Arbitration CAS 2013/A/3075 World Anti-Doping Agency (WADA) v. Laszlo Szabolcs & Romanian Anti-Doping Agency (RADA), award of 12 August 2013

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Wrestling
Doping (methylhexaneamine)
Requirements for the application of a reduced period of ineligibility for the use of a Specified Substance
Assessment of the athlete's degree of fault
Determination of the ineligibility period

1. **In order to prove his entitlement to any reduced period of ineligibility for the use of a specified substance under the applicable national law which implements the provisions of the WADA Code (Article 10.4), an athlete must establish: 1) how the specified substance entered his body; and 2) that the specified substance was not intended to enhance his sport performance or to mask the use of another prohibited substance. If these requirements are satisfied, the athlete's *"degree of fault"* will be considered to determine whether the presumptive two-year period of ineligibility should be reduced, and if so, by what period of time.**

2. **An athlete who makes an internet research on various websites aimed at checking the ingredients of the product and at comparing the detected ingredients with the contents of the Prohibited List before ingesting the product has taken some precautions. Even if further reasonable precautionary steps could have been taken such as the obtaining of a doctor or any reliable person advice, the fault of the athlete can be considered as not significant. The fact that prohibited substances are referred to by different names and do not appear from the Prohibited List as such is not self-evident and is to be taken into account. Therefore, the negligence for not having taken this last step can be considered as rather small.**

3. **In case of use of a Specified Substance, the standard sanction of a two-year period of ineligibility may be replaced with a sanction ranging between a mere reprimand, with no period of ineligibility, up to two (2) years of ineligibility, depending upon the athlete's degree of fault. Where the negligence of an athlete is rather light and in light of the analysis of several other CAS decisions, the appropriate period of ineligibility can amount to a few months of ineligibility.**

1. THE PARTIES

1.1 The World Anti-Doping Agency (hereinafter referred to as "WADA" or "Appellant"), is a Swiss private law foundation with its seat in Lausanne, Switzerland, and its headquarters in Montreal, Canada.

1.2 Mr Laszlo Szabolcs (hereinafter referred to as "the Athlete" or the "First Respondent") is a wrestler affiliated to the Dinamo Bucharest Sport Club.

1.3 The Agenţia Naţională Anti-Doping (hereinafter referred to as "NADO" or the "Second Respondent") is the national doping agency of Romania. It is responsible for the implementation and application of the World Anti-Doping Code (hereinafter referred to as "WADC").

2. THE FACTS

2.1 On 8 July 2012, the Athlete underwent an anti-doping control test carried out during the Individual Seniors Wrestling National Championship in Bucharest. The analysis of the sample showed the presence of *methylhexaneamine* in the Athlete's bodily specimen. *Methylhexaneamine* is a Prohibited Substance classified under S6 b (Specified Stimulants) on the WADA 2012 Prohibited List. The substance is prohibited in-competition only. The Athlete was notified of the adverse-analytical finding and summoned on 8 August 2012 for the discussion of his case before the *"Hearing Commission for Athletes and their support personnel who violated the anti-doping rules"* (hereinafter the "Commission").

2.2 On 7 August 2012, the Commission issued an *interim* decision provisionally suspending the Athlete from competitions and scheduled to hear the Athlete's case on 20 August 2012.

2.3 On 20 August 2012, a hearing was held before the Commission, which was attended by the Athlete. The latter also filed a written statement with the Commission, according to which:

(i) he admitted the use of two (2) pills of a product called "Tested Burner";

(ii) the two (2) pills had been given to him in a gym by a person he knew;

(iii) before taking the two pills he had checked the ingredients of the latter on the internet;

(iv) the only ingredient reported on the internet, which caught his attention were caffeine (which is not on the WADA Prohibited List) and *1,3 dimethylamilamine*;

(v) he then double-checked *1,3 dimethylamilamine* with the WADA Prohibited List reported on the NADO and the WADA websites. None of them reported the substance *1,3 dimethylamilamine* as prohibited;

(vi) it was only in the course of the hearing before the Commission that he became aware of the fact that *1,3 dimethylamilamine* is just another name for *methylhexaneamine* (which is listed as a prohibited substance on the WADA Proibited List);

(vii) the reason for taking the two (2) pills of Tested Burner was not to enhance performance. Instead, he had taken them "*to cure a state of discomfort*" which was due to the high temperatures in Bucharest at the time of the Individual Seniors Wrestling National Championship.

2.4 On 20 September 2012, the Commission rendered its decision (the "Decision"). The Decision reads, *inter alia*, as follows:

"[the Commission], after reviewing the documents within the file, the analysis bulletin [of the Athlete's sample], the sport titles gained during his 20 years of sport activity, the nature of the prohibited substance detected in the sample – methylhexaneamine, which did not enhance his sport performance, as well as the national and international legal provisions:

DECIDES

The ineligibility of the athlete Laszlo Szabolcs, registered to dynamo Bucharest Sport Club from any national or international sport event, for a period of three (3) months, pursuant to article 39 of the Law 227/2006 regarding prevention and fight against doping in sport (…) as the athlete violated the provisions of article 2, paragraph (2), letter a) and b) of the mentioned law. The ineligibility period begins to run from the date of the sample collection, 08.07.2012, while the provisional period of one month and thirteen (13) days from 07.08.2012 to 20.09.2012 shall be credited against the total period of ineligibility. The athlete has to serve one month and seventeen (17) days from the ineligibility period starting with 08.07.2012".

2.5 On 4 October 2012, the Decision was communicated to the WADA.

2.6 On or around 14 November 2012, the WADA filed an appeal with the Appeal Commission of the Romanian National Anti-Doping Agency (hereinafter referred to as the "Appeal Commission") against the Decision, requesting that a sanction of two (2) years ineligibility be imposed on the Athlete.

2.7 On 18 December 2012, the Appeal Commission issued its decision (the "Appealed Decision"), dismissing the appeal filed by the WADA. The relevant parts of the Appealed Decision read as follows:

"[a]fter reviewing the appeal submitted by WADA against the Decision no. 24/20.09.2012 of the Hearing Commission for athletes and their support personnel who violated the anti-doping rules, the Commission holds the following:

The reasons invoked by the Appellant, as well as the evidences administrated within the case cannot be held against the athlete Laszlo Szabolcs and, therefore, the Commission holds that the appeal is ungrounded.

To support this point of view, the Commission notes the following: as for the request to increase the three (3) months ineligibility period established through the Decision no. 24/20.09.2012 of the Hearing Commission to two (2) years ineligibility period, the Appeal Commission founds this request as ungrounded.

The Appeal Commission appreciates that the Hearing Commission had made the right decision when suspending the athlete for a period of three (3) months and did not take proceed to a heavier sanction, taking into account the athlete's honest attitude during the proceedings (he admitted the use of the product), the fact that it is the athlete's first anti-doping rule violation, as well as the fact that the substance detected following the

doping control is a prohibited substance included in Section S6.b (Specified Stimulants) – Methylhexaneamine, according to the Prohibited List published in 2012; all these facts corroborated determined the Hearing Commission to sanction the athlete with three (3) months ineligibility. The Appeal Commission also considers, as a significant argument, that this case is not about losing weight and, consequently, there is no intention of enhancing the sport performance. The documents submitted by the athlete shows with no doubt that there was not any intention for the athlete to lose weight. Moreover, the administration of two (2) pills could not lead to a significant weight loss, which could determine the athlete's inclusion in another weight category. The Commission also retains and underlines that the athlete took only two pills and not two boxes, as WADA documentation incorrectly presents.

The Commission also appreciates that there is not a significant negligence in this case, as long as the athlete searched for information on the product he used – Tested Burner. The athlete's defence is supported by the very first evidence submitted by WADA, respectively a quote from the website (…) representing a thorough description of the product, including references to those who cannot use it. Therefore, the lack of any mention 'not to be used by athletes' could be retained as a motivation for the absence of significant negligence in this case.

In analyzing the case file, the Commission also took into account that the appeal submitted by WADA analyzes the case from the perspective of the general rules of violating the anti-doping regulations and not the one given by the fact that the substance detected in the athlete's body is included in the 'Specified Stimulants' category.

After reviewing the document requested from the National Anti-doping Agency, regarding the cases of anti-doping rules violation involving the specified substance Methylhexaneamine, during 2012-2012, the Commission establishes that four (4) similar cases have been managed, out of which only the case of the athlete Laszlo Szabolcs was appealed by WADA.

Pursuant to the evidences administered in the case, the Commission holds that there are no reasons to increase the ineligibility period of the athlete, as it has been established by the Hearing Commission through the Decision no. 24/20.09.2012".

2.8 On 22 January 2013, the WADA was provided with a translation of the Appealed Decision in English.

3. THE PROCEEDINGS BEFORE THE CAS

3.1 On 1 February 2013 the WADA filed its Statement of Appeal/Appeal Brief against the Appealed Decision with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"). Furthermore, the WADA requested that the case be submitted to a Single Arbitrator.

3.2 On 13 February 2013, the NADO sent a communication to the CAS Court Office requesting that the case be submitted to a panel of three (3) arbitrators.

3.3 On 15 February 2013, the Athlete sent a communication to the CAS requesting that the case be heard by a panel of three (3) arbitrators.

3.4 On 19 February 2012, the CAS Court Office informed the parties that the question of the number of arbitrators had been submitted to the President of the Appeals Arbitration Division of the CAS pursuant to Art. R50 of the Code of Sports-related Arbitration of the CAS (hereinafter referred to as the "CAS Code").

3.5 By letter of 1 March 2013, the WADA appointed Mr Marco Balmelli as arbitrator.

3.6 On 4 March 2013, the NADO filed with the CAS Court Office its Answer.

3.7 By letter dated 6 March 2013, the Athlete requested financial aid and to be assisted by court-appointed counsel.

3.8 On 8 March 2013, the WADA objected to the late filing of the Answer by the NADO. By the same letter, the WADA noted that the Athlete had not yet filed any Answer to the appeal and indicated that "*in order to be fair with the Athlete*" it had no objection that the deadline for the filing of the answer be extended until 22 March 2013. Furthermore, the WADA stated that it had a preference for the decision to be issued on the basis of the Parties' written submission only.

3.9 By letter of 12 March 2013, the NADO acknowledged that it filed its Answer outside the prescribed deadline, but submitted that the late filing had not occurred intentional. Therefore, the NADO requested the CAS to accept its Answer on file. The NADO, moreover, indicated its preference for the decision to be issued on the basis of the Parties' written submission only, and appointed Prof Ulrich Haas as its arbitrator.

3.10 By letter dated 12 March 2013, the Athlete requested a further extension of the time-limit for filing his Answer.

3.11 By letter dated 12 March 2013, the CAS Court Office invited the other Parties to comment on the Athlete's request for an extension of the deadline to file his Answer.

3.12 By letter dated 13 March 2013, the WADA informed the CAS that it had no objection to the extension of the time-limit requested by the Athlete and, in order to reduce the costs of the proceedings, suggested that Prof Haas should act as sole arbitrator for the resolution of the dispute.

3.13 By letter dated 13 March 2013, the NADO also informed the CAS Court Office that it had no objection to the extension of the time-limit requested by the Athlete.

3.14 On 14 March 2013, the CAS Court Office requested the Parties to advise the CAS Court Office whether they agreed to submit the matter to a Sole Arbitrator and – in the affirmative – whether they agreed to the appointment of Prof Haas as Sole Arbitrator.

3.15 By letter dated 15 March 2013, the NADO informed the CAS Court Office that it agreed with the appointment of Prof Haas as Sole Arbitrator.

3.16 On 19 March 2013, the CAS Court Office granted the Athlete's request for financial aid and a court-appointed counsel.

3.17 On 20 March 2013, the CAS Court Office informed the Parties that the extension of the time-limit for the filing of the Athlete's Answer until 28 March 2013 had been granted.

3.18 By letter dated 22 March 2013, the Athlete requested a further extension of the time-limit for the filing of his Answer and informed the CAS Court Office that he agreed to the appointment of Prof Haas as Sole Arbitrator.

3.19 On 22 March 2013, the CAS Court Office invited the WADA and the NADO to comment on the request for the extension of the deadline to file the Answer.

3.20 By letters of 25 and 26 March 2013, both the WADA and the NADO, respectively, agreed to the extension of the deadline. Accordingly, the Athlete was granted a time-limit until 2 April 2013 to submit his Answer.

3.21 On 27 March 2013, the CAS Court Office informed the Parties that Prof Haas had declined his appointment as Sole Arbitrator in the proceedings as he was – *inter alia* – involved as a Sole Arbitrator in another CAS procedure (CAS 2012/A/2747) concerning similar legal and factual issues. After receiving the above communication, the Parties unanimously requested Prof Haas to reconsider his decision to decline the appointment.

3.22 On 2 April 2013, the Athlete filed his Answer.

3.23 By letter dated 8 April 2013, the CAS Court Office on behalf of Prof Haas forwarded the decision in the matter CAS 2012/A/2747 to the Parties for their information. Furthermore, the Parties were requested – after careful analysis of the decision – to advise the CAS Court Office whether they maintain the appointment of Prof Haas as Sole Arbitrator.

3.24 On 26 April 2013, the WADA confirmed its appointment of Prof Haas as a Sole Arbitrator.

3.25 On 29 April 2013, the Athlete and the NADO communicated to the CAS Court Office that they wish to maintain the appointment of Prof Haas as a Sole Arbitrator.

3.26 On 6 May 2013, the CAS Court Office confirmed the appointment of Prof Haas as Sole Arbitrator in the procedure.

3.27 By letter of 22 May 2013 the CAS Court Office advised the Parties that a hearing of the case had been scheduled for 26 June 2013.

3.28 On 28 May 2013, the CAS Court Office was advised by the NADO that it would not send any representatives or call any witnesses at the hearing.

3.29 On 31 May 2013, the CAS Court Office communicated to the Parties the Order of Procedure which was duly signed by all Parties.

3.30 A hearing took place in Lausanne on 26 June 2013. The Appellant was represented by its counsel, Mr Yvan Henzer. The Athlete attended the hearing assisted by his counsel, Mr Paul-Filip Ciucur, and an interpreter, Mrs Ruxandra Bizera. No representative of the NADO attended the hearing. The following witnesses were heard on behalf of the First Respondent: Mr Guia Lazar Hunor, Mr Ştefan Gheorghiţă, Mr Constatin Dima, and Mr Ploeşteanu Nicolae. At the outset of the hearing, the Appellant accepted that the Answer filed by the NADO, even though filed late, be taken on file. 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 and submit their arguments and answers.

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 Sole Arbitrator 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.

In the hearing – following the evidentiary proceedings and the discussion of the matter by the Parties present – the Parties in a spirit of cooperation and minded to reconstruct the true facts and circumstances of the case, agreed that the *"route of ingestion of the prohibited substance"* was herewith established, i.e. that the taking of two pills of the product "Tested Burner" given to the Athlete by his friend Mr Cinstantin Dima caused the positive doping test. Furthermore, the Athlete and the WADA agreed that the Athlete when taking the product "Tested Burner" *"did not intend to enhance his sport peformance"*. In the light of the above, the WADA modified its prayers for relief (without the objection of the Athlete) and requested that a period of ineligibility of eighteen (18) months be imposed upon the Athlete. In view of the above, the following section reporting the position of the Parties does not make reference to the arguments previously upheld by the WADA relating to the "route of ingestion" and the fact whether or not the Athlete had "intent to enhance his sport performance", since these issues are no longer contested between the Parties.

4.1 The Appellant

4.1.1 In its Appeal Brief dated 9 March 2012 (and subsequently amended in the hearing) the WADA requested the the following relief:

"1. That the appeal of WADA is admissible;

2. *That the decision rendered by the Appeal Commission of the Romanian Anti-Doping Organization in the matter of Mr Laszlo Szabolcs is set aside;*

3. *Mr Laszlo Szabolcs is sanctioned with an eighteen month period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed on or voluntarily accepted by Mr Laszlo Szabolcs) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

4. *All competitive individual results obtained by Mr Laszlo Szabolcs from 8 July 2012 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prices.*

5. *WADA is granted an award for costs".*

4.1.2 The Appellant's submissions in support of its requests may be summarized as follows:

(a) It is undisputed that the Athlete tested positive for methylexaneamine, which is a prohibited substance classified under the category "S6 (b)" ("Specified Stimulants") on the 2012 WADA Prohibited List. Such substance is prohibited in-competition. It is clear, therefore, that the Athlete committed an anti-doping rule violation pursuant to Article 2.2 (a) of the *"Law no. 227/2006 Regarding the prevention and fight against doping in sport"* (the "Law 227/2006"). According to this provision the "presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen" constitutes an anti-doping rule violation.

(b) The cornerstone of the rules in the fight against doping is the personal responsibility of the athlete for what he ingests. Therefore, if an athlete uses a product without properly ascertaining whether or not it contains prohibited substances, he bears significant fault or negligence in relation to the anti-doping rule violation committed. This is particularly true –according to the Appellant – with respect to nutritional supplements, where the danger of ingesting prohibited substances is particularly high. This cannot only be inferred from the CAS case law, but also from the warnings reported on the WADA website, according to which *"[e]xtreme caution is recommended regarding supplement use. The use of dietary supplements by athletes is a concern because in many countries the manufacturing and labeling of supplements may not follow strict rules, which may lead to a supplement containing an undeclared substance that is prohibited under anti-doping regulations. A significant number of positive tests have been attributed to the misuse of supplements and taking a poorly labeled dietary supplement is not an adequate defense in a doping hearing".*

(c) The label of the product "Tested Burner" as well as the websites of retailers of said product clearly report the presence of 1,3 dimethylamylamine, which is just another name for methylhexaneamine. Methylhexaneamine is a substance prohibited according to the 2012 WADA Prohibited List. The *"Summary of Major Modifications and Explanatory Notes"* for the 2012 WADA Prohibited List (hereinafter referred to as the "Explanatory Notes") provides the following (important) clarification regarding substances classified under the category S6: *"[a]s a reminder some stimulants may be available under several other names, for example "methylhexaneamine", sometimes presented as dimethylamylamine, pentylamine, geranamine, Forthane, 2- amino-4-methylhexane, geranium root extract or geranium oil"*. The Appellant refers to a decision by a CAS Panel (CAS 2011/A/2677) according to which

an athlete bears significant fault if he or she does not double-check the ingredients on the label of the nutritional prohibited substances for all names are commonly referred to. Since the Athlete in the case at hand searched the Prohibited List only for 1,3 dimethylamylamine and not for methylhexaneamine he acted with significant negligence.

(d) In order to ascertain the degree of fault of the Athlete, the Appellant notes that the following circumstances have to be taken into account in addition to the above: (i) the Athlete was an experienced athlete and, therefore, had a thorough knowledge of his anti-doping responsibilities; (ii) the Athlete did not consult any doctor, physician or medical support personnel, before taking the product; (iii) the two pills of "Tested Burner" were given to the Athlete by a person lacking any medical professional qualification and competence, thus, the Athlete should not have trusted his words; (iv) the Athlete failed to mention the product "Tested Burner" on the anti-doping Control Form filled out by the Athlete on 8 July 2013; (v) the fact that the Athlete had not been previously (*i.e.* prior of the doping test of 8 July 2012) instructed in anti-doping matters cannot be considered as a mitigating circumstance, since athletes have a duty to inform themselves on the applicable rule; (vi) the fact that the Athlete had never tested positive to a prohibited substance prior to the doping control on 8 July 2012 does not constitute a mitigating circumstance. In light of all of the above, the Athlete acted with a high degree of fault.

(e) The fact that, in cases similar to the one of the Athlete, other athletes received a more "lenient" sanction is not to be taken into account in this case. Instead, the case at hand is very similar to the case CAS 2012/A/2747 (see *supra* par. 3.12 ff.), exception made for the timing and the way of ingestion of the prohibited substance. Therefore, the sanction to be imposed upon the Athlete should be similar to the one issued in the CAS proceedings CAS 2012/A/2747.

(f) Considering that the Athlete does not contest the three (3) months sanction imposed on him by the Commission and confirmed by the Appeal Commission, such sanction may not be reduced by the Sole Arbitrator, given the principle of *"ne ultra petita*".

4.2 The First Respondent

4.2.1 In his Answer dated 2 April 2013 the First Respondent requested the CAS:

"1. To dismiss the Appeal lodged by WADA;

2. To maintain and leave (…) the Appeal Commission's decision undisturbed;

3. To order the Appellant to pay all costs, expenses and legal fees relating to the arbitration proceedings before CAS encumbered by the First Respondent".

4.2.2 The Athlete's submissions may be summarized as follows.

(a) Due to the great heat in Bucharest he was feeling down and weary, and battled fatigue. While training at the local gym, he was offered pills of "Tested Burner" by a friend. The

Athlete understood that the product would have the same reaction as several cups of coffee. Since the Athlete did not drink coffee, the "Tested Burner" was an alternative option as the pills contained a high concentration – *inter alia* – of caffeine. The Athlete hoped to overcome his state of discomfort and weariness by taking the pills instead of drinking coffee.

(b) However, prior to taking the two pills of "Tested Burner", the Athlete carefully investigated with the help of a friend, who acted as a translator, the ingredients of the product on various websites. He checked the WADA and the NADO websites as to whether the ingredients contained in "Tested Burner" were reported on the "Prohibited List". Only after he performed his investigation and made sure that "Tested Burner" did not contain a prohibited substance, he decided to take the pills. Before taking the pills the Athlete did not consult Dr Ploeşteanu, the physician of the national team to which he belonged and whom he consults normally in matters relating to nutritional supplements. The Athlete did not deem it necessary to contact Dr Ploeşteanu, since in view of the enquiries made by him on the internet, he felt sufficiently well informed and comfortable that the product did not bear any danger of containing any prohibited substances.

(c) The prohibited substance detected in the Athlete's sample did not have any performance enhancing effects. This may also be inferred from the fact that in the competition in which he had tested positive to methylhexaneamine he obtained rather disappointing results.

(d) The Athlete has been a professional wrestler for many years. During his entire career he had never tested positive nor did he commit any anti-doping rule violation before the incident on 8 July 2012.

(e) The Athlete submits that he never received "formal" education in anti-doping matters and, in particular, on the risks associated with the use of nutritional supplements.

(f) In 2011-2012, the NADO issued four (4) decisions concerning the use of methylhexaneamine by athletes. In all these cases the presence of methylhexaneamine in the athletes' samples was due to the use of nutritional supplements. All of the four (4) athletes involved in those cases (including the First Respondent) were sanctioned with a period of ineligibility of three (3) months. Only the decision relating to the Athlete was appealed by the WADA to the CAS. Considering that the cases referred to above are very similar, if not identical, it is clear that they should receive the same (equal) treatment.

(g) The sanction to be imposed on the Athlete must be consistent with the principle of proportionality, according to which there must be a balance between the relevance of the breach committed and the sanction imposed. The sanction requested by the WADA is clearly disproportionate. The three (3) months period of ineligibility (in addition to the disqualification of the results obtained in the competitions in which he tested positive to methylhexaneamine) is the only sanction which can be considered "proportional". First, (i) the three (3) months ineligibility period perfectly suits the aim of the anti-doping regulations, to increase the Athlete's awareness in relation to the use of nutritional supplements; (ii) the sanction imposed by the NADO takes also into

account the interests of the Athlete, since it does not – contrary to the sanction requested by the WADA – completely destroy the Athlete's career and considerably damage his team; (iii) the position of the WADA would not at all be affected by a confirmation of the three (3) months sanction imposed by the NADO; (iv) there is no "pressing social need" for a harsher sanction, as the case-law in similar cases shows that the average sanctions imposed are between two (2) months up to a maximum of six (6) months. In light of all the considerations made above, the Athlete acted with no significant fault or negligence.

(h) The case at hand – according to the Athlete – is very different from the case CAS 2012/A/2747. In the latter case, the athlete had not checked the label of the product on the internet for the ingredients contained therein. Nor had the athlete in CAS 2012/A/2747 checked the Prohibited List. Furthermore, the athlete in CAS 2012/A/2747 consumed the whole package of the product and not just two pills. In addition, the athlete in CAS 2012/A/2747 did not use the product to recover from a state of discomfort, but to enhance his sport performance during the training. If instead of *"1,3 dimethylamilamine"* the label would have mentioned *"geranium oil"* instead, the Athlete for sure would have been alerted, since the latter name is – unlike *"1,3 dimethylamilamine"* – mentioned in the applicable rules or in the Prohibited List.

4.3 The Second Respondent

4.3.1 In its Answer the Second Respondent – *inter alia* – requests:

"1. To deny the appeal submitted by the appellant World Anti-doping Agency and to maintain the Decision no. 4/18.12.2012 of the Appeal Commission beside National Anti-doping Agency as grounded and legal;

2. To deny WADA's request for relief concerning the award for costs to be paid by the National Anti-Doping Agency, grounded on the fact that the economic situation not only of the country but also of our institution is a very precarious one, as the National Anti-Doping Agency does not have any amounts in its budget provided for such external expenses...".

4.3.2 The Second Respondent – in essence – submits in support of its request as follows.

(a) The Athlete filed with the Appeal Commission a document related to the composition of the nutritional supplement "Tested Burner". This document makes no reference to the prohibited substance detected in the Athlete's sample collected on occasion of the doping control on 8 July 2012.

(b) The Athlete made all of the possible efforts to avoid testing positive, in particular he checked the product for prohibited substances. The Athlete searched the internet for the ingredients of the product. He realised due to his research on the internet that the product contained "caffeine", which is not a prohibited, but only a monitored substance according to the Prohibited List. It was only after ascertaining that the product did not contain a prohibited substance or warnings to athletes (e.g. *"not to be used by the athletes"*)

that the Athlete decided to take the two pills of "Tested Burner". Furthermore, it is estblished that the Athlete took the pills well before the competition.

(c) The Athlete had always acted with the highest care when using food supplements in order to avoid the ingestion of prohibited substances. Indeed, he had always contacted a doctor or a physician prior of making use of a product. In the case of the two (2) pills of "Tested Burner" the Athlete did not consider necessary to get in touch with his doctor, since, after having researched the internet, he had no doubt with regard to the fact that the product he was about to use was "safe". The intake of the product by the Athlete, moreover, was not a long-term use, but just a single use, aiming at recovering from a state of discomfort.

(d) The Athlete succeded in establishing that he acted with no significant negligence. The sanction imposed by the Commission and confirmed by the Appeal Commission is, therefore, appropriate.

5 JURISDICTION OF THE CAS

5.1 Article R47 of the CAS Code reads 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".

5.2 The provision provides three prerequisites to be fulfilled, namely:

- that there must be a "decision" of a federation, association or another sports-related body;
- that the "internal remedies available prior to the appeal" to CAS must have been exhausted, in accordance with the statutes or regulations of the mentioned bodies, and
- that the parties must have submitted to the competence of the CAS.

5.3 The Appealed Decision must be considered as a "decision of an association" within the meaning of Article R47 of the CAS Code, so that the first prerequisite is fulfilled, since the NADO is an association or sports-related body within the meaning of Article R47 of the CAS Code.

5.4 The second prerequisite set forth in the provision at issue is also met, since there are no internal remedies available to the Parties for appealing the Appealed Decision. This follows from Article 61 of the Law 227/2006, according to which *"[t]he decisions of the Appeal Commission may be appealed to the Court of Arbitration for Sport (CAS), in Lausanne in 21 days since the date of the notification"*. It must be noted the Law 227/2006 does not provide any further means for appealing a decision of the Appeal Commission.

5.5 The third prerequisite is equally met. The jurisdiction of the CAS to rule on the present dispute follows from the Order of Procedure, duly signed by all Parties. Finally, the Sole Arbitrator notes that the jurisdiction of the Panel has not been contested by any party to these proceedings and, instead, was explicitly recognised by the Parties in their briefs submitted to the CAS. It follows from all of the above that the CAS has jurisdiction over the present arbitration proceedings.

6 MISSION OF THE SOLE ARBITRATOR

6.1 According to Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law. He may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

6.2 In application of the aforementioned rule, the Sole Arbitrator is entitled to hear the present case *de novo* (CAS 2012/A/2107 [6.12.2010] no. 9.1).

7 ADMISSIBILITY

7.1 Article R49 of the CAS Code reads as follows:

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

7.2 The above-reported provision of the CAS Code, therefore, allows that the time-limit of 21 days for the filing of the appeal may be derogated by the statutes or regulation of the association concerned. In this regard, it must be noted that Article 61 of the Law 227/2006 provides that:

"The decisions of the Appeal Commission may be appealed to the Court of Arbitration for Sport (CAS), in Lausanne in 21 days since the date of the notification".

7.3 The Appealed Decision, reporting the grounds on which it is based, was communicated to the WADA on 22 January 2013.

7.4 On 1 February 2013, the WADA filed with the CAS Court Office its Statement of Appeal/Appeal Brief (see *supra* par. 3.1) against the Appealed Decision.

7.5 The Appellant complied with the time-limits prescribed by the Law 227/2006 and by the CAS Code.

7.6 The appeal is, therefore, admissible.

8. APPLICABLE LAW

8.1 According to Article R58 of the Code, the Court 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 Court deems appropriate. In the latter case the Court shall give reasons for its decision.

8.2 The Second Respondent, *i.e.* the sports organisation that issued the Appealed Decision, has its seat in Romania.

8.3 As a result of the foregoing the Sole Arbitrator considers the Law 227/2006 applicable to the present dispute.

8.4 Considering that the law at issue represents the national implementation of the WADC, the Sole Arbitrator will make recourse, where necessary, to the provisions and principles contained in the WADC for the interpretation of the provisions of the Law 227/2006. This application is based on three kinds of considerations, namely: (i) that the *"WADC was developed and implemented to harmonize anti-doping policies and regulations within sport organizations and among governments"*; (ii) that *"the WADC is the core document that provides the framework for harmonized anti-doping policies, rules, and regulations within sports organizations and among public authorities"* and (iii) that, as pointed out previously, the Law 227/2006 is the national implementation of the provisions of the WADC and of the principles on which the latter is based.

8.5 It must be finally noted that the recourse to the WADC, as it was set out above, appears to be justified also in the light of the provision of Article 66 of the Law 227/2006, which reads as follows:

"The National Sports Federations shall modify and complete their statutes and regulations according to the provisions of the present law, The World Anti-Doping Code [etc.]…".

From the reading of the cited provision, therefore, it is clear that the two texts (*i.e.* the Law 227/2006 and the WADC) shall be interpreted uniformly.

9 MERITS OF THE APPEAL

A. The applicability of the provisions which allow the reduction of the sanction in the case of Specified Substances

9.1 It is undisputed that the First Respondent committed an anti-doping rule violation according to Article 2, par. 2 (a) of the Law 227/2006, i.e. the *"presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's biological sample"* (the provision corresponds Article 2.1 of the WADC). As set out in the outline of the facts of the case, the biological sample provided by the Athlete on 8 July 2012 in the course of an anti-doping control test carried out during

the Individual Seniors Wrestling National Championship in Bucharest tested positive to the prohibited substance methylhexaneamine.

9.2 It is further undisputed that methylhexaneamine is a "specified substance" (see Article 18 of the Law 227/2006 and 4.2.2 of the WADC), that the "route of ingestion" (*i.e.* the way in which the substance entered the Athlete's body) is that indicated by the Athlete (ingestion of two pills of a product named "Tested Burner", which were given to him by a friend in a gym) and, finally, that the Athlete did not act with any intent to enhance his sport performance or to mask the use of another prohibited substance.

9.3 It is, thus, clear and uncontested between the Parties that all of the prerequisites set forth in Article 39 of the Law 227/2006 (corresponding to Article 10.4 of the WADC) are fulfilled (*i.e.* (i) that the substance detected in the Athlete's sample is a "specified substance", (ii) that the "route of ingestion" is established as well as (iii) that the Athlete did not act with any intent to enhance sport performance or to mask the use of another prohibited substance.) It is further beyond dispute between the Parties that the Athlete acted with negligence. None of the Parties pleaded that the Athlete acted with "No Fault or No Negligence". It follows from all of the above, that the period of ineligibility must be determined in application of Article 39 of the Law 227/2006 (corresponding to Article 10.4 of the WADC). The provision provides that the standard sanction of a two-year period of ineligibility may be replaced with a sanction ranging between a mere reprimand, with no period of ineligibility, up to two (2) years of ineligibility, depending upon the Athlete's degree of fault.

9.4 In the case at hand, the Parties are in dispute as to the degree of fault of the Athlete when committing the anti-doping violation. In particular, the WADA maintains that the Athlete acted with a considerable degree of fault and that, therefore, the imposition of an eighteen (18) months period of ineligibility is justified. The Athlete, on the contrary, maintains that he acted only with little negligence and that, accordingly, the three (3) months sanction imposed on him by the Commission and confirmed by the Appeal Commission should be confirmed also by the CAS. The only issue which still needs to be decided, therefore, is the degree of fault with which the Athlete acted with regard to the use of the product containing the prohibited substance methylhexaneamine since, as provided in Article 10.4 of the WADA Code, *"the Athlete's (…) degree of fault shall be the* [only] *criterion considered in assessing any reduction of the period of ineligibility"*.

B. The Athlete's degree of fault

9.5 At the outset of the discussion on the degree of fault, the Sole Arbitrator refers to the case CAS 2012/A/2747, where it is affirmed that:

"(…) the conditions for qualifying for a reduction of the standard sanction in art. 10.4 WADC were intended to be more lenient than the ones in art. 10.5.2 WADC. While the scope of application of the latter requires that the athlete acted with no significant fault (i.e. not intentionally and not grossly negligently), art. 10.4 WADC is already applicable, if the athlete does not act with "intent" (but – e.g. – grossly negligent). The reason for this differentiation is clearly indicated in the comment to art. 10.4 WADC. According thereto,

Specified Substances – unlike other prohibited substances (e.g. EPO) – "are particularly susceptible to unintentional anti-doping rule violations". It follows from this comment that – in principle – the drafters of the WADC wanted to exclude reductions of the standard sanction involving a Specified Substance only where the anti-doping rule violation was committed intentionally".

Based on this consideration, and in view of the submissions of the Parties, it appears that in the present case the Athlete is entitled to some kind of reduction according to the above provision.

9.6 In order to determine the extent of the reduction to which the Athlete is entitled, the Sole Arbitrator takes the facts and circumstances in CAS 2012/A/2747 as a starting point, since both Parties explicitly referred to that case. The Sole Arbitrator is of the view that – in light of the results of the evidentiary procedure – the facts and circumstances in the present case and in the case CAS 2012/A/2747 differ dramatically:

- In the case CAS 2012/A/2747 the athlete took a product to enhance his sporting performance during training, while in the case a hand the ingestion of the product occurred in a non-sporting context. The Athlete took the product in order to ease a state of discomfort caused by the extreme temperatures in Bucharest. The pills were given to the Athlete by Mr Constantin Dima who told the Athlete that taking the pills was like drinking several cups of coffee. Since the Athlete did not drink coffee he hoped to overcome his drowsiness and tiredness by substituting the pills for coffee. This follows from the testimony of Mr Dima, Mr Ştefan Gheorghiţă and Mr Lazar Hunor. Furthermore, this is not contested between the Parties, and is backed by the fact that the Athlete took only 2 pills of the product "Tested Burner". He immediately stopped taking the pills as soon as he realized that the pills (and the caffeine contained therein) had no effect and that he was still feeling exhausted. In the case 2012/A/2747 on the contrary, the athlete concerned consumed the whole package containing the product in order to better perform in training.
- In the case CAS 2012/A/2747 the athlete took the product containing the prohibited substance without carrying out the most obvious measures of precaution. In the mentioned case, the athlete got the product from his brother and consumed it, trusting the words of his brother (who had no experience in anti-doping matters) that the product *"could do no harm"* (CAS 2012/A/2747, par. 7.19). The athlete in the case CAS 2012/A/2747 did neither check the label of the product, nor did he perform an internet check. If he would have taken these simple precautionary steps, the athlete could have avoided the anti-doping rule violation, since the label of the product listed *"Geranium (1,3 Dimethylamylamine or methylhexaneamine)"* (CAS 2012/A/2747 par. 2.4-2.5). Thus, by reading the label and comparing this information with the Prohibited List, the athlete would have realized that the product contained a prohibited substance.
- In the case at hand the situation is quite different. The Athlete got the pills from a friend. However, the Athlete did not trust the words of his friend according to which the pills allegedly contained only caffeine and green tea. He did not ingest the pills on the spot, but put them in his pocket and carried them to Mr. Ştefan Gheorghiţă's apartment (where he was staying) in order to further investigate the matter. That evening, while he

stayed in the apartment, the Athlete – together with Mr Gheorghiţă and Mr Lazar Hunor – did a Google search on the internet with his laptop on the product "Tested Burner". The Athlete availed himself of the help of Mr Hunor, because the latter – unlike him – has a good command of the English language. The internet research performed by the Athlete and Mr Hunor basically consisted of two steps. First, the Athlete (together with Mr Hunor) checked the ingredients of the product "Tested Burner" on various websites. In a second step, the Athlete (again together with the help of Mr Hunor) compared the detected ingredients with the contents of the Prohibited List. Only when this research resulted in no match and no warnings to athletes, the Athlete decided that it was safe to take the pills (the next day). The precautions, thus, taken by the Athlete in the case at hand go far beyond the degree of diligence applied by the athlete in the case CAS 2012/A/2747. The Sole Arbitrator follows from all of the above that the fault of the Athlete is rather light and not significant.

9.7 In coming to this conclusion the Sole Arbitrator does not ignore that the Athlete could have taken a further (i.e. a third) step in order to avoid the anti-doping rule violation. He could have investigated whether the ingredients contained in the product are also referred to by other names and whether these other names are listed on the Prohibited List. He would then have realized that "1,3 dimethylamilamine" (which was mentioned as an ingredient of the product "Tested Burner" on the internet and on the label of the product) is just another name for methylhexaneamine (which is explicitly mentioned on the Prohibited List). This third and further precautionary step is possible, acceptable and reasonable for the athlete. First of all the WADA published the Explanatory Notes alongside with the 2012 Prohibited List. These Explanatory Notes contain the following warning:

As a reminder some stimulants may be available under several other names, for example "methylhexaneamine", sometimes presented as dimethylamylamine, pentylamine, geranamine, Forthane, 2-amino-4-methylhexane, geranium root extract or geranium oil.

9.8 Second, the Athlete could have asked a doctor, physician, pharmacist or any another reliable person if and what synonyms exist for "1,3 dimethylamilamine". Would he have asked the doctor of the national wrestling team (Dr. Ploeşteanu Nicolae), the latter would have – as resulted from the evidentiary proceedings – told him straight away that the substance is a prohibited substance on the Prohibited List. The Sole Arbitrator, however, considers that the degree of negligence for not having taken this third precautionary step is rather small. It is to be noted that the general awareness that prohibited substances may be referred to by different names (not listed on the Prohibited List) – at least at the time when the anti-doping infraction occurred – was not widely spread. The Explanatory Notes that contain this warning are a separate document distinct from the Prohibited List. The Prohibited List itself does not mention that substances may have synonyms. It, thus, requires some additional research to become aware of this document. Furthermore, it is to be noted that if one types the name "1,3 dimethylamilamine" or "dimethylamilamine" into the search button for the Prohibited List on WADA's website (http://list.wada-ama.org/?submit), no reference to the problem of synonyms appears. Instead the message reads:

"No results

If a Substance or a Method you have searched for is not found, please verify with your Anti-Doping Organization to ensure that this Substance or Method is not prohibited as a related Substance or Method that falls under an existing category".

9.9 To conclude, therefore, the fact that prohibited substances are referred to by different names is not self-evident and does not appear from the Prohibited List as such. The Sole Arbitrator, therefore, holds that the negligence for not having taken this last step is rather small. The view taken here is not contradicted by the decision in CAS 2011/A/2677. In the view of the Sole Arbitrator the latter decision is not pertinent, because the decision is based on the assumption that the athlete (in that case) acted with the intent to enhance his sport performance and that, thus, Art. 10.4 WADC was not applicable. The starting point in the case at hand, however, is different, since in this case it is undisputed between the Parties that the prerequisites for a reduction under Art. 10.4 of the WADC are fulfilled.

C. Determining the period of ineligibility

9.10 Since the negligence of the Athlete in this case is rather light and taking the period of ineligibility issued in the case CAS 2012/A/2747 as a reference point, the appropriate period of ineligibility in the case at hand must be considerably lower than 18 months. Having regard to the degree of fault of the Athlete, the Sole Arbitrator considers it appropriate to impose a period of ineligibility of five (5) months. He comes to this conclusion also in light of the analysis of several other CAS decisions related to the taking of Specified Substances contained in food supplements. Among the decisions contemplated are – *inter alia* –

- CAS 2011/A/2645 [29.2.2012]: reprimand and no period of ineligibility (hydrochlorothiazide);
- CAS 2A/2011 [3.5. 2011]: 6 months of ineligibility (*methylhexaneamine*);
- CAS 2011/A/2518 [10.11.2011]: 8 months of ineligibility (*methylhexaneamine*);
- International Rugby Board, Award of 27.1.2012: 12 months (*methylhexaneamine*);
- International Rugby Board, Award of 16.9.2011: 9 months (*methylhexaneamine*)
- CAS 2012/A/2107 [6.12.2010]: 18 months (*methylhexaneamine*);
- CAS 2011/A/2615/2618 [19.4.2012]: 18 months (*tuaminoheptane*);
- CAS 2012/A/2822 [12.7.2012]: 15 months (*methylhexaneamine*);
- CAS 2012/A/2747 [15.4.2013]: 18 months of ineligibility (*methylhexaneamine*);
- CAS 2012/A/2701 [21.11.2012]: 15 months ineligibility (*methylhexaneamine*).

9.11 The Sole Arbitrator would like to note that the fact that the Athlete did not mention the ingestion of the product "Tested Burner" on the doping control form has no influence on the Athlete's degree of fault. Such fact might have a certain relevance for the question whether or

not an athlete acts with the intent to enhance his sporting performance when taking a certain product. If an athlete lists the product on the doping control form this might be viewed as an indication that he did not want to enhance his sporting performance by "illicit means". However, since in the present case the question whether or not the Athlete acted with intent to enhance his sport performance is not disputed, the issue of the doping control form is irrelevant. The Arbitrator is also prevented to – specially – take into account that the Athlete had a "clean doping history". This fact, in principle, has already been given due consideration by the sheer fact that the Arbitrator applied the provisions for a *first* doping infraction in the case at hand. It is difficult to perceive why – contrary to the applicable provisions – the fact that an athlete has a "clean doping history" should be taken into account (in favour of the Athlete) twice. Finally, the fact that other cases involving methylhexaneamine decided by the NADO resulted in a three (3) months period of ineligibility is of no avail here. First, the point of reference for this Panel is – primarily – the applicable rules and the jurisprudence of the CAS. The Sole Arbitrator does not follow the view that in anti-doping matters deference should be given to a sport organisation when applying a set of rules that was designed to be uniformally applied throughout all sports on a worldwide level. Under such circumstances the sports organisation is – unlike in other specific questions related to sports law – never in a better position to decide the facts and the circumstances of the case than a CAS Panel. Instead Art. R57 of the CAS Code applies here without restriction (be it in favour or to the detriment of the athlete). Since the underlying facts of these other NADO decisions relating to methylhexaneamine is unknown to the Sole Arbitrator, the latter is prevented to take these into account in the present case.

10 COMMENCEMENT OF INELIGIBILITY PERIOD

10.1 Article 44.1 of the Law 227/2006 provides that the period of ineligibility – in principle – starts on the day of the decision "providing for Ineligibility". This provision is consistent with Article 10.9 of the WADC which provides that *"the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility"*.

10.2 Article 44.3 of the Law 227/2006 provides that *"[i]n case of delays in the decision providing for Ineligibility, for reasons not attributable to the Athlete, the Ineligibility may start as early as the date of the Sample collection"*. Article 10.9.1 of the WADA Code provides that *"[w]here there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body 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"*.

10.3 It must be also noted that Article 44.2 of the Law 227/2006 provides that *"any period of provisional suspension shall be credited against the total period of ineligibility"*. Article 10.9.3 of the WADA Code, moreover, provides that *"[i]f a provisional Suspension is imposed and respected by the Athlete, then the Athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed"*.

10.4 A provisional suspension was imposed on the Athlete from 8 August 2012 until 20 September 2012, the latter being the date on which the ineligibility was "imposed" on the Athlete by the Hearing Commission. This period must be credited against the five-months period of ineligibility to be imposed on the Athlete. It should be further noted that the decision of the Hearing Commission was issued when the Athlete was still provisionally suspended, so that there was no "interruption" between the suspension and the period of ineligibility served on the Athlete.

10.5 In view of the above, the Sole Arbitrator finds it fair to fix the beginning of the period of ineligibility of five (5) months on the date on which the above-mentioned provisional suspension was imposed on the Athlete, *i.e.* 8 August 2012. As a consequence of the retroactive commencement of the period of ineligibility all sporting results obtained by the Athlete from 8 August 2012 up to the date of the end of the sanction must be disqualified.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by the World Anti-Doping Agency against the decision of the Appeal Commission of the Romanian Anti-Doping Agency dated 18 December 2012 is partially upheld.

2. The decision of the Appeal Commission of the Romanian Anti-Doping Agency dated 18 December 2012 is set aside and replaced with the following:

   Mr Laszlo Szabolcs is sanctioned with a period of ineligibility of five (5) months, commencing on 8 August 2012.

3. All sporting results obtained by Mr Laszlo Szabolcs from 8 August up to the date of the expiring of the period of ineligibilty shall be disqualified.

4. (…).

5. (…).

6. All other or further claims are dismissed.