CAS 2013/A/3274 Mr Mads Glasner v. Fédération Internationale de Natation (FINA)

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Ulrich Haas, Professor, Zurich, Switzerland

Ad hoc Clerk: Ms Esther Baumgartner, University of Zurich, Switzerland

in the arbitration between

Mr Mads Glaesner, Denmark

Represented by Mr Antonio Rigozzi, Attorney-at-law, Lévy Kaufmann-Kohler, Geneva, Switzerland

- Appellant -

and

Fédération Internationale de Natation (FINA), Lausanne, Switzerland

Represented by Mr Jean-Pierre Morand, Attorney-at-law, Carrard & Associés, Lausanne, Switzerland

- Respondent -

I. THE PARTIES

1. **Mr Mads Glasner** (hereinafter referred to as the "**Athlete**" or "**Appellant**"), born on 18 October 1988, is a professional swimmer from Denmark.

2. The **Fédération Internationale de Natation** (hereinafter referred to as "**FINA**" or "**Respondent**") is the international federation which promotes the development of five disciplines of aquatic sports throughout the world. Founded in 1908, FINA today has more than 200 members and is located in Lausanne, Switzerland. FINA has established and is carrying out, inter alia, a doping control program, both for In-Competition as well as Out-of-Competition testing. It has provided for an independent Doping Panel to deal with alleged anti-doping violations. FINA has established regulations to deal with anti-doping violations, i.e. the Doping Control Rules (hereinafter referred to as "**FINA DC**").

II. THE RELEVANT FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and adduced evidence. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits 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 its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 12-16 December 2012, the 11th FINA World Swimming Championships (25m) (the "**Istanbul World Championships**") were held in Istanbul, Turkey.

5. In the morning of 14 December 2012, the Appellant competed in the preliminary heat of the men's 400m freestyle of the Istanbul World Championships, qualifying in first place for the finals.

6. In the evening session of the same day, the Appellant finished third in the men's 400m freestyle final of the Istanbul World Championships. After the 400m final, the Appellant underwent an In-Competition doping control test.

7. On 16 December 2012, the Appellant finished first in the men's 1500m freestyle final of the Istanbul World Championships. Subsequent to the Competition, another In-Competition doping control test was conducted.

8. By letter dated 7 February 2013, the Respondent informed the Appellant that the In-Competition doping control test conducted on 14 December 2012 showed the presence of the substance *phenpromethamine* which is prohibited In-Competition and classified under S6 b (Specified Stimulants) on the WADA 2012 Prohibited List applicable at the time of the Anti-Doping Rule Violation (hereinafter referred to as "**ADRV**").

9. The test of 16 December 2012, however, was negative for all Prohibited Substances.

10. By letter dated 28 February 2013, the Appellant informed the Respondent that he wished to have the B-sample analysed. The opening and analysis of the B-Sample

took place on 6 March 2013 in the presence of the representative of the Appellant, Dr. Laurent Rivier.

11. In the same correspondence, the Appellant advised FINA that: *"he ha*[d] *not competed since being informed of the positive A-sample and* [would] *not participate in any competition until further notice. Furthermore, if the B-sample* [was] *also positive (and, of course, the opening and analysis of the same* [were] *conducted without any issues), Mr. Glaesner* [did] *not intend to contest the presence of the substance in his system* […]*."* Furthermore he stated that *"if any period of ineligibility* [was] *imposed on him, the starting date of such suspension should be the date of sample collection."*

12. On 1 March 2013, FINA advised that it was willing to consider the date of 28 February 2013 as the date of provisional suspension if the Appellant signed and returned an official FINA form by 8 March 2013 at the latest.

13. The FINA form was submitted by the Appellant on 20 March 2013. In the accompanying letter, the Appellant stated that the signing of the form *"shall be considered as a formal confirmation that he considers himself as being provisionally suspended on the terms indicated in* [the] *letter of 28 February 2013* […]*".*

14. On 11 March 2013, the Respondent advised the Appellant that his B-Sample had as well been tested positive for the substance *phenpromethamine*.

15. On 18 March 2013, the Respondent informed the Appellant that his case had been submitted to the FINA Doping Panel.

16. By letter dated 20 March 2013, the Appellant enquired with the Respondent whether the laboratory had tested his sample for the substance *levmetamfetamine* which as well is prohibited In-Competition and classified under S6 b (Specified Stimulants) on the WADA 2012 Prohibited List.

17. By letter dated 17 April 2013, the Respondent informed the Appellant that the laboratory has made *"further investigations"* and came to the final conclusion that the prohibited substance present in the sample was *levmetamfetamine* and not *phenpromethamine* as originally indicated.

18. In the same letter, the Respondent advised the Appellant of the possibility to have the B-sample analysed. The Appellant however abstained to do so and accepted the presence of the Prohibited Substance *levmetamfetamine* in his system.

19. On 14 June 2013, the FINA Doping Panel hearing took place at the FINA headquarters in Lausanne, Switzerland.

20. The final decision of the FINA Doping Panel dated 14 June 2013 reads as follows:

> *"The athlete is found to have committed an anti-doping rule violation under FINA Rules DC 10.4 and DC 2.1.*
>
> *He shall be ineligible for three (3) months, commencing on 19th March 2013.*

All results achieved by the swimmer from 14th December 2012 shall be annulled together with the consequence thereof (forfeiture of medals/prizes, reimbursement of prize money).

All costs of this case shall be borne by Danish Swimming Federation in accordance with DC 12.2.

The judgement shall become effective immediately and is subject to appeal in accordance with FINA Rule DC 13."

21. Upon enquiry of the Appellant, he has been informed by the Respondent that *"it has been decided that all results from 14 December 2012 and forward (including gold medal of 16 December 2012) shall be disqualified"* and not only the results obtained on 14 December 2012.

22. On 11 July 2013, the Respondent handed down its reasoned decision (hereinafter referred to as the "**FINA Decision**") that reads – inter alia – as follows:

"5. 8 Pursuant to FINA DC 9 the result obtained by Mr. Glaesner during the 400 m free style race (bronze medal) has been automatically disqualified.

5. 9 Mr. Glaesner has pleaded for fairness and not to disqualify his gold medal from the 1500 m free style race on 16 December 2012, during the same event, referring to the specific circumstances of the positive test but also the negative test after his gold medal race two days later.

5. 10 For the Doping Panel Mr. Glaesner's degree of fault was, when considering the degree of care required from elite athletes who represent their country in international competition, while not overwhelming, certainly manifest (i.e. clearly apparent and visible). If he would have been more careful he would not have suffered from the consequences of a positive doping test. His behaviour has put a flaw not only on his own reputation but also on that of international swimming, because the public relates the use of doping through this kind of news to the world of swimming. As his results (bronze and golden medal) and positive doping test are so much related to the world championships swimming short course in Istanbul December 2012 and for the public hardly to be distinguished, the Doping Panel sees the disqualification of all results during the championships (and afterwards, although in this case not relevant) as a fair and clear sanction, in combination with the three months ineligibility beginning on 19 March 2013."

III. THE PROCEEDINGS BEFORE THE CAS

23. The proceedings before the CAS can be summarised in their main parts as follows:

24. On 2 August 2013, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "**CAS**") against the FINA Decision rendered by the FINA Doping Panel pursuant to Art. R48 of the Code of Sports-related Arbitration 2013 edition (hereinafter referred to as the "**CAS Code**").

25. On 12 August 2013, the Appellant filed his Appeal Brief pursuant to Art. R51 of the CAS Code.

26. By letter of 9 August 2013, the parties jointly advised the CAS Court Office that they agreed to appoint Prof. Dr. Ulrich Haas as Sole Arbitrator in the present proceedings.

27. By notice dated 20 August 2013, the CAS Court Office informed the parties that the Deputy Division President had confirmed the appointment of Prof. Haas as Sole Arbitrator in this matter pursuant to Art. R54 of the CAS Code. Furthermore, the parties were advised that Ms Esther Baumgartner, Academic Assistant to Prof. Haas at the University of Zurich, Switzerland, had been appointed as *ad hoc* clerk in this matter.

28. By letter dated 29 August 2013, the Respondent asked for an extension of the Answer deadline until 9 September 2013.

29. By letter dated 30 August 2013, the CAS Court Office informed the Respondent that in view of the Appellant's agreement and on behalf of the Sole Arbitrator, such extension was granted.

30. On 9 September 2013, the Respondent filed its Answer Brief.

31. By letter dated 10 September 2013, the CAS Court Office informed the parties of its understanding that the latter wish for the Panel to issue an Award based solely on the parties' written submissions. Furthermore, the parties were invited to inform the CAS Court Office within seven days in case any party nevertheless wished to hold a hearing.

32. On 13 September 2013, the parties informed the CAS Court Office of their mutual consent that the present proceedings may be resolved by way of written submissions and that a hearing would not be necessary. They noted, however, that this agreement was subject to the Appellant being granted an opportunity to respond to the new elements raised in the Respondent's Answer. Furthermore, the Respondent should be permitted to file a limited rejoinder if any further new elements were then raised in the Appellant's Reply specifically on such elements.

33. By letter dated 17 September 2013, the CAS Court Office advised the parties on behalf of the Sole Arbitrator that the Appellant was granted ten days to send a Reply Submission to the CAS Court Office.

34. On 9 October 2013, following an extension of time granted by the Sole Arbitrator, the Appellant filed his Reply.

35. On 17 October 2013, the Respondent filed its Answer to the Reply.

36. On 19 November 2013, the CAS Court Office communicated to the Parties the Order of Procedure, which was duly signed by both Parties.

IV. THE PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

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 nor in the discussion of the claims below.

A. The Appellant

38. In his Appeal Brief, the Appellant asked the Panel to issue an Award:

> *"1. Setting aside paragraph 6.2 of the Decision and holding that only the results obtained by Mr. Glaesner on 14 December 2012 are disqualified;*
>
> *2. Ordering the Fédération Internationale de Natation to issue a corrective press release on the disqualification of Mr. Glaesner's results;*
>
> *3. Condemning the Fédération Internationale de Natation to reimburse the Court Office fee of CHF 1'000 to Mr. Mads Glaesner;*
>
> *4. Condemning the Fédération Internationale de Natation to pay a substantial contribution towards Mr. Mads Glaesner's arbitration-related costs."*

39. According to the Appellant, and not contested or classified as non-decisive by the Respondent, the facts are as follows:

(a) The Appellant since birth has suffered from congenital atrial septum deficiency, a hole in the heart between the right and left small chamber.

(b) As a result of this medical issue, the Appellant's mother has always monitored the use of medication and ingestion of nutritional supplements for the Appellant's entire career.

(c) Since the Appellant's entry into the FINA Registered Testing Pool in 2007, he has been tested over 50 times and has never tested positive for a doping substance.

(d) The Appellant's mother has recurrent sinusitis which she treats with a Vicks Inhaler.

(e) During a visit to the United States, the Appelant's mother ran out of her inhaler and purchased what she believed to be an identical product at a drugstore in Los Angeles. The packaging of the two inhalers looked similar in size although the exterior covers had different colours and a slightly different wording. No prescription is required to purchase the Vicks Inhaler, either in Denmark or in the United States.

(f) At some point after the purchasing of the US Inhaler, the Appellant's mother mistakenly put the cover from the Danish Inhaler on to the US Inhaler.

(g) On 14 December 2012, after having competed in the preliminary heats of the men's 400m freestyle of the Istanbul World Championships, the cold of the Appellant worsened. His mother suggested that he use the US Inhaler with the Danish cover which the Appellant understood to be the Danish Inhaler and which he knew did not contain any prohibited substances.

(h) Before the finals of the 400m freestyle which took place in the evening session of 14 December 2012, the Appellant used the US Inhaler with the Danish cover.

(i) The Appellant did not use the Vicks Inhaler again at the Istanbul World Championship, in particular not on 16 December 2012.

(j) After being advised of the Adverse Analytical Finding (hereinafter referred to as "**AAF**") from his doping control test on 14 December 2012, the Appellant began investigating any possible sources for the substance *phenpromethamine*, never having heard of this substance before.

(k) During these investigations, the Appellant learned of the case of Alain Baxter, a British skier who had used a Vicks Inhaler and tested positive for *levmetamfetamine* (CAS 2002/A/376 *Baxter v. IOC*). The Appellant researched the ingredients of the US Inhaler and found that it contained *levmetamfetamine*.

(l) On 20 March 2013, the Appellant enquired with the Barcelona labaratory whether it had tested his sample for *levmetamfetamine*.

40. The Appellant does not contest the presence of the substance *levmetamfetamine* and the automatic disqualification of his results in the Event in question (i.e. the bronze medal in the 400m freestyle Event on 14 December 2012).

41. The Appellant is not appealing the period of ineligibility of three months or the date of 19 March 2013 at which it began.

42. The decision under appeal relates solely to the disqualification of the Appellant's results on 16 December 2012.

43. According to the Appellant, the FINA Decision *"was not made in accordance with the applicable regulations and is clearly unreasonable in the particular circumstances of the case"* and ought to be set aside. The Appellant's submissions in support of his request concerning the merits of the case can be summarised in essence as follows:

(a) The Appellant argues that FINA DC 10.1 is applicable to Events in the same Competition, regardless of whether these took place prior to or after the Event which is to be automatically disqualified according to FINA DC 9.

(b) Pursuant to the Appellant, the wording of FINA DC 10.1 makes it clear that, contrary to FINA DC 9, *"results obtained in other events in a relevant competition*

shall not automatically be disqualified and, rather, shall only be disqualified if there is some compelling reason to depart from this default position […]*."*

(c) Factors to be included in considering whether to disqualify other results are e.g. the severity of the offence or the fact that the athlete would have continued to benefit from the effects of the Prohibited Substance.

(d) The Appellant submits that there is no reason to depart from the default position in FINA DC 10.1. This is because – *inter alia* – the substance *levmetamfetamine* could not have impacted his performance two days after the use, the severity of the offence must be qualified as minimal and his degree of fault must be considered as low.

(e) In the Appellant's view, FINA DC 10.1 is a specific provision applicable to the relevant Competition in which an Event occurs, whereas FINA DC 10.8 is a general provision applicable to all Events subsequent to the ADRV in question.

(f) The Appellant argues that accordingly *"in applying the general concept of fairness under Rule DC 10.8, it is clearly necessary to consider the content of the more specific Rule in DC 10.1"* as well as the elements included in the comment to FINA DC 10.1 like the severity of an offence as well as negative test results.

(g) According to the Appellant, the concept of *"fairness"* is mandatory under both FINA DC 10.1 and 10.8. In this regard the Appellant cites CAS jurisprudence CAS 2011/A/2671 *UCI v. Rasmussen & DIF* and CAS 2005/A/951 *Cañas v. ATP*.

(h) The Appellant puts forward that the laboratory's error in identifying the substance and the delays which were caused by this error, should be taken into account when considering the concept of fairness under FINA DC 10.8. Furthermore, the fact that this error occurred at all ought to be taken into account by the Sole Arbitrator. On this subject, the Appellant cites CAS jurisprudence CAS OG 06/001 *WADA v. USADA, USBF & Lund.*

(i) Pursuant to the Appellant, the principle that the measure of the sanction imposed by a disciplinary body in the exercise of discretion given to it by the relevant rules is entitled to considerable deference does not limit a CAS Panel from correcting what it believes to have been an erroneous application of the rules. Within this context, the Appellant cites CAS jurisprudence CAS 2012/A/2807 & 2808 *Al Eid & Sharbatly v. FEI.* Although a well-argued decision is not likely to be overruled by a CAS panel, the FINA Decision – in his view – is not sufficiently well-reasoned that it could not be interfered with.

(j) The Appellant notes that the Respondent has published the FINA Decision on its website and that it has issued a press release stating that both of the Appellant's results in the Istanbul World Championship have been disqualified. The Appellant puts forward that in *"circumstances where FINA has the ability to clarify the circumstances of an ADRV to the public via such publications, it is unclear to the Athlete why FINA could not also adequately inform the public referred to in the Decision that the two results in question can most certainly be 'distinguished' and*

that his results in the 1500m event were 'not affected by any doping practice and were fairly obtained' […]*."*

B. The Respondent

44. In its Response to the Statement of Appeal, the Respondent requests to rule as follows:

> *"1. The Appeal is to be rejected.*
>
> *2. The decision of the FINA Anti Doping Panel to disqualify the competitive results obtained by the Athlete after December 14, 2012 including specifically the results achieved in the Event held on December 16, 2012 shall be confirmed.*
>
> *3. The Respondent* [sic!] *shall bear all costs of the proceedings including a contribution to Appellant's* [sic!] *legal fees."*

45. According to the Respondent, the FINA Doping Panel has in every respect correctly applied the FINA DC and has issued a correct decision. The Respondent's submissions in support of its request concerning the merits of the case can be summarised in essence as follows:

(a) The Respondent puts forward that *"the issue at stake is the consequence of an anti-doping violation in regard to results achieved in an Event taking place subsequently to the date of collection through to the commencement of the ineligibility period (or provisional suspension)"* (emphasis in original). It claims that these circumstances are addressed exclusively by FINA DC 10.8.

(b) According to the Respondent, FINA DC 10.1 *"has to be understood in the context of the general principle that consequences of an anti-doping violation are not retroactive."* It argues that it can be difficult for the public to understand that other Events in a Competition would not have been affected by one positive result for a stimulant. For this reason, FINA DC 10.1 provides for the possibility *"to extend the disqualification to all Events part of a Competition* […]*."* According to the Respondent, the main function of FINA DC 10.1 is precisely to allow covering Events prior to the ADRV.

(c) The Respondent argues that FINA DC 10.8 is the narrower, more specific provision and leaves no room for the application of FINA DC 10.1 due to the fact that firstly, the scope of application of FINA DC 10.8. is limited to Events taking place after the ADRV, whilst the scope of application of FINA DC 10.1 covers all Events irrespective of when they take place. Secondly, FINA DC 10.8 is also narrower in its operation for the ruling body and stricter in its application as the *"shall"* clause in the text of the rules – in contrast to the *"may"* clause in FINA DC 10.1 – *"implies that the ruling body **has to** apply the disqualification* […]*"* (emphasis in original).

(d) Thus, according to the Respondent, as a rule all results of Events taking place after the ADRV have to be disqualified pursuant to FINA DC 10.8. As an exception, this does not apply where fairness requires otherwise.

(e) The Respondent argues that the decisive criterion within FINA DC 10.1 in considering whether other results should be disqualified is the relationship between the violation and the effects it may have in the context of a Competition. Examples of such factors can be found in the comment to FINA DC 10.1 (e.g. whether the athlete tested negative in the other Competitions). *"This 'contamination' requirement is for obvious reasons a central element for the application of what is essentially an extension of the sanction* […]*."* However, these criteria cannot be transferred to a case of application of FINA DC 10.8 where no such set of criteria can be found and where an application would not be appropriate. In the context of FINA DC 10.8, *"the 'contamination' is not and cannot be a decisive element because the assumption that the established doping violation may have affected further results, possibly very distant from the collection is simply not the perspective under which this provision operates."* While this does not mean that the criteria mentioned in FINA DC 10.1 may in no case be considered when examining the issue of fairness, they – however – have to be considered correctly in the different perspective of FINA DC 10.8.

(f) According to the Respondent, *"the aspect most relevant in regard of the application of the 'fairness' exception to the application of the disqualification of subsequent results, which is the rule under DC 10.8 is effectively the length of the period during which it is meant to apply and the reason for this length."* Cases where the length between the sample collection and the moment from which the ineligibility takes effect becomes very long and where the reason of this duration is not attributable to the athlete are typically cases in which the *"fairness"* exception should take effect. In this regard, the Respondent cites CAS jurisprudence CAS 2010/A/2216 *Napoleon v. FINA.*

(g) The Respondent further argues that in the present case the second result was achieved just two days from the sample collection. This seems to be a case *"where the issue of 'fairness' just does not arise."* In any event, a *"dead-line of three months between sample collection and begin of ineligibility (in this case provisional suspension) could not be considered as excessive under any circumstances."*

(h) Pursuant to the Respondent, the mentioned CAS jurisprudence shows that FINA DC 10.8 also applies to cases of doping which are not particularly severe.

(i) Finally, the Respondent submits that when the issue at stake is a matter depending on the exercise of a power of appreciation granted by the rules, *"CAS panels shall exercise a certain restraint in their review* […]*."* In this respect, Respondent cites CAS jurisprudence CAS 2009/A/1817 & 1844 and CAS 2013/A/3091 & 3092 & 3093.

V. JURISDICTION OF THE CAS

46. Art. R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the 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 him prior to the appeal, in accordance with the statutes or regulations of that body."

47. In the present case, the CAS jurisdiction is based on rule 12.9.3 of the FINA Constitution 2009-2013 (hereinafter referred to as "**FINA Constitution**") which provides as follows:

"An appeal against a decision by the Bureau or the FINA Doping Panel or the Disciplinary Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.9.2. The only appeal from a decision of the Doping Panel or the Disciplinary Panel shall be to the CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS. Decisions by the CAS shall be final and binding, subject only to the provisions of the Swiss Private International Law Act, section 190."

48. The jurisdiction of the CAS is undisputed between the parties and has been confirmed by the parties' signing of the Order of Procedure.

49. Accordingly, the Sole Arbitrator is satisfied that it is competent to hear this dispute.

VI. ADMISSIBILITY OF THE APPEAL

50. According to Art. R49 of the CAS Code in conjunction with Rule 12.9.3 of the FINA Constitution, the time limit for appeal amounts to 21 days from the date of receipt of the decision appealed against.

51. In respect of time limits, Art. R32 para. 1 of the CAS Code states the following:

"The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification is to be made, the time limit shall expire at the end of the first subsequent business day."

52. It can be left open whether the required place of notification is referring to the seat of the CAS or – in the alternative – to the premises of the legal representative of the Appellant. In both cases the country where the notification is to be made relates to Switzerland.

53. The FINA Decision was received by the Athlete on 11 July 2013. The Statement of Appeal against the FINA Decision was served on 2 August 2013.

54. As 1 August 2013 is an official holiday in Switzerland, the time limit to the Statement of Appeal therefore expires on 2 August 2013.

55. The Appeal is accordingly admissible.

VII. APPLICABLE LAW

56. Art. 187 of the Swiss Private International Law Act (hereinafter referred to as "**PILA**") provides – inter alia – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in absence of such a choice, according to the law with which the action is most closely connected."* This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA.

57. In particular, the provisions enable the parties to mandate the arbitrators to resolve the dispute in application of provisions of law that do not originate in any particular national law, such as sports regulations of an international federation (cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, paras. 597, 636 et seq.; POUDRET/BESSON, Comparative Law of International Arbitration, 2007, para. 679; RIGOZZI, L'arbitrage international en matière de sport, 2005, paras. 1177 et seq.).

58. According to the legal doctrine, the choice of law made by the parties can be tacit (Zürcher Kommentar zum IPRG/HEINI, 2nd ed. 2004, Art 187 para. 11; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2010, para. 1269; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, para. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI, L'arbitrage international en matière de sport, 2005, para. 1172; KAUFMANN-KOHLER/STUCKI, International Arbitration in Switzerland, 2004, p. 118 et seq.). Thus, in agreeing to arbitrate the present dispute according to the CAS Code, the parties have submitted to the conflict-of-law rules contained therein, in particular to Art. R58 of the CAS Code.

59. Art. R58 of the CAS Code states in respect of the applicable law to the merits 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."*

60. In the light of the above, the Sole Arbitrator considers the FINA DC in the version of January 2009 to be the applicable regulations for the purposes of Art. R58 of the CAS Code, and that Swiss law applies subsidiarily. The provisions set in the FINA DC relevant to the present dispute read as follows:

> ***FINA DOPING CONTROL RULES 2009-2013***
>
> ***DC 2 ANTI-DOPING RULE VIOLATIONS***
>
> […]
>
> ***DC 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Competitor's Sample.***

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

[…]

DC 2.1.2 *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Competitor's A Sample where the Competitor waives analysis of the B Sample and the B Sample is not analyzed; or, where the Competitor's B Sample is analyzed and the analysis of the Competitor's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Competitor's A Sample.*

[…]

DC 2.1.3-2.1.4 […]

DC 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

A violation of these Anti-Doping Rules in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting consequences, including forfeiture of any medals, points and prizes.

[Comment to DC 9: When a Competitor wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Competitors in that Event regardless of whether the gold medallist was at fault in any way. Only a "clean" Competitor should be allowed to benefit from his or her competitive results. For Team Sports, see DC 11 (Consequences to Teams).]

DC 10 SANCTIONS ON INDIVIDUALS

DC 10.1 Disqualification of Results in Competition During which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with a Competition may, upon the decision of the ruling body of the Competition, lead to Disqualification of all of the Competitor's individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.

[Comment to DC 10.1: Whereas DC 9 (Automatic Disqualification of Individual Results) Disqualifies the result in a single Event in which the Competitor tested positive (e.g., the 100 meter backstroke), this Article may lead to Disqualification of all results in all races during the Competition (e.g., the FINA World Championships).

Factors to be included in considering whether to Disqualify other results in a Competition might include, for example, the severity of the Competitor's anti-doping rule violation and whether the Competitor tested negative in the other Events.]

DC 10.1.1 *If the Competitor establishes that he or she bears No Fault or Negligence for the violation, the Competitor's individual results in the other Events shall not be Disqualified unless the Competitor's results in Events other than the Event in which the anti-doping rule violation occurred were likely to have been affected by the Competitor's anti-doping rule violation.*

> ***DC 10.2-10.7*** […]
>
> ***DC 10.8 Disqualification of Results in Events Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation***
>
> *In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.*
>
> […]
>
> ***DC 10.9-10.12*** […]

61. The term *"Competition"* is defined in the appendix of the FINA DC as follows:

> *"A series of individual Evens conducted together under one ruling body. Also, the act of participating in an Event."*

62. The term *"Event"* is defined in the appendix of the FINA DC as follows:

> *"A single race, match, game or singular athletic contest an Event."*

63. It is worthwhile to note that the definition of the terms *"Event"* and *"Competition"* in the FINA DC differ from the World Anti-Doping Code 2009 (hereinafter referred to as "**WADC**"). The reason for this is to be found in footnote 4 of the appendix of the FINA DC where it is said that the *"definition has been changed from the Code definition in order to be consistent with other FINA rules. Under FINA rules, a 'Competition' is the same as an 'Event' under the Code."*

VIII. SCOPE OF REVIEW

64. According to Art. R57 of the CAS Code, the Court *"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."* In application of the aforementioned rule, the Sole Arbitrator is entitled to hear the present case *de novo* (CAS 2012/A/2107 *USADA v. Oliveira*, para. 9.1). CAS Panels in the past have contrary to the clear wording accepted restrictions to Art. R57 of the CAS Code, where the first instance was – in view of the very special circumstances of the case and/or in view of its technical expertise – in a better position to decide the matter (e.g. field of play decisions). However, no such specific situation is given in the case at hand. The rules that are at stake here are based on the WADC, the purpose of which is to ensure the uniform application of anti-doping standards throughout the world and across all sports. The Sole Arbitrator cannot see why a federation would have more expertise in applying these rules of a truly transnational character than CAS Panels or why the danger that someone would adjudicate the matter *"according to its subjective sensitivity"* (cf. Answer Brief at para. 77) is any different at the CAS level or the level of the federation organs.

65. Furthermore, the Sole Arbitrator is hesitant to follow the Respondent's view that limits to the mandate of CAS Panels must be imposed in order to deter *"the systematic filing of appeals"*. It is rather doubtful whether a literal application of Art. R57 of the CAS Code really results in the (negative) behavioural consequences described by the Respondent. Even if it were so, these consequences would have to be balanced with those resulting from granting (partial) immunity to the decisions by organs of federation, because the latter might have negative behavioural consequences as well. Partial immunity might induce organs of federations (to a certain extent) to misuse their adjudicative powers to the detriment of the athletes. The Sole Arbitrator is of the view that it does not seem particularly helpful to embark in such behavioural speculations (either in favour or against a partial immunity of decisions of federations). Instead, the Sole Arbitrator would like to point at Art. 6(1) of the European Convention of Human Rights (hereinafter referred to as "**ECHR**") to which he is indirectly bound (cf. CAS 2011/A/2384 & 2386 *UCI & WADA v. Contador Velasco & SCF*, paras. 17 et seq.; CAS 2010/A/2311 & 2312 *NADO & KNSB v. Lommers*, paras. 6.13 et seq.). According thereto, a person affected by a decision must have, in principle, access to (at least) one instance of justice. It goes without saying that doping sanctions strongly affect the rights of an athlete and that federation instances do not provide for access to justice within the meaning of Art. 6(1) ECHR, since they do not guarantee adjudication of the facts and the law by a truly independent judicial instance. Restrictions to the fundamental right of access to justice should not be accepted easily, but only where such restrictions are justified both in the interest of good administration of justice and proportionality. The Sole Arbitrator fails to see why a restriction of his mandate – contrary to the clear wording of the Art. R57 of the CAS Code – would be in the interest of good administration of justice.

66. The Sole Arbitrator is comforted in its view by CAS jurisprudence. The Panel in CAS 2008/A/1718 *IAAF v. ARAF & Yegorova & others*, para. 166 stated as follows.

> *"Based on the clear wording of Art. R57 of the Code, the Panel finds that in view of the specific circumstances of the case nothing supports the ARAF's view on the scope of the Panel's review. Not only can the Panel review the facts and the law contained in the Decisions but it can as well replace those Decisions if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an 'erroneous' decision. The procedure before CAS is indeed an appeal procedure, which means that if the appeal is admissible, the whole case is transferred to CAS for a complete rehearing with full devolution power in favor of CAS. CAS is thus only limited by the requests of the parties (the so called 'petita')."*

67. In CAS 2012/A/2804 *Kutrovsky v. ITF* at para. 9.2 the Panel stated as follows:

> *"While in CAS 2011/A/2518 Kendrick v. ITF the panel stated that the more cogent and well-reasoned a decision is, the less likely a CAS panel would be to overrule it, this was no more than a statement of the obvious and provides no support for the ITF's submission that the Panel can only depart from a first instance decision if it identifies a 'compelling reason' to do so. Such a restriction would contradict the clear language of Article R57 of the Code."*

68. The Panel in Kutrovsky then draws the attention to the statements in CAS 2011/A/2518 *Kendrick v. ITF* at paras. 10.2 and 10.6, a case which is as well mentioned by the Appellant in his Appeal Brief:

> *"Rule 57 of the Code* […] *is phrased in the widest terms. The power is firstly a 'full one' and, secondly ' to review the facts and the law'; i.e. both. It has been described in awards too numerous to name as a de novo power.*
>
> […]
>
> *Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses" (emphasis in original).*

69. The Sole Arbitrator acknowledges that the CAS jurisprudence concerning the CAS mandate in anti-doping matters is far from uniform and that there are CAS decisions that give some deference to the federation instances (cf. CAS 2009/A/1817 & 1844 and CAS 2013/A/3091 & 3092 & 3093). With all respect and for all of the above reasons the Sole Arbitrator has hesitations to concur with the view expressed in these decisions. Furthermore, these decisions (also cited by the Respondent) dealt with the question to what extent deference should be given to an organ of a federation when it comes to the *length of a sanction* imposed. However, the case at issue here is different since the dispute is whether an *additional sanction* may be imposed upon the athlete at all. To conclude, therefore, the Sole Arbitrator is not inclined to give any deference to the decision of the previous instance *ab initio*.

IX. MERITS OF THE APPEAL

70. It is undisputed that the Appellant has committed an anti-doping rule violation and that the results obtained in the Event on 14 December 2002 therefore has to be disqualified. What is at stake in the present case is the disqualification of the Appellant's results of 16 December 2012, which were obtained in the same Competition, subsequent to the inadvertent ADRV, but in an Event during which the Athlete was *"clean"*. The Parties are in dispute as to the relevant FINA DC provision applicable to the case at hand and, furthermore, about the question whether the *"fairness"* exception applies, which would allow refraining from a disqualification of results subsequent to an ADRV. In addition, the parties disagree on the implications of the fact that the Respondent's laboratory has produced a false test result/report.

71. The Sole Arbitrator will first assess which rules govern the matter in dispute (see below **IX(A)**). In a second step, the Sole Arbitrator will then determine whether the Appellant's results of 16 December 2012 must be disqualified according to the applicable rule (see below **IX(B)**). In a final step, the Sole Arbitrator will address the Appellant's request for a corrective press release (see below **X**).

A. The Applicable Rule

i) The Scope of Application of FINA DC 10.1

72. According to the Respondent, FINA DC 10.1 provides an exception to the rule that consequences of anti-doping violations may not apply retroactively. The reason for this is – according to the Respondent – that Competitions consisting of various Events

are perceived by the public as being a unit. Since the public does not distinguish between the various Events (within a single Competition) a doping offence committed at one Event normally taints and spills over to other Events of the same Competition. Thus, it is the purpose of FINA DC 10.1 to extend the disqualification to all (other) Events that are part of the Competition. Pursuant to the Respondent, the main function of FINA DC 10.1 is, however, to sanction Events that occurred *prior* to the ADRV. In the view of the Respondent, FINA DC 10.1 is not applicable to Events (of the same Competition) which took place after the sample collection. The latter are dealt with solely – according to the Respondent – by FINA DC 10.8. The Sole Arbitrator does not follow this interpretation of said provision for the following reasons:

73. Firstly, the wording of FINA DC 10.1 addresses all Events of a Competition. The provision does not differentiate between Events prior or after the ADRV. Quite to the contrary, FINA DC 10.1 makes explicit reference to *"all of the Athlete's individual results obtained"* (emphasis added) in the Competition during which an ADRV occurs. Also the comment to FINA DC 10.1 provides that this provision may lead to the disqualification of *"all results in all races during the Competition"* (emphasis added). It follows from this that the wording of FINA DC 10.1 covers all Events of a Competition independently whether the Event took place prior or subsequent to the ADRV.

74. Secondly, the view held here is supported by a systematic interpretation. FINA DC 10.1.1 determines that the athlete's results in the other Events shall not be disqualified if the athlete establishes that he or she bears no fault or negligence for the ADRV. Furthermore, FINA DC 10.1.1 requires that the athlete's results in Events other than the one in which the ADRV occurred, were not likely to have been affected by the athlete's ADRV. The Sole Arbitrator cannot see how results obtained in an Event prior to the ADRV can be influenced by the latter. If one were, therefore, to restrict the applicability of FINA DC 10.1 to Events prior to the ADRV this would be at odds with the requirements in FINA DC 10.1.1. Events *subsequent* to the ADRV, on the contrary, are (perfectly) capable of being affected by the ADRV committed in a previous Event. It follows from a joint reading of FINA DC 10.1.1 and FINA DC 10.1 and from the purpose of FINA DC 10.1.1, i.e. to concretise FINA DC 10.1, that the latter covers Events prior *and* subsequent to the ADRV within the concerned Competition.

75. Finally, the view of the Sole Arbitrator is also supported when interpreting FINA DC 10.1 in the light of its purpose. The Sole Arbitrator is prepared to follow the Respondent's reasoning that FINA DC 10.1 takes account of the fact that public perception has difficulties in understanding why individual Events within a single Competition are treated differently. However, these difficulties in perception relate to all Events of a Competition independently whether they occur before or after the ADRV. In light of this, it appears difficult to understand why it would appear particularly *"morally wrong and negative for the image of sport to maintain the results of an athlete"* in cases where Events *subsequent* to the ADRV are concerned. Incidentally, the wording of FINA DC 10.1 does not mention the aspect of public perception.

76. For all these reasons, the Sole Arbitrator concludes that FINA DC 10.1 applies to all Events forming part of the Competition irrespective of whether they took place prior or subsequent to the ADRV.

ii) The relation between FINA DC 10.1 and 10.8

77. The Respondent submits that the consequences of ADRVs for all results achieved thereafter (until the commencement of the period of ineligibility or provisional suspension) are addressed exclusively by FINA DC 10.8. The latter provision is – according to the Respondent – the *lex specialis*, i.e. the more specific provision and, thus, takes precedent over FINA DC 10.1.

78. The Sole Arbitrator concurs with the starting point of the Respondent, i.e. that if different (conflicting) rules are applicable to the same matter, the conflict of rules is to be solved by applying the principle *lex specialis derogat generali*. According thereto the (more) specific rule prevails over the more general rule, since the lex specialis is presumed to have been drafted having in mind particular purposes and taking into account particular circumstances. However, the question in the present case is whether FINA DC 10.8 is *lex specialis* in relation to FINA DC 10.1. The Appellant contests this and submits that FINA DC 10.1 is the more specific provision since it deals with results obtained in a particular Competition. The Sole Arbitrator concurs with the view held by the Appellant for several reasons:

79. As previously mentioned, FINA DC 10.1 is applicable to Events relating to the same Competition, regardless of whether these Events took place prior to or subsequent to the Event the results of which are automatically disqualified according to FINA DC 9. FINA DC 10.1 is tailored to the special circumstances of a Competition consisting of several Events and appearing as a unit. However, FINA DC 10.8 does not address such a specific situation. It follows from this that FINA DC 10.1 constitutes a *lex specialis* to FINA DC 10.8.

80. Even if one were to assume – contrary to the view held here – that the relationship between FINA DC 10.1 and FINA DC 10.8 is somewhat unclear, the result would not be any different, because the lack of clarity of a rule cannot go to the detriment of the Athlete. As a general rule any provision with an unclear wording is to be interpreted against the author of the wording (interpretation *contra proferentem*). This principle has been upheld by numerous CAS Panels (CAS 98/222 *B. v. ITU*, para. 31; CAS 99/A/223 *ITF v. K.*, paras. 25 and 48; CAS 2012/A/2997 *NADA v. Y*, para. 32; CAS 2011/A/2612 *Hui v. IWF*, para. 107; cf. also RIGOZZI, L'arbitrage international en matière de sport, 2005, p. 435 fn. 2436). It follows from this that any ambiguity or doubt as to the contents or scope of application of the provisions in the FINA DC must turn against the Respondent, i.e. the drafter of these rules. While the Sole Arbitrator admits that the FINA DC implements the WADC and thereby has to be in compliance with the mandatory articles and other principles of the WADC, the Respondent nevertheless must be perceived as the drafter of the FINA DC. Thus, the Respondent must bear the legal consequences of any ambiguity of the relevant provisions.

81. It follows from all of the above that FINA DC 10.1 is applicable in the case at hand and not superseded by FINA DC 10.8.

B. The Application of FINA DC 10.1 in the Case at Hand

i) The Disqualification of further Results according to FINA DC 10.1

82. Pursuant to FINA DC 10.1, further results obtained in an Event (during a Competition) *"may"* be disqualified by the ruling body if the athlete committed an ADRV in said Competition. The Respondent argues that the decisive criterion within FINA DC 10.1 in considering whether other results should be disqualified or not is the relationship between the ADRV and the effects the latter may have on the Competition, in particular whether the context of the ADRV is such as to *"contaminate"* all results obtained in the Competition. This *"contamination"* requirement – in the Respondent's view – constitutes a central element for the application of what is essentially an extension of the sanction. The Appellant does not object to this view and points to the examples in the comment to FINA DC 10.1. These examples specify two criteria for *"contamination"*, i.e. the seriousness of the athlete's ADRV and whether he or she tested negative in the other Events (causality). These two criteria are also taken up in FINA DC 10.1.1. The provision states that the athlete's results in the other Events shall not be disqualified if he or she bears no fault or negligence for the ADRV and if the results in Events other than the one in which the ADRV occurred were not likely to have been affected by the latter.

ii) Are the other Results "contaminated" by the ADRV?

83. It is undisputed that the Athlete did not test positive in the other Events. Thus, from an objective point of view the ADRV committed on 14 December 2012 did not spill over to the results obtained in the Event on 16 December 2012. However, the question remains, if the results obtained in the other Events are (morally) tainted because of the ADRV committed on 14 December 2012. This presupposes that the ADRV exceeds a certain (minimum) threshold of seriousness. The main factor whether or not an ADRV is serious is the athlete's degree of fault. It is evident in the case at hand that the Athlete did not act with no fault or negligence. However, it is equally true that the degree of fault of the Athlete in the case at hand is rather minor or light. The Respondent correctly noted that *"this case is not a case of intentional doping and this is given"*. It is for exact this reason that the Athlete was only sanctioned by the Respondent with a three-month period of ineligibility. Another factor that makes the ADRV appear less serious is the type of Prohibited Substance that was detected in the Athlete's bodily specimen. The substance in question is forbidden In-Competition only (and, thus, not at all times). Furthermore, it is a Specified Substance which – according to the comment in FINA DC 10.4 – are, by their nature, more likely to *"be susceptible to a credible non-doping explanation"*. In view of all of the above, the Sole Arbitrator qualifies the ADRV as not sufficiently *"severe"* within the meaning of FINA DC 10.1. Consequently, the Sole Arbitrator sees no reason to disqualify the results of the Appellant obtained on 16 December 2012.

iii) No other Conclusion in Application of FINA DC 10.8

84. Just as a side note, the Sole Arbitrator wishes to state that he would not have come to a different conclusion on the basis of FINA DC 10.8. According to this provision results obtained after the ADRV are disqualified, unless fairness requires otherwise. The

Respondent wants to give the term *"fairness"* a narrow reading. In particular, it is of the view that since FINA DC 10.1 and FINA DC 10.8 pursue different goals, the notion of fairness must be interpreted independently from FINA DC 10.1. The Respondent submits that the most relevant aspect to be taken into account in the context of the *"fairness"* test is the starting point of the period of ineligibility. The latter in turn depends, in principle, on the commencement of the disciplinary procedure, in particular the moment in time when the hearing takes place. Only in cases where disciplinary proceedings are delayed, fairness requires – according to the Respondent – to deviate from the default provision in FINA DC 10.8, i.e. to disqualify all results obtained after the ADRV. However, in cases, where the time between sample collection and the commencement of the period of ineligibility is very short, no questions of *"fairness"* arise according to the Respondent.

85. The Sole Arbitrator does not agree with this narrow interpretation of *"fairness"*. First of all, nothing in the wording of the provision points to such a narrow interpretation. Instead, the term *"fairness"* is particularly broad and – at least at first sight – covers more situations than the ones contemplated in FINA DC 10.1. The Sole Arbitrator sees himself comforted in his view by looking at the WADC 2003. The latter contained in Art. 10.8 a reference to *"fairness"* in relation to the commencement of the period of ineligibility. The provision reads as follows: *"*[w]*here required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection."* CAS jurisprudence interpreted the notion of fairness in a rather broad sense (cf. CAS 2008/A/1744 *UCI v. Schachl & ÖRV*, para. 74). It is for exact this reason that the provision relating to the commencement of the period of ineligibility was changed in the revision process leading up to the WADC 2009 deleting the word *"fairness"* and only referring to *"delays not attributable to the athlete"* (cf. HAAS/BOCCUCCI, causa sport 2011, 5, 24).

86. A broad interpretation of the term *"fairness"* also follows from a systematic interpretation of the rules. The purpose of FINA DC 10.1 and FINA 10.8 are not so different after all. Both provisions deal with the question of retroactive disqualifications of results, i.e. with the disqualification of results obtained before the commencement of the period of ineligibility. In light of the similar purpose it is rather difficult to understand why the criteria that would justify the athlete keeping his or her results should be completely different under the two provisions. It seems to the Sole Arbitrator that the opposite should be true instead. The Sole Arbitrator sees himself comforted in his view by looking at the rules and regulations of various sports organisations. The UCI – e.g. – have a comment under its article corresponding to FINA DC 10.8 which provided that *"it may be considered unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation"* (cf. CAS 2008/A/1744 *UCI v. Schachl & ÖRV*, paras. 76 et seq.). This comment more or less amounts to applying the criteria contained in FINA DC 10.1 to FINA DC 10.8 by analogy. Also, CAS Panels in the past have interpreted the notion of *"fairness"* in this sense. This is evidenced by the decision in CAS 2007/A/1362 & 1393 *CONI v. Petacchi & FCI* and *WADA v. Petacchi & FCI* (at paras. 7.22 et seqq.)

> *"The Panel next considers whether, in addition to the disqualification from the Giro d'Italia 2007, Mr. Petacchi should be disqualified from all other competitive results obtained after 23 May 2007, when the sample was collected. Article 274 of the ADR provides for such disqualification 'unless fairness requires otherwise'.*
>
> *The Panel has already concluded that Mr. Petacchi bears No Significant Fault or Negligence, and that it is satisfied as to the circumstances in which the excessive quantity of Salbutamol was taken which led to the adverse analytical finding.* […] *In this case the Panel takes into account the fact that Mr. Petacchi voluntarily excluded himself from much racing since the Giro d'Italia 2007 and the adverse analytical finding*. […]
>
> […]
>
> *In the present case the Panel has concluded that fairness requires that such competitive results as Mr. Petacchi has achieved between the Giro d'Italia 2007 and 31 October 2007 should not be excluded, but that all competitive results and prizes after 31 October 2007 should be forfeited. The Panel is satisfied that the events of 23 May 2007 were 'one-off' and that Mr. Petacchi does not habitually take doses of Salbutamol in excess of the authorised dose. Indeed, the other results at the Giro d'Italia 2007 would seem to justify that view."*

and CAS/A/2671 *UCI v. Rasmussen & DIF* (at para. 84):

> *"In this case, the Panel finds that fairness requires that no disqualification be imposed on the First Respondent with respect to the results obtained in the period between 28 April 2011, date of the third whereabouts failure, and 14 September 2001, date of the provisional suspension. In addition to the fact that Rasmussen was not responsible for the delay in the management of his case, the Panel finds it important to emphasize the circumstance that, as conceded by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen. Therefore, the Panel sees no reason to disqualify them. At the same time, the Panel underlines that the declaration that Rasmussen is ineligible to compete as from 1 October 2011 implies the forfeiture of the results (including medals, points and prizes) achieved in the period for which ineligibility is retroactively imposed* […]*".*

87. The CAS decision cited by the Respondent, CAS 2010/A/2216 *Napoleon v. FINA*, does not contradict the view held here. In said decision (at para. 17) the Panel ruled as follows:

> *"Based on the particular circumstances of this case and the foregoing delays, the Panel finds that in the Appellant's situation fairness requires that the period of disqualification of results should run from the 16th November 2009 to the 29th January 2010 in addition to the period of disqualification running concurrently with the CAS Sanction (14th June 2010 until the 20th August 2010), i.e. for a period of 4 months and 3 weeks. These periods of disqualification equate to the ban imposed by FINA but take account of the undue delay which would have otherwise precluded the Appellant from fair participation in future competitions."*

88. In particular, the CAS Panel in this decision did not stipulate that foregoing delays in the disciplinary procedure are the only factor to be taken into account in the ambit of the *"fairness"* test. The better arguments, therefore, speak in favour of interpreting the term *"fairness"* as encompassing the criteria enshrined in FINA DC 10.1 (but not being limited to them). Thus, the factors which can (also) be taken into account in the ambit of the *"fairness"* test are the severity of the athlete's ADRV and the impact of the ADRV on the subsequent results.

89. The Sole Arbitrator concludes that even if FINA DC 10.8 were applicable in the case at hand, taking into account the relevant criteria under the *"fairness"* exception – in particular the negative test result of 16 December 2012 and the light degree of fault in relation to the ADRV committed on 14 December 2012 – the decision would not be any different.

C. Conclusion

90. In the light of the foregoing, the Sole Arbitrator holds that:

- in the present case FINA DC 10.1 constitutes the applicable rule as the relevant result was achieved two days after the ADRV and, besides, within the same Competition;

- taking into account the relevant criteria under FINA DC 10.1, the Sole Arbitrator sees no reason to disqualify the results of the Appellant of 16 December 2012;

- even if FINA DC 10.8 were applicable this would lead to the identical result.

X. THE APPELLANT'S REQUEST FOR A CORRECTIVE PRESS RELEASE

91. The Respondent has published the FINA Decision appealed in these proceedings on its website and has issued a press release stating that both of the Appellant's results in the Istanbul World Championship have been disqualified. The Appellant demands for a corresponding press release which states that his two results of 14 December 2012 and 16 December 2012 can most certainly be *"distinguished"* and that the second result, i.e. the gold medal, was not affected by any doping practice. Since the FINA Decision has been set aside in these proceedings, the Respondent is under an obligation to correct the public statements made in relation to the Athlete. The Sole Arbitrator therefore grants the Appellant's request.

XI. COSTS

92. Pursuant to Art. R65.1 of the CAS Code, cases which are exclusively of a disciplinary nature and which are rendered by an international federation shall be free of charge, except for the Court Office fee to be paid by the Appellant and retained by the CAS. Since the prerequisites of this provision are met, the proceedings are free subject to the non-refundable Court Office fee that is retained by the CAS.

93. Art. R65.3 of the CAS Code provides that the Panel has discretion to grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

94. With regard to the parties' costs, having taken into account the outcome of the arbitration, the conduct and the financial resources of the parties, the Sole Arbitrator

finds it appropriate and fair that the Respondent pays a contribution of CHF 3'000 towards the Appellant's legal fees and expenses and as a reimbursement of the non-refundable CAS Court Office fee.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Mads Glaesner against the Decision of the Doping Panel of the Fédération Internationale de Natation dated 11 July 2013 is admitted.
2. Paragraph 6.2 of the Decision of the FINA Doping Panel of 11 July 2013 is set aside insofar as it refers to other competitive results than the results obtained by Mr Mads Glaesner on 14 December 2012.
3. The Fédération Internationale de Natation is ordered to issue a corrective press release on the disqualification of Mr Mads Glaesner's results.
4. The Award is pronounced without costs, except for the CAS Court office fee of CHF 1'000 (one thousand Swiss Francs) paid by Mr Mads Glaesner and which is retained by the CAS.
5. The Fédération Internationale de Natation is ordered to pay to Mr Mads Glaesner a contribution towards his legal costs and expenses in connection with these proceedings in the amount of CHF 3'000.
6. All other or further claims are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 31 January2014

The Court of Arbitration for Sport

Ulrich Haas
Sole Arbitrator

Esther Baumgartner
Ad Hoc Clerk