Arbitration CAS 2018/A/5619 World Anti-Doping Agency (WADA) v. United World Wrestling (UWW) & Anzor Boltukaev, award of 8 October 2018 (operative part of 13 September 2018)

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Ken Lalo (Israel); Mrs Annett Rombach (Germany)

Wrestling
Doping (higenamine)
Range of sanction applicable to an unintentional anti-doping rule violation involving a specified substance
No reduction of the standard sanction in case of failure to establish the origin of the prohibited substance

1. **According to Article 10.2.2 of the UWW Anti-Doping Regulations (ADR), the sanction provided for a violation of Article 2.1 ADR committed by an athlete is a suspension for 2 years e.g. for an unintentional violation involving a specified substance. Such sanction, however, can be eliminated, if the athlete proves that he bears *"no fault or negligence"* (Article 10.4 of the ADR), or reduced, *inter alia,* if the athlete proves that the prohibited substance was ingested following the use of a contaminated product and that he bears *"no significant fault or negligence"* (Article 10.5.1 of the ADR): in this case the sanction would be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility, depending on the athlete's degree of fault. The crucial point in both cases is the determination of the origin of the prohibited substance found in the athlete's body. In fact, only in the event the athlete proves *"how the Prohibited Substance entered his … system"* can a fault-related reduction (or elimination) of the sanction be granted.**

2. **Mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability). The mere allegation of a possible occurrence of a fact cannot amount to a demonstration that such fact did actually occur: unverified hypotheses are not sufficient. Instead, an athlete has a stringent requirement to offer persuasive evidence that the explanation s/he offers for an adverse analytical finding is more likely than not to be correct, by providing specific, objective and persuasive evidence of his/her submissions. In this respect, the consumption of coffee or of a nutritional supplement cannot by a balance of probability establish the origin of the prohibited substance especially where no specific nutritional supplement containing the prohibited substance was identified.**

I. THE PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") 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 on the basis of the World Anti-Doping Code (the "WADC"), the core document that harmonizes anti-doping policies, rules and regulations around the world.

2. United World Wrestling ("UWW" or "the First Respondent") is the international governing body for the sport of amateur wrestling, with seat in Lausanne, Switzerland. UWW has, *inter alia,* the power and responsibility to carry out doping controls at events controlled or supervised by it, at the conditions set out in the UWW Anti-Doping Regulations (the "ADR") adopted to implement UWW's responsibilities under the WADC.

3. Mr Anzor Boltukaev (the "Athlete" or the "Second Respondent") is a Russian wrestler of international level born on 5 April 1986. The Athlete is a member of the Russian Wrestling Federation (the "RWF") and participated in the 2016 Olympic Games in Rio de Janeiro, Brazil, in the freestyle 97 kg event.

4. WADA, UWW and the Athlete are referred to as the "Parties". UWW and the Athlete are referred to as the "Respondents".

II. BACKGROUND FACTS

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

6. On 3 May 2017, on the occasion of the 2017 European Wrestling Championships in Novi Sad, Serbia, the Athlete underwent an in-competition doping control. In the doping control form (the "DCF"), the Athlete declared that, in the seven days preceding the sample collection, he had used the following products: *"Riboxine, Polyvitamins"*.

7. The Athlete's A-sample was analysed by the WADA accredited anti-doping laboratory in Seibersdorf, Austria (the "Laboratory"), which, on 29 May 2017, reported an adverse analytical finding (the "AAF") for the presence of Higenamine, a specified substance prohibited in- and out-of-competition under S3 (Beta-2 Agonists) of the list of prohibited substances and methods published by WADA for 2017 (the "Prohibited List").

8. On 1 June 2017, the Athlete was notified by UWW of the AAF and of his right to request the analysis of the B-sample, and of the possibility to accept voluntarily a provisional suspension.

9. On 6 June 2017, the Athlete accepted a voluntary provisional suspension.

10. On 16 June 2017, the Athlete received a copy of the laboratory documentation package relating to the A-sample analysis. Following the review of such documents, the Athlete informed in a telephone conversation the RWF of his waiver to the right to have the B-sample analysed.

11. On 19 July 2017, the Athlete sent a handwritten note in Russian to the RWF, which, in its English translation, reads as follows:

"First of all, I would like to express my sincere apologies to UWW for the fact that some prohibited substance had been detected in my sample. I have never used any performance enhancing substances. Everyone knows me as an honest and decent athlete and person. I do not deceive anyone either in life or in sports, so this news has become a real shock for me. It is especially terrible that due to some accident, many people may start to consider me a cheater without understanding the details. And this can negatively influence not only on me, but also on the Russian national team, and the world of wrestling as a whole. It is just a monstrous sensation for me.

Together with the doctor in the sports medicine, we have examined the laboratory documentation package for the A-sample, and have not found any obvious errors. Therefore, we decided to carefully and thoroughly study the way in which higenamine could still get into my system. Thus, of course, I do not need to open the B-sample.

By this time, we have collected almost all the supplements and medications that I took in the period of a month and a half before the ill-fated test. We decided to send all these supplements and medications to an independent laboratory for examination to determine if there is any higenamine in them. So far, we have not yet been informed by the laboratories we contacted, of the time expected for the result of the analysis, but usually, as we were told, they results are ready within a month.

I am deeply convinced that this absurd situation with a positive test was not my fault, and therefore I would like to defend myself, proving my innocence. Therefore, I would like to use my right for a hearing in UWW so that I can personally address to the arbitrators and present all evidence of my innocence in an alleged wrongdoing. So, it is obvious that now, until the results from the laboratory have been received, I can not provide full written explanations to UWW. As soon as something is known I will immediately report both to you and to UWW, and therefore I ask UWW to postpone the time for my written explanations.

I also would like to take this opportunity to inform UWW, through you, that I, according to the paragraph 7.9.2 of the UWW anti-doping rules and point 4 of the UWW letter of June 1st of this year, have voluntarily accepted the provisional suspension offered to me from June 6 this year, i.e. as soon as I had been informed orally about the positive test results. I will repeat once again, I am an honest man and an honest athlete, and I do not want my name to be involved in any kind of doping scandals. To that extent, I have accepted the provisional suspension immediately, and I will not participate in any training activities or competitions until the end of the investigation run by the UWW, and I reported that to my coach. As this is the first time when I'm personally faced an anti-doping rules violation allegation, I have got no experience in this matter, so I am asking to convey my viewpoint to the UWW in an appropriate form as it is usually being done. Once again I would like to stress that I am deeply shocked and frustrated by the situation and I will cooperate closely with the UWW in the ongoing investigation. And I will also take my own active actions to find out the actual circumstances of higenamine's appearance in my body".

12. On 23 October 2017, the UWW informed the Athlete that it had not received any explanation for the AAF, and set a deadline for the Athlete to state his position in that regard.

13. On 26 October 2017, the Athlete's counsel, Mr Artem Patsev, noted that the preceding correspondence with the RWF had not been forwarded to UWW, and therefore confirmed the content of the Athlete's note of 19 July 2017.

14. On 3 November 2017, the Athlete's counsel provided UWW with a written statement on behalf of the Athlete, asking the UWW *"to eliminate the applicable period of ineligibility due to the fact that: the Athlete bears no fault or negligence, and he will establish how the Prohibited Substance has entered his system"*.

15. On 2 February 2018, the UWW Anti-Doping Panel (the "ADP") issued a decision (the "Decision") finding as follows:

"… the UWW Anti-doping panel decides that the wrestler, M. Anzor Boltukaev:

I. Is found to have committed an anti-doping rules violation, namely article 2.1 of the Rules;

II. Is imposed a period of ineligibility of ten (10) months, i.e. until 5 April 2018 included (this en date includes the credit for the voluntary suspension);

III. The results achieved at the European Championship senior (2nd place in 97 kg Freestyle) are disqualified with all resulting consequences, including the forfeiture of the medal, points and prizes. The Silver medal obtained in this competition must be returned to UWW headquarters within 30 days from the date the decision is received by the wrestler's national federation.

IV. The cost incurred in these proceedings and described in the notice of charge (for example B sample analysis or laboratory documentation package) must be borne by the athlete and/or his national federation".

16. In support of such conclusion, the ADP stated the following:

"26. The substance found ("Higenamine") is a specified substance.

27. There is no evidence that this rules violation was intentional. The default sanction should be 2 years.

28. The athlete seeks a reduction of the period of ineligibility base on no significant fault or negligence, pursuant to article 10.5.1 (specified substances, contaminated products). To apply this article, the athlete must establish that he could not reasonably have known that he had used the substance and establish on a balance of probability how the substance entered his system.

29. In the case at hand, the athlete simultaneously invokes a contaminated product and the fact that the higenamine is a specified substance. A contaminated product is defined as a product that contains a prohibited substance that is not disclosed on the product label or in an information available in a reasonable internet search. The status of specified substance is expressly set in WADA's prohibited list.

30. In his submission, the athlete's counsel explains that the specified substance in his sample is found in a large variety of plants and can also be found in coffee and coffee-based products. He puts forward several studies and sources to document this assertion, and as well as a study in particular, showing that the substance can be found in various nutritional supplements without being disclosed on the labels. The athlete states that he drinks "4-5 cups of strong coffee" per day from various coffee beans and that he could not reasonably imagine that his consumption of coffee could be at the origin of a positive test. He also states that he uses various nutritional supplements such as RedTest, Assault, Essential Amino Energy, Endurus Runners Serum and Epimedium Macun and that none of them disclose on their label the substance at stake or any of its other names. The athlete asserts that it is most probable that these products may have been contaminated.

31. The athlete declares that he consulted and relied on his team doctor to use the above listed supplements and that he was told that the supplements were safe to use. He also relied on his team doctor when

indicating "polyvitamins" on the Doping Control Form instead of naming all the supplements and herbal products he was using.

32. In view of the foregoing, considering the substance and the probability that the substance may be found in a variety of plants and, hence in nutritional supplements without clear indication on the label, the panel finds that it is probable that the substance was ingested through a contaminated product consumed by the athlete.

33. The panel also finds that the athlete had been careful when consulting his team doctor about his supplements and that he could not reasonably suspect that he had used the specified substance Higenamine, whether through his consumption of coffee or nutritional supplements.

34. The panel is therefore satisfied that a reduction of the suspension period may be applied, based on a case of no significant fault or negligence.

35. To determine the period of ineligibility, the panel bases its assessment on the decision in Cilic v. ITF (CAS 2013/A/2237) which sets three degrees of fault (significant, normal, light) and the range for each degree (16-24 months, 8-16 months, 0-8 months).

36. It first notes that athlete is an elite athlete who won a number of medals on the highest level. He was drug tested on several occasions and received, if not education, at least information on his responsibilities as an elite athlete on anti-doping. He must have been exposed to warnings on the dangers of nutritional supplements and contaminated products, although his assertion that he received no anti-doping education is credible in view of his place of residence (Chechen Republic) and language issues. In view of these elements, the panel finds that the athlete's degree of fault is normal and that a period of ineligibility of ten (10) months appears as a proportionate and fair sanction.

37. The athlete voluntarily accepted a provisional suspension on 6th June 2017, this possibility being suggested in the notice of charge of 1st June 2017. He did not participate in any competition since then, including the World Championships Senior held from 20 to 26 August 2017. A credit for the period of voluntary provisional suspension should therefore be taken into account.

38. The results achieved on the occasion of the European Championship were the athlete's sample was collected and ultimately revealed an adverse analytical finding must be annulled. The athlete must returns his medal".

17. On 19 February 2018, WADA received the case file from UWW.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 13 March 2018, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), WADA filed with the Court of Arbitration for Sport ("CAS") a Statement of Appeal against the Decision. The Statement of Appeal named UWW and the Athlete as respondents and contained, *inter alia*, the appointment of Mr Ken E. Lalo as an arbitrator.

19. On 19 March 2018, the CAS Court Office transmitted to the Respondents the Statement of Appeal filed by WADA. For the Athlete, the Statement of Appeal was sent by courier and (i) by facsimile to the address of the RWF and (ii) by email to Mr Patsev, the Athlete's counsel in

the UWW proceedings.

20. On 21 March 2018, Mr Patsev, in an email to the CAS Court Office, acknowledged receipt of the documents received by courier, and indicated that he represented the Athlete in the first instance proceedings, but had not been instructed to represent him at CAS level. Mr Patsev, however, indicated that he would do his best to contact the Athlete to inform him of the CAS proceedings and to deliver to him the documents received.

21. On 21 March 2018, the CAS Court Office sent by email to the RWF the documents it was unable to successfully deliver by facsimile.

22. On 23 March 2018, WADA filed its Appeal Brief pursuant to Article R51 of the Code. The Appeal Brief had attached, *inter alia,* an expert opinion provided by Dr Irene Mazzoni, Senior Manager, Research & Prohibited List, of WADA on 22 March 2018.

23. On 26 March 2018, the CAS Court Office informed the Parties of the timely receipt of the Appellant's Appeal Brief. Furthermore, it informed both Respondents that their Answers to the appeal had to be filed within 20 days, in accordance with Article R55 of the Code. For the Athlete, such correspondence, and the attached copy of the Appeal Brief and its enclosures, were sent by courier to the address of the RWF.

24. On 11 April 2018, Mr Patsev referred to his email message of 21 March 2018 and informed the CAS Court Office that he had been unable to find a valid and correct postal address of the Athlete, and that he was not authorized to represent the Athlete in the CAS proceedings. Mr Patsev indicated, therefore, that he had delivered the documents he had received to the RWF, requesting the RWF to forward them to the Athlete and to inform the CAS Court Office of the actual date of their delivery to the Athlete.

25. On 11 April 2018, the CAS Court Office took note that Mr Patsev was not representing the Athlete in the CAS proceedings.

26. On 16 April 2018, the CAS Court Office remarked that the Respondents had failed to jointly nominate an arbitrator, and that therefore an arbitrator would be appointed by the President of the Appeals Arbitration Division, or her Deputy, pursuant to Article R53 of the Code.

27. On 30 April 2018, the CAS Court Office forwarded to the Parties the acceptance with disclosures of Mr Lalo of his appointment as an arbitrator in this case.

28. On 3 May 2018, the CAS Court Office noted that the Respondents had failed to submit an Answer within the prescribed deadline, and informed the Parties that the arbitration would nevertheless proceed.

29. On 9 May 2018, the CAS Court Office noted that the appointment of Mr Lalo as an arbitrator had not been challenged.

30. On 10 May 2018, Mr Patsev informed the CAS Court Office that he had had, on the same day,

a telephone conversation with the Athlete, during which the Athlete (i) told him that hard copies of the CAS correspondence had been delivered on 10 May 2018, and (ii) requested him to inform the CAS Court Office (a) that he had registered a new email address (*boltukaev_84@mail.ru*), and (b) that the CAS Court Office was invited to send electronic messages directly also to the Athlete.

31. On 10 May 2018, WADA expressed its preference for the case to be decided without a hearing.

32. On 14 May 2018, the CAS Court Office, in a letter sent to the Parties, and to the Athlete by email to the address *boltukaev_84@mail.ru*, requested from the Athlete confirmation that such email could be used for any further communication related to the present procedure. At the same time, the CAS Court Office requested the Athlete to provide a postal address.

33. On 30 May 2018, pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President:	Prof. Luigi Fumagalli, Professor and attorney-at-law, Milan, Italy
Arbitrators:	Mr Ken E. Lalo, Attorney-at-law, Gan-Yoshiyya, Israel Ms Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany.

34. On 4 June 2018, the CAS Court Office, writing on behalf of the Panel:

    i. invited the Athlete to inform whether he had received all previous correspondence and written submissions from CAS relating to the present arbitration and to provide his contact details (postal address);

    ii. requested the RWF to confirm, with a proof of notification, whether the previous CAS correspondence addressed to the Athlete at the RWF's address had been duly transmitted to the Athlete and to provide the CAS with valid contact details for the Athlete.

35. On 6 June 2018, writing from the address *boltukaev_84@mail.ru*, the Athlete sent to CAS the following letter:

    "Dear Sirs,

    This is Anzor Boltukaev, an I'm responding (with the interpreter's assistance, as I do not speak English) to your letter of 4 June 2018.

    First, I would like to note that this is the first email/letter for the case of reference that I got to my email address so far. So I'm kindly asking you to send me to this email all the CAS previous correspondence sent to me before (I cannot say whether I have received everything or not, because if I have not received any particular letter/email, than I would never be aware of this).

    Second, I would like to provide you with my postal address: kv. 6, 279, ulitsa Malaeva (Ugoinaya), Staropromyslovsky rayon, Grozny city, Chechen Republic, 364006 (RUSSIA)".

36. On 6 June 2018, therefore, the CAS Court Office took note of the Respondent's address and

email. In addition, *"for the sake of good order"*, the CAS Court Office transmitted by courier to the Athlete's address a complete copy of the entire CAS case file.

37. On 12 June 2018, the CAS Court Office, writing on behalf of the President of the Panel, granted a deadline to submit an Answer to the appeal brought by WADA against the Decision.

38. On 13 June 2018, WADA in a letter to the CAS Court Office outlined that, *"despite the fact that Mr Boltukaev (i) has known of this appeal since it was filed in March 2018, (ii) confirmed that he received all CAS correspondence in hard copy on 10 May 2018, and (iii) was sent letters by the CAS Court Office to his email address on 14 and 30 May 2018, Mr Boltukaev has not made any attempt to participate in this arbitration nor to comply with the CAS Code"*, and, *"in circumstances where Mr Boltukaev has been eligible to compete again since 5 April 2018"*, expressed his concern *"at the apparently deliberate delay on his part"*.

39. On 6 August 2018, the CAS Court Office noted that the deadline for the Athlete to submit an Answer had expired on 30 July 2018, but that no Answer or any other communication had been received from him. Attached to such correspondence, the CAS Court Office provided a copy of a DHL document indicating that the correspondence sent to the Athlete had been received on 9 July 2018.

40. On 7 September 2018, the Parties were informed that the Panel had decided to issue an award without a hearing.

41. On 13 September 3018, the Operative part of the present Award was issued.

42. On 18 September 2018, the CAS Court Office issued, on behalf of the President of the Panel, an order of procedure (the "Order of Procedure"), which was signed by the Appellant on 24 September 2018 and by the First Respondent on 25 September 2018. The Second Respondent did not sign such Order within the prescribed deadline.

IV. THE POSITION OF THE PARTIES

43. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Panel confirms, however, that it has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellant

44. In its Statement of Appeal and in the Appeal Brief, WADA requested the following relief:

"(1) The Appeal of WADA is admissible.

(2) The decision rendered by the UWW Anti-Doping Panel on 2 February 2018 in the matter of Anzor Boltukaev is set aside.

(3) Anzor Boltukaev is sanctioned with a two-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 Anzor Boltukaev before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

(4) All competitive results obtained by Anzor Boltukaev at the 2017 European Wrestling Championships and at any subsequent competitions until the date of provisional suspension on 6 June 2017 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(5) WADA is granted an award for costs".

45. In its submissions, WADA dealt first with the commission by the Athlete of an anti-doping rule violation; then, it dealt with the determination of the sanction, having regard to the relevant provisions of the ADR.

46. With respect to the first point, in the WADA's opinion, there is no doubt that the Athlete breached Article 2.1 of the ADR: the analysis of his A-sample conducted by the Laboratory revealed the presence of a prohibited substance, and the Athlete did not challenge the AAF. Therefore, the anti-doping rule violation is established.

47. With respect to the second point, WADA referred to Article 10.2.2 ADR and submitted that the period of ineligibility in this matter shall be two years, with no deduction. In fact, this period is subject to potential reduction or suspension pursuant to Articles 10.4 (No Fault or Negligence), 10.5 (No Significant Fault or Negligence) or 10.6 (Reasons Other than Fault) of the ADR. However, in accordance with the definitions of No Fault or Negligence and No Significant Fault or Negligence, in order to successfully plead either, the Athlete had to establish how the prohibited substance entered his system. In WADA's opinion, the Athlete failed to meet his burden to prove the source of the prohibited substance by a "balance of probability" and therefore is not entitled to any reduction from the default sanction of two years. In fact,

i. with respect to establishing the origin of the prohibited substance, as indicated in the CAS case law (CAS 2010/A/2230; CAS 2014/A/3820; CAS 2014/A/3615; CAS 2006/A/1067; CAS 2006/A/1032; CAS 2010/A/2277), it is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered his body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question;

ii. the Athlete contended in the proceedings before the ADP that Higenamine had entered his system as a result of his consumption of coffee. However:

- it is the expert opinion of Dr Irene Mazzoni that there is no evidence that coffee contains Higenamine. Dr Mazzoni also considers that if Higenamine were a constituent of coffee, one would expect many more adverse analytical findings for Higenamine, especially since the Athlete's concentration in this case is rather high (250ng/ml);

- the Athlete's attempt to establish coffee as the origin of Higenamine is mere speculation and must be rejected;

iii. in the alternative, the Athlete submitted that he might have consumed the prohibited substance through the ingestion of various supplements containing plant material extract, which in turn may have contained Higenamine. In this regard, he relied on a study which referred to the possible undisclosed presence of Higenamine, a fat burner, in some nutritional supplements. However:

- the Athlete did not adduce any evidence to support this alternative claim. Specifically, he failed to: (a) identify a supplement he took which contained Higenamine; (b) give details about the ingredient(s) in that supplement which he says are suspect; (c) produce any scientific evidence proving the presence of Higenamine in that ingredient; (d) conduct any laboratory analysis on the supplement; or (e) carry out any research on the supplement manufacturer;
- the probability of this alternative scenario being true is belied by the scientific evidence in this case. The estimated concentration of Higenamine in the Athlete's sample is 250 ng/mL. The current reporting threshold of Higenamine set by WADA is 10 ng/mL. Dr Mazzoni refers to a recent study carried out by the WADA-accredited laboratory in Tokyo, which concluded that *"there is no risk of detecting unintentional Higenamine doping when the WADA reporting threshold is used"*. Extrapolating from that study, Dr Mazzoni concludes that, based on the concentration level found in the Athlete's sample, his adverse analytical finding is not due to contamination or a plant product containing Higenamine;

iv. therefore, the Athlete has not come close to establishing that he ingested a supplement containing Higenamine, let alone in the quantity corresponding to the detected concentration level. He has simply advanced a number of different and competing theories (coffee or contaminated supplements) and has failed to provide any evidence to substantiate either.

48. WADA is not in a position to demonstrate that the anti-doping rule violation was intentional. The maximum applicable period of ineligibility is therefore two years. It is WADA's position that UWW erred in reducing the Athlete's sanction, in the absence of any evidence regarding the origin of the prohibited substance. Therefore, the Athlete has to be sanctioned with a period of ineligibility of two years.

B. The Position of the Respondents

a) The Position of UWW

49. UWW was notified of the Statement of Appeal and of the Appeal Brief. In addition, it received all correspondence sent by the CAS and the other Parties. UWW, however, did not file any submission and did not specify any request for relief.

b) The Position of the Athlete

50. In the proceedings before the UWW the Athlete, *"absolutely shocked, because he has been always following strict doctors' recommendations, and has never even thought of using any prohibited substances"*, asked the ADP to eliminate the applicable period of ineligibility due to the fact that he bore no fault or negligence, and that he could establish how the Prohibited Substance entered his system. In that regard, the Athlete submitted that:

    i. Higenamine is a chemical compound which may be found in a variety of plants. Traditional formulations with Higenamine have been used for thousands of years within Chinese medicine and come from a variety of sources including fruit and orchids. Higenamine is also found in coffee and coffee products, although it is unknown which sorts of coffee beans contain Higenamine (all sorts or only some specific sorts), and what is its concentration in coffee. It is legal to use within food supplements in the UK, EU, the USA and Canada. A study conducted by a group of anti-doping scientists confirmed the presence of Higenamine in some nutritional supplements where it was not listed in the Ingredients section. Indeed, the challenge with prohibited substances which have natural origin lies in the fact that they could be hidden behind the plant name. In case of Higenamine, there are many possible plant sources and because of that, there are many possibilities of its intake by the athletes;

    ii. therefore, two possible scenarios could be advanced to explain the presence of Higenamine in his system:

        - the most probable scenario consists in the ingestion as a result of the drinking of coffee. The Athlete explained that he was (and is) a fan of strong black coffee. He drinks at least 4-5 cups of strong coffee every day. It is obvious that he has never been aware of any risks associated with drinking coffee, and no fault or negligence may be attributed to the Athlete;
        - the other possible source of Higenamine entering the Athlete's system (which is less probable, but may become the most probable on the basis of an analysis of the nutritional supplements used by the Athlete) is a nutritional supplement which was used by the Athlete. The Athlete actually used some nutritional supplements, and duly informed the Russian national team doctor, Dr Said Gireev, of the nutritional supplements he was using. Dr Gireev reviewed the supplements' labels and confirmed that they did not contain any prohibited substances, so the Athlete may keep using them. However, those products now appear suspicious for Higenamine under some plant names. The Athlete, therefore, reserved the right to submit the results of the analyses of those supplements, if he succeeded in locating a laboratory able to perform such analysis;

    iii. it is not disputed that he is not a cheater, and the anti-doping rule violation was not intentional. Moreover, he is well-known in his local wrestling community as one of the most dedicated anti-doping activists, an honest athlete and a fair person, always a fan of playing true in sport and in life as well. On the other hand, he has a very limited level of anti-doping education. It is also undisputed that he has a clean "doping history"; and his

anti-doping rule violation may not be considered very serious since it involves a specified substance which was not proven to have a confirmed sport performance effect at all;

iv. he acted reasonably and with utmost caution, and could never think of a possible risk of Higenamine content in a coffee product (namely, strong coffee in Turkish style made of coffee beans, or green coffee beans' extract in a nutritional supplement). In addition, he asked the professional doctor specializing in sport medicine about the possible risks of using some nutritional supplements before starting such use, and relied on the doctor's professional opinion and advice;

v. therefore, he made all reasonable efforts to comply with the ADR, even though the Russian anti-doping organizations provided him with almost no information as to what these regulations actually entailed. However, it is obvious that no amount of training or individual research would have assisted the Athlete in the circumstances – the Athlete ingested Higenamine through contaminated coffee or through contaminated products like nutritional supplements made of plants' extracts;

vi. given the absence of intent, the Athlete committed what can be described as essentially a technical violation of the ADR. The Athlete did not purposely ingest Higenamine and this substance is unlikely to have a sport performance effect. Therefore, the purpose of prohibiting the substance is not fulfilled – the Athlete may have violated the letter of the ADR but he did not violate its spirit. Indeed, it would be absolutely unreasonable to require all athletes to arrange for all the coffee they consume to be tested to ensure that it is not contaminated by prohibited substances. There is actually nothing further the Athlete could have done or should have done to ensure that the coffee he consumed was free from contaminants. No unreasonable behaviour should be expected from any athlete.

51. On 9 July 2018, at the latest, the Athlete was notified of the appeal filed by WADA, received the entire case file, including the submissions filed and the correspondence exchanged by the Parties, and was invited by the CAS Court Office to submit an Answer.

52. Despite the foregoing, the Athlete did not lodge any Answer to the appeal and to the WADA's contentions, nor did he raise any objection with respect to any aspect of the CAS proceedings.

53. According to Article R55, second paragraph, the Panel may nevertheless proceed, and issue an award.

V. JURISDICTION

54. The jurisdiction of the CAS is not disputed by the Parties.

55. According to Article R47 of the Code:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration

agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

56. The jurisdiction of CAS is contemplated by Article 13.1 of the ADR as follows:

"Decisions made under these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards".

57. Articles 13.2.1 and 13.2.3 of the ADR provide as follows:

"13.2.1 In cases arising from participation in an International Event or in cases involving International level Athletes, the decision may be appealed exclusively to CAS.

13.2.3 In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: ... (f) WADA".

58. The Panel, consequently, has jurisdiction to decide on the appeal filed by WADA against the Decision.

VI. ADMISSIBILITY

59. The Statement of Appeal was filed by WADA on 13 March 2018, i.e. within the deadline set in Article 13.7 of the ADR, which provides that *"… the filing deadline for an appeal filed by WADA shall be the later of (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"*, and complied with the requirements of Article R48 of the Code. The admissibility of the appeal is not challenged by any Party.

60. The appeal is therefore admissible.

VII. SCOPE OF THE PANEL'S REVIEW

61. According to Article R57, first paragraph of the Code,

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".

VIII. APPLICABLE LAW

62. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

63. Article R58 of the Code provides the following:

"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".

64. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, those contained in the ADR, because the appeal is directed against a decision issued by the ADP, which was passed applying the UWW anti-doping regulations.

65. As a result, UWW regulations shall apply primarily. Swiss law, being the law of the country in which the UWW is domiciled, applies subsidiarily.

66. The ADR provisions, based on the WADC, which are relevant in this case are the following:

Article 2 *"Anti-Doping Rule Violations"*

… The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Athlete's Sample ...

Article 3 *"Proof of Doping"*

3.1 UNITED WORLD WRESTLING shall have the burden of establishing that an anti- doping rule violation has occurred. The standard of proof shall be whether UNITED WORLD WRESTLING has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

Article 10 *"Sanctions on Individuals"*

10.2 "Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method"

The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four (4) years where: …

10.2.1.2 The anti-doping rule violation involves a Specified Substance and UNITED WORLD WRESTLING can establish that the anti-doping rule was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two (2) years.

10.5 "Reduction of the Period of Ineligibility based on No Significant Fault or Negligence"

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified 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 at a maximum, two years of Ineligibility, depending on the athlete's or other Person's degree of fault.

10.5.1.2 Contaminated Products

In 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 (2) years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

IX. MERITS

67. The object of this arbitration is the Decision, which found the Athlete responsible for the anti-doping rule violation contemplated by Article 2.1 of the ADR and imposed on him a period of ineligibility of 10 months pursuant to Article 10.5.1 of the ADR: the Athlete's violation was found to be not "intentional" as, in the ADP's opinion, the Athlete had established that the AAF was caused by the use of a contaminated supplement and that he bore no significant fault or negligence. WADA disputes this conclusion and requests the Panel to find that the Athlete failed to establish the origin of the prohibited substance on the balance of probabilities, and therefore that a standard sanction of two years should be imposed, since the intentionality of the violation could not be established.

68. In light of the Parties' submissions, the Panel notes that the issue whether an anti-doping rule violation was committed is not before it. The presence in the Athlete's samples of a prohibited substance is not disputed. The Athlete has therefore committed the anti-doping rule violation contemplated by Article 2.1 (*"Presence of a prohibited substance or its metabolites or markers in an Athlete's sample"*) of the ADR.

69. In the same way, there is no issue as to the intentionality of the violation. WADA, which bears the burden to prove it, admitted not to be in a position to discharge such burden.

70. As a result, the issue to be examined in this arbitration relates only to the consequences to be applied to the Athlete for his unintentional anti-doping rule violation.

71. According to Article 10.2.2 of the ADR, the sanction provided for an unintentional violation of Article 2.1 ADR committed by the Athlete is a suspension for 2 years. Such sanction, however, can be eliminated, if the Athlete proves that he bears *"no fault or negligence"* (Article 10.4 of the ADR), or reduced, *inter alia,* if the Athlete proves that the prohibited substance was ingested following the use of a contaminated product and that he bears *"no significant fault or negligence"* (Article 10.5.1 of the ADR): in this case the sanction would be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility, depending on the Athlete's degree of fault.

72. For the purposes of such provisions, the following definitions of *"No Fault or Negligence"* and of

"No Significant Fault or Negligence" as established by the ADR are relevant:

i. *"No Fault or Negligence"*

"The athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the athlete must also establish how the Prohibited Substance entered his or her system";

ii. *"No Significant Fault or Negligence"*

"The athlete or other Person's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the athlete must also establish how the Prohibited Substance entered his or her system".

73. In that context, therefore, there is one crucial point: it concerns the determination of the origin of the prohibited substance found in the Athlete's body. In fact, only in the event the Athlete proves *"how the Prohibited Substance entered his … system"* can a fault-related reduction (or elimination) of the sanction be granted. According to Article 3.1 ADR, since the burden lies with the Athlete, *"the standard of proof"* to satisfy it *"shall be by a balance of probability"*.

74. As a result, the Panel will examine first whether the Athlete has established the "route of ingestion" of the prohibited substance: only in the event it is found that the "route of ingestion" has been established, then, the Panel would have to examine whether *"No Fault or Negligence"* or *"No Significant Fault or Negligence"* has been proved.

75. In that regard, it is the Panel's opinion that an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the source of the AAF and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. There is in fact a wealth of CAS jurisprudence stating that mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that such fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions. In short, the Panel cannot base its decision on some speculative guess uncorroborated in any manner.

76. In light of the foregoing, the Panel notes that the Athlete offered in the proceedings before the ADP two alternative explanations for the presence of Higenamine in his body, both linked in his submissions to the fact that the substance may be found in a variety of plants. Therefore:

i. he might have ingested it through the consumption of strong black coffee, of which he is a "fan"; or

ii. he might have consumed it as an undisclosed component of a nutritional supplement he was using.

77. The Panel does not find those explanations to be convincing: indeed, they appear to the Panel to amount to mere speculations, unsupported by evidence sufficient to establish that coffee or a nutritional supplement are at the origin of the presence of Higenamine, in the concentration detected, in the Athlete's body.

78. In that regard, the Panel accepts the opinion expressed by Dr Mazzoni of WADA, which defined as *"not feasible"* the Athlete's explanations, and remained unchallenged in this arbitration. According to Dr Mazzoni:

i. as to coffee as a possible origin of the AAF, *"other than the link provided by the athlete (which does not cite any papers or studies), I have found no other evidence that coffee contains higenamine. If higenamine was a constituent of coffee we would expect many more Adverse Analytical Findings (AAF)s, especially since the concentration in this athlete is rather high. However, coffee and higenamine are combined in many supplements, but as separate ingredients"*;

ii. as to a nutritional supplement as a possible origin of the AAF, the *"the relatively high concentration"* detected in the Athlete's sample leads to the conclusion that *"this AAF is not due to a contamination or a plant product containing Higenamine"*. In fact, *"based on different studies conducted on natural plant sources of higenamine and its excretion time from the human body, for higenamine to exceed the current reporting threshold set by WADA (i.e., 10 ng/mL) one would have to eat huge amounts of such plant product within a short period of time. For example, according to a Japanese study … in order for the athlete to have 250 ng/mL in the urine sample and assuming that excretion is linear with dose, it would have to come from … 11.25 mg higenamine, which is equivalent to having around 5625 … pills"*;

iii. therefore, *"based on these studies with natural plant sources of higenamine, and our calculations, the concentration of 250 ng/mL in the athlete's doping control sample cannot have derived from a natural source"*.

79. In addition, the Panel finds that the Athlete failed to:

i. identify a specific nutritional supplement he was using which contained Higenamine;

ii. give details about the ingredients in that supplement which he submitted could contain Higenamine;

iii. produce any scientific evidence proving the presence of Higenamine in that ingredient;

iv. conduct any laboratory analysis on the supplement. Actually, in the proceedings before the UWW the Athlete indicated his intention to have some supplements analysed, but then failed to follow up with his plan;

v. carry out any research with respect to the supplement production.

80. In conclusion, the Panel finds that the Second Respondent has not established, by a balance of probability that the consumption of coffee or of a nutritional supplement was at the origin of

the AAF.

81. According to Article 10.2.2 of the ADR, the sanction provided for the not intentional violation committed by the Athlete is a suspension for 2 years.

82. The Panel cannot find that the Athlete has discharged the burden which lies upon him to establish by a balance of probability the route of ingestion of the prohibited substance.

83. As a result, for the above reasons, the Panel finds that the sanction of the ineligibility for 2 years is necessarily to be imposed on the Athlete, since failing evidence of the route of ingestion of the prohibited substance the Athlete is not entitled to any fault-related mitigation. The Decision, which held otherwise, is to be set aside.

84. According to Article 10.11 of the ADR, the ineligibility starts from the date of the present award. Under Article 10.11.3 of the ADR, however, credit is to be given for the period of suspension already served by the Athlete between 6 June 2017, when he voluntarily accepted a provisional suspension, and 5 April 2018, when the ineligibility period imposed by the Decision expired.

85. Pursuant to Article 10.8 of the ADR, *"all … competitive results of the Athlete obtained from the date a positive Sample was collected …, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".*

86. WADA requested the Panel to disqualify *"all competitive results obtained by Anzor Boltukaev at the 2017 European Wrestling Championships and at any subsequent competitions until the date of provisional suspension on 6 June 2017 …, with all resulting consequences (including forfeiture of medals, points and prizes)".*

87. As a result, all the Athlete's results between 3 May 2017, including the results of 3 May 2017, and 6 June 2017 are disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes. The conditions set by Articles 10.11.1 and 10.11.2 of the ADR to start the period of ineligibility at an earlier date are not met.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 12 March 2018 against the decision rendered on 2 February 2018 by the Anti-Doping Panel of the United Wrestling Federation is upheld.

2. The decision rendered on 2 February 2018 by the Anti-Doping Panel of the United Wrestling Federation is set aside.

3. Mr Anzor Boltukaev is declared ineligible for a period of two years from the date of the present award, with credit given for the period of ineligibility already served between 6 June 2017 and 5 April 2018.

4. All competitive results obtained by Mr Anzor Boltukaev between 3 May 2017, including the results of 3 May 2017, and 6 June 2017 are disqualified, with all of the resulting consequences, including forfeiture of any medals, points and prizes.

5. (…).

6. (…).

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