Arbitration CAS 2012/A/2822 Erkand Qerimaj v. International Weightlifting Federation (IWF), award of 12 September 2012

Panel: Mr Patrick Lafranchi (Switzerland), President; Prof. Petros Mavroidis (Greece); Prof. Ulrich Haas (Germany)

Weightlifting
Doping (methylhexaneamine)
Criteria to reduce the period of ineligibility for specified substances (Art. 10.4 IWF ADP)
Distinction between direct intent, indirect intent and the various form of negligence
Degree of fault of the athlete
Relevant factors to be considered in reducing the period of ineligibility

1. **Whether or not the behaviour of the athlete as such is intended to enhance his sport performance is not a sufficient criteria to establish the scope of applicability of Art. 10.4 IWF ADP. This is all the more true since nutritional supplements are usually taken for performance-enhancing purposes which is not *per se* prohibited. The characteristic of "performance-enhancing" as such is neutral. An athlete is entitled to consume any substance that seems useful to enhance his sport performance as long as this substance is not listed on WADA's Prohibited List. Therefore, the primary focus can obviously not be on the question whether or not the athlete intended to enhance his sport performance by a certain behaviour (i.e. consuming a certain *product*), but moreover if the intent of the athlete in this respect was of doping-relevance. As a result, Art. 10.4 IWF ADP is applicable if the athlete is able to produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance through consuming the specified substance.**

2. **Art. 10.4 IWF ADP remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. Of course the distinction between indirect intent (which excludes the applicability of Art. 10.4 ADP IWF) and the various forms of negligence (that allow for the application of Art. 10.4 ADP IWF) is difficult to establish in practice. In this respect, it can be admitted that an athlete was not aware that a specified substance not labelled on the product was contained in the latter. Therefore, the athlete had no direct intent to enhance his sports performance through the Specified Substance contained in the product. The athlete's indirect intent can only be determined by the surrounding circumstances of the case. An athlete who wrongly trusted a personal trainer's word and listed the supplement on the doping control forms is admitted to have no indirect intent.**

3. **According to Art. 10.4 IWF ADP the athlete's degree of fault (e.g. light or gross negligence) is the decisive criterion in assessing the appropriate period of ineligibility. In this respect, it has no influence on the athlete's degree of fault that it is established to the satisfaction of the hearing panel that he did not intend to enhance his sport**

performance through the specified substance, as this aspect was considered in the athlete's favour when assessing whether or not Art. 10.4 IWF ADP was applicable at all. It cannot be taken into account twice.

4. **It is appropriate to reduce the sanction imposed on an athlete who never received any education or information in anti-doping matters by his federation or the anti-doping agency of his country. Further, the fact that the athlete did not use prohibited/specified substances deliberately and intentionally is relevant. However, the athlete's poor judgment in blindly trusting a personal trainers' advice and not doing further research does not allow for a further reduction.**

1. PARTIES

1.1 Mr. Erkand Qerimaj (hereinafter referred to as "the Athlete" or "the Appellant" is an Albanian international-level weightlifter and member of the Albanian national weightlifting team.

1.2 The International Weightlifting Federation (hereinafter referred to as "IWF" or "the Respondent") is an association constituted under Swiss law and the international governing body for weightlifting with its registered seat in Lausanne, Switzerland and its Secretariat in Budapest, Hungary.

2. FACTS

2.1 On 12 April 2012 the Appellant provided a urine sample while competing at the 2012 European Championships in Antalya, Turkey. The in-competition sample tested positive for *methylhexaneamine*. *Methylhexaneamine* is a prohibited substance classified under S6 b (Specified Stimulants) on the 2012 Prohibited List of the World Anti-Doping Agency (hereinafter referred to as the "2012 WADA Prohibited List"). The substance is only prohibited in-competition, but not out-of-competition.

2.2 The Athlete has been competing at international level since 2003. In approximately 30 in- and out-of-competition doping tests prior to the sample taken on 12 April 2012, the Appellant had never tested positive for any prohibited substances.

2.3 The Athlete does not dispute that the prohibited substance was found in his body.

2.4 It is undisputed between the Parties that the prohibited substance in question can be traced back to a food supplement called *Body Surge* (the "Supplement) that the Appellant took prior to sample collection.

2.5 On the Doping Control Form that the Appellant filled out on the occasion of the sample collection he declared having taken the Supplement during the seven days preceding the testing.

2.6 The Appellant had received the Supplement from N., a personal trainer, former weightlifter and a New York State licensed massage therapist, domiciled in the United States. N. met the Appellant on the occasion of a weightlifting competition in Albania in 2006 and has since supplied him with food supplements and some advice regarding his athletic career. In September 2011, the Appellant replaced the supplement *creatine elite* with the supplement *Body Surge* upon the advice of N.

2.7 The label of the Supplement does not explicitly mention *methylhexaneamine*, but refers to *1.3-dimethylamylamine* as an ingredient. *1.3-dimethylamylamine* is a synonym for *methylhexaneamine*.

2.8 The Appellant claims to have checked the label of *Body Surge* for prohibited substances and to also have asked N. whether or not he could take the Supplement. The latter confirmed that the Supplement did not contain any prohibited ingredients, and the Appellant did not do any research on the product himself.

2.9 By email dated 4 May 2012, the IWF informed the President of the Albanian Weightlifting Federation that the IWF Doping Hearing Panel would investigate the matter on the occasion of the Junior World Championships in Guatemala on 12 May 2012, in case the Appellant requested the Panel to decide on his case based on the submitted documentation.

2.10 On 7 May 2012, the Albanian Weightlifting Federation informed the Respondent that the Appellant requested a hearing in front of the IWF Hearing Panel.

2.11 On 22 May 2012, following a hearing on 12 May 2012, the IWF Doping Hearing Panel imposed on the Appellant the maximum sanction of two years of ineligibility because of an anti-doping violation committed by the Appellant. The IWF Hearing Panel held that the Appellant had not produced corroborating evidence that he had not taken the supplement with the intent to enhance his performance. As a consequence thereof, the IWF Hearing Panel found that the Appellant was not eligible for a reduction or elimination of the sanction.

2.12 The Appellant was not present at the hearing, and was – allegedly – represented by Mr Alven Merepeza, an Albanian physiotherapist, domiciled in Canada, and Mr Ilir Kraja, the General Secretary of the Albanian Weightlifting Federation. Both were in Guatemala at the time to attend the Junior World Championships.

3. PROCEEDINGS BEFORE THE CAS

3.1 The proceedings before the Court of Arbitration for Sport (hereinafter referred to as the "CAS") can be summarized in their main parts as follows:

3.2 By letter dated 11 June 2012, the Appellant filed his statement of appeal with the CAS. The Appellant requested – among others – to have the case decided according to an expedited procedure, suggesting to set the following deadlines:

15 June 2012: IWF appoints its arbitrator; the President of the Panel is then appointed as swiftly as possible;
19 June 2012: the Appellant files his appeal brief;
27 June 2012: IWF files its Answer;
28 June - 5 July 2012: Hearing to take place during this period;
6 July 2012: deadline for issuing the operative part of the award.

3.3 On 12 June 2012, the CAS Court Office informed the parties, that the case had been assigned to the Appeals Arbitration Division of the CAS and should therefore be dealt with according to Art. R47 *et seq* of the Code of Sports-related Arbitration (hereinafter referred to as the "Code"). The CAS Court Office further informed the Respondent of the aforementioned expedited proceedings suggested by the Appellant and invited the Respondent to advise the CAS Court Office according to Article R52 of the Code within 2 days of receipt of the letter by fax whether it agreed to such proceedings. In addition, the CAS Court Office invited the Appellant to file a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn. In particular, the Appellant was invited to specify the names of witnesses, including a summary of their expected testimony. The CAS Court office further requested the Respondent to provide the IWF by June 13 with the letter from Mr Ilir Kraja to the IWF Legal Counsel dated 5 May 2012, and the letter from Mr Ilir Kraja dated 7 May 2012.

3.4 The Respondent submitted the requested letters by fax dated 13 June 2012, and nominated Mr Ulrich Haas as arbitrator. Moreover, it accepted that the dispute would be dealt with on an expedited basis and agreed to the procedural calendar suggested by the Appellant.

3.5 On 19 June 2012 the Appellant filed his Appeal Brief.

3.6 On 21 June 2012 the CAS Court Office invited the Respondent to submit an Answer by 27 June 2012 containing – among others – a statement of defence and any evidence upon which it intended to rely, including the name(s) of any witnesses and a brief summary of their expected testimony. It further informed the Respondent that, failing to submit such answer, the Panel may nevertheless proceed with the arbitration and deliver an award.

3.7 On 27 June 2012 the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the parties that the Panel appointed to decide the case was constituted as follows:

President: Mr Patrick Lafranchi, Attorney-at-law in Bern, Switzerland

Arbitrators: Mr Petros C. Mavroidis, Professor of Law in Commugny, Switzerland
Mr Ulrich Haas, Professor of Law in Zurich, Switzerland

The CAS Court Office further informed the parties that a hearing would be held on 3 July 2012 at the premises of the CAS, Avenue de Beaumont 2, Lausanne, Switzerland. In addition, the parties were invited to provide the CAS Court Office with the names of all persons who would be attending the hearing and were reminded that they were responsible for the availability and costs of the witnesses to be heard at the hearing and – if necessary – to arrange for the attendance of an independent, non-interested interpreter.

3.8 On 27 June 2012 the Respondent filed its Answer to the appeal.

3.9 On 28 June 2012 the CAS Court Office advised the parties that Ms Anne Hossfeld would act as *ad-hoc* clerk in the matter.

3.10 On 29 June 2012 the President of the Panel (on behalf of the Panel) and the parties' legal counsel held a conference call to discuss the hearing schedule. It was decided that all written witness statements would form part of the file. Furthermore, the President of the Panel took note that Respondent's counsel did not consider it necassary to cross-examine S., M., D., B. or E., and that, therefore, these witnesses would not be called to testify at the hearing. The Parties were then provided with the amended Hearing Schedule by the CAS Court Office and with the Order of Procedure. The Parties were requested to return a signed copy of the latter no later than 2 July 2012.

3.11 On 2 July 2012 both parties returned signed copies of the Order of Procedure.

3.12 On 3 July 2012 a hearing was held at the premises of the CAS in Lausanne. Apart from the Panel the following persons attended the hearing: Ms Louise Reilly (Counsel to the CAS), Ms Anne Hossfeld (*ad-hoc* clerk); for the Appellant: Mr. Erkand Qerimaj (the Appellant), Mr Claude Ramoni and Mr Jean-Marie Kiener (both Counsel for the Appellant), Ms Miranda Pistoli (Translater for the Appellant), Mr Sejeli Qerimaj (Observer and relative of the Appellant); for the Respondent: Ms Monica Ungar (legal advisor of the IWF), Mr Yvan Henzer (counsel for the Respondent), Mr Magnus Wallstein (Observer).

3.13 The Parties throughout the hearing did not raise any procedural objections and expressly confirmed at the end of the hearing that their right to be heard and to be treated equally had been respected, as they had been given ample opportunity to present their cases, submit their arguments and answer the questions posed by the Panel. Also, the parties did not challenge the composition of the Panel or reserve any right to do so at a later point.

3.14 The Panel heard the witnesses N. (called by the Appellant) and Z. (called by the Appellant) both via telephone conference. Mr Lluka Heqimi, member of the Albanian National Anti-Doping Agency (called by the Appellant) could not be reached by telephone and was therefore not heard. The Appellant waived his right to hear Mr Heqimi.

3.15 On 6 July 2012 the Parties were informed by letter on behalf of the Panel that the latter found that a suspension of no less than one year shall be imposed on the Appellant. The parties were

further advised that the complete argumentation, including the precise length of the period of ineligibility would be developed in the Award, which would be communicated to the parties in due course.

3.16 On 6 July 2012 the Appellant asked for confirmation whether or not the letter dated 6 July 2012 was to be understood as an arbitral award.

3.17 On 6 July 2012 the President of the Panel informed the parties that his letter dating 6 July 2012 did not constitute an arbitral award within the meaning of Article 189 of the Swiss Private International Law Statute (hereinafter referred to as the "PILA").

3.18 On 9 July 2012 the Appellant referred to the correspondence with the CAS dating 6 July 2012 and raised doubts as to whether circumstances or considerations existed which may affect the capacity of one or several arbitrators to issue an award in the case at hand in full fairness and independence. The Appellant therefore asked each arbitrator to answer three additional questions related to the independence of the Panel.

3.19 On 10 July 2012 the CAS Court Office advised the Parties that the Panel confirmed the statements of independence filed in the matter by the Arbitrators and had nothing further to add.

3.20 On 16 July 2012 the Court of Arbitration for Sport delivered the operative part of the Arbitral Award.

4. PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

This section of the award does not contain an exhaustive list of the parties' contentions, its aim being to provide a summary of the substance of the parties' main arguments. In considering and deciding upon the parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

4.1 The Appellant

On 11 June 2012, in his statement of appeal, and on 19 June 2012 in his Appeal Brief, the Appellant requested – *inter alia*:

1. *The decision issued by the IWF on 22 May 2012 sanctioning the Appellant with a two year period of ineligibility is set aside;*
2. *The Appellant is sanctioned with a warning or a reduced period of ineligibility expiring at the latest on 8 July 2012;*

3. IWF shall bear all the costs of the arbitration if any and shall be ordered to reimburse to the Appellant the Court Office fee in an amount of CHF 1.000.

4. IWF shall compensate the Appellant for the legal and other costs incurred in connection with this arbitration, in an amount to be determined at the discretion of the Panel.

The Appellant's submissions in support of its request – made in his written statements as well as in his oral statements during the hearing – can be summarized in essence as follows:

4.2 The Appellant did not know that *Body Surge* contained a prohibited substance, *in casu methylhexaneamine*. Therefore, he did not consume the product with the intent to enhance his sport performance. For the application of Art. 10.4 IWF Anti-Doping Policy, 31 March 2009 ("ADP") it suffices according to the Appellant that the Athlete did not inent to enhance his performance with the prohibited substance. Whether the product containing the prohibited substance was taken with the overall intent to enhance the performance is of no relevance.

4.2.1 Concerning food supplements, the Appellant was advised by N. who had provided him with food supplements since 2006. The Appellant had always told N. to make sure he purchased "clean products" only. Appellant had never encountered any problems with the products provided by N. prior to the incident. He fully trusted N.'s expertise.

4.2.2 The Appellant used to take creatine which is not on the WADA Prohibited List in preparation for competitions. For this purpose, Appellant used the product *creatine elite* until November 2011. After that date he replaced it with the product *Body Surge*. Appellant changed the products upon the advice of N. The latter assured him that Body Surge was simply a pre-workout creatine. Upon being questioned by the Appellant whether or not the product was "clean", N. had responded:

> *"Erkand, it can't be. I purchase them in an official on line store that sells sport supplements. The United States laws prohibit that a banned substance be sold in the open".*

Furthermore, N. assured the Appellant that he had made further inquiries about the product.

The Appellant himself could not identify any forbidden substances on the label. He did not know at the time that products freely available in the US could contain prohibited substances.

4.2.3 The label on the product only listed *1.3 dimethylamylamine*. Unlike *methylhexaneamine* or *dimethylpentylamine*, the name *1.3 dimethylamylamine* is not explicitly mentioned on the 2012 WADA Prohibited List.

4.2.4 The Appellant took the product in order to prevent injuries and help muscle recovery during training. In the hearing the Appellant further submitted that in the weeks before competitions he, like most weightlifters, would go on a diet to be able to maintain his weight category (77 kilograms). He would eat very little, soups and salads, and still lift 20 tons every day. In order to replace the lost energy, and still keep his weight within the weight category mentioned supra, he supplemented food by taking *Body Surge*.

4.2.5 In addition, the Appellant submits that no increase in his athletic performance occurred since he has started taking *Body Surge*.

4.2.6 The Appellant's intention not to enhance his performance is – according to the Appellant – further evidenced by the fact that he declared having taken *Body Surge* prior to competition on the doping control form on occasion of an out-of-competition test conducted in Albania on 4 April 2012, and again on the IWF's Doping Control Form on the occasion of the sample collected on 12 April 2012. Prior to this, he had tested negative about 30 times in- and out-of-competition tests. He had never tested positive throughout his career before.

4.3 The Appellant claims always to have taken appropriate precautions in order to prevent the intake of prohibited substances. For example, the Appellant would always check where the food he ingests comes from, would only use his own drinking bottles during training and competitions and would share rooms at competitions only with his coach. Furthermore, in case the Appellant was sick, he would always consult with his doctors to make sure that the medication he was taking did not contain any prohibited substances.

4.4 The Appellant submits that had no support in anti-doping matters from his federation or other institutions within his country. In particular the Appellant states:

(1) The Albanian Weightlifting Federation (hereinafter referred to as "AWF") had no detailed knowledge of anti-doping procedures. This is evidenced according to Appellant by a letter by AWF to the IWF dated 5 May 2012. In this letter the General Secretary of AWF assumes that *methylhexaneamine* was not on the WADA Prohibited List before 27 April 2012.

(2) AWF does not provide any list of recommended or banned supplements/ products to its athletes. No website exists relating to anti-doping matters in the Albanian language.

(3) The last informative document published by the Albanian Anti-Doping Agency dates from 1997.

(4) The WADA compliance report dating 20 November 2011 qualifies Albania a non-compliant signatory to the Code.

(5) The Appellant submits that he has only very limited access to information to anti-doping matters. In essence his information is limited to what his coach says. He has no access to medical advice in anti-doping matters.

(6) The Appellant had never been made aware about the side-effects of doping and had never been invited to follow a course on this matter. His access to information is further limited by the fact that he is unable to understand English. It is for this reason that he had to rely on the information provided to him by his coach and N.

4.5 The Appellant claims that his procedural rights had been violated by the way the hearing had been conducted in Guatemala on 12 May 2012. He did not have enough time to apply for a visa to attend the hearing in Guatemala, arrange for his travel and defend himself. Mr Ilir Kraja and Mr Alven Merepeza, to who he had explained the situation and had asked to attend the

hearing on his behalf, failed to put forward evidence showing that the circumstances of the case justified a reduced sanction.

4.6 Considering the overall circumstances, the Appellant submits that his case falls at the very lowest end of the spectrum of fault, because

(1) he did not take the product in order to enhance his sport performance;

(2) he bought the product from a reliable source;

(3) he did not have access to anti-doping information or education; and

(4) he took the necessary steps to ensure that the product he was taking was "clean".

4.7 As to the commencement of the period of ineligibility, the Appellant submits that according to Art. 10.9.2 IWF ADP the period of ineligibility should commence as early as the date of sample collection (12 April 2012) in case the athlete promptly admits the anti-doping violation. As he never disputed the anti-doping violation, the requirements are met in the case at hand.

4.8 The Respondent

In its Answer to the appeal dating 27 June 2012, the Respondent – *inter alia* – requested:

1. *The Appeal filed by the Appellant is dismissed.*
2. *The Respondent is granted an award for costs.*

The Respondent's submissions in support of its requests can be summarized in essence as follows:

4.9 It is undisputed that the Appellant has tested positive for *methylhexaneamine*. According to 10.2 IWF ADP, a weightlifter shall incur a 2 year period of ineligibility for a first doping violation. No reduction of the imposed period of ineligibility is indicated in the case at hand.

4.10 The Appellant is a very experienced athlete who has been competing at international level since 2003. As an experienced weightlifter, he is aware of the anti-doping system and has been tested on numerous occasions. He is also aware that he is responsible for not ingesting any prohibited substances. Therefore, he cannot put the blame for the anti-doping rule violation on the AWF. Also, it was clearly indicated on the label of the product that it contained *1.3-dimethylamylamine*.

4.11 According to Art. 10.5 IWF ADP, the period of ineligibility shall be eliminated or reduced in case of no fault or negligence or no significant fault or negligence. Also, according to Art. 10.4 IWF ADP the period of ineligibility according to 10.2 IWF ADP shall be replaced with a reprimand as a minimum and a period of up to 2 years of ineligibility as a maximum if the Athlete can establish how the substance entered his body and that the taking of the substance was not intended to enhance the athlete's performance. However, neither Art. 10.4 nor Art. 10.5 IWF ADP apply to the dispute at hand.

4.11.1 It is undisputed that the product *Body Surge* caused the adverse analytical finding. The Appellant took the product *Body Surge* in order to enhance his performance. The label of the product states as follows:

> *"BodyStrong's Body Surge is the ultimate ultra-hardcore pre-workout supplement for serious athlete ONLY. Ferocious energy, superhuman strength, vein-popping vascularity, increased muscle pumps, and an intense feeling of mental clarity are just a taste of what you'll be experience when you take just one super-concentrated scoop of Body Surge".*

4.12 According to the Respondent it does not suffice that the Appellant ignored what substances were contained in the product. Instead, the Athlete has to establish to the comfortable satisfaction of the Panel that his whole behaviour was not aimed at enhancing his sport performance. This, however, was not the case of the Appellant. The Respondent submits that if one would adopt a different reading of Art. 10.4 IWF ADP, the athlete could avoid the consequences of anti-doping violation by simply refraining from making inquiries about the contents of the ingested products. Art. 10.4 IWF ADP, however, was intended for a different purpose. The provision was designed to protect athletes that take a product for non-sporting reasons, i.e. for medical, cosmetic, or other non-sporting purposes to protect them from unintentionally ingesting a prohibited substance. It is only these athletes that should benefit from a more lenient sanctioning regime.

4.13 Respondent submits that the opinion expressed in the *Oliveira* case (*CAS 2012/A/2107 Oliveira v. USADA*, award of 6 December 2010) according to which the athlete's intent to enhance performance must be linked to the substance contained in the product and not to the product as such, should not be followed. The Panel's view in *Oliveira* was based on a technical reading of Art. 10.4 of the World Anti-Doping Code ("WADC"). It is not the athlete's knowledge of the precise ingredients of the product that is of relevance. Instead, it is whether or not the Athlete wanted to enhance his sport performance at the time of the ingestion of the product. This follows from paragraph two of Art. 10.4 IWF ADP that refers more generally to the athlete's intent to enhance his sport performance, and not to the specified substance. The view held by Respondent is backed by the commentary to Art. 10.4 IWF ADP which states that the provision applies in the case that *"the Athlete in taking (…) did not intent to enhance his (…) sport performance"*. "In taking" can only be read as "at the time of taking".

4.14 The WADC contains no hint or reference that the athlete's ignorance in relation to the specified substance at the time of ingestion qualifies for a reduction of the sanction.

4.15 Should the Panel – contrary to the view held by Respondent – consider that the Appellant did not intend to enhance his sport performance, it should keep in mind that the Appellant was particularly careless. The Panel should note that according to Art. 2.1.1 IWF ADP the athletes are responsible for what they ingest. They have to be particularly cautious in order to satisfy their duty of care and, therefore, must inquire whether a product contains a prohibited substance or not. Failing to do so constitutes significant fault or negligence which excludes any reduction of the applicable period of ineligibility from the outset. In the case at hand the Appellant was fully aware of said duty.

4.16 The Respondent submits that the Athlete is also responsible for the choice of his medical personnel. N. is not a doctor and does not have any particular knowledge in anti-doping matters. His advice, therefore, cannot be blindly trusted. In addition, the Appellant failed to do any other research on the product himself, e.g. by contacting the producer of the supplement.

4.17 Finally, the Respondent submits that WADA's website contains plenty of useful information regarding supplements that could have been consulted by the Appellant.

5. CAS JURISDICTION

5.1 As Switzerland is the seat of the arbitration and the Appellant is not domiciled in Switzerland, the provisions of the PILA apply, pursuant to its Article 176 para. 1. In accordance with Art. 186 of the PILA, the CAS has the power to decide upon its own jurisdiction.

5.2 Art. R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of an arbitration agreement, or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of these bodies, or because a specific agreement provides for an appeal to the CAS. Therefore, in order for the CAS to have jurisdiction to hear an appeal, either

- the statutes or regulations of the sports federation to which the Parties have submitted *expressly* provide for an arbitration clause referring the matter in dispute to the CAS, or
- the Parties enter into a *specific* arbitration agreement referring the matter in dispute to CAS.

5.3 Furthermore, Art R47 of the Code provides for two additional prerequisites in order for the Panel to decide the matter according to the rules applicable to the Appeals Arbitration Procedures, i.e. that the Appellant has exhausted all (internal) legal remedies available to him prior to the appeal to CAS and that the appeal is directed against a "decision" within the meaning of Art. R47 of the Code.

5.4 The Appellant relies on Art. 13.2 of the IWF ADP in order to bring this matter before the CAS. Art. 13.2 IWF ADP states:

> ***13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions***
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> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, (…) may be appealed exclusively as provided in this Article 13.2.*

13.2.1 Appeals Involving International-Level Athletes
In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.

(…)

13.2.3 Persons Entitled to Appeal
In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed (…).

The Respondent did not contest the jurisdiction of the CAS. Furthermore, both Parties have confirmed the CAS jurisdiction to hear this case by signing the Order of Procedure on 2 July 2012.

6. APPLICABLE LAW

6.1 Pursuant to Article R58 of the Code, the Panel shall decide the dispute

"… according to the applicable regulations and the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports-related body 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".

6.2 The Respondent is the federation that has issued the appealed decision and has its seat in Switzerland.

6.3 As a result of the foregoing, the Panel considers the IWF ADP to be the applicable regulations. In the absence of an express choice of law by the Parties, this Panel will apply, if warranted, Swiss law (as the law at the seat of the federation whose decision is being contested).

6.4 The relevant parts of the IWF Rules and Regulations read as follows:

International Weightlifting Federation
Anti-Doping Policy

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS
Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.
The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

(…)

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

(…)

ARTICLE 4 THE PROHIBITED LIST
4.1 Incorporation of the Prohibited List
These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code. IWF will make the current Prohibited List available to each National Federation, and each National Federation shall ensure that the current Prohibited List is available to its members and constituents.

ARTICLE 10 SANCTIONS ON INDIVIDUALS
10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods
The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers (…) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, (…) are met:

First violation: Two (2) years' Ineligibility.

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances
Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence
If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. (…)

10.5.2 No Significant Fault or Negligence
If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. (…) When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

2012 WADA Prohibited List

PROHIBITED SUBSTANCES

S6. STIMULANTS
All stimulants (including both optical isomers where relevant) are prohibited, except imidazole derivatives for topical use and those stimulants included in the 2012 Monitoring Program.*
Stimulants include:

a: Non-Specified Stimulants:
(…)

b: Specified Stimulants (examples):
(…)
methylhexaneamine (dimethylpentylamine);
(…)
and other substances with a similar chemical structure or similar biological effect(s).

7. SCOPE OF THE PANEL

According to Article R57 of the Code,

"The Panel shall have 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".

In application of the aforementioned rule, the Panel is entitled to hear the present case *de novo* (CAS 2012/A/2107 at 9.1).

8. MERITS OF THE APPEAL

8.1 It is undisputed that Appellant has committed an anti-doping rule violation. What is at stake here is the consequences of this action. The standard sanction for an anti-doping rule violation according to Art. 10.2 IWF ADP is a two-year period of ineligibility. The Parties are in dispute, whether or not the Appellant is entitled to a reduction of the standard period of ineligibility under Art. 10.4 IWF ADP. Art. 10.4 IWF ADP requires a two-step examination. In a first step the scope of applicability must be examined (see below 8.2). In case the provision is applicable the length of the sanction must be determined in a second step (see below 8.17).

a) Applicability of Art. 10.4 ADP IWF

8.2 Art. 10.4 ADP IWF is only applicable if

(1) the substance detected in the bodily specimen of the Athlete is a Specified Substance within the meaning of Art. 4.2.2 IWF ADP;

(2) the Athlete establishes how the Specified Substance entered his body;

(3) the Athlete establishes the *"absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance"*.

8.3 In the case at hand it is undisputed that the first two prerequisites are fulfilled. *Methylhexaneamine* is a specified substance and it entered into the Athlete's body through the intake of the product *Body Surge*. The Parties, however, disagree in regard to the third condition (absence of intent). In particular the Parties disagree on how this term should be interpreted. The following core question is to be decided by the Panel:

> In order to establish whether or not an athlete has intent to enhance his sport performance, does it suffice to demonstrate that the product (i.e. the nutritional supplement) was taken for sporting purposes or is it necessary to establish that the athlete had the intent to enhance his sport performance with the help of the prohibited substance contained in the product?

8.4 The Appellant declared in his submissions that he started taking *Body Surge* to supplement for the product *creatine elite*, which he had been taking previously. When creatine elite went out of

production, the Appellant replaced it with *Body Surge* in November 2011, following the advice of N. The reason for choosing *Body Surge* was, according to the Appellant's submissions, that it helped him during his pre-workout and with intensive workouts. According to N.'s witness statement, the creatine contained in the product *"helps the muscle in a critical moment"*, *"increases its productivity"*, *"prevents injury by strengthening the muscle"* and *"helps to grow new muscle cells"*. Furthermore, the Appellant stated that he took the Supplement prior to competitions to lose weight in order to maintain his weight category. Hence, the Appellant used the Supplement to enable him to compete in a weight category that provided for better chances of success in competitions. If of course, he had failed to maintain his weight category, he would have had to compete in a higher weight category against heavier and therefore probably stronger athletes. The Appellant also explained that he used *Body Surge* to replace the energy that he lost during the intensive periods of training before competitions. Thus, the supplement allowed him to continue exercising even though staying on a diet, i.e. without consuming the amount of calories he would have otherwise consumed. To sum up, the Appellant used the product *Body Surge* in order to improve his sport performance. Therefore, this Panel must rule on the question whether the absence of intent to enhance the sport performance must be linked to the prohibited substance or not.

8.5 Paragraph one of Art. 10.4 IWF ADP explicitly links the (absence of the) intent to the Specified Substance. The provision reads insofar as relevant:

"Where an Athlete (…) can establish how a Specified Substance entered his or her body (…) and that such Specified Substance was not intended to enhance the Athlete's sport performance (…)".

However, in order to justify any elimination or reduction, the second paragraph of Art. 10.4 IWF ADP states that

"The Athlete (…) must produce corroborating evidence in addition to his or her word (…) the absence of an intent to enhance sport performance (…)".

(i) Overview as to the jurisprudence in this matter

8.6 The dispute as to the correct interpretation of Art. 10.4 ADP IWF (which is identical to Art. 10.4 of the WADC) has been dealt with by other arbitral tribunals, in particular in *CAS 2012/A/2107 Oliveira v. USADA*, award of 6 December 2010. In this regard, the Panel remarked the following:

> *"The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (…) with the intent to enhance sport performance. If the Panel adopted that construction, an athlete's usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which is not per se prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete's period of ineligibility. Art. 10.4 provides a broader range of flexibility (i.e., zero to two years*

ineligibility) in determining the appropriate sanction for an athlete's use of a specified substance because "there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation". See Comment to Article 10.4.

If the Panel adopted USADA's proposed construction of clause two of Article 10.4, the only potential basis for an athlete to eliminate or reduce the presumptive two-year period of ineligibility of ingestion of a specified substance in a nutritional supplement would be satisfying the requirements of Article 10.5, which requires proof of "no fault or negligence" or "no significant fault or negligence" for any reduction. Unless an athlete could satisfy the very exacting requirement for proving that "no fault or negligence", the maximum possible reduction for use of nutritional supplement containing a banned substance would be one year. This consequence would be contrary to the WADC's objective of distinguishing between a specified substance and a prohibited substance in determining whether elimination or reduction of an athlete's period of ineligibility is appropriate under the circumstance".

8.7 This view expressed in *Oliveira* was followed by other CAS Panels, e.g. in the cases *CAS 2011/A/2645*, Award of 29 February 2012, no 79-81 and *CAS 2011/A/2495*, Award of 29 July 2011, no 8.31.

8.8 In the *Foggo* decision (*CAS A2/2011 Kurt Foggo v National Rugby League*, Award of 3 May 2011, at no. 47), the Panel found *"that Oliveira should not be followed"*. However, the Panel in *Foggo* did not give any reasons for its decision, nor did the decision deal with the legal issues and systematic questions raised by *Oliveira*.

(ii) Opinion

8.9 The Panel – in principle – is prepared to follow the approach taken by the arbitral tribunal in *Oliveira*.

8.10 First, the wording of Art. 10.4 IWF ADP speaks in favour of *Oliveira*. Paragraph 1 expressly links the intent to enhance performance to the taking of the specified substance. It is true, that this link is not repeated in the second paragraph that constitutes a rule of evidence. However, the second paragraph does not exclude similar interpretation either.

8.11 It follows from the above that whether or not to follow a broad or restrictive interpretation of Art. 10.4 IWF ADP must be decided depending on the purpose of the rule. The underlying rationale of Art. 10.4 IWF ADP is that – as the commentary puts it – *"there is a greater likelihood that specified substances, as opposed to other prohibited substances, could be susceptible to a credible non-doping explanation"* and that the latter warrants – in principle – a lesser sanction. What Art. 10.4 IWF ADP wants to account for is, in principle, that in relation to specified substances there is a certain general risk in day to day life that these substances are taken inadvertently by an athlete. The question is what happens if the risk at stake is not a "general" but a (very) specific one that the athlete has deliberately chosen to take. The Respondent submits that Art. 10.4 IWF ADP was not intended for such cases. If an athlete chooses to engage in risky behaviour (by

taking nutritional supplements), he should not benefit from Art. 10.4 IWF ADP. The Panel is not prepared to follow this interpretation for the following reasons:

(1) The Panel finds it difficult to determine what patterns of behaviour qualify for risky behaviour as defined above. This is all the more true since – in particular when looking at elite athletes – most of their behaviour is guided by a sole purpose, i.e. to maintain or enhance their sport performance. The term 'enhance sport performance' is like an accordion that could be interpreted narrowly or widely: at one end of the spectrum, if an athlete takes – e.g. – a cough medicine, in most circumstances it will be to enable him to recover quicker in order to train again or to compete. Were the Panel to adopt a similar interpretative attitude, then it would risk outlawing a very wide spectrum of activities that are remotely only connected to sports performance. It is very difficult to draw an exact dividing line between products taken by an athlete that constitute a "normal" risk and products that constitute high risks in the above sense, preventing the application of Art. 10.4 IWF ADP from the outset. It is not for this Panel to act as a legislator by drawing this dividing line. It is for this Panel though to decide on the instant case, and the reasoning above should be understood as underscoring our resolve to thwart a wide interpretation of the term 'enhance sport performance'.

(2) It follows from the above that whether or not the behaviour of the athlete as such is intended to enhance his sport performance is not a sufficient criteria to establish the scope of applicability of Art. 10.4 IWF ADP. This is all the more true since – as the arbitral tribunal in *Oliveira* has stated – nutritional supplements are usually taken for performance-enhancing purposes which is not *per se* prohibited. The characteristic of "performance-enhancing" as such is neutral. An athlete is entitled to consume any substance that seems useful to enhance his sport performance as long as this substance is not listed on WADA's Prohibited List. Therefore, the primary focus can obviously not be on the question whether or not the athlete intended to enhance his sport performance by a certain behaviour (i.e. consuming a certain *product*), but moreover if the intent of the athlete in this respect was of doping-relevance.

(3) Finally, the view held by the Panel is also in line with the commentary in Art. 10.4 IWF ADP. The latter reads – inter alia: *"Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance"*. Thus, the commentary assumes that there is a sliding scale with regard to the standard of proof in relation to absence of intent. The more risky the behaviour is in which an athlete engages the higher is the standard of proof for the absence of fault. It is exactly this sliding scale that the Panel will apply in the case at hand.

8.12 As a result, Art. 10.4 IWF ADP is applicable to the case at hand if the Appellant is able to produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance through consuming *methylhexaneamine*.

(iii) Consequence of the view held here

8.13 The Appellant claims not to have known that *methylhexaneamine* was contained in the food supplement *Body Surge* and consequently having acted without intent. According to N.'s witness statement, he had reassured the Appellant upon his request that Body Surge was clean and that it was prohibited in the United States to sell products that contained banned substances over the counter. As *methylhexaneamine* itself was also not mentioned on the label of the product, the Panel is convinced that the Appellant did indeed not know that *methylhexaneamine* was contained in *Body Surge*. This finding is also not disputed by the Respondent. However, the question is whether the mere fact that an athlete is unaware of a substance contained in the product suffices to rule out his intent to enhance sport performance.

8.14 This Panel holds that the term "intent" should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent. In such case Art. 10.4 IWF ADP is excluded. However, Art. 10.4 IWF ADP remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. Of course this Panel is well aware that the distinction between indirect intent (which excludes the applicability of Art. 10.4 ADP IWF) and the various forms of negligence (that allow for the application of Art. 10.4 ADP IWF) is difficult to establish in practice.

8.15 The Panel believes that the Athlete was not aware that the product *Body Surge* contained *methyhexaneamine*. Therefore, the Athlete had no **direct intent** to enhance his sports performance through the Specified Substance contained in the product. What has to be determined is, whether the Athlete had indirect intent. Such indirect intent can only be determined by the surrounding circumstances of the case. The Panel holds that an athlete competing at national and international level who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited/ specified substances. According to the Panel's view, the question if and to what extent the athlete is obliged to do research on a product and its contents, is also determined by the purpose of the product. The more the product is likely to be used in a sport/ training related context, in other words: to enhance sport performance, and the more it is processed, the likelier it is that it contains prohibited/specified substances. It is beyond the scope of the Panel in this case to establish a graduated system of the duty of care an athlete has to take for every single product (food, medication, supplements) that he ingests in order to be eligible to claim not having had intent. However, in the case of a food supplement like *Body Surge*, that is taken in a sport/training related context, the athlete has to take a certain level of precautionary

measures in order not to qualify his behaviour as reckless, i.e. with indirect intent. Any other interpretation would privilege athletes who close themselves off from their duties stipulated in Art. 2.1.1 IWF ADP the most. Moreover, it can be assumed that athletes competing at international level are aware of their anti-doping duties.

8.16 In the case at hand the Panel finds that the Appellant did also not have **indirect intent** to enhance his sport performance within the meaning of Art. 10.4 IWF ADP. However, this does not follow from the fact that Appellant claims to have looked at the label of the product *Body Surge* without being able to identify *methylhexaneamine* or any prohibited/ specified substance. At no point did the Appellant invoke of having been aware of the contents of WADA's Prohibited List or having compared this list to the ingredients labelled on the product. So even if *methylhexaneamine* (instead of *1.3 dimethylamylamine*) had been explicitly listed on the label, the Panel has severe doubts that the Appellant would have been able to identify it as a specified substance and act accordingly. In his statement, the Appellant simply stated that he *"didn't understand anything of the product"* and that he knew that *"certain substances are forbidden"*. Merely looking at the label can therefore not unburden him in the case at hand. The Appellant has also admitted not having done any research himself. Still, the Appellant showed general awareness about his anti-doping duties according to Art. 2.1.1 IWF ADP in asking N. whether or not *Body Surge* was "clean". The latter assured him that no prohibited/ specified substances were contained in the product, and that it was moreover prohibited by United States law to sell products that contained banned substances over the counter. N. also told him that he had made a personal inquiry and that everything *"was fine"* with the supplement. This was confirmed by N. in his witness statement and his testimony in the hearing. The Panel believes that the Appellant (wrongly) trusted N.'s word and also takes into consideration that the Appellant listed the supplement *Body Surge* on the doping control forms of 4 and 12 April 2012 which he would have most likely not done if he had believed he had to hide the use of said supplement. The Panel is therefore comfortably satisfied that the Appellant did not have indirect intent to enhance his sport performance through the use of a specified substance, i.e. *methylhexaneamine*.

b) The appropriate reduction of the period of ineligibility

8.17 The fact that the athlete did not have intent within the meaning of Art. 10.4 ADP IWF does however not automatically lead to the impunity of the athlete. It still has to be determined in a second step to what extent the Appellant is eligible for a reduction of the normal period of ineligibility. The sanction according to Art. 10.4 IWF ADP ranges between a reprimand and no period of ineligibility as a minimum, to a period of two years of ineligibility as a maximum. According to Art. 10.4 IWF ADP the athlete's degree of fault (e.g. light or gross negligence) is the decisive criterion in assessing the appropriate period of ineligibility.

8.18 It is the Panel's view that the Appellant showed considerable fault in the case at hand. First and contrary to the Appellant's submissions, it has no influence on his degree of fault that it is established to the satisfaction of the Panel that he did not intend to enhance his sport performance through *methylhexaneamine*. This aspect was considered in the Appellant's favour

when assessing whether or not Art. 10.4 IWF ADP was applicable at all. It cannot be taken into account twice.

8.19 Furthermore, the following findings speak in favour of a rather high degree of fault of the Appellant:

(1) There can be no doubt that N. is and was not a competent contact for advice in anti-doping matters. Based on the Appellant's submission and N.'s witness statement and oral testimony, the Panel concludes that:

- N. is neither a medical doctor nor a pharmacist. He has no education/training in anti-doping matters.
- He knew that a list of prohibited substances existed, but he had not read it and was unaware of its contents.
- He only undertook minimal (and completely insufficient) precautionary measures to make sure that there were no prohibited/specified substances in the supplement *Body Surge*. N. claims to have contacted the online store where he had purchased the supplement to inquire about its contents. He failed, however, to ask suitable questions. According to his oral statement, he only asked the salesperson of the online store – whose education in anti-doping matters remains unknown to the Panel – whether or not the product was "clean". He was satisfied with the online store's answer that *Body Surge* was "clean". Also, when asked about the general procedure when buying supplements for the Appellant, N. submitted – among others – in his written statement, that he would ask the online store sales person: *"Are there any steroids or anything bad in the supplement?"* and was satisfied with the answer: *"No Sir, we don't sell any such"*. The terms "clean" and "anything bad", however, are open to various interpretations and can include everything from "no artificial additives" through "allowed only out-of-competition" to "no substances that are listed on WADA's Prohibited List". Also, the answers given by the sales person are as open to interpretation as N.'s questions. At least, N. would have had to explicitly refer to WADA's Prohibited List when asking if the product was "clean" or contained "anything bad".
- Speaking English and having access to the Internet, N. could have easily obtained information on anti-doping in general and on the product *Body Surge* and WADA's Prohibited List in particular.

(2) The Appellant knew that N. was not a medical doctor or a pharmacist but still trusted his judgment blindly. He did not get a second opinion by a doctor or a pharmacist, even though he had at least access to doctors. He also did not ask his federation or the National Doping Organization of his home country for assistance. Even though he might not have gotten sufficient and correct information there, he did not even try.

(3) The Appellant never requested specific information on the contents of the products he received from N.. He was satisfied with N.'s reassurances that the products were "clean".

8.20 The Panel does however also see circumstances that speak in favour of a reduction of the period of ineligibility:

(1) Even though one has to differentiate between the trust in a person and the trust in that person's expertise in a certain field, the Panel finds it understandable that the Appellant trusted N., especially after the latter offered him advice and help on the occasion of the Appellant's injury in 2005 or 2006.

(2) According to WADA's 2011 Compliance Report, Albania is a non-compliant state. Even though this only means that Albania has not provided WADA with information as required by the World Anti-Doping Code, it shows – together with the undisputed submissions of the Appellant and the witness statements of Z. (weightlifting coach), S. (weightlifting coach), M. (weightlifting coach), D. (weightlifter), E. (weightlifter) and B. (weightlifter) that anti-doping has a low priority in Albania and that there is no anti-doping program currently in place. Also, except for S., neither the Appellant, nor the above mentioned coaches and athletes have ever received information from the national federation about forbidden supplements and/or substances.

8.21 Having regard to all of the above mentioned criteria that speak against as well as in favour of the Appellant, the Panel considers it appropriate to impose a period of ineligibility of 15 months. In doing so, the Panel is guided by the following circumstances:

(1) The starting point for this Panel is the principle enshrined in Art. 2.1.1 IWF ADP that every athlete is responsible for what he ingests. In light of this principle, the Appellant showed considerable fault in blindly trusting N. and not making further inquiries with other trained and skilled personnel.

(2) The Panel is prepared, however, to take into account the fact that Albania is a non-compliant state with practical no anti-doping education and information for its athletes. In doing so the Panel does not ignore that the Respondent has a legitimate interest in creating a level playing field for all its athletes worldwide. No level playing field would exist if the governing regulations would not apply to every participant to the same extent. One of the core principles in creating uniform conditions between the athletes is to put the individual burden on the athlete according to Art. 2.1.1 IWF ADP. The mere fact that some countries – due to lacking financial resources – cannot provide for adequate anti-doping education/information does, therefore, not give athletes from these countries a licence to be oblivious and negligent in anti-doping matters. Moreover, every athlete who wants to compete at international level has to abide by the regulations governing these competitions and therefore has to make sure that he is aware of their contents. On the other hand, Art. 10.4 IWF ADP refers to the length of the sanction to the athlete's *"personal fault"* [emphasis added]. The degree of this personal fault is, however, determined by the circumstances of the individual case. This is also supported by the commentary to Art. 10.4 IWF ADP that states that *"the circumstances considered must be specific and relevant to explain*

the Athlete's or others Person's departure from the expected standard of behavior". The standard to be applied here is, therefore, a subjective and not an objective one.

(3) The Panel comes to its conclusion also in light of several CAS decisions related to the taking of a specified/prohibited substance contained in a food supplement. Among others:

- *CAS 2011/A/2645*, Award of 29 February 2012: reprimand and no period of ineligibility (*hydrochlorothiazide*);
- *Foggo* (*CAS 2A/2011 Kurt Foggo v National Rugby League*, Award of 3 May 2011): 6 months of ineligibility (*methylhexaneamine*);
- *CAS 2011/A/2518*, Award of 10 November 2011: 8 months of ineligibility (*methylhexaneamine*);
- *International Rugby Board*, Award of 27 January 2012: 12 months (*methylhexaneamine*);
- *International Rugby Board*, Award of 16 September 2011: 9 months (*methylhexaneamine*)
- *Oliveira (CAS 2012/A/2107 Oliveira v. USADA*, award of 6 December 2010: 18 months (*methylhexaneamine*)
- *CAS 2011/A/2615 & 2618*, award of 19 April 2012: 18 months (*tuaminoheptane*)

8.22 The Panel understands that the imposed sanction of 15 months is considerably higher than the sanctions issued in most of the aforementioned cases. And even though decisions rendered by international federations without adjudicated determination by an independent tribunal are of limited significance, the same is not true for the above referenced CAS decisions. Yet, the Panel agrees with the view taken by the Panel in *CAS 2011/A/2518*, Award of 10 November 2011, under 10.23) that stated:

> *"Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport".*

Also, the Panel in *Oliveira* and *CAS 2011/A/2615 & 2618* imposed a sanction of 18 months of ineligibility and applied a very high standard of care demanding the athlete to do intensive research on the contents of a food supplement. Having compared the starting conditions of the Athletes' access to information as well as their precautionary measures, the Panel deems the Appellant's fault roughly equivalent.

8.23 In the case at hand, it is the Panel's task to balance the two conflicting positions of the parties, i.e. the Respondent's interest in creating equal conditions for competitions and the Appellant's limited access to information in anti-doping matters. The Panel deems it appropriate to reduce the sanction imposed on the Appellant for the reason that he never received any education or information in anti-doping matters by his federation or the anti-doping agency of his country. This explains that the Appellant's awareness of the dangers of prohibited/specified substances being contained in food supplements was not as high as it should have been. The Panel further

finds that the case at hand cannot be compared to cases where an athlete uses prohibited/specified substances deliberately and intentionally. A reduction of the standard sanction of 2 years seems therefore mandatory. On the other hand, the Respondent's interests are safeguarded by the fact that the sanction imposed on the Appellant is still considerably high compared to the possible maximum sanction of two years of ineligibility. In the Panel's view, the Appellant's poor judgment in blindly trusting N.'s advice and not doing further research does not allow for a further reduction even if one assumed the complete absence of an established anti-doping system in the Appellant's home country. The Panel understands that the consequences of this decision are far reaching for the Appellant. Being his country's most successful athlete, he was banned from taking part in the 2012 Olympic Games. However, every sanction that would have allowed the Appellant to take part in the Games, i.e. a sanction of no more than three or four months, depending on the commencement date of the period of ineligibility, would have sent out the wrong signal. Not having intent to enhance his sport performance through a prohibited/ specified substance alone does not make the violation of Art. 2.1.1 IWF ADP a minor and pardonable offence.

9. COMMENCEMENT OF INELIGIBILITY PERIOD

Art. 10.9 IWF ADP reads as follows:

> **Commencement of *Ineligibility* Period**
>
> *Except as provided below, the period of* Ineligibility *shall start on the date of the hearing decision providing of* Ineligibility *or, if the hearing is waived, on the date* Ineligibility *is accepted or otherwise imposed.*
>
> *10.9.1 Delays Not Attributable to the* Athlete *or other* Person
> *Where there have been substantial delays in the hearing process or other aspects of* Doping Control *not attributable to the* Athlete *or other* Person*, the* IWF *or* Anti-Doping Organization *imposing the sanction 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.*
>
> *10.9.2 Timely Admission*
> *Where the* Athlete *promptly (which, in all events, means before the* Athlete *competes again) admits, the anti-doping rule violation after being confronted with the anti-doping rule violation by the IWF, the period on* Ineligibility *may start as early as the date of* Sample *collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the* Athlete *or other* Person *shall serve at least one-half of the period of* Ineligibility *going forward from the date the* Athlete *or other* Person *accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.*

Art. 10.9 IWF ADP provides the Panel with some discretion as to the commencement of the period of ineligibility. The Panel acknowledges that the Appellant never challenged that *methylhexaneamine* was found in the sample of 12 April 2012, thus constituting an anti-doping

violation according the IWF ADP. Also, the opening of the B-sample did not delay the proceedings as the hearing before the IWF Anti-Doping Panel had taken place before the sample could be analysed. Last, the Panel is of the opinion that the hearing before the IWF Anti-Doping Panel in Guatemala on 12 May 2012 was not suited to deal with the case in an appropriate way. To a large extent the decision is based on assumptions. It is unclear how the Hearing Panel gathered the information that it used. Even if one takes into consideration that the Appellant agreed to hold a hearing upon the occasion of the Junior World Championships on 12 May 2012, meaning that he was aware that he would most likely not have the opportunity to be present at the hearing or have a lot of time to prepare his defence, no other evaluation is indicated as this does not exempt the Hearing Panel from investigating the circumstances properly. As the proceedings were not suitable to uncover and establish the truth in the case at hand, the time spent on the proceeding should be counted against the period of ineligibility. As a result of an overall view of the circumstances, the Panel determines that the Appellant's suspension will run from 12 April 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Erkand Qerimaj against the decision of the IWF Doping Hearing Panel dated 22 May 2012 is partially upheld.

2. The decision of the IWF Doping Hearing Panel dated 22 May 2012 is set aside and replaced with the following:

   Erkand Qerimaj is sanctioned with a period of ineligibility of fifteen months, commencing on 12 April 2012.

(…)

5. All other or further claims are dismissed.