Arbitration CAS 2019/A/6112 World Anti-Doping Agency (WADA) v. Romanian National Anti-Doping Agency (RANAD) & Anda-Mihaela Vâlvoi, award of 27 January 2020

Panel: Mrs Raphaëlle Favre Schnyder (Switzerland), Sole Arbitrator

Sambo
Doping (furosemide)
Objection of lack of jurisdiction
Shift of the burden of proof related to the establishment of the departure having reasonably caused the AAF

1. **An objection of lack of jurisdiction must be raised prior to any defence on the merits. This rule implies that an arbitral tribunal has jurisdiction if the respondent participates in the proceedings without raising any objection ("*Einlassung*"). An arbitral tribunal can only decide on its competence if its jurisdiction is disputed, except where the lack of objection results from the default of one of the parties.**

2. **According to the World Anti-Doping Code, it is first the athlete's obligation to establish the departure from the WADA International Standard for Testing and Investigations which could reasonably have caused the adverse analytical finding (AAF). Only then shall the relevant national anti-doping agency have the burden − but also the opportunity − to establish that such departure did not cause the AAF.**

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is the independent international anti-doping agency, constituted as a private law foundation under Swiss law, whose aim is to promote and coordinate the fight against doping in sport internationally.

2. The Romaniei Agentia Nationala Anti-Doping (or the Romanian National Anti-Doping Agency in English) ("RANAD" or the "First Respondent") is an anti-doping agency established in Romania. It acts with autonomous decision powers as public law entity with legal standing under the control of the Romanian Government.

3. Mrs Anda-Mihaela Vâlvoi (the "Athlete" or the "Second Respondent"), a Romanian national, is a professional sambo athlete born on 21 April 1999.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced. 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.

5. On 17 September 2017, during the National Junior and Youth Sambo Championship in Bucharest, the Athlete underwent an in-competition doping control test.

6. The sample provided by the Athlete revealed the presence of furosemide, a specified substance prohibited at all times under S5 (diuretics and masking agents) of the WADA 2017 Prohibited List.

7. After having been notified of the positive finding on 26 September 2017, the Athlete waived her right to request that her B-sample bottle be analysed in her letter to RANAD dated 29 September 2017.

8. On 18 January 2018, the Hearing Commission for Athletes and their Support Personnel of RANAD who violated the Anti-Doping Rules (the "RANAD Hearing Commission") issued Decision n°18 pursuant to which the Athlete was, in particular, sanctioned for an anti-doping rule violation ("ADRV") with four (4) years ineligibility beginning from the sample collection date on 17 September 2017 and running until 16 September 2021.

B. Proceedings before the RANAD Appeal Panel

9. In her appeal to the RANAD Appeal Panel, the Athlete did not contest the analytical results reported by the Romanian Doping Control Laboratory in Bucharest but stated that she had no reason or intention to dope. She therefore requested a reduction of the period of ineligibility from four (4) years imposed by the RANDAD Hearing Commission to two (2) years, on the grounds of no significant fault or negligence, pursuant to Article 64 of Law no. 227/2006 regarding the prevention and fight against doping in sport ("RANAD ADL").

10. The RANAD Appeal Panel held several sessions on 29 May 2018, 26 June 2018, 10 July 2018, 18 September 2018, and 3 October 2018. It issued Decision n°12/16.10.2018 on 16 October 2018 (the "Appealed Decision"), which acquitted the Athlete of the ADRV and therefore upheld the appeal, and set aside the RANAD Hearing Commission's Decision n° 18/18.1.2018.

11. On 4 January 2019, RANAD provided WADA with the complete case file by email and sent the reasoned decisions to the International Sambo Federation (the "FIAS") on 14 January 2019.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 25 January 2019, pursuant to Article R47 of the Code of Sports-related Arbitration (2019 edition) (the "Code"), WADA filed a Statement of Appeal against the Appealed Decision. In its Statement of Appeal, WADA requested that the present dispute be submitted to a Sole Arbitrator.

13. By letter dated 29 January 2019, the CAS Court Office invited WADA to submit its Appeal Brief within 10 days pursuant to Article R51 of the Code and invited the Respondents to agree to WADA's requests that a Sole Arbitrator be appointed, and that the arbitration be conducted in English.

14. On 31 January 2019, RANAD agreed with WADA's suggestion that the matter be decided by a Sole Arbitrator.

15. By letter dated 11 February 2019, the CAS Court Office informed the Parties that no communication with respect to the number of arbitrators had been received from the Athlete and that accordingly, pursuant to Article R50 of the Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue, taking into consideration the circumstances of the case. In this regard, the Athlete was invited to inform the CAS Court Office of her intention to pay her share of the advance of costs pursuant to Article R50 of the Code. The Second Respondent did not answer to the CAS Court Office's request.

16. By letter dated 14 March 2019, the CAS Court Office informed the Parties that the deadline for RANAD to pay its share of the advance of costs had been suspended following RANAD's letter dated 11 March 2019 in which it requested an extension.

17. On 18 March 2019, after several extensions, WADA submitted its Appeal Brief in accordance with Article R51 of the Code.

18. By letter dated 19 March 2019, the CAS Court Office acknowledged receipt of the Appeal Brief filed by WADA and invited the Respondents to submit their Answers within 20 days.

19. By letter dated 8 April 2019, RANAD requested an extension of 15 days for filing its Answer and the other Parties were invited state whether they consented to RANAD's request no later than 11 April 2019.

20. By letter dated 8 April 2019, WADA stated that it did not agree that a 15-day extension be granted to RANAD and further requested information from the Athlete about her competition schedule until 30 September 2019 and whether she intended to perform in several specific competitions between April 2019 and June 2019. WADA indicated that it wanted this information before agreeing to the extension sought by RANAD in consideration of the fact that the Athlete was currently eligible to compete although she was not supposed to be.

21. By letter dated 9 April 2019, the CAS Court Office informed the Parties that, in view of the disagreement between the Parties, the decision on RANAD's requested extension of the time

limit to submit the Answer would be made by the President of the CAS Appeals Arbitration Division, or her Deputy, and invited the Athlete to respond to WADA's request by 15 April 2019.

22. By letter dated 10 April 2019, the Parties were advised that the President of the CAS Appeals Arbitration Division had decided to partially grant the Second Respondent's request for extension to file its Answer until 19 April 2019.

23. On 15 April 2019, the CAS Court Office noted that the Athlete had not filed an Answer within the deadline fixed in CAS' letter dated 19 March 2019.

24. On 19 April 2019, the First Respondent filed its Answer further to Article R55 of the Code.

25. On 29 April 2019, the CAS Court Office noted that neither of the Respondents had submitted comments on the Appellant's Request that the Second Respondent provide information on her competition schedule as per WADA's letter dated 8 April 2019.

26. On 4 May 2019, the Parties were invited to inform the CAS Court Office whether they preferred to a hearing to be held on this matter or for the Sole Arbitrator to issue her Award based solely on the Parties' written submissions.

27. By letter dated 6 May 2019, the Parties were informed that the President of the CAS Appeals Arbitration Division had appointed Mrs Raphaëlle Favre Schnyder as Sole Arbitrator and that the case file had been transmitted to her on same date.

28. By email dated 7 May 2019, the Appellant informed the CAS Court Office that it did not deem a hearing necessary.

29. By letter dated 20 May 2019, the First Respondent asked the CAS Court Office to inform on whether a decision regarding necessity of a hearing had been made and noted that in its Answer, it had stated it would be available for a hearing if deemed necessary by the Sole Arbitrator. On the same date, the CAS Court Office noted that the Second Respondent has not submitted any preference with respect to a hearing.

30. By letter dated 5 June 2019, the Parties were informed that the Sole Arbitrator had deemed herself to be sufficiently well-informed to decide the case based solely on the Parties' submissions without the need to hold a hearing.

31. By letter dated 14 June 2019, the CAS Court Office acknowledged receipt of the Order of Procedure duly signed by the First Respondent and invited the Appellant and the Second Respondent to file their signed Order of Procedure by 21 June 2019.

32. By letter dated 17 June 2019, the CAS Court Office acknowledged receipt of the Order of Procedure duly signed by the Appellant.

33. On 25 June 2019, after an additional deadline had been set, the CAS Court Office informed the Parties that it had not received a signed Order of Procedure from the Second Respondent.

IV. SUBMISSIONS OF THE PARTIES

34. The Appellant's submissions, in essence, may be summarized as follows:

- The Athlete underwent an anti-doping control on 17 September 2017 and the analysis of the sample revealed the presence of furosemide. Furosemide is a specified substance prohibited at all times under S5 (Diuretics and masking agents) of the 2017 WADA Prohibited List.

- The Athlete does not dispute the analytical finding.

- The Athlete has committed an anti-doping rule violation under Article 2 para. 2(a) RANAD ADL.

- During the proceedings before the RANAD Hearing Commission, the Athlete had not challenged the conformity of the sample collection procedure, nor did she do so in her written submissions before the RANAD Appeal Panel. She only asserted certain flaws during a hearing before the RANAD Appeal Panel without referring to specific provisions of the applicable regulations or the WADA International Standard for Testing and Investigations ("ISTI"). However, she did so without adducing any corroborating evidence, nor providing any explanation as to how the alleged departures could reasonably have caused the adverse analytical finding ("AAF").

- There is no reason to call into doubt the testimony of the Anti-Doping Control Officer ("DCO") regarding the fact that the partial sample equipment was sealed in the Athlete's presence before she left for the medal ceremony.

- The sample collection procedure was in compliance with ISTI and even if that were not the case, the fact that the Athlete left the doping control station quickly without informing the DCO precludes her from relying on any potential deviation to invalidate the AAF, as such deviation would have been caused by herself.

- The Athlete has not evidenced that the alleged deviations could reasonably have caused the AAF, nor did she establish any causal link between the alleged deviation and the AAF. Therefore, there is no legal basis for the absolute nullity of the testing as held by the RANAD Appeal Panel.

- Regarding the sanction, the Athlete has never put forward an explanation as to how furosemide might have entered her body and therefore failed to meet the burden of proof as to the origin of the substance.

- As no intention can be established by WADA, and as the Athlete is not entitled to any reduction in the default sanction, the ineligibility sanction of two years provided for by Article 57 RANAD ADL must be applied.

35. In its Appeal Brief, the Appellant submitted following prayers for relief:

"WADA respectfully requests the Panel to rule as follows

1. *The Appeal of WADA is admissible.*

2. *The decision dated 16 October 2018 rendered by the Appeal Panel of RANAD in the matter of Anda-Mihaela Vâlvoi is set aside.*

3. *Anda-Mihaela Vâlvoi is found to have committed an anti-doping rule violation.*

4. *Anda-Mihaela Vâlvoi is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Anda-Mihaela Vâlvoi before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

5. *All competitive results obtained by Anda-Mihaela Vâlvoi on the occasion of the National Junior and Youth Sambo Championships in Bucharest, Romania on or around 17 September 2017 and any further competitive results from 17 September 2017 until 18 January 2018 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*

6. *The arbitration costs shall be borne by RANAD or, in the alternative, by the Respondents jointly and severally.*

7. *WADA is granted a significant contribution to its legal and other costs".*

36. The First Respondent's submissions, in essence, may be summarized as follows:

- The Athlete underwent an anti-doping control on 17 September 2017 and the analysis of the sample revealed the presence of furosemide. Furosemide is a specified substance prohibited at all times under S5 (Diuretics and masking agents) of the 2017 WADA Prohibited List.

- The Athlete does not dispute the analytical finding and has waived both the B-sample analysis as well as the DNA Test.

- The Athlete has committed an ADRV under Article 2 para. 2(a) RANAD ADL.

- There are no legal or factual grounds for any reduction of the period of ineligibility.

- The 2-year sanction is in accordance with the principle of proportionality and also is in accordance with the Athlete's own prayers for relief before the RANAD Appeal Panel, where she requested a reduction from 4 years to 2 years (initially) and then 1 year of ineligibility.

- The Athlete has failed to establish that the alleged departures from the ISTI could have caused the AAF and such departures have been caused by the Athlete's own actions.

37. In its Answer, the First Respondent submitted following prayers for relief:

"We respectfully request that the COURT OF ARBITRATION FOR SPORT deem this ANSWER submitted on behalf of the Romanian National Anti-Doping Agency, and thus

A. to uphold the appeal lodged by the Appellant against the Decision no. 12 rendered on 16 October 2018 by the RADA Appeal Committee;

B. to amend RADA Appeal Committee's decision accordingly;

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

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

38. The Second Respondent did not submit any statement or brief containing prayers for relief.

V. JURISDICTION

39. Given that the Parties appearing before the CAS are neither domiciled nor resident in Switzerland, reference shall be made to Chapter 12 of the Swiss Private International Law Act ("PILA") in determining the extent to which the CAS can rule on its own jurisdiction. Indeed, pursuant to Article 176(1) PILA, *"[t]he provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland"*.

40. Pursuant to Article R55 of the Code and Article 186 PILA, CAS has the power to decide on its own jurisdiction. This power stems from the international arbitration doctrine of "*Kompetenz Kompetenz*" (ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (éd.), International Arbitration in Switzerland – A Handbook for Practitioners, La Haye 2004, p. 29; MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zürich 2004, pp. 115-116; WENGER W., N 2 ad Art. 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, Basel 2000).

41. Article 186(2) PILA provides that an objection of lack of jurisdiction must be raised prior to any defence on the merits (Decision of the Swiss Supreme Court 4A_682/2012 of 20 June

2013, para. 4.4.2.1). This rule implies that an arbitral tribunal has jurisdiction if the respondent participates in the proceedings without raising any objection ("*Einlassung*") thereby implicitly admitting the arbitral tribunal's competence (ATF 128 III 50 para. 2c/aa). Hence, an arbitral tribunal can only decide on its competence if its jurisdiction is disputed, except where the lack of objection results from the default of one of the parties (ATF 120 II 155 consid. 3c).

42. This is the scenario that has presented itself in the present procedure given that the Second Respondent did not actively participate in the proceedings, with the exception of, *e.g.*, her letter dated 6 March 2019. Accordingly, the Sole Arbitrator must decide on her own competence.

43. The jurisdiction of CAS, which is not disputed by the First Respondent, derives from Article 76(1) RANAD ADL pursuant to which:

> *"The decisions by the Appeal Commission may be appealed to the Court of Arbitration for Sport (CAS) in Lausanne only by the entities stipulated in article 74 para (1) letters c) and f) within 21 days after being notified".*

and Article R47 of the Code, which provides:

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

44. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Appellant and the First Respondent. The Sole Arbitrator further notes that the Second Respondent, who was clearly aware of the proceedings given that she sent at least one letter, never objected to the jurisdiction of the CAS to hear this case.

45. It follows that CAS has jurisdiction to adjudicate and decide the present dispute.

VI. ADMISSIBILITY

46. Article R49 of the Code provides as follows:

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

47. Article 76(2) RANAD ADL provides as follows:

"The filing deadline for an appeal filed by WADA to the Court of Arbitration for Sport (CAS) shall be twenty-one (21) days after the last day on which any other party in the case could have appealed or twenty-one (21) days after WADA's receipt of the complete file relating to the decision".

48. The Statement of Appeal was filed within the deadline of 21 days after WADA's receipt set by Article 76(2) RANAD ADL. The appeal complied with all other requirements of Article 48 of the Code, including the payment of the CAS Court Office fee.

49. Article R51(1) of the Code provides as follows:

"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit".

50. The Appeal Brief was filed by the Appellant on 18 March 2019, within the deadline extended by the CAS Court Office.

51. It follows that the appeal is admissible.

VII. APPLICABLE LAW

52. Article R58 of the Code provides as follows:

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

53. The Appealed Decision was rendered by the RANAD Appeal Panel in application of the RANAD ADL, as well as the Operational and Disciplinary Regulations for the Management of the Doping Control Results by the National Anti-Doping Agency ("RANAD ADR").

54. As, pursuant to Article 102 RANAD ADL, *"the provisions of the present law are completed by the provisions of the World Anti-Doping Code and they shall be interpreted in commitment to this Code"*, the World Anti-Doping Code 2015 ("WADC") is also to be considered.

55. Hence, the RANAD ADL, the RANAD ADR and the WADC are the laws applicable to this appeal.

VIII. MERITS

56. Considering all of the Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete commit an ADRV?

B. Must the testing and the finding of an ADRV be annulled due to procedural flaws during the sample collection process?

C. In case the first question is answered in the affirmative and the second in the negative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete commit an ADRV?

57. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the case-at-hand.

58. Pursuant to Article 2.1 WADC:

> *"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.*
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> *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.*
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> *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".*

59. The relevant parts of Article 2 RANAD ADL read as follows:

> *"Doping in sport represents the occurrence of one or more of the anti-doping rule violations set forth in Paragraph 2.*
>
> *(2) The following actions constitute anti-doping rule violations:*

(a) The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's biological sample".

60. Article 23 RANAD ADL reads as follows:

"The athlete is directly liable for what is found in his/her biological sample".

61. The Sole Arbitrator observes: (i) that the Athlete underwent an in-competition doping control test on 17 September 2017; (ii) that the analysis of the A-sample revealed the presence of furosemide; (iii) that furosemide is a specified substance at all times under S5 (Diuretics and masking agents) of the 2017 WADA Prohibited List; and (iv) that the Athlete waived the analysis of the B-sample and did not dispute the analytical results of the sample when appearing before the RANAD Appeal Panel.

62. The Sole Arbitrator notes that Article 2 (2) (a) RANAD ADL forbids the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids. WADA has presented a Doping Control Report issued by the Bucharest WADA-accredited Laboratory dated 26 September 2017. According to said report, the Bucharest Laboratory detected the presence of furosemide in the Athlete's A-sample. Considering that the Athlete has not disputed the Bucharest Laboratory's finding, the Sole Arbitrator is comfortably satisfied that the Athlete has violated Article 2 (2) (a) RANAD ADL and thus committed an ADRV.

B. Must the testing and the finding of an ADRV be annulled due to procedural flaws during the sample collection process?

63. The relevant parts of Article 36 RANAD ADL read as follows:

"(4) In the situation of an Adverse Analytical Finding, the Agency shall review the occurrence of one of the following cases:

a) a Therapeutic Use Exemption was granted or is in the process of being granted;

b) there is a suspicion regarding a departure from the International Standard for Testing and Investigations or the International Standard for Laboratories that invalidates the determined adverse analytical finding.

(7) In case one of the situations set forth in para (4) occurs and the Agency decides not to bring forward the Adverse Analytical Finding as an anti-doping rule violation, it shall so notify the Athlete, the national federation, the international federation, the Romanian Olympic and Sports Committee and the World Anti-Doping Agency".

64. Further, Article 3.2.3 WADC stipulates the following:

"Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or Anti-Doping Organization rules which did not cause an Adverse Analytical Finding or other anti-doping

rule violation shall not invalidate such evidence or results. If the Athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

65. Finally, Article 9 RANAD ADR reads as follows:

> *"(1) The departures from any other international standard or other anti-doping rules or policies set forth in the Code or the national legislation which did not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate such evidence results.*
>
> *(2) If the athlete or other person establishes a departure from another international standard or other anti-doping policy or rule which could reasonably have caused an anti-doping rule violation based on an adverse analytical finding or other anti-doping rule violation, then the Agency shall have the burden to establish that such departure did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation".*

66. The RANAD Hearing Commission noted that *"following the reviews conducted as provided in article 36 paragraph (4) letter (b) of the Law, ANAD established that there is no suspicion regarding a departure from the International Standard for Testing and Investigations"* and that *"given the facts established pursuant to the provisions of article 36 paragraph (4) of the Law, ANAD decided to manage the case as an alleged anti-doping rule violation".*

67. During her hearing before the RANAD Hearing Commission, the Athlete explained that *"on 17.09.2017 I participated in the Junior and Youth National Championship, that it took place at the Mircea Eliade Hall, in Bucharest. I did a doping control, got into the station and I gave the ID to a lady and I went to the toilet with another lady, I offered the A sample (partial), I went back to the station (which was a little further away from the toilet) I put the box with the partial sample on the table with the documents and in the meantime a colleague calls us at the premiere, I went quickly, but when I came back I found the box sealed on the bench (I do not know if it was mine), I asked if it is mine and the lady said to check the code with the one on the form (it was the same). We went, I gave the rest of the sample, and to equate it, I shed one glass from one bottle to another. I went, I signed, the lady asked if I had anything to object to, I said no, I signed and I left".*

68. Before the RANAD Hearing Commission, the DCOs Dr Cristina Uluc and Mrs Adriana Cocos − who collected the Athlete's sample with code no. 6304200A − stated that the Athlete presented herself at the doping control station, after which she provided a partial urine sample, which was sealed according to the applicable procedures, and the partial sample code was entered onto the doping control form ("DCF"). They also confirmed that the Athlete participated in the prize ceremony, and that on her return she identified her partial sample according to the sample code entered on the DCF. Moreover, she was asked if she had any comments on the collection procedure for recording in the DCF. The Athlete said she had no comments, and on the DCF it was written *"No comments"*. A copy of the DCF was handed to the Athlete, according to the methodological norms in force.

69. The RANAD Appeal Panel, in turn, heard testimony from the Athlete and the DCOs, and on the subject of the control procedure found that:

> *"After releasing the partial sample, the appellant was called to the medal ceremony, at which point she left the station unescorted, for an estimated lapse of time of 20-30 minutes, while the ceremony in excess of 1 hour, according to the statement of Mr. Robert-Alexandru Andreescu. This aspect was confirmed by all the interviewed witnesses, including Dr. Cristina Uluc. The appellant justifies her departure from the doping control station - unescorted and without the approval of a DCO - on account of the lack of instructions, since the appellant was submitting to a doping control for the first time. Dr. Cristina Uluc maintains that the info briefing was conducted prior to the onset of the sample collection. Nonetheless, the unescorted departure from the doping control station is an incident that should have been mandatorily recorded in the station's log departure/return time).*
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> *Another core element, subject to intense debate, referred to the sealing of the partial sample. To this effect, the appellant described in detail the features of the partial sample kit, contesting that the seal was placed in a bag, as initially claimed by Dr. Cristina Uluc. According to the DCO, some partial sample kits do not include a bag, instead they feature a stopper on which the bar code is applied, the strip with the unique code is applied, and that is being recorded. As such, the athlete could not leave without applying the stopper, because otherwise the bottle would be blocked. Nevertheless, the appellant claimed that - although the bottle could have been blocked with the stopper - she did not apply the bar code, the one which singles out the sample. This statement was contradicted by Dr. Cristina Uluc who maintained that the seal was applied in the presence of the athlete.*
>
> *From the cross-examination of the witnesses it appears that the athlete's departure from the station and the lack of monitoring were due to the unsuitable conditions in which the doping control was conducted, an aspect also acknowledged by the DCO. As such, although initially the doping control team consisted in 3 DCOs, one of them left and two remained, which rendered impossible the monitoring of athletes and the overall monitoring of the station. "But I passed in front on the doping control station and there was no one there beside the athletes. It happened. I saw it myself' stated the appellant's coach. Dr. Cristina Uluc admitted that the station was non-compliant, that a national-level event took place in a sports high-school, and "the toilet is down the hall, that I was offered a locker room where there is no room to separate the sample collection area from the waiting area…". The unsuitable conditions - the very high temperature - led to the station door being open which enabled the access of any person. Although, according to the regulations, access to the station must be recorded, according to the statement rendered by Mr. Viorel Gasca, with no objection raised by the DCO, "There was a back and forth dynamic as the doctor previously said, a mess. Come and go, come and go. They would say: "speed up, it's hot, we can't take it anymore, no air conditioning". And this is true, it was unbearably hot".*

70. The RANAD Appeal Panel considered that *"the afore-described aspects indicate beyond any doubt the occurrence of serious procedural flaws consisting in: (i) the incident that occurred (the athlete left the station for a time lapse of minimum 20 minutes) and (ii) the sealing of the partial sample collected from the athlete up until the occurrence of the incident and the filling and re-sealing of the sample after the time of her return to the doping control station".*

71. As a consequence, the RANAD Appeal Panel found that the *"failure to record the appellant's unescorted departure from the doping control station - likely owing to the fact that this major incident was unbeknownst to the doping control team at the time the doping control was in progress - given the unsuitable conditions in which the testing was conducted, acknowledged also by the DCO, raises serious concerns as to the accuracy of the partial sample sealing, and, in outcome, in relation to the testing result. Although Dr. Cristina Uluc (DCO) insisted throughout the entire hearing procedure that the athlete left the doping control station unescorted, still, this fact is not recorded in the station log".*

72. Therefore, the RANAD Appeal Panel held that *"the procedural irregularities listed above trigger the absolute nullity of the testing that was performed under these conditions - a formal nullity that renders useless the substantive analysis on the anti-doping rule violation for which the athlete is held liable"*, thus upheld the Athlete's appeal and setting aside the RANAD Hearing Commission's Decision no. 18/18.01.2018.

73. As a consequence of the testing procedure having been annulled by the RANAD Appeal Panel, it found that the ADRV had not been *"proven in conformity with the procedure set forth in the present law"* as per Article 56(1) RANAD ADL and acquitted the Athlete.

74. The Sole Arbitrator finds that the Athlete signed the DCF without adding any remark as to her concerns about the sample collection process, that she also did not raise any such concern in her 27 November 2017 appeal letter to the RANAD that therefore the departure from ISTI has not been proven by the Athlete. Thus, it is the Sole Arbitrator's view that evidence of a departure of the collection procedure from ISTI is not sufficient for finding an annulment.

75. The Sole Arbitrator further considers that the RANAD Appeal Panel did not take into consideration the requirements of Article 9 RANAD ADL and Article 3.2.3 WADC, pursuant to which it is first the Athlete's obligation to show that the departure from the ISTI could reasonably have caused the AAF. Only then shall RANAD have the burden − but also the opportunity − to establish that such departure did not cause the AAF.

76. The Athlete has not argued, explained or proven how the contended departure from the ISTI could have caused the AAF. To the contrary, the Athlete has not contested the AAF, nor did she contend that the sample was manipulated in her absence from the doping control station or that it was not even her sample. She even declined to the opportunity to have the sample B analysis and to DNA testing, thereby demonstrating that she did not think that the sample was not hers.

77. Therefore, even if the sample collection procedure had not been in compliance with ISTI, such non-compliance would not be sufficient to invalidate the results as the Athlete has not even attempted to show or establish that the alleged procedural failures had resulted in the AAF.

78. And even if the Athlete had succeeded in establishing that there existed a causal link between the departure from the ISTI and the AAF (*quod non*) and that she was not precluded from invoking such causal link due to her own behaviour, the consequence of such evidence would not have been the annulment of the results, but, pursuant to Article 9 RANAD ADL and Article

3.2.3 WADC, would rather have been the shifting of the burden of proof to RANAD to prove that such departure did not cause the AAF or the factual basis for the ADRV.

79. Hence, the Sole Arbitrator finds that the analytical results showing the presence of furosemide in the Athlete's sample are valid and that the Athlete has committed an ADRV.

C. If an ADRV has been committed, what is the sanction?

1. The duration of the ineligibility period

80. Article 57 RANAD ADL reads, in the relevant parts, as follows:

> *"The period of ineligibility for the violation set forth in article 2 para 2) letters (a), (b) and (t) shall be 4 (four) years as it follows, unless the provisions of articles 63, 64 or 67 are applicable:*
>
> *a) where the anti-doping rule violation does not involve a specified substance, unless the athlete or another person can establish that the anti-doping rule violation was not intentional.*
>
> *b) where the anti-doping rule violation involves the use of a specified substance and the Agency can establish that the anti-doping rule violation was intentional.*
>
> *c) where the provisions set forth in a) and b) above are not applicable, the period of ineligibility shall be 2 (two) years".*

81. As stipulated in Article 57 RANAD ADL, the basic duration of the ineligibility period for a violation under Article 2(2) (a), (b) and (t) is four years, except where the prohibited substance is a specified substance and RANAD cannot establish that the ADRV was intentional; in such case, the period of ineligibility is two years.

82. Furosemide is a specified substance. Furthermore, in their respective submissions, WADA and RANAD submit that the appropriate length of the ban should be two years and admit that they are not in a position to establish that the ADRV was intentional.

83. The relevant Articles in Chapter X on Elimination, Reduction or Suspension of Period of Ineligibility of the Law no. 227/2006 essentially read as follows:

> *"Art. 63. - If an athlete or other person establishes in an individual case that he/she bears no Fault or Negligence, the period of ineligibility will be eliminated.*
>
> *Art. 64. - The reduction of the period of ineligibility based on no significant fault or negligence applies in the following cases:*
>
> *a) For specified substances or contaminated products, for the occurrences set forth in art. 2 para (2) letter a), b) and f)*

b) Where an athlete or other person establishes no significant fault or negligence in relation to a specified substance or a contaminated product, the sanction will be, at a minimum, a reprimand, and at a maximum 2 (two) years ineligibility, depending on the degree of fault".

84. In Article 3 (17) RANAD ADL, no fault or negligence is defined as follows: *"the Athlete establishing that he or she did not suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule".*

85. In Article 3 (18) RANAD ADL, no significant fault or negligence is defined as follows: *"the Athlete establishing that his or her 'Fault or Negligence', when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation".*

86. Whether an Athlete bears any fault or negligence can only be assessed in the presence of evidence as to how the prohibited substance entered the Athlete's body. As illustrated in the examples from CAS jurisprudence identified by WADA in this case, the Athlete has the burden of proof to offer compelling and persuasive evidence on how the unintentional ingestion of the prohibited substance occurred.

87. The Athlete had originally requested a reduction from four years to two years in her Application for Appeal to the RANAD Appeal Panel dated 2 May 2018. In her second submission to the RANAD Appeal Panel dated 3 October 2018, the Athlete requested a reduction of the period of ineligibility from four years to one year, arguing that she did not intentionally use furosemide and that she had no reason to do so as she met the weight requirements for the category in which she competed.

88. According to the Appealed Decision, the Athlete did not provide the RANAD Appeal Panel with any explanation for the presence of furosemide in her sample. She further did not prove or demonstrate how furosemide entered her body and she did not give any explanation at all as to the origin of the furosemide.

89. The Athlete further did not file any submissions before the CAS regarding the length of the ban or any other consequence of the ADRV. In particular, the Athlete has not submitted to the CAS that the period of ineligibility should be mitigated for some reason.

90. The Athlete has not argued or even tried to establish the origin of furosemide, how the substance has entered her body, and that she did not know or suspect − and could not have known or suspected − that she had used or been administrated furosemide.

91. Hence, the Sole Arbitrator finds that Athlete has not shown that she bears no fault or negligence or that her fault or negligence was not significant in relationship to the ADRV, and that as a consequence, the period of ineligibility should be eliminated or reduced.

92. Therefore, the Athlete shall be sanctioned with a two-year period of ineligibility under Article 57 RANAD ADL.

2. Commencement of the Ineligibility Period and Credit for Period of Ineligibility Served

93. The Parties' submissions with this regard are as follows:

- With respect to the start date of the sanction, WADA requested that the ineligibility period commence on the date of the CAS Award rendered in this proceeding and that the period of provisional suspension imposed on the Athlete until the date of the CAS Award be credited against the total period of ineligibility to be served. WADA did not elaborate upon the issue further.

- The First Respondent requested that the Appeal lodged by the Appellant be upheld and the Appealed Decision be amended accordingly. The First Respondent did not address the question of the date of the commencement of the period of ineligibility.

- The Athlete did not address the matter during the CAS proceedings.

94. The Sole Arbitrator is guided by Article 60 RANAD ADL, reading in relevant parts as follows:

> *"(1) The period of ineligibility shall begin to run on the date of the final hearing decision providing on ineligibility, or, if the hearing is waived, on the date ineligibility is accepted.*
>
> *(2) Where there has been a delay in reaching a decision on ineligibility, for reasons not attributable to the athlete or other person, the period of ineligibility may commence at an earlier date - as early as the date of sample collection or the date on which another anti-doping rule violation last occurred.*
>
> *(3) Where the provisions of para (2) apply, all competitive results achieved during the period of Ineligibility, including retroactive ineligibility, shall be disqualified.*
>
> *(4) Where the athlete or other person promptly admits the anti-doping rule violation, after the Agency notified him/her on the violation, the period of ineligibility may commence as early as the date of sample collection or the date on which another anti-doping rule violation - other than the one set forth in article (2) para 2) letter a) - last occurred.*
>
> *(5) Where the provisions set forth in para (4) above apply, the athlete or another person shall serve at least one-half of the otherwise applicable period of ineligibility, effective the date on which the athlete or another person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date on which the sanction is otherwise imposed.*
>
> *(6) The provisions of the present article shall not apply where the period of ineligibility has already been reduced under article 67.*

(7) The period of provisional suspension is credited against the period of ineligibility ultimately imposed, where the period of provisional ineligibility is imposed and observed.

(8) The athlete or other person, who voluntarily accepts in writing the provisional suspension imposed by an anti-doping organization with results management authority, shall receive a credit for such period of voluntary provisional suspension against the period of ineligibility ultimately imposed.

(9) No credit against an ultimately imposed ineligibility shall be granted for any given lapse of time prior to the effective date of the provisional suspension or voluntary provisional suspension.

(10) In Team Sports, where a period of ineligibility is imposed upon a team, the period of ineligibility shall commence on the date of the final hearing decision providing for ineligibility, or, if the hearing is waived, on the date ineligibility is accepted".

95. Considering that the RANAD Hearing Commission had declared the beginning of the period of ineligibility to be on 17 September 2017 (date of the sample collection), but that the RANAD Appeal Panel lifted such sanction of ineligibility in the Appealed Decision, the Sole Arbitrator finds that for practical reasons, and in order to avoid any eventual misunderstanding, the period of ineligibility shall start on the date of this Award, but that the period of ineligibility effectively served by the Athlete shall be credited against the total period of ineligibility to be served.

3. Disqualification of Results

96. WADA has requested that all competitive results obtained by the Athlete from 17 September 2017 until 18 January 2018 (inclusive) be disqualified. WADA has not further addressed this issue in the CAS proceedings, nor did the Respondents.

97. Article 56 RANAD ADL reads as follows:

"(1) Any anti-doping rule violation set forth in art. 2, paragraph (2) committed by the Athlete during or in connection with a competition and/or sport event, proven in conformity with the procedure set forth in the present law leads to disqualification, invalidation of all of the Athlete's individual results obtained in that competition and forfeiture of all medals, points and prizes.

(2) Further to the automatic invalidation of the results obtained in the competition where the positive sample was collected, by virtue of paragraph (1), all the other results obtained effective the date of sample collection or of another anti-doping rule violation shall be invalidated with all the consequences incurred thereof including forfeiture of all medals, points and prizes.

(3) If the Athlete establishes that he or she bears No Fault or Negligence for the violations referred to in para (1), the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's violation of the provisions of article 2 para (2).

(4) An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

(5) In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under para (4), all other competitive results of the Athlete obtained from the date a positive Sample was collected whether in-competition or out-of-competition or other anti-doping rule violation of Article 2 para (2) letters b)-j) occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".

98. Pursuant to Article 56 (5) RANAD ADL, the disqualification of results from the date of collection of the positive sample through the commencement of any provisional suspension of ineligibility period is the main rule and applying fairness would be an exception. Neither the Appellant nor the Respondents have argued principles of fairness.

99. Based on the above considerations, the Sole Arbitrator finds it justified to disqualify all of the Athlete's results obtained between 17 September 2017 and the decision issued by the RANAD Hearing Commission on 18 January 2018, with all resulting consequences, including forfeiture of medals, points and prizes.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by WADA on 25 January 2019 against the decision rendered by the Appeal Panel of RANAD on 16 October 2018 is upheld.

2. The decision of the Appeal Panel of RANAD of 16 October 2018 is set aside.

3. Anda-Mihaela Vâlvoi is suspended for a period of two (2) years commencing on the date of this Award.

4. Any period of provisional suspension or ineligibility effectively served by Anda-Mihaela Vâlvoi shall be credited against the total period of ineligibility to be served.

5. All competitive results obtained by Anda-Mihaela Vâlvoi between 17 September 2017 and 18 January 2018 are disqualified with all resulting consequences, including forfeiture of medals, points and prizes.

6. (…).

7. (…).

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