



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2019/A/6465 World Anti-Doping Agency (WADA) v. International Skating Union (ISU) & Vitali Mikhailov

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Ms. Carine Dupeyron, Attorney-at-Law, Paris, France, President
Arbitrators: Mr. Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy
Mr. Patrick Lafranchi, Attorney-at-Law, Bern, Switzerland

in the arbitration between

World Anti-Doping Agency (WADA), Montreal, Canada

Represented by Mr. Ross Wenzel and Mr. Magnus Wallsten, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

International Skating Union (ISU), Lausanne, Switzerland

Represented by Dr. Béatrice Pfister, Attorney-at-Law, Gümligen, Switzerland

First Respondent

Vitali Mikhailov, Minsk, Belarus

Second Respondent

I. THE PARTIES

1. The appellant is the World Anti-Doping Agency (“**WADA**” or the “**Appellant**”), a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms on the basis of the World Anti-Doping Code (the “**WADC**”), the core document which harmonizes anti-doping policies, rules and regulations around the world.
2. The first respondent is the International Skating Union (“**ISU**” or the “**First Respondent**”), the international governing body for competitive ice skating disciplines. It was founded in Scheveningen, Netherlands, in 1892 and is headquartered in Lausanne, Switzerland. The ISU was formed to establish standardized international rules and regulations for the skating disciplines it governs, and to organize international competitions in these disciplines.
3. The second respondent is Mr. Vitali Mikhailov (the “**Athlete**” or the “**Second Respondent**”), a Belarusian international-level speed skater. He is the current holder of the Belarusian record in 1,000 meters (the First Respondent and the Second Respondent are referred to together as the “**Respondents**”).

II. FACTUAL BACKGROUND

4. On 2 March 2019, an in-competition doping control was carried out on the Athlete during the 2019 ISU World Allround Speed Skating Championships in Calgary, Canada (the “**Competition**”). The Athlete provided a urine sample (the “**Sample**”). In the doping control form, in the section dedicated to “*Medications taken in the last seven days*”, the Athlete indicated that he had consumed a food supplement called “*Pre Workout Allmax.*”.
5. On 26 March 2019, the WADA-accredited laboratory in Montreal, Canada (the “**Laboratory**”) reported the results of its analysis (the “**Report**”). The Laboratory found an Adverse Analytical Finding (“**AAF**”) for the Prohibited Substance higenamine.
6. The Report indicated in the details of the analysis “*Higenamine (a product labelled as containing higenamine was declared by the athlete). Results reported on the certificate of analysis no 19L01778BA.*”
7. On 5 April 2019, ISU wrote to the Skating Union of Belarus to inform the National Federation that the in-competition Anti-Doping test of the Athlete of 2 March 2019 was positive and was found to contain higenamine, which is a “*specified substance prohibited at all times.*” As per the ISU Anti-Doping Rules (the “**ISU ADR**”), ISU recalled that the Athlete had the right to submit an explanation, dispute the ISU assertion and to request that the B-Sample be analyzed.

8. On 8 April 2019, the Skating Union of Belarus replied and provided the Athlete's explanation to the ISU. In his explanation, the Athlete stated amongst others:

“On February 24, 2019, being at a training camp before the World Championships in Calgary, (Canada) at the GNC sports nutrition store in the CF Market Mall, I bought the pre-workout complex IMPACT IGNITER of the AllMAX brand for the first time, since this is a major brand in the sports nutrition industry. I did not imagine that it could contain a prohibited substance.

Therefore, when taking the doping test 03/03/2019, I wrote this dietary supplement in my anti-doping form.

Only when I was informed about the prohibited substance Higenamine was found in my body, I thoroughly studied the composition of AllMAX IMPACT IGNITER and I found this substance in its composition. I have never imagine[d] that buying a sport drink in a big store, can sell drinks with containing a prohibited substance.” [sic]

9. In the same letter, the Skating Union of Belarus further noted that:

“[...] the Skating Union of Belarus would like to admit that Mr. Vitaly Mikhailov has bought the pre-workout complex Impact Igniter by non-acquaintance. The sportsman has indicated this workout complex in his anti-doping form. Mr. Mikhailov fully admitted that he purchased this complex by non-acquaintance and by mistake.”

III. PROCEEDINGS BEFORE THE ISU DISCIPLINARY COMMISSION

10. On 12 June 2019, the ISU filed a statement of complaint against the Athlete alleging the commission of an Anti-Doping Rule Violation (“**ADRV**”).
11. On 12 August 2019, the ISU Disciplinary Commission ruled in favor of the Athlete and found that he did not breach the ISU ADR, as follows:

“Rule 4.0 of the WADA Technical Document – TD2108MRPL is not discretionary for this substance. Hence, a value of 7ng/ml of higenamine should not have been reported as an Adverse Analytical Finding. Given that this level should not have been reported, no weight can be given to a sanction flowing from it. The correct result is that no Adverse Analytical Finding (pursuant to the WADA Technical Document) was found. The result was only reported due to the admission of the Skater by declaration that he had used a supplement on the DCF. This supplement was later confirmed as stating it contained higenamine in the list of ingredients. Hence, the laboratory found that the presence of higenamine was not a positive test from a plant or organize [sic] source but from a supplement. Therefore, higenamine was reported at below the reporting threshold of 10ng/ml. In this case the athlete was placed in jeopardy by the honest and correct declaration of use of a nutritional supplement declared on his Doping Control Form. That supplement contained a prohibited substance that manifested in his urine sample at a level below the MRPL. The MRPL is presumably set after consideration of the possibility of natural sources or contamination effects, and due to scientific uncertainty of any performance enhancing effects below this level.”

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 19 September 2019, the Appellant filed with the CAS Court Office its Statement of Appeal with respect to the decision rendered by the ISU Disciplinary Commission on 12 August 2019 cited above at §11 (the “**Appealed Decision**”). In its Statement of Appeal, the Appellant appointed Professor Luigi Fumagalli as arbitrator.
13. On 26 September 2019, the Appellant requested an extension of the time-limit until 14 October 2019 to file its Appeal Brief.
14. On 4 October 2019, in the absence of any opposition to this extension by the Respondents, the CAS Court Office granted the Appellant the requested extension of the deadline.
15. On 4 October 2019, the Respondents jointly nominated Mr. Patrick Lafranchi as arbitrator.
16. On 14 October 2019, the Appellant filed its Appeal Brief.
17. On 15 October 2019, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondents to submit their Answers within 20 days.
18. On 5 November 2019, the First Respondent filed its Statement of Defense.
19. On 12 November 2019, following communication complications between the CAS Court Office and the Athlete leading to the Athlete being granted a new time-limit to provide his Answer, the Athlete confirmed having received the Appeal Brief and its annexes. He further indicated that he would be represented by the legal representative of ISU, that he agreed “*with the response of ISU and the statement of defense*” and that he did not consider a hearing to be necessary. On the same day, the First Respondent indicated that it would defer to the decision of the Panel whether to hold an oral hearing or not.
20. On 13 November 2019, the Appellant submitted that it considered that the case could be decided “*on the papers*” and without an oral hearing.
21. On 20 November 2019, following request by the CAS Court Office for the Athlete’s clarification in this regard, the Athlete confirmed that he agreed with the response of the ISU and the ISU’s Statement of Defense and that he did not consider a hearing to be necessary in this case.
22. On 9 January 2020, the CAS Court Office notified the Parties that Ms. Carine Dupeyron had accepted her appointment by the President of the CAS Appeals Arbitration Division and enclosed her acceptance form, in which Ms. Dupeyron disclosed that she “*has been appointed as Sole Arbitrator by the President of the CAS appeals arbitration division in an unrelated case where one of the parties is represented by the law firm Kellerhals Carrard*”.

23. On 20 January 2020, the CAS Court Office noted that no challenge had been filed against the appointment of Ms. Dupeyron and informed the Parties that the Panel was constituted as follows:
- Ms. Carine Dupeyron, Attorney-at-Law, Paris, France, President
 - Mr. Luigi Fumagalli, Professor and Attorney-at-law, Milan, Italy
 - Mr. Patrick Lafranchi, Attorney-at-Law, Bern, Switzerland.
24. On 7 February 2020, the CAS Court Office informed the Parties of the Panel’s decision not to hold a hearing.
25. On 20 April 2020, the CAS Court Office confirmed receipt by the Appellant and the Respondents of the Order of Procedure, signed by each of the respective Parties.

V. SUBMISSIONS OF THE PARTIES

26. The Panel has taken into consideration all the Parties’ written submissions and has weighed the arguments made by the Parties in the light of all the evidence presented. The Panel sets out below a summary of the Parties’ positions, which does not attempt to be an exhaustive account of all the evidence and arguments put forward before this Panel but focuses on the essential elements, though the Panel has considered them all.
27. As preliminary points, the Panel underscores that:
- the Second Respondent informed the Panel that he was represented by ISU’s legal representative in these proceedings and confirmed in writing his agreement with the submissions made by ISU, procedurally and on the merits;
 - the First Respondent, ISU, confirmed that “*the relevant facts of the case at hand and the wording of the applicable legal provisions are undisputed*” and that it accordingly “*limit[ed] itself to discussing the decisive question which is: can Vitali Mikhailov be found guilty of an anti-doping rule violation for the presence of the prohibited substance higenamine, designated as beta-2 agonist, despite the fact that level of the substance found in his body was below 10ng/mL, i.e. below the Minimum Required Performance Level for Detection and Identification of non-Threshold Substances according to Rule 4.0 of the WADA Technical Document (WADA TD2018MRPL, Exhibit 13 to the Appeal Brief.*”
28. Based on the foregoing, the Panel (i) presents below the position of the Respondents altogether as a joint position, and (ii) accepts that the facts underlying the AAF, in particular the level of higenamine found by the Laboratory in the Athlete’s A sample, that higenamine is a Non-Threshold Substance and the application of ISU ADR and Rule 4.0 of the WADA TD2018MRPL to the case are undisputed facts and elements admitted by all Parties.

A. The Appellant's Position

29. In its submissions dated 19 September 2019 and 14 October 2019, the Appellant maintains that according to Article 2.1 ISU ADR, it is the Athlete's personal duty to ensure that no Prohibited Substance enters his body.
30. The Appellant further points out that, according to Article 3.1 ISU ADR, the standard of proof in this case is greater than a mere balance of probability but less than proof beyond reasonable doubt.
31. In the case at hand, the Appellant then submits that it is not contested that the Athlete's Sample contained a Prohibited Substance, and that the mere presence of such substance constitutes an ADRV.
32. The Appellant explains that higenamine is not a Threshold Substance as defined in the WADC and that therefore, the AAF may result from a concentration below the established reporting limit.
33. Further, the Appellant argues that Rule 4.0 of the WADA Technical Document numbered TD2018MRPL (the "**WADA TD2018MRPL**") does not preclude laboratories from submitting as AAF a sample that contains higenamine under 10.0 ng/mL, but rather that this is a laboratory's discretionary choice. In the Appellant's opinion, the use of the word "*should*" in Rule 4.0 of the WADA TD2018MRPL illustrates this interpretation, i.e. that non-reporting of a Prohibited Substance below the indicated reporting limit is not mandatory, but discretionary, as follows:
- "A confirmed identification of a Non-Threshold Substance at any concentration level shall be reported as an Adverse Analytical Finding with the following exceptions:*
- Salmeterol and higenamine **should** not be reported at levels below 10 ng/mL (i.e. 50% of the MRPL for beta-2 agonists)⁹;"*
34. By way of support of its understanding of the wording, the Appellant relies on CAS cases CAS 2016/A/4596 "*FIFA v. SAOC*" and CAS 2017/A/5078, "*Roman Eremenko v. UEFA*".
35. Consequently, the Appellant submits that where a positive test for higenamine is reported, the presence of a prohibited substance constitutes an ADRV regardless of the fact that the presence of the substance is below the reporting limit of 10ng/mL as foreseen in the WADA TD2018MRPL.
36. With respect to the Respondents' defense, the Appellant submits that the purpose of the reporting limit for higenamine was initially to address concerns relating to athletes inadvertently ingesting the substance in certain natural products, which are common in Asia and contain higenamine. Since it was not contested that the Athlete ingested the substance from a non-natural source, the Appellant considers it logical that the Laboratory reported a finding of an AAF.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

37. In the event that the Panel finds that Article 2.1 ISU ADR is not violated, the Appellant subsidiarily submits that the Athlete must be found to have violated Article 2.2 ISU ADR, which is intended to sanction “use” or “attempted use” of a prohibited substance.
38. In that respect, the Appellant highlights that intent, fault or negligence is not required in order to establish a violation of Article 2.2 ISU ADR. Then, based on the Athlete’s admission that he had bought and voluntarily consumed a pre-work out product containing the prohibited substance, the Appellant submits that this constitutes reliable means to establish the ADRV under Article 2.2 ISU ADR, to the comfortable satisfaction of the Panel, which is the applicable standard of review.
39. With regard to the sanction attached to the ADRV, the Appellant first resolves not to put forward a case of an intentional violation against the Athlete but submits that the Athlete acted negligently by failing to investigate the content of the product it bought, all the more so since the Athlete is an experienced 33-years old skater. As a conclusion, WADA requests that, taking into account the degree of the Athlete’s fault, the Athlete should be sanctioned with the maximum two-year period of ineligibility.
40. Specifically, in its request for relief set forth in the Appeal Brief, WADA “*respectfully requests CAS to rule that:*”
1. *The Appeal of WADA is admissible.*
 2. *The decision dated 12 August 2019 rendered by the ISU Disciplinary Commission in the matter of Vitali Mikhailov is set aside.*
 3. *Vitali Mikhailov is found to have committed an anti-doping rule violation.*
 4. *The results achieved by Vitali Mikhailov on 2 March 2019 and any other results achieved at the Competition, are disqualified.*
 5. *Vitali Mikhailov is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force.*
 6. *WADA is granted a contribution to its legal and other costs.”*

B. The Respondents’ Position

41. As a preliminary remark in the Statement of Defense, the Respondents expressly accept the facts underlying the dispute and declare limiting their arguments to one decisive question in this case, which is, in their view, as follows: “*can Vitali Mikhailov be found guilty of an anti-doping rule violation for the presence of the prohibited substance higenamine, designated as beta-2 agonist, despite the fact that the level of substance found in his body was below 10ng/mL; i.e. below the Minimum Required Performance Level for Detection and Identification of Non-Threshold Substances according to Rule 4.0 of the WADA Technical Document.*”
42. Regarding the interpretation of Rule 4.0 of the WADA TD2018MPRL, the Respondents submit that the Appellant’s theory based on the term “*should*” is unsustainable, for several reasons. The first one is that the word “*should*” has been mistakenly adopted but

was “*meant to mean ‘shall’*” when placed in the context of the WADA TD2018MRPL, as there is no intelligible reason to leave the reporting at the discretion of laboratories. Secondly, in the Respondents’ opinion, there is no reason for treating athletes differently as to the reporting of AAFs with respect to concentrations below the defined reporting level, and accordingly Rule 4.0 of the WADA TD2018MRPL is applicable to all cases of a finding of higenamine below 10 ng/mL i.e. leading to non-reporting. Thirdly, the Respondents recall that the purpose of the reporting limit was intended to avoid sanctioning athletes for inadvertently ingesting higenamine in natural products. Hence, interpreting Rule 4.0 as the Appellant does would mean that certain athletes could be sanctioned, but not others, while in both cases athletes would have very low levels of the concerned Prohibited Substance.

43. The Respondents conclude that understanding Rule 4.0 as non-mandatory provision would therefore make the rule arbitrary and lead to unequal treatment of athletes.
44. In other words, the Respondents insist that the Athlete should not be treated any differently than any other athlete with a finding of higenamine of below 10 ng/mL, whatever the source of the substance. Moreover, contrary to the Appellant’s submission, there is no indication in Rule 4.0 of the WADA TD 2018MRPL that non-reporting would be limited to cases of involuntary intake of higenamine through natural products.
45. The Respondents also note that the reporting limit in itself is questionable, as its original purpose, which was to account for difference in the capability of laboratories to identify low levels of higenamine, is outdated. This supports non-reporting. Another reason supporting non-reporting is that higenamine at such low levels has no effect on the athlete.
46. Overall, interpreting this provision of the WADA TD2018MRPL as giving the laboratories discretion to report or not an AAF raises a “*constitutional concern*” as the laboratories, whose tasks and competences are limited to the analysis of samples, have no authority to determine if the athlete must be treated as having committed an ADRV or not. Stated differently, the Respondents argue that this would not be compatible with the allocation of authority between fact finders and hearing bodies.
47. Turning to the case law cited by the Appellant, in particular CAS awards CAS 2016/A/4596 and CAS 2017/A/5078, the Respondents raise the existence of a paradox in these decisions, between:
 - asserting that any quantity of a substance constitutes an ADRV, and
 - allowing that small quantities are not necessarily reported.
48. According to the Respondents, this paradox leads to having the athletes “*entirely at the will of the laboratories*”, which is “*nothing short of arbitrariness.*” To avoid this unfair situation, the Respondents argue that the non-reporting shall be understood as mandatory.
49. Finally, the Respondents submit that the Appellant’s statement that whether the “presence” or “use” of a Prohibited Substance, and therefore an ADRV under Article 2.1, respectively 2.2 ISU ADR, can be established by other reliable means, such as

admissions by the Athlete, is not relevant to the resolution of the present case. The question at hand is not whether a Prohibited Substance is present or not in the Athlete's sample, but the concentration level below 10ng/mL of higenamine, i.e. whether in these circumstances, the Athlete could be found guilty of an ADRV.

50. In that regard, the Respondents insist that the Athlete's honesty in declaring the food supplement in his Doping Control Form and later confirming it in his declaration should not be a reason for punishing him, while other, less honest athletes might not be reported.
51. As a conclusion and request for relief, the Respondents submit that *"the ISU Disciplinary Commission was right in holding that the reporting limit for higenamine established by Rule 4.0 of the WADA TD 2018MRP[L] is mandatory, that it was in violation of this rule to report the presence of higenamine of 7ng/mL in the Skater's body as adverse analytical finding and that therefore the Skater has to be acquitted of the charge to have violated the ISU Anti-Doping Rules and the Appeal dismissed. The ISU considers it appropriate to order Appellant to pay to Respondent ISU a substantial contribution towards its legal fees and other expenses incurred in connection with the present proceedings in accordance with R.64.5."*

VI. JURISDICTION

52. The jurisdiction of CAS shall be examined in light of Article R47 of the CAS Code of Sports-related Arbitration (Edition 2019) (the CAS Code"), which reads as follows: *"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."*
53. Specifically here, the Appellant relies on Article 13.2.1 ISU ADR (reproducing Article 13.2.1 WADC) which states as follows: *"In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS."*
54. The jurisdiction of the CAS has not been challenged by the Parties. As it is also undisputed that the Athlete is an International-Level Athlete, the Panel is satisfied that it has jurisdiction to hear this case.
55. The Panel recalls that, in accordance with Article R57 of the CAS Code, it has full power to review *de novo* the facts and the law and may issue a new decision, which replaces the Appealed Decision or annul it and refer the case back to the previous instance.

VII. ADMISSIBILITY

56. Article R49 of the CAS Code provides as follows: *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body*

concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document”.

57. Article 13.5 ISU ADR generally confirms the above, as it provides that: *“the time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party.”*

58. However, the Appellant, which, according to Article 13.2.3(f) ISU ADR is among the « Persons » entitled to appeal from decisions regarding ADRVs, benefits from a special deadline, as follows from Article 13.5 ISU ADR: *“The filing deadline for an appeal or intervention filed by WADA shall be the later of:*

a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or

b) Twenty-one (21) days after WADA’s receipt of the complete file relating to the decision.”

59. The Appealed Decision was rendered on 12 August 2019; hence, at the earliest, the deadline for the National Anti-Doping Agency of Belarus expired on 2 September 2019. Considering that WADA filed its Statement of Appeal on 19 September 2019, the Panel is satisfied that the Appellant’s appeal was timely filed as per Article 13.5(a) ISU ADR and is therefore admissible, a conclusion which has not been contested by the Respondents.

VIII. APPLICABLE LAW

60. Article R58 of the CAS Code provides the following: *“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.”*

61. In their respective written submissions, both the Appellant and the Respondents rely on the ISU ADR.

62. Since the Athlete is affiliated to the ISU and considering that the ISU and its affiliates are subject to the ISU ADR, the Panel finds that the ISU ADR are applicable to this dispute. Subsidiarily, the Panel will apply the Swiss law as Switzerland is the country where ISU is domiciled; the Panel however notes that the Parties have not formulated any explicit argument under Swiss law.

IX. DECISION ON THE MERITS

63. At the outset, the Panel acknowledges the absence of debate amongst the Parties regarding the finding made by the Laboratory, which reported the presence of higenamine in the sample of the Athlete at a concentration level of 7ng/mL during an in-competition doping control test. It appears to also be undisputed that:
- higenamine is a Prohibited Substance and is not a Threshold Substance;
 - the Laboratory reported the AAF;
 - the Laboratory was aware of the declaration by the Athlete in the Doping Control Form, stating that he had ingested a food supplement called Pre Workout Impact Igniter Allmax prior to the competition, a declaration which was confirmed by the Athlete;
 - the Pre Workout Impact Igniter Allmax supplement contains higenamine, an information which is present on the box of the food supplement itself;
 - the ISU ADR and Rule 4.0 of the WADA TD2018MRPL apply.
64. The Panel concurs with the Respondents that this case revolves around one legal question, which is whether the Athlete could be sanctioned for an ADRV when the Prohibited Substance was reported by the Laboratory at levels which are below reporting levels foreseen under Rule 4.0 of the WADA TD2018MRPL.
- A. The Panel's decision on an ADRV committed by the Athlete**
65. It is unchallenged that the Laboratory reported an AAF of higenamine on the A-Sample of the Athlete, and it appears that the Athlete waived its right to have the examination of the B-Sample. It is also undisputed that higenamine is a Prohibited Substance, and not a Threshold Substance. Accordingly, an ADRV of "Presence" under Article 2.1 ISU ADR could be considered having been established (see Article 2.1.3 ISU ADR). The Panel observes that an ADRV of "Use" under Article 2.2 ISU ADR could be considered established too, given the admission by the Athlete, in addition to the AAF of the A-Sample.
66. However, according to the Appealed Decision, such ADRV is not established because it is based on an AAF that was reported by the Laboratory in violation of Rule 4.0 of the WADA TD2018MLPR. In these circumstances, the ISU Disciplinary Commission determined that this violation suffices to ignore the AAF and consequently, there is no further basis for establishing an ADRV. In other words, no ADRV could be found if it were not for a reporting that should not have taken place.
67. The Panel notes that the Respondents have also developed additional arguments to support that the AAF of the Laboratory must be "ignored," based in particular on the original purpose of Rule 4.0, the risk of unequal treatment between athletes, arbitrariness of the reporting by the laboratories, the anti-constitutional role given to the laboratories, etc. See, in that regard, §§41-51 supra.

68. The Panel has carefully studied the arguments of the Parties and has applied Article 20 ISU ADR as a guideline on how to interpret the relevant provisions of the ISU ADR. The ISU ADR shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. In that regard, the Panel decides as follows:

- On the interpretation of Rule 4.0 of the WADA TD2018MRPL: the Panel has examined the interpretations put forward by the Parties, and is not convinced by the Respondents' reasoning, according to which Rule 4.0 contains an explicit or clear prohibition of reporting an AAF when the reporting limit of 10mg/mL is not reached; in the Panel's view, this interpretation is at odds with the clear language of Rule 4.0 of the WADA TD2018MRPL, which uses the term "should," not "shall" and therefore does not contain an explicit provision preventing laboratories from reporting in those cases; hence, the Panel concludes that the Appealed Decision incorrectly interpreted Rule 4.0 of the WADA TD2018MRPL;
- On the drafting history of Rule 4.0 of the WADA TD2018MRPL: the Panel understands from the evidence on the record and the Appealed Decision that, originally, one reason for the discretion left to the laboratories not to report an AAF when the higenamine level is below 10ng/mL, was so as to give due consideration to the technical ability of laboratories to detect and report results when concentration levels are low, in order to avoid false positives or uncertain results; a second reason for this discretionary reporting limit was to tolerate the presence of higenamine at low levels because in certain regions in the world it was possible for the Prohibited Substance to be inadvertently ingested as part of natural ingredients; however, the Panel notes that none of these circumstances for which Rule 4.0 was originally drafted so as to lessen the reporting obligation of the laboratories applies here: the Laboratory did not have any technical difficulty in making this finding and nothing in the record suggests that there was inadvertent ingestion of higenamine through natural ingredients; this is also confirmed by the message from Professor Ayotte of the Laboratory of 26 March 2019, which noted that while the level of higenamine was of 7ng/mL (only), the Athlete had disclosed that he had ingested a performance-enhancing supplement, and therefore, in those circumstances, reporting was made; hence, in the Panel's view, the drafting history of Rule 4.0 suggests that the Laboratory had actually no reason not to report the presence of the Prohibited Substance detected;
- The risk of arbitrariness of the reporting: the Respondents have raised the argument of the risk of treating athletes differently in the reporting of AAFs, because laboratories could make arbitrary reporting decisions; however, here, the Laboratory stated that it reported the AAF taking into account the Athlete's admission of the use, for performance enhancing purposes, of a food supplement containing higenamine, which is an explanation different from higenamine resulting from natural sources; the Laboratory test report and Professor Ayotte confirm that in such cases, where higenamine does not originate from natural products but has been ingested voluntarily, the AAF is reported, whether or not it is below the Rule 4.0 reporting level; hence, it does not appear that there would be arbitrariness in the reporting of the AAF as all athletes that admit having ingested this supplement would have their AAF reported;

- The constitutional concern: the argument is not fully developed by the Respondents, who actually do not even reference the Constitution that would be concerned; the vagueness of this argument in itself is a reason to dismiss it; moreover, the Panel believes that it does not make sense here, for different reasons, in particular (but not only) because laboratories are not official, public or investigative authorities but private entities conducting analysis and reporting their results to their clients; laboratories observe ethical and technical principles that are not challenged in the present case, and there is no identity and no relationship between the laboratories and decision making bodies such as disciplinary commissions and/or the CAS;
 - Case law cited: the Panel will note that the Respondents have not adduced any case law supporting their reading of Rule 4.0 of the WADA TD2018MRPL and the reasons they have advanced to discard the AAF; the Respondents did not rebut the cases put forward by the Appellant but for raising a paradox in Rule 4.0; however the reasons for this apparent “paradox” have been explained above, that is to account for the technical capability of laboratories and that higenamine could be inadvertently ingested via natural products; in contrast, the Appellant has adduced several past cases which confirm the finding of an ADRV when a Prohibited Substance is identified, including when the AAF is below reporting levels. The Panel has reviewed those cases and agrees with the Appellant’s submission in this regard;
 - The honest reporting of the Athlete and its unexpected damaging consequences: the Respondents insist that, had the Athlete not reported his ingestion of the Pre-Work-Out Igniter AllMax, there would have been no reporting; in other words, that the transparency of the Athlete played against him; this theory suggests that confirming the ADRV in the present case could discourage athletes from making honest reporting in their Doping Control Forms. The Panel is not convinced of the sustainability of this argument, for two reasons: first, because it assumes that the Athlete could lie on the Doping Control Form, without any consequences; second, because there is no certainty that the Laboratory would not have reported the AAF in any event: indeed, the Panel notes that the assertion made by Professor Ayotte was limited to stating that the Laboratory reported the AAF, because the reporting limit meant for higenamine resulting from natural products did not apply in the present case, but Professor Ayotte did not state that the Laboratory would not have reported the AAF in other circumstances.
69. In light of the foregoing, the Panel concludes that the presence of higenamine in the A-Sample of the Athlete is sufficient for the finding of an ADRV under Article 2.1.2 ISU ADR, which requires the “*presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed*”. To make its decision, the Panel also considered Article 2.1.3 ISU ADR, providing that “*Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample shall constitute an anti-doping rule violation*”, to conclude that the concentration level of higenamine in the Athlete’s urine was an irrelevant factor to determine the ADRV, having excluded as set forth above the arguments raised by the Respondents which aimed at excluding the AAF.

70. As obiter dictum and on a side note, the Panel recalls that, independently from the question of the reporting of higenamine below the reporting limit specified in Rule 4.0 of the WADA TD2018MRPL, an ADRV under Article 2.2 ISU ADR could also be demonstrated since the Athlete admitted having ingested a Prohibited Substance.
71. Finally, the Panel notes that Article 10.11.2 ISU ADR entitled “Timely Admission” provides a derogation to the principle that the period of ineligibility shall start on the date of the final hearing decision providing for ineligibility, in the following terms: *“Where a Skater [...] admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the ISU, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.”* This flexibility offered to the Panel to modify the starting date of the ineligibility period in case of the finding of an ADRV was not raised by the Parties during the procedure, in particular by the Respondents. The Panel accordingly did not have any reason to decide whether or not it should use that possibility, which is discretionary. As a last obiter dictum however, the Panel considers that although the Athlete has spontaneously admitted the use of a food supplement, he did not admit the existence of an ADRV in his case; furthermore, the circumstances of the case set forth in paragraph 74 below (negligence of the Athlete, his experience as a professional athlete) would not have justified an exception from the classic rule of Article 10.11 ISU ADR on the commencement of ineligibility period.

B. The Panel’s decision on the Sanction

72. The Panel observes that the Appellant does not put forward a case of intentional use.
73. The remaining question is whether the Athlete has established “No Significant Fault of Negligence” as provided for in Article 10.5.1.1 ISU ADR to obtain a reduction of the applicable sanction. The Panel notes that while the Respondents have developed their arguments regarding the reasons for discarding the AAF, and subsequently the ADRV, they have not put forward elements supporting a more lenient sanction if an ADRV was found.
74. The Panel decides here, in light of the duties incumbent on athletes constantly recalled by WADA, international and national federations, the surprising lack of diligence of the Athlete who has failed to take a step as simple as reading the label of performance enhancing product and did not make any inquiries about the product, and his experience as a 33-year old athlete, that the Athlete has not established no significant fault or no significant negligence in accordance with Article 10.5.1.1 ISU ADR.
75. The sanction shall therefore be a 2-year period of ineligibility, starting as of the date of the present award.
76. The Panel also confirms that, in application of Article 10.1.1 ISU ADR, the results achieved by Vitali Mikhailov on 2 March 2019 and any other result achieved at the Competition are disqualified.

X. COSTS

77. Since the present Appeal is against the decision of an international federation in a disciplinary matter, the relevant rule in the CAS Code is Article R65, which provides (i) in its subsection 2 that the proceedings are free beyond the Court Office fee of CHF 1,000 paid by the Appellant with the filing of its Statement of Appeal, and (ii) in the following subsection, that:

“In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties”.

78. The Panel observes that the Appellant requested to be “*granted a contribution to its legal costs and fees*”, and that the Respondents expressed the same request. Taking into account the outcome of the case rejecting the Respondents’ position, the respective financial resources of the Parties and that the Second Respondent, by joining the arguments of the First Respondent, did not render the case more complex or increase the Appellant’s costs, the Panel determines that the ISU shall pay a contribution of CHF 3,000 towards the Appellant’s legal costs and fees. The Respondents shall bear their own legal fees and expenses.

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The Appeal filed by WADA against the International Skating Union on 19 September 2019 against the decision rendered on 12 August 2019 by the Disciplinary Commission of the International Skating Union is upheld.
2. The decision rendered on 12 August 2019 by the Disciplinary Commission of the International Skating Union is set aside.
3. Vitali Mikhailov is found to have committed an anti-doping rule violation.
4. Vitali Mikhailov is sanctioned with a two-year period of ineligibility starting on the date of this Award.
5. All competitive results obtained by Mr. Vitali Mikhailov on 2 March 2019 and any other results achieved at the 2019 ISU World Allround Speed Skating Championships in Calgary, Canada, are disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.
6. The Award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss francs) paid by WADA, which is retained by the Court of Arbitration for Sports.
7. ISU is ordered to contribute CHF 3,000 to WADA's legal fees and costs.
8. All further motions and requests for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 30 September 2020

The Court of Arbitration for Sports



Carine Dupeyron
President



Luigi Fumagalli
Arbitrator



Patrick Lafranchi
Arbitrator