Arbitration CAS 2016/A/4716 Cole Henning v. South African Institute for Drug-Free Sport (SAIDS), award of 9 March 2017

Panel: Mr Monty Hacker (South Africa), Sole Arbitrator

Mixed Martial Arts
Doping (methylhexaneamine)
Burden and standard of proof in respect of Specified Substances
Identification of the origin of the prohibited substance as a prerequisite to negate intention
Unavailability of the Special Assessment for an out-of-competition ADRV related to a specified substance
Qualification of an intentional violation based on the reckless conduct of the athlete and on the circumstances

1. **Where an anti-doping rule violation (ADRV) is in respect of Specified Substances, the burden rests with the anti-doping organisation (ADO) to establish that the violation was intentional. Although the WADA Code is silent on the precise standard of proof which the ADO must provide to establish that a violation was intentional, the practice is that the standard required by CAS panels would be the same "comfortable satisfaction" standard that ADO are held to establish in an ADRV, especially since "comfortable satisfaction" has been recognised in CAS awards as the general standard applicable in disciplinary matters, in order for the CAS panel to determine which sanctions or other results should follow.**

2. **The identification of the substance consumed by the athlete as the cause of the ADRV is a pre-requisite to negate the intentional element of the ADO applicable rules, without which identification of the intention to "cheat" may be assumed.**

3. **An athlete does not qualify for the benefits of the special assessment provided by the ADO applicable rules (article 10.2.3 of the SAIDS Rules corresponding to article 10.2.3 of the WADA Code), enabling the athlete to invoke the rebuttable presumption that the ADRV was not intentional if the substance is a Specified Substance and the athlete can establish that the prohibited substance was used out-of-competition, because the ingesting of the product the day before competition (at best for the athlete) should be considered as in-competition ingesting especially where pursuant to the athlete's evidence, the use of the product was to benefit his sporting performance i.e. was used for the purpose of his sport and not for an unrelated purpose, and because neither the athlete nor his counsel have raised or argued for the exclusion of "intentional" from the provisions of Article 10.2.3, either expressly or impliedly.**

4. **Carelessly ingesting a variety of supplements and products, without investigating whether any of them contained any Prohibited Substances, particularly at a time when he was aware that certain substances are banned, highlights an awareness on the part of the athlete that there existed a risk that this conduct might constitute or result in an**

ADRV, which risk he manifestly disregarded. These circumstances and evidence justify the conclusion that the athlete knowingly, negligently and/or recklessly engaged in conduct both by acts and/or omissions which truly represent a substantial and inexcusable breach of his duties under the applicable rules, thereby constituting the intention (to cheat).

I. THE PARTIES

1. Mr Cole Henning (hereinafter referred to as the "Appellant" or the "Athlete"), is a South African mixed martial arts professional fighter, who was 23 (twenty three) years of age at the time he was tested in competition on 11 July 2015. He was regarded and treated during both the IDHP[1] and the ADACSA[2] Hearings as an elite Athlete despite the fact that he was, at the time of the competition at which he was tested, participating in his first professional fight.

2. The South African Institute for Drug-Free Sport (hereinafter referred to as "SAIDS" or the "Respondent") is the National Anti-Doping Organisation in South Africa. Its responsibilities include the management of both in and out of competition testing for athletes in South Africa participating in most sports including Extreme Fighting Championships (hereinafter referred to as the "EFC"). EFC, in turn includes all combat sports, particularly Mixed Martial Arts, (the sport in which the Appellant competed at the time of his testing). EFC has adopted the World Anti-Doping Agency Code ("WADA Code"), following an international review of the WADA Code by all signatories, with the ratification of the new WADA Code 2015, effective as of 1 January 2015. These Rules under the WADA Code have been adopted and implemented by EFC, following the international review of such a Code by all signatories, with the new WADA Code 2015, effective as of 1 January 2015. It is also SAIDS function, inter alia, to administer the management of the results of Anti-Doping testing, as well as the prosecution of violators of its Anti-Doping Rules and the promotion of Anti-Doping education amongst the various South African sporting bodies which have adopted the WADA Code, including the WADA Code 2015 Prohibited List.

3. The Appellant and the Respondent are hereinafter referred to jointly as the "Parties".

4. The present appeal concerns the decision (hereinafter referred to as the "Appealed Decision") of the Respondent's Anti-Doping Appeal Committee of South Africa Appeal Committee (hereinafter referred to as the "ADACSA"), consisting of a Tribunal, which has issued a unanimous decision on 2 July 2016, dismissing the Appeal by the Athlete and confirming the 4 (four) year sanction of ineligibility imposed on the Athlete by the Respondent's Independent Doping Hearing Panel (hereinafter referred to as "IDHP").

[1] IDHP – Independent Doping Hearing Panel
[2] ADACSA – Anti-Doping Appeal Committee of South Africa

5. The Appellant has acknowledged that he has committed an Anti-Doping Rule Violation (hereinafter referred to as an "ADRV") involving an S6 Specified Substance, namely, Methylhexaneamine, in-competition.

II. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts, as established on the basis of the Parties' written and oral submissions and the evidence examined in the course of the present proceedings both before and during the hearing. This background is set out with 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 that follows. While the Sole Arbitrator has considered all facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, the Sole Arbitrator refers in this award only to the submissions and evidence that the Sole Arbitrator considers necessary to explain its reasoning.

7. On 11 July 2015, the Appellant, at his first professional fight, held under the auspices of EFC, provided a urine sample which, upon analysis was found to be positive for the Specified Substance Methylhexaneamine. Methylhexaneamine is only prohibited in-competition under the category of S6 Specified Stimulants, according to the WADA 2015 Prohibited List, (hereinafter referred to as the "List"). He waived his right to have his "B" sample tested.

8. On 8 February 2016, the IDHP imposed a 4 (four) year period of ineligibility on the Athlete for an anti-doping rule violation ("ADRV") (hereinafter referred to as the "IDHP Decision").

9. The Appellant, in a Notice of Appeal dated 1 March 2016, appealed against the IDHP Decision, asserting, on appeal, that the IDHP erred in its decision by finding as a fact, that he had the intention to cheat in the tournament at which he was tested. He furthermore set out reasons why he could not have had the intention to cheat, adding that he had mistakenly testified during the original IDHP Hearing that he had stopped using the product, TNT-Mercury Napalm the day before the tournament. He further contended that there was no dispute between the parties that the product TNT-Mercury Napalm (which he had ingested), contained the Prohibited Substance. In addition he contended that the IDHP Tribunal, in arriving at its sanction, had failed to apply, the established principles of "No Fault or Negligence", alternatively, "No Significant Fault of Negligence".

10. On 2 July 2016, the ADACSA rendered its Decision confirming the IDHP Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

11. On 22 July 2016, the Athlete filed his Statement of Appeal with respect to the Appealed Decision rendered by the ADACSA on 2 July 2016. The Athlete requested a sole arbitrator to hear the matter only on the basis of the Parties' written submissions in order to reduce the costs of the arbitration proceedings.

12. On 27 July 2016, the Respondent informed the CAS Court Office that it has no objection to the appointment of a single arbitrator to hear the present matter.

13. On 15 August 2016, the Appellant filed his Appeal Brief.

14. On 8 September 2016, the CAS Court Office granted a five-day extension to the Respondent to file its Answer.

15. On 12 September 2016, the Respondent filed its Answer.

16. On 22 September 2016, the CAS Court Office informed the Parties that no objection was raised by them with respect Mr. Monty Hacker's disclosure and consequently, the appointment of Mr. Monty Hacker, Attorney-at-law in Iliovo, Johannesburg, South Africa was confirmed by the President of the CAS Appeals Arbitration Division.

17. On 27 October 2016, the CAS Court Office noted that the Parties would prefer a hearing to be held in this matter, as long as the hearing could take place in South Africa.

18. On 10 November 2016, a hearing was held at the Sole Arbitrator's premises in South Africa. The Sole Arbitrator was assisted by Mr. José Luis Andrade, CAS Counsel, by video-conference and joined by the following:

For the Appellant:	Mr. Cole Henning (the Athlete)
	Mr. Jacques Du Randt (Counsel)
	Ms. Cari Du Perez (Observer)
For the Respondent:	Mr. Michael Murphy (Counsel).

19. The oral hearing of argument by the legal representatives of the Parties addressed particularly, the applicability of the SAIDS Anti-Doping Rules (hereinafter referred to as the "Rules"), with particular reference to the sanction to be imposed on the Appellant.

20. The Parties were given the opportunity to present their case, submit their arguments, and answer the questions posed by the Sole Arbitrator.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant

21. The position of the Appellant, according to the evidence given before the IDHP:

- He acknowledged that he had taken certain medicines including anti-inflammatories;
- He found it difficult to testify because he did not know he was on an illegal substance, having been given a quantity of supplements through clients from the gym, so he did

not know exactly what he was on, a lot of them being different pre-workouts. He did however emphasize that he was really unaware that he was *"on an illegal substance"*;

- He was on supplements, but was unaware that some of them contained *"an illegal substance"*. He gave a list of the supplements he was on, but did not know what *"they contained"* and *"had no idea"*;
- He had not ever heard of SAIDS;
- No-one had informed him about a list of Anti-Doping substances or to look at the list of ingredients of any product he was using;
- His Doping Control Form, which he signed prior to providing his urine sample on 11 July 2015 reflected the following substances he had been using as *"pre-workouts"*, namely, anti-inflammatory; post workout; pre-workout; meal replacements and anabolic Creatine. His comments written on the Doping Control Form are: *"I think is cool, everything was explain to me nicely"*;
- On being asked to identify the names of the pre-workouts he was using he replied*: "pre-workout Nutrinox, Muscle Form and TNT-Mercury was one"*. He was however unable to say which one he had been using on the day because it was a while back, but he was using different ones on different days. He was also unable to say which of the supplements contained the Prohibited Substance;
- The effect on him of each of his pre-workouts was much the same, causing him a skin irritation and giving him a rush or an energy boost, both in and out of competition;
- He was unaware of there being illegal substances he may not use;
- He was unaware of there being a list of banned substances, but acknowledged that PDs and module 6 drugs would definitely be illegal;
- No one had informed him about a list of Anti-Doping substances or to look at the list of ingredients of any product he was using;
- When questioning what he was being tested for on 11 July 2015, he was told PDs, which he understood to include steroids. He also denied knowing that he was not allowed to use steroids;
- He was also both unaware that there were substances he was not allowed to take in-competition and that there was a need for him to sign a declaration, acknowledging an awareness he was not permitted to take steroids or certain substances;
- The only time he checked on or researched the legality of substances he was taking was after he received notification from the Respondent of his positive anti-doping analysis for Methylhexaneamine. He acknowledged that following his research he gained the impression that the product used by him which contained the banned substance was *"TNT-Mercury. I think"*;
- When asked to provide the name on the package (which contained the banned substance), he responded *"Well. I think Methylhexaneamine, I think"*;

- He, in answer to questions put to him, testified that he had not ever heard of SAIDS and that his professional Mixed Martial Arts career had only been a couple of months old prior to being tested on 11 July 2015; although he acknowledging competing in another two fights subsequent to being tested, prior to being notified of his ADRV;
- He had waived his right to have his "B" sample tested and accepted that he had committed the ADRV with which he was charged;
- When put to him by the Chairperson at the IDHP that he did not know that this prohibited stimulant was in it, he responded, *"No, I had no idea"*;
- He found that the pre-workouts he was using were beneficial for him in training and in-competition;
- He thought that the substance which was the cause of his ADRV for Methylhexaneamine might have been TNT-Mercury. His precise words about the possibility that TNT-Mercury did in fact contain the banned substance were, *"I think it was TNT-Mercury. I think"*;
- When asked by Dr Collins what the name was on the package, he responded*, "Well, I think Methylhexaneamine, I think"*;
- He contradicted (his manager), Ms Magardi while she was testifying when she stated that he had taken the substance which had caused his ADRV on the day of the competition, when he interrupted her stating, *"No, I stopped using them about a day before"*;
- Prior to him having been informed of his ADRV, he had not ever checked up on or researched the supplements he was taking to ascertain what they contained or if there was anything in them that he should not be taking.

<u>Ms. TANYA MAGARDI (the Appellant's manager and his sole witness):</u>

- She manages the gym at which the Appellant works out;
- Because the gym at which the Respondent (and other professional fighters whom she also manages) work out, was still building up there were no available sponsors and neither she nor they, prior to the time of the Respondent's ADRV, were aware that there existed banned substances for athletes. Having now become aware of this it has become her management responsibility to monitor this as the gym is now sponsored by Biotech and there is a disclosure of everything which is in the products (used by the fighters);
- She was previously aware that the fighters used pre-workouts, including protein shakes and Creatine, as well as samples of un-named products which were brought into the gym, but could not say which of these pre-workouts or products contained Prohibited Substances. She did however volunteer the existence of a product used in the gym, the ingredients wherein are not specified, so she is unable to say precisely what that product has in it. She has asked the Biotech people to have a look at a sample of it and ascertain if it is that product that contains the Prohibited Substance;
- When questioned by a member of the IDHP Tribunal, Dr Collins, she acknowledged that there was a supplement used that does not have the ingredients listed on it, adding

that it does have some items on it but because she had not encountered this problem before, she was unable to say that that was the specific substance. Her precise words were, *"So we can't exactly say that this is the product that has it in it"*. This question however preceded Dr Collins putting it to her that during the Appellant's testimony the Appellant had indicated that during his post ADRV investigation he had been able to find where the Methylhexaneamine was. However before she could respond the Appellant interjected saying *"I said I think ja; it's a possibility, ja"*;

- When asked by Dr. Collins if she had a list of the ingredients on it (the sample), she volunteered to produce the product from her car. She added that she had tried to read the label and to go and search it, but *"could not say that it was the specific one that was used that was the problem"*;
- She acknowledged that she had since become aware of the existence of banned substances for athletes and was in the process of obtaining a list of all the banned substances. She added that she suspected that the use of a flu medication could have been the cause of the Appellant testing positive. Currently she said her athletes are contractually bound to declare any type of product they are using, in order for her to discharge her management responsibility;
- She also acknowledged that until then she had never looked at the ingredients of products which her amateur and professional athletes were using. Consequently she acknowledged that she was only now responsible for the supplements which her athletes use, whereas in the past she had been *"plain stupid thinking she could use any over-the counter workouts without investigating them"*;
- On returning to testify, a short while later she produced a carton taken from her car and handed it to Dr. Collins to read the label. After reading the label Dr. Collins asked her if she had read the label, which she confirmed she had done. She added that she intended obtaining help from a pharmacist to figure out if the product could be part of it, because she had Googled it after the Respondent's ADRV, and *"saw that it could have been in the pre-workout"*, but was unable to say *"if it was there or not"*;
- She also stated that the Appellant had used the product on the night of the fight, whereupon the Appellant interjected stating, *"No, I stopped using them about a day before"*, assuring the Chairperson *"ja, before, ja"*;
- Dr. Collins then put it to her that she was not aware of Methylhexaneamine or any other stimulant being in the product and asking whether she was aware of other names for Methylhexaneamine, to which she answered that she had obtained the list showing what other terms were used, it being a type of Ephedrine which she ascertained looking for synonyms, but was unable to see any of those products on that product itself, explaining that that was why she was unable to *"pin it down*", deciding to *"take it to the pharmacist"*. This aside, she testified earlier that she had *"asked the Biotech guys and I've asked a Lab to have a look at it to make sure that it is that product"*.
- When Dr Collins suggested one of the synonyms to her, namely *"1.3 Dimethylamylamine or DMAA"* listed on the carton, Ms. Magardi said "OK". At this point the Chairperson

enquired whether this was another name for Methylhexaneamine, to which she responded "OK";

- When asked if she was aware that there are banned substances for athletes, she responded, *"I've become more aware of it now, we are now getting the list of all the substances that are banned"*.

22. In his Appeal, it was further argued on behalf of the Appellant that:

- he was an inexperienced and was competing in his first professional tournament when tested, although he had competed in two subsequent tournaments between the time of being tested and the receipt of notification of his ADRV;
- in completing his Anti-Doping Control Form, the Appellant reflected anti-inflammatories, post-workout, pre-workout, meal replacement and anabolic Creatine as the substances which he had used;
- the product which the Appellant ingested, as the product that contained the Prohibited Substance was TNT-Mercury;
- it was the undisputed that on the day of the tournament at which he was tested, he had made an enquiry into illegal substances and was advised by the SAIDS official that he was testing the Appellant for PD-Steroids, although no-one had ever informed him about any of the following, namely:
  - there being a list of Anti-Doping substances;
  - there being a need for him to scrutinize the list of ingredients on any product that he was using;
  - he was prohibited from using Anti-Doping substances prior to his urine test referred to;
  - that there were substances that he was not allowed to take in-competition, other than steroids and Schedule 6 drugs;
  - that he needed to sign a declaration acknowledging an awareness that he was not allowed to take certain substances;
  - that he had any knowledge of the existence of SAIDS;
  - that he needed to establish which ingredients were in the substances used at the gymnasium;
  - that products could be purchased off-the-shelf of any general supplement shop or gym, which could possibly contain a Prohibited Substance;
  - that Anti-Doping measures needed to be observed by him prior to competing, and;
  - that products given to him for ingestion by promoters would not be safe and might contain any banned substances, whether or not purchased off-the-shelf;
- it was further argued that the IDHP and the ADACSA erred in their decision by:
  - imposing on the Appellant a 4 (four) year sanction of ineligibility, finding that he actively intended to cheat, by holding that the commission of the ADRV was

intentional in terms of Article 10.2.1.2 of the SAIDS Rules where the onus was on SAIDS to establish that he had the intention to cheat and by failing to recognise that the Respondent had not established the intention to cheat on the part of the Appellant;

- failing to impose a sanction of a maximum period of ineligibility of 2 (two) years, as there existed no *intention* on the part of the Appellant to cheat;
- finding that the Respondent had discharged the burden it bears (on a balance of probability and less than beyond a reasonable doubt, as stated in Article 3.1) of establishing the existence of the intention on the part of the Appellant, as provided for in Article 10.2.1.2 SAIDS Rules;
- holding that the Appellant, knowing that certain drugs like steroids and Schedule 6 drugs are illegal and obtained through a prescription or even illegal means, demonstrates that he knew that there would be a significant risk that by **taking a product, he knew there was a significant risk that** this might constitute an ADRV;
- by not holding that the Appellant was unaware that his conduct constituted an ADRV and that he therefore lacked intention.

B. The position of the Respondent

23. It was contended in the Respondent's Answer that:

- When completing his Doping Control Form, disclosing the substances he was using, the Appellant omitted to include therein the substance TNT-Mercury Napalm;
- The Appellant first testified that he had *"no idea"* which supplements he used had contained the Prohibited Substance and he later told the IDHP that he thought it was possible that the product he consumed known as TNT-Mercury contained the Prohibited Substance;
- When Ms. Magardi produced a supplement container/carton which the IDHP found referred to a substance described as 1.3 Dimethylamylamine, a synonym for Methylhexaneamine, however she couldn't *"pin it down to that"*;
- The ADACSA correctly found that it cannot be said that the Appellant has established either how the Prohibited Substance entered his body or the identity of the Prohibited Substance which he had ingested, causing his ADRV for Methylhexaneamine;
- The Appellant knew that some substances were banned and showed little concern for the risk that these supplements might result in an ADRV, knowing that these supplements might result in an adverse analytical finding;
- SAIDS never contended that the Appellant had consumed TNT-Mercury Napalm knowing it contained Prohibited Substances, however he showed scant regard for his responsibility to establish what was and what was not prohibited, for checking whether substances he took contained Prohibited Substances and that he was reckless as to consequences;

- The Appellant ought to have volunteered to deliver to the Respondent the substances which he had been using, in order for the Respondent to have these substances tested and analysed, to ascertain the origin and identity of these substances which the Appellant was using;
- The Appellant, by not carrying out the most basic level of assessment regarding his obligations as an athlete, by not checking the content of any substance he consumed, in circumstances where he knew that at least some substances were banned, showed little concern for the risk that these supplements might result in an adverse analytical finding. He also knew that one or more of the substances which he had been using, gave him *"a bit of a rush, an energy boost"*; whilst being aware that substances were being used for the purpose and benefit of his sport and not for an unrelated purpose;
- He was enjoined to establish in relation to the supplements or similar products that he uses, whether the components thereof could contain Prohibited Substances;
- Simply put, the question is whether the Appellant's conduct evidenced the sort of recklessness envisaged by the Rules. If it did, then intent, as contemplated in Article 10.2.2 as read with Article 10.2.3 of the SAIDS Rules, was established by SAIDS; in which event the ADACSA erred after making a positive finding of intention on the part of the Appellant and yet proceeding to Articles 10.4 and 10.5 of the SAIDS Rules. That apart, there was no reason to differ with ADACSA's findings;
- The Appellant failed to establish how the relevant substance came to be present in his body. Furthermore, both he and Ms Magardi failed to make a meaningful attempt to do so;
- Regard being had to the fact that there are frequent warnings by various Anti-Doping organisations about supplements, that they are unregulated, and the risks they pose, for the Appellant to say that he knew absolutely nothing, and for others to have to tell him precisely what to do, is highly improbable, particularly in 2015 and 2016, after the highly publicised Anti-Doping exposures that have enjoyed a large degree of media coverage. Furthermore, he cannot have been unaware of media reports of the exposure of Anti-Doping cheats such as Ben Johnson, Montgomery and Lance Armstrong. Therefore having this awareness, the Appellant demonstrated a complete disregard for any responsibility to ascertain the Rules that affect his and a variety of other sports, for participation therein;
- For the Appellant to say that he knows absolutely nothing, is no longer an excuse that can be accepted in 2016, particularly not from an elite professional athlete;
- The Appellant used substances and supplements with little regard for what they were, so much so that he is not even certain which supplement it was that caused the adverse analytical finding, this despite contending wrongly, as Counsel for the Appellant does on his behalf, that it was the ingesting of TNT-Mercury Napalm which was the cause of the Appellant's ADRV for Methylhexaneamine which, apart from being wrong is speculative;
- The *"I know nothing"* approach, is no excuse for an ADRV;

- Even after being charged, the Appellant clearly made little effort to establish how the Prohibited Substance entered his system. Even the reliance which Ms Magardi placed on the pharmacist, Biotech and a laboratory to analyse and report on the sample of a suspected Prohibited Substance, failed to yield any results, and;
- Referring to paragraph 29 on page 81 of the Appeal Bundle, reading:
- *"It has never been SAIDS case that Mr Henning consumed TNT Mercury-Napalm knowing it contained the relevant prohibited substance. It is rather SAIDS case that Mr Henning showed scant, if any, regard for his responsibility to establish what was, and was not prohibited, for checking whether substances he took contained prohibited substances, and that at best for him he was reckless as to consequences"*;
- This latter-mentioned point he based on the concept of intent under the previous WADA Code (which was similar to the SAIDS Anti-Doping Rules 2009), quoting the learned authors of Sports Law and Practice, Adam Lewis QC and Jonathan Taylor, Bloomsburg, 2014, as page 601, expressly making the point that recklessness is included, and;
- The Appellant was clearly reckless.

V. JURISDICTION

24. Article R47 of the Code of Sports-related Arbitration ("CAS Code") provides as follows:

25. *"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 it prior to the appeal, in accordance with the statutes or regulations of that body".*

26. The jurisdiction of the CAS, which is not disputed in this matter, derives, inter alia, from Article 13 of the SAIDS Rules.

27. The jurisdiction of CAS is further confirmed by the Parties by means of their signature on the Order of Procedure.

28. It follows accordingly that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY OF THE APPEAL

29. According to Article R49 of the CAS Code the time limit for appeals amounts to 21 days from the date of receipt of the Appealed Decision.

30. The Appealed Decision was issued on 2 July 2016 and the Statement of Appeal was filed on 22 July 2016. Consequently, the Appeal was filed within the 21-day deadline set out above. The Appeal, thus, is admissible.

VII. APPLICABLE LAW

31. Article 187 of the Swiss Private International Law Act (hereinafter referred to as "PILA") provides – inter alia – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA.

32. In particular, the provisions enable the parties to mandate the arbitrators to resolve the dispute in application of provisions of law that do not originate in any particular national law, such as sports regulations of an international federation (cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, paras. 597, 636 et seq.; POUDRET/BESSON, Comparative Law of International Arbitration, 2007, para. 679; RIGOZZI A., L'arbitrage international en matière de sport, 2005, paras. 1177 et seq.).

33. According to the legal doctrine, the choice of law made by the parties can be tacit (Zürcher Kommentar zum IPRG-HEINI, 2nd ed. 2004, Art 187 para. 11; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 1387; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, para. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI A., L'arbitrage international en matière de sport, 2005, para. 1172; KAUFMANN-KOHLER/STUCKI, International Arbitration in Switzerland, 2004, p. 118 et seq.). Thus, in agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code.

34. Article R58 of the CAS Code states in respect of the applicable law to the merits as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarity, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

35. The Sole Arbitrator wishes to outline the main SAIDS Rules applicable to the present matter in the following sections.

36. Article 2.1.1 of the SAIDS Rules, dealing as it does with the presence of a Prohibited Substance or its metabolites or markers in an athlete's sample, identifies the violation of the Rules by an athlete as follows:

"It is each athlete's duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substances 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 athlete's part be demonstrated in order to establish an Anti-Doping Rule violation under Article 2.1".

37. The Sanctioning Rules applicable to this Appeal are Articles 2.1.1, 10.2.1.2, 10.2.3 of the SAIDS Rules, unless the requirement of "intentional" is found not to have been established by SAIDS, in which event consideration must be given to Articles 10.4 and 10.5, and possibly also 10.6 of the SAIDS Rules.

38. Article 10.2 of the SAIDS Rules stipulates that the period of ineligibility for a violation of Article 2.1 shall be as follows, subject to a potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 of the SAIDS Rules:

"10.2.1 The period of ineligibility shall be 4 (four) years where:

10.2.1.2 the Anti-Doping Rule violation involves a Special Substance and SAIDS can establish that the Anti-Doping Rule violation was "intentional"".

39. Article 10.2.3 of the SAIDS Rules defines the term "intentional" as meant to identify those athletes who cheat. *"The term therefore requires that the athlete or other person engaged in conduct which he or she knew constituted an Anti-Doping Rule violation or knew that there was a sufficient risk that the conduct might constitute or result in an Anti-Doping Rule violation and manifestly disregarded that risk. An Anti-Doping Rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in competition, shall be refutably presumed to be not "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-competition. An Anti-Doping Rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in competition, shall not be considered "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-competition".*

40. Article 10.2.3 of the SAIDS Rules contains a special assessment which applies to Specified Substances prohibited in competition only, but used out-of-competition, reading, *"An ADRV resulting from an Adverse Analytical Finding for a (Specified) Substance which is only prohibited In Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was Used Out-Of-Competition".*

41. Conversely, should the Sole Arbitrator determine that the Respondent has failed to establish intentional on the part of the Appellant, the Sole Arbitrator will then need to apply the provisions of Articles 10.4 and 10.5, both of which centre around Fault which, in terms of Appendix 1 of the 2015 WADA Code is defined as follows:

42. *"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances 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 Article 10.5.1 or 10.5.2".

VIII. MERITS OF THE APPEAL

A. Introductory comments

43. In an Article by Professors Antonio Rigozzi and Ulrich Haas and Mesdames Emily Wisnosky and Marjolaine Viret (hereinafter referred to as "Rigozzi et al"[3]), they comment on the definition of Fault, stating *"criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under Article 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other person was involved".*

44. The focus in this definition is on the ideas of *"any breach of duty"* and *"any lack of care"* exhibited by Athletes or other Persons. The phrase *"any breach of duty"* evokes both violations committed knowingly and violations committed negligently. Therefore, in the 2015 WADA Code, the term Fault is indeed used in association with both violations in the intentional range, and at the other end of the spectrum, with violations committed with No (Significant) Fault or Negligence. Rigozzi et al goes on to add that Fault under the 2015 WADA Code is not a *"one-size fits all"* concept. Rather, as provided in the definition, the assessment is conducted by evaluating the *"specific and relevant"* circumstances that could explain *"the Athlete's or other Person's departure from the expected standard of behaviour"*. According to Rigozzi et al, it therefore leaves open the possibility that even significant departures from the expected standard of care or important breaches of duty might be subject to a credible and relevant (non-doping) explanation, which could lead to a relatively low level of Fault.

45. Returning to the term *"intentional"*, according to Rigozzi et al, this term is used in Articles 10.2 and 10.3 of the WADA Code to identify those Athletes who cheat, adding that the term therefore requires that the Athlete or other person was engaged in conduct which he or she knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. In order therefore for the Athlete to fall within this definition, there clearly exists the concept of acting with knowledge and with recklessness (or *dolus eventualis*, in civil law jurisdictions) in the commission of an ADRV.

46. Rigozzi et al warns hearing panels to assess the circumstances of the case and refrain from imposing a four year period of ineligibility if they accept that the Athlete did not intend to *"cheat"*, even if technically the Athlete's violation was committed with knowledge or recklessness.

[3] International Sports Law Journal (2015) by Professors Antonio Rigozzi, Ulrich Haas, Mesdames Emily Wisnosky and Marjolaine Viret.

47. Following Rigozzi et al's argument, intentional violations are those committed with a high level of Fault, which comprises an assessment of the circumstances of the case to confirm that knowing (or reckless) Use truly demonstrates an intention to cheat. Where therefore the panel finds that a violation was not intentional, it then turns to determine if any of the reductions set forth in Articles 10.4 or 10.5 of the WADA Code apply. If, where the ADRV is in respect of Specified Substances, as in the present case of the Appellant, the burden rests with the Respondent to establish that the violation was intentional. Although the WADA Code is silent on the precise standard of proof which the Respondent must provide to establish that a violation was intentional, the practice is that the standard required by CAS Panels would be the same *"comfortable satisfaction"* standard that Anti-Doping Organisations (hereinafter referred as "ADOs") are held to establish in an ADRV, especially since *"comfortable satisfaction"* has been recognised in CAS awards as the general standard applicable in disciplinary matters. According to Rigozzi et al, one of the key policy drivers underlying the revision of the sanctioning regime was punishing *"real cheats"* more harshly, yet providing more flexibility in other circumstances. This policy therefore translates into treating intentional violations with a strict four year period of ineligibility and the non-intentional violations with more flexibility, i.e., allowing the Fault-related reductions. From this perspective, according to Rigozzi et al, a violation would only be intentional, if the Athlete's Fault was rather high, at a level which can fairly be considered as *"cheating"*, as opposed to a more *"technical"*, albeit possibly knowing, violation of the Rules, where perhaps a finding of not intentional is proportional and better suited to WADA's policy goals.

48. The CAS practice in disciplinary matters also points to a general acceptance of the comfortable satisfaction standard on the prosecuting sports organisation. That said, comfortable satisfaction is a variable standard, described in the WADA Code as *"greater than a mere balance of probability but less than proof beyond a reasonable doubt"*.

49. According to Rigozzi et al, compelling reasons support requiring the Respondent, as the ADO to establish the origin of the substance, i.e. how the substance entered the Athlete's system, to show the violation was intentional. The consequences of a finding of intentional are quite severe from the perspective of an Athlete (i.e., the likelihood of the imposition of a 4 (four) year sanction of ineligibility), thus in cases involving an adverse analytical finding, concerns of proportionality and fairness will often command a requirement to show the origin of the substance. In cases where the ADO seeks to establish that a violation was intentional by alleging knowing ingestion of a substance, this could appear to be a self-evident statement. Therefore; firstly, an ADO would also need to establish the origin of the substance when it is alleging conduct more akin to "reckless", if any assessment of the "recklessness" of the conduct in question is to be meaningfully undertaken; Secondly, CAS Panels and the Swiss Supreme Court have held the importance of establishing the origin of the substance in relation to evaluating an Athlete's fault, and; thirdly, requiring an ADO to show the origin of the substance to establish intentional is aligned with a fundamental principle of *contra proferentem*, where ambiguities in the WADA Code would be interpreted against the drafter. Furthermore, the definition of intentional does not explicitly include the requirement to establish the origin of the substance in the Athlete's system. However, just as athletes are required to establish the origin of a substance to demonstrate a "low" degree of Fault and receive a reduction from a

two year period of ineligibility, it stands to reason that in most cases, ADOs would be reciprocally held to establish the origin of a substance to justify an increase in a basic sanction to demonstrate a "high" degree of Fault – see Rigozzi et al, page 30.

50. On a related note, according to Rigozzi et al, that CAS Panels in the past have used the instrument of "Beweisnotstand"[4] – recognised by Swiss law or other jurisdictions – to support a party (more specifically, an athlete party) that is faced with a *"serious difficulty in discharging the burden of proof,"* where this difficulty is inherent in the fact to be established. According to this principle, procedural fairness in this type of situation requires the opposing party to co-operate in the procedure, notably by providing counter evidence to contest the allegations of the party bearing the burden of proof. If the opposing party fails to do so, the Panel may conclude that the party has discharged its burden. In connection with the requirement to establish the origin of the substance, this obligation to co-operate has been considered fulfilled when the opposing party provides – in a substantial manner – alternative credible factual scenarios regarding the origin of the substance. In the CAS 2011/A/2384 & 2386[5] case, the Panel accepted on a balance of probability that the Prohibited Substance in the Athlete's system originated from contaminated supplements, rather than the Athlete's theory of meat contamination. However, since the cyclist neither established which particular supplement was contaminated, nor the circumstances surrounding the contamination, the Panel found that the fault-related reductions could not apply for lack of sufficient precision, regarding the origin of the substance, and the sanction remained (under the 2009 WADA Code), the maximum 2 (two) year period of ineligibility. By contrast, if, in the case at stake, the Sole Arbitrator makes a finding that the Respondent did not intend to cheat and find that the most probable pathway of ingestion was inadvertent, applying a 4 (four) year period of ineligibility for failure to establish the origin of the substance *stricto sensu*, would inevitably raise proportionality concerns. However, as Athletes have a responsibility under the WADA Code to *"be knowledgeable and comply with all applicable Anti-Doping policies and Rules adopted pursuant to the WADA Code"* (Article 22 of the SAIDS Rules), it follows therefore that the threshold would be quite high, and only available under very particular (and rare) circumstances where the Athlete's lack of awareness of the prohibited nature of his or her conduct is excusable (see CAS 2008/A/1557). Similarly in the case of CAS 2007/A/1252.

B. Main issues of the Appeal

51. Having set out the details of the evidence given by the Appellant and his witness, as well as the arguments raised by both Parties, the main issues to be resolved by the Sole Arbitrator are as follows:

52. Was the conduct of the Appellant careless and/or reckless to so high a degree as to cause the Sole Arbitrator to safely conclude that he ought to have known that there existed a significant risk that his conduct, as dealt with above, might result in an ADRV in accordance with Article 10.2.1.2 or 10.2.3 of the SAIDS Rules and that he manifestly disregarded that risk?

[4] Rigozzi et al, page 30
[5] CAS 2011/A/2384 & 2386 UCI v. Contador, para. 493 and 262.

53. In the event, that the Sole Arbitrator is comfortably satisfied that an ADRV has occurred, as admitted by the Appellant, it rests upon the Respondent to discharge the burden of proving intention on the part of the Appellant, as provided for in Articles 10.2.1.2 and 10.3 of the SAIDS Rules, in order for the Sole Arbitrator to determine which sanctions or other results should follow, the ADRV being in respect of a Specified Substance.

a) Analysis and interpretation of Articles 10.2.2 and 10.2.3 of the SAIDS Rules

54. As Counsel for the Appellant referred to and placed some importance on the CAS 2016/A/4643 case[6], it is important to distinguish that case from the case of the Appellant for the following reasons:

55. It was clear what steps had been taken by Ms Sharapova to ensure that she complied with the Rules. She relied upon her management team to ensure that she complied with the Rules, in spite of the fact that it remained her obligation to be responsible for whatever products entered her system. Neither she nor the Appellant entered in their respective Doping Control Forms the product which was responsible for their respective ADRVs: in the case of Ms Sharapova, the substance which she ingested was clearly identified as Mildronate, having the international non-proprietary name, Meldonium, an S4 hormone and metabolic modulator, whereas in the case of the Appellant, he was unable to identify, with any degree of certainty, the substance which he ingested, creating at the very least, no small amount of confusion on the part of the members of the IDHP Hearing Panel.

56. Ms Sharapova's management staff had been negligent in failing to take cognisance of a 2016 change in the WADA Prohibited List, which change included therein the product Meldonium which she had been using and as prescribed for her by her doctor for quite some time prior to the change. As a result, she was unaware of the fact that by continuing to use Mildronate, she was committing an ADRV. However, in the case of the Appellant, he, like Ms Sharapova, was unaware of the fact that he was using an illegal substance, but, up until the time of him being tested, neither he nor his manager, Ms Magardi, were aware of the lawful or unlawful usage of any of the substances which he had been ingesting. In fact, he was only aware of what he had been ingesting in general terms, namely anti-inflammatories, post-working, pre-workout, meal replacements and anabolic Creatine. He testified that he was on supplements and was really unaware of the fact that some of them contained illegal substances. He had produced a list of the substances he was using, but did not know what was in them and when asked whether he knew that any of it contained a prohibited stimulant, his answer was, *"No, I had no idea"*.

57. Ms Sharapova's case was argued on the basis that the intention in Article 10.2.1 of the SAIDS Rules did not apply and that the question of sanction had to be considered pursuant to the provision of Article 10.5 SAIDS Rules, in particular Article 10.5.1 under the principle of No Significant Fault or Negligence. In the present case however, the Respondent's argument centres around Article 10.2.1.2 of the SAIDS Rules, as read with Article 10.2.3 where, despite

[6] CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation.

this, the Appellant challenges the assertion that his ADRV was intentional, relying upon the application of Article 10.5.1.1, in order to have his 4 (four) year sanction of ineligibility reduced to the minimum of a reprimand and a maximum of a 2 (two) year period of ineligibility. By comparison, it was not contended in the Sharapova case that Ms Sharapova's ADRV was intentional, and the CAS, in applying the principle of No Significant Fault or Negligence to Ms Sharapova's ADRV, reduced the applicable 2 (two) year period of ineligibility (under the current 2015 WADA Code) to 15 (fifteen) months.

58. The evidence given before the IDHP shows that the Appellant knew little or nothing about the Anti-Doping Rules, was oblivious to the fact that he had an obligation to take steps to find out about the Anti-Doping regime, had never heard of SAIDS, was unaware of the list of Prohibited Substances, but nevertheless had an awareness that certain substances like PDs and module 6 drugs *"would be definitely, you know, illegal"*. Unlike him, Ms Sharapova knew about the Anti-Doping regime, took all sorts of steps to observe the regime and yet those steps still fell short.

59. The Respondent urged the Sole Arbitrator to find the existence of intent on the part of the Appellant because he didn't bother to check at a time when the local media, electronic, radio and print, had been abuzz with the Lance Armstrong case and yet, knowing that certain substances are banned, the Appellant fails to take steps to find out what that means and which substances are banned and why. The Respondent questioned whether this could seriously be considered not to show either intent, or significant fault or negligence on the part of the Appellant. It therefore contended that this case is about the question of "intent", an area in which the ADACSA erred by considering Article 10.5 after finding intention on the part of the Appellant, in terms of Articles 2.2.1.2 and 10.2.3 of the SAIDS Rules. The Respondent furthermore emphasised that if the Sole Arbitrator find the existence of intent on the part of the Appellant, that then puts an end to the case and to the application of Article 10.5.1 of the SAIDS Rules to it, including the aspect of No Significant Fault or Negligence, neither of which will apply in instances in which intent has been found to exist. The Respondent supports this argument by referring to Lewis[7].

60. On the question of intent, the Respondent argues that to say that the substance which the Appellant ingested gave him a boost, certainly does not go far enough. What is however significant is the presence of the banned substance in his fluids, coupled with the knowledge which he has that certain drugs are prohibited and yet he fails to take the trouble to look on the website to check to see what steroids and what substances are banned. In so doing, the Respondent argues, the Appellant manifestly disregarded the risk of presence. In fact, the Appellant had no idea which of the supplements he had used contained the Prohibited Substance. The Appellant however remembers, when getting to the Hearing, that in his case, if he needs to demonstrate intent in order to establish No Significant Fault or Negligence, he, as a last thought, testifies that he thought the product he consumed, known as TNT-Mercury Napalm, might have contained the Prohibited Substance. So even by that stage

[7] LEWIS/TAYLOR, Sports Law and Practice (2014).

(at the IDHP Hearing) he had not taken the trouble to investigate and establish the identity of the substance that he had ingested.

61. Then we have the reference to Dimethylamylamine and the IDHP Panel which accepts the say-so of Ms Magardi's evidence to which the Appellant expresses the opinion that he thinks it is that. However, this is challenged by the Appellant saying, *"no it wasn't that"*. So even at the Appeal stage, there was no real care taken to find out what the substance is or where it is banned or how it is banned. Moreover, Ms Magardi got it wrong with the Appellant suggesting that possibly it was the wrong name, but what Ms Magardi basically said was, that this ("unidentified" product which the Appellant had been taking amongst his pre-workouts), was what he was taking and this seems to have something in it. So, what we have here is the young man who is fighting at the elite level, in his first professional fight, but he overlooks that these SAIDS Rules apply to all athletes. The Appellant knew enough to know that certain substances were banned and he also knew enough to know that he should have gone and checked to ascertain whether they were or were not banned. Simply asking Ms Magardi, she didn't really know either. The Appellant must then accept the consequences of that, namely that he was manifestly disregarding a risk which he had to have been aware of. In this regard, the Respondent conceded that proportionality as raised by the Appellant is very important. He goes on to argue that looking at Ms Sharapova's situation, it could not be argued that she was reckless in continuing to use the Mildronate. However, she didn't intend, on the version that was accepted, to cheat. She wasn't taking the substance to cheat, but the question is, was it recklessness on her part? Not on the facts. In her case, she personally knew about the ITF Anti-Doping Rules, had people who were supposed to assist her with those Rules and her conduct therefore would not amount to recklessness. Turning to the Appellant, he knew there was something out there, there's no evidence that he told Ms Magardi to look out, and it appears as though nobody even bothered. In Ms Magardi's case, she does nothing.

62. In addressing the question of recklessness, the Respondent quotes the Appellant's Counsel referring to the meaning of "intentional" as intended to identify those Athletes who cheat, which, in turn, requires actual intent. For its part, the Respondent's Counsel suggests circumstances which, in the present case, demonstrate recklessness, as distinct from negligence. However, "intentional" is in the mind of the Appellant who, when applied to No Significant Fault or Negligence, he has the burden to rebut intention on his part. To do so, he must establish how the Prohibited Substance entered his system. To achieve this, the Respondent argues that the Appellant has problems both to establish how the substance got into his system and to identify the substance, both of which highlight this problem, because:

- he has no idea which of the supplements he had been using, contained the Prohibited Substance. It is his responsibility to explain not only that, but also how the substance got into his system. However, his evidence is that *"he had no idea"*, and;
- he testified that he thought the product he consumed was known as TNT-Mercury Napalm, which he <u>thought</u> contained the Prohibited Substance. Further, when Ms Magardi produced a supplement container/carton the label of which described its contents identified by Dr Collins as 1.3 Dimethylamylamine, which the IDHP Panel correctly assumed to be a synonym for Methylhexaneamine. This was not disputed by the Respondent which, at the time, erroneously believed that this was how the substance

had got into the Appellant's system. However, it is clear to the Sole Arbitrator that TNT-Mercury Napalm was definitely not the substance which caused the Appellant's ADRV and in the case of 1.3 Dimethylamylamine, this too was not the substance which the Appellant ingested to cause his ADRV because Ms Magardi was not in a position to identify it as the product which the Appellant had ingested, either on the day of the tournament or at any other time. More particularly, her words were that she, *"could not say that it was the specific one that was used, that was the problem"*. Unfortunately, however, during the ADACSA Hearing, the Tribunal, in its reasons for its decision, appears to have misinterpreted the IDHP reference to 1.3 Dimethylamylamine, confusing it with 1.3 Dimethylamine, which is clearly not the same as either Methylhexaneamine or 1.3 Dimethylamylamine. However, whatever the position, neither TNT-Mercury Napalm, nor 1.3 Dimethylamine, are the substances which had been properly identified as to have been ingested by the Appellant to cause his ADRV for Methylhexaneamine. As for the Appellant, he contended in his Appeal Brief, that only after the Appellant was charged and had become aware of the Anti-Doping Rules and the List of Prohibited Substances, did it come to his attention that the label of TNT-Mercury Napalm was the product which contained the closest name to the Prohibited Substance. This did not however identify TNT-Mercury Napalm as the substance which had caused the Appellant's ADRV. Any suggestion on the part of the Appellant that it was, is pure speculation. This is apparent from the Appellant's answer to which of the products he used actually contained the banned substance, which was, *"I think it was the TNT-Mercury, I think"*. When asked further for the name on the package containing the TNT-Mercury, the Appellant responded, *"Well I think Methylhexaneamine, I think"*.

63. In the IDHP Decision, sanctioning the Appellant to a four year period of ineligibility, the IDHP records the name of the product appearing on the label of the carton correctly as 1.3 Dimethylamylamine, but the ADACSA in their reasons go on to add that the IDHP incorrectly, made a finding that the product which the Appellant had used, contained the specific Prohibited Substance. In fact, the product which the Appellant ingested was never identified with any degree of certainty either by Ms Magardi or the Appellant;

64. It follows therefore that despite what is contained in the Decisions of the IDHP and the ADACSA, there was still no certainty that any specific product ingested by the Appellant which caused his ADRV, was 1.3 Dimethylamylamine. What is however certain is that it was neither TNT-Mercury Napalm nor 1.3 Dimethylamine. Hence, for these reasons, the Sole Arbitrator has come to the conclusion that neither the Appellant nor his manager, Ms Magardi, had either provided the origin or the identity of the product which was responsible for the Appellant's ADRV for Methylhexaneamine. In fact it was the finding of the ADACSA that *"the actual substance that the Athlete consumed to result in the presence of the Prohibited Substance in his system was not established at the Disciplinary Committee Hearing and it is as such not known"*;

65. All of this then begs the question why the Appellant is persisting with the mistaken contention that TNT-Mercury Napalm is correctly identified as the substance which the Appellant consumed, causing his ADRV for Methylhexaneamine. The only explanation which the Sole Arbitrator is able to advance is that its purpose is to assert that the Appellant has properly

identified the substance which he had consumed as the cause of the ADRV, a pre-requisite to negate the intentional element of Articles 10.2.1.2 and 10.2.3 of the SAIDS Rules, without which identification the intention to "cheat" may be assumed, and;

66. It is cogent to consider the effect, if any, of the contradiction in the evidence of Ms Magardi and the Appellant that the "unidentified" substance which the Appellant used was ingested, according to Ms Magardi, *"on the night of the fight"*, contrary to the Appellant's interjection during her evidence, contradicting her, with the words, *"about a day before"*, which words the Appellant's counsel contends that it was a mistake on the part of the Appellant. In other words, the Appellant now contends that the unidentified substance was ingested, as alleged by Ms Magardi, on the night of the fight. The Sole Arbitrator however, finds that it matters not, because according to the Appellant's evidence, the use of the product which he ingested was to benefit his sporting performance and was used for the purpose of his sport and not for an unrelated purpose. Furthermore, neither the Appellant nor Ms Magardi were able, with any degree of certainty, to identify any of the separate substances relied upon by each of them, as the likely product which the Appellant had ingested on the day of the fight or a day or so before.

67. During the initial Hearing before the IDHP, the Appellant did not explain the reason why he testified that he had discontinued ingesting the substance immediately prior to the competition, nor indeed was he questioned on this point, either by SAIDS or by members of the Panel. It must therefore be assumed that at the time of the IDHP Hearing, none of the Parties either appreciated the significance of the Special Assessment available for an out-of-competition ADRV for the ingesting of the Specified Substance, or else possibly regarded it as being too close to the time of the competition, to be of any significance either to the charge against the Appellant or his defence/s thereto.

68. There also exists a lacuna in the evidence with regard to Ms Magardi's reliance which she placed on the pharmacist and/or a laboratory and/or on Biotech, to one or more of whom she referred the sample of the suspected "unidentified" product for analysis and identification, prior to her testifying at the IDHP Hearing. The existence of this lacuna suggests to the Sole Arbitrator that neither the pharmacist nor the laboratory nor Biotech were able to identify this sample, as otherwise the Appellant, through his legal counsel would, by the time of the ADACSA Hearing, have sought the leave of the ADACSA Tribunal to introduce this further evidence.

69. Additionally, the Sole Arbitrator finds that the Appellant does not qualify for the benefits of the special assessment provided by Article 10.2.3 of the SAIDS Rules, enabling the Appellant to invoke the rebuttable presumption that the ADRV was not intentional, this by virtue of the exclusion of "intentional" from the provisions of Article 10.2.3 of the SAIDS Rules, not only because, in the Sole Arbitrator's opinion, the intentional ingesting of the product the day before competition, (at best for the Appellant), with knowledge that the competition takes place on the following day, as in-competition and not out-of-competition ingesting, but also because neither the Appellant nor his counsel have raised or argued for any such exclusion, either expressly or impliedly. Moreover, in his Appeal Brief, the Appellant has contended that

he *"mistakenly stated in the original IDHP Hearing that he stopped using the product about a day before the Tournament, which is factually incorrect as the Appellant did in fact use the product the morning of the Tournament"*. Accordingly the Sole Arbitrator finds that the special assessment is not available to the Appellant. Had the Appellant been able to successfully invoke and benefit from this special assessment, he would then be facing a maximum two year sanction of ineligibility under Articles 10.4 and 10.5 of the SAIDS Rules instead of the current four year period, applicable to Article 10.2.3 of the SAIDS Rules. The other difficulty which the Appellant faces with regard to the invoking of the Special Assessment is the fact that as dealt with herein, namely that he has been unable to establish with any degree of certainty the origin or identity of the Prohibited Substance ingested by him, which it is incumbent on him to do in order to satisfactorily invoke the provisions of Articles 10.4 and/or 10.5 of the SAIDS Rules. The Sole Arbitrator bases his finding upon the following CAS jurisprudence, namely CAS 2011/A/2384 & 2386 and CAS 2012/A/2959[8], which are pertinent to this Appeal.

b) Applying intentional to the Appellant ADRV

70. The following are the factors which the Sole Arbitrator takes into account in order to determine whether the Respondent has discharged the burden it bears in order to establish that the conduct of the Appellant relative to the commission of his ADRV was such that he knew that there existed a sufficient risk that his conduct might constitute or result in an ADRV and that he manifestly disregarded that risk. If so, and if the Sole Arbitrator finds this conduct on the part of the Appellant to have been reckless, beyond negligence, that would establish intentional and with it, the intention to cheat. Should the Sole Arbitrator however be required to delve into the mind of the Appellant in order to establish a direct intention to cheat, rather than an implied intention to cheat, which can be inferred? In the Sole Arbitrator's opinion, the answer is "yes" in regard to an implied intention as he is unable to conclude that the Appellant had a direct intention.

71. Whilst the term intentional is meant to identify those athletes who cheat, it requires that the Athlete or other person was engaged in conduct which he or she knew constituted an ADRV or knew that there was a sufficient risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

72. The Sole Arbitrator has already excluded the availability to the Appellant of the Special Assessment for Prohibited Substances used out-of-competition to the Appellant, inter alia, owing to the Appellant's inability to identify, with any degree of certainty, the substance which he ingested, causing his ADRV. However, to quote Lewis:

73. *"This is by no means a simple requirement, a formal requirement. To the contrary, it is a threshold requirement to any plea in mitigation because a Hearing Panel cannot make any meaningful analysis of whether an athlete is at fault for the presence of a Prohibited Substance in his system, unless it knows how the substance got there. Obviously, this pre-condition is important and necessary, otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely*

[8] CAS 2012/A/2959 WADA v. Ali Nilforushan.

made up. To rely on such speculation as to the circumstances in which the athlete ingested a Prohibited Substance, would undermine the strict liability Rules underlying the Swiss Olympics Doping Statute".

74. According to Rigozzi et al, a finding that a violation is intentional under the 2015 WADA Code, would seem to comprise more than acting with knowledge (or recklessness) alone. It suggests that a full look at the factual circumstances of a case is warranted to confirm that violations involving knowing or reckless conduct truly represent a substantial and inexcusable breach of an athlete's duties under the WADA Code. It is clear to the Sole Arbitrator that the Appellant had to have known that his conduct in carelessly ingesting a variety of supplements and products, without investigating whether any of them contained any Prohibited Substances, particularly at a time when he was aware that certain substances are banned, highlights an awareness on the part of the Appellant that there existed a risk that this conduct might constitute of result in an ADRV, which risk he manifestly disregarded.

75. This then brings the Sole Arbitrator to the way to establish, absent being able to delve directly into the Appellant's mind, that the Appellant took this risk knowing that it might constitute or result in an ADRV and that he manifestly disregarded that risk. The Sole Arbitrator does so by inferring the existence of intent, based on a careful consideration of the factual circumstances and the evidence in this case. These current circumstances and evidence to which the Sole Arbitrator has referred, justify his conclusion that the Appellant knowingly, negligently and/or recklessly engaged in conduct both by acts and/or omissions which truly represent a substantial and inexcusable breach of his duties under the SAIDS Rules, thereby constituting the intention (to cheat). However, in order to carefully consider this point, as the Respondent alleges recklessness on the part of the Appellant, this requires a consideration of the evidential facts appearing in paragraph A above, which need not be re-visited, plus the following further facts which are pertinent to the determination of recklessness and thereby intent on the part of the Appellant, namely:

- The Appellant had no idea what he was ingesting and was unconcerned;
- Both the Appellant and his manager Ms Magardi were unable to identify the product which he had ingested causing his ADRV for Methylhexaneamine, this in spite of having had an opportunity both between the time when he received notification of his ADRV, through both to the time of the IDHP Hearing and the ADACSA Hearing, in order to establish the origin and identity of this substance, which they failed to do;
- Despite Ms Magardi testifying that she was herself unable to identify this substance and had sought the assistance of the pharmacist, Biotech and a laboratory, by delivering a sample of the product to one or other of these parties, she failed to furnish either to the IDHP Panel or to the ADACSA Panel, any evidence at all of what the pharmacist, Biotech or the laboratory had established concerning the identity of the sample which she had handed over;
- The Appellant persists that the unidentified product which he had ingested was TNT-Mercury Napalm, despite the fact that it has been established that the latter-mentioned product did not contain any of the listed items in Methylhexaneamine, for it to qualify as the cause of the Appellant's ADRV;

- Moreover, the evidence referred to in paragraph A above established that the Appellant knew nothing of the Anti-Doping Rules, knew nothing of what he was ingesting, cared not what the content was of the substances or supplements he was using, he relied upon his lack of knowledge of what he could or could not lawfully take or ingest, but without making any enquiries at all with anyone. He furthermore remained unconcerned about whatever he ingested in the pursuit of his sporting career, receiving a boost to his energy and being oblivious to the fact that any one or more of these unidentified substances or supplements might possibly give him an advantage over his fellow combat fighting martial arts competitors. This, in the Sole Arbitrator's opinion, constitutes recklessness to so high a degree as to safely conclude that the Appellant ought to have known that there was a significant risk that his conduct might result in an ADRV and that he manifestly disregarded that risk.

76. This factual review of the circumstances of the present case confirms that this reckless conduct on the part of the Appellant truly represents a substantial and inexcusable breach of his duties under the Code.

77. In light of the above, the Sole Arbitrator concludes to his comfortable satisfaction, based on more than a mere balance of probability but less than proof beyond a reasonable doubt, as the standard to apply to these facts and evidence.

78. The Sole Arbitrator is also mindful of the fact that the confusion which the Appellant, his manager and his legal counsel created concerning the origin and/or identification of the unknown substance was, to say the very least, unhelpful. Furthermore, in coming to this conclusion that intention on the part of the Appellant has been established, the Sole Arbitrator finds that the Respondent has undertaken a meaningful exercise and has discharged to the comfortable satisfaction of the Sole Arbitrator, its burden of proof to establish that the Athlete has committed an ADRV pursuant to the Rules, this despite the fact that the definition of intention does not explicitly include the requirement for the Respondent to establish the origin of the substance in the athlete's system. Furthermore, referring to the CAS jurisprudence (CAS 2016/A/4643, CAS 2011/A/2384 & 2386 and CAS 2012/A/2959) was most helpful in enabling the Sole Arbitrator to find that the burden of establishing intention has been discharged by the Respondent. Having already dealt with the relevant facts in the cases of Sharapova and Contador, the pertinent facts in the Ali Nilforushan case are that this athlete had ingested specified substances as part of a weight-loss programme, which was not intended to cause a benefit to his sport and in addition, he had never received any Anti-Doping education and, being a showjumper, thought that only horses were subject to doping control. In this case however, the 2009 WADA Code was applicable, whereby his sanction was considered pursuant to the provisions of Article 10.5.1 of that Code which provided a mandatory 2 (two) year sanction of ineligibility, unless the reduction provisions under Article 10.5.2 of the WADA Code were applicable to Mr Nilforushan's Anti-Doping Rule violation. In coming to its conclusion, Mr Nilforushan's Hearing Panel, considered the athlete's lack of Anti-Doping education. Nevertheless, the Appeal Tribunal held that the FEI Tribunal which heard the matter, erred in considering that it had discretion to reduce the mandatory 2 (two) year period of ineligibility under Article 10.5.2 because, in the absence of the necessary "truly

exceptional" circumstances, the question of discretion does not arise. Accordingly, the sanction which was imposed upon Mr Nilforushan was the mandatory 2 (two) year suspension, which compares with the 4 (four) year suspension applicable under the 2015 WADA Code, pursuant to Article 10.2.3 thereof. In the Sole Arbitrator's view, in the present case, there are no exceptional circumstances which exist to mitigate the Appellant's high degree of fault.

79. One of the other factors which emerges from the Record of the IDHP Hearing is the Appellant's comment which he inserted on his Doping Control Form, when told of the purpose for which his urine sample was required was, *"I think is cool, everything was explained to me nicely"*. This comment is consistent both with the Appellant having had no Anti-Doping education whatever at that time and being totally unconcerned about it. In fact, he ought to have begun his enquiries and investigations immediately after the delivery of his urine sample, when he was alerted to the Anti-Doping Regime. It was then that he should have begun questioning the possibility that he might be doing something wrong with regard to his ingesting of unknown substances and supplements, which might possibly contain Prohibited Substances, but he did nothing until after receiving notification of his ADRV.

80. Were the Sole Arbitrator to accept that the Appellant's overall conduct, which he has found to be reckless, is insufficient to establish intention, this would then be opening a loophole for athletes demonstrating conduct (including acts and omissions) which are not dissimilar to those of the Appellant, by providing them with an easy route to a reduced sanction of a maximum of 2 (two) years ineligibility, with the possibility of a minimum of a sanction. To do so, it is the Sole Arbitrator's opinion that he would be failing in his duty towards athletes who obey the WADA Anti-Doping Regime and endeavour to keep a level playing field to which the majority of athletes in most sports aspire to adhere.

81. The Sole Arbitrator finds that there exist many significant departures from the expected standard of care, including important breaches of duty on the part of the Appellant, none of which might be subject to a credible, relevant (non-doping) explanation, which could lead to a relatively low level of fault. To the contrary, the Sole Arbitrator finds the Appellant's level of fault to be high enough to allow the Sole Arbitrator to truly infer an intention to cheat, on the part of the Appellant.

82. The Sole Arbitrator is satisfied that the Respondent has established the elements of recklessness on the part of the Appellant, namely that he had an awareness of the existence of a significant risk, with him going on to manifestly disregard that risk.

83. The inability on the part of both the Appellant and Ms Magardi to establish the origin and identity of the Prohibited Substance, coupled with the surrounding confusion, made it impossible for the Respondent itself to establish the origin and identity of the Prohibited Substance which the Appellant ingested. Furthermore, applying the principle which applied in the Contador case, this inability on the part of the Respondent is no bar to the Sole Arbitrator finding that the Respondent has discharged the burden which it bears to establish intent on the part of the Appellant pursuant to Article 3 of the SAIDS Rules.

84. Accordingly, the appropriate sanction to be imposed upon the Appellant is a 4 (four) year period of ineligibility, as provided for in Article 10.2.1.2, as read with Article 10.2.3 of the SAIDS Rules. In the Sole Arbitrator's view, on due consideration of all the facts and circumstances in this matter, and the fact that the Respondent has discharged its burden of establishing intention on the part of the Appellant, there exists no need to consider fault as provided for in Articles 10.4 and 10.5 of the SAIDS Rules, which relate to No Fault or Negligence or No Significant Fault or Negligence, respectively.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 22 July 2016 by Mr. Cole Henning against the decision issued on 2 July 2016 by the Anti-Doping Appeal Committee of South Africa is dismissed.

2. (…).

3. (…).

4. All other prayers and motions for relief are dismissed.