Decision

International Bobsleigh and Skeleton

Doping Hearing Panel

IN THE MATTER OF A REQUESTED PROVISIONAL SUSPENSION OF

Mr. ALEXANDR ZUBKOV
To Bobsleigh Federation, of Russia
President Alexandr Zubkov
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I BACKGROUND

1. Mr. Alexandr ZUBKOV (hereinafter referred to as the "Athlete", (IF ID Number 130635, born on August 10, 1974), is a member of the Bobsleigh Federation of Russia.

2. On November 28, 2017 the International Bobsleigh and Skeleton Federation (hereinafter referred to as the "IBSF") notified the Athlete to provisionally suspend him in accordance with article 7.9 of the IBSF Anti-Doping Rules (hereinafter referred to as the "IBSF ADR"). The letter of the IBSF of November 28, 2017 is attached to this Decision as Annex I.

3. The notification of the provisional suspension from the IBSF followed a notification dated November 24, 2017 the IBSF has received from the International Olympic Committee ("IOC") informing that the IOC Disciplinary Commission (hereinafter also referred to as the "Oswald Commission") decided to sanction the Athlete because of anti-doping rule violations (hereinafter also referred to as "ADR") committed by him according to the Oswald Commission in the context of the Sochi 2014 forensic and analytic doping investigations.

3. In the (not motivated) decision of the Oswald Commission of November 22, 2017 (attached as Annex II hereto, and referred to as the "Non-Motivated Decision") the Athlete:

   a) is found to have committed anti-doping rule violations pursuant to Article 2 of The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi, in 2014;

   b) is disqualified from the events in which he participated upon the occasion of the XXII Olympic Winter Games in Sochi, in 2014, namely:

      (i) the Two-Man's Bobsleigh Event, in which he ranked 1st and for which he was awarded a gold medal, a medallist pin and a diploma;

      (ii) the Four-Man's Bobsleigh Event, in which he ranked 1st and for which he was awarded a gold medal, a medallist pin and a diploma;

       c) has the medals, medallist pins and the diplomas obtained in the above-mentioned
Events withdrawn and is ordered to return the same to the International Olympic Committee.

II. The International Bobsleigh and Skeleton Federation is requested to modify the results of the above-mentioned events accordingly and to consider any further action within its own competence.

III. Aleksandr ZUBKOV is declared ineligible to be accredited in any capacity for all editions of the Games of the Olympiad and the Olympic Winter Games subsequent to the Sochi Olympic Winter Games.

IV. The Russian Olympic Committee shall ensure full implementation of this decision.

V. The Russian Olympic Committee shall notably secure the return to the International Olympic Committee, as soon as possible, of the medals, medallist pins and diplomas awarded in connection with the Two-Man’s and the Four-Man’s Bobsleigh Events to the Athlete.

VI. This decision enters into force immediately. *

The Oswald Commission made clear in its Non-Motivated Decision that it intended to render a motivated decision within a reasonable time after the notification of the present decision, which it did on December 6, 2017, hereinafter referred to as the "Oswald Decision" and attached hereto as Annex III. The Non-Motivated Decision entered into force immediately (so per November 24, 2017).

4. In the same letter of November 28, 2017 the IBSF gave the Athlete and the Bobsleigh Federation of Russia the opportunity for a Provisional Hearing, as provided for in article 7.9.3 of the IBSF ADR.

5. The Athlete and the Bobsleigh Federation of Russia requested by email of November 27, 2017 an expedited hearing in accordance with article 7.9.3. of the IBSF ADR before the IBSF Doping Hearing Panel, consisting of the undersigned Panel members, which took place on December 1, 2017 at the Municong Congress Center at the Airport in Munich, Germany.

6. The Athlete was represented at the hearing by his legal representative Philippe Bärtsch (Schellenberg Wittmer Ltd) of Geneva, Switzerland and accompanied by the Secretary General of the Bobsleigh Federation of Russia, Sergey Parkhomenko, who acted as his translator.

7. The IBSF Doping Hearing Panel came to the conclusion that at the moment of the hearing there was not yet sufficient evidence relating to the Athlete that would justify the provisional
suspension being maintained for the time being. The Oswald Commission was invited to present the IBSF with a reasoned decision as soon as possible in order to reconsider the position of the Athlete. The reasoned decision of the IBSF Doping Hearing Panel of December 1, 2017 is attached hereto as Annex IV.

8. On December 6, 2017 the Oswald Decision (Annex III) was rendered and the IBSF Doping Hearing Panel consistent with its decision of December 1, 2017 invited the Athlete and its representative to continue on December 15, 2017 the hearing it started on December 1, 2017.

9. The IBSF Doping Hearing Panel received preceding the hearing of December 15, 2017 from Bird&Bird LLP, acting on behalf of the IBSF, an application for reconsideration of the decision to lift the provisional suspension for the Athlete. As the IBSF ADR does not provide for any such application the IBSF Doping Hearing Panel was not in any position to accept or deny such application.

10. On December 15, 2017 the IBSF Doping Hearing Panel, consisting again of the undersigned members, continued at the Municong Congress Center at the Airport in Munich, Germany the hearing of December 1, 2017. The purpose of the hearing was to decide on the question whether the Oswald Decision would give reason to re-impose the provisional suspension that was lifted by the Doping Hearing Panel by its December 1, 2017 decision.

11. The Athlete participating in the hearing by means of Skype was represented by his legal representative Philippe Bärtsch (Schellenberg Wittmer Ltd) of Geneva, Switzerland. Mr Bärtsch presented his arguments at the hearing. His written submission is attached to this Decision as Annex V.

12. The IBSF Doping Hearing Panel refers for the facts of the matter against the Athlete and the reasons for the IBSF to originally provisionally suspend the Athlete to Annex III, the Oswald Decision.

II. QUALIFICATIONS

13. The IBSF relied for the conduct of a follow up investigation into a possible anti-doping rule violation of the Athlete and its decision to provisionally suspend the Athlete exclusively on the Oswald Decision (in the meaning of article 7.7 of the IBSF ADR). The IBSF did not perform itself any further investigation into the facts and circumstances of the matter. The IBSF Doping Hearing Panel did not receive any additional investigation performed by the IBSF. The IBSF Doping Hearing Panel understands under the current exceptional circumstances such approach of the IBSF Anti-Doping Administrator.
14. The IBSF Doping Hearing Panel understands the position of the IBSF as such that the IBSF is satisfied by the Oswald Decision that an anti-doping rule violation by the Athlete has occurred. The Athlete has been properly notified in accordance with article 7.7 of the IBSF ADR and in accordance with article 7.9.2 provisionally suspended by the IBSF.

15. It follows from the above that the IBSF Doping Hearing Panel for its assessment of this case and the question whether it should re-impose the provisional suspension of the Athlete has to rely as well exclusively on the findings in the Oswald Decision.

III LEGAL FRAMEWORK

16. The IBSF ADR sets out in article 7.9.2 the regime with regard to an Optional Provisional Suspension:

"In case of an Adverse Analytical Finding for a Specified Substance, or in the case of any other anti-doping rule violations not covered by Article 7.9.1, IBSF Anti-Doping Administrator or its delegate may impose a Provisional Suspension on the Athlete or other Person against whom the anti-doping rule violation is asserted at any time after the review and notification described in Articles 7.2–7.7 and prior to the final hearing as described in Article 8."

17. Article 7.9.3 and especially article 7.9.3.2 of the IBSF ADR give rules on how a provisional suspension in accordance with the above provision can be challenged. Article 7.9.3.2 reads:

"The Provisional Suspension shall be imposed (or shall not be lifted) unless the Athlete or other Person establishes that: (a) the assertion of an anti-doping rule violation has no reasonable prospect of being upheld, e.g., because of a patent flaw in the case against the Athlete or other Person; or (b) the Athlete or other Person has a strong arguable case that he/she bears No Fault or Negligence for the anti-doping rule violation(s) asserted, so that any period of Ineligibility that might otherwise be imposed for such a violation is likely to be completely eliminated by application of Article 10.4; or (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes."

18. On December 1, 2017 the Athlete making use of the above article challenged before the IBSF Doping Hearing Panel successfully the decision of the IBSF to provisionally suspend him. With
the Oswald Decision in place now the IBSF is satisfied (moreover) that an anti-doping rule violation by the Athlete has occurred.

19. The IBSF Doping Hearing Panel acknowledges that the IBSF has a broad authority to suspend provisionally the Athlete of whom it has a reasonable cause to believe it has committed an ADRV. The IBSF refers in this respect to the CAS decision in the matter of Alexander Legkov versus the International Ski Federation (FIS) (CAS 2017/A/4968). CAS upheld a decision of the FIS to provisionally suspend the athlete Legkov for circumstances similar to the subject at the time the Oswald Commission did not provide its decisions yet.

20. CAS construed the relation between the articles 7.9.2 and 7.9.3.2 of the FIS Anti-Doping Rules (that are identical in this respect to the IBSF ADR) as follows in paragraph 174 of its award:

"Another possible reconciliation is to acknowledge that Article 7.9.2 (either independently or, as noted above, together with article 7.7) confers a broad discretion, but Article 7.9.3.2 effectively acts as cap on such discretion by precluding a suspension where the grounds for successful challenge as set out in (a), (b) or (c) are clearly present at the outset and where a suspension is being contemplated, but has not yet been imposed (the "Preclusion"). The Panel prefers the latter analysis (....)."

21. CAS thus introduces a cap on the discretion of (here) the IBSF to provisionally suspend athletes and such cap is found in article 7.9.3.2 under (a), (b) and (c) of the IBSF ADR. The IBSF Doping hearing panel has tested the provisional suspension of the Athlete that is to be imposed according to the request of the IBSF against the provision of article 7.9.3.2 under (c):

"... (c) some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a final hearing in accordance with Article 8. This ground is to be construed narrowly, and applied only in truly exceptional circumstances. For example, the fact that the Provisional Suspension would prevent the Athlete or other Person participating in a particular Competition or Event shall not qualify as exceptional circumstances for these purposes."

22. The IBSF Doping Hearing Panel has taken due notice of the fact that article 7.9.3.2 sub (c) of the IBSF ADR has to be construed narrowly and applied only in truly exceptional circumstances. It is clear and incontrovertible that the current situation qualifies as such "truly exceptional circumstances" in the present case.
IV APPLICATION OF ARTICLE 7.9.3.2 SUB (C) BY THE IBSF DOPING HEARING PANEL

A. Preliminary Remarks

23. The IBSF Doping Hearing Panel has no reason to doubt the facts that are presented by the Oswald Decision in the matter of the Athlete. In its decision of January 6, 2017 (attached hereto as Annex VI) the IBSF already made the following qualification in that respect:

"The Doping Hearing Panel has taken strong notice of the systemic Russian doping control manipulation and cover up that is mentioned in the McLaren-reports. The second report even sharpens the picture and confirms the findings of the first report and identifies summer, winter, and Paralympic athletes involved in the doping cover-up and manipulation (p.4 of McLaren Report II)."

24. At the same time the Doping Hearing Panel made the following nuance to the use of the above-mentioned findings in individual cases:

"However, the McLaren Report II makes as well very clear that it has not assessed the sufficiency of evidence to prove an anti-doping rule violation of an athlete. The Doping hearing Panel refers to page 35-36 of the McLaren Report II:

"The IP ("Independent Person") is not a Results Management Authority under the World Anti-Doping Code and therefore does not have the authority to bring forward ADRV cases against individual athletes. Accordingly the IP has not assessed the sufficiency of the evidence to prove an ADRV by any individual athlete. Rather, for each individual Russian athlete, where relevant evidence of possible manipulation to conceal positive tests has been uncovered in the investigation, the IP has identified that evidence and will have provided it to WADA. The different types of evidence provided with respect to any individual athlete are like strands in a cable. It will be up to each Results Management Authority to determine whether the provided strands of evidence, standing alone or together build a sufficiently strong cable to support an ADRV in an individual case. Alternatively, the information may simply provide intelligence of that athlete as "benefiting from alleged manipulations to conceal positive doping tests" and may inform possible future targeted testing by the federation."

25. The IBSF Doping Hearing Panel refers to the declaration of the Independent Person (Professor Richard H. McLaren, O.C., hereinafter to be referred to as well as "McLaren") in this respect that was submitted on September 21, 2017 on the request of the Oswald Commission (Submission 4 in the IOC Package relating to the Athlete). The Independent Person repeats that the evidence in the matter of the Athlete "was never obtained to establish an Anti Doping Rule
Violation case against individual athletes. For the avoidance of any doubt and to be very clear, the focus of the IP Investigation, based upon its mandate, was to review evidence to establish whether "there had been a manipulation of the doping control process during the Sochi Games..." and to "identify the modus operandi and those involved in such manipulation" (p.1).

26. The Oswald Commission concur with the conclusion of McLaren of the existence during the Olympic Winter Games Sochi 2014 of a scheme in which the samples of protected Russian athletes (.....) were swapped (..) (Oswald Decision, paragraph 129-132).

27. From the general observations of McLaren, the Oswald Commission comes to the conclusion that in general the investigation by McLaren "contain a wealth of relevant elements, which have contributed to help the Disciplinary Commission to understand the scheme put in place in Sochi and the implication of athletes therein" (Oswald Decision, paragraph 142).

28. The Oswald Commission's mission was to conduct investigations into Russian athletes who participated in Sochi 2014 to determine whether they, and if so, which athletes, had actually participated in the conspiracy mentioned by McLaren and benefitted from it (Oswald Decision, paragraph 95).

29. The Oswald Commission stated that "the relevance of the elements related to the individual athletes has to be considered from a different perspective" (paragraph 133 of the Oswald Decision). The Oswald Commission observed that in his reports and specifically in the IP Report 2 McLaren carefully explained how the elements provided in his reports regarding individual athletes had to be understood and used.

30. The Oswald Commission qualifies as the authority responsible for assessing the relevant evidence in cases concerning the application of the IOC Anti-Doping Rules. It came to the conclusion that the relevant evidence in this respect unquestionable includes the elements provided in the reports and also in the EDP's, which McLaren prepared for that very purpose in respect of each of the athletes against which the Oswald Commission has opened proceedings (paragraph 138 and 140 of the Oswald Decision).

31. The Oswald Commission in this respect qualified the statements of Dr Grigory Rodchenkov as being of major significance (Oswald Decision, paragraph 243). All evidence that McLaren had available was tested against the statements of Dr Rodchenkov and since (the team of) McLaren was the only person that had access to Dr Rodchenkov in this respect, the Oswald Commission concluded that McLaren is the best placed person to make an assessment of the reliability of what Dr Rodchenkov had reported. McLaren came to the conclusion that Dr Rodchenkov was
a "truthful witness". This was one of the key findings of McLaren Oswald Decision, Paragraph 245 and 246).

32. The Oswald Commission reviewed all aspects of the case and all elements available and became convinced that Dr Rodchenkov was telling the truth for a large number of reasons, of which a number are mentioned in paragraph 249 of the Oswald Decision. Dr Rodchenkov was the main actor in the system and he is the best placed person to explain what it was, according to the Commission.

The qualification "major significance" by the Oswald Commission referring to Dr Rodchenkov's statements makes sense, since in a number of cases against the athletes involved there was no other evidence available (no Salt, no scratches or marks on bottles) other then the fact that the athlete was mentioned by Dr Rodchenko to be on the "Duchess-list".

B. Dr Rodchenkov

33. The Oswald Commission in the case of the Athlete reports its findings in Paragraph 365 up to and including Paragraph 388. Reference is made to Oswald Decision.

34. The subjects paragraphs show that the Oswald Decision leans heavily in the individual case of the Athlete on the statements of Dr. Rodchenkov. This is not surprising, where McLaren and consequently the Oswald Commission came to the conclusion that "Dr. Rodchenkov was the main actor in the system and he is the best placed person to explain what it was".

35. The IBSF Doping Hearing Panel is prepared to accept the conclusions drawn in the McLaren reports about the involvement of individual athletes and the trustworthiness of Dr Rodchenkov. The IBSF Doping Hearing Panel has at least no grounds to come to another decision in this respect.

36. However, the conclusion of both McLaren and the Oswald Commission that (a) Dr Rodchenkov is the main actor in the system and (b) the best placed person to explain what it was, is the core of the decision of the Oswald Commission to sanction individual athletes and is at the foundation of the decision of the IBSF to provisionally suspend the Athlete.

37. The athletes that are confronted with the statements of Dr Rodchenkov and that are implicated by his accusations need to be protected and safeguarded by legal rights in order to provide them a due process. This leading principle is here the core of what the IBSF Doping Hearing Panel will have to decide upon.
38. The IBSF Doping Hearing Panel will review in that respect two main arguments that are relevant to the question whether the athletes were protected sufficiently in their legal rights to receive due process, being Article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair process and the provisions regarding Substantial Assistance in the WADA Code and in the (identical) IBSF ADR.

C. ECHR

39. The IBSF Doping Hearing Panel respects the fact that the internal proceedings of the IBSF do not require protection in the same manner as the accused in a criminal proceeding, for example. However, it is generally accepted by WADA following the receipt of a detailed opinion from the former President of the European Court of Human Rights Judge Jean-Paul Costa, that the applicability of the principles of proportionality and human rights are now expressly in the purpose, scope and organization of the Code. (https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code).

40. According to Judge Jean Paul Costa:

"Whenever disciplinary anti-doping procedures concern rights and obligations of a civil nature, they fall under the scope of application of Article 6 § 1 of the Convention regarding the right to a fair trial."

According to the IBSF Doping Hearing Panel the principle of Article 6 of the Convention has to be reflected in the same manner in matters regarding Provisional Suspension as in Final Decisions, when assessing whether an previous decision (the Oswald Decision, on which a provisional or final suspension respectively will have to be based) complied with the right of the Athlete to a fair trial.

41. When considering the admission of evidence from absent witnesses, as is the case in the Oswald Decisions where Dr. Rodchenkov as key witness was not examined or cross examined, the European Court of Human Rights used to apply a three-step process in assessing whether Article 6 has been complied with:

1. Were there good reasons for the witnesses absence from the trial?
2. Was the absent witness’ evidence “sole or decisive”?
42. In more recent cases the European Court relied more strongly on the sole question whether there is other supporting evidence securing the conviction other than the evidence of the absent witness. The threshold for the sufficiency of additional evidence will be higher in the event that the absent witness evidence is more important, as is the matter in the subject case.

42. According to the IBSF Doping Hearing Panel there were no good reasons for Dr Rotchenkov to be absent from the hearing before the Oswald Commission. Dr Rodchenkov mentioned in an article in the New York Times ("NYT") of September 22, 2017 (Annex VII hereto) his availability and willingness to provide his testimony before WADA and Hearing Panels of Federations, but none of them ever sought to interview him. According to Dr Rodchenkov in the same NYT interview only one of the two IOC commissions established to investigate Russian doping asked for his evidence—and "that was just two weeks ago" (thus around 8 September 2017). This latter request will have led to the affidavits of Dr Rodchenkov of November 2, 2017,

43. The fact that Dr Rodchenkov was able to give an interview to the NYT in September 2017 and the fact that there were apparently no constraints for that, questions the attempts made by the Oswald Commission to have Dr Rodchenkov present (even by skype or other technical means) at a hearing before its commission to be interrogated by the Oswald Commission and cross examined by the Athlete's representatives. The statement in Paragraph 272 of the Oswald Commission is not sufficient justification to be absent if invited properly and timely. The question remains why Dr Rodchenkov was not already invited at the very start of the Oswald Commission, in order to avoid the time pressure that is now used as an argument why the affidavit of Dr Rodchenkov would suffice:

"Because of the constraints linked to the conditions imposed on any intervention of Dr Rodchenkov on the one hand, and the already mentioned time constraints requiring a resolution of the matters without further delay, the only practicable solution at that stage of the proceedings was the provision of written affidavits."

44. In the opinion of the IBSF Doping Hearing Panel and being the foundation of both McLaren and the Oswald Commission the evidence of Dr Rodchenkov -the absent witness- was "decisive" in placing sanctions on the Athlete.

45. In earlier CAS matters similar arguments have been used, although reference was made not to article 6 of the Convention but to Swiss procedural law:

CAS 2015/ A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO)
"35. At the beginning of the hearing and after considering the respective arguments of Appellant and Respondent, the Panel determined that the admissibility of Dr. Schanzer’s 27 May 2015 expert report is a matter of Swiss procedural law and exercised its discretion to exclude it as evidence because of his unavailability for cross examination during the hearing in accordance with its 18 May 2015 ruling."

In the above matter the expert report was declared unadmissible since the expert was not available for cross examination. The similarities with the subject case are clear.

**D. WADA CODE AND IBSF ADR: SUBSTANTIAL ASSISTANCE**

46. It goes without saying that Dr Rodchenkov has committed an Anti-Doping Rule Violation as provided for in the WADA Code and the IBSF ADR, during the years that he ran the Moscow Laboratory as director.

47. By cooperating with McLaren in disclosing evidence about a widespread doping scheme in Russia, Dr Rodchenkov is to be regarded as an individual providing "Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations". The WADA Code (applicable in this matter through article 1.2 of the IOC -Doping Rules) in article 10.6.1 and the IBSF ADR in article 10.6.1 allows to:

"suspend a part of the period of Ineligibility imposed in an individual case in which it has results management authority where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to IBSF."

48. The definition of Substantial Assistance according to the WADA Code and the IBSF ADR reads:

"Substantial Assistance: For purposes of Article 10.6.1, a Person providing Substantial Assistance must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any"
case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought."

49. In the definition of "Substantial Assistance" there are important procedural obligations inserted, that to the opinion of the Doping Hearing Panel are there to be able for the Anti-Doping Organization or Hearing Panel to consider the reliability of the individual providing such assistance and —even so important— to safeguard the legal position of third parties, among which other athletes, against allegations of such individual without the third parties (athletes) being able to adequately defend themselves against these allegations. Two of such procedural obligations are:
   A) presenting testimony at a hearing
   B) before a hearing panel or Anti-Doping Organization if so requested,

50. Both obligations have not been complied with in the subject case. The testimony of Dr Rodchenkov to McLaren cannot be regarded as a testimony before an Anti-Doping Organization or hearing panel,. The mandate of McLaren was of another nature and he made clear in several statements that the evidence he received was never obtained to establish an Anti-Doping Rule Violation case against the individual athletes.
   Dr Rodchenkov was requested by the Oswald Commission to present his testimony at a hearing since the Oswald Commission stated that it had preferred to be able to hear Dr Rodchenkov in person. Instead of the hearing Dr Rodchenkov submitted an affidavit.

51. The IBSF Doping Hearing Panel regards the fact that no examination of Dr Rodchenkov took place before an Anti-Doping Organization or hearing panel, where he was prepared to provide his testimony at a hearing and the Oswald Commission itself preferred the same, (even as the representative of the Athlete did) as a violation of the WADA Code and the IBSF ADR on the obligation to follow procedural rules in respect of substantial assistance in discovering Anti-Doping Rule Violations.

V CONCLUSION

52. The IBSF Doping Hearing Panel comes to the conclusion that not hearing Dr Rodchenkov before a proper Disciplinary Commission or Hearing Panel instead of exclusively before McLaren is in breach of the WADA Code and the IBSF ADR and especially of article 10.6. of the WADA Code and article 10.6. of the IBSF ADR.

53. The IBSF Doping Hearing Panel comes to the conclusion that not hearing Dr Rodchenkov before a proper Disciplinary Commission or Hearing Panel instead of exclusively before McLaren is convincingly probable to be successively contested before a Court as being not compatible with
the principles of international law, Swiss procedural law and in particular with article 6 § 1 of the European Convention for the Protection of Human Rights regarding the right to a fair process.

54 Following from the above conclusions it leads the IBSF Doping Hearing Panel to the finding that a provisional suspension of the Athlete under the current, exceptional circumstances would be clearly unfair within the meaning of article 7.9.3.2 sub (c) of the IBSF ADR.

The IBSF Doping Hearing Panel emphasises that article 7.9.3.2 sub (c) just refers to the fact that a Provisional Suspension prior to a final hearing in accordance with Article 8 would be clearly unfair. The Doping Hearing Panel envisages that at such IBSF final hearing or at another hearing before a Disciplinary Doping Panel such as for instance CAS, the procedural deficiency mentioned above may be removed by examining and cross-examining Dr. Rodchenkov (as said before, to which he has declared to be prepared).

55. The decision of the IBSF Doping Hearing Panel following the considerations in this document is not to re-impose the provisional suspension of the Athlete.

56. The IBSF Doping Hearing Panel would like to add the following consideration to its decision in this matter. The IBSF Doping Hearing Panel did not make any decision in this document about the validity of the McLaren report and the documents that have been made available to the IBSF. Nor has the IBSF Doping Hearing Panel expressed any opinion on the Oswald Decision, other than that the IBSF Doping Hearing Panel came to the conclusion that there was a legal necessity to have Dr Rodchenkov as witness available for examination and/or cross examination in order to create equality of treatment and therewith due process, which the Oswald Commission denied wrongfully.

DECISION

1. The IBSF Doping Hearing Panel having considered all information made available to it and for all the legal reasons and in the exceptional circumstances mentioned above diligently comes to the conclusion not to re-impose the provisional suspension of Alexandr Zubkov that was imposed on him by the IBSF on 23 November 2017 and lifted by the IBSF Doping Hearing Panel on December 1, 2017.

2. The IBSF Doping Hearing Panel noted that no application was made by the IBSF in respect of costs. Therefore, the IBSF and the Athlete shall bear their own costs.

IBSF Doping Panel, 18 December 2017