Arbitration CAS 2021/A/8391 Andrejs Rastorgujevs v. International Biathlon Union (IBU), award of 26 August 2022

Panel: Prof. Peter Grilc (Slovenia), President; Mr Reto Annen (Switzerland); Mr Nicholas Stewart QC (United Kingdom)

Biathlon
Doping (missed test, filing failures)
Sufficiently precise information provided as Whereabouts Filing
Inclusion of previous Whereabouts Failures in the assessment of an athlete's next Whereabouts Failure
International Standard for Testing and Investigation and concept of shared responsibility
Telephone call by a Doping Control Officer to an athlete

1. **It is the athletes' responsibility to ensure that all the information required in a Whereabouts Filing is accurate and in sufficient detail to enable any Anti-Doping Organization (ADO) wishing to do so to locate an athlete for testing. Athletes must provide sufficient information to enable Doping Control Officers (DCOs) to find the location, to gain access to the location, and to find the relevant athlete at the location. Athletes have to provide, for each day during the quarter, the full address of the place where they will be staying overnight specifically indicating home, temporary lodgings, hotel, *etc.*. Athletes have to eliminate in advance all possible difficulties that a DCO might encounter at the athlete's chosen specific location and have to comply with the duty to be diligent in filling in the information on the place of residence with sufficient precision for the DCO to be able to locate it without any particular effort.**

2. **Warnings to athletes by Controlling Organisations relating to previous Whereabouts Failures stand as relevant factor for judging the next Failure and can make a new Failure more blameworthy, for instance in case an athlete simply continues to file an address which he had already been told was inadequate.**

3. **The burden of accurately entering the information into the Anti-Doping Administration Management System (ADAMS) is solely on athletes. Suggested options for assisting athletes such as a warning that the entry is not locatable and a request to correct the deficiency are not in the International Standard for Testing and Investigation (ISTI) Rules and not contemplated as a responsibility of the anti-doping organizations. Additionally, the option of a phone call asking for further clarification is discretionary. The fundamental purpose of the ISTI Rules is to place responsibility squarely on the athlete and to enable control that the athlete cannot respond to by preparing for it in advance or possibly avoiding it. Athletes must use and comply with the system as it is. In a case where no events or circumstances placed any responsibility on the IBU/International Testing Agency (ITA) for any of the athlete's three Whereabouts Failure, where there were no deficiencies or anything misleading in the actions and**

communications by the IBU/ITA, the burden of accurately entering the information into ADAMS being solely on the athlete and the three failures being entirely the athlete's responsibility, the concept of shared responsibility has no application.

4. The purpose of a discretionary phone call is not to invite an athlete for testing, but to potentially confirm that an athlete is not present. The absence of a phone call does not give an athlete a defence to the assertion of a Missed Test, nor does it allow an athlete to say that an otherwise deficient filing of an address is repaired by the availability of a phone call by a DCO.

I. THE PARTIES

1. Mr Andrejs Rastorgujevs (the "Athlete" or the "Appellant") is an international-level Latvian biathlete.

2. International Biathlon Union (the "IBU" or the "Respondent") is the international governing body of biathlon. Its registered seat is Salzburg, Austria.

II. NATURE OF THE CASE

3. On 17 September 2021, an Arbitral Award (the "ADD Award") was delivered by the Anti-Doping Division of the Court of Arbitration for Sport ("CAS ADD") finding an anti-doping violation (three Whereabouts Failures within a 12-month period) committed by the Athlete pursuant to Article 2.4 of the IBU Anti-Doping Rules ("IBU ADR").

4. In the ADD Award the Sole Arbitrator partially upheld the Request for Arbitration filed by the IBU and sanctioned the Athlete with a period of ineligibility of eighteen months commencing on 11 March 2021, rendering all competitive results obtained by the Athlete from 1 July 2020 until the date on which the CAS ADD decision entered into force to be disqualified, with all resulting consequences including forfeiture of medals, points, and prizes.

5. By his Statement of Appeal and Appeal Brief, the Appellant requests recognition that his whereabouts filing for the period between 8 September 2020 and 28 September 2020 regarding Passo Stelvio (Italy) was sufficient under International Standard for Results Management ("ISRM"), Article B.2.1.(b) of Annex B, with the result that he has not committed an anti-doping rule violation pursuant to Article 2.4 of the IBU ADR, and annulment of the ADD Award of 17 September 2021.

6. The IBU maintains in the present proceedings that the Athlete has breached those rules and that the sanctions imposed by the ADD Award should be upheld.

III. BACKGROUND FACTS

7. The information detailed in this section is a summary of relevant facts as established in the ADD Award and provided by the Parties in their written pleadings and factual and legal exhibits. This section serves solely for the purpose of factual synopsis. To the extent they are necessary or relevant, additional facts may be set out below, in particular analysis of the merits. The present award only refers to such evidence and arguments to the extent necessary to explain its reasoning; the Panel has, however, considered all facts, claims, and legal arguments put before it.

8. The Athlete is a world-class biathlete, three times Olympic Games participant, World Championships participant (2011-2021) and a three-time European Champion. He has been subjected to permanent doping controls and had not breached the ADR until the breach that gave rise to the ADD Award under appeal here.

9. The present proceedings revolve around three Whereabouts Failures within a 12-month period, which are the following: (i) the Filing Failure effective as of 1 October 2019; (ii) the Missed Test on 17 June 2020 and (iii) the Filing Failure effective as of 1 July 2020. The Athlete admits the first two. But he denies the 2020 Filing Failure and, if he is right on that point, he will not have committed the anti-doping violation ("ADRV") found by the ADD Award and this appeal will succeed.

10. The following is a chronological summary of the events on each of the three Whereabouts Failures as identified in the ADD Award.

A. First Whereabouts Failure: Filing Failure (10 - 18 November 2019; Bormio/Sjusjeon)

11. On 18 November 2019, the IBU asked the International Testing Agency (the "ITA"), which manages the anti-doping programme for the IBU, to check the whereabouts for the Athlete for the period between 10 and 18 November 2019 and assess whether to file a Filing Failure against him due to insufficient whereabouts information for the entry *"Bormio"*.

12. On 26 November 2019, the ITA wrote requesting the Athlete to give an explanation for failing to provide sufficient Whereabouts Filings to enable Anti-Doping Organisations to locate him for testing between 10 and 18 November 2019. The only information available in his Anti-Doping Administration Management System ("ADAMS") account was *"overnight accommodation"* in Bormio at *"Passo Stelvio, Passo Stelvio, Italy"*.

13. On 21 December 2019, the ITA received from the Athlete an admission that he he had not been in Passo Stelvio between 10 and 18 November 2019 as indicated in ADAMS but was training in Sjusjeon, Norway. He stated that he had been unable to log into his ADAMS account due to the alleged absence of an internet connection.

14. On 17 February 2020, the ITA notified the Athlete that it had recorded the Filing Failure against him in accordance with Article I.3.6 of the International Standard for Testing and Investigation

("ISTI"), noted that the entry *"Sjusjeon"* and *"Bormio"* were created in ADAMS on 29 August 2019 and stated:

> *"Therefore, from 11 to 18 November 2019,* [the Athlete] *should have, at least, indicated further details to enable Anti-Doping Organizations (ADO) to locate* [him] *for Testing. Furthermore,* [the Athlete] *had sufficient time to amend* [his] *ADAMS account accordingly before 11 November 2019 since* [he] *arrived in Norway on 5 November 2019. Consequently, the ITA finds that* [the Athlete] *did not establish that no negligent behavior on* [his] *part caused or contributed to the Filing Failure".*

15. The Athlete did not exercise the right to request an administrative review.

16. The First Whereabouts Failure was therefore confirmed against the Athlete, effective as of 1 October 2019.

B. Second Whereabouts Failure: Missed Test (17 June 2020; Riga/Alūksne)

17. The Athlete's Whereabouts information stated that on 17 June 2020 between 06h00 and 07h00, he would be available for testing at the location Varaviksnes gatve 8¬11, Riga. On that day, a Doping Control Officer ("DCO") from the Latvian Anti-Doping Bureau attended the above address but was unable to locate the Athlete for testing during the 60-minute timeslot. No entrance door code details were provided in the Athlete's Whereabouts Filing and when the DCO eventually gained access to the building his knocks at the Athlete's apartment door and calls to the telephone number listed went unanswered.

18. On 10 July 2020, the ITA wrote to the Athlete advising him of this apparent Missed Test under Article 5.6 of the IBU ADR and Article I.4.3 of the ISTI and requesting his explanation.

19. On 9 August 2020, the ITA received from the Athlete an admission that he had failed to submit accurate information, stating that he had had a change in his training programme and went to Alūksne, Latvia, on 16 June 2020, therefore he was not in Riga on 17 June 2020.

20. On 1 October 2020, the ITA recorded the Missed Test against the Athlete in accordance with Article I.4.3 ISTI and noted that:

> *"While it is not challenged that your training dates in Aluksne changed several times before you were able to go there, you were required to keep your Whereabouts information complete and accurate at all times. Additionally, pursuant to Article I.3.1 (e) of the ISTI, the update concerned a mandatory activity, namely a training session. In light of the above, the ITA finds that you were unable to establish that no negligent behaviour on your part caused or contributed to your failure to be available and accessible for Testing. Therefore, the ITA has decided to record this Missed Test".*

21. The Athlete did not exercise the right to request an administrative review.

22. The Second Whereabouts Failure was therefore confirmed against the Athlete due to the Missed Test on 17 June 2020.

C. Third Whereabouts Failure: Filing Failure (8 - 28 September 2020; Passo Stelvio)

23. On 1 October 2020, the ITA sent an e-mail to the Athlete and requested explanations for an apparent Filing Failure in failing to provide a sufficient and accurate Whereabouts Filing to enable the IBU to locate him for testing between 8 and 28 September 2020. As in November 2019, the only information available in his ADAMS account was overnight accommodation in Bormio at *"Passo Stelvio, Passo Stelvio, Italy"*. The Athlete was informed that this constituted an apparent Filing Failure under Article 5.6 of the IBU ADR and Article I.3.6 of ISTI and was afforded the opportunity to provide explanations.

24. On 7 October 2020, the ITA received the Athlete's explanations that he was staying in the Hotel Passo Stelvio, that he had stayed in the same hotel previously and that on 22 August 2013 a DCO had been able to locate and test him based on the same whereabouts information.

25. On 25 November 2020, following a review of the Athlete's explanations, the ITA recorded the Filing Failure against the Athlete, giving him the right to request an administrative review of that decision within seven days.

26. On 2 December 2020, the Athlete requested an administrative review and on 7 January 2021 submitted a statement for the review.

27. On 11 December 2020, the results of an Administrative Review were delivered to the ITA.

28. On 15 January 2021, the ITA informed the Athlete that the reviewer considered that the Athlete had not filed sufficient information to be located for Testing for the purposes of the ISTI.

29. Accordingly, a Third Filing Failure within a 12-month period was recorded and confirmed against the Athlete, effective as of 1 July 2020.

IV. THE CAS ANTI-DOPING DIVISION PROCEEDINGS

30. On 22 February 2021, after being informed by the IBU of the alleged anti-doping violation pursuant to Article 2.4 IBU ADR on 8 February 2021, the Athlete provided a statement.

31. On 11 March 2021, the IBU issued the Notice of Charge and decision on Provisional Suspension.

32. On 22 April 2021, the Athlete filed with the CAS ADD an application for provisional measures under Article 7.3.3.1(a) of the IBU ADR and A2 and A18 of the Arbitration Rules applicable to the CAS ADD (the "CAS ADD rules") requesting that his suspension be lifted.

33. On 3 May 2021, the IBU referred the ADRV to the CAS ADD by a request for arbitration filed in accordance with Article 8.1.2.1 of the IBU ADR and A13 of the CAS ADD Rules. Pursuant to A14 of the CAS ADD Rules, this was to be adjudicated by a Sole Arbitrator. The IBU

expressly waived its right under A16 of the CAS ADD Rules to nominate a Sole Arbitrator and requested that a Sole Arbitrator be appointed by the President of the CAS ADD.

34. On 24 May 2021, the Athlete submitted his Answer to the IBU's Request for Arbitration.

35. The CAS ADD Office and the Parties exchanged communications about procedure. Initially, the IBU was neutral as to whether a hearing was necessary and the Athlete sought a hearing and a preliminary decision in respect of his application for provisional measures The IBU did not seek to serve evidence, whilst the Athlete served statements of Mr Aldis Cirulis, the Latvian team doctor, confirming the testing visit to the Hotel Passo Stelvio in August 2013, and Mr Giovanni Capitani, the hotel manager, referring to its location and some invoices. When the IBU was unable to accommodate the early hearing date which he proposed, the Athlete waived his right to a hearing and asked for a determination based on the written submissions and evidence.

36. Considering that the Athlete waived his right to have a hearing and the IBU's neutral position on this issue, the Sole Arbitrator deemed himself sufficiently informed to render an award based on the Parties' written submissions and evidence, as allowed by Article A19.3 (1) of the CAS ADD Rules.

37. The Disposition in the ADD Award (except for costs) reads as following:

> *"1. The application of Andrejs Rastorgujevs for provisional measures as regards his Provisional Suspension from 11 February 2021 is denied.*
>
> *2. The Request for Arbitration filed by the International Biathlon Union on 3 May 2021 is partially upheld.*
>
> *3. Andrejs Rastorgujevs is found to have committed an anti-doping rule violation pursuant to Article 2.4 of the IBU ADR.*
>
> *4. Andrejs Rastorgujevs is sanctioned with a period of ineligibility of eighteen (18) months.*
>
> *5. The period of ineligibility shall commence on 11 March 2021, which is the start date of the provisional suspension imposed on Mr. Andrejs Rastorgujevs.*
>
> *6. All competitive results obtained by Andrejs Rastorgujevs from 1 July 2020 until the date on which the CAS ADD decision enters into force are disqualified, with all resulting consequences including forfeiture of medals, points and prizes.*
>
> *7. […].*
>
> *8. […].*
>
> 9. *All other motions or prayers for relief are dismissed".*

V. THE APPEAL PROCEEDINGS BEFORE CAS

38. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code") on 7 October 2021 the Appellant filed a Statement of Appeal in which he asked the President of the CAS Appeals Arbitration Division to submit it to a Sole Arbitrator.

39. On 18 October 2021, in accordance with Article R51 of the CAS Code, the Appellant filed the Appeal Brief.

40. On 18 October 2021, the Respondent *inter alia* requested that the present procedure be submitted to a Panel of three arbitrators.

41. On 20 October 2021, pursuant to Article R50 of the CAS Code, the Deputy President of the CAS Appeals Arbitration Division (the "Deputy Division President") decided to submit the present procedure to a Panel of three arbitrators. Accordingly, both Parties were invited to nominate, in turn, an arbitrator.

42. On 28 October 2021, the Deputy Division President issued an Order on the Appellant's request for a stay, rejecting such request.

43. On 1 November 2021, the Appellant nominated Mr Reto Annen, Arbitrator in Chur, Switzerland, as an arbitrator.

44. On 15 November 2021, the Respondent nominated Mr Nicholas Stewart QC, Barrister in London, United Kingdom, as an arbitrator.

45. On 25 November 2021, the Appellant filed a petition for challenge against Mr Stewart QC. In accordance with Article R34 of the CAS Code, the Respondent and Mr Stewart QC filed written comments on the petition for challenge.

46. On 24 January 2022, the Challenge Commission of the Board of the International Council of Arbitration for Sport rendered its decision, dismissing the Appellant's petition for challenge.

47. On 31 January 2022, on behalf of the Deputy Division President, the CAS Court Office informed the Parties about the constitution of the Panel.

48. By letter to the Parties dated 10 February 2022, the Panel decided to hold a hearing. After several rounds to coordinate scheduling of the hearing, by the CAS Court Office from 8 March 2022, the parties were informed that the hearing would be held by video conference on 28 March 2022 13:00 CET. The Parties were informed that pursuant to Article R44.2, CAS Code, they should call to be heard by the Panel such witnesses and experts which they had specified in their written submissions. Further, the Parties were invited to provide the CAS Court Office, on or before 15 March 2022, with the names of all persons who would be attending the hearing, their email addresses, and a back-up phone number.

49. On 10 March 2022 the Order of Procedure was sent to the parties, which they signed on 18 March 2022.

50. On 18 March 2022, the Appellant filed translations of Google map entries and entries in ADAMS, since these exhibits had been previously filed in the Latvian language.

51. On 23 March 2022, the draft Hearing Schedule was sent to the parties.

52. A virtual video-conference hearing was conducted on 28 March 2022 at 13:00 CET. Besides the Panel members and Mrs Delphine Deschenaux-Rochat, Counsel to the CAS, the following persons were present:

- For the Appellant: Mr Andrejs Rastorgujevs (athlete), Dr Inga Kačevska (Legal Representative), Mrs Beatrise Bensone (interpreter, provided by the Appellant), Mr Normunds Putns (witness).

- For the Respondent: Mr Nicolas Zbinden (counsel), Mr Anton Sotir (counsel), Mr Greg McKenna (Head of Biathlon Integrity Unit), Mr Carlos Kammerlander (A-D Coordinator of the Biathlon Integrity Unit).

53. The hearing followed a schedule agreed by the parties and allowed for opening statements by both parties, examination of witnesses by the parties, cross-examinations, questions to the parties, parties' closing statements and rebuttals.

54. At the hearing, Mr Rastorgujevs, making the opening statement for the Appellant, made some declarations concerning *inter alia* his background, results, career and testing history as well as the circumstances concerning the Whereabouts Failures.

55. Mr Putns, appearing as a witness, described Mr Rastorgujevs as a hard-working, responsible, and consistent athlete and person, with whom he had worked as his manager over the years. In that role, he covered the business and partly the organisational part, but not the sporting and coaching. Managing ADAMS was thus left to the Athlete.

VI. POSITIONS OF THE PARTIES AND REQUESTS FOR RELIEF

56. The positions of the parties may be essentially summarized as below. This section principally reproduces the parties' arguments in their submissions of 7 October 2021, 18 October 2021, 19 November 2021 and at the hearing held on 28 March 2022.

A. Appellant's request for relief and positions

57. On 7 October 2021, the Appellant filed the Statement of Appeal challenging the ADD Award containing the following request for relief:

"The Athlete hereby respectfully request the Appeals Arbitration Division of the Court of Arbitration for Sport as follows:

a. Accept this Statement of the Appeal;

b. asks the President of the CAS Appeals Arbitration Division to submit the appeal to a Sole Arbitrator;

c. Decide on Provisional Measures: the Provisional Suspension imposed on me by the IBU on 11 March 2021 shall be lifted with immediate effect and I shall be entitled to continue with my sporting activity without any restrictions.

d. Find Whereabouts Filing between 8 September 2020 and 28 September 2020 regarding Passo Stelvio (Italy) sufficient under International Standard for Results Management Article B.2.1.(b) of Annex B;

e. Recognize Andrejs Rastorgujevs to not have committed an anti-doping rule violation pursuant to Article 2.4 of the IBU ADR".

58. In his Appeal Brief filed on 18 October 2021, the Appellant requested the CAS to *"Uphold Prayer of Relief provided by Athlete in the Statement of Appeal"*.

59. The Panel notes that the Appellant's request for relief did not ask for reduction of the 18-month period of ineligibility if this Panel upheld the Sole Arbitrator's finding of the ADRV. Moreover, neither the Statement of Appeal nor the Appeal Brief explicitly addressed that question. However, the Respondent's Answer did address that point anyway and expressly submitted (with reasons given) that the Athlete's fault was significant and *"the circumstances of this case do not envisage any further reduction of the already-imposed eighteen-month period of ineligibility"*. There was no appeal by the Respondent asking for an increase of the 18-month ineligibility, so an increase was not something for this Panel to consider. The Respondent simply asked for confirmation of the period of ineligibility imposed in the ADD Award.

1. First and Second Whereabout Failure (Filing Failure 10 – 18 November 2019 and Missed Test on 17 June 2020) - not contested

60. The Tribunal notes at the outset that the Appellant does not contest the first and second Whereabout Failures. Despite that, and for the sake of completeness and consistency only, a summary of his submissions and positions follows since some of them are used to explain the context of the third Whereabout Failure.

61. **The First Whereabout Failure.** As the location of Passo Stelvio, Bormio, Italy was entered in ADAMS for the dates in question, but the Athlete was in Sjusjoen, Norway, the Appellant adds nothing to the facts that would alter the findings of fact in the ADD Award. He had to change his training plans and locations at short notice due to illness and did not have access to the internet to correct the ADAMS entry. Regarding the entry of the location *"Passo Stelvio"*, it is a common training location for biathletes since he had made the same entry for several years.

62. **The Second Whereabout Failure.** The Appellant explains that he had to be at the location at the 60-minute time slot he had indicated in the ADAMS system, he had moved from Riga to Aluksne, about 185 km away, due to several short-notice changes in training dates. When he noticed the missed DCO calls on 17 June, the Athlete immediately called the DCO and offered to return to Riga for testing, but this was refused. In addition, this call did not appear on the failed test form, in which the DCO is supposed to record every call it receives from the athlete.

2. Third Whereabouts failure (Recorded Filing Failure 8 – 28 September 2021) – contested

a. Geographic indication of the location in ADAMS was sufficiently precise

63. By an ITA letter of 1 October 2020, the Athlete was informed that he had failed to comply with the obligation to provide sufficiently detailed information on his stay in Bormio, Italy. Consequently, the ITA issued a Recorded Filing Failure on 25 November 2020. It is the Appellant's position that the third Whereabouts Failure is, in its essence, an allegation that the information filed to ADAMS was not sufficient, and the ITA was not, in fact, locating the Athlete. Therefore, the information indicated in ADAMS must be recognized as sufficient for location. The Appellant reiterates the contents of his written statement of 7 January 2021, confirming that when in Bormio, Italy, the Athlete has always stayed in the same hotel *"Passo Stelvio"* being located right in Passo Stelvio, Bormio, Italy. He points out that he constantly filed his location in the same way with no deviations (Locality: Bormio. Address: Passo Stelvio, Passo Stelvio, Italy). It was done similarly also in September 2020, mentioning *"Passo Stelvio"* two times since the hotel where the Athlete resided has the same name as the mountain pass. To his knowledge the mountain pass itself is a sufficient geographic indication to locate him, yet the hotel he stayed in is the only hotel in Passo Stelvio with such name. Other statements and positions in the Statement of Appeal for the period between 11 December 2020 and 17 September 2021 overlap with what is contained in this Decision and therefore do not need to be summarised.

64. In support of his position, the Appellant submits that in June 2021 his manager sent a letter from Latvia to an address identical to the address he had entered in ADAMS, and that this letter was delivered by the post office without any problems at the Hotel Passo Stelvio.

65. Further, the Athlete filed the address of the hotel in the most appropriate way, given the sometimes-inconsistent listings of address by the hotel itself for the following reasons:

- Google *Maps* lists the factual address of the hotel as: Hotel Passo Stelvio, Passo dello Stelvio, 23032 Bormio SO, Italy. Further, when locations for Bormio and Passo Stelvio are inserted in *Google Maps*, they are more than 20 kilometres apart.

- The legal address indicated on the receipt from Athlete's stay in hotel in September 2020 is: Hotel Passo Stelvio, Passo dello Stelvio, 39020 Stelvio (BZ), Italy.

- The address indicated the e-mail received from the hotel states: Hotel Passo Stelvio, Passo dello Stelvio, c/o via Funivia n.15, 23032 Bormio SO, Italy, which, as the Athlete later found out, was the address for correspondence.

- To the knowledge of the Appellant, the IBU has conducted tests for athletes staying at Passo Stelvio also in circumstances when the address is not fully entered in Whereabouts Filing, in comparable situations and without finding Whereabouts failures;

- The legal requirement concerning circumstances of the third Whereabouts failure is not met, because the address had been entered in the same way in 2013, as found by the ITA and reconfirmed by the IBU, and was consequently found sufficient for testing purposes since;

- The factual address and address for correspondence is almost identical, except for the indicated street and house number;

- The Athlete had taken a video that showed that the Whereabouts Filing was the most proper way to indicate the factual address.

b. Warning

66. The notification regarding the first noted Whereabouts Failure could not be understood as a clear warning regarding the Whereabouts Filing regarding Passo Stelvio but rather a warning regarding the change of address. Moreover, the DCO was not trying to reach the Athlete for testing at the given time.

67. Both, paras. 86 and 90 of the ADD Award refer to the IBU relying on the argument that the Athlete was *"warned"* about ADAMS entry *"Passo Stelvio, Italy"* being insufficient for the proper location of the Athlete for testing purposes. The IBU argued that the Athlete was informed that such actions constituted an apparent Filing Failure under Article 5.6 of the IBU ADR and Article I.3.6 of International Standard for Testing and Investigations:

> *"We are hereby notifying you of an apparent failure to comply with the whereabouts requirements of the* [IBU ADR]*, in particular your failure to provide sufficient Whereabouts filings to enable Anti-Doping Organisations to locate you for testing between 10 November 2019 and 18 November 2019. The only information available in your ADAMS account is: Passo Stelvio, Italy".*

68. This *"warning"* was taken out of context because the Athlete received the *"warning"* with regards to a Filing Failure in respect of the period between 10 November 2019 and 18 November 2019, when he was in a different location to his ADAMS filing (*Sjusjoen, Norway* instead of *Passo Stelvio, Italy*). Within context, the Athlete interpreted the *"warning"* as referring to the fact that he was not in the location indicated in the ADAMS, not that the filed location itself was somehow insufficient and prevented the Anti-Doping Organization from locating the Athlete for testing. The Athlete understands the IBU's *"warning"* as not straightforward and to his knowledge since 2013 there had been no issues regarding the filing of his whereabouts in such manner. It would

therefore have been reasonable for such indication of Athlete's location to be upheld, as it had been done consistently.

c. Shared responsibility

69. The Appellant points out that athletes have previously been found to share responsibility for Whereabouts Failures with the anti-doping organisation. In this respect he relies on case law in *Alex Quiñonez v. World Athletics*[1] (reduction of sanction to one year due to shared responsibility) and CAS 2007/A/1318 (exoneration in full)[2].

70. The case law deals with *"shared responsibility"* both on the question whether a Whereabouts Failure has even occurred and the question, if so, what is the degree of fault directly relating to sanction. It appears that in cases where the athlete takes the responsibility of managing Whereabouts filings upon himself, the sanctions regarding Whereabouts Failures are harsher than the ones imposed on athletes who decide to authorize this duty to third parties, even though it has been explicitly stated that *"an athlete cannot hide behind the failure of his Representative"*.[3] Having in mind *Alex Quiñonez v. World Athletics*, it appears that absence of the word *"hotel"* from the building name *"Hotel Passo Stelvio"* amounts to a Whereabouts Failure with more unforgiving sanctions than the instance where athlete is in fact located in Portugal rather than the USA (indicated in ADAMS) at the time of the recorded Whereabouts Failure, based on a mere circumstance that ADAMS entries were submitted by the representative rather than the athlete himself.

d. Fault

71. As to the Athlete's Degree of Fault, the Appellant relies on the IBU ADR definition of Fault, being *"any breach of duty or any lack of care appropriate to a particular situation"*. The Athlete had consistently indicated his location as a participant in the IBU Registered Testing Pool and the only identified lack of care so far identified had been the absence of the word *"hotel"* from the building name *"Hotel Passo Stelvio"* and the double use of the place name *"Passo Stelvio"* twice (as it is the only hotel in the indicated location with such name), since the Athlete had provided information about the country, city, mountain pass and the hotel he was residing in and where he was available for Testing.

72. The Appellant relies on para. 86 of the ADD Award, where the Sole Arbitrator takes the view that the Athlete's degree of fault for the third Whereabouts failure, the incomplete 'Passo Stelvio' filing, was far from egregious:

> *"86. (…), the Athlete's degree of fault for the third Whereabouts failure, the incomplete 'Passo Stelvio' filing, was far from egregious. Whilst he must be held at some fault for not understanding that the*

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1 Sport Resolutions SR/164/2021 *Alex Leonardo Quiñonez v. World Athletics*. Decision of the Disciplinary Tribunal his of 14 July 2021.

2 Arbitration CAS 2007/A/1318, Award of 7 December 2007, p 13.

3 Sport Resolutions SR/164/2021 *Alex Leonardo Quiñonez v. World Athletics*, Decision of the Disciplinary Tribunal of 14 July 2021, para. 6.46.

name of the hotel had to be included, he had not done so in his many visits over the years and this had not been expressly pointed out to him. It is difficult to attribute any bad motive to him for omitting the hotel name and the IBU rightly did not attempt to do so (…).

90. In the Sole Arbitrator's judgment, the appropriate reduction is 6 months. This reflects a relatively low degree of fault on the part of the Athlete and treats responsibility as shared between him and the IBU".

73. In respect of fault the Appellant relies on CAS 2020/A/7528.

e. Telephone call

74. The Athlete relies (already in his Request for Arbitration of 23 May 2021) on the argument that should the Whereabouts Failure be confronted with the actual attempts at physical location (*i.e.*, a phone call), it would be found faulty. The ADD Award rebutted this in para. 76. However the Appellant relies on the press release published by the CAS Court Office regarding the CAS 2020/A/7528 procedure, which stated that:

"[a]lthough a telephone call during the 60-minute window was not required by the rules, it was nevertheless reasonable for the Athlete to expect such a call, as a matter of standard practice among other Doping Control Officers".

75. The Appellant submits that in situations when there is no attempt to locate the athlete, the standard expectation of athletes is that during the specified time slot the DCO will do what is reasonable in the circumstances to try to locate the Athlete and that he would indeed be available for location from the information provided in ADAMS. However, when similar Whereabouts Filing Failures amount to a Missed Test (arguably a more severe violation of the ADR), this standard practice is suddenly recognized in the proportionality assessment.

f. Violation was not intentional, and it is attributable to a misunderstanding

76. The violation was not intentional and was attributable to a misunderstanding, as recognized by the ADD Award, and had in no way deprived clean competitors of the opportunity to earn medals in competitions in which the Athlete had participated. Since 2013 the Athlete was fully content that the filing of Whereabouts Location in Passo Stelvio, Italy, was sufficient for testing purposes. The intent to avoid testing was not noted in the ADD Award, which stated that:

"The Athlete made some attempt to register his whereabouts and, whilst the address he gave was imprecise, that followed with his previous practice and there is no evidence that it was in bad faith" (para. 92).

g. Fairness

77. Consequently, all the above reasons can be found as grounds for setting aside the ADRV finding on the basis of fairness, also being in accordance with CAS practice (CAS 2018/A/5583).

B. Respondent's request for relief and positions

78. The Respondent set out the following in Answer to Appeal of 19 November 2021:

> *"The International Biathlon Union respectfully requests the Panel to rule as follows:*
>
> *(1) The appeal of Andrejs Rastorgujevs is dismissed.*
>
> *(2) The decision rendered by the Anti-Doping Division of the Court of Arbitration for Sport on 17 September 2021 (cases 2021/ADD/18 & 2021/ADD/19) is confirmed.*
>
> *(3) The arbitration costs, if any, shall be borne by Andrejs Rastorgujevs.*
>
> *(4) The International Biathlon Union is granted a contribution to its legal and other costs".*

1. First and the Second Whereabout Failures

79. The Panel notes at the outset that, since the Appellant does not contest the First and Second Whereabout Failures the Respondent's positions concerning these failures are summarised in this Award only in so far as they relate to the understanding and subsequent assessment of the third Failure, that is contested.

2. Third Whereabouts Failure

a. Insufficiency of the filing

80. The Respondent challenges that the information provided by the Athlete was complete. Consequently, the Athlete did not comply with all the requirements of Article I.3.1 ISTI and the information was not sufficient to locate him for testing between 8 September and 28 September 2020.

81. The Athlete was expressly informed, when being included in the Registered Testing Pool ("RTP"), that the information to be included in ADAMS must be as precise as possible:

> *"Be as precise as possible to enable unannounced tests (do not expect a phone call!). Please supply entrance pass codes to buildings and give clear directions to the buildings/rooms in order to ensure access for the doping control officers".*

82. On 9 May 2019, while signing the IBU Acknowledgement Form, the Athlete confirmed that he had read and understood that he would be liable for a Filing Failure if he submitted late, inaccurate, or incomplete whereabouts information.

83. The only information provided by the Athlete in ADAMS was that he would be in Bormio and the address provided was *"Passo Stelvio, Italy"*. The sections *"More information"* and *"Additional Information"* were left blank.

84. The information that must, at the very least, be included in an athlete's Whereabouts filings is set out in detail in ISTI Article I.3.1. ISTI Article I.3.1(d) requires an athlete to provide, for each day during the quarter, the full address of the place where they will be staying overnight, specifically indicating home, temporary lodgings, hotel, *etc.*. Therefore, the Athlete by having indicated *"Passo Stelvio, Italy"* did not provide the information required by ISTI Article I.3.1(d).

85. The Respondent relies on CAS case law, emphasising the following in respect of the athlete's duty to provide complete Whereabouts information (CAS 2020/A/7526 & 7559):

> *"126. Several CAS precedents underscore that the 'particular circumstances of the case' must be assessed beginning from the quality of the information provided by the Athlete (see CAS A1/2013 ASADA v. Jarrod Bannister, para 28, and CAS A4/2013 ASADA v. Joshua Ross, para. 15). As to the 'nature of the location chosen by the Athlete', the Panel is of the opinion that athletes should put themselves in the shoes of a DCO and be diligent at foreseeing and removing beforehand any possible difficulties that a DCO might encounter at the specific location chosen by the athlete (e.g., if the location were a hotel room, the hotel concierge should be alerted).*
>
> *127. In the Panel's view, the whole system hinges on the premise that athletes have the duty to be diligent at filing Whereabouts Information that is accurate enough to allow DCOs to find them without any particular effort. In this respect, Article I.3.4 ISTI is unequivocal: 'It is the Athlete's responsibility to ensure that he/she provides all of the information required in a Whereabouts Filing accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in his/her Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, the Athlete must provide sufficient information to enable the DCO to find the location, to gain access to the location, and to find the Athlete at the location'"* (emphasis omitted).

86. The filing is insufficient from the point of view that Passo Stelvio is a mountain pass with at least six hotels as well as other buildings. At least one of those other hotels (Hotel Perego) is visible on the Athlete's video.

87. The indication *"Passo Stelvio, Italy"* is not an address, therefore the information was not sufficient for a DCO to locate the Athlete, as the Athlete might have been staying at any of the hotels in this mountain pass or elsewhere in Passo Stelvio, Italy.

88. The Athlete does not deny that he failed to specify that he was staying at the Hotel Passo Stelvio and to provide the full address, including postcode for the hotel.

89. It is clear from the Athlete's video and photo that the Passo Stelvio Hotel is also known as the *"Hotel Stilfserjoch"*, which is also the name on the main façade of the hotel. To suggest that a mere reference to *"Passo Stelvio"*, even when repeated twice, is sufficient to identify the Athlete's precise location in Passo Stelvio is manifestly wrong.

90. Insufficiency from the point of view that the address in ADAMS was inaccurate and incomplete. The Sole Arbitrator in the ADD Award established the following:

> *"70. It was not contested that the Athlete indeed stayed at the Hotel Passo Stelvio between 8 and 28 September 2020, and that (some seven years earlier) on 22 August 2013, he had been tested there despite having then indicated in ADAMS only the address 'Passo Stelvio, Passo Stelvio, Italy'. Mr Capitani, who ran the hotel, says that is the correct address rather than more simply, 'Passo Stelvio, Italy' but does not and cannot deny that the hotel itself is called the Hotel Passo Stelvio. In other words, the use of the place name 'Passo Stelvio' twice is not meant, as regards the first use, to replace the building name 'Hotel Passo Stelvio'.*
>
> *71. Indeed, that full address of the location including the building name was confirmed by the hotel receipt produced and relied on by the Athlete himself and the invoices produced by Mr Capitani, all of which began 'Hotel Passo Stelvio'. It cannot be said that the presence of the word 'Hotel' at the beginning of the address is irrelevant or de minimis. The documents and common sense suggest otherwise, especially when there are other places to stay in Passo Stelvio and specifying 'Passo Stelvio, Passo Stelvio' does not entail that the location could only be the Hotel Passo Stelvio in Passo Stelvio (…).*
>
> *74. The information 'Passo Stelvio, Passo Stelvio', without referring to Hotel Passo Stelvio, was not sufficient for a DCO to identify precisely where the Athlete was staying, not least as the Athlete might have been staying at any of the other hotels in the mountain pass - Albergo Folgore, Rifugio Garibaldi, Hotel Pirovano Quarto, and Albergo Ristorante Tibet - or elsewhere in Passo Stelvio, Italy".*

b. Warning

91. The Athlete had been informed less than a year earlier that *"Passo Stelvio"* was not sufficient as a Whereabouts location. The ITA, in the notification of 26 November 2019 relating to the Athlete's first Whereabouts Failure, had already warned him that the location provided in November 2019 (*"Passo Stelvio, Italy"*) was not sufficient.

92. The defence of the Athlete that he does not speak sufficient English to understand basic correspondence is misleading, which is proved as from para. 21 of the Statement for Administrative Review of the Athlete of 7 January 2021.

93. Further, the IBU relies on the conclusions that were made in the Administrative Review of the Decision to record a Filing Failure (8-28 September 2020), paras. 33, 35, 39:

> *"33. With respect, in the 26 November 2019 notification of an apparent filing failure that you received from the ITA, it specifically indicated that the information available in your ADAMS account for 10-18 November 2019 was only »Passo Stelvio, Italy« and that this information was insufficient to enable an Anti-Doping Organization to locate you for Testing (…).*
>
> *35. (…) irrespective of the reason that your whereabouts information was considered to be inaccurate in November 2019 (because you were actually in Sjusjeon, Norway) and the reason that the first filing failure was eventually recorded against you, you were warned that the information was insufficient and*

you were aware that you needed to provide more detailed information, which you failed to do in September 2020 (…).

39. (…) it was your decision to not take a different course of action when making your Whereabouts Filings in September 2020, after being warned that the information provided in November 2019 was insufficient, that is negligent and that caused or contributed to the Third Whereabouts Failure. Once you were warned in November 2019 by the ITA that simply indicating »Passo Stelvio, Italy« was insufficient, it was incumbent on you to not repeat the same mistake in September 2020".

94. With respect to the test in August 2013 (the "2013 Test"), based on the explanations provided by the DCO, the information submitted by the Athlete in ADAMS was not sufficient to locate him as required by the ISTI in the 60-minute timeslot between 6h00 and 7h00. In the Mission Summary of 22 August 2019, the DCO described the difficulties he encountered, which resulted in the athlete being given advance notice of the test:

"We arrived at 6.00 o'clock to Passo Stelvio. We looked for a car with Latvia licenze Plate. We found it behind the Hotel Passo Stelvio, so we asked to the reception if a Lithuanian athlete was sleeping there. The receptionist preferred to go calling him in his room. The athlete wasn't in his room and his doctor Mr Aldis said us that the athlete left with the car in the morning to conduct his wife to Bormio. The Doctor called the athlete, he came back to the hotel. At 7.10 o'clock he arrived and at 7.15 we notified him. Taking the blood sample, it seemed to me that the test tubes were drawing not enough blood. For what concern the urine test we have taken 2 provisional samples".

95. The DCO was able to locate the Athlete only by the fortuitous coincidence that he happened to chance upon a car with a Latvian plate in front of Hotel Passo Stelvio. The 2013 episode therefore only serves to confirm the insufficiency of the Whereabouts information, about which the Athlete was already warned in 2019. The CAS ADD decision 2021 reached the same conclusion by finding that:

"[t]his incident, so relied on by the Athlete, in fact confirms or is at least consistent with the insufficiency of the Whereabouts information which he filed".

96. The IBU finds it unreasonable to accept that the ITA was required to contact the DCO who did the 2013 Test to clarify the information submitted by the Athlete.

97. Summarizing, the information provided by the Athlete was incomplete, did not comply with all the requirements of Article I.3.1 ISTI and was not sufficient to locate him for testing between 8 September and 28 September 2020. Therefore, the ITA correctly recorded the Passo Stelvio Filing Failure against the Athlete.

c. Shared responsibility

98. The Respondent does not explicitly comment on the Appellant's position on Shared Responsibility in the Presentation of Positions, but it is possible to find its position in para. 75 of the Answer to Appeal firmly submitting that the Athlete's Fault is significant and that the

circumstances of this case do not envisage any further reduction of the already imposed eighteen-month period of ineligibility, preceded by para. 74 which deals with para. 90 of the CAS ADD Decision, where a period of ineligibility of eighteen (18) months was imposed. The context dealing the shared responsibility is as follows:

> *"90. In the Sole Arbitrator's judgment, the appropriate reduction is 6 months. This reflects a relatively low degree of fault on the part of the Athlete and treats responsibility as shared between him and the IBU. It also gives due weight to the fact that the Whereabouts failure was only partial, and had no other consequences (e.g., in the Athlete being in fact unlocatable). By this calculation the 6 months is to be deducted from the usual 2 years ineligibility, to arrive at 18 months as just and proportionate for this ADRV".*

99. In the light of the foregoing, the Tribunal understands the Respondent to disagree with the concept of Shared Responsibility in the context as presented by the Appellant.

d. Fault

100. The Respondent does not specifically comment on the Appellant's position on Fault. The only place where the Respondent takes a position on this is on page 20 of the Answer to Appeal in the context of *"B. Consequences for the Anti-Doping Rule Violations"* and "*B.1. Period of ineligibility"*. Nevertheless, it is clear from the statements on page 20 that the Respondent takes the position that the Athlete's Fault is significant.

e. Telephone call

101. As to the Athlete's claim that he provided his phone number to be reached *"within a few seconds"*, the IBU submits that the comment to Article I.4.3(c) ISTI that relates to Missed Tests makes it expressly clear that the placing of a phone call is entirely discretionary.

102. Moreover, if an athlete's (defective) Whereabouts information requires a phone call to be placed to locate him, then he/she will necessarily be given advance notice of the test. Depending on whether the athlete is willing to submit to the test, he/she can either ignore the call or answer and say that he/she is not in the vicinity (and then leave that location to avoid testing). In short, the possibility of a phone call cannot remedy otherwise defective Whereabouts information.

103. The Athlete had been specifically warned by the IBU not to expect a phone call.

104. ISTI is unequivocal that the absence of a phone call does not give the athlete a defence to the assertion of a Missed Test:

> *"Comment to I.4.3(c): (…) Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test".*

105. The ISTI confirms that the purpose of the phone call is to see if an athlete is at his/her specified location, and the WADA Guidelines confirm that the purpose of any discretionary phone call is not to invite the Athlete for Testing, but to potentially confirm that the Athlete is not present.

106. In this regard, it was confirmed by the Panel in CAS 2020/A/7528 that the athlete must be physically at the specified location, not nearby:

> *"118. As to the latter obligation, the Athlete appears to have been under the impression that it was sufficient to discharge his duty under Appendix A of the Anti-Doping Regulations and ISTI Annex I.3.2 if he were at the specified location at the same time as the DCO and that it was enough for him to be nearby his specified location and rely on the fact that he could return to the location within short order if notified of the need for a test.*
>
> *119. In the Panel's view, properly understood, the requirement that an athlete must be available at a specific location for testing for a 60-minute period imposes a requirement on the athlete to be physically present at the specified location during the 60-minute period that has been specified by him or her. It is not enough that the athlete be nearby, such that he or she can get to the specified location if asked to do so within the 60- minute period. It is instead an obligation to be physically at the specified location, and to be accessible and available for testing at that specified location during the specified time".*

107. It was emphasised in CAS 2020/A/7526 & 7559 that:

> *"the evaluation of the reasonableness of a DCO's attempt must be made looking objectively at the steps taken by the DCO in the specific location chosen by the athlete, in light of the information provided by the athlete and in connection with said athlete's duty of diligence in foreseeing and reducing potential difficulties. In this respect, the personal situation of the concerned athlete and/or the actual presence and availability at the specified location is irrelevant".*

108. In this respect, the Sole Arbitrator at first instance ruled that *"the possibility of a discretionary phone call (which would not be to invite the Athlete for Testing, but to confirm that the Athlete was not present) cannot remedy otherwise defective Whereabouts information, as the comment to Article I.4.3(c) ISTI relating to Missed Tests makes clear; and if an athlete's (defective) Whereabouts information requires a phone call to be placed in order to locate him, then he/she will necessarily be given advance notice of the test contrary to the purpose of Whereabouts Filings, which is against their purpose"* and that *"[w]hile whereabouts requirements are onerous on athletes they are necessary in order (1) to facilitate no advance notice for out-of-competition testing, and (2) to allow athletes to claim with credibility that they are subject to testing at any time so that the public can have confidence that the athletes are clean".*

109. The WADA ISTI Guidelines for Implementing an Effective Testing Programme (Version 1.0 October 2014) (the "WADA Guidelines"), page 53/54, provide:

> *"If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO may telephone the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call*

is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present".

110. The IBU also relies on the conclusions that were made in the administrative review with respect to the Passo Stelvio Filing Failure:

> *"27. On the basis of the evidence that you submitted, as well as the information in the case file, it cannot be said that you provided the full address of the Hotel Passo Stelvio in your whereabouts filings for the period between 8 and 28 September 2020. In fact, you did not even provide the full name of the Hotel Passo Stelvio in your whereabouts filings for this period.*
>
> *Further, in your First Explanation (…), you included your hotel receipt for the Hotel Passo Stelvio, which indicates the full address of the hotel. None of this information, including the name of the hotel, was included in your whereabouts filings for the period between 8 and 28 September 2020.*
> *The Reviewer also refers to the comment to ISTI Article I.3.6(b), which indicates that an athlete fails to comply with the requirement to make whereabouts filings (…) (ii) where he/she makes the filing but does not include all of the required information in that filing (…). As mentioned above, the Reviewer considers that you did not provide the information required by ISTI Article I.3.1(d) regarding your overnight accommodations because the full address of the Hotel Stelvio was not included in your whereabouts filings.*
>
> *In coming to the conclusion above, the Reviewer has taken into consideration your contentions that, since at least August 2013, you have been providing the same information in your whereabouts filings regarding your bi-annual stays in Bormio at Passo Stelvio and that in August 2013 this information was sufficient for a Doping Control Officer to locate you for Testing.*
>
> *However, neither you nor the ITA have explained the circumstances of the August 2013 Doping Control, specifically with respect to how you were located for Testing on 22 August 2013 in Bormio. As such, the Reviewer considers that no conclusions can be made with respect to the sufficiency of the information that you provided at that time. In any event, as mentioned above, this information did not satisfy the requirements of ISTI Article I.3.1(d) because it did not include the full address of the hotel.*
>
> *The Reviewer also has difficulty with your arguments that, in your past stays in Bormio since 2013, you indicated* [in your whereabouts filings] *that you would be staying at Passo Stelvio, and that based on your previous experience that you were successfully located for Testing in August 2013, you saw no reason to change the way you filed your whereabouts information. You also indicated in the First Explanation that you have never received a single remark or comment regarding the accuracy of the information provided".*

f. Violation was not intentional, and it is attributable to a misunderstanding

111. The Respondent does not explicitly discuss this issue.

g. Fairness

112. The Respondent does not explicitly discuss this issue.

C. Provisional suspension imposed by IBU on 11 March 2011

113. In the Appellant's prayer for relief he asks that the Provisional Suspension imposed by the IBU on 11 March 2021 shall be lifted with immediate effect which would enable him to continue with his sporting activity without any restrictions. As the Deputy Division President has already ruled on such request in her Order on Request for a stay of execution issued on 28 October 2021, such request is moot.

VII. JURISDICTION

114. Article R47 of the CAS Code provides that:

> *"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".*

115. Article A2 first paragraph of the CAS ADD Arbitration Rules provides that:

> *"CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged antidoping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an antidoping rule violation has occurred. The CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions".*

116. Article 21 of the CAS ADD Arbitration Rules provides that:

> *"Unless Article 15 para. 1 applies, the award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons by mail or courier in accordance with Articles R47 et seq. of the Code of Sports-Related Arbitration, applicable to appeals procedures".*

117. Furthermore, the jurisdiction of the CAS as well as the applicable rules for the exercise of that jurisdiction is not in dispute between the Parties.

118. The Athlete in this case is an International-Level Athlete, and it is therefore possible to appeal the decision of CAS ADD.

119. The Panel is satisfied that based on Article R47 of the CAS Code, Article 21 CAS ADD Arbitration Rules, and the common position adopted by the Parties, as confirmed by the Parties' signature of the Order of Procedure, the CAS has jurisdiction to decide the dispute in this appeal.

VIII. ADMISSIBILITY

120. Article R47 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. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".*

121. Article A21 of the CAS ADD Arbitration Rules provides as follows:

> *"Unless Article 15 para. 1 applies, the award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons by mail or courier in accordance with Articles R47 et seq. of the Code of Sports-Related Arbitration, applicable to appeals procedures".*

122. The Appellant in these proceedings received the CAS ADD Award on 17 September 2021. In submitting the Statement of Appeal on 7 October 2021, the Appellant complied with the 21-day time limit provided for in both Article R49 of the CAS Code and A21 of the CAS ADD Arbitration Rules. In addition, the Statement of Appeal fulfilled the other requirements of Article R48 of the CAS Code. The Appeal Brief, submitted on 18 October 2021, was in time according to Article R27 of the CAS Code, providing that *"If the last day of the time limit is an official holiday or a non-business day in the location from where the document is to be sent, the time limit shall expire at the end of the first subsequent business day".*

123. Based on the foregoing and in the absence of an objection to admissibility, the Panel concludes that the present appeal is admissible.

IX. APPLICABLE LAW

124. Article R58 CAS Code provides that:

> *"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".*

125. The applicable regulations are the IBU Anti-Doping Regulations. In accordance with R58 of the CAS Code, the Panel will decide this dispute according to those regulations and, subsidiarily, according to the law of Austria, where the IBU has its seat.

126. Article 1.4.2.2 of the IBU ADR currently in force, provides the following:

"With respect to any anti-doping rule violation case that is pending as of the ADR Effective Date and any anti-doping rule violation case brought after the ADR Effective Date based on an anti-doping rule violation that occurred prior to the ADR Effective Date, the substantive aspects of the case will be governed by the anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive anti-doping rules set out in these IBU Anti-Doping Rules (unless the hearing panel determines that the principle of lex mitior appropriately applies under the circumstances of the case), while the procedural aspects of the case will be governed by these IBU Anti-Doping Rules".

127. With respect to whereabouts failures, Article 1.4.2.3 of the IBU ADR reads as follows:

"Any Article 2.4 whereabouts failure (whether a filing failure or a missed test) that took place prior to the ADR Effective Date may be relied upon as one of the requisite elements of an Article 2.4 anti-doping rule violation under these IBU Anti-Doping Rules until 12 months after it took place".

128. Pursuant to Articles 7.1.1 and 7.2.1 of the IBU ADR, the IBU ADR incorporate the provisions of the WADA International Standard for Results Management ("ISRM"):

"7.1.1 These IBU Anti-Doping Rules incorporate the International Standard for Results Management, as amended from time to time. The International Standard for Results Management is therefore binding on all Athletes and other Persons in the same way these IBU Anti-Doping Rules are binding on them".

"7.2.1 The IBU will carry out the review and notification of any potential antidoping rule violation in accordance with the International Standard for Results Management".

129. Considering the above, the IBU ADR in force at the time of the Whereabouts Failures (as supplemented by the ISTI) apply to the substance of this matter.

130. The current IBU ADR (as supplemented by the ISRM) apply to the procedural aspects of this matter.

131. The Panel notes that the ISTI now in force have significantly changed numbering from the ISTI referred to in this award.

X. MERITS

132. The questions to be decided are:

- Was the Athlete's ADAMS location sufficiently precise to satisfy the conditions and criteria set by the IBU ADR, ISTI and case law?

- Are warnings to the Athlete by the Controlling Organisation relating to previous Whereabouts Failures a relevant factor for judging the next Failure and if so, to what extent?

- Whether the facts and circumstances of the case allow the application of the concept of shared responsibility, specifically between the IBU/ITA and the athlete?

- What is the level of responsibility required of an athlete under his Third Whereabouts Failure?

- Can the Athlete rely on there being any obligation on the DCO to make a telephone call when the athlete cannot be found at the address given in ADAMS or such address does not allow to locate the athlete accurately before the DCO's visit to the site?

- Was the Third Failure unintentional and is therefore attributable to misunderstanding?

A. Was the Athlete's ADAMS location sufficiently precise to satisfy the conditions and criteria set by the IBU ADR, ISTI and case law?

133. The legal basis is the ISTI 3.2. (Defined terms specific to the International Standard for Testing and Investigations), in which a filing failure by the Athlete is defined as a *"failure by the Athlete (…) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filing or to update that Whereabouts Filing where necessary to ensure that it remains accurate and complete, all in accordance with Article I.3 of the International Standard for Testing and Investigations"*.

134. Further, Article I.3.6 of the ISTI sets out the requirement for a Filing Failure to be confirmed against an athlete.

135. Following the Comment to I.3.6(b) ISTI the athlete fails to comply with the requirement to make Whereabouts Filings *"(iii) where he/she includes information in the original filing or the update that is inaccurate (e.g., an address that does not exist) or insufficient to enable the Anti-Doping Organization to locate him/her for Testing (e.g., 'running in the Black Forest')"*.

136. Article I.3.6(d) ISTI, provides *"that the Athlete's Failure to Comply was at least negligent. For these purposes, the Athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure"*.

137. Accordingly, the athlete must enter his whereabouts in the ADAMS system in each case as accurately as possible.

138. The Panel considers those provisions in the light of the fact, that on 12 April 2019 the athlete was also explicitly told that he must be as precise as possible when giving his address and not assume that the DCO would call him to find him (*"Be as precise as possible* (…) *do not expect a phone call! Please supply entrance pass codes to buildings and give clear directions to the buildings/rooms"*). Further, the Athlete was informed in the proceedings concerning the first Whereabouts failure of October 2019 that the information in ADAMS had been deficient.

139. Even if it is accepted that the above provisions of the ISTI are written in legal language that may be alien to the average athlete, the Appellant was warned in non-complex, non-legal language which is easily understood by an athlete. During the proceedings, it was claimed by the Athlete that his poor knowledge of English hindered his understanding of the relevant provisions, notifications, and warnings, in particular his communication with the ITA and the IBU. The Panel does not accept that claim, as it has itself seen the evidence of a video of the Athlete taken in Passo Stelvio, showing his spoken English at a level where he could not have had any serious difficulty with reading and understanding the ITA notification of 26 November 2019 and other documents presented to him by the ITA and the IBU. The Panel adds that if (unlike this Appellant) an athlete is not confident of understanding such obviously important communications, it is their responsibility to seek help from someone who can explain it to them.

140. In the present case, the Athlete committed two clear and, in the view of the Panel, serious violations of Art. 2.4 IBU ADR in October 2019 and on June 17, 2020. On both dates, he could not be found at the specified location at all but was somewhere else altogether. These violations are undisputed. After these two clear violations and the subsequent warnings received, it can be assumed that the Athlete was (or at least should have been) sensitized regarding ADAMS and the associated rules.

141. It follows from the above that the overall effect of the rules and notifications was very clear and easy to understand. The argument that athletes might be administratively inept does not stand, because they are aware of the importance of the doping issue; in general, it must be important for all athletes to follow the strict doping rules so that those athletes who do follow the rules can practise a clean sport. The Athlete formally undertook these administrative obligations by signing up to the RTP.

142. Information must be included in an athlete's whereabouts filings in detail in accordance with ISTI Article 1.3.1.

143. Article I.3.4 ISTI states unambiguously that it is the Athlete's responsibility to ensure that all the information required in a Whereabouts Filing is accurate and in sufficient detail to enable any ADO wishing to do so to locate the Athlete for testing. More specifically, the Athlete must provide sufficient information to enable a DCO to find the location, to gain access to the location, and to find the Athlete at the location.

144. ISTI Article I.3.1(d) requires an athlete to provide, for each day during the quarter, the full address of the place where they will be staying overnight specifically indicating home, temporary lodgings, hotel, *etc.*. Therefore a general indication *"Passo Stelvio, Passo Stelvio"* did not provide the information required by ISTI Article I.3.1(d). The Athlete did not use the opportunity to be precise and accurate, also leaving blank both sections *"More information"* and *"Additional Information"*.

145. The indication that the geographical name of Passo Stelvio should refer to a *"hotel"* is significant because, although Passo Stelvio is primarily known as a mountain pass and could indicate that

the building on the mountain pass itself is a *"hotel"*, there are several hotels (6) and other facilities in the whole area of Passo Stelvio, which is primarily known as a mountain pass, and the filed information did not indicate that the building on the pass itself is "the" hotel.

146. By doing so, the athlete has not eliminated in advance all possible difficulties that the DCO might encounter at the specific location chosen by the athlete (*e.g.* if the location were a hotel room, the hotel concierge would have to be alerted, which is one of the criteria set by case law in relation to the accuracy of the entry) and has not complied with the duty to be diligent in filling in the information on the place of residence with sufficient precision for the DCO to be able to locate it without any particular effort.

147. The existence of insufficiency, inaccuracy and incompleteness has already been pointed out in the ADD Award. The Panel agrees with paragraphs 70 and 71 of the ADD Award.

148. Both the Appellant and the Respondent highlight the 2013 control, which passed without consequences for the Athlete, even though the DCO did not immediately find him but had called him first. Even then the Athlete could have been aware that his information in ADAMS was insufficient. Further, the Athlete obviously knew that he had not been at the hotel when the DCO arrived and that the DCO had needed to call him. Therefore, it can be assumed that he knew he had not complied with the rules, although due to a few lucky coincidences (*e.g.* a car with Latvian plates parked in front of the hotel) he was found. However, the Panel is of the view that it is not established by the evidence that the Athlete knew in 2013 that the DCO had had difficulty finding the hotel, besides that, he was not ever notified of any whereabouts failure in 2013. Therefore, what happened in 2013 can hardly be considered as supportive of to his case.

149. The test with the June 2021 letter sent by Mr Putns to the Passo Stelvio address, being the same as the ADAMS filing (Passo Stelvio, Passo Stelvio) in support of the Appellant's position and that letter being served without any problems in support of the Appellant's argument that the address is precise enough, is not persuasive. The letter was delivered by a mail employee, who would know the Passo Stelvio area, and not by a DCO not having such local knowledge. Further, the Athlete must have been aware that he had to make the information in ADAMS as detailed as possible and therefore the clear ISTI rules render the example of the mail delivery moot.

150. In view of the above and having looked at the written submissions with all the evidence submitted, and listened to the parties and the witness at the hearing, the Panel considers that the entry in ADAMS for the period 20 to 28 September 2020 was not in compliance with ISTI Article 1.3.1. and was not sufficient to locate the Athlete for testing between 8 September and 28 September 2020.

B. Are warnings to the Athlete by the Controlling Organisation relating to previous Whereabouts Failures a relevant factor for judging the next Failure and if so, to what extent?

151. The Appellant takes the position that the ITA warning regarding the First Failure had a significant impact on his understanding and conduct regarding the sufficiency, correctness, and completeness of the filing in September 2020. Within the context, the Athlete interpreted the *"warning"* as referring to the fact that he was not in the location indicated in the ADAMS, not that the filed location itself was somehow insufficient and disabled the ADO from locating the Athlete for testing. The Respondent does not recognise this link and the context as relevant.

152. The Panel has carefully read the warning in the ITA notification letter of 26 November 2019 and analysed its text. It was written when the ITA/IBU did not yet know that the Athlete had not even been in Italy on the relevant dates, so the Athlete could not reasonably have understood the letter as directed to that point. The first, 5-line paragraph was clearly saying that the file information had been insufficient and ended with: *"The only information in your ADAMS account is: Passo Selvio, Italy"*. That was a particularly clear warning that even if the Athlete had been in Passo Selvio, the filed information was insufficient.

153. The 26 November 2019 letter is sufficiently clear, and the Athlete's grasp of the English language is sufficiently strong, for the Panel to conclude that he must have understood that the address he had filed in ADAMS did not meet the requirements of the IBU ADR and ISTI. This makes his Third Whereabouts Failure more blameworthy, as he simply continued to file the same address which he had already been told was inadequate.

154. Even if the Athlete had misunderstood that letter in the way he claims, that would in no way have relieved or diminished his responsibility to make a complete and sufficient filing of his exact location in Passo Selvio in September 2020.

C. Whether the facts and circumstances of the case allow the application of the concept of shared responsibility, specifically between the IBU/ITA and the athlete?

155. In the ADD Award, a 6-month reduction of the suspension has been considered as *"appropriate"*, reflecting the Sole Arbitrator's view of a relatively low degree of fault on the part of the Athlete and his treating responsibility as shared between the Athlete and the IBU. The Appellant claims that the case law supports the concept of shared responsibility for Whereabouts Failures.

156. As from para. 4 of the decision CAS 2007/A/1318, the ultimate responsibility for providing whereabouts information rests with each Athlete*, "however, it shall be the responsibility each Member to use its best efforts to assist the ISU in obtaining whereabouts information as requested by the ISU".*

157. The Appellant's suggested options for assisting the athlete seem to be (i) a warning that the entry is not locatable and a request to correct the deficiency, or (ii) a phone call asking for further clarification. The first option is not within the ISTI rules and clearly not contemplated as a responsibility of the anti-doping organisations. The second option is exceptional, as Article

I.4.3(c) and Comment to Article I.4.3(c) state that the call is discretionary, *i.e.* of an optional nature (see also D of this award). Either option would erode the fundamental purpose of the ISTI Rules, which is to place responsibility squarely on the athlete and to enable control that the athlete cannot respond to by preparing for it in advance or possibly avoiding it.

158. The Panel also cannot accept the argument put forward at the hearing that shared responsibility is justified by the fact that the ADAMS computerised system ought to pick up and alert the athlete to such deficiencies in the notified address. This amounts to an unsupported assertion that ADAMS should be programmed to include a whole extra element so as to spot a filing deficiency and trigger a response to help athletes where they had failed to file information complying with the rules. To substantiate such an extreme assertion would require expert evidence to show that it was technologically feasible to design a system that could recognise the many ways in which an address might be insufficient and alert the athlete; and, even more importantly, that it was in some way a failure of responsibility by the anti-doping organisations not to have introduced such an element into ADAMS, ISTI and the relevant anti-doping rules. The Panel finds this part of the Appellant's argument far-fetched and completely unrealistic. It is the Panel view that athletes must use and comply with the system as it is.

159. The Panel does not see any events or circumstances which placed any responsibility on the IBU/ITA for any of the Athlete's three Whereabouts failures. On this point, the Panel does not agree with the ADD Award in the finding of shared responsibility. There were no deficiencies and nothing misleading in the actions and communications by the IBU/[ITA]. The burden of accurately entering the information into ADAMS was solely on the Athlete and the three failures were entirely the Athlete's responsibility. The concept of shared responsibility has no application to the present case.

D. Should the DCO make a telephone call when the athlete cannot be found at the address given in ADAMS or such address does not allow the DCO to locate the athlete accurately before the DCO's visit to the site?

160. This issue of a telephone call is closely connected with the issue of a previous warning and the issue of shared responsibility.

161. The Athlete states that if the DCO had not been able to locate him despite the ADAMS entry, the DCO would have called him by telephone.

162. The starting point is clearly the discretionary nature of the telephone call (Comment to Article I.4.3(c) ISTI). In the light of the provisions of the ISTI and case law, a telephone call is merely an option arising from the discretion of the DCO and in no way rises to the level of a reasonable expectation on the part of the Athlete arising from any obligation to make such a telephone call in case of uncertainty or doubt.

163. Requiring a phone call to be placed to locate the athlete would give him advance notice of the test, which would remedy otherwise defective Whereabouts information.

164. The purpose of discretionary phone call is not to invite the Athlete for testing, but to potentially confirm that the Athlete is not present. A warning by the IBU not to expect a phone call further cramps the room for manoeuvre of the athlete in relying on such a call. Relying on the same Comment to Article I.4.3(c) ISTI, the Panel's view is that the absence of a phone call does not give the athlete a defence to the assertion of a Missed Test; nor does it allow an athlete to say that an otherwise deficient filing of an address is repaired by the availability of a telephone call by a DCO.

165. Further, WADA ISTI Guidelines for Implementing an Effective Testing Programme (Version 1.0 October 2014; p. 53/54) is based on the DCO having the possibility of making a phone call (*"the DCO may telephone the Athlete to advise him/her"*). Following Guidelines, *"[s]uch a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present"*. The Panel further relies on para. 118, 119 of the awards in CAS 2020/A/7528 and on para. 128 of the award in CAS 2020/A/7526 & 7559.

166. Consequently, in the light of the provisions of the ISTI and case law, a telephone call is merely an option arising from the discretion of the DCO and in no way rises to the level of an expectation on which an athlete can or should rely to repair deficiencies in the address given in his Whereabouts filing.

E. Was the Third Failure non-intentional and attributable to misunderstanding?

167. Even if the Third Failure was unintentional – in the sense that the Athlete did not deliberately make a filing which he knew did not comply with the rules – it has been established beyond dispute that it occurred. The Athlete has failed to establish that he was not negligent and the Panel considers that he plainly was negligent in relation to the Third Failure. The Panel has concluded that the events of 2013 could not be used in the Athlete's favour (see above at para. 148); and has also found that the [ITA] letter of 26 November 2019 was a clear warning to the Athlete that the filed address was insufficient.

F. Sanction

168. In the present matter, this Panel does not endorse the concept of shared responsibility which led the Sole Arbitrator to a reduction of the two-year ineligibility period (ADD Award, para. 90). The entire responsibility for the infringements therefore rests with the Appellant.

169. According to Article Art. 10.3.2 of the IBU ADR, the athlete will be sanctioned with a maximum two-year ban after the third violation of this rule. This ban can be reduced to one year depending on the athlete's fault.

170. There are clearly three failures under the rules. The Panel is of the view that all violations were serious, especially the third one, which was already red alerted after the previous two failures, including warnings to the Athlete, especially the very clear warning of 26 November 2019. The Third Failure cannot therefore be defined as the result of negligence or misunderstanding at all.

According to the facts, the Third Failure was precisely the type of filing failure which fundamentally undermines the whole system.

171. In the light of the foregoing, the Appellant's Motion for Relief cannot be granted in respect of seeking that the Whereabouts Filing between 8 September 2020 and 28 September 2020 regarding Passo Stelvio was sufficient under the ISTI and that the Appellant should be recognized not to have committed an anti-doping rule violation pursuant to Article 2.4 of the IBU ADR.

172. There is no argument or evidence justifying a reduction of the 18-month period of ineligibility. Summarising three valid points in the Respondent's Answer: (i) the Appellant is an international athlete who has been subject to IBU doping control since 2013; (ii) the sanction should take account of his fault on all three Whereabouts Failures and he was clearly at fault on the first two; (iii) he was on red alert before the third Whereabouts Failure, particularly with the warning in the ITA letter of 26 November [2019], and was seriously negligent on that third failure. The Panel accepts all those points. Adding the Panel's rejection of the element of shared responsibility – which was a significant point in the Sole Arbitrator's 6 months reduction from the two-year starting point – there is no possible justification for a further reduction of the 18-month period of ineligibility. In the light of the Panel's findings, even if the ADD Award had imposed a two-year period of ineligibility, the Athlete would have faced real difficulty in achieving any reduction on appeal. However, in the absence of any specific appeal requesting an increase of the sanction, the Panel shall uphold the 18-month ban.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Andrejs Rastorgujevs against the Award of the Anti-Doping Division of the Court of Arbitration for Sport of 17 September 2021, is dismissed.

2. The Award of the Anti-Doping Division of the Court of Arbitration for Sport of 17 September 2021 is confirmed.

3. (…).

4. (…).

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