Arbitration CAS 2016/A/4776 Dorian Willes v. International Bobsleigh & Skeleton Federation (IBSF), award of 14 July 2017

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Prof. Martin Schimke (Germany); Prof. Luigi Fumagalli (Italy)

Para-skeleton
Doping (methylhexaneamine)
Insufficient evidence to justify invalidation of adverse analytical finding
Duty to avoid consumption of substances prohibited in or out of competition
Efforts by athlete not justifying sanction reduction based on no fault or no significant fault

1. **Absent any specific circumstances neither a deviation from a test distribution plan nor the erroneous naming of the testing authority in the official doping control record may invalidate an adverse analytical finding.**

2. **Under the Anti-Doping Rules of the IBSF the athlete's duty to avoid consumption of substances prohibited in or out of competition is a continuing duty, lasting until the end of the competition. Therefore, and given that the competition is defined to continue until the conclusion of the awards ceremony, any adverse analytical finding resulting from what an athlete ingested until the end of the awards ceremony does not assist the athlete in undermining his/her anti-doping rule violation. Put differently, the athlete would still be responsible for the presence of any prohibited substance in his/her body even if *e.g.* consumed in an allegedly uncontrolled awards ceremony environment.**

3. **Where an athlete restricts his/her research as to whether or not a supplement contains prohibited substances to the WADA Prohibited List app despite the fact that a variety of other sources of information are readily available to him/her (amongst others *e.g.* from the consultation of a doctor and/or a physician and/or his/her sporting federation as well as the fact that a simple internet research reveals that the supplement in question contains the prohibited substance) no reduction in the stipulated sanction on the grounds of no fault or no significant fault is justified.**

I. INTRODUCTION

1. This appeal is brought by Mr. Dorian Willes (the "Appellant") against the Respondent, the International Bobsleigh & Skeleton Federation ("IBSF"), the United States Anti-Doping Agency ("USADA") and the World Anti-Doping Agency ("WADA") with respect to the decision of the IBSF Doping Hearing Panel (the "IBSF DHP") dated 18 August 2016 (the

"Decision") finding that the Appellant was guilty of an anti-doping rule violation ("ADRV") under the IBSF Anti-Doping Rules (the "IBSF ADR") and imposing, inter alia, a one-year period of ineligibility.

2. As described below, USADA and WADA were dismissed from this appeal for lack of jurisdiction by Decision of the Panel on 9 February 2017. Therefore, the only remaining Respondent is the IBSF.

II. PARTIES

3. The Appellant is a member of the USA Para-Skeleton Team.

4. The IBSF is the International Sports Federation for Bobsleigh and Skeleton, and is recognized as such by the International Olympic Committee.

III. FACTUAL BACKGROUND

A. Background Facts

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

6. On 17 March 2016, the Appellant ingested a dietary supplement (the "Product") known as Executioner.

7. Between 18 and 19 March 2016, the Appellant represented the USA Para-Skeleton team in the World Championships in Utah, USA (the "Championships").

8. The Appellant did not declare in the Declaration of Use Form that he had taken Executioner.

9. On 19 March 2016, the Appellant underwent an in-competition doping test. Pursuant to analysis at the Salt Lake City WADA accredited laboratory (the "Laboratory") the A sample provided by the Athlete tested positive for Methylhexaneamine ("MHA"), a stimulant and specified substance prohibited in-competition under WADA's Prohibited List (the "Prohibited List").

10. On 18 April 2016, the Appellant received notice of the adverse analytical finding ("AAF"). He was accordingly provisionally suspended.

11. On 20 May 2016, the IBSF was informed that the Appellant's B sample also tested positive for MHA pursuant to the analysis at the Laboratory.

12. On 8 July 2016, the Appellant submitted a memorandum challenging the sample collection process and asking for his provisional suspension (which he had accepted on 20 May 2016) to be lifted. The Appellant also sought an expedited hearing.

13. On 5 August 2016, a hearing took place before the IBSF DHP. The Appellant and the IBSF were present and represented at the hearing. Neither USADA nor WADA were parties to the underlying procedure.

14. On 18 August 2016, the Decision was issued.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 2 September 2016, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the IBSF, USADA, and WADA in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code") challenging the Decision and applying for various discovery against all the above-identified Respondents. In his Statement of Appeal, the Appellant nominated Dr. Martin Schimke as arbitrator.

16. On 16 September 2016, the Appellant filed his appeal brief in accordance with Article R51 of the Code.

17. On 19 September 2017, the IBSF nominated Prof. Luigi Fumagalli as arbitrator.

18. On 12 October 2016, the IBSF filed its answer in accordance with Article R55 of the Code.

19. On 25 November 2016, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the parties that the appeal, the object of this procedure, would be heard by the following Panel:

President:	The Hon. Michael J. Beloff M.A. Q.C., Barrister in London, England
Arbitrators:	Dr. Martin Schimke, Attorney-at-Law in Düsseldorf, Germany
	Prof. Luigi Fumagalli, Attorney-at-Law in Milan, Italy.

20. On 9 February 2017, the Panel issued a fully reasoned Award on Jurisdiction dismissing USADA and WADA from this procedure for lack of jurisdiction.

21. On 7 April 2017, having considered the Appellant's and the then Respondents' written submissions, the Panel limited the scope of the Appellant's witness testimony and dismissed the Appellant's application for discovery concerning (1) the IBSF testing plan at the Championships, (2) the USADA Doping Control Officer report for the Championship, (3) the WADA Data and Statistics for the top 10 prohibited substances on the Prohibited List resulting in Adverse Analytical Findings since 2010, (4) the Utah Olympic Park Tower Timing Documents showing the exact time on 19 March 2016 when Heat 4 of the Para Skeleton and Heat 4 of the Para Bob at the Championships concluded, (5) specifications and Certifications

of the Drop Box where USADA DCO deposited the 12 collected samples at the Laboratory, on grounds of (as applicable) irrelevance, non-existence or public availability.

22. On 8 and 9 May 2017, the IBSF and Appellant, respectively, signed and returned the Order of Procedure in this appeal.

23. On 9 May 2017, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel to the CAS, and joined by the following attendees:

For the Appellant:

Mr. Dorian Willes

Mr. David Kurtz, Counsel for the Appellant

Mr. Matthew Richardson, UK Para-bobsleigh and skeleton competitor at the Championships (by Skype)

Mr. Jason Lettice Australian, Para-bobsleigh and -skeleton competitor at the Championships (by Skype)

Mr. Terry Holland, ISBF transportation Manager at the Championships (by Skype).

For the Respondent

Ms Heike Grosswang, Secretary-General of the IBSF

Mr. Stephen Netzle, Counsel for the IBSF

Mr. Gary Robbins, DCO at the Championships (by telephone)

Mr. Daniel Eichner, M.D., head of the Laboratory (by telephone).

24. With the agreement of the parties and Panel, Mr. William Bock for USADA observed, by telephone, the examination of Mr. Gary Robbins.

25. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel. Upon its conclusion, the parties confirmed that they had been treated equally and fairly. No objections were made as to any part of the procedure.

V. SUBMISSIONS OF THE PARTIES

26. The Appellant's submissions were summarized as follows in paragraphs 7 and 8 of the Statement of Appeal:

"A. No Anti-Doping offense committed as the IBSF Sample Collection Authority (USADA) conducted Sample Collection in violation of the policy and mandatory requirements of the IBSF Anti-Doping Rules (ADR) and of the World Anti-Doping Code (WADC) and the International Standard for Testing and Investigations (ISTI) rendering the Laboratory's Adverse Analytical Finding In-Competition fatally defective and invalid.

B. No Anti-Doping offense committed as the WADA approved Laboratory selected by USADA conducted Sample Testing in violation of the policy and mandatory requirements of the IBSF Anti-Doping Rules (ADR) and of the World Anti-Doping Code (WADC) International Standard for Laboratories rendering the Laboratory's Adverse Analytical Finding In-Competition fatally defective and invalid.

C. The Substances, Analytical Methods or Decisional Limits approved by WADA on the Prohibited List (IBSF ADR 3.1) are no longer presumed to be medially and scientifically valid, and are subject to rebuttal of more recent and contemporary medical/scientific research. [CAS 2013/A/3437].

D. The Adverse Analytical Finding of the substance methylhexaneamine, specifically and expressly listed on the WADA 2015 Prohibited List for In-Competition use, is based upon out of date science of Analytical Methods and Decision Limits contrary to international standards of testing and enforcement regulations. Further, the WADA List of Prohibited Substances does not conform to usual scientific practice and legislative process, leading to confusion for Athletes by its ambiguity warranting the application of "contra proferentem".

E. The IBSF cannot meet its burden of proof to establish an Anti-Doping Offense thereby foreclosing the imposition of IBSF ADR Article 9 Disqualification of Result.

F. Should the CAS Hearing Panel decide the Adverse Analytical Finding valid, in conformity with the mandatory IBSF ADR and WADA International Testing Standards, the Athlete has met his burden of proof to establish No Fault thereby resulting in a Sanction under IBSF ADR Article 10 of the minimum Sanction: Warning/Reprimand only, no period of ineligibility; or No Significant Fault with the Sanction not to exceed 6 month period of ineligibility".

27. In his Statement of Appeal the Appellant requested the following relief:

The Appellant respectfully requests the Court of Arbitration for Sport to set aside the Decision of the IBSF Doping Panel for all the Reasons above stated, more particularly holding the Adverse Analytical Finding to be invalid for failure to comply with the mandatory provisions of the WADC, ISTI and IBSF. Should CAS find the AAF valid, then the Athlete should be sanctioned to a period of ineligibility no greater than six (6) months as Result of No Fault/No Significant Fault.

Further it is respectfully requested the Court award Appellant' costs and expenses including Expert Witness and Counsel Fees in addition to direct and consequential Damages for Gross Negligence of Respondents.

28. The IBSF's bifurcated submissions, in essence, may be summarized as follows:

- *a positive case* [*i.e.* that the laboratory analysis of the Appellant's samples was unchallenged and was consistent with his admission of ingestion of the product which contained the prohibited substance MHA and that the presence of the MHA in those samples constituted an AAF and established the commission by the Appellant of the ADRV]

and

- *a negative or rebuttal case* [*i.e.* that the Appellant's arguments that no ADRV was committed because certain requirements of the ISF ADR, ISTI and ISL were disregarded failed on the facts and in law and that the challenge to the inclusion of MHA in the prohibited list was impermissible, and that there was no evidence that the AAF for MHA was based on outdated

science of analytical methods, and decisional limits contrary to international standards of testing and enforcement regulations].

29. In its answer, the IBSF requested the following relief:

(1) The Appeal shall be rejected and the decision of the IBSF Doping Hearing Panel of 18 August 2016 shall be confirmed.

(2) The Appellant shall grant the IBSF a contribution towards its legal fees and other expenses incurred in connection with the proceedings and which the IBSF will quantify at the closure of the hearing.

VI. JURISDICTION

30. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

31. The Appellant relies on IBSF Anti-Doping Rules 13.2 as conferring jurisdiction on the CAS. The jurisdiction of the CAS is not contested by the IBSF and is confirmed by the signature of the Order of Procedure by the parties. Accordingly, CAS has jurisdiction to hear the appeal filed by the Appellant against the IBSF to challenge the Decision.

VII. ADMISSIBILITY

32. Article R49 of the Code provides as follows:

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

33. The Decision was received on or about 18 August 2016. The Statement of Appeal was filed on 2 September 2016. The appeal was accordingly admissible and its admissibility was not contested by the IBSF.

VIII. APPLICABLE LAW

34. Article R58 of the Code provides as follows:

"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 a choice, according to the law of the country in which the

federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

35. The applicable regulations are the IBSF Anti-Doping Rules ("IBSF ADR"), the World Anti-Doping Code ("WADC") standard for laboratories, the WADC International Standard for Testing and Investigations ("ISTI"). Since the IBSF is domiciled in Switzerland, Swiss law applies subsidiarily.

IX. MERITS

36. The following matters were not in issue between the parties:

- The accuracy of the laboratory analysis.
- The ingestion by the Appellant of Executioner on 17 March 2016.
- That Executioner contained MHA.
- That MHA was a stimulant whose use was prohibited in competition under the WADC.
- That MHA is not a threshold substance but synthetic.
- That any finding of (by definition exogenous) MHA in a human sample has been caused by an exogenous production).
- That the presence of MHA in urine constituted an ADRV under Article 2.1 of the IBSF ADR.

37. These undisputed matters formed a strong roadblock in the Appellant's path in so far as he sought to challenge the finding against him of an ADRV. He had in effect either to show that the samples tested were not his, or that their integrity had been so compromised that the test results could not be relied upon. He did not seek to suggest the first and, in the Panel's view, he did not succeed in establishing the second.

38. The Panel will consider each item of the Appellant's challenge *seriatim* although by the conclusion of the oral hearing it was apparent that some were not pursued as vigorously as others, if indeed pursued at all.

"Non-compliance with the IBSF Test Distribution Plan ("TDP")"

39. The Appellant initially asserted that all top 6 athletes in each competition had been tested instead of randomly selected athletes as he considered was provided by the TDP.

40. The relevant provisions of the IBSF ADR are as follows:

Article 5.4 IBSF ADR

"Consistent with the International Standard for Testing and Investigations, and in coordination with other Anti-Doping Organizations conducting Testing on the same Athletes, IBSF shall develop and implement an

effective, intelligent and proportionate test distribution plan that prioritizes appropriately between disciplines, categories of Athletes, types of Testing, types of Samples collected, and types of Sample analysis, all in compliance with the requirements of the International Standard for Testing and Investigations. IBSF shall provide WADA upon request with a copy of its current test distribution plan.

IBSF shall ensure that Athlete Support Personnel and/or any other Person with a conflict of interest are not involved in test distribution plan for their Athletes or in the process of selection of Athletes for Testing".

Article 5.2.2 IBSF ADR

"IBSF may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place".

Article 5.7 IBSF ADR

"5.7.1 At its International Competitions or Events, IBSF shall determine the number of finishing tests, random tests and target tests to be performed.

5.7.2 In order to ensure that Testing is conducted on a No Advance Notice Testing basis, the Athlete selection decisions shall only be disclosed in advance of Testing to those who need to know in order for such Testing to be conducted".

41. Before the Championships, the IBSF instructed that the first six athletes of every competition must be tested. The Appellant was accordingly in error as to the content of the TDP (the IBSF instruction not having been disclosed to the participants or the teams). The Appellant finished fourth and was therefore, in accordance with the TDP, subject to in-competition testing given that only six athletes finished the competition.

42. In any event the Panel does not understand how deviation from the TDP could of itself invalidate the test results.

"DCF indicates USADA instead of IBSF as testing Authority"

43. The Appellant noted that the Doping Control Official Record ("DCOR") indicates the USADA as the responsible testing authority whereas in fact the responsible testing authority was the IBSF. The Testing Reports for both the A sample and the B sample, however, correctly indicate the IBSF as Testing Authority while USADA is also correctly indicated as the Collection Authority.

44. In the Panel's view, erroneous naming of the testing authority in the DCOR could not have affected the test results.

"Late notification of Doping Control"

45. The Appellant also alleges that *"all athletes were not notified of selection for testing until after the conclusion of the Awards Ceremony"*. During that delay, the athletes were not supervised for at least 60

minutes, but *"exchanging hugs, kisses, liquids, food, spirits and engaging in urine elimination"* (somewhat hyperbolically described by Mr. Netzle as an *"orgy"*), which uncontrolled post-competition environment allegedly exposed the Appellant to transference of a prohibited substance or unknown ingestion of a substance prohibited in-competition and compromised the integrity of the AAF.

46. According to Article 5.3.5 ISTI ADR

> *"The Sample Collection Authority, DCO or Chaperone, as applicable shall establish the location of the selected Athlete and plan the approach and timing of notification, taking into consideration the specific circumstances of the sport/Competition/training session/etc. and the situation in question".*

47. The DCO, Gary Roberts, explains that he decided to notify the athletes at the Awards Ceremony (which took place close to the Doping Control Station and which was mandatory for all athletes to attend) rather than at the conclusion of their race. The Panel notes that the IBSF DHP said it may be questioned whether the testing procedure *"did comply with what the Rules mandatorily oblige for testing procedures"* (para 23 of the Decision), but abstained from answering a question which it (as does the Panel) considers irrelevant in this context.

48. The Panel finds that in point of fact

    i. There was a gap between the end of the Appellant's race and the notification to the Appellant (and others) of the need to submit to doping control. The length of that gap (which was not contemporaneously measured) was the subject of different estimates of no less than one but no more than two hours.

    ii. During that time the athletes (including the Appellant) ate and drank to assuage any thirst or hunger caused by the demands of the races by indulging in alcoholic beverages of the kind that they would have foreseen before and during the races themselves.

    iii. No evidence has been provided as to exactly what foods or liquids (other than wine) were consumed at that time by the celebrants (including the Appellant) or, in particular, whether such food or liquids were of a kind that might have been or contained prohibited substances.

49. In so far as the object of the Appellant's exercise was to show that the positive tests of his samples resulted from something that he ate or drank during that period as distinct from the Executioner, the Panel considers that the above evidence falls far short of dislodging the ingestion of the Executioner from its position as the prime suspect for the cause of those positive tests.

50. But if (*quod non*) the positive tests did result from what the Appellant ingested during that period, it would not assist him in undermining the ADRV. He would still have been responsible for the presence of the MHA in his body. The duty to avoid at the material time consumption of substances prohibited in or out of competition is a continuing duty Article 2.2 IBSF ADR (of which the Appellant was himself aware). The competition continued until conclusion of the

awards ceremony. See the definition *"Competition: A single race, match, game or singular sport contest. For example, 2 man bobsleigh, 4 man bobsleigh, women's bobsleigh"* Appendix 1 ditto.

51. Nor, for the same reason, is the Appellant's argument improved in so far as he seeks to rely upon the absence of the kind of warning later given in the DCOR that *"consumption of any fluid or food … is at your own risk"* at the conclusion of the race.

52. There was a debate between the parties as to whether or not there should not have been such a gap between the end of the race and the notification of the Athlete that he was selected for the testing. The Appellant relies on Article 5.8.2 of the IBSF ADR which provides *"that the DCO shall write the name of the Athlete on the official notification form and present it to the Athlete, as discreetly as possible, immediately after the Athlete has completed his competition"*. The IBSF relies on Article 5.3.5 ISTI ADR which provides *"that the Sample Collection Authority shall establish the location of the selected Athlete and plan the approach and timing of notification, taking into consideration the specific circumstances of the Competition"*.

53. The Panel notes only that there is a tension between the provisions on which each side respectively relies, and indeed between the underlying policies. A purpose of immediate notification is to prevent an athlete from leaving the competition site and evading doping control or from taking measures to compromise the results of any tests, *e.g.* by swallowing enough water to affect the assessment of the amount of any prohibited substance in his urine so contriving a false negative. But a concomitant warning as to the risk of consumption of food or drink before the doping itself is carried out may be desirable, if not strictly necessary, to remind the athlete of his or her overriding duty.

54. The Panel however repeats that whether or not such a gap was appropriate matters not for the purposes of the appeal. The test results could not have been affected by it.

55. To complete the chronology, the chaperone Alexis Tew notified the Appellant of the Doping Control at 07:49 pm. He checked in the Doping Control Station at 07:55 pm so that, as is shown in the DCOR there was no delay, capable of being criticized, between notification and arrival at the Doping Control Station.

"Shortcomings at the Doping Control Station"

56. The Appellant notes that "the Athletes" had been *"required* [sic] *opportunity to have a representative present at the Doping Control"* and that *"unauthorized individuals"* had been roaming the doping control station, *"co-mingling with athletes prior to providing urine samples for testing"*. Three specific individuals were identified – Mr. Kurtz himself, Mr. Holland and Mr. Raupp, IBSF Volunteer Transportation Manager – all of whom had in fact a reason to be present to assist another athlete who had smoked marijuana and was concerned for the consequences: nor was it (nor could it) sensibly be suggested that any of that trio have done anything to interfere with the sample collection.

57. The DCOR states:

"You may have a Representative accompanying you through the doping control process, but such Representative may not witness the sample collection unless requested/authorized by you, agreed upon by the Doping Control Officer and in accordance with relevant procedures".

58. If and in so far there were other (unidentified) unauthorized individuals in the doping control station, there is no evidence that any of them were present at any sample collection.

59. Moreover, in the DCOR the Appellant confirmed without any additional remarks or observations:

"By signing below, I agree and certify that (i) the information I have given on this document is correct, (ii) notification and sample collection were conducted in accordance with the relevant procedures subject to the comments added on the associated Supplementary Report Form(s), (if any) …".

60. Any retreat from this position would need to be justified by reference to some facts undiscovered or undisclosable at the time of signature, but critically, even had the alleged shortcomings been sufficiently evidenced it has not been explained by the Appellant how they could have adversely affected the test results. Nor once again does the Panel understand how they could have done so.

61. The Appellant complains about the location signatures of the DCO Gary Roberts and his assistant Dr. Brenner on the DCOR. There was and is, however, no doubt which persons carried out the Doping Control, namely Mr. Tew as notifying chaperone, Gary Roberts as the DCO and Dr. Brenner as the assistant of the DCO. Both Mr. Roberts and Dr. Brenner signed the DCOR. That they may have chosen the wrong line for their signatures cannot affect the efficiency of the sample collection.

"Breach of the Chain of Custody"

62. The Appellant also notes that the samples were left in the drop box of the SMRTL for at least 48 hours, as he claims, *"in an unapproved manner"* and contrary to the ISTI.

63. However, (i) the Sample Manifest signed by the DCO shows that the samples (including the ones from the Appellant) were hand-delivered by him to the laboratory on 19 March 2016 at 10:50 pm and was confirmed by the DCO, (ii) the deposit of the samples in the lab's drop box was confirmed by the SMRTL on 21 March 2016, (iii) the integrity of the transport container was inspected and confirmed on 23 March 2016.

64. There is no provision in the ISTI or the ADR which would prohibit hand-delivery of the samples to the laboratory and deposit in a secure drop box until the laboratory personnel can confirm receipt.

65. In the Panel's view the DCO and the SMRTL acted in full compliance with Article 9 ISTI which provides, so far as material:

*"**9.0 Transport of Samples and documentation***

9.1 Objective

a) To ensure that Samples and related documentation arrive at the laboratory that will be conducting the analysis in proper condition to do the necessary analysis; and

b) To ensure the Sample Collection Session documentation is sent by the DCO to the Testing Authority in a secure and timely manner.

9.2 General

9.2.1 Transport starts when the Samples and related documentation leave the Doping Control Station and ends with the confirmed receipt of the Samples and Sample Collection Session documentation at their intended destinations.

9.2.2 The main activities are arranging for the secure transport of Samples and related documentation to the laboratory that will be conducting the analysis, and arranging for the secure transport of the Sample Collection Session documentation to the Testing Authority.

9.3 Requirements for transport and storage of Samples and documentation

9.3.1 The Sample Collection Authority shall authorize a transport system that ensures Samples and documentation are transported in a manner that protects their integrity, identity and security.

9.3.2 Samples shall always be transported to the laboratory that will be analyzing the Samples using the Sample Collection Authority's authorised transport method, as soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations […].

9.3.4 The DCO shall send all relevant Sample Collection Session documentation to the Sample Collection Authority, using the Sample Collection Authority's authorised transport method, as soon as practicable after the completion of the Sample Collection Session.

9.3.5 If the Samples with accompanying documentation or the Sample Collection Session documentation are not received at their respective intended destinations, or if a Sample's integrity or identity may have been compromised during transport, the Sample Collection Authority shall check the Chain of Custody, and the Testing Authority shall consider whether the Samples should be voided".'

66. The efficacy of the sample storage and the acceptance procedure are considered for the purpose of the WADA accreditation of the laboratory. As part of the acceptance procedure, personnel of the SMRTL examined the container and the samples and found them in good order ("Inspect transport container and record for any irregularities", signed off by SMRTL officer).

67. The Panel concludes that there was neither contamination nor substitution of the Appellant's samples.

Departures from an International Standard or the ADR?

68. The Appellant has not, in the Panel's view, established in any way that the timing of notification or any other alleged departure from the International Standards or ADR (which are anyway disputed) could reasonably have caused the AAF (*i.e.* the presence of MHA in his urine sample). See CAS 2014/A/3639, paras. 104-105. On the contrary, the doping control in question was

fully compliant with all applicable rules and regulations under the WADC and the ADR and did not depart from an International Standard or the ADR.

69. In any event Article 3.2.3 ADR (the anti-technicality rule) states:

> *"Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation, then IBSF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".*

70. The Appellant argues that the fact that he was not immediately notified about the doping control was a breach *"so fundamental that it invalidated the analysis result"*. There is, however, no indication whatsoever that the timing of the notification caused the AAF, or that any other step in the collection or delivery of the samples somehow "aggravated" the AAF.

"Methylhexaneamine should not be on the WADA Prohibited List"

71. The Appellant contends that *"Methylhexaneamine should not be on the WADA Prohibited List"*.

72. In the Panel's view the Appellant is unable in point of law to advance such an argument.

73. The criteria for including Substances and Methods on the prohibited List are set out in Article 4.3.3 WADC and Article 4.3.3 ADR which state the following:

> *"WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List, the classification of substances into categories on the Prohibited List, and the classification of a substance as prohibited at all times or In-Competition only, is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport".*

74. Consistent CAS jurisprudence confirms that accordingly the Appellant's challenge must be rejected *in limine*, see *e.g.* CAS OG 06/001, paras 4.7 and 4.8; CAS 2005/A/921, award dated 18 January 2006, para 42; CAS 2005/A/726, para 2.4.

"The Appellant was not aware that 1,3 Dimethylamylamine was synonymous to MHA"

75. The Appellant argues that 1,3 Dimethyamylamine was not listed in the WADA "app" and that he did therefore not realise that Executioner contained a prohibited substance. He sought to rely on a report dated 30 September 2016 from Michael J. Coyer, a Forensic Toxicologist, belatedly submitted on 5 October 2016 the gist of which was that, as a layman not a chemist the Appellant could be excused for not appreciating that the ingredients on the label of Executioner indicated that it contained MHA.

76. The Panel rejected the report on the grounds of lateness and also that Dr. Coyer's field of expertise *i.e.* forensic toxicology did not extend to the issue (name recognition) on which he purported to pronounce.

77. For a variety of reasons the Panel in any event is compelled to reject the argument that the Appellant's lack of awareness was excusable:

    (i) The label of Executioner does not only refer to 1,3 Dimethylamylamine but also to Geranium Oil which is a popular name for MHA.

    (ii) Moreover, the entry of "1,3 Dimethylamylamine" in any internet search engine leads the inquirer to the information on various websites that this is synonymous with MHA and that it is a prohibited substance.

    (iii) USADA has repeatedly warned athletes from taking dietary supplements because of the risk that they may contain prohibited substances. In particular, the Supplement 411 of USADA, easily accessible on the internet, contains clear warnings and recommendations. It refers to the various names under which a prohibited substance in general and MHA in particular may be labelled on a dietary supplement.

    (iv) (a) The name and look of the product Executioner, (b) the label referring to *"Insane Energy"* that is provided by the ingredients, (c) the way in which the product is advertised (*"Kill every workout"*), (d) the fact that the producer of Executioner, Killer Labz, also offers products containing testosterone and other prohibited substances, (e) and the explicit warning that the label information has not been evaluated by the Food and Drug Administration are the reddest of red flags to any athlete.

78. In the Panel's view, the Appellant's restriction of his research to the WADA app was woefully inadequate given the variety of other sources of information readily available to him (like for example from the consultation of a doctor and/or a physician and/or his sporting federation) and cannot justify any reduction in the stipulated sanction on the grounds of no fault or no significant fault.

79. Given the expiry of the period of ineligibility imposed by the Decision, the Appellant's surviving purpose in pursuing this Appeal was to clear his name. The Panel acknowledges that he is not a drug cheat in the sense of someone who intentionally sought to enhance his sporting performance by use of a prohibited substance. However, even given his relative lack of experience in international competition and doping control (which the Panel recognizes) he fell far short (as even he himself conceded in his oral testimony) of standards of due diligence required of the modern athlete.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Dorian Willes on 2 September 2016 is dismissed.

(…)

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