular) in Article 5.2.4.3.2.3, is located under the rubric of the confirmation procedure for the B sample; accordingly, as a simple matter of language, the *"entire test"* sentence more naturally refers to the test (singular) of the B sample alone (which includes an initial testing and a confirmation testing) rather than to the tests (plural) of the A sample and the B sample taken together.

d) Article.5.2.4.3.2.3 does not expressly refer to the A sample at all.

e) A similar distinction is drawn in relation to the confirmation procedure for the A sample at 5.2.4.3.1.4, which clearly refers to the A sample only, and not to the B sample at all.

292. The Panel next turns to Article 5.2.4.3.2.10 of the ISL which provides *"If the "B" Sample confirmation proves negative, the Sample shall be considered negative and the Testing Authority and the Testing Authority, WADA and the International Federation notified of the new analytical finding"*. Again the Panel recognizes the force of the submission that the sample refers to the sample provided by the Appellant before its division into 'A' and 'B' samples. However again, according to the Majority of the Panel, there is a plausible reading that the *"entire test"* only concerns the B sample. The sample referred to in the substantive part of the Article, is presumptively the B sample referred to in the introductory provision and this refers to the second test performed on this sample.

293. While recognizing that there is – to put it at its lowest – a serious ambiguity in those two articles, the Panel accordingly determined to turn to others sources and considerations of harmony as well as of hierarchy of norms to ensure that the interpretation of these terms reconciles Article 2.2 of the WADC (read with its commentary) and Article 5.2.4.3.2.3 of the ISL, not least because the ISL itself provides *"The following articles of the Code directly address the ISL"* setting out, *inter alia*, Article 2.2 together with the comment thereon. Article 2.2 and the comment thereon are therefore expressly incorporated in the ISL. Such harmonizing construction is available, as explained above (see above at §283).

294. The Panel accepts that the WADA Athlete Reference Guide to the WADC 2015 in, Appendices, page 26, provides that *"If the B-Sample does not confirm the analysis of the A-Sample, no further action will be taken and, of course, any Provisional Suspension will be lifted"*.

295. As to this, the Panel makes four points:

a) The Guide itself states that *"The World Anti-Doping Code sets out rules that you, as an athlete, must follow. The point of this guide is to help you understand the rules. This document is merely a guide. It is no substitute for the language of the Code. To emphasize:* ***the language of the Code is always the primary source.*** *This guide is thus provided purely for the purpose of understanding and is in no*

way a binding legal document"; it thus has no legal standing as an interpretative instrument of the WADC;

b) The provision is (rightly or wrongly) as to what will happen, in the circumstances described, not what must happen;

c) The provision can sensibly be read as referring to a "Presence" case, and not to a "Use" case;

d) If, however, it is intended to interpret the Code and to apply to a "Use" case, distinct from a "Presence" case, it is, in the Panel's respectful view, wrong.

296. The Panel accepts that several German authors appear to prefer the Appellant's argument (ADOLPHSEN/NOLTE/LEHNER/GERLINGER, Sportrecht in der Praxis 2018 [Sports law in practice 2018], §1546, page 374, providing that *"The result of the B-Sample displaces the result of the A-Sample. The opposite result of the A-Sample thus loses its relevance"*; also RÖSSNER, Die Bedeutung der B-Probe für den Nachweis eines Dopingvergehens [The significance of the B sample for the proof of a doping rule violation], SpuRt 2/2009, S. 53, 55, stating that *"A negative B-Sample eliminates the result of the A-Sample"*). These authors consider that the B sample is the binding final evidence that can eliminate the suspicion and the conditional probative value of a positive A sample.

297. As to this, the Majority of the Panel recalls that (i) the views of commentators have of themselves no legal force, although their arguments always demand consideration and (ii) these commentators have adopted an approach based on a negative B sample, which is different from an inconclusive B sample, with which the present case is concerned.

298. The Panel has also borne in mind the *contra proferentem* rule which would resolve an ambiguity in the regulations i.e. the ISL to the benefit of the athlete against the UCI. If it had to construe Article 5.2.4.3.2.3 in isolation, the Panel could have accepted the Appellant's interpretation, but this principle remains to be interpreted in light of the norms and their hierarchy between the WADC (UCI ADR) and ISL, as opposed to using for reading provisions in isolation.

299. The Panel appreciates the force of the contention that, to construe the analysis of the A sample as never giving rise to more than a suspicion, either to be upgraded to proof or eliminated depending on the result of the B sample, better respects the rights of the athlete. It accepts that the A sample is necessarily analysed without his or her oversight, whereas the athlete and/or his/her representative shall be authorized to attend the "B" confirmation (Article 5.2.4.3.2.6 of the ISL).

300. However, the choice made by the drafters of the WADC, transposed into the UCI ADR, was different. The language of Article 2.2 of the UCI ADR pulls in a different direction; which is that an ADRV is established as long as, in addition to the analysis of the A sample, there is sufficiently cogent evidence of whatever kind (for example, analytical data, or athlete admission) to support the ADRV. In the Majority of the Panel's view, those who drafted the WADC made a policy choice by finding ADRV not only in "Presence" cases but also in "Use"

cases with a distinct standard of proof. The Panel itself must respect these choices, as it is an adjudicative, not a legislative body.

301. The Panel notes that where only a "Use" case can be advanced, the UCI has to prove both that: (a) the A sample positive result is reliable; and (b) there is a satisfactory explanation for the lack of confirmation in the B sample and (c) on both issues to the standard of *"comfortable satisfaction"*, as per Article 3.1 of the UCI ADR.

302. In the view of the Majority of the Panel, the need for the UCI to satisfy those tests adequately protects persons in the Appellant's position, who will always have the opportunity of a hearing in which he can challenge the Respondent's case. This is all the more true that the ISL norm itself will require a stricter threshold to discard the A sample that is that the B sample must be negative.

303. Finally, the Panel accepts that there have been cases, such as that of the middle distance runner Bernard Lagat against whom no action was taken where an adverse A sample was not confirmed by an adverse B sample. However, the Majority of the Panel notes that the B sample was actually negative, not atypical, as per the present case, and that it was the choice of a regulator not to bring charges in such circumstances so that this decision does not create any legal precedent.

304. The real question before the Panel on the present appeal is therefore whether the "Use" charge can be upheld *"based upon reliable analytical finding data from the analysis of an A Sample (without confirmation from an analysis of a B sample)"*.

305. As underscored by the Respondent at §80-83 of their answers to the Panel's questions dated 11 June 2020, Marjolaine Viret put forward that a negative finding (or rather unconfirmed AAF) in an athlete's B sample does not, in principle, prohibit an Anti-Doping Organisation from proceeding with an assertion of a Use ADRV:

> *"The idea of "confirmation" reflects the purpose of the B Sample analysis to show that the A Sample results were scientifically correct. It does not, however, explain exactly what it takes for a confirmation to be recognised as such.*
>
> […]
>
> *A clear case of non-confirmation is given where the B Sample is reported negative, in the sense that no Prohibited Substance, and no indication of a Prohibited Method, is detected. The consequence is that no offence can be prosecuted under Art. 2.1. Proceedings might still be initiated under Art. 2.2 for Use of a Prohibited Substance or Method, though establishing an anti-doping rule violation despite a negative B Sample may prove a rather difficult enterprise"*.

306. Thus, in the view of the Majority of the Panel, Ms. Viret's analysis supports the possibility in law of using an A sample alone for the purposes of Article 2.2.

307. However, the Panel considers that this question is essentially a matter of expert evidence, which has been carefully assessed by the Panel below. Generally, the Majority of the Panel found the Respondent's experts more persuasive than those of the Appellant, who appeared to be sceptical about the generally accepted methodology used to identify exogenous EPO which was a matter beyond the scope of the Panel's deliberations.

i. Analysis of the A-sample

308. The analysis of the Appellant's A sample showed the presence of the Prohibited Substance rhEPO (and this was confirmed in the First and Second Seibersdorf Opinions).

309. The Appellant has challenged the reliability of this analysis. Taking the Appellant's explanations in the order in which they are set out above in the summary of his positions, the Panel finds that:

a) the chronic alcohol consumption scenario was unsupported by any convincing evidence that the Appellant, a professional cyclist, unlikely for that very reason to indulge in such excessive drinking, actually did so; the absence of any excessive consumption of alcohol was also clearly confirmed at the hearing by the Appellant himself, who unambiguously stated that: *"About alcohol, it always depends from the culture of the person* […] *if you are American, if you are Portuguese* […] *for example in my case drinking wine during dinner is pretty normal* […] *my father and my grandfather have grapes and* […] *in September we collected the grape to make wine and I remember since I was a kid that for breakfast we ate meat and drank wine* […] *I was seven years old or eight or nine. This is about culture and I mean, alcohol is not an illegal substance* […] *but in 2017 I drank less than before much less, I mean, I still drink when I am at home I always drink wine".*

b) the alleged glycosylation disorder scenario lacked any factual basis, distinct from theoretical support, since there was no evidence in the record that the Appellant had any such disorder as might have led to endogenous production of the EPO;

c) the "accidental" swap scenario was speculative, and again unsupported by anything concrete to support a suspicion of manipulation during the doping control or thereafter by or in the Laboratory; moreover, the Panel recalls that the Respondent was entitled to rely on the presumption of Article 3.2.2 of the UCI ADR [i.e. that the Laboratory conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories], and notes that it was for the Appellant to rebut this presumption, which he has failed to do. Finally the Panel notes that there were means available to the Appellant, such as DNA analysis, to support its swapping theory but that the Appellant did not explore this option.

d) The lack of confirmation from the blood sample was convincingly discarded in particular, the Second Seibersdorf Opinion, stating that the negative analysis of the Appellant's serum sample does not impact upon the reliability of the presence of rhEPO in his urine. The Second Seibersdorf Opinion explained that the reason why the athlete's blood sample did not test positive for recombinant EPO can be traced in the fact that these substances leave

the blood stream earlier but stay detectable in urine: *"Urine is considered a reservoir, where excreted substances are collected till urine delivery (micturition). Consequently substances which have left the blood stream via renal elimination are detectable in the urine sample, but might no longer be detectable in the corresponding blood/serum/plasma samples, even if these samples are taken at the same time. An indication of the low concentration of rec. EPO in urine is the low intensity of the rec. EPO band in comparison to the endogenous band. This does not unequivocally prove the final step of elimination, but is compatible with this assumption"*.

310. Overall, the Panel was of the view that the Appellant's experts did not seriously challenge the presence of rhEPO but rather attempted to provide explanations for the AAF, none of which convinced the Panel.

ii. Analysis of the B-sample

311. Regarding the B-sample of the Appellant, the Internal Assessment (as well as the First and Second Seibersdorf Opinions) explained the lack of confirmation of the AAF in the Rider's B-sample.

312. According to the Internal Assessment, immunopurification and/or degradation of EPO are highly likely reasons for the inconsistence in the analytical result of the two samples:

"General Conclusion

Observed difference between the results obtained from confirmation procedure of the erythropoiesis stimulating agents (ESAs) in A- and B-sample 4121328 can be focused on the observed presence (A-sample) and absence (B-sample) of the characteristic smear, which is expected from rEPO. A single band is clearly visible with a migration slightly above the endogenous EPO band in A- and B-sample 4121328, but as the B-sample 4121328 is missing the characteristic smear expected from recombinant EPO, this evidence has been lost in this B analysis that can only be interpreted as doubtful but not conclusive.

[…] *we can conclude that an appropriate and up-to-date SAR-PAGE method has been applied to the analysis of A- and B-sample 4121328. The laboratory staff involved in the analysis is competent, the described procedures have been followed, and correct samples have been analyzed. The overall acceptable performance is verified by the evaluation of the quality control samples (positive and negative) of each analytical batch, and there is no reason to assume that the difference between analysis results could result from technical mistakes, sample mismatch, or non-conformities in analytical process.*

Regarding performance of the specific analytical batch, immunopurification was identified as the highest risk for the repeatability of the method. Incomplete yield could theoretically result into to the partial loss of EPO-isoforms in the purification and consequently, to lower amount of EPO in the gel (i.e. decreased sensitivity of the method). Enzyme activity and/or physical properties (e.g. high salt content) of the sample were also targeted as potential factors which could result in the degradation of the EPO-isoforms, and lead to minor differences between samples. Taking into account the SG- and pH properties of the A- and B-sample 4121328, high SG value may refer to an excess of salts, and alkaline pH to potential microbial activity.

It is our current opinion that immunopurification and/or degradation of EPO are highly likely phenomena as a source of the inconsistence in analytical result between A- and B-sample 4121328".

313. The First Seibersdorf Opinion observed that *"For the confirmation of the B-sample, the same amount was used as for the A sample (15 mL) and also two negative controls were placed next to the athlete's sample. While both negative controls were clearly negative and the positive control clearly positive, the smear above the athlete's sample disappeared. It is clearly visible that the overall band intensity is drastically reduced compared to the A sample, despite an exposure time of 120 sec was used. Most likely, this decrease can be attributed to the relatively high pH of the sample and enzymatic activity, which promoted degradation of the EPO contained in the athlete's sample including the smear above the band"* (emphasis added).

314. The Second Seibersdorf Opinion confirmed the above findings and the Laboratory further explained that the lack of confirmation of the AAF in the Rider's B-sample is due to degradation of the EPO in the B-sample:

"The most likely cause of the difference is a degradation of the EPO in the B-sample. This holds for the recombinant as well as the endogenous part of the EPO band. Due to the fact that in the A-sample the endogenous form appears to be much more abundant than the recombinant one, a degradation of the total EPO content will most likely lead to a disappearance of the recombinant part, while the endogenous part is still visible.

Two factors constitute evident indicators of a degradation of the EPO content in the B sample:

- The drastic decrease of the signal intensity of the EPO band in the B-sample gel image, although the exposure time of the B-sample gel image was increased from 40 sec to 120 sec compared to the A-sample gel image. Higher band intensity would have been expected by using a longer exposure time.

- The elevated pH, typically found e.g. by microbial activity. […], *microbial activity typically causes degradation.*

[….]

In the present case […], *based on the documentation and evidence that we have reviewed, degradation constitutes a satisfactory explanation for the lack of confirmation in the B sample".*

315. The Panel also traversed the particular arguments raised by the Appellant regarding the B-sample. Specifically, the Panel notes that:

a) the *"microbial activity scenario"* was discussed by Dr Gmeiner in his oral testimony who said, and the Panel accepts, that *"One of the most probable reasons for the difference between the two is the fact that the B sample has to be stored and frozen and that can caused a decrease on the concentration",* rather than that it was the product of exposure to heat; in any event, even if the alleged degradation of the B sample in some way resulted from delay in its analysis, the Panel is unable to see how UCI [was] to blame, considering that it had already proposed two alternative (earlier) dates than the later one chosen, albeit explicably, by the Appellant;

b) as to the *"conflict of interest defence"*: this grounds, if sustainable, would have to affect every report and opinion of the Laboratory staff relied upon by UCI and, according to the Appellant, all subsequent reports from other experts asked to confirm the Lausanne laboratory finding This would certainly affect the way all WADA accredited laboratories operate; that grave consideration apart, which is not sustained by any evidence from the Appellant applicable to his case but solely in relation to the unrelated premature destruction of Russian samples by the Laboratory, the Panel did not detect any evidence that the Laboratory distorted the results of the samples of an anonymous athlete or otherwise wished to act other than in a proper professional manner, which, the Panel repeats, the WADC and its derivatives assumes it will have done. Moreover, during the hearing, nothing prompted the Panel to suspect that the Laboratory staff would act or had acted in an unethical manner; to the contrary, the testimony of the director of the laboratory, Ms. Kuuranne, was found highly credible by the Panel; this final feature, together with the absence of any countervailing evidence, suffices for the Panel to exclude this *"conflict of interest"* argument.

316. For all the above reasons the Panel concludes that the Respondent has established the existence of an ADRV under Article 2.2 of the UCI ADR based on the reliable analytical data from the A sample of the Appellant and the UCI experts' evidence to the comfortable satisfaction of the Panel.

317. In light of this conclusion, the Panel does not need to turn either, whether as a matter of jurisdiction or of the merits, to the question of the damages sought by the Appellant, which has become moot.

iii. Sanction

318. The Appellant has not established that the ADRV, as found by the Panel, was not intentional, therefore the presumptive sanction must be four years pursuant to Article 10.2.1.1 of the UCI ADR.

319. While the debates have heavily focused on the reliability of the A and B samples, the Panel notes that the Appellant has not established, or even sought to establish, the source of the prohibited substance, i.e. how the rhEPO substance has entered his body.

320. Accordingly, his sanction could not be reduced on the basis of "No Fault or Negligence" or "No Significant Fault or Negligence," which was in any event not argued by him.

321. Regarding the financial consequences of the ADRV, Article 10.10.1.1 of the UCI ADR provides that the imposed fine could be reduced:

"Bearing in mind the seriousness of the offence, the quantum of the fine may be reduced where the circumstances so justify, including:
1. Nature of anti-doping rule violation and circumstances giving rise to it;
2. Timing of the commission of the anti-doping rule violation;
3. Rider or other Person's financial situation;

4. Cost of living in the Rider or other Person's place of residence;
5. Rider or other Person's Cooperation during the proceedings and/or substantial assistance pas er article 10.6.1".

322. In the present case, the Panel assesses that the fine ordered in the Appealed Decision failed to take into consideration the financial situation of the Appellant, resulting from his provisional suspension and accordingly reduces it by 50%.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The Panel has jurisdiction to hear the appeal filed by Mr. André Cardoso on 14 December 2019.

2. The appeal filed by Mr. André Cardoso against the decision rendered by the UCI Anti-Doping Tribunal on 15 November 2018 is partially granted.

3. The fine imposed on Mr. André Cardoso in the decision rendered by the UCI Anti-Doping Tribunal on 15 November 2018 is reduced to EUR 26,000; the decision rendered by the UCI Anti-Doping Tribunal on 15 November 2018 is confirmed in all other respects.

4. (…).

5. (…).

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