



Arbitration CAS 2018/A/5695 Bernadette Coston v. South African Institute for Drug-Free Sport (SAIDS), award of 8 February 2019

Panel: Mr Mohamed Abdel Raouf (Egypt), Sole Arbitrator

Field Hockey

Doping (methyhexanamine)

Establishment of the ADRV by the presence of the prohibited substance

Establishment of the source of the prohibited substance not a sine qua non of proof of absence of intent

Burden and standard to establish the intent of the athlete to cheat

Reduction of the sanction dependent on the proof of the source of the prohibited substance

- 1. Sufficient proof of an Anti-Doping Rule Violation (ADRV) under Article 2.1.2 of the SAIDS Anti-Doping Rules is established by the presence of a Prohibited Substance or its Metabolites or Markers in the athlete's A Sample where the athlete waives analysis of the B Sample and the B Sample is not analysed.**
- 2. The establishment of the source of the prohibited substance is not a *sine qua non* of proof of absence of intent. The SAIDS Anti-Doping Rules, based on the World Anti-Doping Code, represent a new version of an anti-doping code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. Article 10.2.1 of the SAIDS Anti-Doping Rules does not refer to any need to establish source, in direct contrast to Articles 10.4 and 10.5 of the SAIDS Anti-Doping Rules combined with the definitions of No Fault or Negligence and No Significant Fault or Negligence, which expressly and specifically require to establish source. Those factors are compelling and support the proposition that the establishment of the source of the prohibited substance in the athlete's A Sample is not mandated in order to prove an absence of intent.**
- 3. According to the SAIDS Anti-Doping Rules, SAIDS must prove to the comfortable satisfaction of the hearing panel that the athlete knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. If SAIDS can establish that the athlete ingested the substance with the intent to cheat, then the appropriate sanction shall be four years of ineligibility. If not, then the sanction drops to two years of ineligibility. In a case involving a Specified Substance, the athlete's demeanour during the presentation of her case and evidence, the short term effects of the ingestion of the substance, the athlete's attempts to discover the origin of the prohibited substance before and after the appealed decision and the athlete's clean record are sufficient to negate the intentionality of the athlete's ADRV.**
- 4. If it has not been established that the athlete intended to cheat, the sanction should drop to two years of ineligibility, unless the athlete can establish "no fault" or "no**

significant fault”. The athlete carries this burden on the balance of probabilities, as per Article 3.1 of the SAIDS Anti-Doping Rules. To qualify for any reduction, the athlete must establish the source of the substance. Particularly in cases involving contamination scenarios, explanations based solely on the word of the accused and his/her entourage, must be approached with caution. It would otherwise be too easy for athletes to cast blame on a family member, partner, friend, etc. who is not subject to any anti-doping rules or consequences. Moreover, if no scientific evidence was adduced to explain the reported concentration of the substance in the athlete’s system, it must be considered that the athlete did not establish the source of the substance and cannot qualify for a reduction based on No Fault or No Significant Fault.

I. PARTIES

1. Bernadette Coston (the “Athlete” or the “Appellant”) is a South African international level field hockey player.
2. The South African Institute for Drug-Free Sport (“SAIDS” or the “Respondent”) is a statutory body established by the South African Institute for Drug-Free Sport Act No. 14 of 1997 as amended in 2006 as the independent National Anti-Doping Organisation for South Africa.

II. FACTUAL BACKGROUND

A. The Facts

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the 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.
4. On 9 December 2017, the Athlete underwent an in-competition doping control and provided her urine sample after taking part in a hockey match during the Professional Hockey League (PHL) tournament held in Johannesburg, South Africa. The match, which took place from 25 November 2017 to 12 December 2017, fell under the jurisdiction of the South African Hockey Association.
5. The Athlete’s urine sample was submitted for analysis to the World Anti-Doping Agency (“WADA”) accredited Doping Control Laboratory Gent in Belgium, which reported the

presence of a prohibited substance in her sample, namely a Class S6 Stimulant, 4-methylhexanamine-2-amine (“Methylhexanamine” or the “Substance”).

6. On 6 February 2018, SAIDS notified the Athlete that she had tested positive for the Substance in her A Sample, that the Substance is a stimulant classified as a specified substance under Clause S6 of the 2017 World Anti-Doping Code Prohibited List (the “WADA Prohibited List”), and that the presence of the Substance in the Athlete’s A Sample constitutes a breach of Article 2.1 of the 2016 SAIDS Anti-Doping Rules (the “SAIDS Anti-Doping Rules”). The Athlete was not provisionally suspended from competing and participating in any authorized or organized sport or any national or international level competition.
7. On 8 February 2018, the Athlete elected not to have her B Sample analyzed while electing her right to request for a hearing before an Independent Doping Hearing Panel (the “SAIDS Tribunal”) to present evidence and make submissions.

B. Proceedings before the SAIDS Tribunal

8. On 9 February 2018, SAIDS sent the Athlete a charge letter informing her of the charge against her, as well as the details of the SAIDS Tribunal to hear the charge and hearing date.
9. On 19 February 2018, a hearing was held before the SAIDS Tribunal. At the said hearing, SAIDS was represented by Ms. Wafeekah Begg, while the Athlete had no legal representation, but was assisted by Mr. Sheldon Rostron (South African Women’s Head Coach). There were no witnesses called at the hearing for either SAIDS or the Athlete.
10. On 19 February 2018, SAIDS provided the Athlete with a document including the submissions made against her in the hearing (the “Principle Submissions”), indicating *inter alia* that the indicative estimates for the concentration of the Substance in the A Sample obtained from the Athlete was approximately 69 ng/ml.
11. On 20 March 2018, the SAIDS Tribunal rendered its decision (the “Appealed Decision”) finding that the Athlete is guilty of violating Article 2.1 of the SAIDS Anti-Doping Rules and determining that the Athlete fell short of the high standards imposed on an athlete to exercise utmost caution to avoid an anti-doping rule violation. As a result, the Athlete was declared ineligible to participate in any competition or other activity for a period of four years with effect from 19 February 2018 (being the date of the hearing). The Appealed Decision also ruled that the Athlete forfeits any results, medals and prizes obtained during the Professional Hockey League (PHL) tournament held in Johannesburg, South Africa on 9 December 2017 in terms of Article 10.1 of the SAIDS Anti-Doping Rules.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 16 April 2018, the Appellant filed her statement of appeal against SAIDS with respect to the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related

Arbitration (the “Code”). In her statement of appeal, the Appellant nominated Mr. David Chen as arbitrator.

13. On 24 April 2018, the Respondent stated its preference that this procedure be referred to a Sole Arbitrator, and suggested Mr. Raymond Hack accordingly.
14. On 27 April 2018, the Appellant filed its appeal brief in accordance with Article R51 of the Code.
15. On 18 May 2018, the CAS informed the Parties that, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division following the parties’ disagreement on the number of arbitrators needed for this procedure, the Panel appointed to decide the case was constituted as follows:

Sole Arbitrator: Dr. Mohamed Abdel Raouf, Attorney at Law, Giza, Egypt.

16. On 29 May 2018, the Respondent filed its answer in accordance with Article R55 of the Code.
17. On 10 and 11 July 2018, an Order of Procedure dated 10 July 2018 was signed by the Appellant and the Respondent, respectively.
18. On 26 September 2018, a hearing was held at the CAS Headquarters in Lausanne, Switzerland. The Sole Arbitrator was assisted at the hearing by Mr. Brent J. Nowicki, Managing Counsel to CAS. The following persons were in attendance:

For the Appellant: Ms. Bernadette Coston, the Appellant
Mr. Nigel Riley, Counsel
Mr. Ian Minnaar, Bembridge Minnaar Attorneys in Johannesburg, South Africa
Ms. Kelly-Ann Rock, Bembridge Minnaar Attorneys in Johannesburg, South Africa
Mr. Sean Coston (witness)

For the Respondent: Ms. Wafeekah Begg, Legal Manager, SAIDS in Cape Town, South Africa

19. At the outset of the hearing, the Parties confirmed that they had no objection to the composition of the Panel. During the hearing, after the opening statements presented by the Parties, the Sole Arbitrator heard evidence from both the Appellant and Mr. Sean Coston, the witness called by the Appellant.
20. At the hearing, the Parties submitted their closing and rebuttal statements and repeated their requests for relief.
21. At the end of the hearing, the Parties expressly stated that they were satisfied with the conduct of the hearing and that their right to be heard had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

22. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant relies on the witness statement of her brother, Mr. Sean Coston, adduced with the appeal brief to argue that she was unaware that her brother had contaminated the supplement that she was using, known as Evolve Nutrition Prolong BCAA ("Prolong BCAA"), with a different Evolve Nutrition supplement that he was using known as Chemical X ("Chemical X"), thereby giving rise to her ingestion of the Substance for which she was tested positive.
- Mr. Coston testifies that:
 - During December 2017, he and the Appellant were co-residing at their parents' home in Alberton, South Africa;
 - He is a part time amateur gym enthusiast and uses the supplement known as Chemical X;
 - Without advising any person thereof, he mixed together the product known as Prolong BCAA used by the Appellant and his own supplement known as Chemical X in order to extend his supply of the latter for the month of December 2017 until he could afford to purchase further supplies;
 - He is totally ignorant and uneducated with regards to chemical substances and their composition;
 - In or about early April 2018, the Appellant informed him that it was her belief that due to the manufacturer (Evolve Nutrition) making other supplements that contain the Substance that a cross-contamination might have occurred;
 - He then informed the Appellant for the first time in early April 2018 that he had mixed the two products together (the "Mixture"); and
 - Upon reading the list of ingredients in the product label of Chemical X, the Appellant discovered that it contains 1,3 Dimethylamine, also known as Methylhexanamine for which she was tested positive.
- The Appellant submits that she could not reasonably have been expected to be aware of the possibility of such contamination and that she was unaware of the contamination until after the Appealed Decision.
- The Appellant further submits that due to the behavior of her brother as testified by him, she has established that she has fulfilled her duty of utmost caution. According to the Appellant, there should therefore be no fault attributed to her and that at the worst for the Appellant's the degree of fault would be of a "light" nature.
- For the Appellant, despite her having followed the correct procedure in determining the "safety" of her product, she has always alleged that the only source of the Substance is ingesting the Prolong BCAA.

- The Appellant also asserts that the definition of intentional doping requires a person to engage in a conduct that he/she knew constituted an anti-doping rule violation (“ADRV”) and manifestly disregarded that risk.
 - The Appellant submits that she has established the origin of the prohibited Substance on the balance of probabilities. For the Appellant, it is quite clear from the contents of her brother’s witness statement that she has committed no fault with regards to an ADRV.
 - The Appellant further submits that, in the event that the Sole Arbitrator finds there was a degree of fault on her behalf, the same can only be a light degree of fault with sanction of 12-16 months and not the sanction of four years that was imposed on the Appellant by the Respondent.
 - The Appellant argues that her brother’s evidence was not within her knowledge at the time of the proceedings conducted before the SAIDS Tribunal, which, had it been aware of such evidence, would not have found any fault on behalf of the Appellant with regards to the finding of the prohibited Substance, and as such would have found the Appellant not guilty of any offence and imposed no sanction.
 - In summary, the Appellant’s case is that she insisted at all times that she had ingested the Substance from the Prolong BCAA and that she had no knowledge of her brother’s action in mixing her supplement, the Prolong BCAA, and the Chemical X until informed thereof by her brother in early April 2018.
23. In her statement of appeal, the Appellant *appeals against both her conviction and the sentence imposed and requests that the Decision be set aside, alternatively, that the sentence imposed be reduced.*
24. In her appeal brief, the Appellant requested the following relief:
- The Sole Arbitrator *should [have] in the face of the evidence being led by the Appellant:*
- 33.1 Found the Appellant to have discharged the onus regarding the requisite burden of proof;*
 - 33.2 Found the Appellant not guilty of any offense; and*
 - 33.3 Not imposed any sanction upon the Appellant.*
- 34. In Conclusion, the Appellant prays that the sentencing imposed on her of four years be reduced.*

B. The Respondent

25. The Respondent’s submissions, in essence, may be summarized as follows:
- The Respondent submits that the Appealed Decision is correct and should be upheld in that an ADRV has been established after finding the Substance in the Athlete’s system, which is classified as a Class S6, Stimulant on the WADA Prohibited List.
 - The Respondent objects to the submission of a new evidence by the Athlete, that being the testimony of her brother. For the Respondent, this evidence was never presented before, during or even after the hearing before the SAIDS Tribunal. There has been

absolutely no opportunity for the Respondent to challenge this evidence and thus given the opportunity to do so either.

- The Respondent contends that the submission of this late evidence is done in bad faith. The Respondent was never given notice of this new evidence, not even within the Appellant's 21-day appeal period or requesting that this evidence be relayed to the SAIDS Tribunal for consideration or allow the Respondent to challenge and investigate.
- The Respondent finds it quite convenient that the Athlete has discovered this new evidence after the sanction was rendered against her and within her 21-day appeal period.
- With respect to the Appellant's argument that she has committed no fault or negligence, the Respondent submits that the Sole Arbitrator should first address Article 10.2.1.2 of the SAIDS Anti-Doping Rules. The ADRV involves a Specified Substance and the SAIDS can establish that the ADRV was intentional. The standard of proof in this regard pertaining to this case is to the comfortable satisfaction of the hearing panel as per Article 3.1 of the World Anti-Doping Code (the "WADC").
- In the Respondent's submission, this means that SAIDS must prove to the comfort satisfaction of the Sole Arbitrator that the Athlete knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. This is what the Respondent refers to as indirect intent.
- The Respondent contends that Article 10.2.1.2 of the SAIDS Anti-Doping Rules places the burden on SAIDS to prove intention. If the Sole Arbitrator is satisfied that SAIDS has not established intention, then the burden shifts to the Athlete to demonstrate that there was no fault or no significant fault or negligence.
- The Respondent also submits that international level athletes and highly educated professionals such as the Appellant, who is also a registered chiropractor at a sports injury clinic and at a sports medical centre, may be considered as significantly at fault or held to be significantly negligent in this regard, should the Sole Arbitrator find that the Respondent has not successfully established indirect intention.
- The Respondent further asserts that the Appellant has not exhausted all her responsibilities as an international level athlete to satisfy the Sole Arbitrator that no fault or no significant fault and negligence would be applicable to her.
- With respect to the witness statement of the Athlete's brother, the Respondent asserts that it does not make sense why he would mix his supply of Chemical X into her container of Prolong BCAA instead of scooping out from her container and put into his.
- For the Respondent, there is no basis to differ with the Appealed Decision's findings and that it did not err in such findings, especially the one in paragraph 38 of the Appealed Decision whereby it lists all the reasons for why the Appellant fell within the significant degree of fault.
- The Respondent also submits that there can be no serious consideration given to the argument raised that the Appellant had established a basis for reliance upon Article 10.4 of the SAIDS Anti-Doping Rules, pursuant to which if an athlete establishes in an

individual case that he or she bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated.

- The Respondent adds that, in terms of Article 10.5.1.1 of the SAIDS Anti-Doping Rules, the Appellant will need to establish no significant fault or negligence in order for the period of ineligibility to be at a minimum a reprimand and at a maximum 2 years of ineligibility, depending on the Athlete's degree of fault.
- Relying on the definition of "No Significant Fault or Negligence" in Appendix 1 (Definitions) of the SAIDS Anti-Doping Rules, the Respondent submits that the Appellant is required to establish before the Sole Arbitrator that her Fault or Negligence when viewed in the totality of the circumstances was not significant in relation to the ADRV.
- Lastly, the Respondent states that in spite of the Appellant's argument that she has not been negligent, it is a key principle of the fight against doping that an athlete cannot blindly rely on the persons she had relied on and also be sharing supplements with someone else and not checking the contents of that supplement, especially that an athlete has a personal duty to ensure that no prohibited substance **enters his or her body**.

26. In its answer, the Respondent requested the following relief:

81. *It is SAIDS's respectful submission that the appeal should be dismissed with no costs attributable to the Respondent;*
82. *That CAS to uphold the decision of the SAIDS Appeal Panel;*
83. *Not to accept the new evidence tendered by the Appellant;*
84. *The Appellant to pay all costs of this Arbitration.*

V. JURISDICTION

27. Article R47 of the Code provides as follows:

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

28. The Appellant relies on Article 13.2.1 of the SAIDS Anti-Doping Rules (Appeals Involving International-level Athletes or International Events). Such Article provides as follows:

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

29. The Respondent does not dispute jurisdiction and indeed confirmed in its answer that it is common cause between the parties that the CAS has jurisdiction to hear this matter and determine the present appeal. CAS jurisdiction is also confirmed by the Respondent in signing the Order of Procedure and participating in this proceeding fully.

30. Consequently, the Sole Arbitrator determines that he has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

31. 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

32. Article 13.7.1 of the SAIDS Anti-Doping Rules (Appeals to CAS) also provides as follows:

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

33. The record shows that the Appellant, who has a right to appeal under Article 13.2.1 of the SAIDS Anti-Doping Rules, received the Appealed Decision on 27 March 2018. The Appellant's deadline to appeal therefore, expired on 17 April 2018. The Appellant filed her statement of appeal on 16 April 2018.

34. In its answer, the Respondent does not dispute the admissibility of this appeal and the Parties participated in this proceeding fully.

35. Consequently, the Sole Arbitrator determines that this appeal is timely and admissible.

VII. APPLICABLE LAW

36. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

37. As set forth above, the Athlete's doping control procedure was initiated and directed by the SAIDS in accordance with the SAIDS Anti-Doping Rules. In their written and oral submissions, both the Athlete and SAIDS relied on the SAIDS Anti-Doping Rules.

38. The Appealed Decision was also rendered in application of the SAIDS Anti-Doping Rules and consequently, the Sole Arbitrator determines that this appeal shall be decided on the basis of the SAIDS Anti-Doping Rules.

VIII. MERITS

A. The Anti-Doping Rule Violation

39. Pursuant to Article 2.1 of the SAIDS Anti-Doping Rules, the presence of a prohibited substance or its metabolites or markers in an athlete's sample constitutes an ADRV.
40. Sufficient proof of an ADRV under Article 2.1.2 of the SAIDS Anti-Doping Rules is established by the *presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed.*
41. It is common ground between the Parties that the analysis of the Athlete's A Sample revealed the presence of 4- methylhexanamine-2-amine, which is a prohibited stimulant that is classified as a Specified Substance under Clause S6 of the WADA Prohibited List. The Substance is prohibited in-competition. The Substance is a "Specified Substance" as this term is defined in Article 4.2.2 of the SAIDS Anti-Doping Rules.
42. As the Athlete has expressly waived her right to the analysis of the B Sample and the B Sample has not been analysed, she is deemed to have accepted the analytical results of the A Sample. Therefore, the violation of Article 2.1 of the SAIDS Anti-Doping Rules is established.

B. The Appropriate Sanction

43. The starting point for determining the length of the sanction is Article 10.2.1 of the SAIDS Anti-Doping Rules, which provides that the period of ineligibility shall be four (4) years where:
10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.
10.2.1.2 The anti-doping rule violation involves a Specified Substance and SAIDS can establish that the anti-doping rule violation was intentional.
44. Pursuant to Article 10.2.2 of the SAIDS Anti-Doping Rules, if the above Article 10.2.1 does not apply, *the period of ineligibility shall be two (2) years.*
45. It should be noted that Article 10.2.1 of the SAIDS Anti-Doping Rules does not specifically mention that establishing the source of the prohibited substance is a prerequisite before SAIDS establishes intent. Accordingly, a legal question which arises is whether a proof of source of the prohibited substance is mandated under Article 10.2.1 of the SAIDS Anti-Doping Rules in order to allow SAIDS to establish intent, in the same way that it is mandated for the purposes of Articles 10.4 or 10.5 of the SAIDS Anti-Doping Rules under the definitions of No Fault or Negligence and No Significant Fault or Negligence, which require that *the Athlete must also establish how the Prohibited Substance entered his or her system.*

46. In this respect, the Sole Arbitrator adopts the guidance given in *CAS 2016/A/4534* and *CAS 2016/A/4676* to find that the establishment of the source of the prohibited substance is not a *sine qua non* of proof of absence of intent.
47. Indeed, in the present case, the following factors support the proposition that establishment of the source of the prohibited substance is not a *sine qua non* of proof of absence of intent:
- (i) Article 10.2.1 of the SAIDS Anti-Doping Rules does not refer to any need to establish such source;
 - (ii) Establishment of such source is specifically required when an athlete seeks to prove No Fault or Negligence (Article 10.4 of the SAIDS Anti-Doping Rules) or No Significant Fault or Negligence (Article 10.5 of the SAIDS Anti-Doping Rules) and the definitions of No Fault or Negligence and No Significant Fault or Negligence in Appendix 1 (Definitions) of the SAIDS Anti-Doping Rules. If such establishment is expressly required in one rule, its omission in another must be treated as deliberate and significant;
 - (iii) Article 10.2.1 of the SAIDS Anti-Doping Rules, which does not specifically mandate the need to establish source as a precondition of proof of lack of intent, is modelled on the WADC and must be presumed to be deliberate;
 - (iv) Any ambiguous provisions of a disciplinary code must, in principle, be construed *contra proferentem*. See, *CAS 94/129: The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated Players must be predictable* (para. 34). This is especially so when, on the express language of the WADC and the SAIDS Anti-Doping Rules, the purpose of the concept of intent is to identify athletes “who cheat”; and
 - (v) In an article by four well recognized experts including Antonio Rigozzi and Ulrich Haas “Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code”, *International Sports Law Journal*, (2015) 15:3-48, the view is expressed:

The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete’s level of Fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional.
48. The Sole Arbitrator, therefore, finds the above factors, supporting the proposition that establishment of the source of the prohibited substance in the Athlete’s A Sample is not mandated in order to prove an absence of intent, compelling. In particular, the Sole Arbitrator notes that the SAIDS Anti-Doping Rules, based on the WADC, represent a new version of an anti-doping code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. Article 10.2.1 of the SAIDS Anti-Doping Rules does not refer to any need to establish source, in direct contrast to Articles 10.4 and 10.5 of the SAIDS Anti-Doping Rules combined with the definitions of No

Fault or Negligence and No Significant Fault or Negligence, which expressly and specifically require to establish source.

49. Because this case involves a Specified Substance, and as rightly noted by the Respondent in its Principle Submissions, the onus is on SAIDS to establish that the ADRV was intentional. In other words, in terms of Article 2.1 of the SAIDS Anti-Doping Rules, the presence of a prohibited substance will be considered an intentional ADRV if it involves a Specified Substance and SAIDS can establish that the ADRV was intentional.
50. Under Article 10.2.3 of the SAIDS Anti-Doping Rules, the term “intentional” is meant *to identify those Athletes who cheat. The term, therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*
51. Pursuant to Article 3.1 of the SAIDS Anti-Doping Rules (Burdens and Standards of Proof), *SAIDS shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation, which made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond 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.*
52. Accordingly, SAIDS must prove to the comfortable satisfaction of the Sole Arbitrator that the Athlete knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. If SAIDS can establish that the Athlete ingested the Substance with the intent to cheat, then the appropriate sanction shall be four years of ineligibility. If not, then the sanction drops to two years of ineligibility.
53. In consideration of the foregoing, and in contemplation of the evidence put before the Sole Arbitrator in both written and oral form, the Sole Arbitrator is not comfortably satisfied that the Athlete ingested the Substance with the intention to cheat. Indeed, SAIDS failed to establish that the Athlete engaged in conduct which she knew constituted or might constitute or result in an ADRV, in that she knowingly ingested the Substance or otherwise intended to cheat.
54. Given the circumstances of this case involving a Specified Substance, the Athlete’s demeanour during the presentation of her case and evidence, the short term effects of the ingestion of the Substance, the Athlete’s attempts to discover the origin of the prohibited substance before and after the Appealed Decision and the Athlete’s clean record are, in the Sole Arbitrator’s judgment, sufficient to negate the intentionality of the Athlete’s ADRV.
55. Having found that the Respondent did not establish that the Athlete intended to cheat, the sanction should drop to two years of ineligibility, unless the Athlete can establish “no fault” or “no significant fault”. This is confirmed by the Respondent, which stated in its Principle Submissions that if the panel decides that SAIDS has not established the requirements of Article 10.2.1.2 of the SAIDS Anti-Doping Rules, then in terms of Article 10.5.1.1 of the

SAIDS Anti-Doping Rules, the Athlete will need to establish No Significant Fault or Negligence, in order for the period of ineligibility to be reduced.

56. As set forth above, the Athlete carries this burden on the balance of probabilities, as per Article 3.1 of the SAIDS Anti-Doping Rules. To qualify for any reduction, the Athlete must establish the source of the Substance.
57. The Athlete suggests that the Mixture was the source of the Substance found in her A Sample. On the balance of probabilities, the Sole Arbitrator is not satisfied that this is the source.
58. Indeed, after examining the sole witness called by the Athlete, the Sole Arbitrator still does not understand why the Athlete's brother would add his product to his sister's product to make his product last – especially when he did not live with her. Logic would tell that he should have taken some of her product and mixed it with his own product. The Sole Arbitrator therefore agrees with the Respondent that it does not make sense why the Athlete's brother would mix his supply of Chemical X into her container of Prolong BCAA instead of scooping out from her container and put into his. Moreover, the Sole Arbitrator struggles to understand how the Athlete's brother could extend his supply of Chemical X by mixing it with his sister's container of Prolong BCAA and having them both consume the Mixture from the same container.
59. Also, the Appellant emphasized at the hearing that her brother was to never touch her belongings. Despite this clear familial understanding, on this one occasion her brother not only “touches” her product, he co-mingles his product with her product so that he can later continue “touching” her product. Such common understanding speaks against the alleged actions.
60. Nevertheless, even if the testimony of the Athlete and her brother were deemed fully justifiable, the Athlete's explanation of how the Substance entered her body is based exclusively on her word and that of her brother. Such explanations, particularly in cases involving contamination scenarios (or scenarios where the Athlete's brother deliberately comingled her product with the Substance), based solely on the word of the accused and his/her entourage, must be approached with caution. It would otherwise be too easy for athletes to cast blame on a family member, partner, friend, etc. who is not subject to any anti-doping rules or consequences.
61. Moreover, no scientific evidence was adduced to explain whether the reported concentration of the Substance in the Athlete's system (approximately 69 ng/ml) would or could have resulted from the approximate 7 servings the Athlete's brother added to her partially filled container. This evidence would however be needed to support the Athlete's theory. Otherwise, it cannot be determined whether the Athlete's brother transferred sufficient quantities of the Substance to the Athlete's container such that she would produce the reported urinary concentration of approximately 69 ng/ml.

62. Based on the above, considering that the Athlete did not establish the source of the Substance, she cannot qualify for a reduction based on No Fault or No Significant Fault. The Sole Arbitrator therefore concludes that the period of ineligibility should be two years.

C. The Commencement of the Period of Ineligibility

63. Article 10.10 of the SAIDS Anti-Doping Rules (Commencement of Ineligibility Period) provides:

Except as provided below, 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 Ineligibility is accepted or otherwise imposed.

64. Article 10.10.1 of the SAIDS Anti-Doping Rules (Delays Not Attributable to the Athlete or other Person) also provides:

Where there have been substantial delays in the hearing process or other aspects of the Doping Control not attributable to the Athlete or other Person, SAIDS may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

65. Article 10.10.3.1 of the SAIDS Anti-Doping Rules further provides:

If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility, which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility, which may ultimately be imposed on appeal.

66. The Sole Arbitrator notes that the Athlete was not provisionally suspended and that the Appealed Decision imposed on the Athlete a period of ineligibility of four years with effect from 19 February 2018 (being the date of the hearing held before the SAIDS Tribunal). The Athlete was also ordered to forfeit any results, medals and prizes obtained during the Professional Hockey League (PHL) tournament held in Johannesburg, South Africa on 9 December 2017 in terms of Article 10.1 of the SAIDS Anti-Doping Rules.

67. Based on the foregoing, considering that the time taken to notify the Athlete of the ADRV and render a decision on the violation was not excessively long (i.e. a total of four months), the Sole Arbitrator deems it fair and reasonable to maintain the period of the Athlete's ineligibility as from 19 February 2018 as set by the SAIDS Tribunal.

C. Conclusion

68. Having thoroughly considered the submissions of the Parties and the evidence presented at the hearing, the Sole Arbitrator, for the reasons set out above, finds that:
- The presence of a prohibited substance or its metabolites or markers in the Athlete's A Sample was established and, thus, the Athlete is found to have committed an ADRV pursuant to Article 2.1 of the SAIDS Anti-Doping Rules.
 - The ADRV is held not to be intentional since SAIDS failed to establish that the Athlete engaged in conduct which she knew constituted or might constitute or result in an ADRV, in that she knowingly ingested the Substance or otherwise intended to cheat.
 - The Athlete was not able to establish the source of the Substance and cannot qualify for a reduction based on No Fault or No Significant Fault. Therefore, the appropriate sanction to be imposed on the Athlete is a period of ineligibility of two years.
 - The period of ineligibility of the Athlete shall commence as from 19 February 2018.
 - All competitive results achieved by the Athlete during the period of ineligibility shall be disqualified, with all the resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 16 April 2018 by Ms. Bernadette Coston against the South African Institute for Drug-Free Sport concerning the decision of the SAIDS Tribunal of 20 March 2018 is partially upheld.
 2. The decision of the SAIDS Tribunal of 20 March 2018 is set aside.
 3. Ms. Bernadette Coston is declared ineligible for a period of two (2) years, commencing as from 19 February 2018.
 4. All competitive results achieved during the period of ineligibility shall be disqualified, with all the resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.
- (...)
7. All other or further motions or prayers for relief are dismissed.