Arbitration CAS 2013/A/3347 World Anti-Doping Agency (WADA) v. Polish Olympic Committee (POC) & Przemyslaw Koterba, award of 22 December 2014

Panel: Judge Conny Jörneklint (Sweden), Sole Arbitrator

Weightlifting
Doping (amphetamine)
Non-participation of the respondent to an appeal proceeding
Factors to be considered in reducing the period of ineligibility under Article 10.5.2 ADR
Balance of probability as the applicable standard of proof
Period of ineligibility and reasons of "fairness" for backdating the starting date of the suspension.

1. **The participation of the respondent is mandatory to an appeal proceeding. Otherwise the appeal would be inadmissible due to the absence of a valid legal procedural-relationship between the parties to the proceedings. Especially in doping proceedings that involve – as does the case at hand – the magnification of the sanction imposed on the athlete, it would be procedurally unacceptable to make a decision on the merits if the athlete concerned has not been properly included in the proceedings; at the very least, he/she should receive knowledge of the proceedings in such a way that enables the person to legally defend him/herself. Only if the respondent had knowledge of the appeal proceedings and the knowledge he had was of such a nature as to enable him to defend himself and his legal interests is it possible to conduct the proceedings in his absence.**

2. **For purposes of assessing the athlete's or other person's fault under Article 10.5.2 (no significant fault or negligence) of the relevant Anti-Doping Regulations (ADR), the evidence considered must be specific and relevant to explain the athlete's or other person's departure from the expected standard of behaviour. Thus, for example the fact that an athlete would lose the opportunity to earn large sums of money during a period of ineligibility or the fact that the athlete 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.**

3. **The standard of proof for anti-doping rule violations is expressed in Article 3.1 ADR. Where the rules place the burden of proof upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be one of a balance of probability, except as provided in Articles 10.4 and 10.6 where the athlete must satisfy a higher burden of proof. It follows that the athlete has to establish how the prohibited substance entered his body by a balance of probability. According to CAS case law, the balance of probability means that the athlete has to convince the adjudicating authority that the occurrence of the circumstances on which his/her defence is based is more**

probable than the non-occurrence or than other possible explanations of the charges pertaining to doping. Mere speculations, unsupported by any evidence of any kind cannot pass the balance of probability test.

4. **The strict application of Article 10.9 ADR dealing with the starting date of the period of ineligibility could lead to apparently unfair situations: an athlete, for instance, could serve his/her sanction years after the adverse analytical finding; or, having already served a portion of a sanction following a provisional suspension stayed or on the basis of a first instance decision, find him/herself in the situation of serving, some time thereafter, a second part of the sanction – which actually appears to be a second sanction. The former situation was underlined by various CAS panels to be a reason of "fairness" for backdating the starting date of the suspension.**

I. THE PARTIES

1. The World Anti-Doping Agency (WADA or the "Appellant") is a Swiss private law foundation with its seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

2. The Polish Olympic Committee (POC or "First Respondent") has the mission to develop, promote and protect the Olympic Movement in Poland, in accordance with the Olympic Charter. It has its seat in Warszawa, Poland.

3. Mr. Przemysław Koterba (the "Athlete" or "Second Respondent") is a weightlifter affiliated with the Polish Weightlifting Federation, (PWF), the governing body for weightlifting in Poland.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as submitted by the Parties in their written submissions and in the evidence examined during the course of the proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

5. On 26 May 2012, on the occasion of the Polish National Senior Championship in Zakliczyn (Poland), the Athlete was selected to provide a urine sample.

6. On the Doping Control Form, the Athlete disclosed that he had taken the following products: Olfen, Voltaren, Dicloduo, Maiamil, B12 and Miligamma.

7. The sample provided by the Athlete was analyzed by the WADA-accredited laboratory in Warszawa, Poland, which reported an adverse analytical finding. The Athlete tested positive for amphetamine, which appears on the WADA 2012 Prohibited List under the group S6. Stimulants, (a) Non-Specified Stimulants.

8. On 25 July 2012, the Anti-Doping Disciplinary Commission of the Polish Weightlifting Federation decided to impose a six-month period of ineligibility upon the Athlete further to his anti-doping rule violation.

9. On 25 March 2013, WADA filed an appeal against this decision with the Court of Arbitration for Sports of the Polish Olympic Committee (the "CAS POC").

10. By a decision issued on 3 September 2013 (the "Appealed Decision"), the CAS POC dismissed WADA's appeal and confirmed the six-month ban.

11. In short, the CAS POC found that (i) the Athlete tested positive for a specified substance, (ii) that the Athlete established how the prohibited substance entered his body, (iii) that he did not intend to enhance his sport performances and (iv) that the 6-month period of ineligibility was appropriate.

12. The CAS POC made the following determinations in its decision (in its English translation):

> *"1. The appeal is dismissed.*
>
> *2. Pursuant to Article 92 clause 4 of the Regulations of the Court of Arbitration for Sports at the Polish Olympic Committee, the final fee is set at the amount of PLN 4,000 (four thousand), payable to the Court of Arbitration for Sports at the Polish Olympic Committee".*
>
> *[…]*
>
> *IV. Violation of anti-doping regulations.*
>
> *1. Amphetamine, for which the athlete tested positive, is a prohibited substance shown under category "S6 (a)" - Non-specified Stimulants in the WADA List of Prohibited Substances 2012. The use of that substance in competition is prohibited.*
>
> *2. Therefore, the athlete must be deemed to have violated Article 2.1 of the Model Anti-Doping Rules.*
>
> *V. Decision as to sanction.*
>
> *[…]*
>
> ***The Court of Arbitration for Sports at the Polish Olympic Committee considered as follows:***
>
> *WADA's appeal against the decision of the Disciplinary, Anti-Doping and Transfer Board of the Polish*

Weightlifting Federation, issued on 25 July 2012, does not deserve to be granted.

Pursuant to Article 10.4 of the Model Anti-Doping Rules, whenever the athlete or another person can explain how the specific substance got into the athlete's body or how the athlete came into the possession of that substance, and demonstrate that the substance was not used to improve the athlete's performance or to conceal the use of a performance-boosting substance, the duration of the penalty consisting in the ban on participation in contests, as provided for in Article 10.2 shall be replaced as follows: for the first violation - from reprimand without the ban on participation in future contests up to two (2) years of such ban.

In the light of Article 10.4 sentence 2 of the Model Anti-Doping Rules, to substantiate the waiver or shortening of the ban period, the athlete or another person must submit, along his/her deposition, also evidence in its confirmation that will convince the disciplinary board as to the absence of the intention to improve performance or to conceal the use of a performance-boosting substance. The criteria for considering the possibility of shortening the ban period is the degree of the athlete's or another person's guilt.

Within the meaning of Article 10.4 of the Model Anti-Doping Rules, to meet the requirement of demonstrating how the prohibited substance got into the athlete's body, it is sufficient to provide a plausible account of related circumstances.

The athlete is obliged to demonstrate the circumstances that supposedly occurred, the so-called "probability balance" taken into consideration. According to the case law of the Court of Arbitration for Sport in Lausanne, the "probability balance" means that the defendant athlete has to convince the adjudicating authority that occurrence of the circumstances on which his/her defence is based is more probable than non-occurrence or than other possible explanations of the charges pertaining to doping, see Judgement of the Court of Arbitration for Sport in Lausanne in case: Wawrzyniak vs. the Greek Football Federation, Ref. No. CAS 2009/A/2019).

In view of the above and of the facts of this case, the Court fully believes the depositions of the athlete and his coaches and treats them as sufficiently plausible explanations of the way how the prohibited substance, i.e. amphetamine, got into the athlete's body.

The athlete has never before tested positive during anti-doping tests, which makes it highly probable that he was not taking drugs before the test concerned in this case. Besides, amphetamine is a psychotropic drug that is sometimes taken as a stimulant at parties, which should obviously meet with due disapproval. The factual circumstances of this case taken into account, it is highly probable that such prohibited substance could have been added, even quite unintentionally and by chance, to the athlete's glass of beer during a party at his home. One should bear it in mind that even the athlete himself said, "I could have met the wrong kind of people during a private party". The athlete' explanations suggest that some of the guests could have brought amphetamine to the party.

Practical experience and logical thinking taken into account, the circumstances described by the athlete explain in a sufficiently plausible manner how amphetamine could have got into his body without his knowledge and will.

In this Court's opinion, also the other condition under Article 10.4 sentence 2 of the Model Anti-Doping Rules - that the prohibited substance was not used to improve the athlete's performance or to conceal another performance-boosting substance - has been met.

The physico-chemical properties of amphetamine hardly suggest that its use might significantly improve the athlete's performance in his specific discipline, i.e. weightlifting. Amphetamine increases neither the muscle bulk

nor strength, which are the two most important features in weightlifting. This also follows from the testimony of witness Mirosław Chlebosz, who said, "I am aware of the effect of amphetamine on performance weightlifters. I have never encountered a case where an athlete would take amphetamine to improve his result".

Within analysis of the possibility that the athlete actually took amphetamine to improve his performance, one should consider the way in which that prohibited substance got into his body. One cannot possibly assume that the amphetamine that was introduced into the athlete's body during a party (quite apart from his being unaware of that fact) was actually taken with the purpose of improving his results in weightlifting. As follows from the circumstances, amphetamine could have been taken only as a stimulant at the very most.

The decision of the PWF Disciplinary, Anti-Doping and Transfer Board of 25 July 2012, despite the absence of substantiation and indication of the legal grounds for the penalty of 6 months' disqualification and ban on participation in national and international contests, is compliant with the Model Anti-Doping Rules.

It is beyond all doubt that during the test on 26 May 2012, the athlete tested positive for a prohibited substance - amphetamine. Although not guilty, the athlete failed to exercise due care in preventing introduction of the prohibited substance into his body. However, the circumstances of that introduction and the fact that amphetamine was not used to improve the athlete's performance taken into account, the penalty is adequate.

Giving the arbitral award in this case, the Court also bore it in mind that by the moment of lodging of the appeal by WADA (i.e. 25 March 2013), the athlete had already served the whole of the penalty and taken up participation in contests. The increase of severity of the penalty imposed on the athlete after such penalty has actually been served would offend the basic principles of equity and justice".

13. The Appealed Decision was notified to WADA on 3 October 2013.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 11 October 2013, WADA filed its statement of appeal serving as appeal brief with the Court of Arbitration for Sport (CAS) against the Appealed Decision.

15. By a letter dated 16 October 2013, notified to the First Respondent on 25 October 2013, the CAS Court Office informed the parties that the case had been assigned to the Appeals Arbitration Division of the CAS and should, therefore, be dealt with according to Article R47 *et seq.* of the Code of Sports-related Arbitration (2013 edition) (the "Code"). The CAS Court Office further invited the Respondents to submit to the CAS an answer containing *inter alia* a statement of defence, any contentions of lack of jurisdiction, and any exhibits or specifications of other evidence they intended to rely on. Finally, the CAS Court Office took note of the Appellant's request that the present case be submitted to a sole arbitrator and had suggested nomination of Dr. András Gurovits, attorney at law in Zürich, Switzerland. The Respondents were invited to inform the CAS Court Office whether they agreed to the appointment of a sole arbitrator and to the suggested arbitrator. The Respondents were informed that in the absence of an answer or in case of disagreement, the President of the CAS Appeals Arbitration Division or his Deputy, in accordance with Article R50 of the Code, would decide these issues, taking into account the circumstances of the case.

16. The CAS Court Office was informed by the DHL that it was not able to deliver the CAS letter of 16 October 2013 to the Athlete. WADA provided on 15 November 2013 a new address for the Athlete. In a letter dated 25 November 2013, the CAS Court Office informed WADA that DHL still was not able to deliver the CAS letter to the Athlete. As an answer WADA provided a telephone number to the Athlete. Yet, DHL remained unable to deliver the letter. As a consequence, WADA, on 12 December 2013, provided a new address and a new telephone number. According to a DHL report the statement of appeal serving as appeal brief was finally delivered to the Athlete on 16 December 2013.

17. On 13 November 2013 the POC filed its answer in accordance with Article R55 of the Code and agreed to submit the case to a sole arbitrator leaving the appointment of the sole arbitrator for the decision of the President of the CAS Appeals Arbitration Division.

18. The President of the CAS Appeals Arbitration Division nominated Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden, as the Sole Arbitrator for this case to which none of the parties objected. The nomination of the Sole Arbitrator was confirmed in a letter to the Parties of 25 March 2014.

19. On 21 May 2014, the CAS Court Office issued an Order of Procedure and requested the parties return a signed copy of such Order by 28 May 2014. On the same day, WADA returned a signed copy of the Order of Procedure confirming that its right to be heard had been fully upheld. The POC, however, declared on 29 May 2014 in essence that it has no standing to be sued and shall, thus, not be deemed a party to the CAS proceedings and that it will not sign the Order of Procedure. The Athlete did not return a signed copy of the Order of Procedure although the respective DHL reports show that the CAS Court Office's letter containing the Order was delivered to the Athlete on 22 May 2014. Within said order, the CAS Court Office notified the Parties that the Sole Arbitrator considered himself to be sufficiently informed to decide the matter without the need to hold a hearing, pursuant to Article R57 of the Code.

IV. THE PARTIES' SUBMISSIONS

A. The Appellant

20. On 11 October 2013, in its "Appeal Brief", the Appellant requested CAS to rule as follows:

> *"1. The Appeal of WADA is admissible.*
>
> *2. The decision of the Court of Arbitration for Sports of the Polish Olympic Committee in the matter of Mr Przemysław Koterba is set aside.*
>
> *3. Mr Przemysław Koterba is sanctioned with a 2-year period of ineligibility starting on the date on which the decision of the Court of Arbitration for Sports enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Przemysław Koterba) before the entry into force of the decision shall be credited against the total period of ineligibility to be served.*

4. *All competitive results obtained by Mr Przemysław Koterba from 26 May 2012, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prices.*

5. *WADA is granted an Award for costs".*

21. The Appellant's submissions in support of its request can be summarized, in essence, as follows:

Regarding the anti-doping rule violation:

Article 2.1 ADR provided that *"The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample"* constituted an anti-doping violation.

Amphetamine was a prohibited substance, which was classified under S6 (a) "non-specified stimulants" on the 2012 WADA Prohibited List. It was prohibited in competition.

The presence of a prohibited substance in the bodily sample of the Athlete was duly established by the analysis conducted by the WADA-accredited laboratory in Warsaw. Furthermore, the adverse analytical finding was not challenged by the Athlete.

Consequently, the violation by the Athlete of Article 2.1 ADR (presence of a prohibited substance or its metabolites or markers in an athlete's sample) was established.

Regarding the sanction: According to Article 10.2 of the ADR, the Athlete shall incur a two-year period of ineligibility for a first anti-doping violation.

The CAS POC had erred in applying Article l0.4 ADR since this provision only applied for specified substances. But amphetamine was not a specified substance, as expressly specified by the WADA Prohibited List.

Pursuant to Article 10.5 ADR, which applied for non-specified substances, an athlete can establish that, in view of the exceptional circumstances of his individual case, the period of ineligibility shall be eliminated (in case of no fault or negligence as per Article 10.5.1 of the ADR) or reduced (in case of no significant fault or negligence as per Article 10.5.2 of the ADR).

According to the constant CAS case law, the proof of the Athlete on how the prohibited substance has entered his system was a necessary prerequisite condition in establishing an absence of fault or a no-significant fault (see CAS 2005/A/922, 923 & 926; CAS 2006/A/1067; CAS 2006/A/1130, § 41).

The Athlete was required to prove his allegations on the "balance of probability". The balance of probability standard entailed that the athlete has the burden of convincing the adjudicatory body that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the positive testing (CAS 200B/A/1515, § 116).

At the hearing which had been held before the CAS POC, on 3 September 2013, it seemed that the Athlete had confessed that he had not known how amphetamine had entered his system. However, he had thought that he could have been somehow contaminated *"during a party where alcohol had been served"*. He had further explained that *"somebody could have added something to my glass of beer, and this, as I see it, is the only possible explanation"*.

In the Appellant's opinion, these explanations were highly suspicious and hypothetical. Moreover, the declarations of the Athlete were not substantiated by any evidence. Under these circumstances, it must be found that the Athlete had not established, on a balance of probability, how the prohibited substance had entered his body; his mere declarations did not constitute sufficient evidence (see CAS 2008/A/1479; CAS 2007/A/1284 & 1308, para 117).

The Appellant further submits*, in arguendo*, that the ordinary two-year ban applicable for first anti-doping rule violations can nevertheless not be reduced since the Athlete bore a significant fault.

The cornerstone of the anti-doping legal system was the personal responsibility of the athlete for what he ingests. This fundamental principle was implemented in Article 2.1.1 of the ADR, which states as follows:

"It is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes 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, faults, negligence or knowing Use on the athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1 [=presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample]*"*.

The Appellant further submitted that in CAS 2005/C/976 & 9862, the panel offered the following opinion at paras. 73 and 74:

"The WADC [World Anti-Doping Code] *imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet) […]. The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition …. It is this standard of utmost care against which the behaviour of an athlete is measured if an anti- doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care"*.

In the Appellant's conclusion, in order to benefit from an elimination of the period of ineligibility for no fault or negligence, the athlete must thus establish that he did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution, that he had used or been administered the prohibited substance. As

confirmed by the CAS case law, the burden on an athlete to establish no fault or negligence was placed extremely high (CAS 2006/A/1025, Nr. 11-4; CAS OG 06/001 Nr. 4.11).

Moreover, the Appellant contents that the comments to Article 10.5.2 ADR made abundantly clear that the sanction can only be reduced under Article 10.5.1 and 10.5.2 which require that:

"[…] the circumstances are truly exceptional and not in the vast majority of cases".

Any evidence adduced within this context has to be *"specific and decisive"*. Certain specific examples of circumstances which will not entitle an athlete to a complete elimination of the sanction were given in the commentary section to Article 10.5 ADR which reads as follows:

"[…] A positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement, the administration of a prohibited substance by the player's team physician or coach without disclosure to the player, sabotage of the player's food or drink by a spouse […]". These examples highlight, in the Appellant's opinion, how exceptional the circumstances must be for an athlete to be able to avail himself of Article 10.5.2 ADR.

Given that athletes are held to be at fault even in the above circumstances, the Athlete could not invoke a highly improbable sabotage of his drink as a mitigating circumstance. Since the Athlete was bound by a duty of care, he should have avoided to put himself in an unsure situation - allegedly a few days before an important competition - by entering into an environment where people were using recreational drugs. At least, he should have been prudent enough not to accept drinks which were not in sealed bottles in order to avoid any risk of contamination or sabotage.

With respect to recreational drug use, the CAS had always been very reluctant to accept reduced sanctions, considering that the athletes were responsible for what they ingest (see CAS 2008/A/1627; CAS 2008/ A/1628; CAS 2008/ A/1516; CAS 2008/A/1479; CAS 2008/A/1515; CAS 2006/A/1130; CAS 2006/A/1067). In the constant CAS case law, the athletes, who were tested positive for recreational drugs (mostly cocaine), were found to have committed a significant fault or negligence.

In short, the Athlete had not established that he bore no fault or negligence, so that he must be sanctioned with a two-year period of ineligibility according to the Appellant.

B. The Athlete

22. The Athlete filed neither an answer within the time limit prescribed by the CAS Court Office by its letter of 16 October 2013 which became effective once such letter was notified to the Athlete by DHL nor any other submissions in his defence, nor did he otherwise participate in this appeal proceedings.

C. The POC

23. The POC submitted the following in its answer:

> *"Position of the Polish Olympic Committee*
>
> *1. The CAS POC is being considered as the autonomous and independent organisation under Polish law. Therefore the POC shall not be deemed responsible for the CAS POC rulings and/or actions.*
>
> *2. It should be also pointed out that proceedings before the CAS POC are confidential and the POC has no access to the case files of the CAS POC, including the files of the case at hand. Thus the POC does not know the facts or the legal aspects of the case.*
>
> *3. Concerning the case of Mr Przemysław Koterba the POC has access only to open components of the case files namely to the CAS POC decision dated 3 September 2013 with its grounds as well as to the note of a dissenting opinion of one of the Arbitrators of the Panel - Ms Maria Zuchowicz regarding the grounds of the decision at hand (which is being enclosed to this Answer to the Appeal for the CAS reference).*
>
> *4. In the light of the above the POC shall not take any stand in merits regarding Mr Przemysław Koterba's case. Consequently the POC shall not bring: any petitions in this case or motions as to evidence or witnesses or holding a hearing and shall leave the case at hand for the CAS examination and final decision".*

24. In its letter of 29 May 2014 refusing to sign the Order of Procedure, the POC added the following:

> *"[…] the POC declares that the [CAS POC] is an autonomous and independent organisation. In this respect the POC shall not be deemed as a party in the proceedings involving the [CAS POC's] rulings or actions.*
>
> *[…]*
>
> - *the POC denies its locus standi in the present case, as well as*
> - *the POC is not a party to any dispute, disagreement or misunderstanding relating to Mr. Przemysław Koterba*
> - *the POC has no intention to refer any case or dispute to the CAS at the moment and*
>
> *[…]".*

V. JURISDICTION OF CAS

25. 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 CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

[…]".

26. The CAS POC determined according to the applicable rules that:

"Like any other sports association, the Polish Weightlifting Federation (PWF) is obliged to observe the anti-doping regulations adopted by the Commission against Doping in Sport (CADIS), which is an independent organization to fight doping in the Republic of Poland. On 8 April 2004 the Commission adopted the World Anti-Doping Code ("the Code"); it operates under the Sports Act of 25 June 2010 (Journal of Laws No. 127, item 857), applying anti-doping regulations within all kinds of anti-doping control tests. Athletes, support crew (coaches, instructors, physicians etc.) as well as other persons who accept the anti-doping regulations as the precondition of participation in the sports competition are bound by those regulations. Basing on the Model Anti-Doping Rules, the Polish sports associations adopt anti-doping regulations, incorporating them in their charters and disciplinary bylaws, and are obliged to observe such regulations. Being a member of PWF, Przemysław Koterba is obliged to observe the anti-doping regulations".

27. The Sole Arbitrator doesn't find any reason not to accept what the CAS POC found according the applicable rules of this case. This means that jurisdiction in this matter is derived from Article 13 ADR. According to Article 13.2.3. WADA is entitled to appeal to CAS against a decision from CAS POC.

28. The jurisdiction of CAS is not disputed by the Parties and is otherwise confirmed by the Order of Procedure duly signed by WADA.

29. Therefore, CAS has jurisdiction to decide on the present matter. Under Article R57 of the Code, the Sole Arbitrator has full authority to review the facts and the law.

VI. APPLICABLE LAW

30. According to Article R58 of the Code:

"the Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such 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 Panel deems appropriate. In the latter case, the Court shall give reasons for its decision".

31. The Decision was issued under the ADR, and there is no dispute as to the applicability of the ADR in the present matter. Therefore, the ADR shall apply on the merits. As to procedural issues, the procedural rules of the CAS Code, supplemented by Swiss procedural law and principles are applicable as the CAS has its seat in Switzerland, pursuant to Article R28 of the Code.

VII. ADMISSIBILITY

32. Article 13.5 of the ADR provides as follows:

"The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by appealing party".

33. The Appealed Decision, rendered on 3 September 2013, was notified to WADA on 3 October 2013. The statement of appeal serving as appeal brief filed by WADA on 11 October 2013 was, thus, timely lodged before the expiry of the 21-day time limit set forth under the above-mentioned provision and is admissible.

VIII. THE SOLE ARBITRATOR'S FINDINGS ON THE MERITS

A. Valid legal procedural-relationship

34. The Sole Arbitrator acknowledges that the while the POC filed its Answer on 13 November 2013 and engaging in the present proceedings without any objection to its standing to be sued it only raised such objection by its letter of 29 May 2014 denying its *locus standi* and arguing that it should not be regarded as a party. The Sole Arbitrator notes in this respect Article R56 of the Code which provides:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument […] after the submission of the appeal brief and of the answer".

The First Respondent did not claim any exceptional circumstances for its late inclusion of its argument on the standing to be sued and the Sole Arbitrator fails to recognize such circumstances in the present case. Consequently, the First Respondent's argument put forward in its letter of 29 May 2014 is dismissed as late and the Sole Arbitrator deems it, for the sake of procedural economy, superfluous to enter into analysing the merits of such late argument.

With regard to the Second Respondent, the Sole Arbitrator notes that he refrained from communicating with the CAS Court Office and equally failed to submit his answer in accordance with Article R55 of the Code. It is, therefore, essential that the Sole Arbitrator resolves the question of whether a legally valid and binding procedural-relationship was established between the Appellant and the Second Respondent in order for the appeal proceedings to be conducted *in absentia*.

35. Article R55 of the Code provides as follows:

"If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award".

36. Moreover, the Sole Arbitrator refers to CAS jurisprudence providing that *"mandatory to an appeal proceeding is the participation of the respondent. Otherwise the appeal would be inadmissible due to the absence*

of a valid legal procedural-relationship between the parties to the proceedings. Especially in doping proceedings that involve – as does the case at hand – the magnification of the sanction imposed on the athlete, it would be procedurally unacceptable to make a decision on the merits if the athlete concerned has not been properly included in the proceedings; at the very least, he/she should receive knowledge of the proceedings in such a way that enables the person to legally defend him/herself" (CAS 2013/A/3112; CAS 2007/A/1284 & 1308).

37. As an initial matter, the Sole Arbitrator notes that the initial letter from the CAS Court Office including the statement of appeal serving as appeal brief - after some problems to obtain the right address - was sent to the Athlete by DHL, and that also the Order of Procedure was successfully delivered by the same way. According to the DHL report on record, the letter notifying the statement of appeal serving as the appeal brief was delivered to the Athlete on 16 December 2013 and the Order of Procedure on 22 May 2014.

38. In light of the above, the Sole Arbitrator is comfortably satisfied that the Athlete had knowledge of the appeal proceedings and the knowledge he had was of such a nature as to enable him to defend himself and his legal interests. Hence, in the Sole Arbitrator's view, a legally valid procedural-relationship between the Appellant and the Athlete has been established and the present appeal proceedings shall be conducted *in absentia* of the Second Respondent.

B. Anti-Doping Violation

39. As the CAS POC confirmed amphetamine, for which the Athlete tested positive, is a prohibited substance under category "S6 (a)" - Non-specified Stimulants in the WADA List of Prohibited Substances 2012. The use of that substance in competition is prohibited. Therefore, the athlete must be deemed to have violated Article 2.1 of the ADR.

C. Determining the sanction

40. According to Article 10 of the ADR the following sanctions are applicable:

> *"**10.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs***
>
> *An Anti-Doping Rule violation occurring during or in connection with an Event may lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.*
>
> *10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competition shall not be Dis-qualified unless the Athlete's results in Competition other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.*

10.2 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 Prohibited 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".

41. Therefore, the Sole Arbitrator now has to put under scrutiny whether Article 10.4 or 10.5 apply to the present case.

42. Article 10.4 ADR, which is identical to Article 10.4 of the current World Anti-Doping Code ("WADC"), states that elimination or reduction of the Period of Ineligibility for *Specified Substances* can be decided under Specific Circumstances.

43. In this case the Prohibited Substance is amphetamine. As already held in para 39, amphetamine is a Non-specified Stimulant mentioned under S6 (A) in the Prohibited List and not a Specified Substance. It follows that Article 10.4 ARD cannot be applied in the present case.

44. This conclusion means that the Sole Arbitrator has to analyse whether Article 10.5.1 or 10.5.2 ARD can be applied. These two articles and its commentaries read as follows:

"10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 *No Fault or Negligence*

If an Athlete 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 an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete 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.

10.5.2 *No Significant Fault or Negligence*

If an Athlete 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 eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete 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: The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete 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 Athlete 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 rule 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 an Athlete 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 (Athletes 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 Athlete's personal physician or trainer without disclosure to the Athlete (Athletes 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 Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes 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 Athlete 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 Athlete exercised care in not taking other nutritional supplements.)

For purposes of assessing the Athlete's 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 Athlete's or other Person's departure from the expected standard of behavior. Thus, for example the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete 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 Athlete's or other Person's fault under Article 10.5.2, as well as Articles 10.3.3, 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 Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility".

45. When a Prohibited Substance is detected in an athlete's Sample in violation of Article 2.1 the athlete has to establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced in application of Article 10.5.1 or 10.5.2 ADR.

46. The standard of proof is expressed in Article 3.1 ADR. Where the rules place the burden of proof upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be one of a balance of probability, except as provided in Articles 10.4 and 10.6 where the athlete must satisfy a higher burden of proof. It follows that the athlete has to establish how the Prohibited substance entered his body by a balance of probability. According to CAS case law, the balance of probability means that the athlete has to convince the adjudicating authority that the occurrence of the circumstances on which his/her defence is based is more probable than the non-occurrence or than other possible explanations of the charges pertaining to doping (see e.g. CAS 2009/A/2019, which the CAS POC referred to and CAS 2008/A/1515, which the Appellant used for reference).

47. In this case the Athlete has stated that he does not know how amphetamine entered his body, but has mentioned the possibility that it could have happened during a party where alcohol had been served and that someone had, to his ignorance, unknowingly to him put amphetamine in his glass. The Athlete has described that he had a private party in his home to which about 15 persons were invited. Among this group of people were no other athletes, only his acquaintances with no links to sport coming from the same village as the Athlete. The party took place when the Athlete returned from the World Championship and before the Polish Championship. The Athlete stated that the interval between the party and the test was 5 days.

48. The Athlete's suggestion that amphetamine entered his body through a beer contaminated by some of his friends is mere speculation, unsupported by any evidence of any kind. It is rather unlikely that a friend of the Athlete, who must have known that he was a successful athlete, would expose him to the risk of getting caught with amphetamine in his body. Even if the friend alleged to have contaminated the Athlete's glass of beer did not know that amphetamine was on the Prohibited List he or she must have known that amphetamine is an illegal drug. It is at least as plausible that the Athlete intentionally used amphetamine as a recreational drug.

49. It is therefore the Sole Arbitrator's conviction that the Athlete has not established on the balance of probability that amphetamine entered his body during the party without his intent. Consequently, Article 10.5.1 or 10.5.2 ADR are not applicable in this case and there is, therefore, no legal basis to reduce the sanction.

50. In conclusion, the Athlete shall be sanctioned pursuant to Article 10.2 ADR, which provides a two-year period of ineligibility.

D. The start date of the period of ineligibility

51. Pursuant to Article 10.9 ADR *"the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*

Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed".

52. Article 10.9.1 ADR reads as follows:

*"**10.9.1** Delays Not Attributable to the Athlete or other Person*

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another antidoping rule violation last occurred".

53. The strict application of Article 10.9 ADR could lead to apparently unfair situations: an athlete, for instance, could serve his/her sanction years after the adverse analytical finding; or, having already served a portion of a sanction following a provisional suspension stayed or on the basis of a first instance decision, find him/herself in the situation of serving, some time thereafter, a second part of the sanction – which actually appears to be a second sanction. The former situation was underlined by the panel to be a reason of "fairness" for backdating the starting date of the suspension in the award CAS 2007/A/1437, in paragraphs 8.2.6-8.2.7. The latter circumstance was also considered by the panel in CAS 2009/A/1870, paragraph 128.

54. The duration of the proceedings from the sample collection on 26 May 2012 over the appeal proceedings on national level until the delivery of this award constitute, to the conviction of the Sole Arbitrator, substantial delays. The Sole Arbitrator is further of the view that, while the Athlete did not facilitate the present proceedings as he did not actively participate, he did not delay the proceedings either. In other words, the substantial delay of proceedings since 26 May 2012 is not attributable to the Athlete. Coupled with the disqualification of results since 26 May 2012 (see E. below), the effective sanction in the present case would bite for more than four years after the Sample Collection would it start on the date of notification of this Award. Having taken all circumstances of the present case, including the fact that the Athlete has already served six months of suspension, into consideration, the Sole Arbitrator holds that fairness warrants in the present case that the starting date of the two-year period of ineligibility, reduced by the respective period of ineligibility already served by the Athlete, is backdated to 1 January 2013.

E. Disqualification of results

55. Article 9 of the ADR provides that *"An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes".* Article 10.8 ADR states *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".*

56. In strict application of Article 9 and Article 10.8 of ADR, all competitive results obtained by the Athlete from 26 May 2012 through the date of notification of this Award would be disqualified with all the resulting consequences including forfeiture of any medals, points and prices. However, for the same reasons as for backdating the start of the period of ineligibility, the Sole Arbitrator holds that fairness requires that disqualification shall apply only for those competitive results which the Athlete obtained between 26 May 2012 and the expiry of the two-year period of ineligibility, backdated to commence on 1 January 2013 and reduced by the respective period of ineligibility already served by the Athlete.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by WADA on 11 October 2013 against the decision of the Court of Arbitration for Sport of the Polish Olympic Committee issued on 3 September 2013 is upheld.

2. The decision of the Court of Arbitration for Sport of the Polish Olympic Committee issued on 3 September is set aside.

3. Przemysław Koterba is sanctioned with a two-year period of ineligibility, the commencement date of which is backdated to 1 January 2013. The period of ineligibility already served by Przemysław Koterba in connection with his anti-doping violation of 26 May 2012 shall be credited against the two-year period of ineligibility.

4. All competitive results obtained by Przemysław Koterba from 26 May 2012, including the results in the Polish National Senior Championships, through the date of expiry of the two-year period of ineligibility shall be disqualified with all the resulting consequences including forfeiture of any medals, points and prices.

(…)

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