Arbitration CAS 2022/ADD/48 International Skating Union (ISU) v. Laura Barquero Jimenez, consent award of 6 September 2022

Panel: Mrs Raphaëlle Favre Schnyder (Switzerland), Sole Arbitrator

Skating (pairs skating)
Doping (clostebol metabolite)
Ratification and incorporation of a settlement agreement in a consent award
Verification of the bona fide nature of the settlement agreement

1. **Under Swiss Law, an arbitration tribunal has authority to issue an award embodying the terms of the parties' settlement if the contesting parties agree to a termination of their dispute in this manner. A CAS panel's ratification of their settlement and its incorporation into a consent award serves the purpose of enabling the enforcement of their agreement.**

2. **It is the task of the CAS panel to verify the *bona fide* nature of the settlement agreement to ensure that the will of the Parties has not been manipulated by them to commit fraud and to confirm that the terms of the agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.**

I. PARTIES

1. The International Skating Union ("ISU") is the International Federation governing competitive ice-skating disciplines, including figure skating, synchronized skating, speed skating, and short track speed skating.

2. Ms Laura Barquero Jimenez (the "Athlete" or "Respondent") is a national of Spain and a team member of the Comité Olímpico Español who participated in the Olympic Winter Games Beijing 2022.

II. FACTUAL BACKGROUND

3. This summary is provided by way of background facts largely drawn from the IOC's Application of 13 June 2022 and the Anti-Doping Rules Violation Case Resolution Agreement signed by the Parties on 24 August 2022 (the "Settlement Agreement") as referred to below.

4. The Athlete, born 21 October 2001, is a Spanish ice-skater who has been competing internationally since at least 2017.

5. The Athlete competed in the pairs skating competition (short programme), with her partner Marco Zandron, in the Beijing Winter Olympics finishing 11th.

6. On 18 February 2022 the Athlete was subject to an In-Competition doping control under the Testing Authority and Results Management Authority of the IOC and urine sample no. A and B 7049023 was collected from her. The Athlete also declared on her Doping Control Form ("the DCF") "Melatonine, Enantyum", when asked to provide information relating to medication or supplements taken in the seven days prior to the doping control. She also confirmed on her DCF that the sample collection was undertaken in accordance with the relevant procedures for sample collection.

7. On 20 February 2022, the WADA-accredited National Anti-Doping Laboratory in Beijing, China ("the Laboratory"), reported an AAF for clostebol metabolite 4-chloro-3α-hydroxy-androst-4-en17-one. Clostebol is a substance prohibited by WADA at all times and is classified as a non-specified substance under Section S1(1) (Anabolic Androgenic Steroids) of the 2022 WADA Prohibited List.

8. Upon receipt of the AAF, the ITA conducted the Initial Review of the result under Article 7.2.2 of the IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022 (the "IOC ADR") and Article 5.1.1 of the International Standards for Results Management and found that: (a) no applicable Therapeutic Use Exemption had been or was in the process of being granted to the Athlete either by the IOC, ISU or the National Anti-Doping Agency; (b) there was no apparent departure from the International Standard for Testing and Investigations or International Standard for Laboratories that could undermine the validity of the AAF; and (c) the AAF was not caused by the ingestion of the Prohibited Substance through a permitted route insofar as anabolic steroids are banned irrespective of the route of ingestion.

9. On 21 February 2022, the ITA (on behalf of the IOC) notified the Athlete of the AAF, and it informed her that she would have until 23 February 2022 to indicate whether she wished to have the B-sample analysed, failing which she would be deemed to waive her right to B-sample analysis and she would be deemed to not challenge the AAF.

10. On 22 February 2022, the Comité Olímpico Español informed the ITA that it had informed the Athlete of the ITA's correspondence as to notification of the AAF. On the same day, the Athlete signed the B-sample arrangement form, wherein she stated that she did not accept the AAF, that she did request the opening and analysis of the B-sample, and that she did request the laboratory documentation package.

11. Still on 22 February 2022, the ISU imposed a provisional suspension on the Athlete.

12. On 23 February, the ITA informed the Athlete that the B-sample opening and analysis would take place on 2 March 2022.

13. On the same day, the ITA provided the A-sample Laboratory Documentation Package ("LDP") to the Athlete. On 28 February 2022, the ITA informed the Athlete that the estimated concentration in the A-sample was about 0.5 ng/ml.

14. On 2 March 2022, the Athlete attended the opening of the B-sample virtually with her representatives.

15. On 3 March 2022, the Laboratory reported an AAF for clostebol metabolite 4-chloro-3α-hydroxy-androst-4-en17-one in the B-sample, thereby confirming the A-sample results.

16. On 9 March 2022, the ITA provided a Notice of Charge to the Athlete and invited a response by 23 March 2022.

17. On 15 March 2022, the ITA informed the Athlete that the estimated concentration in the B-sample was about 0.5 ng/ml.

18. On 25 March 2022, the ITA provided the B-sample Laboratory Documentation Package to the Athlete.

19. On 22 April 2022, following extensions granted by the ITA, the Athlete provided a written submission, related exhibits, and an expert report of Dr Alberto Salamone.

20. On 25 April 2022, the ITA informed the Athlete that it would proceed to evaluate the explanations and supporting documents provided by the Athlete and further information on the next steps with the disciplinary proceedings will be provided in due course.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 13 June 2022, the IOC filed an application pursuant to Article 8.1.1 of the IOC ADR.

22. The ISU declared by email dated 17 June 2022 that it intended to join this application.

23. By letter dated 22 June 2022, the Athlete stated that she had never disputed the existence of an ADRV and fully accepts the requests for relief made by the ITA on behalf of the IOC in its application joined by the ISU and that she would not file any submission related explicitly to the existence of an ADRV.

24. On 25 July 2022, the CAS ADD Office informed the Parties that in accordance with Articles A16 and A17 of the Rules of the CAS Anti-Doping Division, and on behalf of the Division President, Ms Raphaëlle Favre Schnyder, Attorney-at-law in Zurich, Switzerland, had been appointed to act as Sole Arbitrator in this procedure.

25. On 10 August, the Sole Arbitrator issued a Partial Award finding that Ms. Laura Barquero Jimenez had committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the IOC ADR and declared that with the issuance of this Partial Arbitral Award, the IOC's participation in this proceeding was hereby terminated.

26. On 11 August 2022, the CAS Court Office submitted to the ISU and the Athlete the Sole Arbitrator's proposal for the procedural calendar for the second part of the proceedings with regard to the consequences of the ADRV which may be imposed on the Athlete.

27. Both Parties confirmed their agreement with the proposed procedural calendar and, by letter dated 15 August 2022, the CAS ADD Office invited the ISU to submit its preliminary request for relief by 25 August 2022.

28. On 25 August 2022, the ISU informed the CAS ADD Office that the Parties had reached an agreement and requested that the Sole Arbitrator issue a consent award terminating the procedure based on the signed "Case Resolution Agreement dated 24 August 2022".

IV. JURISDICTION

29. Pursuant to the Scope of the IOC ADR, the IOC ADR apply *"in relation to the Olympic Games Beijing 2022. They shall, without limitation, apply to all Anti-Doping Activities and Doping Controls over which the IOC has jurisdiction in relation to the Olympic Games Beijing 2022".*

In particular, the IOC ADR provides that *"these Rules shall, without limitation, apply to […] (b) all Athletes entered in the Olympic Games Beijing 2022 or who have otherwise been made subject to the authority of the IOC in connection with the Olympic Games Beijing 2022 (see below); […]".*

Where the case was not resolved upon waiver of a hearing or resulting from other consequences as provided for in article 7.8 of the IOC ADR, *"[…] the ITA shall promptly file an application with the CAS Anti-Doping Division, acting as first-instance authority to conduct proceedings and to issue decisions, as per the CAS Anti-Doping Division Arbitration Rules. The application shall be filed in the name of the IOC by the ITA acting on the IOC's behalf"* as provided for in Article 8.1 of the IOC ADR.

Further, Article 8.1.2 states that: *"The composition of the hearing panel and procedures applicable to the CAS Anti-Doping Division shall be as per the CAS Anti-Doping Division Arbitration Rules".*

30. Rule A1 of the Arbitration Rules of the CAS ADD ("the Arbitration Rules") states:

"The Anti-Doping Division of the Court of Arbitration for Sport (CAS ADD) has been established to hear and decide anti-doping cases as a first-instance authority pursuant to a delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic programme (Olympic IFs), and any other signatories to the World Anti-Doping Code (WADC). These WADC signatories have delegated their powers to CAS ADD to decide whether or not there has been a violation of their anti-doping rules, as well as to decide any sanction, if applicable, in accordance with the WADC. CAS ADD and these procedural rules have been established in conjunction with the applicable anti-doping rules of the WADC signatories concerned".

31. Rule A2 of the Arbitration Rules provides:

"A2 Jurisdiction of CAS Anti-Doping Division - Application of the Present Rules CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any WADC signatory which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions. These Rules apply whenever a case is filed with CAS ADD. Such filing may arise by reason of an arbitration clause in the Anti-Doping Rules of a WADC signatory, by contract or by specific agreement".

32. The Athlete signed the Athlete Information Notice on her Doping Control Form, thereby confirming her understanding of and consent to the following text:

"The ITA will in particular initiate and undertake testing activities on the occasion of the Games, determine whether or not a potential anti-doping rule violation has occurred pursuant to the Rules, and if so, file the case with the Court of Arbitration for Sport for decision".

33. The jurisdiction of the CAS ADD is not disputed by the Parties who have confirmed it by signing and returning the Order of Procedure.

34. Accordingly, the CAS ADD has jurisdiction to hear the dispute.

V. THE PARTIES' SETTLEMENT

35. On 24 August 2022, as part of the Case Resolution Agreement, the Parties gave the following factual and legal reasons:

"Clostebol metabolite was found in Ms Barquero's urine. Clostebol belongs to Class S1(1) (Anabolic Androgenic Steroids) of the WADA Prohibited List 2022 and is a Non-Specified Substance. The period of Ineligibility in such a case is four years, unless Ms Barquero can prove that the ADRV was not intentional. The ISU has involved the expert Prof. Botrè who has examined Ms Barquero's explanations and reasoning on behalf of the ISU. He came to the conclusion that it is probable/plausible that the ADRV happened as described by Ms Barquero (contamination of surface touched by her emanating from a cream, containing the Prohibited Substance, but not used by her), but that it is also plausible/probable that the ADRV results from an earlier use of a medication containing the prohibited substance by Ms Barquero. The ISU accepts, that Ms Barquero could establish non- intentional use per art 10.2.1.1 ISU ADR on the required balance of probability. The applicable period of Ineligibility, thus, is 2 years (art 10.2.2 ISU ADR).

The argument of Ms Barquero of No Fault and Negligence cannot be accepted by the ISU. Even if the ISU accepts that because of lack of time Ms Barquero did not straight ahead check upon receipt of the cream, whether it contained a prohibited substance, she stored it for a considerable period of time without checking its content and, therefore, ran the risk of being in possession of a cream possibly containing a prohibited substance. This was certainly negligent behaviour. Thus, art 10.5 ISU ADR does not apply.

Different from what Ms Barquero argues, the case is not a case of a contaminated product. If at all, it is the case of a contaminated surface which does not fall under art 10.6.1.2 ISU ADR. The ISU, thus, can accept No Significant Fault and Negligence, but not per art 10.6.1.2 ISU ADR, but only per art 10.6.2 ISU

ADR. This means that the otherwise applicable period of Ineligibility (two years) can be reduced at a maximum to half of this period, id est one year. In a scale of No Significant Fault and Negligence, the ISU could accept that the fault of the Skater was at the lowest level.

The ISU does not accept the further arguments of Ms Barquero pointing at her low age and lack of experience in anti-doping. She is a senior competitor (age of 20 years) and belongs to the supreme elite of Skaters. Her former partner participated at an anti-doping education activity at the European Figure Skating Championships 2019 and, even, would one assume he did not pass his knowledge to her, it was and is her responsibility to be sufficiently informed on her anti-doping obligations. Besides, Ms Barquero in her own explanation stated that she "is always cautious with all products that she uses to avoid any doping rule violation, and as she did not have the box of Trofodermin and the leaflet with the product's information, she decided to wait and look for information about the product before applying the cream". This shows that she was well aware of her anti-doping risks and obligations.

36. *Therefore, the Parties agreed on the following wording in the Settlement Agreement:*

> *"1. Ms Barquero accepts a sanction of one year Ineligibility starting on 22 February 2022.*
>
> *2. The period of provisional suspension from 22 February 2022 shall be credited against this period of Ineligibility.*
>
> *3. The period of Ineligibility shall, therefore, end on 21 February 2023.*
>
> *4. Each, Ms Barquero and the ISU, shall bear their own costs in connection with the case.*
>
> *5. The settlement shall be enshrined by CAS in a Consent award terminating the procedure and constitutes the full and final settlement.*
>
> *6. This Settlement Agreement is governed by Swiss Law. Any dispute relating to this Settlement Agreement shall be finally settled by arbitration before the Court of Arbitration for Sport in accordance with the Code of sports-related Arbitration".*

37. Under Swiss Law, an arbitration tribunal has authority to issue an award embodying the terms of the parties' settlement if the contesting parties agree to a termination of their dispute in this manner. The Sole Arbitrator's ratification of their settlement and its incorporation into a consent award serves the purpose of enabling the enforcement of their agreement.

38. The Parties have requested that the Sole Arbitrator ratify and incorporate the Settlement Agreement reproduced above into a Consent Award. It is the task of the Sole Arbitrator to verify the *bona fide* nature of the Case Resolution Agreement to ensure that the will of the Parties has not been manipulated by them to commit fraud and to confirm that the terms of the Case Resolution Agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.

39. After reviewing the terms of the Case Resolution Agreement, the Sole Arbitrator finds no grounds to object or to disapprove of the terms of the Settlement Agreement and is satisfied that the Settlement Agreement constitutes a *bona fide* settlement of the dispute brought to her

attention. Furthermore, the sanction determined by mutual consent of the Parties does not appear to be in violation of the ISU ADR and/or of the World Anti-Doping Code.

40. In view of the above, and in particular of the joint request made by the Parties, the present Consent Award puts an end to the arbitration procedure *2022/ADD/48 ISU v. Laura Barquero Jimenez* on the terms indicated in the Case Resolution Agreement and those detailed below.

41. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted to her by the Parties. Accordingly, all other prayers for relief are rejected.

VI. COSTS

(…).

VII. APPEAL

47. Article 8 of the 2019 ISU ADR provides:

> *8.3 At the end of the hearing, or on a timely basis thereafter, the CAS panel will issue a written decision that includes the full reasons for the decision and for any period of Ineligibility imposed, including (if applicable) a justification for why the greatest potential Consequences were not imposed.*
>
> *8.4 The decision may be appealed to the CAS as provided in Article 13. Copies of the decision will be provided to the Athlete or other Person and to other Anti-Doping Organisations with a right to appeal under Article 13.*

48. Pursuant to Article A21 of the ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons in accordance with Articles R47 *et seq*. of the CAS Code of Sports-Related Arbitration, applicable to appeals procedures.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Sole Arbitrator, with the consent of the International Skating Union and Ms. Laura Barquero Jimenez, hereby ratifies the Case Resolution Agreement signed by the International Skating Union and Ms. Laura Barquero Jimenez on 24 August 2022, which provides that:

a) Ms. Laura Barquero Jimenez is found to have committed an anti-doping rule violation pursuant to Article 2.1 and/or Article 2.2 of the IOC Anti-Doping Rules applicable to the Games of the XXIV Olympic Winter Games Beijing 2022.

b) A period of one (1) year of ineligibility is imposed on Ms. Laura Barquero Jimenez, starting on 22 February 2022.

c) The period of provisional suspension from 22 February 2022 shall be credited against this period of Ineligibility. The period of Ineligibility shall, therefore, end on 21 February 2023.

2. The award is pronounced without costs, except for the ADD Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the IOC, which is retained by the ADD.

3. (…).

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