Arbitration CAS 2012/A/2767 Nadir Bin Hendi v. Union Internationale Motonautique (UIM), award of 20 December 2012 (operative part of 12 September 2012)

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Michele Bernasconi (Switzerland); Mr Maurizio Cohen (Monaco)

Powerboat racing
Doping (methylhexaneamine)
CAS power of review
Conditions for the elimination or reduction of the period of ineligibility for specified substances
Evidential burden of proof

1. **According to Article R57 of the Code the CAS panel has full power to review the facts and the law. This means that the CAS appellate arbitration procedure entails a de novo review of the merits of the case, which it is not confined to merely deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it is the function of the CAS panel to make an independent determination as to whether the parties' contentions are inherently correct rather than only to assess the correctness of the decision appealed against.**

2. **Rule 10.4 of the UIM Anti-Doping Rules contains three conditions which the athlete must satisfy to eliminate or reduce the prescribed period of ineligibility for specified substances for a first doping offence, i.e. 2 years. The first condition requires the athlete to establish how the specified substance entered his/her body. The second condition requires the athlete to establish that he did not take the specified substance to enhance performance. If, but only if, those two conditions are satisfied, the athlete can adduce evidence as to his/her degree of culpability with a view to eliminating or reducing his period of suspension. All three conditions have to be satisfied to achieve such result.**

3. **There are circumstances in which notwithstanding that the legal burden is placed upon a party, an evidential burden may be placed upon the other party.**

1. THE PARTIES

1.1 Nadir Bin Hendi ("the Appellant") is a multiple time world champion, European Champion, and Middle East champion in the sports of Jet-ski and offshore powerboat racing. He is currently a member of the Victory Team in Dubai, serving frequently as throttleman.

1.2 The Union Internationale Motonautique ("the Respondent") is the governing body of the sport of powerboat racing and is recognized as such by the International Olympic Committee;

it is also a member of the General Association of International Sports Federations and the Association of the IOC Recognized International Sports Federations. The UIM was established in Belgium in 1922 and transferred to Monaco in 1988, where it functions in conformity with Law No. 1355, dated 23 December 2008, for an unlimited period.

2. THE APPEAL

The Appellant appeals against the first decision of the UIM Tribunal ("UIMT") of 23 March 2012 suspending him for a period of 2 years commencing on 21 November 2011 ("the Decision") for a doping offence under the UIM Anti-Doping Regulations ("the Rules") which are based, *mutatis mutandis*, on the 2009 WADA Code ("WADC").

3. FACTUAL BACKGROUND

3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

3.2 The Appellant once suffered from nasal blockages.

3.3 In October 2005 the Appellant was first treated for complaints of nasal blockage by Dr. Bakul Kotak, at which time Dr. Kotak diagnosed a deviated nasal septum, and prescribed a Xyclomod nasal spray ("the XC spray") until such time as the Appellant underwent septoplasty surgery.

3.4 The XC spray is manufactured by Ursapharm, and its active ingredient is xylometazoline hydrochloride. The product does not disclose the presence of any banned substances; specifically, xylometazoline is not listed as a banned substance.

3.5 In October 2008, Dr. Rahman as well detected in the Appellant a deviated nasal septum to the right side and hypertrophy of the left interior turbinate; Dr. Rahman also prescribed the XC spray for continued use.

3.6 In November 2010, Dr. Habib confirmed the earlier diagnosis of deviated nasal septum, and noted almost total obstruction of the right nasal passage and partial obstruction of the left side. Dr. Habib further noted the Appellant's use of XC spray, and recommended once more that he continue to use it until such time as he could have surgical treatment (to relieve his chronic nasal symptoms).

3.7 The Appellant continued to regularly use XC spray during waking hours on an hourly basis (well in excess of the prescribed amount) until the positive test, described hereafter.

3.8 On 15 October 2011, at a world championship in Cernobbio, Italy, the Appellant was subjected to an in-competition test, which disclosed in his sample the presence of Methylhexaneamine ("MHA") and so constituted an adverse analytical finding ("AAF").

3.9 MHA is banned as a stimulant by the Respondent, and is listed as a Specified Substance within the meaning of UIM Anti-Doping Rule 4.2.2; it was added to the WADA List of Prohibited Substances in 2010, and was designated by WADA as a Specified Substance in 2011.

3.10 On 21 November 2011 the Appellant was, upon notification of the AAF, provisionally suspended by the Respondent.

3.11 On 26 November 2011 a hearing was held before the UIMT, at which time the Appellant's representatives disclosed that he had been treating his broken nose with the XC spray; and that he believed that to be the cause of the AAF.

3.12 In response to the mention of the XC spray as the possible cause of the AAF, the UIMT adjourned the hearing but, after receipt of advice received from the head of a WADA accredited laboratory, and upon resumption:

(i) found that the Appellant could not establish that that the AAF finding was caused by the use of the XC spray,

(ii) disqualified his results from the 15 October 2011 competition,

(iii) confirmed his provisional suspension,

(iv) however allowed the Appellant to *"enter further defence and or evidence by 10th December 2011 at the latest"*.

3.13 On 2 December 2011, the Appellant requested a complete laboratory documentation package for the testing of the "A" and "B" samples #3532670; and requested additional time to submit his written defense, until at least 15 January 2012.

3.14 On 6 December 2011, the Appellant filed an appeal to the Court of Arbitration for Sport ("CAS") directed against the provisional suspension issued by the UIMT, and requested provisional relief allowing him to compete at the 2011 UIM Class 1 World Powerboat Championships, which were to commence on 8 December 2011.

3.15 On 7 December 2011, the Deputy President of the CAS Appeals Arbitration rejected the request for provisional relief.

3.16 On 8 December 2011, the UIMT:

(i) held that the Appellant, Boat no.3 be disqualified from both races of the UIM C1 World Championship Event in Cernobbio 15 – 16 October 2011 and from all other results and points obtained at that event;

(ii) ruled that he remained provisionally suspended from racing until a final decision concerning a possible ineligibility (under Rule 10.2) was taken;

(iii) stated that he might enter an additional defence to his potential ineligibility and to the requested laboratory documentation package by 15 January 2012 as requested;

(iv) stated that a final decision would be taken subsequently.

3.17 On 14 December 2011, the Appellant accordingly withdrew his CAS appeal, noting that it had been strictly limited to the issue of the provisional suspension, and expressly reserving his right to appeal the final decision of the UIMT on the merits of the alleged anti-doping rule violation, pursuant to Article 13 of the Rules.

3.18 On 16 December 2011, the CAS issued its termination order with respect to the Appellant's appeal (limited to the issue of the provisional suspension).

3.19 On 21 December 2011, the Appellant underwent surgery to correct his nasal symptoms.

3.20 On 13 January 2012, the Appellant made a further submission to the UIMT, and requested that his case be decided on an expedited basis.

3.21 On 13 February 2012, the UIMT found that there was insufficient evidence to conclude that the Appellant's AAF was caused by the XC nasal spray, and gave the Appellant until 21 February 2012 to submit further evidence.

3.22 On 7 March 2012, having still received no final decision from the Respondent, the Appellant wrote to WADA requesting that WADA intervenes.

3.23 WADA did not intervene.

3.24 On 23 March 2012 the UIMT issued the appealed Decision.

4. SUMMARY OF SCIENTIFIC TESTING AND RESEARCH

4.1 Research by UIM: at the Federazione Medico Sportiva Italiana anti-doping laboratory in Rome on 30 November 2011.

Subsequent to the 15 October 2011 "positive test", the Respondent had a bottle of the XC spray tested to determine if it was contaminated with or contained MHA. The test proved negative.

4.2 Research by Dr. Hussein Farghaly: at the International Poisoning and Pharmaceutical Consultancies ("IPPC") in Alexandria, Egypt, in early 2012, described in a report dated 1 May 2012.

Dr. Farghaly administered Sanger's test to determine the possible presence of aliphatic amines as impurities of xylometazoline (the active ingredient in the XC spray) which revealed that the XC spray did, in fact, contain aliphatic amines as impurities, which, in his view, were similar in structure to MHA, i.e.: ethylene amine, hexane amine and octane amine.

4.3 Research Conducted by Mr Paul Scott at Scott Analytics, Science in Defense of Sport between 2 May and 31 May 2012:

Mr. Scott initially received 2 bottles of XC spray from the Appellant. One of those bottles was initially tested for MHA. None was found in it.

Mr. Scott also had a male volunteer use the XC spray, and provide a urine sample. Initial testing of that urine sample was inconclusive, but the chromatographic peaks suggested that in Mr Scott's view further study was warranted.

Accordingly, Mr Scott acquired an additional five bottles of XC spray from the Appellant, in order to conduct a lengthier study, in which a male volunteer used the XC spray on a much more frequent basis for a 2 week period, and provided urine samples periodically during this 14 day period. Testing of those urine samples was conducted by LC/MS/MS; the testing of the samples collected days 7, 9 and 11 in this 14-day period was positive *for MHA*.

4.4 Research by Aegis laboratory IN Nashville, Tennessee between 1 and 11 June 2012:

Mr Scott's findings were confirmed by Aegis laboratory for all 3 days and additionally day 14.

5. PROCEEDINGS BEFORE CAS

5.1 On 11 April 2012 the Appellant filed his statement of appeal at the CAS against the UIMT Decision dated 23 March 2012, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration ("the Code").

5.2 On 23 May 2012 the Appellant filed his appeal brief and request for a brief extension to submit laboratory testing documents as evidence.

5.3 On 4 June 2012, the Appellant was granted his requested extension of time to file additional documents, which the Appellant duly did on 15 June 2012.

5.4 On 9 July 2012 the Respondent filed its answer.

6. THE CONSTITUTION OF THE PANEL AND THE HEARING

6.1 By letter dated 10 May 2012, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: The Hon. Michael J. Beloff MA QC, Barrister in London, England (President), Mr Michele A.R. Bernasconi, Attorney-at-law in Zurich, Switzerland and

Mr Maurizio Cohen, Attorney-at-law in Monaco, Monaco (arbitrators). The parties did not raise any objection as to the constitution and composition of the Panel.

6.2 By Order of Procedure dated 3 September 2012, signed by the parties, the parties confirmed that the CAS has jurisdiction over this dispute and the date of the hearing.

6.3 A hearing was held on 5 September 2012 at the CAS, Château de Béthusy, Lausanne. At the close of the hearing, the parties confirmed that they were satisfied as to how the hearing and the proceedings had been conducted.

6.4 In addition to the Panel and Ms Louise Reilly, Counsel to the CAS, the following people attended the hearing: Mr Nadir Bin Hendi, who gave evidence, and his wife, Mrs Safa Bin Hendi (who was an observer). The Appellant was represented by Mr Howard Jacobs. Mr Paul Scott gave expert evidence on behalf of the Appellant. The Respondent was represented by Mr Andrea Dini, UIM Secretary General and Mr Kimon Papachristopoulos, UIM Legal Consultant. Dr. Stephane Bermon and Dr. Irene Mazzoni gave expert evidence by telephone on behalf of the Respondent.

6.5 In light of the Appellant's objections to the Respondent calling Dr Bermon and Dr Mazzoni, at the outset of the hearing the Panel ruled that Dr Bermon could be heard if his role was confined to explaining and justifying the UIMT Decision but he could not introduce supplementary, analytical material; the Panel ruled that the same restriction would apply to Dr Mazzoni.

7. THE PARTIES' SUBMISSIONS

A. The Appellant's Submissions and Requests for Relief

7.1 The Appellant's submissions were as follows:

(1) Under Art. R57 of the Code, CAS both could and should review all of the facts and the law, including the evidence of Mr Scott which postdated the Decision, and which the Respondent had not sought to contradict.

(2) Even in a case involving a Specified Substance, such as the present, the athletes can escape a penalty upon a finding of no fault or negligence (cf. the Rule 10.5.1: "If a Driver establishes in an individual Case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated").

(3) This is a case where the positive test was caused by a situation where the non-prohibited XC spray either:

(i) caused a false positive for MHA; or

(ii) metabolized in such a way as to cause a positive test for MHA.

(4) The Appellant here has provided an explanation as to the cause of the positive test, supported by evidence, which should be accepted, especially where no alternate explanation of a possible cause is provided by the UIM (see, CAS 2011/A/2384 and 2386, at para 263: *"The likelihood of alleged alternative scenarios having occurred is, however, to be taken into account when determining whether the athlete has established, on a balance of probabilities, that the source he is alleging of entry into his system of the Prohibited Substance is more likely. It is in this manner that the Panel understands §5.9 of CAS 2009/A/1930"*).

(5) The present case should be distinguished from many nutritional supplement cases, where the prohibited substance was actually contained in the product (whether disclosed or undisclosed;. see, e.g. CAS 2011/A/2495-2498, involving caffeine pill contaminated with furosemide; CAS 2011/A/2515, involving nutritional supplement that contained methylhexaneamine described on label as "1,3 Dimethylpentylamine"; and CAS 2010/A/2107 involving nutritional supplement that contained oxilofrene on the label described as "methylsynephrine" where, a *"no fault or negligence"* finding was precluded by the Comments to WADC 10.5.1, which have been interpreted by CAS as precluding such a finding because athletes have been warned for years that supplements can be contaminated with banned substances that are not disclosed on the labels; see also CAS 2009/A/1870, at para 127).

Unlike in those other cases, where the supplement was shown to contain the prohibited substance, the XC spray itself has been shown not to contain any MHA, despite the AAF.

(6) The Appellant could not have known that ingredients of the XC spray would cause a positive test for the banned substance MHA; even WADA did not know that (cf. CAS 2007/A/1312, where at para 160 it was held that the athlete was not at fault in a situation involving a contaminated catheter, since neither the athlete nor the anti-doping organization knew of the risk of a contaminated, used catheter causing a positive drug test for cocaine; the Panel noted that *"if the CCES was unable to appreciate the risks, we cannot expect the Appellant to have known about them either"*).

(7) Based therefore on the appropriate finding of no fault or negligence, Appellant should receive no penalty at all.

(8) Alternatively the Appellant relies on Rule.10.4 which provides as follows:

> *"Where a Driver or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such specified Substance was not intended to enhance the Driver's sport performance or mask the use of a performance- enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following*:
>
> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

To justify any elimination or reduction, the Driver or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Driver or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".

(9) The Appellant has shown how the MHA entered his body, i.e. from the XC spray.

(10) The Appellant's explanation as to the cause of the positive test, should be accepted where no alternate explanation of a possible cause is provided by the Respondent (see, again, CAS 2011/A/2384 and 2386.).

(11) On the evidence the Appellant could not have used MHA to enhance his sport performance, since he was unaware that the XC spray could be metabolized into it (see, CAS 2011/A/2645, at para 78-82; CAS 2010/A/2107, at paras 9.14 and 9.17).

(12) (Alternatively to 11) on the evidence the Appellant did not use the XC spray to enhance his performance but for bona fide medical purposes.

(13) For all of these reasons, given the absence of any or any above minimal fault, the appropriate sanction under UIM Anti-Doping Rule 10.4 is a warning, and at most, in the light of other MHA cases, is a 6 month sanction with reference to CAS 2011/A/2515, where a 6 month sanction was imposed and *UK Anti-Doping v. Wallader*, where the sanction was of 4 months. In each of those cases, unlike in the present, the substance itself (methylhexaneamine) was disclosed on the label of each of their products, albeit misdescribed (see CAS 2011/A/2495-2498 para 8.25 – 8.26. and CAS 2011/A/2645, paras 91-93, where a warning was the sanction imposed in analogous circumstances.

(14) In the further alternative, the Appellant submits that any sanction in excess of six months would be disproportionate. Under Swiss law, a penalty is valid only if it is consistent with the fundamental principle of proportionality (with reference to TAS 2007/O/1381 at p. 17, para 99; CAS 2005/C/976 & 986, p. 49, paras 138-9). Pursuant to such principle, the severity of a penalty must be in proportion with the seriousness of the infringement (CAS 1999/A/246; TAS 2007/A/1252).

7.2 For all of the foregoing reasons, Appellant requested that the Panel:

(1) Declare that Appellant's appeal should be upheld;

(2) Declare that the 2 year sanction issued by the UIM Doping Hearing Panel be set aside;

(3) Reinstate any results that were set aside by the UIM Doping Hearing panel;

(4) Declare that:

(i) Appellant has established that his positive test was due to no fault or negligence, pursuant to UIM Anti-Doping Rule 10.5.1, such that the otherwise applicable period of ineligibility shall be eliminated; or

(ii) In the alternative, that Appellant has established that UIM Anti-Doping Rule 10.4 applies, and that the appropriate sanction is a warning (or at a maximum, not to exceed 6 months); or

(iii) In the alternative, that any sanction in excess of 6 months would be disproportionate.

(5) Award Appellant a contribution toward his costs in this Appeal.

B. The Respondent's Submissions and Requests for Relief

7.3 The Respondents submit as follows:

(1) The Appellants doping offense was established by the results of the analysis of the A and B sample which had both been provided by him on 15 of October at the UIM C1 World Championship Event in Cernobbio held from 15 – 16 October 2011.

(2) The A sample and, on request of the Appellant, the B sample were tested. Both analyses result in an AAF of MHA (a specified substance) in the Appellant's urine.

(3) The sample collection and the test were conducted by the WADA accredited *"Federazione Medico Sportiva Italiana Laboratorio Anti-doping"* (FMSI). The documentation package showed no irregularities in the sample collection and in the analysis procedure.

(4) The AAF finding in the Appellants specimen constitutes a doping offence according to article 2.1 of the Rules.

(5) The Appellant could neither before the UIMT nor before CAS prove how the substance entered into his body nor that he had no intention to enhance his performance in the use thereof.

(6) The expert reports of Dr Farghaly did not provide sufficient proof of the Appellant's innocence to the requisite standard. With regard to Xylometazoline Dr Farghaly conceded that its metabolism is not yet known and with regard to the alphaticamines he conceded that it is not known how they result in a positive test for MHA. In short, his reports contain no more than unproven theory.

(7) The analysis of the sample of the XC spray which was provided by the Appellant did not confirm the presence of MHA.

(8) The expert from WADA, Dr. Mazzoni, who is there in charge of research and of the prohibited list, stated, after her own study and consultation with further experts, that the metabolism of xylometazoline is not completely known, but the only metabolite reported in the literature would bear no resemblance to MHA. In addition, looking at the degradation products reported in the literature, none of them gave rise to MHA.

(9) The chemical structure of Xylometazoline, made it very difficult to envision the possibility of it producing MHA through biotransformation.

(10) The concentration of MHA in the Appellants sample was approximately 20 ug/mL, which would be surprisingly high for a hypothesized metabolite or the metabolite of an alleged impurity.

(11) None of the aliphatic amines found in the impurities would be precursors for the synthesis of MHA.

(12) Mr Scott's report is also inadequate for the following main reasons:

(a) It was a single testing of only one volunteer. Any scientific proof based on testing of volunteers requires a certain number of the same in order to produce a reliable result and to exclude abnormalities and other mistakes that can occur during such testing.

(b) The solitary volunteer is anonymous and is not available as a witness.

(c) It is not known what the volunteer consumed during the testing period: he may have consumed unknowingly or knowingly any drinks, food products, supplements or medicine containing MHA during the testing period and that may have caused the positive result for MHA.

(d) Mr Scott admittedly provides no scientific explanation for the alleged metabolic process resulting in the positive test.

(13) Accordingly the Appellant satisfies the conditions of neither Article 1.4 or of 10.5 of the Rules for any reduction or elimination of sanction;

(14) The cases relied on by the Appellant provide no useful precedent given their different context and circumstances.

7.4 The Respondents therefore ask that the appeal be dismissed and the final decision of the UIMT be upheld, *i.e.*

1. The Appellant has committed a doping offense at the UIM C1 World Championship Event in Cernobbio 15 – 16 October 2011 according to art 2.1 of the UIM Anti-Doping rules. The presence of MHA in his sample was established.

2. The Appellant, Boat no 3 is disqualified from both races of the UIM C1 World Championship Event in Cernobbio 15 – 16 October 2011 and from all other results and points obtained at that event.

3. The Appellant is ineligible to participate in powerboat racing for a period of 2 years, commencing on 21 November 2011 and ending on 20 November 2013.

In addition, the Appellant had to be disqualified according to art. 10.1 of the anti-doping rules from all other results obtained at the UIM C1 World Championship event in Cernobbio 15 – 16 October 2011, since it is likely that his results in the race on 16 October 2011 and in all other competition have been affected by the anti-doping rule violation (art. 10.1.1 of the UIM Anti-Doping rules).

8. JURISDICTION OF THE CAS

8.1 Article R47 of the Code provides as follows:

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.

8.2 Article 13.2.1 of the Rules provides as follows:

13.2.1 Appeals Involving International-Level Drivers

In cases arising from competition in an International Event or in cases involving International-Level Drivers, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.

8.3 The jurisdiction of the CAS over this Appeal is accordingly both clear and undisputed.

8.4 CAS's jurisdiction was further confirmed by the parties' signing the Order of Procedure.

14 ADMISSIBILITY[1]

14.1 Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

[1] [Sections 9 to 13 omitted in original award].

14.2 The UIMT decision was issued on 23 March 2012 and the appeal was filed on 11 April 2012. It follows that the appeal was filed in due time and is admissible. Furthermore, the admissibility of the appeal is uncontested.

15 APPLICABLE LAW

15.1 Article R58 of the Code provides as follows:

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.

The applicable regulations are the Rules.

15.2 The Rules provide, so far as material, as follows:

"R2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Driver's Sample

2.1.1 It is each Drivers personal duty to ensure that no Prohibited Substance enters his or her body. Drivers are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Driver's part be demonstrated in order to establish an antidoping violation under Article 2.1.

[Comment to Article 2.1.1: For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), UIM's Anti-Doping Rules adopt the rule of strict liability which was found in the Olympic Movement Anti-Doping Code ("OMADC") and the vast majority of pre-Code anti-doping rules. Under the strict liability principle, a Driver is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in a Driver's Sample. The violation occurs whether or not the Driver intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault. If the positive Sample came from an In-Competition test, then the results 29 of that Competition are automatically invalidated (Article 9 (Automatic Disqualification of Individual Results)). However, the Driver then has the possibility to avoid or reduce sanctions if the Driver can demonstrate that he or she was not at fault or significant fault (Article 10.5 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances)) or in certain circumstances did not intend to enhance his or her sport performance (Article 10.4 (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances)). The strict liability rule for the finding of a Prohibited Substance in a Driver's Sample, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all "clean" Drivers and fairness in the exceptional circumstance

where a Prohibited Substance entered a Driver's system through No Fault or Negligence or No Significant Fault or Negligence on the Driver's part. It is important to emphasize that while the determination of whether the anti-doping rule has been violated is based on strict liability, the imposition of a fixed period of Ineligibility is not automatic. The strict liability principle set forth in International Federation's Anti-Doping Rules has been consistently upheld in the decisions of CAS.]

R4.2.2 Specified Substances

For purposes of the application of Article 10 (Sanctions on Individuals), all Prohibited Substances shall be "Specified Substances" except (a) substances in the classes of anabolic agents and hormones; and (b) those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.

R10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited

Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years' Ineligibility.

[Comment to Article 10.2: Harmonization of sanctions has been one of the most discussed and debated areas of antidoping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Drivers are professionals making a sizable income from the sport and in others the Drivers are true amateurs; in those sports where a Driver's career is short (e.g., artistic gymnastics) a two year disqualification has a much more significant effect on the Driver than in sports where careers are traditionally much longer (e.g., equestrian and shooting); in Individual Sports, the Driver is better able to maintain competitive skills through solitary practice during disqualification than in other sports where practice as part of a team is more important. A primary argument in favor of harmonization is that it is simply not right that two Drivers from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between IFs and National Anti-Doping Organizations.]

10.4 Elimination or Reduction of the Period of Ineligibility for specified Substances under specific Circumstances

Where a Driver or other Person can establish how a specified Substance entered his or her body or came into his or her possession and that such specified Substance was not intended to enhance the Driver's sport performance or mask the use of a performance- enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Driver or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Driver or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

[Comment to Article 10.4: specified Substances as now defined in Article 4.2.2 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a specified Substance could be very effective to a Driver in competition); for that reason, a Driver who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation. This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Driver in taking a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the specified Substance or the timing of its ingestion would not have been beneficial to the Driver; the Driver's open Use or disclosure of his or her Use of the specified Substance; and a contemporaneous medical records file substantiating the non-sport- related prescription for the specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Driver to prove lack of an intent to enhance sport performance. While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Driver may establish how the specified Substance entered the body by a balance of probability. In assessing the Driver's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Driver's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that a Driver would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Driver only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.]

R10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

R10.5.1 No Fault or Negligence

If a Driver establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Driver's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Driver must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

R10.5.2 No Significant Fault or Negligence

If a Driver or other Person establishes in an individual case that he or she bears No significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in a Driver's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Driver must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

[Comment to Articles 10.5.1 and 10.5.2: UIM's Anti-Doping Rules provide for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Driver can establish that he or she had No Fault or Negligence, or No significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti- Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Driver was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation. Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where a Driver could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Drivers are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by the Driver's personal physician or trainer

without disclosure to the Driver (Drivers are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Driver's food or drink by a spouse, coach or other person within the Driver's circle of associates (Drivers are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) If the Driver clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Driver exercised care in not taking other nutritional supplements.) For purposes of assessing the Driver or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Driver or other Person's departure from the expected standard of behavior. Thus, for example the fact that a Driver would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Driver only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. While minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Driver or other Person's fault under Article 10.5.2, as well as Articles 10.4 and 10.5.1. Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Driver or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility]".

15.3 Neither party has contended that any provision of any national law is engaged in the present appeal procedure. The submissions have focused on the Rules. Neither party has submitted that the principle of proportionality additionally invoked by the Appellant is unique to Swiss law or that the law of the domicile of the Respondent, i.e. the Principality of Monaco, does not recognize that well-established principle.

15.4 Accordingly, the Panel will indeed apply the Rules and, additionally as far as relevant, the principle of proportionality as vouched for by previous CAS jurisprudence (BELOFF ET AL., Sports Law, 2nd ed., 2012, paras. 1.44 and 1.52)

16 MERITS

16.1 According to Article R57 of the Code the Panel has *"full power to review the facts and the law"*. As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, which it is not confined to merely deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it is the function of this Panel to make an independent determination as to whether the parties' contentions are inherently correct rather than only to assess the correctness of the UIMT Decision (see CAS 2007/A/1394, para. 21).

16.2 This case turns on the interpretation and application of Rules 10.4 and 10.5 of the Rules. The Panel will consider each in turn.

16.3 Rule 10.4 contains three conditions which the athlete must satisfy to eliminate or reduce the prescribed period of ineligibility for a first doping offence, i.e. 2 years. The first condition ("Condition (i)") requires the athlete to establish how the specified substance entered his body. The second condition ("Condition (ii)") requires the athlete to establish that he did not take the specified substance to enhance performance. If, but only if, those two conditions are satisfied, the athlete can adduce evidence as to his degree of culpability with a view to eliminating or reducing his period of suspension ("Condition (iii)"): All three conditions have to be satisfied to achieve such result (CAS 2010/A/2230, paras 11.3-4).

16.4 Moreover, satisfaction of the Condition (i) is a *sine qua non* of proceeding to Condition (ii). Proof of absence of intent to enhance performance on the clear language of the Rule provide an answer to the threshold question of how the specified substance entered the athlete's body. The two Conditions (i) and (ii) are distinct (CAS 2010/A/2230*,* para 11.6).

16.5 The athlete bears the burden of satisfying Condition (i) and the standard of proof is expressly one of balance of probabilities. The athlete must therefore show that it is more likely than not that his explanation of how the specified substance entered his body is correct – in mathematical terms he must be over the 50% threshold. The higher standard of comfortable satisfaction applies only to Condition (ii).

16.6 In the present case the Appellant asserted that his use of the XC nasal spray explained the presence of MHA in his urine sample and the AAF. It was not in issue that he did indeed use such a spray during the competition at which he was tested. His own evidence to this effect was not challenged: it was supported by unimpeachable medical evidence from several doctors: and such use was indeed declared on the DCF.

16.7 As to whether the XC spray was the cause of the positive test, the Appellant initially relied on two experts: Dr Farghaly and Mr Scott but during the course of the hearing Appellant realistically and rightly accepted that Dr Farghaly's evidence was insufficient to carry the Appellant over the 50% threshold. Dr Farghaly's evidence was indeed hypothesis without verification. The only relevance of Dr Farghaly's hypothesis is historical inasmuch as it stimulated Mr Scott to carry out his own test.

16.8 The Panel finds as a fact that Mr Scott in subjecting a single volunteer to several dosages of the XC spray identified that the volunteer's sample did indeed contain MHA. Appellant suggested that for the Respondent to reject Mr Scott's evidence was tantamount to making an accusation of scientific fraud. This is not the view of the Panel. The issue before the Panel is not what Mr Scott found but the conclusion to be drawn from it. Nor was the Panel disposed to reject the evidence because, as the Respondent suggested, Mr Scott was not a neutral. This Panel recognises that when an expert offers his opinion on behalf of a party, the circumstances in which he was engaged and the nature of his instructions may require a careful assessment of the weight to be attached to it. But Mr Scott was not offering an opinion: he was describing

the result of an experiment. He found what he found - it is not suggested otherwise: and his results were confirmed by the Aegis laboratory although expressly qualified by the reference in its report to a lack of validation data. It does not, however, follow that what he found is decisive in favour of the Appellant.

16.9 The Panel noted that Mr Scott was careful to say only that his tests showed that the use of the XC spray can produce a positive sample i.e. that it was possible for it to do so. The use of the word "possible" in this context requires explanation. The Panel does not interpret it as distinguishing, for Article 10.4 purposes, between what was merely possible as distinct from probable: but rather to say that a causal link between such use and such sample could be shown. Whether the tests carried out by Mr Scott showed that it was more probable than not that the use of the XC spray explained the presence of the MHA in the Appellant's sample (and in such quantities) is a separate question.

16.10 In the Panel's view Mr Scott's tests fell well short of acceptable scientific standards. He was – as he admitted – constrained by considerations of both time and money. In a perfect world, he would have used a cohort of volunteers: included the Appellant in them: and had a control group. A comprehensive test would have taken months, not weeks. Mr Scott accordingly conceded that his results would not justify publication in a peer-reviewed journal, which itself reflects the insufficiency of a single test as the basis for a convincing thesis.

16.11 The Panel was concerned additionally about the following matters:

(1) Given that the volunteer was a solitary volunteer, there was no way of knowing whether or not he was typical in his response to the dosages administered or was an outlier.

(2) While the Panel naturally accepts that volunteers in experiments of this kind conventionally remain anonymous, in this instance the Panel was unable to question this solitary volunteer as to potentially material matters: his physiology (which could affect metabolism), his lifestyle, what he had ingested during the period of the tests other than the XC spray, etc.

(3) Mr Scott admitted that:
   (a) although he had asked the volunteer at the outset of the test whether he was consuming anything other than his ordinary food and drink, the volunteer had only, at a second time of asking and at the conclusion of the tests, mentioned additionally Gatorade and Cytomax;
   (b) he had not asked the volunteer specifically about whether he was consuming energy drinks;
   (c) he had wholly omitted to ask the volunteer whether he was taking any medication.

(4) There was moreover no documentation which indicated on a daily basis – or at all – what the volunteer was taking on any of the test days.

(5) It was common ground that the XC spray itself contained no MHA. No explanation was provided for the metabolic means whereby a spray which contained no MHA could itself, when used, result in a positive sample for MHA. While it is true that, as argued by the Appellant, the Panel is concerned with whether, and not with how, use of the spray could produce a positive test for MHA, in the absence of an answer to the how question, doubt is raised as to the soundness of the answer advanced by Mr Scott as to the whether question.

(6) Dr. Mazzoni, whose list of scientific credentials in chemistry and biochemistry was impressive (and who had the expertise in metabolism which Mr Scott admitted he himself lacked) disputed that there would be any causal connection between the use of the spray and the positive sample which (if correct) meant that the presence of MHA in the volunteer's sample must have some other cause. There was no scientific evidence adduced by the Appellant to contrary effect: the Panel repeats – Dr. Farghaly's report was hypothesis, not thesis.

(6) In particular the disparity between the amount of MHA found in the Appellant's sample and that found in the volunteer's sample – which as Mr Scott accepted could be of the order of 100-1 (or to put it another way the latter being 1% of the former) even, making all allowances for the fact that these figures were extrapolations from a qualitative (as distinct from quantitative analysis), disabled the Panel from making a sufficient read-across from the volunteer's to the Appellant's positive samples. Mr Scott suggested that the disparity might be accounted for by the fact that the Appellant's long term use of the spray, according to his evidence, was far in excess of that which medical advice permitted to be administered to the volunteer: but given the short half- life span of MHA itself, Mr Scott could only say that the half-life of such compounds as were potentially responsible for the two positive tests must be significantly different but were unknown. Given the fact that the burden of proof under Rule 10.4 is placed on the Appellant, this attempted reliance on what is unknown rather than what is known is insufficient.

(7) The Panel is aware that it may be difficult for an athlete, a lay person, to provide a disciplinary tribunal with scientifically robust evidence. The Panel can envisage circumstances where the requirements of Article 10.4, in particular condition (i), can be satisfied without provision of such evidence. However in the case before it, the evidence provided by the Appellant in the form of Mr. Scott's evidence did not satisfy the Panel that, on the balance of probabilities, the XC spray used by the Appellant was responsible for the presence of MHA in the Appellant's body.

16.12 The Appellant himself had the products disclosed on his DCF subjected to analysis, all of which was negative (though the Panel notes that it was only products of the same kind which could be tested, since *ex hypothesi*, those he had consumed during the competition were not

available for testing). This exercise, however, only showed at best what could not have produced the positive result, not what could.

16.13 The Appellant also suggested that he volunteered for the critical doping test as a replacement for the designated crew member who was at the material time in dialogue with the Crown Prince of Dubai. The implication of such evidence, if accurate, was that he must have believed that he had nothing to hide. The Panel did not find this part of his evidence reliable. It was the first time the Appellant had mentioned that he came to be tested in that way. Moreover, it was inherently improbable since such arbitrary substitution of a person for testing would have flatly contradicted proper doping control procedures.

16.14 There was a further peculiarity in the Appellant's oral testimony. He claimed never to have been submitted to testing before this occasion. Yet both in an undated written statement handed in at the UIMT hearing and in the appeal brief before CAS, he claimed to have been tested on several previous occasions. The Panel found his explanation that the statement provided to the UIMT was drafted by someone else unconvincing: the statement was put forward – indeed described – as his statement. In any event, this explanation would itself display on his part a certain casualness towards important matters. But whether this was his first test or one of several does not seem to the Panel relevant to the issue arising under Condition (i).

16.15 It was also urged upon the Panel that, because, as was common ground, the Appellant rejected a proposal from the Respondent that he should admit to unwitting ingestion of a supplement containing a specified substance (from the Respondent's perspective, the Panel accepts, a proposal designed to prompt him to come clean rather than to mislead), this indicated that the Appellant was not prepared to take (untruthfully) a short cut leading to early reinstatement. The Panel would only observe that such a short cut would not have resulted in a completed acquittal of the Appellant of the charge of falling short of the highest standards demanded of professional athletes in modern sport to avoid ingestion of specified substances. But in the final analysis the outcome of his appeal turns on the solidarity (or lack of it) of the Appellant's scientific case and not on the cogency of his own evidence.

16.16 The Panel acknowledges that the Respondent's answer defence was not without its imperfections. In breach of Rule R55 they did not indicate at the time of filing their answer that they intended to call Dr. Mazzoni as a witness. For that reason the Panel did not permit her to address the detail of Mr Scott's evidence, since it would have unfairly have disadvantaged the Appellant. Furthermore, her criticism of Dr Farghaly (and indeed that of Mr Bermon) in support of the UIM Panel made reference to discussions with other scientists some named e.g. Dr. Saugy and Professor Ayotte, and some unnamed, without providing any report at all of the detail of what they said, still less any report from them. The Panel could not give weight to hearsay evidence adduced in so informal manner.

16.17 Nonetheless the Panel reminds itself that the Respondent has no burden to discharge. It can take its stand on the position that the Appellant's evidence does not meet the threshold of

balance of probabilities. The Appellant placed reliance on a passage in *Contador* cited above at para 7.2 (4). The Panel does not read that passage as in any sense contradicting the allocation of burden in Article 10.4 of the Rules. It acknowledges that there are circumstances in which notwithstanding that the legal burden is placed upon a party, an evidential burden may be placed upon the other party. However, the circumstances of the present case do not fall within such a category, and the Panel does not see any reason to depart from the usual allocation of the burden of proof.

16.18 The Panel wishes to make it clear that the dispositive factor which leads it to dismiss the present appeal is the inability of the Appellant to meet the standard of balance of probability in the evidence adduced on his behalf. It is, the Panel recognises, possible that the XC spray was the cause of the AAF, but establishment of a possibility is not the same as establishment of a probability; the law (in Article 10.4) recognises that crucial distinction. The Panel is not required to, and therefore does not accuse the Appellant of deliberate doping.

16.19 Had the Appellant passed the relevant threshold, there would be no issue as to his ability to satisfy the other conditions in Article 10.4. It is clear beyond doubt that he did not use the XC spray in order to enhance his sport performance but for therapeutic purposes. Equally, even assuming that for this purpose that use of the XC spray was responsible for the AAF, he could be entirely acquitted of any fault at all, since neither he nor indeed WADA or anyone else could have recognised the possibility of such use leading to an AAF for MHA.

16.20 The Panel need not consider the alternative case advanced by the Appellant under Rule 10.5 since under either limb of that rule, establishment of how the specified substance entered the athlete's body is, as it is under Rule.10.4, a precondition of utilization of the Rule to eliminate or reduce sanction.

16.21 The Panel has also been invited to consider whether the standard sanction of 2 years for a first offence is nonetheless disproportionate in the Appellant's case. The Panel accept that the mere fact that a sanction is prescribed does not mean it is proportionate but it stresses the exceptional nature of those few cases where the doctrine has been independently relied on.

16.22 In the particular circumstances of this case, the Panel is content to say that it discerns no valid reason to conclude the standard sanction of two years to be disproportionate.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Nadir Bin Hendi on 11 April 2012 against the decision of the UIM Anti Doping Hearing Panel dated 23 March 2012 is dismissed.

2. The decision of the UIM Anti Doping Hearing Panel is confirmed.

3. (…).

4. (…).

5. All other or further claims are dismissed.