



**Arbitration CAS 2006/A/1175 D. v/ International DanceSport Federation, award of 26 June 2007**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr David W. Rivkin (USA); Mr Goetz Eilers (Germany)

*Dance Sport*

*Doping*

*Specified substance (Sibutramine)*

*Power of an association to secure the observance of its rules by its associates*

*Lack of intention of the athlete to enhance his/her sport performances*

*Sanction*

1. Swiss law allows an association to sanction the associates for their breach of the association rules, so as to secure the observance of those rules. Disciplinary commissions are actually intended to serve this purpose. In this framework, any reproach for the way specific disciplinary proceedings are organized should not be limited to an overall criticism about an alleged lack of independence or of a conflict of interest between the association and the associates, or the functional or organizational position of the disciplinary committee, but should concern identified violations of the internal rules of the association, or mandatory rules of the applicable law, governing the composition and the activity of the chamber in charge of hearing the given case.
2. As Sibutramine is mentioned by the IADC among the Specified Substances, no further evaluation is requested in order to establish whether Sibutramine is particularly susceptible to unintentional doping. Where sufficient elements have been adduced by the athlete, which are based on the characteristics of the sport concerned, as well as on scientific indications that have not been specifically contradicted, to confirm that Sibutramine could not enhance his/her sport performance, and therefore justify the conclusion of the lack of her intention to achieve that effect. Besides, the general purpose to achieve a “slimming” benefit, by use of a product not mentioning on the label the presence of a Specified Substance, cannot be equated to the specific intention to enhance the sport performance within the meaning of Article 5(V)(2) of the IADC.
3. The fact that a major sporting event is to take place within the period of ineligibility of an athlete found responsible of an anti-doping rule violation does not affect the measure of the sanction.

D. (the “Dancer” or the “Appellant”) is a Lithuanian ballroom dancer, born in 1979.

The International DanceSport Federation (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.

The Dancer is registered with the Lithuanian Dance Sport Federation (LDSF), which in turn is a member of the IDSF. As a result, the Dancer is subject to and bound by the applicable rules and regulations of IDSF, including its anti-doping rules.

On 19 August 2006, the Dancer participated, with her dance partner, A., in an IDSF Grand Slam Standard competition in Stuttgart, Germany. On that occasion, the Dancer underwent a doping control according to the IDSF anti-doping rules.

In a letter of 14 September 2006, the Anti-Doping Director of the IDSF informed the Dancer of her positive test result. The WADA accredited German laboratory (the *“Institut für Dopinganalytik und Sportbiochemie Dresden”*) had in fact detected in the A-sample of urine provided by the Dancer the presence of Sibutramine, which is a prohibited substance of the category “S6: Stimulants” under the 2006 IDSF Anti-Doping Code (the “IADC”).

In the same letter, the Anti-Doping Director of the IDSF informed the Dancer of her provisional suspension from any further competition as from 14 September 2006 according to Article 5(IV)(1) of the IADC.

On 14 September 2006 the Dancer requested the analysis of the B-sample of urine she had provided.

On 8 October 2006, the IDSF Disciplinary Council (the “DC”) decided to temporarily lift the provisional suspension until the B-sample was analyzed. The adoption of this decision was communicated to the Dancer on the same day by phone and on 10 October 2006 by e-mail. The formal written decision, dated 16 October 2006, was received by the Dancer on 18 October 2006.

In a letter dated 10 October 2006 the Anti-Doping Director of the IDSF informed the Dancer that *“the analysis of the B-sample confirmed the analysis of the A-sample”*. The Dancer was therefore charged with a doping offence under Article 1(VII)(1) of the IADC.

By e-mail of 18 October 2006, the Dancer was informed that, as a consequence of the B-sample analysis, her provisional suspension from any further competition had re-entered into force with immediate effect until the case was decided by the DC. In the same e-mail, the Dancer was informed of the composition of the Chamber of the DC in charge of dealing with her case (the “Chamber”).

On 26 October 2006, the Dancer submitted to the Chamber her statement of defence. In substance,

the Dancer indicated that the positive test was caused by her ingestion of a herbal slimming remedy, called “Meizitang”, which she had bought for beauty purposes in a spa in Lithuania in August 2006 and began to ingest on a daily basis since this date until 19 August 2006. In this connection the Dancer emphasized that scientific examination, performed by the “*Medicines Control Laboratory of the State Medicines Control Agency at the Ministry of Health of the Republic of Lithuania*”, had established that the tablets contained in the particular package of “Meizitang” contained Sibutramine, despite the fact that it was not mentioned on the ingredients list of the packet. As a result, the Dancer submitted, primarily, that she had to be held at “*No Fault or Negligence*” pursuant to Article 5(I)(1) of the IADC, and thus suffer no period of ineligibility, and, subsidiarily, that the sanction should be limited to a minimum level pursuant to Article 5(V)(2) of the IADC, Sibutramine being a “*Specified Substance*”.

On 17 November 2006, the Chamber issued the following decision (“the Decision”):

- “1. Pursuant to article 1.VII.1 of the LADC, an anti-doping rule violation has been committed by the Athlete.
2. The athlete, D. is responsible for the commission of such anti-doping rule violation.
3. By virtue of art. 1.VII.1, and in accordance with art. 5.V.2 of the LADC, D. shall be declared ineligible for competition for 3 (three) months, starting from September 14<sup>th</sup>, date of the first provisional suspension.  
*For the calculation of the sanction, days where the suspension was temporarily lifted are not to be taken into account. Therefore, the Athlete will be allowed to compete again starting from December 22<sup>nd</sup> 2006.*
4. The athlete shall bear her own costs and expenses of the present procedure.
5. According to article 16 of the IDSF Disciplinary Code, the Athlete shall bear the minimum costs for any proceedings. Therefore, the Athlete shall pay the amount of CHF 100,00 (one hundred Swiss Francs).
6. The costs and expenses incurred with the IDSF Disciplinary Council shall be borne by the IDSF”.

The Decision, in substance, confirmed that the presence of a prohibited substance in the urine samples provided by the Dancer constituted a doping offence pursuant to the IADC, and indicated that the “*circumstance [inadvertent doping] that modifies responsibilities cannot be applied to this case ...: the Athlete cannot claim ignorance as after carrying out the relevant investigations we have noted that the information on the substance, effects of the substance, on the combination specifically with Meizitang are easily accessible to any person and of course much more accessible to an Athlete who should be informed about the drugs and other substances she takes*”.

At the same time, however, the Chamber acknowledged that Sibutramine was a “*Specified Substance*” with the ensuing applicability of Article 5(V)(2) of the IADC, “*that enables ... replacing the sanction of two years of ineligibility by that set out in this regulation*”. Therefore, the Chamber considered that the sanction of 3 months of ineligibility was appropriate.

The Decision was notified to the Dancer on 18 November 2006.

On 21 November 2006, the Appellant filed an appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the Decision

On 16 March 2007, IDSF filed its answer to the appeal, with a counterclaim, requesting the CAS:

- “- *to turn down the Appeal of D.;*
- *to set aside the Decision of the IDSF DC dated November 17<sup>th</sup>, 2006,*
- and*
- *newly Decide this case, provisionally enforceable”.*

On 23 November 2006, IDSF submitted its answer to the Appellant’s application for provisional measures, asking the CAS to dismiss it.

On the same date, the Deputy President of the CAS Appeals Arbitration Division issued a decision on the Appellant’s application for provisional measures, as follows:

- “1. *Admits the application for a stay filed by D.*
2. *States that the present order is rendered without costs”.*

A hearing was held in Lausanne on 25 April 2007.

## LAW

### Jurisdiction

1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS, which is not disputed by either party, is based *in casu* on Article 6(VI) of the IADC, and Article 11 of the DC Code, which provide for an appeal to CAS against any decision made by the DC or one of its chambers.
2. In fact, pursuant Article 6(VI) [*“Appeals”*] of the IADC,
  - “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.*

2. *Decisions appealed shall remain in effect while under appeal unless the appellate body orders otherwise.*
3. *The following parties shall have the right to appeal to CAS:*
  - a) *The ATHLETE or other PERSON who is the subject of the decision being appealed*
  - b) *IDSF*
  - c) *the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have effect in the relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games*
  - d) *the International World Games Association (IWGA), where the decision may have effect in the relation to the World Games, including decisions affecting eligibility for the World Games*
  - e) *WADA.*
4. *The only person that may appeal from a suspension (Art. 6 II 1) is the ATHLETE or other PERSON upon whom the suspension is imposed”.*

3. Article 11 of the DC Code then provides, with respect to decisions made by the DC in its role as first instance adjudication body, such as those concerning violations of the IADC (Article 9 DC Code), that:

*“Any decision made by the IDSF Disciplinary Council in its role as First Instance may be submitted exclusively by way of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-related Arbitration. The period allotted for an appeal – if any – shall be two months after the receipt of the decision of the IDSF Disciplinary Council. However, filing an appeal for such a decision does not suspend or affect the IDSF Disciplinary Council's decision, which shall remain in full force until the Court of Arbitration has taken its respective decision”.*

4. In the same way, the Decision provided that:

*“8.1 The formal decision of the IDSF Disciplinary Council may be appealed to the Court of Arbitration for Sport ("CAS") in Lausanne; Switzerland, according to its rules and jurisdiction;*

*8.2. Any such appeal must be made within two months after the reception of this decision (according Art. 11 of the DC Code);*

*8.3. Filing an appeal does not suspend or affect the IDSF Disciplinary Council's decision, which shall remain in full force until the CAS has taken its respective decision;*

*8.4. According Art. 6 VI of the AD Code, and applicable to this case, the following persons shall have the right to appeal to CAS:*

- *The athlete or other Person who is the subject of the decision being appealed;*
- *The International DanceSport Federation (IDSF);*
- *The World Anti-Doping Agency (WADA)”.*

## Appellate Proceedings

5. As these proceedings involve an appeal against a decision imposing a disciplinary sanction, issued by a federation (IDSF) whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in a disciplinary case of international nature, in the meaning and for the purpose of the Code.

## Admissibility

6. The statement of appeal of the Dancer was filed on 21 November 2006, within the time limit set by the IADC, the DC Code and the Decision.

7. In its answer, however, the Respondent challenged the admissibility of Dancer's appeal. In the Respondent's opinion, in fact, the appeal brief was not filed within the time limit set by Article R51 of the Code: according to ISDF that time limit expired on 26 January 2007, while the appeal brief was filed on 29 January 2007, with the consequence that *"the appeal should be deemed to have been withdrawn"*.

8. Article R51 [*"Appeal Brief"*] of the Code so provides:

*"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn."*

*In his written submissions, the Appellant shall specify any witnesses and experts whom he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise."*

9. The Panel does not agree with the Respondent's submissions. In this respect the Panel in fact notes:

- i. that the appeal had to be filed *"within two months after the reception"* of the Decision, as directed by para. 8.2 of the same in accordance with Article 11 of the DC Code with an indication prevailing over the somehow contradictory provision contained in Article 6(VI)(1) of the IADC (indicating a deadline of twenty-one days);

- ii. that it is a principle of Swiss law that *"where a time-limit is expressed in months or in years the dies ad quem shall be the day of the last month or of the last year whose date corresponds to that of the dies a quo or, when there is no corresponding date, the last day of the last month"* (Article 4 para. 2 of the European Convention on the Calculation of Time-Limits of 16 May 1972, in force for Switzerland since 28 April 1983: RS 0.221.122.3; Article 77 para. 1 No. 3 of the Swiss Code of Obligations); and

- iii. that pursuant to Article R32 of the Code:

*"the time limits fixed under the present Code shall begin from the day after that on which notification*

*by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. 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. If the last day of the time limit is an official holiday or a non-business day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day”.*

10. As a result, the Panel finds:
  - i. that the Decision was notified to the Dancer on 18 December 2006;
  - ii. that the time limit for the filing of the statement of appeal expired on 18 January 2007;
  - iii. that the appeal brief fell due on 28 January 2007, which was a Sunday, with the consequence that the time limit for its filing expired on the next day 29 January 2007.
11. Therefore, the appeal brief, submitted by the Appellant on 29 January 2007, was filed within the time limit set by Article R51 of the Code. The appeal cannot be deemed withdrawn.
12. Accordingly, the appeal is admissible.

### **Applicable law**

13. According to Article R58 of the Code, the Panel is required to 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”.*
14. In this case, the parties have not agreed on the application of any particular law. Therefore, IDSF rules and regulations have to be applied primarily, with Swiss law applying subsidiarily.

### **Scope of Panel’s Review**

15. Pursuant to Article R57 of the Code,  
*“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. [...]”.*

### **The Evaluation of the Panel**

16. The Appellant, in her first group of submissions, challenges the Decision, and requests that it be set aside, by invoking *“procedural unfairness”, “lack of independence”, “real risk of a conflict of interest”, errors in the reasoning, and the failure to consider the “proportionality”.*

17. In other words, the Appellant, in support of her request, is adducing reasons broadly pertaining to the procedure before the Chamber (*errores in procedendo*), which she submits was affected by some defects (“*unfairness*”, “*lack of independence*”, “*risk of a conflict of interest*”, lack of motivation), as well as concerning the exercise of the power of evaluation vested in the Chamber (*errores in iudicando*), indicated as flawed by errors. According to the Appellant, such reasons justify the setting aside of the Decision, so that a *de novo* judgment can be rendered by this Panel.
18. In this respect the Panel notes that, according to Article R57 of the Code, it has full power to review the facts and the law. The Panel consequently hears the case *de novo* and is not limited to considerations of the submissions before the DC: the Panel can consider all new arguments produced before it. This implies that, even if a violation of the principle of due process (such as the alleged “*unfairness*”, “*lack of independence*”, “*risk of a conflict of interest*”, or lack of motivation) occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129, *USA Shooting & Q. v/ UIT*, *CAS Digest I*, p. 187 at 203; CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 255 at 257; CAS 2000/A/274, *S. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 398 at 400; CAS 2000/A/281, *H. v/ Fédération Internationale de Motocyclisme*, *CAS Digest II*, p. 410 at 415; CAS 2000/A/317, *A. v/ Fédération Internationale des Luttes Associées*, *CAS Digest III*, p. 159 at 162; CAS 2002/A/378, *S. v/ Union Cycliste Internationale & Federazione Ciclistica Italiana*, *CAS Digest III*, p. 311 at 315). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance “*fade to the periphery*” (CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest II*, p. 255 at 264, citing Swiss doctrine and case law).
19. The Appellant has had and has used the opportunity to bring the case before the CAS, where all of the Appellant’s fundamental rights have been duly respected. At the end of the hearing, the Appellant expressly confirmed that she had no objections in respect of her right to be heard and to be treated equally in the CAS arbitration proceedings. Accordingly, even if any of the Appellant’s rights had been infringed upon by the DC, the *de novo* proceedings before the CAS would be deemed to have cured any such infringements.
20. In the same way, the CAS Panel, by using its full power to review the facts and the law, can consider all the elements of the dispute, and review the exercise of the power of evaluation vested in the Chamber, indicated as flawed by errors, so to determine whether an anti-doping rule violation has been committed by the Dancer and, in the event an infringement is found, whether the proper sanction has been applied.
21. In light of the foregoing, the Panel found it unnecessary to verify whether the Decision was affected by “*procedural unfairness*” on the part of the IDSF and the Chamber, whether the Chamber “*lack[ed] ... independence*”, and whether a “*risk of a conflict of interest*”, existed in order to be able to issue a *de novo* decision on the existence of an anti-doping rule infringement and its consequences. The Panel, in fact, has this power irrespective of the existence of the defects alleged by the Appellant.















2. D. is declared ineligible for competition for 3 (three) months, from 14 September 2006 to 14 December 2006.
  3. The counterclaim filed by the International DanceSport Federation is dismissed.
- (...)