



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1898 WADA v. International DanceSport Federation & Boris Maltsev & Zarina Shamsutdinova

ARBITRAL AWARD

rendered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Professor Brigitte Stern, Paris, France

Arbitrators: Mr Quentin Byrne-Sutton, attorney-at-law, Geneva, Switzerland

Mr Goetz Eilers, attorney-at-law, Darmstadt, Germany

in the arbitration between

WORLD ANTI-DOPING AGENCY

Represented by Mr François Kaiser, attorney-at-law, Lausanne, Switzerland

-Appellant-

and

INTERNATIONAL DANCESPORT FEDERATION

Represented by Mr J. De Mooy, attorney-at-law and IDSF Anti-Doping Director,
Steenbergern, Netherlands

- First Respondent-

and

BORIS MALTSEV, Almaty City, Kazakhstan

Not represented

- Second Respondent-

and

ZARINA SHAMSUTDINOVA, Almaty City, Kazakhstan

Not represented

- Third Respondent-

1. THE PARTIES

- 1.1 The World Anti-Doping Agency (hereinafter "WADA" or the "Appellant"), is an international organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport. WADA is a Swiss private law foundation, with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. It coordinates the development and implementation of the World Anti-Doping Code (hereinafter the "WADC"), the document harmonizing anti-doping policies.
- 1.2 The International DanceSport Federation (hereinafter "IDSF" or the "Respondent") is the international federation, recognized by the International Olympic Committee, governing all aspects of DanceSport worldwide, either directly through its own organs, or through its national member bodies, or by administrative agreements with other persons and organisations. IDSF is a legal entity under Swiss law and has its headquarters in Lausanne, Switzerland.
- 1.3 Mr Boris Maltsev and Ms Zarina Shamsutdinova (hereinafter the "Athletes" or "Second and Third Respondents") are dancers from Kazakhstan, who are affiliated with the Kazakhstan DanceSport Federation (hereinafter "KDSF"), which in turn is a member of IDSF. The Athletes are ranked, as a couple, 157 out of 3482 in the IDSF World Ranking.

2. FACTUAL BACKGROUND

- 2.1 The following summary of facts is based on the written submissions of the parties and the exhibits produced.
- 2.2 On 7 December 2008, the Athletes participated in the 2008 IDSF Asian Championships Latin (hereinafter the "Championships"), in Chinese Taipei. The event was organised by the Asian DanceSport Federation (hereinafter "ADSF"). The ADSF and the Anti-Doping Office of the Taipei Olympic Committee agreed that doping controls would be conducted by a representative from IDSF or a delegate authorised by ADSF or the organising committee.
- 2.3 As the winning couple, the Athletes were selected to be subject to doping-control testing. After the competition, the Athletes were informed that they had been selected for testing but they refused to sign the notification form. At the doping-control station, Mr Hsin-Yi Hsu, the Doping-Control Officer (hereinafter "DCO") informed the Athletes of the possible consequences of a refused test. The Athletes briefly left the doping-control station, accompanied by chaperones, to change their clothes. When they returned to the station, they repeated their refusal to be tested.

CAS 2009/A/1898 WADA v. IDSF & Maltsev & Shamsutdinova - Page 3
Tribunal Arbitral du Sport
Court of Arbitration for Sport

2.4 The DCO again explained the requirements of a doping test and then proceeded to file a report. On the DCO Report Form, the Athletes explained their refusal to provide urine samples in the following terms:

1st We didn't get IDSF consent form about free will doping control passing, we weren't warned about it, 2nd there wasn't Kazakhstan representative of dance federation, 3rd We didn't sign any document about free will doping control passing (IDSF consent form) before competition.

2.5 On the same form, the DCO reported "*I've told them about the consequences of refused doping control procedure, and they still didn't want to provide the samples for anti-doping, and they writed (sic) the reasons above*".

2.6 On 20 December 2008, the IDSF Anti-Doping Director sent each of the Athletes a notice of an anti-doping rule violation, informing the Athletes that they were being disqualified from the Championships, with all the resulting consequences, and that they were provisionally suspended.

2.7 On 30 December 2008, the IDSF Anti-Doping Director sent the IDSF Disciplinary Council a Complaint regarding the anti-doping rule violation of each of the Athletes and requested the imposition of a two-year sanction on the Athletes.

2.8 By email dated 28 January 2009, the Athletes wrote to the Chairman of the IDSF Disciplinary Council in the following terms:

We regret about happened in the city of Tappet (sic), we did not know what to do, as there was no representative face from federation of Kazakhstan with us. In connection with not the notice about changes in system rules under the control of application of a dope, we have made a mistake and have not handed over an urine on the control. We have specified the reasons in the document after competition. We deeply regret about happened and we apologize for incorrect behaviour at all commisslon for infringement of rules. Being guided by rules of IDSF, we have sent a champion cup to Taiwan.

We ask to concern us indulgently as we recognize the error, and we guarantee that have won at competitions without application of any dope. We regret and really sorry about happened and we guarantee henceforth to be more attentive with rules of IDSF.

2.9 By decision dated 3 June 2009, the IDSF Disciplinary Council sanctioned the Athletes with a period of one year of ineligibility, starting on the date of the refused doping test, i.e. on 7 December 2008 (hereinafter the "Decision").

3. PROCEDURAL BACKGROUND

- 3.1 On 2 July 2009, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter the "CAS") against the IDSF Disciplinary Decision. WADA named the IDSF, Mr Maltsev and Ms Shamsutdinova as Respondents to the appeal.
- 3.2 In accordance with Article R52 of the Code of Sports-related Arbitration (hereinafter the "Code"), the CAS initiated an appeal arbitration procedure under the reference *CAS 2009/A/1898 WADA v. International DanceSport Federation & Boris Maltsev & Zarina Shamsutdinova*.
- 3.3 On 21 August 2009, WADA filed an appeal brief.
- 3.4 On 14 September 2009, the IDSF filed an answer.
- 3.5 The Athletes did not file any answer.
- 3.6 On 28 and 30 September 2009, the IDSF and WADA respectively informed the CAS that their preference was for the Panel to issue an award solely on the basis of the parties' written submissions.
- 3.7 On 1 October 2009, the CAS notified the parties that the arbitration panel (the "Panel") appointed to decide the procedure was constituted as follows:

President: Professor Brigitte Stern, Paris, France
Arbitrators: Mr Quentin Byrne-Sutton, attorney-at-law in Geneva, Switzerland
Mr Goetz Eilers, attorney-at-law in Darmstadt, Germany

- 3.8 On 10 November 2009, the parties were informed that the Panel had decided not to hold a hearing and to decide the matter based on the parties' written submissions.
- 3.9 On the same date, a Procedural Order providing the terms of reference of the proceedings was circulated for the parties' signature.
- 3.10 This Procedural Order was duly signed by WADA on 13 November 2009, by IDSF on 16 November 2009, as well as by Mr Boris Maltsev and Ms Zarina Shamsutdinova, who sent the signed Procedural Order to CAS on 17 November 2009.

4. PARTIES' SUBMISSIONS

A. WADA's Submissions

- 4.1 WADA submits that it is uncontested that the Athletes refused to be tested, which is necessarily an infringement of article 1.VII.3 of the IDSF Anti-Doping Code 2008

(hereinafter "IADC 2008" or "IADC"), which defines "*Refusing, or failing without compelling justification, to submit to SAMPLE collection*" as an anti-doping violation.

- 4.2 In relation to the sanction to be imposed for the anti-doping rule violation, WADA requests a two-year period of ineligibility and refers to article 5.VI.2 IADC 2008, which provides:

The refusal to submit to DOPING CONTROL or to provide a blood or urine SAMPLE is a frustration of evidence and a violation of the ATHLETE'S cooperation duties (Art. 4 II 2, Art. 4 II 4). This includes OUT-OF-COMPETITION testing. An ATHLETE shall only be entitled to refuse to provide a blood or urine SAMPLE in circumstances where the mandatory procedures and safeguards set out in the IDSF ANTI-DOPING CODE and its other Anti-Doping regulations are not observed.

– For the first violation two (2) years' INELIGIBILITY are imposed.

– For the second violation: Lifetime INELIGIBILITY is imposed.

In cases of NO SIGNIFICANT FAULT OR NEGLIGENCE the period of INELIGIBILITY may be reduced, but not to less than one year for first violations and eight years for second or subsequent (sic) violations.

- 4.3 WADA argues that the Athletes cannot claim an elimination of the sanction for no fault or negligence as they deliberately chose to ignore the warnings of the DCO and refused to submit to the sample collection. Furthermore, WADA points out that the wording of article 5.VI.2 IADC 2008 does not appear to allow for an elimination of the sanction for no fault or negligence.

- 4.4 In relation to a possible reduction of the sanction for no significant fault or negligence, WADA submits that in any event a reduction may only be applied where the circumstances are truly exceptional, *i.e.*, where an athlete can show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relation to the doping offence (see comment to article 10.5.2 of the WADC). WADA submits that such is not the case here and relies on a recent CAS case of refusal to submit to sample collection (*CAS 2008/A/1564 WADA v. IIHF & Busch*), where the Panel held:

The Panel finds ... also that art 10.5.2 of the 2003 WADC (No significant fault or negligence) is to be doubted whether to be applicable in the case of Mr Busch, since the exception of art 10.5.2 of the 2003 WADC by strict textual analysis covers only the issue of "failing to submit to sample collection" (art 2.3 of the 2003 WADC), but not the issue of refusal, which by its very nature is an intentional behaviour...

- 4.5 WADA concludes that as the Athletes "*intentionally refused to submit to sample collection, there is no room for a reduction of the sanction, as held by the CAS Panel in the Busch case.*"

- 4.6 With respect to the lack of the IDSF form of consent and referring to article 3.I.3 IADC 2008 whereby "*PARTICIPANTS must, before they take part in a IDSF-granted*

DanceSport EVENT, agree to comply with this ANTI-DOPING CODE by completing and signing the forms of consent”, WADA submits that the foregoing rule represents an eligibility requirement only and cannot be relied on by the Athletes as providing allowance to refuse to submit to sample collection in infringement of the applicable regulations. Regardless of whether such forms of consent are provided or signed, Articles 3.I.5 and 4.II.4 of the IADC 2008 set out the Athletes’ obligation to submit to anti-doping testing in the following terms: “all athletes are subject to doping controls”, and must “tolerate the carrying out of doping controls and, insofar as necessary, must actively participate....”

- 4.7 Concerning the absence of a KDSF representative, WADA submits that there is no requirement for a KDSF representative to be present and the absence of a KDSF representative can have no bearing on the validity of the testing procedure, article 4.VI.3 of the IADC 2008 merely providing that: “*The ATHLETE is entitled to present himself/herself for the SAMPLE collection with a PERSON of his or her choice (official, trainer, physician, masseur, etc.)*.”
- 4.8 Finally, WADA submits that the fact that the IADC was not implemented into the KDSF rules is irrelevant as the Athletes took part in an IDSF event and the applicable regulations are therefore the IDSF regulations.
- 4.9 In light of the above, WADA seeks a two-year period of ineligibility for each of the Athletes, starting on the date the CAS award comes into force, with credit given for any period of suspension already served. Furthermore, WADA requests that all competitive results achieved by the Athletes from 7 December 2008 through the commencement of the applicable period of suspension shall be disqualified with all of the resulting consequences, WADA also seeks an award of costs.

B. IDSF’s Submissions

- 4.10 IDSF questions the admissibility of the appeal by contending that the Statement of Appeal was filed outside the applicable time limit.
- 4.11 IDSF submits that its Disciplinary Council decided to reduce the normal two-year sanction as it considered it was a case of no significant fault or negligence “*when viewed in the totality of the circumstances and taking the behavior and the excuses of the Athletes into account*”. These circumstances included the fact that the Championships’ organisers did not provide the “mandatory” forms of consent and the alleged negligence of the KDSF in not informing its athletes in their own language of the anti-doping rules and in not incorporating the IDSF rules into the KDSF national regulations.
- 4.12 IDSF considers that the Athletes were negligent but that mitigating factors exist. By reference to article 5.VI.2 of the IADC 2008 (set out above at paragraph 4.2) the IDSF

submits that the Athletes “*did not intentionally refuse to submit to the doping controls but were insecure about the procedure because of the missing forms*”. The IDSF submits that the Athletes believed that the IDSF anti-doping procedure had been changed and that testing was only mandatory when the consent forms were distributed before a competition.

4.13 Contrary to WADA’s position that the consent forms were merely an eligibility requirement, IDSF submits that the forms are a reassurance to athletes that proper procedures are being followed and that the absence of the forms “*can therefore have caused anxieties that mandatory procedures and safeguards as set out in the IDSF Anti-Doping Code 2008 were not observed in full; meaning that the athletes erroneously believed that a case of art. 5.VI.2 of the IDSF Anti-Doping Code 2008 was given.*”

4.14 IDSF points out that it is a small international federation with very limited financial resources. It is not an Olympic medal sport and all anti-doping officials of the IDSF work voluntarily. Furthermore, DanceSport events do not attract large sums of money and prize money for competitors is limited. IDSF submits that the Athletes cannot bear the full burden of responsibility in this case as mistakes were also made by the Championships’ organisers and the KDSF. IDSF concludes that this is a case of no significant fault or negligence and accordingly, the Decision of the IDSF Disciplinary Council should be upheld. IDSF also seeks an award of costs.

5. APPLICABLE LAW

5.1 As far as the *law applicable to the arbitration* is concerned, the Swiss Private International Law Act (“PILact”) applies as the *lex arbitri*. Indeed, according to article 176 of the PILact, it governs all international arbitrations with their seat in Switzerland if one of the parties was not domiciled in Switzerland; and in the present case, the seat of the arbitration is in Switzerland (where the CAS has its headquarters) and neither the WADA nor the Athletes are domiciled in Switzerland.

5.2 This implies that the acceptance of arbitration must meet the requirements of art 178 of the PILact, according to which it is sufficient for an agreement to arbitrate to be expressed in writing for it to be valid.

5.3 As far as the *law applicable to the merits* is concerned, Article R58 of the Code provides that:

The Panel shall decide the dispute according to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

5.4 In this case, all the Parties did not agree on the application of a specific law. The Panel will therefore decide on the rules of law it deems appropriate in order to deal with this case. Article R58 suggests, in case there is no agreement, among other choices, that the law of the country where the sport related body which has issued the challenged decision is domiciled should be applied.

5.5 The Panel considers that the rules that governed the Asian Championships are the pertinent rules to apply. This was also the view of the Appellant and one of the Respondents.

5.6 In its Statement of Appeal, WADA stated :

Since the Dancers took part to the IDSF Asian Championships Latin 2008, an international event organized by an IDSF member, they were bound by the IDSF rules and regulations, in particular with the IADC 2008.

The IADC 2008 is therefore applicable to the case at hand.

5.7 In its Statement of Defence, in addressing the question of the applicable regulations, the IDSF declared that: *"IDSF agrees that the rules as stated by WADA under paragraph II of its Appeal Brief are correct and applicable."*

5.8 The Athletes have not made any submission in front of this Panel as to which regulations and/or rules of law apply. However, it is noteworthy that in their email submission to the IDSF Disciplinary Committee on 28 January 2009 – which is the lower instance in this case – the Athletes wrote: *"Being guided by rules of IDSF, we have sent a champion cup to Taiwan."* This, at the very least, indicated the Athletes had no objection to the rules of the IDSF.

5.9 In light of the parties' positions and given the fact that the IDSF Asian Championships 2008 was an international event, the Panel deems that the IDSF regulations are applicable, among which the IDSF Anti-Doping Code 2008 (IADC 2008). Since the IADC 2008 implements the 2003 WADC and contains direct references to the WADC and the International Standard for Testing, the latter will also be taken into account when applying and interpreting the IADC 2008. Furthermore, in keeping with article R58 of the Code and considering the IDSF is domiciled in Switzerland, the Panel shall apply Swiss law if any national rules of law need applying in addition.

6. CAS JURISDICTION AND ADMISSIBILITY

A. Jurisdiction

6.1 Article R47 of the Code provides that:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

6.2 According to Article R47 of the Code, there are three prerequisites for CAS jurisdiction (see, e.g., CAS 2004/A/748 *Roc Viatcheslav Ekimov v/IOC, USOC & Tyler Hamilton*, n° 83; CAS 2008/A/1471 & CAS 2008/A/1486 *FINA v/Tagliatferri & Federazione Italiana Nuoto and WADA v/CONI & Tagliatferri*, n° 5.1):

- there must be a “decision” of a federation, association or another sports-related body;
- “the (internal) legal remedies available” must have been exhausted prior to appealing to the CAS;
- the parties must have submitted to the competence of the CAS.

6.3 The “Formal Decision” – as it is entitled – of 3 June 2009 of the Disciplinary Council of IDSF is without any doubt a decision, and under Article 6.VI of the IADC 2008 the only remedy provided for appealing such a decision is an appeal before the CAS:

“1. Any decision made by the Disciplinary Council or one of its Chambers may be appealed to the Court of Arbitration for Sport (“CAS”) in Lausanne, Switzerland, according to its rules and jurisdiction. This includes namely

- *decisions that an anti-doping rule violation was committed or not committed*
- *a decision imposing CONSEQUENCES for an anti-doping rule violation*
- *a decision that IDSF lacks jurisdiction to rule an alleged anti-doping rule violation or its CONSEQUENCES*
- *a decision revising the ANTI-DOPING REPRESENTATIVE’S decision to impose a PROVISIONAL SUSPENSION.*

Any such appeal must be made within twenty-one (21) days after the reception of such decision, according to the requirements of CAS.

[...]

3. The following parties shall have the right to appeal to CAS

a) the ATHLETE or any other Person who is the subject of the decision being appealed

b) IDSF

[...]

d) WADA”

6.4 Consequently, there were no further internal remedies to exhaust before appealing to the CAS and in that respect the appeal must be deemed within the jurisdiction of CAS as stipulated by the foregoing article 6.VI of the IADC and article R47 of the Code. Furthermore, the provision expressly states that WADA benefits from the right to appeal.

6.5 It remains therefore only for the Panel to verify whether the different Parties have submitted to the jurisdiction of the CAS.

6.6 As far as WADA is concerned, its right of appeal is stated in Article 6.VI of the IADC, and it submitted itself to the jurisdiction of the CAS in making its appeal.

6.7 As far as the First Respondent is concerned, the jurisdiction of the CAS is not disputed by IDSF. The IDSF's submission to the jurisdiction of CAS derives from Article 6. VI of the IADC and from Article 6 of its Statutes, which provides:

"Article 6

Disputes

In view of the international composition of the IDSF and the resultant difficulties in settling disputes judicially where problems arise between members or between members and the IDSF, Members waive the right to take such disputes to law, and agree that such disputes shall be subject to the binding decision of the IDSF Disciplinary Council, the General Meeting or the Court of Arbitration for Sport in Lausanne, Switzerland."

6.8 As far as the Second and Third Respondents are concerned – the two Athletes, Mr Maltsev and Ms Shamsutdinova – they never raised any objection to the jurisdiction of the IDSF Disciplinary Committee, whether at the stage of the proceedings before that Committee, or at the stage of the proceedings before the CAS. Moreover, they participated in the proceedings before the IDSF Disciplinary Committee by sending it an e-mail giving their reading of what happened in Taipei and participated in the implementation of its decision by sending the cup back to the organizers of the Asian Championships, as acknowledged in their e-mail to the IDSF Disciplinary Committee, in which they wrote: *"Being guided by rules of IDSF, we have sent a champion cup to Taiwan."*

6.9 Furthermore, although they decided not to file any submissions in this proceeding in addition to those of the IDSF, the Athletes have neither objected to the jurisdiction of the CAS nor formally defaulted since they duly signed the Order of Procedure, which forms the terms of reference of this proceeding and which stipulates under §9 that: *"(b) signature of the present Order, the parties confirm their agreement that the Panel may decide this matter based on the parties' written submissions."*

6.10 For the above reasons the conditions of Article R47 of the Code are fulfilled and the CAS has jurisdiction.

6.11 For sake of clarity, the Panel points out that it is not basing its jurisdiction on the Athletes' participation in the competition, since even if, for reasons explained below in section 7D of this award, such participation implies in the Panel's view the acceptance of the substantive rules applicable to the competition, their mere participation cannot be deemed an agreement in writing to accept CAS jurisdiction. Rather, the Panel bases its

jurisdiction primarily on the unambiguous acceptance of its jurisdiction by the two Athletes when signing the Procedural Order sent to them at the beginning of this procedure, bearing in mind also that at no stage of the proceedings did the Athletes expressly or impliedly contest the jurisdiction of the IDSF Disciplinary Committee, as the lower instance, or of the CAS as the appellate body.

B. Admissibility

6.12 As indicated above, Article 6.VI of the IADC 2008 provides that: *“Any such appeal must be made within twenty-one (21) days after the reception of such decision, according to the requirements of CAS”*.

6.13 The IDSF raises issue with the admissibility of WADA’s appeal, contending in its Statement of Defence that:

“Indeed the Decision of the IDSF DC was send on June 11th 2009 to WADA by the IDSF Anti-Doping Director (not the IDSF DC as stated by WADA, see exhibit 4 as submitted by WADA) giving WADA a time frame to file an Appeal till July 2nd 2009 at the latest. WADA’s Statement of Appeal is dated July 2nd 2009. The Statement of Appeal was send by CAS to the parties involved on July 8th 2009 (attached). Question is whether the Statement of Appeal was filed by WADA with CAS July 2nd 2009 or only dated July 2nd 2009. The attached letter of CAS dated July 8th 2009 gives no answer to this question. If the Statement of Appeal was not filed with CAS at the same day as dated, than the Appeal is not made within the given deadline as mentioned by WADA under par. 22/23 of its Appeal Brief.” (Emphasis in the original)

6.14 As appears from this excerpt of the Statement of Defence, IDSF suggests that *if* the date which appears on the appeal is not the correct date, then the Statement of Appeal is time barred. Consequently, the question of the date needs examining.

6.15 Pursuant to Article R32 of the Code, *“the time limits fixed under the present Code are respected if the communications by the parties are sent before midnight on the last day on which such time limits expire.”* As the parties were advised by a letter of 24 September 2009 from the CAS, WADA filed its Statement of Appeal with the CAS by facsimile on 2 July 2009. However, since the originals only arrived at the CAS on 6 July 2009, the Statement of Appeal was notified to the Respondent on 8 July 2009.

6.16 WADA was informed that the Athletes were sanctioned with a 12-month period of ineligibility for their violation of anti-doping rules, by an email sent by IDSF Disciplinary Council on June 11 2009, which means that WADA had until July 2nd to file an appeal.

6.17 Since WADA did in fact send its Statement of Appeal by facsimile to the CAS on 2 July 2009, the IDSF’s objection is not applicable.

6.18 For the above reasons, the Panel considers that the appeal was filed in due time and is admissible.

7. MERITS OF THE APPEAL

A. Fundamental Principles

7.1 In its submissions, the IDSF implicitly contended that since it was a small federation with less means than some, the level of awareness of competing athletes regarding applicable rules might be inferior, which should lead to more indulgence when examining their required degree of diligence. In that relation, the Panel wishes to point out at the outset that neither the equality of treatment between elite athletes competing in different sports at a worldwide level, nor the rationale of anti-doping rules, allows such reasoning to be followed in a manner which would result in avoiding the strict application of anti-doping rules. Both the World Anti-Doping Programme and the rules of the IDSF itself make this clear. The 2003 World Anti-Doping Code (the "WADC"), which was in force until 31 December 2008, explains that the purpose of the code is:

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide; and*
- *To ensure harmonized, coordinated and effective anti-doping programs at the international level with regard to detection, deterrence and prevention of doping.*

7.2 Under the section dedicated to its rationale, the WADC further states that "*(d)oping is fundamentally contrary to the spirit of sport*".

7.3 The same idea is contained in Article 1 of the IADC concerning "Fundamental Principles and Interdictions":

- IV. Doping contravenes the fundamental principles of DanceSport and medical ethics.*
- V. Doping is prohibited.*

7.4 It is with the above principles in mind that the Panel will discuss the facts of the present case and arrive at its decision.

B. Scope of Review

7.5 Article R57, para. 1 of the Code provides as follows that the CAS has the power to review *de novo* the matter under appeal: "*The Panel shall have full power to review the facts and*

the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance....”

7.6 The Panel has therefore full power to review the facts and the law as presented in the IDSF Disciplinary Council Decision dated 3 June 2009, which is now under appeal.

C. Existence of an Anti-Doping Violation

7.7 Article 5.VI.2 of the IADC provides that “*(t)he refusal to submit to DOPING CONTROL or to provide a blood or urine SAMPLE is a frustration of evidence and a violation of the ATHLETE’S cooperation duties (Art. 4 II 2, Art. 4 II 4).*”

7.8 The Athlete’s refusal to submit to a doping control is not in dispute.

7.9 During the 2008 IDSF Asian Championships Latin, in Chinese Taipei, the two Athletes refused to submit to an anti-doping control which was organized by the Anti-Doping Office of the Chinese Taipei Olympic Committee, in accordance with the rules of IADC 2008. The Athletes refused the test, although they were warned twice about the gravity and the consequences of such refusal.

7.10 In its Statement of Claim, WADA argues that the Athletes refusal was in violation of article 1.VII.3 of the IADC, and in its Statement of Defence the IDSF replies that it is “*(n)ot disputed, obvious and clear that the athletes committed an anti-doping rule violation according to the IDSF Anti-Doping Code.*”

7.11 The fact that the Athletes sent back their cup to the competition organizers and the content of the Athletes’ email of 28 January 2009 to the Chairman of the IDSF Disciplinary Council tends to indicate that they also recognize that their refusal to undergo the test was in violation of the ISDF regulations, and that they were accepting a sporting sanction.

7.12 However, the question remains whether there are special circumstances that would justify the refusal of the test. The Panel shall therefore now turn to that question.

D. Existence of a Justification for the Refusal to Submit to the Control?

i) A general approach to the mandatory procedures and safeguards

7.13 Article 5.VI.2 of the IADC provides that “*(a)n ATHLETE shall only be entitled to refuse to provide a blood or urine SAMPLE in circumstances where the mandatory procedures and safeguards set out in the IDSF ANTI-DOPING CODE and its other Anti-Doping regulations are not observed*”.

- 7.14 In relation to the foregoing provision, the IDSF contends in essence that “*mandatory procedures and safeguards*” must be interpreted to encompass a requirement that athletes be mandatorily required to sign a Consent Form upon participating in an IDSF international event.
- 7.15 In order to analyse this argumentation, the Panel has first to determine what are the mandatory procedures and safeguards in question.
- 7.16 Relevant in that respect is the Appendix to the IADC named “WADA Guidelines for Urine Sample Collection”, which provides that “*(t)his guideline expands upon the International Standard for Testing and details the recommended process for the collection of urine for doping control purposes, both In-Competition and Out-of-Competition. The guideline includes on-site preparation, sample collection and post-test administration. With the exception of those mandatory areas which are part of the World Anti-Doping Program, the processes outlined in this document are not mandatory ...*”.
- 7.17 Those guidelines implement and to some degree complement the corresponding rules of procedure found in the “*International Standard for Testing*” adopted by WADA as part of its World Anti-Doping Program.
- 7.18 The Panel finds that the reference to mandatory procedures and safeguards must be understood as a reference to the rules and procedures that exist to enable doping controls to be organized in an efficient, orderly, safe and fair manner. No such mandatory rule has been said to have been infringed.
- 7.19 The Panel will now examine in that connection the main arguments raised by the IADC and the two Athletes to justify their refusal to undergo the doping control, *i.e.* the contentions that the Athletes had signed no IDSF Consent Form (or other document) accepting to submit to doping tests, that they were not warned that controls could be made and that no representative of the KDSF was present to assist them.

7.20 The Panel will examine those contentions in reverse order.

ii) Is the absence of a KDSF Representative a violation of a mandatory safeguard?

7.21 The Panel considers that the absence of a representative of the KDSF cannot be deemed a violation of a mandatory safeguard, as no rule exists that provides for such a presence. Article 4.VI.3 of the IADC 2008 provides that “*(t)he ATHLETE is entitled to present himself/herself for the SAMPLE collection with a PERSON of his or her choice (official, trainer, physician, masseur, etc.)*, but nowhere is it stated that such person must be a “representative” of the national federation of which the Athlete is a member. The absence of a KDSF Representative at the time of the doping control cannot therefore be considered a violation of a mandatory safeguard.

iii) Is the absence of advance warning of doping controls a violation of a mandatory safeguard?

With respect to the contention that there should be a mandatory warning that doping controls might occur, neither the IADC 2008 nor its above-quoted Appendix of Guidelines for Sample Collection contain any provision to that effect. Article 4.VI.1 IADC provides that: "*If TESTING will be carried out at a EVENT, it is advisable to remind the ATHLETES about the controls and their duty to hold themselves ready for TESTING at the beginning of each COMPETITION of the EVENT.*" (Emphasis added.) However, the Panel finds that such rule, which is not formulated as an obligation but as a recommendation (the word "advisable" being used), is simply aimed at trying to enhance the efficiency of the testing process by "reminding" the athletes that they must be available for possible tests.

7.22 Therefore, the Panel considers that the absence of a warning cannot be considered a violation of any mandatory procedure or safeguard.

iv) Is the absence of any signed Consent Form a violation of a mandatory safeguard?

7.23 IDSF in its Statement of Defence repeatedly refers to the absence of "the mandatory Forms of Consent." Therefore, the Panel turns now to the argument that the Athletes' refusal to submit to the doping control was justified by the lack of any signed Consent Form as provided for under article 3.I.3 of the IADC 2008, which states that: "*Participants must, before they take part in a IDSF-granted DanceSport event, agree to comply with this anti-doping code by completing and signing the forms of consent as codified in Appendix A to art. 19 of the IDSF Statutes*".

7.24 The Panel finds that such Forms of Consent may be considered "necessary" in a positive manner, but not "mandatory" in a negative manner, *i.e.* that article 3.I.3 of the IADC is, above all, a rule of eligibility. In other words, in order to participate in a competition, where the Athletes are presented with a Form of Consent, it is mandatory for them to sign it in order to participate in the competition, but if none is presented to the Athlete, it cannot be mandatory to sign one. Thus, the absence of a Form of Consent does not relieve athletes from the obligation to abide by anti-doping rules and to submit to doping-control tests. Formalities cannot be used in order to circumvent the existence of the anti-doping rules.

7.25 The main reason for such finding is that, whether it be in respect of the technical rules of a sport or the disciplinary or anti-doping rules, the choice of an athlete to participate in a competition must necessarily be deemed a tacit acceptance of the regulations governing that competition, subject to the regulations conforming to legality and being properly and fairly applied. In other words, participation in a competition necessarily implies the acceptance of the substantive rules governing the competition.

- 7.26 Any other solution would lead to the absurd situation in which an athlete who participated in a competition without expressly accepting the applicable regulations by means of a signed consent form could claim all the rights of a competitor – such as the right to be declared the winner with the corresponding advantages (medals, points, prizes, etc.) or the right to ask for the disqualification of another athlete – while at the same time being able to reject the application of those provisions that he/she had violated or which were unfavourable to him/her in the circumstances, simply by invoking a lack of written consent to such provisions. That would not only create great confusion but would also undermine basic principles upon which sports competition is founded such as the requirements of having a level playing field and equality of treatment.
- 7.27 In other words, athletes cannot be deemed to have the right to pick and choose the rules they abide by when seeking to participate in a competition. On the contrary, they must carefully inform themselves regarding the content of applicable regulations and determine on such basis whether they are willing and able to compete.
- 7.28 Anti-doping rules, such as the duty to submit to in-competition doping controls, are no exception, since they very much partake in establishing a level playing field in sports competitions. The existence of in-competition doping controls of elite athletes in international competitions and the duty to undergo such doping controls if one participates in those competitions are particularly basic and well-known rules in all sports. Under the IDSF regulations, the strict obligation for all athletes who participate in competitions to accept doping-control tests is made clear in the formulation of a number of provisions, e.g. articles 3.I.5 and 4.II.4 of the IADC 2008 according to which: “*all ATHLETES are subject to DOPING CONTROLS*”, and must “*tolerate the carrying out of DOPING CONTROLS and, insofar as necessary, must actively participate ...*”.
- 7.29 It is noteworthy in this context that the introduction to the WADC states that: “*Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. Athletes accept these rules as a condition of participation*” (Emphasis added); and that in the corresponding official “Comment” it is underlined that: “*By their participation in sport, Athletes are bound by the competitive rules of their sport*”.
- 7.30 In this case, the Athletes are not arguing that the IADC regulations as a whole are inapplicable to their participation in the IDSF Asian Championships but are contending in essence that the requirement of submitting to a doping control is not applicable because they were not aware of it and did not sign a Consent Form for such purpose before entering the competition. But, as stated before, the absence of a Consent Form cannot be deemed a valid excuse in itself, since despite the lack of such forms the Athletes decided to participate in the competition and must thereby be deemed to have accepted the competition rules.
- 7.31 For the above reasons, the Panel finds that article 3.I.3 of the IADC 2008 neither has the purpose nor the effect of making the duty of submitting to a doping control subject to

the signing of a Consent Form, and the Athletes acquired that duty by participating in the competition.

7.32 The Panel concludes therefore that no “*mandatory procedures and safeguards*” protecting athletes in the meaning of article 5.VI.2 IADC have been violated in this case, *i.e.* there exists no justification for the refusal to submit to the control, with the consequence that the Athletes must be deemed to have committed an anti-doping rule violation.

7.33 The Panel shall now turn to the question of whether the Athletes, despite having been found guilty of a violation of an anti-doping rule, can invoke any circumstances which can alleviate the sanction that is provided for in the IADC 2008.

E. The sanction

i) The sanction decided by the IDSF Disciplinary Committee

7.34 After they refused the test, the two Athletes were notified by the IDSF Anti-Doping Director, in a letter dated 20 December 2008 that they were disqualified from the Asian Championships Latin 2008 and had to return the cup, that they were also provisionally suspended from all competitions, national and international, until the IDSF decides the case. The IDSF Anti-Doping Director also informed Mr Boris Maltsev and Ms Zarina Shamsutdinova that he had requested from the IDSF a two-year ineligibility, and that IDSF will rule on the sanction after having given the opportunity to both Athletes to be heard.

7.35 The IDSF Disciplinary Committee ruled that *(t)he Athletes shall be declared ineligible for competition for one year (12 months), starting from 7 December 2008, date of the sample collection.*” (Emphasis in the original). It is because WADA found this sanction not severe enough that it presented this appeal.

ii) Existence of mitigating factors for the sanction?

7.36 Article 5.VI.2 provides that in case of refusal to submit to doping control, the sanction is the following:

– *For the first violation two (2) years’ INELIGIBILITY are imposed.*

– *For the second violation: Lifetime INELIGIBILITY is imposed.*

In cases of NO SIGNIFICANT FAULT OR NEGLIGENCE the period of INELIGIBILITY may be reduced, but not to less than one year for first violations and eight years for second or subsequent violations.

7.37 A reading of the IDSF Disciplinary Council's Decision indicates that several elements were taken into account by that instance, in deciding to reduce the normal sanction, in

brief, the negligence of other actors of the anti-doping fight on the one hand and the “behavior and the excuses of the Athletes” on the other.

7.38 First, the IDSF Disciplinary Council pointed to the negligence of the organizers of the Championships, who did not hand over any Form of Consent to the Athletes before the competition: “ ... *the report of the IDSF Chairman Keji Ukai dated December 9th 2008 establishes that the organizing committee did not have prepared the papers ... The statement of the Athletes, not having been asked about a form of consent and the declaration of Chairman K. Ukai together show, that the procedure at least in this point has not been formally correct.*” Second, the IDSF Disciplinary Council pointed to the negligence of the KDSF for not having implemented anti-doping rules in its Statute: “*Besides that we do have the statement of the Secretary of the KDSF dated March 19th 2009 saying that ~ unfortunately – earlier the Anti-Doping Code was not included in the rules of the KDSF. Understanding the importance of the matter, the presidium of the KDSF had made a decision to include the Anti-Doping Code obligatory into the rules of KDSF.*”

7.39 The IDSF Disciplinary Council continued its reasoning and concluded as follows that, given all circumstances, no significant fault or negligence could be attributed to the Athletes:

Although the IADC follows in general the “strict liability principle” and a respective violation of the Anti-Doping Code would have to be sanctioned with a certain period of ineligibility (min.2 years for a first violation) the Chamber in Charge takes the view, that sanctioning the Athletes with such a period of ineligibility under the circumstances of the case would constitute an inappropriate sanction ... On the other hand ... the Chamber is not in a position to refrain from any sanction at all, but to see a case of no significant fault or negligence when viewed in the totality of the circumstances and taking the behaviour and the excuses of the Athletes into account... At this point, the Chamber judges the joint responsibility of the organizer of the 2008 ISDF Asian championships together with the approached Anti-Doping Office and the KDSF as other aspects of doping control that were not attributable to the Athletes. Therefore the one year period of ineligibility shall start at December 7th 2008, the date of the sample collection.”

7.40 The Panel disagrees with the manner in which the IDSF Disciplinary Council framed the issue.

7.41 Firstly, although it is not denied that both the organizers and the KDSF did not implement their respective obligations under the Anti-Doping rules, these are separate faults and do not alleviate the Athletes significant fault or negligence. The question is not so much whether the organizers and the KDSF properly implemented the Anti-Doping rules but whether their actions and/or any other circumstances invoked by the Athletes prevented them from understanding their duties under the applicable anti-doping rules. In this regard, the Panel finds that there is a no necessary causal link between the actions of

the various sport authorities and the fault of the Athletes which relieves the latter from their own responsibility.

7.42 Secondly, the IDSF Disciplinary Committee also took into account the excuses sent by the two Athletes, who had written to it: "*We ask you to concern us indulgently as we recognize the error.*" The Panel wants to emphasize that presenting excuses after the facts cannot be considered as a mitigating factor of the violation consisting in the refusal to undergo the doping test.

7.43 As there are no elements, which can be deemed mitigating factors, the Panel finds that in the circumstances of this case as evidenced by the written documents on record, the Athletes were significantly negligent in refusing to undergo the test.

7.44 As a result the sanction cannot be reduced and the ineligibility period to be applied is two years in application of article 5.VII.2 of the IADC.

7.45 According to Article 5.III IADC:

An anti-doping rule violation in connection with an IN-COMPETITION test automatically leads to the DISQUALIFICATION of the individual result obtained in that COMPETITION with all resulting consequences, including forfeiture of any medals, points, and prizes, irrespective of any other sanction that may be applied, subject to the provisions of this article. In the event of a dancer from a Formation Team being disqualified, this DISQUALIFICATION extends to the entire Formation Team.

7.46 On that basis, the Athletes' results were correctly disqualified.

7.47 In its letter of 20 December 2008 to the Athletes giving them notice of an anti-doping rule violation, the Anti-Doping Director indicated to them that they were provisionally suspended from all IDSF competitions and/or national competitions until the IDSF Disciplinary Committee decided the case. The latter having then sanctioned the Athletes with a period of ineligibility of one year, this means that they could not compete until 7 December 2009. As set out above, the Panel decides that the Athletes are sanctioned with a two-year period of ineligibility. Pursuant to article 5.X.1 of the IADC, where required by fairness, the period of ineligibility may commence as early as the date of the sample collection. Taking into account all the circumstances of this case, the Panel believes that fairness requires that the two-year period of ineligibility shall commence on 7 December 2009, with the period of one year of ineligibility already served by the Athletes being credited against the total period of ineligibility to be served. Furthermore, all competitive results obtained by the Athletes from 7 December 2008 through the date of this award shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

8. COSTS

8.1 For disciplinary cases of an international nature ruled in appeal, such as the case in point, article R65 of the Code provides as follows:

“R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If all circumstances so warrant, the President of the Appeals Arbitration Division may decide to apply Articles R64.4 and R64.5, 1st sentence, to an appeals arbitration, either ex officio or upon request of the President of the Panel.”

8.2 As this is a disciplinary case of an international nature brought by the World Anti-Doping Agency, the proceedings will be free, except for the Court Office filing fee of CHF 500 already paid by WADA, which is retained by the CAS.

8.3 As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. In the present case, taking into account the fact that the Panel decided this matter without a hearing and that the Athletes filed no written submissions, the Panel rules that the IDSF shall pay CHF 1,500 as a contribution towards WADA's legal fees and other expenses incurred in connection with the present arbitration proceedings.

CAS 2009/A/1898 WADA v. IDSF & Maltsev & Shamsutdinova - Page 21
Tribunal Arbitral du Sport
Court of Arbitration for Sport

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of WADA against the decision of the IDSF Disciplinary Council, dated 3 June 2009, is declared admissible and upheld.
2. The decision of the IDSF Disciplinary Council, dated 3 June 2009, in the matter of Boris Maltsev and Zarina Shamsutdinova is set aside.
3. Boris Maltsev and Zarina Shamsutdinova are sanctioned with a two-year period of ineligibility starting on 7 December 2009, with the period of one year of ineligibility already served by the Athletes being credited against the total period of ineligibility to be served.
4. All competitive results obtained by Boris Maltsev and Zarina Shamsutdinova from 7 December 2008 through the date of this award shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.
5. This award is pronounced without costs, except for the non-reimbursable Court Office fee of CHF 500 (five hundred Swiss Francs) already paid and to be retained by the CAS.
6. The IDSF is ordered to pay the amount of CHF 1,500 (one thousand five hundred Swiss Francs) as a contribution towards WADA's legal fees and other expenses incurred in connection with the present arbitration proceedings.
7. All other claims and prayers for relief are dismissed.

Done in Lausanne, on 3 March 2010

THE COURT OF ARBITRATION FOR SPORT

Brigitte Stern
President of the Panel

Brigitte Stern
