2021/A/8210 Oleg Verniaiev v. Gymnastics Ethics Foundation & International Gymnastics Federation (FIG)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Jan Paulsson, Judge, Court of Cassation, Bahrain
Arbitrators:	Mr Efraim Barak, Attorney-at-Law, Tel-Aviv, Israel
	Mr Romano Subiotto KC, Solicitor-Advocate in London, UK, and Avocat in Brussels, Belgium

in the arbitration between

Mr Oleg Verniaiev, Ukraine

Represented by Mr Andriy Kharytonchuk, Vandellos Sports Law, Valencia, Spain

Appellant

and

Gymnastics Ethics Foundation (GEF), Lausanne, Switzerland

Represented by Dr Stephen Netzle, Partner, TIMES Attorneys AG, Zurich, Switzerland

First Respondent

International Gymnastics Federation (FIG), Lausanne, Switzerland

Represented by Dr Stephen Netzle, Partner, TIMES Attorneys AG, Zurich, Switzerland

Second Respondent

I. THE PARTIES

1. Oleg Verniaiev (the "Appellant") is an elite gymnast who has represented Ukraine internationally for more than a decade.

2. The Gymnastics Ethics Foundation ("GEF" or the "First Respondent") and International Gymnastics Federation ("FIG" or the "Second Respondent"), together the "Respondents") are respectively the disciplinary body and the general governing body for international gymnastics.

3. Appellant and Respondents will together be referred to as the "Parties".

II. INTRODUCTION AND FACTS OF THE PROCEDURE

4. The Appellant participated in the 2012 and 2016 Olympic Games, winning gold (parallel bars) and silver (all-around) in the latter, and has moreover accumulated an impressive collection of medals in World and European competitions. He complains of a decision by a three-member panel of the GEF Disciplinary Commission, which on 12 July 2021 issued the following decision:

"*Mr. Oleg Verniaiev is to be declared ineligible for a period of four years, starting on 5 November 2020, pursuant to Art. 10.2.1.1 of the FIG Anti-Doping Rules, as the forbidden substance Meldonium was found in his urine sample of 26 August 2020.*

Based on Art. 10.10 of the FIG Anti-Doping Rules, all of the Athlete's results achieved in the time period since 26 August 2020 are disqualified.

Mr. Oleg Verniaiev is ordered to pay the costs for the A- and B-sample tests and laboratory documentation packages to the GEF in the total amount of EUR 3,276.50 as well as the cost of EUR 1,800 for the medical expert's report and CHF 500 towards the costs of these proceedings.

This decision is to be published in the FIG bulletin and on the FIG website."

("the Decision").

5. In the meanwhile, the Appellant had accepted a provisional suspension as of 5 November 2020 which means that, unless he obtains a different result in these CAS proceedings, his suspension would in principle end on 4 November 2024, thus causing him to be excluded from participation in two editions of the Olympic Games. (The Appellant was of course unable to defend his all-around gold medal from the Rio Games in Tokyo in 2020 as the latter were postponed to 23 July – 8 August 2021.)

6. The doping control test that resulted in an Adverse Analytical Finding ("AAF") was notified to the Appellant by letter from FIG dated 5 November 2020, subsequent to the taking of samples (out of competition) on 10 August 2020 (urine only) and 26 August 2020 (urine and blood serum). The FIG informed him on 17 December 2020 that the analysis of blood and urine samples did not detect the same substances, and further on

4 January 2021, that the blood sample (693538) was analysed only for human growth hormone and that there was no AAF in relation to it, as opposed to the urine sample (3153113) in which the presence of Meldonium was detected. This is a prohibited substance under the 2020 WADA list, chapter S4: Hormone and Metabolic Modulators. This substance is thought to increase the flow of oxygen throughout the body by expanding the arteries and thus to be usefully prescribed for the treatment of ischemia (insufficient blood flow). In sports, it is said to increase endurance and recovery.

III. PROCEEDINGS BEFORE THE CAS

A. Correspondence and pre-hearing written submissions

7. On 31 July 2021, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration ("CAS Code").

8. On 12 August 2021, the Appellant filed his Appeal Brief. The 40-page, single-spaced Appeal Brief was signed by Mr Boris Boguslavsky and Ms Ganna Gnizdovska, as the Appellant's co-counsel as that time.

9. An "amended" 22-page Appeal Brief was sent on 14 October 2021, this time signed by Mr Andrii Kharytonshuk alone as counsel. Although Mr Boguslavsky and Ms Gnizdovska had remained copied on correspondence as late as 27 September 2021, the addition of Mr Kharytonchuk had been announced by a letter from the Appellant himself dated 24 September 2021 and expressing disagreement with Ms Gnizdovskaya's expressed position on his behalf with respect to the extenstion of a deadline. Indeed, the Appellant himself had on 16 September 2021 requested that the CAS provide him "*for my records … to my personal email entire communication in this case.*") The amended Brief contained further exhibits as well as fact-witness statements by the Appellant's coach, Mr Gennadi Sartynski, and Mr Volodomyr Hrybuk, a gymnast, as well as an expert opinion signed by Dr Ivars Kalvins. In response to a query by the Respondents, Mr Kharytonshuk made clear by an email dated 19 October 2021 that the two Briefs are complementary and should therefore be answered cumulatively; i.e. the "*amended*" version is not a replacement.

10. On 10 October 2021, the Appellant requested production of (1) the laboratory documentation package (LPD) concerning blood sample #693538 and (2) the analytical testing menu concerning the same sample.

11. On 20 October 2021, the Respondents requested a stay of proceedings until that request had been dealt with and any consequently produced documents could thus be subject to comment.

12. On 3 November 2021, the CAS Court Office informed the Parties that the Panel appointed to decide on the present matter is constituted as follows:

President: Mr Jan Paulsson, Judge, Court of Cassation, Bahrain

Arbitrators: Mr Efraim Barak, Attorney-at-Law in Tel Aviv, Israel
Mr Romano Subiotto, KC, Solicitor-Advocate in London, UK, and Avocat in Brussels, Belgium

13. On 9 November 2021, the Respondents informed the CAS that they had provided the blood sample analysis to the Appellant, but that with respect to the "A-DocPack of the HGh analysis" it would not be produced by the Cologne Laboratory without an "official and specific" request from the CAS Panel.

14. On 12 November 2021, the Appellant maintained his request for production and objected to the stay.

15. On 15 November 2021, the CAS Court Office advised the Parties that the deadline for the Respondents' Answer was suspended pending the Panel's determinations.

16. On 31 December, the CAS Court Office transmitted the Panel's request that the Laboratory produce the HGh analysis.

17. The laboratory analysis was forwarded on 24 January 2022.

18. On 27 January 2022, the CAS Court Office informed the Appellant that his deadline for commenting on the laboratory analysis was 7 February 2022, whereupon the time limit for the Respondents' Answer would resume.

19. On 7 February 2022, the Appellant gave notice that (1) he had no comments with respect to analysis provided by the Laboratory and (2) he would no longer be represented by prior co-counsel, but by Mr Kharytonchuk alone.

20. The Respondents' Answer was filed on 14 February 2022.

21. On 21 February 2022, the Appellant requested a hearing of his case; the Respondents indicated that, while not considering a hearing to be "indispensable", they did not oppose it.

22. On 22 April 2022, the CAS Court Office forwarded to the Appellant, to Mr Kharytonchuck, and to Dr Netzle a request received by the CAS from the Ukrainian Gymnastics Federation ("UGF") for it to be allowed "*to participate in the arbitration process 'in the status of amicus curiae'*". The request was in the form of a 5-page single-spaced letter dated 12 April 2022 to the CAS from Mr Oleksandr Sukhomlyn, President of the UGF, explaining that it had been motivated by a perception of "*large-scale aggression by Russia against Ukraine*" which, so the letter surmised, had been preceded by "*preparatory actions of economic and social nature…. It is now clear that previously disguised actions against Ukraine were carried out for propaganda purposes, including the field of sports.*" Mr Sukhomlyn expressed "*great surprise*" at the announcement of the withdrawal of two of the Appellant's initial co-counsel, especially since this took place *after* the filing of the appeal prepared by the withdrawing lawyers; "*it is unclear how the position set forth in the appeal will be defended without the participation of those who drafted and presented it… UGF did not receive the clear explanantion from*

Oleg Verniaiev about the legal collision [sic]… which violated the integrity of the arbitration process."

23. On the same day (22 April 2022), Mr Kharytonchuck wrote to the CAS rejecting the proposition that UGF should be entitled "*to step into the case because it strongly disagrees with the Athete's decision to refuse from further legal aid that was provided to him by his former counsels*" and should "*not exercise the procedural rights granted to the parties… The present case does not involve any violations of the UGF own rules or statutes. UGF does not allege any circumstances or new information related to the case known to it either.*"

24. On 11 July 2022, following further correspondence indicating continuing disagreement, the CAS Court Office, on behalf of the Panel, wrote as follows to the Parties:

"*Under the relevant rules, appellants challenging the disciplinary sanctions of an international federation do so in their own name, not by their national federation acting on their behalf. This propostion is not affected by the possibility that (A) appellants may be supported by their national federation; (B) the fate of the challenge may be of indirect consequence to the national federation; (C) the appellants' conduct of their case is not to the satisfaction of the relevant national federation.*

The Panel nevertheless indicates its willingness from the submissions from the UGF as to any other precise circumstances it wishes to call to the Panel's attention, in which case the Appellant and the Respondents will be given an opportunity to respond thereto."

25. On 18 July 2022, the UGF filed a substantial written submission in support of its application to intervene, asserting that 16 Ukrainian athletes (including the Appellant) had provided samples which revealed the presence of Meldonium. The UGF suggested the possibility of sabotage and expressed its intent to "*ask the [Panel] to conduct an independent examination during the CAS hearing.*" The UGF noted that the Appellant's inclination to support this approach had been expressed more than a year previously, in a detailed and rather technical letter dated 16 March 2021, which (in English translation) raises the possibility that a drug manufactured by a Belarun company contains Meldonium and is traded into Russia. It suggested (in a section of its letter entitled "*The contradictory behavior of the gymnast Verniaiev after filing an appeal with the CAS, which has signs of external influence by the third party on gymnast*") that the Appellant had now made a volte-face, consistent with his disavowal of his original lawyers.

26. On 25 August 2021, the Respondents wrote that they "*have no information on the reason why the Appellant and the UGF seem not to be pulling on the same rope, although both are fighting against the Appellant's doping sanctions*", but in any event had no objection to the UGF's participation in these proceedings.

27. Ultimately, this matter was resolved when the UGF, on 8 September 2022, withdrew its request to participate in two succinct sentences, stating as its reason that: "*We believe the Appellant is able to present his case himself without intervention of UGF.*"

28. This letter had not, however, emerged in isolation. It transpired from a letter of 19 September 2022 to CAS from Mr Kharytonchuck that his client, the Appellant, had written a letter to him dated 7 September 2022 which (in translation) concluded that "*The absence of a common view will negatively affect the communication of my position as an Appellant to the CAS, which will harm both my interests and the interests of the UGF. I am sincerely grateful to the UGF for its willingness to help me with the defence of my interests in this case, but I hereby request the UGF to refuse further participation in this case.*" Mr Kharytonchuck oddly referred to this letter as his own: "*UGF stepped down from this case following my (sic) request on 07/09/2022.*"

29. In sum, there is no dispute for the Panel to resolve with regard to the standing of UGF, which has finally withdrawn. But these communications were received in formal proceedings, and are therefore recorded as a matter of record and transparency. They will have no effect on the outcome.

30. On 2 December 2022, the CAS invited the Parties to submit a joint hearing schedule proposal by 9 December 2022. They did so, and the hearing was conducted in accordance therewith.

B. The (virtual) CAS hearing

31. On 15 December 2022, the substantive hearing was conducted at the CAS seat in Lausanne, Switzerland, entirely by videoconference. In addition to the Panel members, Ms Andrea Sherpa-Zimmermann, CAS Counsel, was present.

32. The Appellant was represented by Mr Andriy Kharytonchuk.

33. The Respondents were represented by Dr Stephan Netzle, counsel to both GEF and FIG. In attendance were Ms Martina Coxova, GEF; Ms Molly Oldridge, GEF: Ms Charlotte Perret, FIG; and Mr Loïc Vidmer, FIG.

34. The witnesses of fact, who testified and were questioned, included the Appellant himself as well as his coach, Mr Gennadii Sartinskyi, and a fellow gymnast, Mr Hrybuk.

35. Two experts also testified and were questioned, namely Dr Ivars Kalvinš, acknowledged as the inventor of Meldonium, called by the Appellant, and Dr Hans Geyer, the Deputy Head of the Sports University Cologne (an IOC/WADA accredited laboratory), called by the Respondents.

36. At the outset of the CAS hearing both Parties confirmed that they do not have any comments nor objections with respect to the formation of the Panel nor to the way the proceedings were conducted that far. At the closing of the hearing both Parties also confirmed that they were satisfied with respect to the right to be heard.

IV. SUBMISSIONS OF THE PARTIES

37. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In

considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

38. In his Appeal Brief, the Appellant requested as follows:

"*On the merits:*

1) to set aside the decision of Disciplinary Commission of Gymnastics Ethics Foundation of 12 July 2021;
2) to recognize that the source of Meldonium was contaminated food product and reduce the suspension by the period already served by the Appellant;

or/alternatively

to recognize that ADRV was not intentional and the suspension period shall be limited by two years;
3) to backdate any such period of ineligibility to the date of sample collection (26 August 2020) in accordance with Article 10.11 of the FIG ADR;
4) the Respondents shall contribute to the legal and other costs incurred by the Appellant in the amount of 5'000 CHF."

39. The Appellant initially argued that the commencement of the period of ineligibility should run from 26 August 2020 on the grounds that he then made a "timely admission" of guilt in the sense of Art. 10.11.2 FIG ADR; this contention was inconsistent with his subsequent and constant insistence on innocence by reason of lack of intent and unsurprisingly was no longer pursued as the proceedings reached the hearing stage. Similarly, initial queries as to due process and the qualifications of the personal at the doping control station have fallen away.

40. The Appellant contests the usefulness of Meldonium in gymnastics, where the effort in competition is of relatively short duration.

41. The Appellant originally contended that the tests yielded conflicting and therefore unacceptable results. The FIG countered that the blood test was simply irrelevant as it did not test for Meldonium, and the Appellant – again unsurprisingly -- did not pursue this contention.

42. Although the Disciplinary Commission Panel appointed an independent expert, namely Dr Hans Geyer of the Institute of Biochemistry of the German Sports University in Cologne (where the samples had been analysed), the Appellant initially considered that the expert was given insufficient information, and that there is "*an unaccountable discrepancy between the content of the report and the conclusions given in the panel's decision with reference to such report*." This somewhat inchoate contention also fell away as the case advanced to hearing.

43. In any event, the Appellant contends that the likely source of the detected prohibited substance was contaminated food purchased from an ordinary commercial supermarket, such as the one in the neighborhood of his parents, that metabolites of Meldonium are likely present in livestock and crop products from Belarus and Russia sold in Ukraine, and that the infraction was thus unintentional, with the result that his suspension should be reduced to two years under the second half-sentence of the aforementioned Article 10.2 of the FIG ADR.

44. The Appellant asserts, as his counsel put it in the opening statement on his behalf at the hearing, that he "*does not understand what he did wrong or know how this happened*". He lists his "*favorite foods*" as being "*chicken, pork, mayonnaise, ketchup, cheese, yogurt, fruits, coffee with milk, kefir, and bread*" and contends that, as he ingests food produced from milk and meat, on a balance of probability the ADRV was caused by one of these products. Meldonium is used in the treatment of animals in regions from which the markets in which the Appellant and his family procured their food.

45. The Appellant quotes the report of Dr Geyer – the Respondents' expert – to the effect (as the Appellant contends) that the concentration of Meldonium in the urine sample "*corresponds to the contamination scenario*". This is the quoted passage:

"*Based on the data of 7 doping control samples in 2020 and 2021 (see table 1)*

It is very likely that the adverse analytical finding was caused by an application of one or more low "non-doping relevant" doses of meldonium, e.g. by contaminated milk or meat between 10th and 20th August 2020 and not by an administration of high, "doping-relevant" doses of meldonium, as recommended for athletes by the meldonium selling pharmaceutical company."

46. The Appellant's expert, Dr Kalvinš, concurs, adding in his written report that "*Meldonium can be consumed with contaminated food or drinks and it would go unnoticed by the person taking such food or drink. Because Meldinium does not have any particular smell or taste.*"

B. The Respondents' Position

47. In their Answer, the Respondents requested as follows:

"*(1) to dismiss the Appeal of the Appellant and confirm the Decision of the Disciplinary Commission of the Gymnastics Ethics Foundation of 12 July 2021;*

(2) to confirm that

a. the Appellant's results achieved in the time period since 26 August 2020 are disqualified including the forfeiture of any medals, points and prizes.

b. a period of ineligibility of four years apply to the Appellant, beginning at the date of the decision of the CAS, from which the period of provisional suspension already served shall be deducted;

(3) to order that the Appellant shall bear the costs of this arbitration proceeding to the extent such costs are imposed by the CAS;

(4) to order the Appellant to contribute to the Respondents' legal fees and other expenses related to this arbitration".

48. The Respondents observe that this case is not about the reality of an infraction of the WADC, which is uncontestable, but as to the duration of the Appellant's suspension. In that respect, they take the view (as expressed in their opening statement at the hearing before the present Panel) that the practical effect of a four-year suspension given the timing of the AAF and the shiting of the cycle of the Olympic Games due to the outbreak of the Covid-19 pandemic that led to the postponement of the Tokyo 2020 OG is harsh and unfortunate, and that the Panel could "*find a way*" to limit the suspension to the time it has already been in effect they would accept that outcome with "*sympathy*" for the athlete. The Respondents expressed an understanding that the four-year rule was designed not to bar an athlete from more than one edition of the Olympic Games. While adopting this stance, they nevertheless do not accept that the Appellant's simple denials, and his alterative suggestions of the likelihood of sabotage on the part of a hostile rival, should be accepted as decisive with respect to his alleged lack of culpable intent; their "*sympathy*" does not extend, as they put it, to a "*widening*" of the metaphor of disculpation through the "*narrowest of corridors*" which has emerged in CAS jurisprudence applying the WADA Code. As will be seen, the present Award broadly adopts this nuanced position.

49. The Respondents' Answer notes that

> "*While the definitions of "No Fault or Negligence" and "No Significant Fault or Negligence" explicitly require the athlete to establish the origin of the prohibited substance to benefit from an elimination or reduction of the otherwise applicable sanction, Art. 10.2 FIG ADR does not contain such express requirement, although it is difficult to imagine that an athlete may establish "no intentional use" without demonstrating the way how the prohibited substance entered his or her body.*"

and makes this reference in the footnote to the just-quoted passage:

> "*See also comment to Article 10.2.1. WADC 2021 (and to Article 10.2.1 FIG ADR): "While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance."*"

50. The Respondents observe that this dispute does not involve a determination whether a prohibited substance was actually detected, as the demonstration of the fact of its ingestion is scientifically uncontested, but what the consequences should be. (Whether the maximum tolerated concentrations were consistent with a proper understanding of

"intentionality" is, as will be seen, a different matter.) In their counsel's review of the relevant jurisprudence, the Respondents discern significant differences on the part of CAS arbitrators, which turn on nuances but also seem outcome-determinative. As he put it, it seems wrong "*to put the blame on the Panels*", but rather on an over-ambitious rule-drafting attempt by WADA motivated by its "*fear of the application of discretion of CAS judges [sic].*"

51. Therefore, in the present case, in order to avoid the unintended effect of depriving the Appellant of the occasion of the opportunity to defend his Rio gold medal in two consecutive Olympics, the Respondents would be satisfied with a "solution" that could achieve this effect -- but "without widening the 'narrowest of circumstances'.

52. Having been called by the Respondents at the CAS hearing, Dr Geyer immediately commenced his testimony by taking the initiative to inform the Panel of "*new results*" which postdate his previously submitted written report. To quote his recorded words to the Panel, the "*new results concerning consumption of milk from cows treated with a medicament containing Meldonium*" show that a positive result may result even from a quantity detectible in 100-200 ml milk ("one glass") rather than in one liter, with the result that it is "*easily possible that unintentional doping results can occur if milk from treated cows is consumed and you can easily exceed the WADA threshold and be reported as positive.*"

V. JURISDICTION OF THE CAS

53. Article R47 of the CAS Code provides :

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

54. This appeal is brought before the CAS under Article 13 of the FIG ADR and Article 30 of the FIG Code of Discipline. The appellate jurisdiction of the CAS was expressly acknowledged by the GEF Discipinary Commission in paragraph 40 of its decision of 12 July 2021.

55. The jurisdiction of the CAS is not contested by either Party and all of them signed the respective Order of Procedure.

56. Therefore, in accordance with Article R47 of the CAS Code and the provisions cited above, the Panel considers that it is competent to decide the present matter.

VI. ADMISSIBILITY

57. Article R49 of the CAS Code provides:

"*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.*"

58. The Decision was issued on 12 July 2021, and the Appellant filed his Statement of Appeal on 31 July 2021, hence within the 21-day term established by the applicable regulations.

59. The admissibility is not contested by either Party. Accordingly, there is no issue with respect to timeliness. It follows that the appeal is admissible.

60. The Parties further accept that the CAS has authority to hear this appeal pursuant to Article R57 of the CAS Code, which provides that:

"*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*."

VII. APPLICABLE LAW

61. Article R58 of the CAS Code reads as follows:

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

62. As a participant in FIG events, the Appellant is bound by Article R58 of the CAS Code, the FIG Statutes and Anti-Doping Rules ("ADR").

63. With respect to *proof of violation*, the FIG ADR provides notably:

"*It is each Athlete's personal duty to ensure that no Prohibited Substance Enters their bodies. Athletes are responsible for any Prohibited Substance of 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 ..*
(Art. 2.1.1)

The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an antidoping rule violation to be committed.
(Art. 2.2.2)

The standard of proof shall be whether FIG has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete … alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances except as provided in Articles 3.2.2 and 3.2.2, the standard of proof shall be by a balance of probability."
(Article 3)

64. The *consequences of violation* of the FIG ADR are specified in FIG Article 10.2.1:

"*The period of ineligibility for a violation of Article 2.1.,, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article `0.5, 10.6 or 10.7:*
10.2.1. The period of ineligibility shall be four (4) years where:
10.2.1.1 The anti-doping ruleviolation does not involve a Specified Substance, *unless the Gymnast … can establish that the anti-doping rule violation was not intentional.*"

65. Article 10.6.2.1 of the FIG ADR makes an exception in the event the Athlete can establish both no significant fault or negligence and the provenance of the prohibited substance from a contaminated product – in which case the period of ineligibility can range from none (albeit with a "reprimand") to two years. Meldonium is not a Specified Substance.

66. Swiss law applies subsidiarily to fill any lacuna, and to intervene in case of a contravention of Swiss law, such as a due process violation of such a gravity as to merit annulment.

67. Given the time period when the alleged misconduct took place, there is no dispute as to the application of the FIG Anti-Doping Rules then in vigor.

68. Article 13.2.1 of the FIG ADR provides for an exclusive right of appeal to the Appellant, as an "*international-level athelete*", from the Decision to the CAS. The seat of the CAS is in Lausanne, Switzerland. FIG itself is established in Swizerland. Pursuant to Article 58 of the CAS Code, these proceedings are accordingly governed by Swiss law (which does not exclude the effect of other laws in light of case-specific contexts).

VIII. THE MERITS

B. The assessment of the Panel

69. The question now is whether the present CAS Panel, with plenary powers of review, considers that the consequent sanction of suspension and fine was proper. This is not a matter of inculpation, but rather of *exculpation,* and therefore the test is one of balance of probabilities (and not the higher burden of satisfying a panel's "comfortable

satisfaction") in answering this essential question: *does the record in this case justify a finding that the Appellant did not* ***intentionally*** *ingest a prohibited substance?*

70. The rules make it incumbent upon athletes to avoid the ingestion of prohibited substances. The question arises to determine the degree of effort that is required to discharge this positive duty. There must be a continuum that proceeds from the level of ordinary care to increasing degrees of determined compliance leading to one of extraordinary precautions which cannot be reasonably required. To use the expression which has become familiar in this context (perhaps borrowing the title of the best-selling study by the economists Daron Acemoglu and James Robinson, *The Narrow Corridor*, an examination of the enduring difficulty of sustaining liberal democracy), the corridor of exculpation may be narrow, yet it exists; there must be a point of inflection after which the steps of absolute guaranteed avoidance would be unreasonable. (In this case, as will be suggested below from the example represented by this case, such a point may have be reached, if it is posited that athletes must cease drinking milk altogether because some milk sold in commerce may be contaminated by Meldonium injected in cows and is a prohibited substance.)

71. In reaching this conclusion, the Panel does not ignore the hypothesis of unfair prejudice to competitors who have avoided the ingestion of substances that transgress the legislated standard. But in this case, the shortening of the period of suspension does not entail prejudice to other athletes, as it does not result in their relegation in past competitions (as would be the case if an athlete were reinstated to the result of past competitions with the consequences of demotion of others).

72. The Panel observes that this is a case in which the Respondents explicitly expressed sympathy for an athlete who would be deprived of the ability to compete in two Olympic Games, if the suspension were maintained in its totality, and indicated that they would not be adverse to the shortening of the suspension. Otherwise, so their counsel expressly stated, the result would offend a sense of proportionality. In sentiment, the Panel agrees in the circumstancs of this case. On the other hand, proportionality is a concept often raised as an equitable consideration, and the doping rules do not encourage the unpredictability that would result from unfettered reference to fairness.

73. In other words, the outcome of this case can hardly constitute a precedent, since it arises in an exceptional context where the respondent federation very transparatenly calls upon the Panel to find a way to endorse the invocation of equity and where WADA is not a party.

74. That being said, there are also purely legal considerations that miltate in favour of reducing the suspension, such as those that derive from the testimony of Dr Geyer, and from the fact that the Parties are agreed that the applicable rules are those of 2015, and not the amendments of 2021.

75. As already stated, Dr Geyer's testifimony before the Panel concluded that recent studies of Meldonium lead to remarkable revisions of the scientific assessment of concentrations required to justify the conclusion that a culpable trace of the prohibited substance has been detected. It is a fair conclusion from his words that the "*maximum*

concentrations" of Meldonium tolerated by WADA's "*maximum concentrations*" is five or even ten times higher than was had been understood "*in 2020*" (before the "*new results*"). He stated explicatly that "*we have many doping tracks, scenarios, which lead to unintentional doping cases.*"

76. The Respondents observed that they had not seen the recent studies that justify these revisions. But this was the expert *called by the Respondents to state his views as evidence*, and the fact that he was the "*independent*" expert appointed to advise the Disciplinary Commission does not in the slightest alter this fact. The present Panel found Dr Geyer's testimony be commendably candid, especially giving his status within a laboratory routinely tasked with the detection of breaches of doping rules.

77. The 2015 WADA Code refered explicitly to the need to identify athletes "*who cheat*". Later on, this was apparently felt to raise the spectre of inconsistent outcomes reached by panels holding subjective and irreconcilable ideas as to the kind of evidence that reveal the "intentions" of athletes, and the result was the 2021 revision which flatly punishes positive outcomes unless the athlete proves, by a preponderance of the evidence, *innocent contamination and due care* – leading to a reduced (two year) suspension: in effect a penalty of strict liability. It may be useful to review the relevant texts.

78. Some explicit references may be useful. Article 10.2.1 of the 2015 WADA Code enabled Athletes to obtain a reduction of the four-year period of ineligibility if the Athlete can "*establish*" that the violation "*was not intentional*." Article 10.2.3 of the 2015 WADA Code then provided this explanation:

> "*… the term 'intentional' is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete […] engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

79. Article 10.2.1 remains unchanged in the 2021 WADC (although it is now Article 10.2.3). But this comment was added:

> "*While it is theoretically possible for an Athlete […] to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.*"
>
> (According to Article 24.2 of the 2015 WADC and Article 26.2 of the 2021 WADC, "*The comments annotating various provisions of the Code shall be used to interpret the Code*").

80. Moreover, in Article 10.2.3 of the 2021 WADA Code the explanatory reference to "*Athletes who cheat*" was removed. The change is shown as follows:

> "*… the term 'intentional' is meant to identify those Athletes who ~~cheat. The term, therefore, requires that the Athlete~~ engage~~d~~ in conduct which they ~~he or she~~ knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

81. Footnote 59 which appears at the end of this text reads as follows: "*Comment to Article 10.3.3: Article 10.2.3 provides a special definition of 'intentional' which is to be applied solely for purposes of Article 10.2.*". The 2021 WADA Code is not *per se* applicable to the Appellant, but there is no indication that the deletion of the comment was intended to alter the effect of the rule itself.

82. Athletes who have committed an Anti-Doping Rule Violation ("ADRV") and seek to reduce the period of ineligibility under Article 10.2.1 of the 2015 WADA Code need to prove both that they did not intentionally use a prohibited substance and (on the assumption that the explanation given in Article 10.2.3 of the 2021 WADA Code is binding) that they did not take the risk of using a substance which might lead to an ADRV.

83. Dr Geyer has candidly disclosed that new, post-2020, testing indicates that the "*maximum concentration*" allowed under the WADA Code were fixed at an unintended high level, indeed a multiple of five or ten times higher than the one under which the Appellant was found guilty of a doping violation. This news arrives too late to renew the debate as to whether there should have been an adverse finding at all, but as to the proposition that this Appellant should be given unprecedent punishment under Article 10 of the 2015 WADA Code (ineligibility to participate in two Olympic Games) needs only to be stated to be rejected. The "*corridor*" may be "*narrow*", but this one sets him free; the reversal of an ADRV on the grounds of lack of intention without proof of the source of the ingested prohibited substance may be "*highly unlikely*", but that does not mean "*impossible*". The Appellant did not need to prove where he bought a glass of milk which had a concentration which may have been ten times lower that the maximim of what WADA understood that it was forbidding.

84. The Panel concludes that the four-year period of ineligibility shall be reduced to a two-year suspension on the basis of Article 10.2.1 of the 2015 WADA Code, starting on 5 November 2020, which is the first day of the Appellant's provisional suspension. The Panel notes that any suspension longer than two years would deprive the Athlete of two editions of Olympic Games. The Panel deems that such punishment would be disproportionate in the present case.

85. For the avoidance of doubt: nothing in the reasoning of the present Panel should be read as deviating from the juriprudential consensus that an appellant's speculations, declarations of a clear conscience, and character references are not *per se* sufficient proof.

IX. CONCLUSION

86. The issue in this case was the duration of the Appellant's suspension. He partially prevailed. The Respondents, exhibiting a strong impulse of fairness, were not advere to the outcome which is reached in this Award, but were – in the legitimate interest of avoiding an erosion of the high requirement for disproving intent -- firm in their rejection of the Appellant's reliance on affirmations of a clear conscience and the like.

87. Neither Party should therefore be deemed the losing Party.

X. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed on 31 July 2021 by Mr Oleg Verniaiev against the decision issued by the Gymnastics Ethics Foundation on 12 July 2021 is partially upheld.

2. The decision issued by the Gymnastics Ethics Foundation on 12 July 2021 is amended as follows:

   Mr. Oleg Verniaiev is to be declared ineligible for a period of two years, starting on 5 November 2020, pursuant to Art. 10.2.1.1 of the FIG Anti-Doping Rules, as the forbidden substance Meldonium was found in his urine sample of 26 August 2020.

   The other elements of the GEF decision are confirmed.

3. (…).

4. (…).

5. All other applications and requests for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 14 March 2023

THE COURT OF ARBITRATION FOR SPORT

Mr Jan Paulsson
President of the Panel

Mr Efraim Barak
Arbitrator

Mr Romano Subiotto KC
Arbitrator