**Arbitration CAS 2021/A/8056 Olga Pestova v. Russian Anti-Doping Agency (RUSADA), award of 23 May 2022**

Panel: Mr Alexis Schoeb (Switzerland), Sole Arbitrator

*Rugby*
*Doping (methylhexaneamine)*
*Conditions for the reduction of the standard sanction on the basis of "No Significant Fault or Negligence"*
*Level of care expected from the athlete for a finding of "No Significant Fault or Negligence"*
*Categories and levels of fault*

1. **According to the applicable regulations, in order for the standard sanction for a violation involving a specified substance and a non-intentional anti-doping rule violation to be reduced on the basis of "No Significant Fault or Negligence", the athlete must, on a balance of probabilities, firstly establish how the prohibited substance entered his/her system (the so-called "route of ingestion"). This is the "threshold" condition established by the anti-doping rules to allow "access" to a finding of "No Significant Fault or Negligence". Secondly, s/he must establish the facts and circumstances that are relevant to his/her fault and, on that basis, why the standard sanction should be reduced. A period of ineligibility can be reduced based on "No Significant Fault or Negligence" only in cases where the circumstances justifying a deviation from the duty of exercising the *"utmost caution"* are truly exceptional, and not in the vast majority of cases.**

2. **The "bar" should not be set too high for a finding of "No Significant Fault or Negligence". In other words, a claim of "No Significant Fault or Negligence" is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some *"stones unturned"*. An athlete can always read the label of the product used or make internet searches to ascertain its ingredients, cross-check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in every and all circumstances. To find otherwise would render the "No Significant Fault or Negligence" provision in the World Anti-Doping Code (WADC) and translated into the applicable regulations meaningless.**

3. **Until the 2015 version of the WADC, anti-doping rules allowed a distinction between three degrees of fault or negligence. The 2015 version of the WADC significantly differs from the previous scheme for the consideration of the specificities of individual cases. As a result, the time span of 24 months which is still available now covers only two instead of three categories of fault: 1) normal degree of fault: over 12 months and up to**

**24 months with a standard normal degree leading to an 18-month period of ineligibility; and 2) light degree of fault: 0-12 months with a standard light degree leading to a 6-month period of ineligibility. In order to determine into which category of fault a particular case might fall, it is helpful to consider both "objective" and "subjective" levels of fault. The objective level of fault points to *"what standard of care could have been expected from a reasonable person in the athlete's situation"*, while the subjective level looks to *"what could have been expected from that particular athlete, in the light of his/her particular capacities"*. Therefore, the objective element should be foremost in determining into which of the relevant categories a particular case falls; the subjective element can then be used to move a particular athlete up or down within that category. All in all, however, there might be some overlap within those elements.**

## I. BACKGROUND

1. Ms Olga Pestova is a Russian citizen and Rugby sevens player, born on 24 December 1997 (the "Player" or the "Appellant").

2. The Russian Anti-Doping Agency ("RUSADA" or the "Respondent") is the National Anti-Doping Organisation in Russia, with registered office in Moscow, Russia. RUSADA is a signatory to the World Anti-Doping Code ("WADC"). Accordingly, RUSADA has *inter alia* the responsibility to pursue all potential anti-doping rule violations within its jurisdiction pursuant to the All-Russian Anti-Doping Rules (the "ARADR"), adopted in order to implement RUSADA's responsibilities under the WADC. The WADC is *"the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements"*.

## II. FACTUAL SUMMARY

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

4. On 4 October 2020, at the end of the match of the Russian Rugby Championships played in Taganrog (Russia) (the "Match") with her team "VVA-Podmoskovie" at that time (the "Team"), the Player underwent an in-competition anti-doping control and provided a urine sample numbered 4511535 (the "Sample").

5. The doping control form dated 4 October 2020 and signed by the Player (the "DCF") contained a declaration of the medications/supplements taken in the preceding 7 days (*"BCAA, Ortamol"*)

and the blood transfusions received in the preceding three months (*"No blood transfusion"*), and no comments with respect to the collection procedure.

6. On 21 October 2020, the Anti-Doping Laboratory of Seibersdorf, Austria (the "Laboratory") confirmed an adverse analytical finding (the "AAF") for *"the presence of the stimulant 4-methyl-2-hexanamine"* (the "Substance"). It is not disputed that the Substance corresponds to *"4-Methylhexan-2-amine (methylhexaneamine)"* ("MHA"), which is mentioned as a specified substance prohibited in-competition under *"S.6(b) Specified Stimulants"* of the list of prohibited substances and methods of January 2020 published by the World Anti-Doping Agency ("WADA") (the "2020 Prohibited List").

7. On 22 October 2020, the Player was notified by RUSADA of the AAF and of the opening of disciplinary proceedings against her for a potential Anti-Doping Rules Violation ("ADRV"). The Player was notably informed of her right to either admit the ADRV or request the B sample analysis, as well as of her immediate provisional suspension from participating in training camps and competitions.

8. On 24 October 2020, the Player sent an email to RUSADA asking *"How can [she] request[s] the results of A sample analysis from the laboratory?"*.

9. On 26 October 2020, the Player's counsel sent an email to RUSADA requesting *"[t]o clarify the circumstances of the case […] the concentration request to the Seibersdorf Anti-Doping Laboratory in regard of the prohibited substance methylhexan-2-amine (methylhexanamine) in sample A45111535 collected from the Athlete"*.

10. On 26 October 2020, RUSADA replied by email asking whether the Player wanted to request the A sample documents file. On the same day, the Player's counsel replied by email that they *"just want to know the concentration"*. Such request was submitted on the same day to the Laboratory by RUSADA.

11. On 27 October 2020, the Laboratory informed RUSADA by email that *"[t]he estimated concentration of 4-Methylhexanamine in the sample A4511535 is approximately 3 µg/mL (2950 ng/mL)"* and drew RUSADA's attention that *"this is a rough estimation of the concentration range from the qualitative confirmation data"*.

12. By letter dated 29 October 2020, RUSADA informed the Player of the receipt of the concentration report from the Laboratory and that *"the concentration of methylhexan-2-amone (methylhexanamine) found in your doping sample A4511535 is 3 mcg/ml (2950 ng/mL)"*.

13. The Player did not submit a B-sample analysis request within the deadline specified in the RUSADA notification which was considered as a renunciation to analyse the B-sample.

14. On 25 March 2021, a hearing was held in person before the RUSADA Disciplinary Anti-Doping Committee (the "DADC").

15. The DADC issued a decision No 73/2021 (the "Decision") on 13 May 2021, by which it was found that the Player had committed an ADRV.

16. On 19 May 2021, the grounds of the Decision were issued and notified to the Player. In essence the DADC indicated the following (English translation submitted by RUSADA):

*"As follows from a report by a Seibersdorf anti-doping laboratory, the Athlete's sample contained methylhexan-2-amine (methylhexanamine) under Class S6-b of 2020 WADA Prohibited List.*

*Pursuant to Art. 2.1.1 ADR approved by the order of the Ministry for Sport of No 947 9 August 2016 effective as of the date of the alleged violation, the athlete has a duty to ensure that no prohibited substance enters her system. Athletes are liable for any prohibited substance, or its metabolites, or markers identified in their samples (Art 2.1.1 ADR). The Athlete didn't present evidence of taking every possible measure, of outmost care, to prevent a prohibited substance entering her body.*

*In accordance with Art. 2.1 ADR, it is a personal duty of every athlete to ensure that no prohibited substance enters his/her body. Pursuant to Art. 10.2 ADR, standard sanction for this violation of Art. 2.1 is a 2-year ineligibility, unless eligibility is reduced or eliminated pursuant to Art. 10.4 (Elimination of the period of ineligibility when there is no fault or negligence), or to Art. 10.5 (Reduction of the period of ineligibility when there is no significant fault or negligence), or pursuant to Art. 10.6 there exist reasons to eliminate or reduce the period of ineligibility not related to fault (Substantial assistance in discovering or establishing anti-doping rules' violation (Art. 10.6.1) or a prompt admission of an anti-doping rule violation immediately after the charges are brought (Art. 10.6.3).*

*The Committee has considered the head injury that was sustained a week before the sample collection date which was confirmed by a certificate from an emergence room in Taganrog and an opinion from a neurologist as a mitigating circumstance that impacts the degree of fault as this incident might have had an impact on the physical and psychological condition of the Athlete and the purchase and the consumption of the drink were a result of some negligence. It should be also considered that the name of the substance on the bottle was written with orthographical mistakes that, considering the physical and psychological condition of the Athlete, made it more difficult for the Athlete to check the drink for prohibited substances.*

*In consideration of the above, the Committee ruled to confirm the violation of ADR by Olga Pestova. The Committee is of the opinion that there exist reasons to reduce the period of ineligibility pursuant to Art. 10.5 ADR and therefore the Athlete is subject to a sanction of a 1-year period of ineligibility as from the date of provisional suspension".*

## III. PROCEDURE BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 9 June 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision, naming RUSADA as Respondent. The Statement of Appeal contained, *inter alia*, a request that the present case be submitted to a sole arbitrator and a request that the present dispute be expedited in accordance with Article R52 of the Code and that this appeal be decided prior to *"the end of July 2021"*.

18. On the same day, the Appellant submitted a request that the time for filing the Appeal Brief by extended until 12 July 2021.

19. By email of 23 June 2021, the Respondent informed the CAS Court Office that it agreed that the present case be submitted to a sole arbitrator and that it had no objection to the Appellant's time extension request but that it did not agree with the Appellant's request for the present procedure to be expedited.

20. By email of 23 June 2021, the CAS Court Office informed the Parties that the Appellant's request to file her Appeal Brief until 12 July 2021 was granted, that the Parties would be informed in due course about the name of the sole arbitrator in accordance with Article R54 of the Code and that the Respondent did not agree to an expedited procedure.

21. By letter dated 26 June 2021, the Appellant requested the CAS to order RUSADA to produce, by 6 July 2021, a copy of the Player's case file in its possession, accompanied by an English translation.

22. By email of 7 July 2021, the Respondent informed the CAS Court Office that it would sent the requested case file but noted that such case file did not contain any relevant documents that the Appellant had not *"already seen"*, as there was no additional evidence submitted by RUSADA in the case file other than *"the usual documentation relating to sample collection and analysis (including the Doping Control Form and Adverse Analytical Finding), together with correspondence with the Appellant and her advisors regarding the notification to the Appellant, and details pertaining to the Adverse Analytical Finding"*.

23. By email of 8 July 2021, the Respondent provided the CAS Court Office and the Appellant with the requested case file and noted that *"the remaining documents in the case file were the position advanced by the Appellant in the first instance proceedings, together with the various Annexes to that position"* and that it would not appear that the Respondent needed to produced documents that the Appellant already had in her possession.

24. By email of 9 July 2021, the Appellant requested an extension of the deadline to file her Appeal Brief until 16 July 2021.

25. By email of 9 July 2021, the CAS Court Office informed the Parties that the Appellant was invited to the file her Appeal Brief no later than 16 July 2021, since the Respondent had confirmed that it had no objection against the Appellant's time extension request.

26. By email of 22 July 2021, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief filed on 16 July 2021 and invited the Respondent to submit its Answer within 20 days of this email.

27. By email of 29 July 2021, the Respondent requested a time extension to file its Answer by ten days, *i.e.* until 21 August 2021. Such request was granted by the CAS Court Office by letter of 30 July 2021.

28. By email of 24 August 2021, the CAS Court Office informed the Parties that, pursuant Article R54 of the Code, Mr Alexis Schoeb (Attorney-at-Law in Geneva Switzerland) had been appointed as Sole Arbitrator by the Deputy President of the CAS Appeals Arbitration Division

in the present case.

29. On 25 August 2021, further to an additionally granted time-extension, the Respondent filed its Answer brief.

30. By letter dated 5 October 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in this matter, which would be held by videoconference, and invited the Parties to inform the CAS Court Office whether they would be available on the dates proposed by the Sole Arbitrator.

31. In accordance with the Parties' availabilities, a hearing was scheduled to be held on 9 November 2021.

32. By letter dated 3 November 2021, the CAS Court Office informed the Parties that, further to the Appellant's request, the Sole Arbitrator allowed Mr Sergei Mishin to assist the Athlete and the witnesses as interpreter during the hearing.

33. On 9 November 2021, a hearing was held by video-conference. The Sole Arbitrator was assisted by Mrs Andrea Sherpa-Zimmermann, Counsel to the CAS. The following persons attended the hearing:

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| For the Appellant: | Mr Sergei Lisin, Counsel |
| | Mr Sergei Mishin, Counsel |
| | Ms Irina Krivetskaya, Witness |
| For the Respondent: | Mr Graham Arthur, Counsel |

34. In view of the absence of the Appellant's appointed expert due to her unavailability, the Parties agreed to suspend the hearing and to resume it early December 2021.

35. By letter dated 15 November 2021, the CAS Court Office informed the Parties that the hearing was scheduled on 2 December 2021.

36. On 23 and 25 November 2021, the Parties returned a signed copy of the Order of Procedure, issued by the CAS Court Office on behalf of the Sole Arbitrator.

37. By letter dated 29 November 2021, the CAS Court Office informed the Parties that due to unexpected circumstances, the hearing scheduled on 2 December 2021 had to be postponed to a later date and invited the Parties to confirm whether they would be available on the other proposed dates.

38. By letter dated 2 December 2021, the CAS Court Office informed the Parties that further to their correspondence concerning the date of the hearing and in accordance with their availability, the Sole Arbitrator decided to hold the hearing on 16 December 2021.

39. On 2 December 2021, the hearing resumed by video-conference. The Sole Arbitrator was assisted by Mrs Andrea Sherpa-Zimmermann, Counsel to the CAS. The following persons attended the hearing:

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| For the Appellant: | Mr Sergei Lisin, Counsel |
| | Mr Sergei Mishin, Counsel |
| | Dr Ekaterina Drozdova, Expert |
| | Ms Irina Krivetskaya, Witness |
| For the Respondent: | Mr Graham Arthur, Counsel |

40. At the conclusion of the hearing, the Parties indicated that they were satisfied that their right to be heard had been duly respected and that they had been treated fairly and equally during the arbitration proceedings. The Sole Arbitrator therefore informed the Parties that the proceedings were closed.

## IV. THE POSITION OF THE PARTIES

41. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, indeed, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

### A. The Position of the Appellant

42. In her Appeal Brief the Appellant requested the Sole Arbitrator to:

*"a. set aside the Decision,*

*b. establish that the violation of Article 2.1 2019 ADR was committed, but to limit the sanction to a reprimand and no period of ineligibility on the grounds of no significant fault or negligence (Art. 10.5.1.1 2019 ADR), and*

*c. order RUSADA to pay legal fees and costs of this appeal procedure incurred by the Athlete (if any)".*

43. The Appellant submits that she does not dispute the violation of Article 2.1 ARADR but denies an intentional use of the Substance and disputes the consequences of such violation of the ARADR.

44. In support of her appeal, the Appellant has provided the following explanations and legal considerations:

***a) Factual Background***

45. The Appellant explains that:

- On 27 September 2020, *i.e.* a week before the Match and the sample collection, she suffered a head injury during a match. Such head injury was *"quite severe"* as it left her with an open wound, but she did not receive an appropriate medical treatment as:
    - the ambulance medics that were on duty at the game just cleaned and sutured the wound and let the Player go, instead of taking her to a hospital to determine the extent of a possible brain injury and relevant treatment;
    - the team doctor at that time did not take her for an examination by a neurologist, but asked her several questions and prescribed her a pain reliever.
- On the evening of the same day, she began to feel dizzy, her vision became impaired, and she had an acute headache.
- She and her teammate Ms Irina Krivetskaya went to a small local trauma clinic in Taganrog, where she had an X-ray examination. However, the doctors at this trauma clinic did not conduct a diagnosis protocol that would be customary for head trauma cases (examination by a neurologist and MRI).
- While the Team stayed in Taganrog preparing for the next game scheduled on 4 October 2020, she continued to experience acute headache, nausea and dizziness but nevertheless continued to train with the Team. She lost appetite, felt distracted and easily lost focus, even doing simple tasks like packing her bag. Her physical condition at that time was made worse by the concurrent premenstrual syndrome.
- She did not tell the Team's management about her medical condition as she feared they would immediately remove her from the upcoming game's team list and that would be detrimental to the Team. She also told the Team's medic, Mr Alexandrov, that she was feeling fine.
- On 2 October 2020, before an evening training session, she and her teammate Ms Irina Krivetskaya went to a sport nutrition shop and she decided to buy some energy bars as it appeared the only 'food' she could eat on those day without feeling sick.
- In the shop, she asked for a caffeine drink as she thought it would help her against the nausea. The salesperson said they didn't have caffeine at that moment but offered a drink called *"Melior"* that he claimed would have a similar effect. As the price was just 200 Rubles (less than 3 US dollars), the Player decided to buy it. Her teammate paid for the drink with her card.
- Back in her hotel room, she checked the bottle package for any prohibited substances. As the ingredients were written in English, she thought that she should check them directly on the WADA website and not on the RUSADA website. She didn't find any prohibited

substances and drank the bottle in the evening of 2 October 2020.

- Before drinking from the "Melior" bottle, she didn't seek any advice from the Team's medic, Mr Alexandrov, as he hadn't worked with the Team before, and she feared he could remove her from the game if he discovered how sick she was.

- The headache got worse after she drank from that bottle and she didn't buy any new bottles.

- At the sample collection of 4 October 2020, in addition to feeling sick and stressed, she felt extremely nervous because that was the first sample collection in her life. She felt disoriented and didn't indicate the "Melior" drink on the doping control form.

### *b) Source of the Substance*

46. According to the Appellant, the only possible source of the Substance in her urine sample is the drink "Melior" that she consumed in the evening of 2 October 2020 and submits to have established, with a high degree of probability, the source of the Prohibited Substance in her sample, because:

- The purchase of the drink, in addition to her statement, is confirmed by: a) the witness statement of her teammate, Irina Krivetskaya, that paid for the drink with her bank card; b) the shop's receipt and a bank statement confirming the payment by Irina Krivetskaya;
- In her witness statement, she says that the Appellant consumed the drink in the evening of 2 October 2020, *i.e.* approximately 48 hours before the time of the sample collection.
- If the ingredients information on the label was correct, she may have ingested 90 milligrams of 4-Methylhexan-2-amine.
- According to a 2009 research paper, a single dose of 40 milligrams of 4-Methylhexan-2-amine consumed by two healthy male volunteers led to the finding of circa 3 mkg/mL of the substance in their urine samples in the next 48 hours. Such excretion dynamics look similar to those in the Appellant's case, at least a x2 higher dose would unlikely lead to a quicker excretion time.
- Taking into consideration the concentration of the Prohibited Substance in the Player's sample, it seems reasonable to assume that she did not consume the drink in-competition, a period begins 12 hours before the start of the competition pursuant to the International Standard On Testing and Investigation and the ARADR.
- If she consumed the Prohibited Substance in competition, its concentration in her urine sample would have been much higher (in the above research paper, the concentration did not fall below 10 mkg/mL within the first 12 hours).

### *c) Melior Sport Drink*

47. Regarding the source of the Substance, the Appellant further explains that:

- She didn't keep the bottle and an attempt, in November 2020, to buy the same drink at the

same shop was unsuccessful, as it was no longer available for sale.

- A search for a drink with a similar name in the Russian federal database of registration certificates for nutritional supplements (https://fsa.gov.ru/) produced no results. However, the drink appears to be widely available in online shops in Russia.
- The drink is sold in a 100-ml dark glass bottle with a screw cap and a good quality label and the bottle's pictures on the Internet shows that:
  - The name of the country is written with a mistake ("Irland" instead of "Ireland");
  - The word "Manufacture" is used instead of "Manufactured";
  - The botte looks identical to the bottles normally used in Russia for cheap alcohol drinks and cough medications (*"Эта тара изготавливается по стандарту B-100 ГОСТ (28-B)"*);
  - The Prohibited Substance (4-Methylhexan-2-amine) is indicated among the ingredients by an alternative name, which again is misspelled: 1,3-dimethylamilamine instead of 1,3-dimethylamylamine; the Prohibited List refers to 4-Methylhexan-2-amine or methylhexaneamine.
- It is highly likely that the drink sold under Melior name is a counterfeit product of Russian origin and the details of the manufacturer appear falsified as well.

### *d) Cognitive Impairment*

48. The Appellant explains that she did not receive a proper examination after her head injury and that the severity of her trauma has been assessed on the basis of:
    - Her examination by a neurologist on 17 November 2020, who diagnosed the Player with a *'neurasthenic syndrome associated with a closed craniocerebral injury and evident asthenic syndrome'*;
    - The expert opinion by a neurologist, Dr Ekaterina Drozdova, dated 26 November 2020 who relied on the documentary evidence only ("Expert Opinion") and which concluded that she suffered a concussion, or a mild cerebral contusion.

49. The Appellant claims that a possible cognitive disorder caused by concussion is of particular relevance to assess whether she could adequately evaluate the information and make decisions when she bought and consumed the "Melior" sport drink.

50. The Appellant underlines that Dr Drozdova, who authored a few scientific publications on cognitive disorder in brain injury, concluded her Expert Opinion as follows:

    *"Based on the above circumstances, it is highly probable that the psychological and physical condition of the Athlete, between 27 September (date of the injury) and 4 October 2020 (sample collection) was significantly impacted by the brain injury, including cognitive disorder.*

    *Specifically, this disorder resulted in a limited ability of the Athlete to adequately assess her own physical condition and the risks associated with sport events, in a reduced ability to remember the information and to focus her attention, to search for, analyze and evaluate the information and possible consequences of her own actions or decisions".*

***e) Fault***

51. The Appellant explains that she did check the ingredients of the drink for prohibited substances but was misled by an alternative name of the Prohibited Substance which was also misspelled.

52. She argues that in assessing whether she exercised "outmost care" required from her under the ARADR when she made the decision to consume that drink, the cognitive impairment effect described above should be taken into consideration. Specifically, she considers that the traumatic brain injury that she suffered, which consequences might have been exacerbated by lack of appropriate treatment, physical and emotional stress in the following days, most likely have impacted her ability to:

- search for and analyse information,
- focus attention,
- assess her own physical condition,
- make decisions,
- assess the risks of a possible negative outcome of her actions (or inaction).

53. She thus claims that:

- Her behaviour in these circumstances cannot be considered as negligent. Rather she considers that she exercised the care and fulfilled her duty as an athlete to prevent any prohibited substances entering her body that were adequate to her practical experience with, and knowledge of, the anti-doping rules, as well as her physical condition and cognitive capacity following concussion.

- Her lack of experience and her cognitive impairment led to her failure to indicate any of the medications that she had been given by her team medic shortly after the injury (the headache pain relievers).

54. According to the Appellant, the inclusion of 4-Methylhexan-2-amine on the WADA Prohibited List remains debatable as its negative health effect remains insufficiently documented. In a 2016 research paper *"Have prohibition policies made the wrong decision? A critical review of studies investigating the effects of DMAA"*, the authors analysed the results of 16 scientific studies on the use of DMAA and concluded as follows:

*"There is a limited evidence base describing the adverse effects of DMAA. The volume of evidence surrounding DMAA is small, with most experimental studies utilizing less rigorous designs. While the studies highlight that there are severe adverse effects which can be experienced, it is unclear how prevalent these are, and whether they are actually related to DMAA use. They also serve to show that all substances have the potential to cause harm".*

## B. The Position of the Respondent

55. In its Answer, the Respondent concluded that:

*"The Appellant has committed an anti-doping rule violation arising from the Presence of a Prohibited Substance in Sample A4511535.*

*RUSADA says that by failing to take steps to understand and act on her responsibilities in connection with the use of supplements, the Appellant acted with a degree of Fault that warrants a period of Ineligibility of at least that imposed by the DADC. It maintains its view that the DADC erred in relation to its application of ADR Article 10.5.1.1.*

*The Appellant was provisionally suspended on 22 October 2020 and should receive credit in that regard as against the period of Ineligibility to be imposed. RUSADA will supplement its position as regards the timings of any period of Ineligibility at the hearing of this matter.*

*For the reasons explained in this Response Brief, RUSADA says that –*

*The Player has committed an Anti-Doping Rule Violation contrary to ADR Article 2.1;*

*The Consequences to be applied in respect of the Anti-Doping Rule Violation are that a period of Ineligibility be imposed pursuant to Article 10.5.1.1 of the ADR.*

*RUSADA respectfully requests that costs be awarded to RUSADA in accordance with Rule 64.4 and Rule 64.5 of the Code of Sports-related Arbitration".*

56. The Respondent first notes that the anti-doping rule violation was not contested by the Appellant and that she accepted that the presence of MHA in her Sample A4511535 which constituted an anti-doping rule violation as per Article 2.1 ARADR.

57. The Respondent further notes that the Appeal is based upon the Appellant's view that the Decision was wrong. However, the Respondent considers that the Appellant does not claim that she acted with No Fault, so it must accept that she acted with some fault. According to the Respondent, the issue is, therefore, how much fault can be attributed to the Appellant.

58. In support of its Answer, the Respondent has provided the following explanations and legal considerations:

### *a) Means of Ingestion*

59. The Respondent explains that, although the use of "Melior" was not disclosed on the Appellant's Doping Control Form, it has made enquiries with the Laboratory as to whether the consumption of 90mG of MHA (assuming that the labelling on the "Melior" bottle is accurate) is consistent with the amount of MHA identified in the Appellant's Sample. The Laboratory confirmed that the consumption of "Melior" in the manner described by the Appellant is a possible explanation for the finding of MHA in the Appellant's Sample.

### *b) The Appellant's Fault*

60. The Respondent considers that there are two distinct elements to the Appellant's case on Fault, being the impact of her head injury on her ability to manage her 'doping risk', and the steps that she took to manage that doping risk, which both also encompass her case as to the absence of Significant Fault.

### *c) Head Injury*

61. The Respondent does not dispute that head injuries *per se* can result in the symptoms described by the Appellant in the Appeal Brief and related documents. However, it argues that the evidence does not assist in the understanding of exactly what symptoms the Appellant was experiencing on 2 October 2020. In particular, the Respondent considers that it is not clear whether the head injury suffered by the Appellant was exacerbated by the Appellant continuing to train with the Team after incurring the injury and continuing to play matches.

62. In this respect, the Respondent does not accept that the Appellant can establish on the balance of probabilities that her judgement or decision-making capacity was, in any event, impaired by her head injury and claims that:

- The Appellant's position, which is based upon her assertion that the injury affected her ability to make good decisions, and by implication that if she had not suffered the injury, she would have behaved differently, is not supported by either the neurological examination or the Expert Opinion.

- The Appellant is required to establish that it is more likely than not that the neurological examination and the Expert Opinion paint an accurate picture of her health as of 2 October 2020. However, the Expert Opinion is based on the neurological examination undertaken on 18 November 2020, seven weeks after the Appellant used the Melior drink and thus that no contemporaneous medical evidence exists in relation to the Appellant's state of health on 2 October 2020.

- The time elapsed between injury and diagnosis raises questions as to whether or not it is possible to extrapolate a conclusion as to the Appellant's health on 2 October 2020 from an examination conducted seven weeks later.

- The Appellant continued to train and play in circumstances whereby such participation could have had a negative impact on her injury. It is for this reason, for example, that World Rugby's guidance on head injuries recommends that players absent themselves from such activity for a period of weeks.

- There is an inconsistency between the asserted severity of the Appellant's injury and the ability of the Appellant to carry on training and playing in a demanding sport. Rugby Sevens is a physically challenging sport, played over two halves of seven minutes each, which requires speed, stamina and tactical awareness and discipline, and the Respondent thus queries whether the Appellant would have been able to successfully participate in the sport with an undiagnosed concussion.

- The Appellant was aware of the situation she was in and realised that if she disclosed the effect her head injury was continuing to have, she would lose her place in the team. Her team knew that she had incurred a head injury, and that she had been instructed to rest. Any responsible team official would have taken her out of the team if the Appellant had admitted that she was still suffering ill-effects from that injury some days later. It is commonplace for

players to be taken away from playing and training after suffering a head injury, to avoid the injury being made worse. But the Appellant knew what she was doing when she chose to keep quiet about her ongoing physical symptoms.

- It appears from the Witness Statement of Mr Alexandrov that he advised the Appellant to rest for three days thereafter and prescribed a number of medications. After three days, the Appellant told Mr Alexandrov that she felt ready to train. Mr Alexandrov says in this regard that the Appellant *"insisted that she was feeling alright and resume training on the fourth day after the trauma. She felt okay after the training, did not have any complaints, she only visited me for the wound management. When I asked her how she felt, she said she was fine and ready to play the next games"*.

- This implies that she resumed training on Thursday, 1 October 2021, and Mr Alexandrov's testimony suggests that the Appellant did not demonstrate flawed judgement or decision making: rather, she quite correctly assessed that if she told her team about her injury and how it was affecting her, she would be taken out of the team and required to rest. She did not want this to happen – this was a rational, considered decision. It was the wrong decision, but the Respondent does not believe that the Appellant can plausibly suggest that the Appellant made this wrong decision because she was affected by her injury. She knew that she should tell her team, but also knew that if she did, she would lose her place on the team and she did not want that to happen.

### *d) Objective Fault Factors*

63. The Respondent argues that supplements are a doping risk, and the Appellant chose to use the supplement "Melior". The Appellant therefore had a responsibility pursuant to ADR Article 22.1.3 to make sure that "Melior" was 'safe'. However, the Appellant used the "Melior" drink, labelled as having MHA as one of its ingredients, which labelling is not disputed.

64. The Respondent considers that at a minimum the Appellant exhibited a normal level of Fault and that the Appellant's Fault was Significant in relation to the anti-doping rule violation, and as such the standard sanction required by ADR Article 10.2.2 should be imposed, for the following reasons:

- Even if the Appellant's evidence is accepted, that the Appellant conducted what at best can be described as a cursory check of the "Melior" drink and did not consult anyone within her team as to its use.

- The Player was negligent in declining to be upfront with her team about her medical condition. If she had done so, then this case would never have arisen because she would either have not used the "Melior" drink (because her team would have identified it as being a doping risk) or she would not have played. But that is the position – if the Appellant's evidence is accepted, then the Appellant was the author of her own misfortune by failing to disclose the ongoing impact of her injury to her team. Any athlete in the Appellant's position would be expected to be honest with her team about an injury.

- The CAS 2013/A/3327 & 3335 decision says that it is reasonable for an athlete to take the

following steps as regards the use of a dietary supplement or similar product, in 'certain circumstances': read the label; cross-check the ingredients on the label with the list of prohibited substances; make an internet search of the product; ensure the product is reliably sourced; and consult appropriate experts in these matters and instruct them diligently before using the product. These 'certain circumstances' include those whereby although the product is used out-of-competition, it is marketed as being 'performance enhancing' in some respect. The Appellant has admitted that she was looking to acquire a stimulant-based product and was offered Melior as an alternative to caffeine. The label describes "Melior" as a 'pre-workout drink'. The only reason why any athlete would use a pre-workout drink before training would be to improve performance in training: there would be no point otherwise. The Appellant was, therefore, required to undertake these steps:

- *Read the label*: it is not disputed that the Appellant read the label of the "Melior" drink. As noted, the packaging of the "Melior" drink includes the ingredient '1,3-dimethylamilamine'. The name 1,3-dimethylamilamine is a synonym of MHA. A competent check of the "Melior" drink would have revealed that it contained a Prohibited Substance, and so the "Melior" drink should be avoided. Even absent this, the words 'pre-workout' were a red flag;

- *Check the Prohibited List*: There is a Russian language version of the Prohibited List hosted on the RUSADA website, although it is not clear if the Appellant attempted to view this. It is reasonable to assert that had the Appellant attempted to search this document on Yandex – or at the very least, following through a line of enquiry using her domestic National Anti-Doping Organisation's website - she may have been able to access several resources that would have been useful in assessing the doping risks associated with "Melior";

- *Make an internet search of the product*: The key ingredient of "Melior" (as far as this matter is concerned) is 1.3 dimethylamylamine. A search undertaken using Yandex of 1.3 dimethylamylamine produces result which raises a host of 'red flags' as regards 1.3 dimethylamylamine in that it is identified as MHA. It may be noted that whilst the Appellant draws attention to the spelling used on the "Melior" bottle labelling for 1.3 dimethylamylamine, even if a variety of spellings are used when making checks, the search 'hits' remain consistent;

- *Ensure the product is reliably sourced*: there is no evidence that the Appellant took any particular care as far as the supplier of the "Melior" drink is concerned;

- *Consult appropriate experts*: the reason why the Appellant did not seek Mr Alexandrov's advice and assistance regarding the "Melior" drink was that she did not want to have to admit that she was still feeling some physical effects from her head injury. He had already instructed her to rest and if he became aware that she was still not completely recovered he would have taken her out of the team. The Appellant did not want that to happen. Had the Appellant consulted with Mr Alexandrov the problems with "Melior" would have become immediately apparent.

### *e) Subjective Fault Factors*

65. The Respondent further claims that none of the subjective factors listed in the CAS 2017/A/5301 & 5302 alter the conclusion that, at a minimum, the Appellant exhibited a normal level of Fault:

- *Youth and Experience*: the Appellant refers in her testimony to her Sample collection being her first experience of Doping Control, albeit that this has no relevance to Fault. The only relevance in this regard is the failure to disclose "Melior" on the Doping Control Form.

- *Language or environmental problems*: the Appellant draws attention to the fact that the labelling of the "Melior" bottle was in English. This would not be a significant complication when it came to checking the product.

- *Anti-Doping Education*: the Appellant received antidoping education in January 2020. It is referred in this regard to the Statement of Valeriya Konova, a RUSADA official. The Appellant had, therefore, received some training as regards the risks associated with supplements. It appears – given her testimony regarding the limited checks she undertook – that she acted on this training.

## V. JURISDICTION

66. The jurisdiction of the CAS, which is not disputed by the Respondent, is based by the Appellant on Article R47 of the Code and Article 15.2.1 of ARADR (edition 2021).

67. Article R47 of the Code 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".*

68. Article 15.2.1 of the ARADR provides as follows:

*"In cases arising from participation in an International Event or in cases involving International Level-Athletes, the decision may be appealed exclusively to CAS".*

69. The jurisdiction of the CAS is confirmed by the Order of Procedure, duly signed by and returned by each of the Parties.

70. Therefore, the CAS has jurisdiction to decide the present dispute between the Parties.

## VI. ADMISSIBILITY

71. The Statement of Appeal was timely filed, as accepted by the Respondent, and complied with

the requirements set by Article R48 of the Code and Article 15.2.3.3 of ARADR (edition 2021).

72. Accordingly, the appeal is admissible.

## VII. SCOPE OF REVIEW

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

74. It is to be noted, however, that the power to review the dispute *de novo*, as granted to the Sole Arbitrator by Article R57 of the Code, does not alter the arbitral nature of CAS proceedings. It thus does not authorize the Sole Arbitrator to render a decision *ultra petita*, *i.e.* beyond the disputed issues submitted to arbitration and the petitions lodged by the parties.

## VIII. APPLICABLE LAW

75. Pursuant to Article R58 of the Code, the Sole Arbitrator is required to decide the dispute:

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

76. The Appellant submits that the applicable national anti-doping rules at relevant times were the 2019 ARADR, as applicable at the time the alleged ADRV occurred. This is not disputed by the Respondent.

77. At the same time, the Sole Arbitrator notes that it was not directed to the application of any specific set of domestic law, which might apply subsidiarily. In this regard, the 2019 ARADR does not contain any specific reference to rules of law which might be subsidiarily applicable.

78. Consequently, the Sole Arbitrator finds that the ARADR (edition 2019) and, subsidiarily, Russian law given RUSADA's domicile in Russia, are applicable in the present dispute.

## IX. MERITS

79. The object of this arbitration is the Decision, which imposed on the Appellant a 1-year period of ineligibility as from the date of the Appellant's provisional suspension (*i.e.* 22 October 2020), for the anti-doping rule violation contemplated by Article 2.1 of the ARAD. Indeed, the DADC confirmed the Appellant's ADRV but found that there *"exist reasons to reduce the period of ineligibility pursuant to Art. 10.5 ADR".*

80. While the Appellant does not dispute her anti-doping rule violation contemplated by Article 2.1

of the ARADR but requests the Sole Arbitrator to *"limit the sanction to a reprimand and no period of ineligibility on the grounds of no significant fault or negligence (Art. 10.5.1.1 2019 ADR)"*, the Respondent requests that a period of ineligibility *"of at least that imposed by the DADC"* be imposed pursuant to Article 10.5.1.1 of the ADR.

81. As a result of the Parties' requests and submissions, there is only one main issue that needs to be addressed by this Sole Arbitrator in the following paragraphs: the duration of the sanction against the Appellant following her anti-doping rule violation.

***What is the appropriate sanction for the Appellant anti-doping rule violation?***

82. According to Article 10.2 of the ARADR, taking into account that RUSADA has not sought to establish that the anti-doping rule violation was intentional, the standard sanction for the violation committed by the Appellant, involving a specified substance and a non-intentional ADRV, is an ineligibility period of 2 years (Article 10.2.2 of the ARADR). However, the sanction can be eliminated or reduced if the Appellant proves that she bears *"no fault or negligence"* (Article 10.4 of the ARADR) or *"no significant fault or negligence"* (Article 10.5.1.1 of the ARADR). In this latter case, the sanction shall be at a minimum a reprimand and no period of ineligibility, and at a maximum two years of ineligibility, depending on the Appellant's fault.

83. In the case of the Appellant, it is not disputed that she committed a fault, and thus the main question in this arbitration is whether the level of the Appellant's fault requires a modification of the Decision and the application of a more lenient sanction under Article 10.5.1.1 of the ARADR, which reads as follows:

*"Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand, and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault".*

84. The term "No Significant Fault" is defined in the ARADR as follows:

*"The Athlete or other Person's 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. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".*

85. The term "Fault" is defined in the ARADR as follows:

*"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that*

*an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2".*

86. It follows from the foregoing provisions and definitions of the ARADR that in the present case the Appellant must, on a balance of probabilities (Article 3.1 ARADR), establish:

- how MHA entered her system;
- the facts and circumstances that are relevant to her Fault and, on that basis, why the standard sanction should be reduced.

87. Firstly, the Appellant (who is not a "minor") had to establish how the MHA entered her system (the so-called "route of ingestion"), which is the "threshold" condition established by the anti-doping rules to allow "access" to a finding of "No Significant Fault or Negligence".

88. In the present case, it is not disputed that the consumption of a drink called "Melior", in the manner described by the Appellant, is a possible explanation for the finding of MHA in the Appellant's Sample, and thus that the AAF could have been caused by the ingestion of such drink.

89. In particular, the Appellant explained that she consumed the drink on the evening of 2 October 2020, approximately 48 hours before the time of the sample collection, which is consistent with the fact that the drink "Melior" appears to contain 90 milligrams of MHA and corresponds proportionally to the quantity of MHA found in her Sample.

90. Indeed, the label of one bottle of "Melior" states that it contains 90 mg of the ingredient '*1,3-dimethylamilamine*', which – even misspelled '1,3-dimethylamylamine', corresponds to MHA. The Appellant concludes that the estimated urinary concentration of MHA in the Appellant's Sample (*i.e.* 3 µg/mL (2950 ng/mL), as confirmed by the Laboratory) is consistent with this ingested amount.

91. RUSADA itself made enquiries with the Laboratory as to whether the consumption of 90mg of MHA is consistent with the amount of MHA identified in the Appellant's Sample, and the Laboratory confirmed that the consumption of "Melior" in the manner described by the Appellant was a possible explanation for the finding of MHA in the Appellant's Sample.

92. RUSADA thus accepted that the ingestion of the contents of one bottle of "Melior", as suggested by the Appellant could, scientifically, lead to the quantity of MHA found in the Appellant' system 48 hours later.

93. Such explanation is also convincingly corroborated by the Appellant's evidence that one bottle of "Melior" was purchased on 2 October 2020.

94. Based on the above, the Sole Arbitrator finds that the Appellant has established, on a balance of probabilities, that the drink "Melior" was the source of the Substance in her Sample.

95. Secondly, the Appellant has to establish the facts and circumstances that are relevant to her

Fault and, on that basis, why the standard sanction provided for in Article 10.2.2 of the ARADR should be reduced.

96. The issue whether an athlete's fault or negligence is "significant" has been much discussed in the CAS jurisprudence, and chiefly so with respect to the various editions of the WADC (e.g., in the case CAS 2013/A/3327 & 3335, as discussed by the Parties in the present arbitration, but also in a number of other cases: *e.g.*, *inter alia* CAS 2004/A/690; CAS 2005/A/830; CAS 2005/A/847; CAS OG 04/003; CAS 2006/A/1025; CAS 2008/A/1489 & 1510; CAS 2009/A/1870; CAS 2012/A/2701; CAS 2012/A/2747; CAS 2012/A/2804; CAS 2012/A/3029).

97. These cases offer guidance to the Sole Arbitrator. It is, however, to be underlined that all cases are "fact specific" and that no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the ARADR itself, while defining the conditions for the finding of "No Significant Fault or Negligence", stresses the importance to establish it *"in view of the totality of the circumstances"*, and therefore paying crucial attention to their specificities.

98. One point needs to be underlined in this respect. A period of ineligibility can be reduced based on "No Significant Fault or Negligence" only in cases where the circumstances justifying a deviation from the duty of exercising the *"utmost caution"* are truly exceptional, and not in the vast majority of cases. However, the "bar" should not be set too high for a finding of "No Significant Fault or Negligence". In other words, a claim of "No Significant Fault or Negligence" is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some *"stones unturned"*.

99. It is in fact clear to the Sole Arbitrator (as noted in CAS 2013/A/3327 & 3335, §§ 74-75) that an athlete can always read the label of the product used or make internet searches to ascertain its ingredients, cross-check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in every and all circumstances. To find otherwise would render the "No Significant Fault or Negligence" provision in the WADC (translated into the ARADR) meaningless.

100. In order to have guiding indications, the Sole Arbitrator was referred by the Parties to the award rendered in CAS 2013/A/3327 & 3335, according to which "objective" and "subjective" levels of fault must be taken into consideration. The objective level of fault points to *"what standard of care could have been expected from a reasonable person in the athlete's situation"*, while the subjective level looks to *"what could have been expected from that particular athlete, in the light of his/her particular capacities"*. On the basis of those elements, in CAS 2013/A/3327 & 3335 a distinction was made between three degrees of fault or negligence ("significant", "normal" and "light") and a corresponding distribution of the range of the period of ineligibility was suggested: 16-24 months for a significant degree, with a "standard" significant fault leading to 20 months; 8-16 months for a normal degree, with a "standard" normal degree leading to 12 months, and 0-8 months for a light degree of fault, with a "standard" light degree leading to a period of 4 months.

101. As noted in CAS 2017/A/5301 & 5302, to which the Sole Arbitrator was also referred to by the Respondent, CAS 2013/A/3327 & 3335 was decided in 2014, under anti-doping rules which allowed a distinction between three degrees of fault or negligence. However, Article 10.5.1.1 of the ARADR (adopted on the basis of the 2015 version of the WADC) significantly differs from the previous scheme for the consideration of the specificities of individual cases. The CAS 2013/A/3327 & 3335 doctrine, therefore, had to be adapted to the sanctions system of the 2015 WADC, and thus, the ARADR in this arbitration.

102. As a result, the time span of 24 months which is still available now covers only two instead of three categories of fault:

    i. normal degree of fault: over 12 months and up to 24 months with a standard normal degree leading to an 18-month period of ineligibility; and

    ii. light degree of fault: 0-12 months with a standard light degree leading to a 6-month period of ineligibility.

103. As suggested in CAS 2013/A/3327 & 3335, and confirmed in CAS 2017/A/5301 & 5302 in order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault: the objective element should be foremost in determining into which of the relevant categories a particular case falls; the subjective element can then be used to move a particular athlete up or down within that category. All in all, however, the Sole Arbitrator notes that there might be some overlap within those elements.

104. In the present case, the Sole Arbitrator first notes that the Respondent has not filed an appeal against the Decision. Consequently, a potential sanction above the 1-year period of ineligibility imposed on the Appellant by the DADC shall not be considered in the present dispute under the principle of the prohibition of *reformatio in pejus*.

105. In this context, the Sole Arbitrator further notes the following elements:

- in favour of the Appellant:
    - She checked the ingredients of the drink "Melior" on the WADA website but alleges that she may have been misled by an alternative name of the Substance which was misspelled.
    - The suspected substance labelled on the bottle of "Melior", *i.e. "1,3-dimethylamilamine"*, was not expressly listed in the 2019 Prohibited List;
    - She used the "Melior" drink 5 days after a severe head injury which may have had cognitive impairment effects on her;
    - The head injury's cognitive impairment effects on her may have been exacerbated by lack of appropriate treatment and physical and emotional stress in the following days, which may have notably impacted her ability to search for and analyse information adequately;
    - Her behaviour corresponded to her (lack of) practical experience and knowledge of

the anti-doping rules, as well as her physical condition and cognitive capacity following her head injury.

- against the Appellant:
  - *"1,3 Dimethylamylamine"*, which was indicated on the label of the bottle of "Melior", is a synonym for MHA. The entry of *"1,3 Dimethylamylamine"* or *"1,3-dimethylamilamine"* in an internet search engine leads to the information on various websites that this is synonymous with MHA and that it is a prohibited substance in the 2019 Prohibited List;
  - The use of the drink "Melior" was not indicated by the Appellant in the DCF;
  - She did not ask a doctor whether her head injury required the use of a product such as the drink "Melior";
  - She deliberately did not seek any medical or expert advice regarding the "Melior" drink before consuming it;
  - She did not disclose her physical condition to the Team doctor or management and lied about her condition in order to resume training and be able to play despite her head injury;
  - Except on the WADA website, she did not proceed to any further check of the product, in particular on a web engine search tool.

106. In particular, the Sole Arbitrator notes the following statements from both the Appellant and the Team doctor:

- Player: *"I did not tell anything about my physical condition to the team management, as I thought that, if they remove me from the games, the team may lose a chance to win. For that reason, when the team's medic asked me how I felt, I told him I was okay. […]".*

- Team doctor: *"I repeatedly asked Olga how she felt. In the first days, she told me that she had a minor headache, and I prescribed her Cifran ST, Pyracetam and Lineks. Also, in the first three days she was to stay in bed. After that, when I examined her, she said that she was feeling alright and ready to train and to play. In principle, I was thinking about taking her off of the fourth tour game. But incisions are very common in rugby, this did also affect her perception of the injury".*

- Player: *"I did not ask the team's medic, Petr Alexandrov, for help because he had not worked with our team before (it was his first trip with team). I did not really know him. Besides, I tried to stay away from him, as I feared he would understand how badly I felt and would remove me from the games".*

- Team doctor: *"It is true that Olga did not ask for my advice regarding that drink. At every examination, Olga insisted that she was feeling alright and resume training on the fourth day after the trauma. She felt okay after the training, did not have any complaints, she only visited me for the wound management. When I asked her how she felt, she said she was fine and ready to play the next games".*

107. From an objective point of view, it appears that the present matter is a case of an injured athlete

who chose not to disclose the nature and seriousness of her injury to her team and then took the risk to consume a product purchased in a supplement shop without seeking any advice. The Appellant, after only a minimal check, decided to consume a product that was clearly labelled to contain the substance *"1,3 Dimethylamilamine"* which, even if not correctly spelled *"1,3 Dimethylamylamine"*, undoubtedly refers to MHA. In the Sole Arbitrator's view, the existence of the Prohibited Substance could have been easily discovered by the Appellant through a fairly simple internet search, as demonstrated by the Respondent.

108. As such, compared to the standard of care that could have been expected from a reasonable person in the Appellant's situation, the behaviour of the Appellant appears to be particularly negligent.

109. However, from a subjective point of view, the circumstances surrounding the Appellant's behaviour may mitigate the Appellant's fault in the present case.

110. The Sole Arbitrator first notes that the Appellant's position is based upon her assertion that her head injury affected her ability to make sound decisions, and by implication that if she had not suffered such head injury, she would not have committed an ADRV. The Appellant thus submits that she acted in the *"best possible way"* considering her cognitive impairment at the time of the consumption of the drink "Melior".

111. In support of this position, the Appellant's appointed expert, Dr Drozdova, confirmed – both in her Expert Opinion and during the hearing – that the Appellant suffered a concussion, that she had not been properly tested and had not received a proper treatment following her head injury. She confirmed that she should not have been allowed to play as any activity could have exacerbated the Appellant's condition. In addition, Dr Drozdova also underlined that the potential cognitive impairments due to a concussion could last for several days, and thus that the Appellant might not even have been aware of the severity of her condition.

112. The opinion of Dr Drozdova confirms that the Appellant's head injury may have caused some cognitive impairments which may have lasted for some time. Therefore, the Appellant may well have suffered from an impaired ability to think which could explain her reckless behaviour.

113. The Respondent did not dispute the Appellant's injury and did not provide any counter-evidence which could have rebutted Dr Drozdova's opinion and the Appellant's position in that regard.

114. On that basis, the Sole Arbitrator has no reason to question the findings of Dr Drozdova regarding the existence of the Appellant's head injury and the potential cognitive impairments caused by it. Therefore, the Sole Arbitrator considers that it is not excluded that her ability to adopt a more prudent behaviour in the present case may have been diminished.

115. However, the Respondent disputed the actual symptoms of the Appellant following her head injury and argued that she failed to prove on a balance of probabilities that she experienced symptoms that would have seriously compromised her judgment and decision-making in order to consider that her fault was below a normal degree.

116. In this regard, the Sole Arbitrator notes that the opinion of Dr Drozdova does not specify the degree or the severity of the cognitive impairments and thus the concrete effects of the concussion on the Appellant's ability to think and act in an appropriate way. In particular, the file contains no indication showing that the Appellant's ability to think was significantly diminished.

117. As such, the Sole Arbitrator finds that the Appellant did not concretely demonstrate that she actually suffered from severe cognitive impairments following her head injury and she did not establish the extent of such cognitive impairments. She thus failed, in particular, to demonstrate that her potential cognitive impairments were, in the present case, severe enough to consider that her degree of fault was light.

118. Without contesting the impact and consequences of a serious head injury as experienced by the Appellant, the Sole Arbitrator notes that the file contains several indications showing that the Player acted in a mindful and considerate way before ingesting the "Melior". In particular, the Sole Arbitrator emphasises that the Player knowingly and intentionally:

- refrained from informing a team member or a doctor about her serious health condition in order to be able to play despite her head injury;

- decided to purchase an unknown product with "similar effects" to caffeine upon the advice of a seller of a random supplement shop;

- checked the ingredients labelled on the "Melior" bottle on the WADA website before drinking it.

119. Based on these concrete factual elements and in the absence of further explanations from the Appellant showing how the cognitive impairments altered her ability to think or act in a mindful way, the Sole Arbitrator can only conclude that such cognitive impairments would not be able to justify a further reduction of the sanction imposed on the Appellant by the DADC.

120. Indeed, it is underlined that the DADC acknowledged, in the Decision, that the Appellant's injury might have had an impact on the physical and psychological condition of the Appellant, and thus already took this factor into account when it decided that the duration of the suspension to be imposed on the Appellant be reduced from two years to one year.

121. Consequently, having regard to all of the circumstances of the case and in particular the subjective elements of the Appellant's fault and her potentially diminished capacities, the Sole Arbitrator comes to the conclusion that the Appellant's degree of fault was "normal" but in its lower range. Accordingly, the Appellant's degree of fault warrants the imposition of a sanction of 12 months of ineligibility in the present case.

122. In conclusion, the Sole Arbitrator finds that the appeal has to be dismissed and the Decision is therefore confirmed.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Ms Olga Pestova with the Court of Arbitration for Sport against the decision issued on 13 May 2021 by the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency is dismissed.

2. The decision issued on 13 May 2021 by the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency is confirmed.

3. (…).

4. (…).

5. All other prayers for relief are dismissed.