Arbitration CAS 2017/A/5357 World Anti-Doping Agency (WADA) & Fédération Internationale de Basketball (FIBA) v. Hellenic National Council for Combating Doping (ESKAN) & Olga Chatzinikolaou, award of 31 May 2018

Panel: Mr Jacques Radoux (Luxembourg), Sole Arbitrator

Basketball
Doping (cocaine metabolites)
Standard of proof to rebut the intentional committing of an anti-doping rule violation
Balance of probability and source of prohibited substance

1. **The standard of proof by which an athlete can rebut the presumption of having intentionally committed an anti-doping rule violation or establish specific facts or circumstances is on the balance of probability.**

2. **The standard of proof of "balance of probability" has to be understood in the way that in case a CAS panel is offered several alternative explanations for the ingestion of the prohibited substance but it is satisfied that one of them is more likely than not to have occurred, the athlete has met the required standard of proof regarding the means of ingestion of the prohibited substance. It remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the panel to be less likely to have occurred. In other words, for the panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The athlete thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.**

I. PARTIES

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

2. The Fédération Internationale de Basketball ("FIBA") is the International Federation governing the sport of basketball. It was established according to Articles 60 ff. of the Swiss Civil Code (CC). Its headquarters are in Mies, Switzerland. One of its responsibilities is the regulation of basketball, including, under the World Anti-Doping Code ("WADC"), the running and enforcing of an anti-doping program.

3. The Hellenic National Council for Combating Doping ("ESKAN" or the "First Respondent") is the Greek national anti-doping authority responsible, *inter alia*, for adopting and implementing the anti-doping rules, directing the collection of the samples, managing the rest results and conducting the hearings on the national level.

4. Ms Olga Chatzinikolaou (the "Athlete" or the "Second Respondent") is an International-Level Athlete under the rules of the FIBA. She competes, *inter alia*, in the FIBA Eurocup for Woman with her club and is a member of the Greek national team.

II. FACTUAL BACKGROUND

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

6. On 26 March 2017, the Athlete played in the 4th game of the Women's Greek Basketball Cup Final with her club. The game started at 17h00. After the game, around 19h00, the Athlete was requested to undergo an in-competition anti-doping control. The doping control started around 19h35 and was completed at 20h21.

7. The Athlete's urine A Sample was analyzed in the Athens WADA-accredited laboratory (the "Athens Laboratory") and was found to contain cocaine metabolites. Further to the Athlete's request, the B Sample was also analyzed. The B Sample confirmed the findings of the A Sample. The approximate concentrations of the relevant metabolites in both samples were 270 ng/mL benzylecgonine ("BZE") and 400 ng/mL for methylecgonine ("EME").

8. Cocaine is a stimulant prohibited under section S6 of the WADA Prohibited List 2017. It is prohibited in-competition only and is a non-specified substance in the sense of the WADA Prohibited List.

9. On 13 April 2017, the Athlete was provisionally suspended by ESKAN.

10. Following the hearing held by the ESKAN's Primary Disciplinary Committee, said Disciplinary Committee, decided, on 17 July 2017, that the Athlete bore no responsibility for the substance found in her sample and that, consequently, she should not be submitted to any sanction (the "Appealed Decision"). As is apparent from the Appealed Decision, that the Disciplinary Committee, in view of the concentrations of BZE and EME found in the sample, accepted the Athlete's explanation that the positive finding came from a passive inhalation of cocaine at an afternoon dinner more than 12 hours prior to the game preceding the anti-doping control and thus out-of-competition.

11. On 12 September 2017, WADA received copy of the Appealed Decision through FIBA.

12. On 28 October 2017, the samples were transferred, upon request of WADA, from the Athens Laboratory to the Lausanne WADA accredited laboratory (the "Lausanne Laboratory") for further analyzing. On 1 November 2017, the Lausanne Laboratory informed WADA that the Athlete's sample contained the cocaine parent compound in an estimated concentration of 10 ng/ml, BZE in an estimated concentration of 120 ng/ml and EME in an estimated concentration of 800 ng/ml.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 3 October 2017, WADA filed its statement of appeal in accordance with Articles R47 of the Code of Sports-related Arbitration (the "Code"), against ESKAN and Ms Chatzinikolaou (together "the Respondents"), requesting that the Appealed Decision be set aside and the Athlete sanctioned with a four year period of ineligibility. In its statement of appeal, WADA nominated Mr Alexander McLin as arbitrator.

14. By letter dated 13 October 2017, the CAS Court Office acknowledged receipt of the statement of appeal and informed the Respondents, *inter alia*, that according to Article R53 of the Code, they should nominate an arbitrator within ten (10) days of receipt of the said letter.

15. On 16 October 2017, FIBA filed a request for intervention.

16. On 19 October 2017, the CAS Court Office, pursuant to Article R41.3 of the Code invited the parties to express their position on FIBA's request for intervention.

17. On 26 October 2017, WADA informed the CAS that it had no objections to FIBA's request for intervention. The Respondents did not object to FIBA's request for intervention in the given deadline.

18. On 7 November 2017, the Second Respondent acknowledged receipt of the CAS Court letter from 3 November 2017 and noted that she has not been informed by ESKAN or WADA that her sample would be transferred from the Athens Laboratory to the Lausanne Laboratory. Further, she requested to be given the full documentation package from the Lausanne Laboratory. Finally, she pointed out that the results from the Athens Laboratory and the Lausanne Laboratory seemed to differ although both Laboratories are officially accredited by WADA.

19. On 10 November 2017, the CAS Court Office acknowledged receipt of the Second Respondent's wish to appoint Mr Sofoklis Pilavios as arbitrator, which was however submitted out of time, and invited WADA and the First Respondent to express their position on such nomination.

20. By letter dated 16 November 2017, the CAS Court Office acknowledged receipt of WADA's Appeal Brief, filed on 13 November 2017 within the extended time-limit, and invited the Respondents, pursuant to Article R55 of the Code, to file their answer should be filed within twenty (20) days upon receipt of the said letter.

21. The same day, the CAS Court Office invited the Respondents to express, until 22 November 2017, their position on WADA's request of 15 November 2017 for the appointment of a sole arbitrator in the present matter.

22. On 23 November 2017, the CAS Court Office informed the parties that given the silence of the Respondents on the subject, the President of the CAS Appeals Arbitration Division would, in application of Article R50 of the Code, decide whether or not to appoint a sole arbitrator in the present matter.

23. On 1 December 2017, the CAS Court Office acknowledged receipt of the Second Respondent's requests for a two (2) week extension of the deadline to file her answer as well as for further analysis of her sample by a third Laboratory and invited WADA to express its position on said requests.

24. WADA having agreed to the extension of the deadline to file the answer, the two (2) week extension for the filing of the Second Respondent's answer has been granted by the CAS Court Office on 5 December 2017. WADA however pointed out, in an e-mail of 12 December 2017, that it considered a further analysis of the sample in a third WADA accredited Laboratory to be neither necessary nor helpful.

25. On 29 December 2017, the CAS Court Office acknowledged receipt of the Second Respondent's answer, filed on 21 December 2017, and informed the parties that pursuant to Article R54 of the Code, Mr Jacques Radoux, référendaire at the European Court of Justice, Luxembourg, had been appointed as Sole Arbitrator in the present matter and that unless the parties agree or the Sole Arbitrator orders otherwise on the basis of exceptional circumstances, Article R56 of the Code provides that the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely, after the submission of the appeal brief and the answer.

26. On 16 January 2018 and after due consultation with the parties, the CAS Court Office advised the parties that the Sole Arbitrator had taken the following decisions and issued the following procedural directions:

> *"- In view of Article R41.3 and R41.4 of the CAS Code, of Articles 14.2.1 and 14.2.3 of the Greek Law No 4373, which contains an arbitration agreement that is binding for FIBA, FIBA's reasoned request for intervention, which was filed within the 10-day time limit prescribed by Article R41.3, is accepted;*
>
> *- FIBA is thus allowed to intervene in the current appeal procedure to the extent that its intervention relates to WADA's requests for relief and grounds of appeal;*
>
> *- A copy of the CAS file, to date, is enclosed for FIBA's intention which is granted with the opportunity to submit a brief within 10 days from receipt of the present letter by DHL;*
>
> *- The Respondents will then be granted a ten day time-limit to answer to FIBA's brief;*

- *Pursuant to Article R57 of the CAS Code and in view of the CAS file, the Sole Arbitrator has decided to hold a hearing in this case;*

[…]

- *The Sole Arbitrator will decide on the Second Respondent's request to have her sample tested by a third accredited WADA laboratory after the hearing".*

27. Following some further correspondence, the CAS Court Office informed the parties that the hearing would be held on 23 March 2018 at the CAS Court Office.

28. By letter dated 8 February 2018, the CAS Court Office acknowledged receipt of the brief filed by FIBA, within its extended time-limit to do so, and invited the Respondents to file their answer to FIBA's brief.

29. On 23 February 2018 and within the applicable time-limit, the Second Respondent filed her answer to FIBA's brief.

30. On 1 March 2018, the Second Respondent requested a postponement of the hearing on the grounds that she was to compete in the Final-Four Basketball Women's Cup that would be held from 23 to 25 March 2018 in Athens.

31. On 6 March 2018, the CAS Court Office informed the parties that as the parties had all been duly consulted, as the date of the hearing had been fixed for the Second Respondent's convenience in spite of FIBA's difficulty to make itself available that date and as the hearing date was determined at a moment in time on which the date of the Final' Four-Basketball Women's Cup was very likely to have been known, the hearing would be held on 23 March 2018 except if all parties agreed otherwise.

32. On 8 March 2018, the CAS Court Office informed the parties that, as not all parties had agreed to the said request, the hearing would be held as planned on 23 March 2018 and notified the order of procedure to the parties.

33. On 9 March 2018, WADA signed and returned the order of procedure in this arbitration procedure. FIBA signed the order of procedure on 13 March 2018. The First Respondent signed the order of procedure on 14 March 2018. The Second Respondent signed the order of procedure on 15 March 2018.

34. On 23 March 2018, a hearing took place at the CAS Court Office. The Sole Arbitrator was assisted by Mrs Pauline Pellaux, Counsel to the CAS, and joined by the following participants:

For WADA:

Mr Ross Wenzel and Mr Nicolas Zbinden (counsel) (in person)

Dr Irene Mazzoni (expert) (by phone)

Dr Tiia Kuuranne (expert) (in person)

For FIBA:

Ms Nathalie St. Cyr Clarke (FIBA Legal Affairs Manager) (in person)

For the Second Respondent:

Ms Olga Chatzinikolaou (Second Respondent) (in person)
Mr Ioannis Marakakis (counsel) (in person)
Ms Vasiliki Moschoviti (counsel) (in person
Mr Konstantinos Andreou (expert) (in person)

35. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel. After having testified and before leaving the hearing, the Athlete was given the opportunity to explain her view to the Sole Arbitrator. At the hearing, the counsel of the Athlete requested to be allowed to submit two affidavits as evidence. WADA not having agreed to the production of this new evidence, the Sole Arbitrator, in absence of any exceptional circumstances having prevented the Second Respondent from producing this evidence at an earlier stage of the procedure, rejected said request according to Article R56 of the Code.

36. At the conclusion of the hearing, the parties confirmed that their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

A. WADA's submissions

37. WADA's submissions, in essence, may be summarized as follows:

- The Appealed Decision was rendered in application of the Greek law n° 4373/2016 (the "law n° 4373"). Thus the law n° 4373 is applicable to the present appeal.

- In the present case it is not contested that the analyses of the Athlete's A and B samples revealed the presence of metabolites of cocaine and that the Athlete has breached Article 3.1 of the law n° 4373 by committing an ADRV.

- According to Article 11.2.1.1 of the law n° 4373, the period of ineligibility shall be four (4) years where the anti-doping rule violation ("ADRV") does not involve a specified substance, unless the athlete can establish that the ADRV has not been intentional. As the athlete bears the burden of establishing that the ADRV was not intentional, CAS panels have held that, except for extremely rare cases, the athlete must establish how the substance entered his or her body. The present case does not fall within the category of the extremely rare cases in which the origin of the substance does not have to be established to prove that the ADRV was not intentional.

- The Athlete is required to prove the origin of the prohibited substance on the "balance of probability". The balance of probability standard entails that the Athlete has the burden of convincing the Panel that the occurrence of the circumstances on which she relies is more probable than their non-occurrence. Thus, the Athlete must adduce concrete and actual evidence of the specific circumstances in which the unintentional ingestion of the prohibited substance would have occurred and bring analytical prove that the explanation of origin brought forward could have caused the positive findings in the relevant concentrations.

- In the present case, the Athlete argued, on the basis of the statements from several experts (Prof. Tsatsakis, Dr Koutsafti and Dr Tsantiris), that the findings of the Athens Laboratory, i.e. the ratio between the concentrations of EME and BZE found in the sample as well as the fact that the parent compound of these two metabolites was not found, confirm that the Athlete unknowingly and passively inhaled cocaine more than fifteen (15) hours before the in-competition anti-doping test. However, on the basis of the findings of the Lausanne Laboratory, and more specifically the fact that the parent compound was found, the explanation of origin provided by the Athlete is contradicted by the statements of the experts she relied on in first instance. Indeed, first, according to Dr Koutsaftis and Mr Tsantiris, the parent compound can only be detected in the sample for a period of a maximum of 8 hours from the intake of cocaine. As a result, the results of the Lausanne laboratory would indicate a much more recent use of the prohibited substance than that alleged by the Athlete. Second, it is apparent from the concentrations of the metabolites found by the Lausanne Laboratory that the concentration of BZE is higher than that of EME. According to both of the Athlete's experts, this indicates that the use took place within the previous 15 hours from sample collection. Third, the concentrations of the metabolites detected by the Lausanne Laboratory were even higher than the estimations of the Athens Laboratory concentrations and the latter, according to Dr Mazzoni, could not have resulted from a passive inhalation almost 24 hours before the doping control.

38. In its appeal brief, WADA requested the following relief:

1. The Appeal of WADA is admissible.

2. The decision of the First-Instance Disciplinary Committee of ESKAN dated 17 July 2017 in the matter Olga Chatzinikolaou is set aside.

3. Olga Chatzinikolaou has committed an anti-doping violation under art. 3.1 and/or 3.2 of the law n° 4373.

4. Olga Chatzinikolaou is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Olga Chatzinikolaou before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

5. WADA is granted an award on costs.

39. At the hearing, WADA specified its request for relief under 5. in so far that only the First Respondent, i.e. the Hellenic National Council for Combating Doping (ESKAN), should bear the costs of the arbitration and should make a considerable contribution to the legal and other costs that WADA had to engage in the present procedure.

B. FIBA's submissions

40. FIBA shares the conclusions presented by WADA in its Appeal Brief and supports its request for relief.

41. FIBA's submissions can by summarized as follows:

- According to Article 4.1 of the law n° 4373, the burden of proof that an ADRV occurred is on WADA. Pursuant to Articles 11.2.1, 11.4, 11.5.1.2 and 11.5.2 of the law n° 4373, the athlete bears the burden of proving that the ADRV was not intentional, and that she bore no (significant) fault or negligence.

- In the present case, the fact that two metabolites of cocaine were present in the Athlete's A and B samples is not contested. Thus the ADRV is established. The fact that the parent compound was or was not present in the samples is irrelevant. It is up to the Athlete to establish on the "balance of probabilities" that the occurrence of the circumstances on which the Athlete relies are more probable than its non-occurrence or more probable than other possible explanations for the ADRV.

- In order to establish that the intake of cocaine was not "intentional" in the sense of Article 11.2.3 of the law n° 4373, the Athlete has two options: first, it is sufficient to demonstrate on a balance of probabilities that the cocaine was (i) ingested out-of-competition and (ii) in a context unrelated to sport performance, knowing that these two requirements are distinct and cumulative. Second, even outside of these circumstances, the Athlete could establish that the ADRV was unintentional, e.g. by showing that even though the prohibited substance was taken in-competition, this happened unknowingly.

- FIBA considers that the out-of-competition intake has not been established, *inter alia*, in view of the fact that besides her own word, the Athlete has not furnished any direct evidence of her having been exposed to cocaine smoke on the night of 25 March 2017. In particular, the Athlete did not present any evidence for anyone having smoked cocaine at the afternoon dinner or of her attending said dinner. Further, the indirect evidence constituted by the expert reports is severely undermined by the findings of the Lausanne Laboratory as these findings render said reports insufficient for establishing, on a balance of probabilities, that the Athlete passively inhaled cocaine at a party around twenty-four (24) hours before the doping control. In these circumstances, FIBA considers that it can be left open whether the Athlete is in a position to establish that the cocaine was used in a context unrelated to sports performance.

- As the Athlete did not provide any other explanation for the adverse analytical finding than unintentional passive inhalation of cocaine, the Athlete would have to prove that her case is one of the rare cases in which, according to the CAS jurisprudence, lack of intent could be established without having to demonstrate how the substance entered the Athlete's body. However, no such argumentation has been developed by the Second Respondent.

- The Athlete having failed in showing that the ADRV was unintentional, the ineligibility period should be four (4) years. However, given that the Athlete was suspended from 13 April 2017 until 17 July 2017, 95 days should be credited, on basis of Article 11.1.3.1 of the law n° 4373, against this period of ineligibility.

C. The Second Respondent's submissions

42. The Second Respondent's submissions may, in substance, be summarized as follows:

- The alleged finding of cocaine in the sample at a concentration of 10 ng/mL has at best to be considered as a "trace" and does not indicate a use of cocaine close to the time of the doping control. If the Athlete had used cocaine 30 minutes to 5 hours before the game, the concentration of the detected cocaine would have varied from 1.000 ng/ml up to 10.000 ng/ml. This important variation in concentration reflects the difference between a "recent use" and an exposure to the substance which may have taken place from a day up to a couple of weeks before the sample was taken. Thus, if the Athlete had used cocaine 30 minutes to 5 hours before the doping control, then, cocaine could have been detected in the urine. If the substance had already passed on to a second stage of elimination, then the concentration of the metabolites should and would have been at least ten times higher than the ones found and would range between 2.000 ng/mL to 4.000 ng/mL.

- In the present case, the concentration level of BZE was only 270 ng/mL and that of EME only 400 ng/mL demonstrating that the exposure to cocaine took place many hours before the doping control. As WADA did not provide factual evidence to rebut the findings and arguments relied upon in the Appealed Decision, it has to be concluded that the Athlete managed to establish beyond doubt that the ADRV was not intentional and did not come from an in-competition use of the substance.

- According to a written report of the Athlete's expert, Mr Tsantiris, a certain number of requirements have to be met to ensure that the results of the sample testing are accurate. In this regard, the Athlete emphasizes, *inter alia*, that: the screening should take place within a time frame of ten (10) days after sample collection; it should be ensured that the samples do not contain mild residues and are within the normal pH-range (5-8); samples are recommended to only be frozen once; biological samples are considered to be compromised when kept under preservative conditions, stored in deep freezing and then reheated for examination; transferring a sample abroad does not allow to maintain the appropriate temperature (-20°C); there is a risk of tampering, dilution or alteration in vitro or in vivo and, as urine is a biological material, there is biological process of decomposition

that is enhanced by frequent changes in temperature of the sample; the Athens Laboratory did not detect the parent compound either because it was not present in the sample or because the sample only contained traces of it, the second of these two options being more probable as the concentrations of BZE and EME were low. As a result, the Second Respondent considers that it is proven beyond doubt that the sample testing which took place in the Lausanne Laboratory is faulty and unreliable.

- The Second Respondent further reiterates her arguments and explanations brought forward before the Disciplinary Committee, i.e. that she did not voluntarily or intentionally ingest cocaine but that she must have ingested that substance unknowingly by passively inhaling it at an afternoon dinner on 25 March 2017. Hence, the intake occurred out-of-competition and was unrelated to sport performance.

43. In her requests for relief the Second Respondent asks the Sole Arbitrator to:

1. *Overrule the Appeal against the Appealed Decision enclosed as Exhibit 1, deeming it inadmissible and uphold the decision of the First-Instance Disciplinary Committee of ESKAN.*

2. *Set aside the Appeal Brief by virtue of the arguments that have been presented and conclude that the Second Respondent shall not incur any penalty.*

3. *In the hypothetical and improbable case that the Panel considers that the Player has committed an anti-doping rule violation and shall be sanctioned, to determine a more accurate sanction in proportion with a rightful and appropriate interpretation of the facts in line with the arguments that have been presented, such as disciplinary measure of reprimand.*

4. *Condemn the Appellant to the payment of the whole CAS administration costs and Panel fees.*

5. *Fix a sum to be paid by the Appellant to the Second Respondent in order to cover its defence fees and costs in the amount of CHF 10.000.*

44. While duly invited to do so, the First Respondent did not submit any Answer.

V. JURISDICTION

45. Article R47 of the Code provides, *inter alia*, as follows:

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

46. The Appealed Decision has been adopted by the Disciplinary Committee of ESKAN, which is the national anti-doping organisation of Greece. The necessary arrangements for the harmonisation of the Greek legislation with the World Anti-Doping Code ("WADC") are set out in the law n° 4373. According to Article 14.2.1 of the same law, in cases involving

"International-Level Athletes" a decision like the Appealed Decision "may be appealed exclusively before CAS".

47. In the present matter, all parties agreed that the Second Respondent is an *"International-Level Athlete"* in the sense of the law n° 4373. Further, it follows from Article 14.2.3 of said law, that WADA as well as FIBA have the right to appeal the Appealed Decision to the CAS.

48. The Appealed Decision is a decision of *"sports-related body"* in the sense of Article R47 of the Code as ESKAN has been designated by the law n° 4373 as the entity possessing *"primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of the Samples, the management of test results, and the conduct of the hearings at national level"*.

49. Finally, regarding the condition according to which the *"internal remedies available prior to the appeal"* to CAS have been exhausted, the Sole Arbitrator notes that pursuant to Article 14.1.3 of the law n° 4373, WADA has the right to *"directly"* appeal a decision like the one at hand to the CAS.

50. In the light of the foregoing, the Sole Arbitrator finds that CAS has jurisdiction to hear the present appeal. In addition, none of the parties to the present proceedings contested said jurisdiction and all parties confirmed CAS jurisdiction by execution of the order of procedure.

VI. ADMISSIBILITY

51. 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. […]"*.

52. In its relevant parts, Article 14.7.2 of the law n° 4373 provides that *"[n]otwithstanding the above, the period within which the WADA may file an appeal is: (a) twenty-one (21) days after the last day on which any other party in the case could have appealed, or (b) twenty-one (21) days after WADA's receipt of the complete file relating to the decision"*.

53. WADA received notification of the Appealed Decision on 12 September 2017 and filed its statement of appeal on 3 October 2017.

54. By doing so, WADA respected the twenty-one (21) day period set out by the law n° 4373 to file the appeal. Moreover, the Respondents did not object to the admissibility of this appeal. Finally, WADA filed the Appeal Brief within the deadline set out in Article R51 of the Code.

55. In the light of the foregoing, the Sole Arbitrator finds that the appeal is admissible.

VII. APPLICABLE LAW

56. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

57. In the present case, it is uncontested that the applicable regulation is the law n° 4373 which is, at the same time, part of the law of the country in which the body that issued the Appealed Decision has its seat.

58. However, as the purpose of the law n° 4373 is to insure the harmonization of Greek law with the WADC and as some of the provisions of the law n° 4373 contain a direct reference to the WADC the latter might be taken into consideration by the Sole Arbitrator to guide him in case he has to interpret the provisions of the law n° 4373 or to correct an eventual lacuna in the law n° 4373.

VIII. MISSION OF THE SOLE ARBITRATOR

59. Article 14.1.1 of the law n° 4373 provides that *"[t]he scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker".*

60. With regards to the CAS, Article 14.1.2 of the law n° 4373 states that *"[i]n making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed".*

61. In application of these rules, which are in line with the full power of review provided for in Article R57 of the Code, the Sole Arbitrator is entitled to hear the present case *de novo*.

IX. MERITS

62. As a preliminary point, it should be remembered that cocaine (and its metabolites) is a "non-specified substance" and is prohibited in-competition only. Cocaine is a non-threshold substance and it is, thus, irrelevant whether the concentration of the substance found in the sample could or not have had a performance enhancing effect on the athlete. The presence as such of the substance in the system of the athlete is sufficient to establish an ADRV.

63. In the present case, it is not contested that metabolites of cocaine, i.e. BZE and EME, were found by the Athens Laboratory in the A and the B-samples of the Athlete. It is further uncontested that the Athens Laboratory is not accredited to analyse samples for the presence of the parent compound of cocaine and did, therefore, presumably not look search for the said compound.

64. The ADRV is thus uncontested.

65. According to Article 11.2.1.1 of the law n° 4373, the period of ineligibility shall be four (4) years when the ADRV involves a non-specified substance, unless the athlete can establish that the

ADRV was *"not intentional"*. Pursuant to Article 11.2.2 of the law n° 4373, if Article 11.2.1 does not apply, the period of ineligibility shall be two years. Article 11.2.3 of the said law provides that the term *"intentional"* is meant to identify those athletes who cheat and that an ADRV 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 non-specified substance and the athlete can establish that said substance was used out-of-competition in a context unrelated to sport performance.

66. In the present case, the Athlete argues that the ADRV was not intentional and that she bore no fault.

67. In this regard, it should be borne in mind that the standard of proof by which the athlete can rebut the presumption of having intentionally committed said ADRV or establish specific facts or circumstances is, pursuant to Article 4.1 of the law n° 4373, on the balance of probability. This provision has to be understood in the way that in case a Panel is offered several alternative explanations for the ingestion of the prohibited substance but that it is satisfied that one of them is more likely than not to have occurred, the athlete has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered, by the Panel, to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The athlete thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred (CAS 2009/A/1926 & 1930, para. 31).

68. It should further be recalled that, according to existing CAS jurisprudence, although it is not necessary for an athlete to establish the source of the prohibited substance to establish lack of intent, whenever an athlete cannot prove said source, *"it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him"* (CAS 2016/A/4676, para. 37).

69. Regarding the Athlete's explanations in relation to the circumstances in which, according to her, the substance got into her system, the Sole Arbitrator finds, first, that the Athlete has not provided any actual and valid evidence that these circumstances really occurred. Indeed, apart from the Athlete's own statement that she attended a late afternoon dinner in a friend's apartment, she did not bring any valid evidence of said attendance within the time frame opened for that. Second, in contrast, *inter alia*, to case CAS 2009/A/1926 & 1930, in which, the consumption of cocaine by the third person involved was proven by analytical tests and the intensive physical contact between the athlete and said third person confirmed by witnesses as well as by these persons themselves, any such test or corroborating factual evidence or testimonies establishing that the Athlete actually did attend that late afternoon dinner or that people at the said dinner were indeed smoking cocaine are missing in the present case.

70. However, to establish the origin of a prohibited substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation. As the Sole Arbitrator in CAS 2017/A/4962 recalled: *"[t]o permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and*

Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body".

71. It is not sufficient for an athlete to merely make protestations of innocence and suggest the prohibited substance must have entered his or her body without his or her knowledge (see, in this sense, CAS 2006/A/1067, para. 14).

72. In the present case there is, though, no concrete and direct evidence demonstrating that the factual circumstances in which the unknowing and passive inhalation of cocaine allegedly took place even occurred.

73. With regards to the indirect evidence brought forward by the Athlete, i.e. the expert evidence according to which the concentration of the metabolites found by the Athens Laboratory as well as their ratio confirm the scenario according to which she had unknowingly and passively inhaled the cocaine at the late afternoon dinner the day before the anti-doping test, the Sole Arbitrator considers that this indirect evidence could be left unexamined as the factual circumstances on which this scenario rests were not established in the first place.

74. However, for the sake of completeness, this evidence will also be addressed.

75. In this regard, first, Mr Andreou, although stating that the ratio between metabolites found by the Athens Laboratory pleaded for an intake more than 15 hours before the anti-doping test, did not disagree with Dr Kuuranne when the latter explained that the alleged discrepancies between the findings of the Athens Laboratory and the findings of the Lausanne Laboratory are due to the application of different methodologies in these two Laboratories and showed that, according to her calculations, the absolute values of the peak areas do not differ so much if the internal standards are applied and that the ratio between the metabolites resulting from the Athens Laboratory analysis would have been reversed and, thus, would be similar to the one resulting from the Lausanne Laboratory. Further, Mr Andreou even though considering that there the drop of the pH-value from 5.5 to 5.15 was a significant one, especially in view of the fact that the lower limit for a valid analysis is 4.5, and questioning the conditions under which the sample was transported from the Athens Laboratory to the Lausanne Laboratory, did not contest that the International Standards for Laboratories was respected. Finally, Mr Andreou agreed with Dr Kuuranne and Dr Mazzoni that none of the doubts on the acidity of the sample or the conditions of its shipping could have made cocaine appear in a sample if it had not been before.

76. Second, as WADA pointed out during the hearing, it follows from one of the studies (R.C. Baselt) cited by the Athlete's experts that even the concentrations of the metabolites found by the Athens Laboratory, which are significantly lower than the ones found by the Lausanne Laboratory, are too high to be the result of a passive inhalation twenty-four (24) hours before the anti-doping test, which is the only explanation brought forward by the Athlete for the origin of the substance. In this regard, Dr Mazzoni reiterated her statement that, on basis of published literature in that field, the analytical findings of both Laboratories could not result from a passive intake twenty-four (24) hours before the anti-doping test.

77. Third, it follows from a study cited by WADA's experts that the levels of concentration of metabolites and cocaine found by the Lausanne Laboratory in the Athlete's sample are very similar to the results found in study (by E.J. Cone) of a group of individuals having actively smoked cocaine less than 9 hours before the sample was taken. In this context, in their answer to a question from the Sole Arbitrator, Mr Andreou and Dr Mazzoni agreed on the fact that the concentrations of metabolites found by the Laboratories in the present case could also be the result of an active intake of cocaine at a moment in time so close to the anti-doping test that only the first signs of such intake had appeared in the urine of the Athlete, the excretion of the parent compound and metabolites having not, at the time of the sample taking, reached its peak yet.

78. This finding is not undermined by the argument, raised by the Athlete, that it would not have been necessary for her to take a stimulant like cocaine to compete in a game that her team won by forty (40) or more points. Indeed, the Sole Arbitrator considers that there may be other reasons for an athlete to use cocaine than wanting to win a game, such as, *inter alia*, outperforming rival teammates or showing a good performance with the aim of improving its bargaining position in the upcoming negotiations for a new contract for the next season like the ones that, according to the Athlete, were due as she had a one year contract that was about to end with the basketball season 2016/2017 in May 2017.

79. In the light of the above, the Sole Arbitrator finds that the Athlete failed to establish, on a balance of probabilities, the source of the cocaine and the metabolites found in her system. In this regard, it has to be pointed out, that this conclusion can be drawn on the basis of the findings of the Athens Laboratory alone. Thus, the Sole Arbitrator finds that it is not necessary to order a supplementary analysis of the sample by a third accredited laboratory as requested by the Athlete.

80. In the absence of any other objective and/or subjective circumstances that would be exceptional enough to make an intentional violation improbable (CAS 2016/A/4828, para. 136), the Sole Arbitrator holds that, in the present case, the lack of intent has not been established.

81. Thus, in application of Article 11.2.1.1 the period of ineligibility shall be four (4) years.

82. Regarding the Athlete's request that if the Sole Arbitrator were to come to the conclusion that the Athlete has committed an anti-doping violation and should be sanctioned, the sanction should be a "reprimand", it has to be recalled that according to the law n° 4373 a "reprimand" can be imposed in cases set out by Article 11.5 of said law.

83. In this respect, first, pursuant to Article 11.5.1.1 of the law n° 4373 *"[w]here the anti-doping rule violation involves a Specific Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and a maximum, two years of Ineligibility"*.

84. Second, pursuant to Article 11.5.1.2 of the law n° 4373 *"[i]n cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a*

Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility".

85. As, in the case at hand, the facts do not relate to a specified substance or a contaminated product in the sense of the above provisions of the law n° 4373, these provisions cannot be applied.

86. Finally, considering a possible reduction of the four (4) year period of ineligibility for "no fault" or "no negligence", the Sole Arbitrator notes that given the Athlete's failure to rebut the legal presumption of having committed the ADRV intentionally, such a reduction cannot be granted. Indeed, the finding that the Athlete could not establish lack of intent to cheat logically precludes the Sole Arbitrator from concluding that said Athlete did not commit any fault or was simply negligent (CAS 2016/A/4828, para. 141-143).

87. In the light of the forgoing, the Appealed Decision, which did not impose any eligibility period on the Athlete, has to be considered manifestly wrong. Thus, the Appealed Decision shall be annulled and the Athlete shall be suspended for a period of four (4) years.

88. Concerning the starting point of the period of ineligibility, Article 11.11 of the law n° 4373 provides in its relevant part that *"[…], the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed".*

89. In the present case the ineligibility period shall thus start on the date of notification of the present award.

90. According to Article 11.1.3.1 of the law n° 4373, *"[i]f a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or the other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed […]".*

91. In the present case, the Athlete has been provisionally suspended from 13 April 2017 until 17 July 2017. Therefore, this period of provisional suspension shall be credited against the four (4) year period of ineligibility to be served.

92. In the light of all those considerations, the Sole Arbitrator concludes that the appeal is admissible, that the Appealed Decision has to be set aside and that the Athlete has to be declared ineligible for a period of four (4) years running from the date of notification of the present award, with credit given for the period of ineligibility already served from 13 April 2017 until 17 July 2017.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 October 2017 by the World Anti-Doping Agency with the Court of Arbitration for Sport against the decision of the Hellenic National Council for Combatting Doping (ESKAN) dated 17 July 2017 is admissible.

2. The decision of the Hellenic National Council for Combatting Doping (ESKAN) dated 17 July 2017 is set aside.

3. Ms Olga Chatzinikolaou committed an anti-doping rule violation according to Article 3.1 of the Greek law n° 4373.

4. Ms Olga Chatzinikolaou is sanctioned with a four (4) year period of ineligibility, starting on 31 May 2018. The period of provisional suspension served by Ms Olga Chatzinikolaou between 13 April 2017 and 17 July 2017, shall be credited against the four-year period of ineligibility to be served.

(…)

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