CAS 2011/A/2677 Dmitry Lapikov v/ International Weightlifting Federation (IWF)

ARBITRAL AWARD

Delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President:	Mr Martin **Schimke**, Attorney-at-law, Düsseldorf, Germany
Arbitrators:	Mrs Alexandra **Brilliantova**, Head of Legal Dept, Russian Olympic Committee, Moscow, Russia Mr Denis **Oswald,** Attorney-at-law, Neuchâtel, Switzerland
Ad hoc Clerk:	Mr Nicolas **Cottier**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Dmitry Lapikov, Kaliningrad, Russia

Represented by Mr Ian Mill QC and Mr James Segan, Barristers, London, United Kingdom

- Appellant -

and

International Weightlifting Federation (IWF), Lausanne, Switzerland

Represented by Carrard & Associés, Mr François Carrard and Mr Yvan Henzer, Attorneys-at-law, Lausanne, Switzerland

- Respondent -

1. THE PARTIES

1. Mr Dmitry Lapikov (hereinafter "the Appellant" or "the Athlete") is an international athlete practicing weightlifting and a member of the national team of the Russian Weightlifting Federation ("RWF"). The Appellant is 29 years old and works as a captain of police in Kaliningrad, Russia.

2. The International Weightlifting Federation (hereinafter "the Respondent" or "the IWF") is a permanent not for profit organization composed of 189 affiliated national federations worldwide, from all five continents. It has its seat in Lausanne, Switzerland. The IWF is governed by Swiss law, in particular Articles 60-79 of the Swiss Civil Code.

2. FACTUAL BACKGROUND

3. This section summarizes the main relevant facts and allegations based on the parties' written submissions. In this award, additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. The Panel has considered all the factual allegations, legal arguments, and evidence submitted by the parties in the present proceedings, but it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 19 and 26 August 2010, the Appellant underwent two operations at the St Petersburg State Clinical Hospital in order to address calculus (stones) in his salivary glands. He was kept in hospital until early September 2010. The Appellant caught the flu in early January 2011.

5. The Appellant was advised by the then RWF team doctor, Dr Alexander Cheliumov, to supplement his daily food intake with more vitamins and amino acids as a means of helping to prevent a recurrence of his illness.

6. The Appellant consulted the internet, and with the support of Dr Petrov, the RWF's vice-president for medical and anti-doping support, a qualified but non-practicing doctor, selected the supplement M5 Extreme (hereinafter "the Supplement") produced by the company Cellucor. The Appellant and Dr Petrov compared the ingredients listed on the Cellucor website with the 2011 Prohibited List of the WADA Code. No reference was made on the website to "methylhexanamine" or "dimethylamylamine" as being an ingredient of the Supplement.

7. In order to obtain the Supplement more quickly, the Appellant asked the RWF Vice-President, Maxim Agapitov, who was visiting the USA between 15 and 23 January 2011, to take delivery of the Supplement while in the USA, which Mr Agapitov did.

8. Mr Agapitov passed the Supplement over to Dr Petrov, who gave it to the Appellant. On the Supplement's box, reference was made to "dimethylamylamine" as being an ingredient of the Supplement. On the box it was also explicitly mentioned: "[...] enhances athletic performance."

9. Despite the reference to "dimethylamylamine" on the Supplement's box, Dr Petrov still advised the Appellant to take the Supplement in four courses, these being 7-13 February, 28 February – 6 March, 21-27 March and 10-16 April 2011.

10. The Appellant was tested ahead of the 2011 European Weightlifting Championships in Kazan by the Russian National Anti-Doping Agency on 31 March 2011 and 4 April 2011, four respectively eight days after the end of the third course of intake of the Supplement by the Appellant. No trace of a Prohibited Substance was found in the sample.

11. On 17 April 2011, the Appellant won a gold medal. He was then subjected to a drug test. The Appellant disclosed on the doping control form that he had been taking vitamins and amino acids.

12. On 13 May 2011, the Respondent notified the Russian Weightlifting Federation (hereinafter "the RWF") of an Adverse Analytical Finding (hereinafter "AAF") of the presence of a specified substance within the meaning of the World Antidoping Code of the World Antidoping Agency (hereinafter "the WADA Code"), namely "methylhexanamine (dimethylpentylamine)" (hereinafter "the Specified Substance"), in the urine sample taken from the Appellant on 17 April 2011.

13. The Appellant did not request an analysis of the B sample, and he was provisionally suspended from 13 May 2011 onwards.

14. On 5 July 2011, the Appellant declared:

"(...) *Before taking the preparation I carefully studied this bioactive substance on the prohibited components of the WADA list. On the packing of the preparation M5 EXTREME produced by CELLUCOR it was written that the preparation contained dimethylamilamine – substance with the similar name however not from the WADA list of prohibited substances. Judging by that I counted the preparation to be safe for taking during my preparations for the competitions. I took preparation M5 EXTREME produced by CELLUCOR during my training sessions from April 10th to April 16th 2011 for ergogenic effect and better well-feeling.*"

15. On 25 August 2011, the IWF sent to the RWF and the other national weightlifting federations a warning on Clenbuterol and Methylhexanamine, informing them that "*From 2011 Methylhexaneamine has been reclassified as a Specified Stimulant. Methylhexaneamine is increasingly being found in nutritional supplements,*

typically those that are designed to increase energy or aid weight loss. Any product that contains any of the following ingredients on that label may be reported as an Adverse Analytical Finding for Methylhexaneamine: Methylhexaneamine; Methylhexanamine; DMAA (dimethylamylamine); (...)."

16. A hearing of the IWF Doping Hearing Panel (hereinafter "the IWF Panel") took place in Paris on 7 November 2011. The Appellant did not attend the hearing but was represented by Mr Syrtsov, the President of the RWF, who was accompanied by Dr Petrov and Mr Krokhin.

17. During the hearing, Dr Petrov informed the IWF Panel that the Appellant had not spoken to any coach or team doctor before purchasing the Supplement. Dr Petrov added that the Appellant was a very experienced sportsman who would not have willingly broken anti-doping rules, knowing particularly that he would in any case be tested during the European championships and that an AAF would prevent him from competing in the London Olympics.

18. Following the hearing, the IWF Panel passed a decision sanctioning the Appellant with four years' ineligibility starting on 13 May 2011. Such decision, dated 23 November 2011, was communicated to the Appellant on 5 December 2011.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. The Appellant filed his statement of appeal to CAS on 26 December 2011 and his appeal brief on 3 February 2012.

20. In his statement of appeal, the Appellant made the following requests for relief:

"Having regard to the facts of my case (which I shall expand upon in my Appeal Brief), I belief that according to article 10.4 of the IWF Anti-Doping Policy the period of Ineligibility imposed on me by the IWF Doping Hearing Panel should be replaced with a reprimand."

21. The Appellant's main submissions in his appeal brief can be summarized in the following three grounds for appeal:

a. First, the automatic sanction of 4 years' ineligibility for a first violation, which is provided for in article 10.2 of the IWF's Anti-Doping Policy (hereinafter "the IWF ADP"), is contrary to the WADA Code to which the IWF is a signatory, and is in any event disproportionate. The starting point, in accordance with the WADA Code, should have been a period of 2 years' ineligibility.

b. Second, the period of ineligibility should have been reduced in any event under article 10.4 of the IWF ADP to a maximum of 9 months: the Supplement was not intended to enhance the Appellant's athletic performance and was not intended to mask the use of a performing-enhancing substance, and the Appellant had always been candid about how it came to be in his body.

c. Third, and alternatively, the starting point of 2 years' ineligibility should have been halved to 1 year under article 10.5.2 of the IWF ADP: the Appellant bears no significant fault or negligence.

22. Based on the submissions made in his appeal brief, the Appellant "reduced" his requests for relief, inviting the CAS Panel to "*allow his appeal, and to substitute a sanction of 9 months from 13 May 2011, alternatively a sanction which would not prevent him from competing at the London Olympics.*"

23. The Respondent submitted its answer on 29 February 2012.

24. The award requested by the Respondent is as follows:

" *I. The Appeal filed by Mr. Dmitry Lapikov is dismissed.*
II. The International Weightlifting Federation is granted an award for costs."

25. The Respondent's main submissions in its answer can be summarized as follows:

a. The IWF ADP, which the Appellant expressly subjected himself to, has been approved by WADA, and notably article 10.2 has been declared to be compliant with the WADA Code according to a WADA compliance report issued on 20 November 2011. The WADA Code is not self-executing in any case. Therefore the IWF ADP is applicable, irrespective of its compliance with the WADA Code.

b. Article 10.2 IWF ADP does not allow for discretion, there is no room for the Panel to apply the principle of proportionality.

c. Article 10.4 IWF ADP does not apply because, although the Athlete can satisfy the first condition of article 10.4 IWF ADP, namely the explanation on the origin of the presence of the prohibited substance in his bodily sample, he cannot satisfy the second condition, namely that he did not intend to enhance his athletic performance.

d. By its very nature, the dietary supplement "M5 Extreme" aims at enhancing performance. The enhancing-performance effect is even used in the relevant marketing literature; the label of the supplement "M5 Extreme" states that the product:

"increases muscle mass; improves strength and endurance; promotes strong blood pumps; revails detailed vascularity; enhances athletic performance."

e. The Appellant failed to prove that he did not bear any significant fault or negligence, as required by article 10.5.2 IWF ADP. The Appellant did not fully comply with his duty of care when he made the decision to ingest the Supplement.

26. On 14 May 2012, the Appellant produced additional statements supported by a letter from WADA dated 16 April 2012 where WADA explains why it confirmed to IWF that the 4-year ban provision under the IWF ADP would be in line with the WADA Code.

27. On 15 May 2012, the Respondent informed CAS that the IWF executive board had met on 9 May 2012 and had decided *inter alia "to amend the IWF Anti-Doping Policy (IWF ADP) in the sense that the sanction for specified substances is reduced to two years, with immediate effect.* „The Respondent therefore confirmed that, in application of the principle of the *lex mitior*, the Appellant should be sanctioned with a two-year period of ineligibility.

28. Both parties signed the order of procedure on 15 May 2012.

29. A hearing was held on 18 May 2012.

30. The Appellant, who took part to the hearing by way of videoconference, was represented by Mr. Ian Mill QC and Mr. James Segan, barristers, Mr. Jim Lankshear, solicitor, as well as Mr. Antonio Rigozzi, attorney-at-law. The Respondent was represented by Ms Monika Ungar, IWF legal counsel and Mr Yvan Henzer, attorney-at-law.

31. In their opening statements, the Parties summarised their written submissions. The Appellant notably explained that there were three grounds for his appeal, firstly, the invalidity of a four years ban versus a two years ban, secondly, the application of article 10.4 of the IWF Code and the lack of intent of the Appellant to ingest the Specified Substance, which is only prohibited in competition and, thirdly, the absence of significant fault which should allow, based on the jurisprudence, a reduction of the sanction to a period allowing the Appellant to take part to the London 2012 Olympics.

32. The Panel then heard several witnesses, whose statements can be summarized as follows in their relevant parts:

The Appellant, Dmitry Lapikov

33. Mr. Lapikov confirmed first the content of his written statements, adding that he had only reviewed the Russian version of his statements and that therefore only this version should be taken into consideration. Addressing the Respondent's questions, Mr. Lapikov confirmed that he had received an antidoping education and that he did know his duty to check what he was ingesting. He confirmed as well that he had a team doctor, Dr. Chilumov, whose duty was to check his daily diet. Mr. Lapikov added that the doctor of the national team provides food supplements to the athletes and that M5 Extreme was not one of those supplements. However, Mr. Lapikov explained that he took this product on the basis of an individual advice from Dr. Chilumov and after a research that Mr. Lapikov did himself on the product M5 Extreme. Dr. Chilumov pre-agreed the ingestion of the product with Dr. Petrov. Mr. Lapikov then explained that he had ordered the product himself online by using his credit card and providing the hotel address of Mr. Agapitov in the USA. Mr. Lapikov then confirmed that he had checked the labelling on the box before ingesting the product. He notably indicated that he had controlled that each component was admissible and had even consulted Dr. Petrov in order to get his confirmation. To the question of the Respondent on the reasons why he had not mentioned on 5th July 2011 that he had consulted other people, Mr. Lapikov explained that he did not know at that time how important this was for the case. Then he explained that he had taken the product M5 Extreme on the basis of an intake program established by Dr. Petrov and his coach. Mr. Lapikov added that he would have taken that product even if the European Championships had not taken place as he needed the product to recover from his illness. Mr. Lapikov eventually confirmed that he had taken the product on 16 April because he had a training that day. Then Mr. Lapikov replied to the Panel's questions and stated that he had noted the similarity of the name "dimethylamilamine" indicated with the Specified Substance "Methylhexanamine (dimethylpentylamine)" and that he therefore asked Dr. Petrov if this substance was admissible.

Mr. Munkuev Baldjievich

34. Mr. Baldijievich confirmed that the content of his written statement was correct and true. Addressing the Respondent's questions, Mr. Baldijievich confirmed that it was usual for weightlifters to use food supplements with the advice of doctors. In the Appellant's case, a program was elaborated by Mr. Baldijievich with the support of Dr. Petrov. Mr. Baldijievich then confirmed that the program of intake was independent from the European Championships. Mr. Baldijievich confirmed that the intake program included an ingestion the week before such championships. Then Mr. Baldijievich explained that Dr. Petrov knows his job very well and attends doping workshops. Mr. Baldijievich eventually confirmed that the Appellant was the only one to take M5 Extreme.

Dr. Alexander Petrov

35. Dr. Petrov confirmed first his written statement, notably its translation into English. Addressing the Respondent's questions, Dr. Petrov explained that he was participating to the training of the team, which however does not mean that he is a coach. As vice-President of the Weightlifting Federation of Russia, Dr. Petrov is in charge of medical issues and in that context specialised in doping matters. His main duties consist in knowing the list of prohibited substances, the therapeutic use of substances, the educational programme available to the athletes and collaboration with the Russian medical agency. Dr. Petrov then explained that the Russian national athletes receive supplements through an authority which tests the products centrally. This is mandatory according to Dr. Petrov. The team doctors then provide those supplements, M5 Extreme being not among them. However, the range of managed products does not include all supplements. In the wake of the Appellant's case, a ban has been decided on 20 September 2011on the use of food supplements without team Doctor's approval. According to Dr. Petrov, M5 Extreme seemed to be the best product to fit the Appellant's needs. Dr. Petrov was absolutely happy with the first information provided on the producer's website. He could have the information translated into Russian through Google and his own daughter could help him with the English. The ingredients were specified on the website. Yet, Dr. Petrov confirmed that he had noticed that other ingredients were eventually indicated on the box, notably the substance "dimethylamilamine". Dr. Petrov felt however comfortable as that substance was not on the 2011 WADA List. Dr. Petrov then stressed that this supplement was specifically used for training sessions. He added that he normally does not work with athletes and that it was only due to the Appellant's difficult situation that Dr. Petrov decided to support him. Dr. Petrov then confirmed that he knew that "Methylhexanamine (dimethylpentylamine)" was prohibited in competition. Yet he did not mention the intake program of M5 Extreme before the IWF Doping Panel because he thought that the sanction would not exceed 6 months and that the anticipated period of ineligibility was close to its end. Dr. Petrov admitted that this was an unfortunate mistake of him due to the fact that he was fearing that it would have a negative impact on his reputation which would be too important compared to the impact he anticipated that it would have on the Appellant. To Dr. Petrov's opinion, this substance does not have more effect on an athlete than Caffeine. Yet Dr. Petrov admitted the fact that it is banned. Dr. Petrov then admitted that he does not think that there is a major difference between "dimethylamilamine" and "Methylhexanamine (dimethylpentylamine)". However, as soon as he saw the reference to "dimethylamilamine" on the box, he checked the 2011 WADA List and considered that this substance was allowed. Dr. Petrov then explained that it took around 24 hours to eliminate the substance and that he was presumably too "arrogant" when he allowed the intake so close to the competition. However, Dmitry Lapikov had passed the control twice out of competition. Dr. Petrov then confirmed that he had heard about the warnings on food supplements and that he

was aware that supplements can be contaminated. He knows that the WADA List contains groups of substance and does not list all the names of substances which belong to the same group. However, Dr. Petrov stressed that "dimethylamilamine" was not on the 2011 WADA List and that at the moment of the intake of that substance by the Appellant he thought that this was a complete different substance than "Methylhexanamine (dimethylpentylamine)". It is only when he was confronted to the case that Dr. Petrov searched further and discovered that those were different names for the same substance.

Mr. Maxim Agapitov

36. Mr. Agapitov confirmed the content of his written statement. He then explained under which circumstance it came that he delivered M5 Extreme to the Appellant, stressing that he delivered only one container to Mr. Lapikov and that it was rather unusual for him to deliver food supplements to Russian athletes.

37. After having heard the Witnesses, the Panel left the floor back to the Parties for their closing statements. The Appellant stated again that the ingestion was for training purposes and that the doctors had advised him to take M5 Extreme. The use of that product was not at all in view of the European Chamionships but only to recover from a serious illness. Based on the jurisprudence quoted by the Appellant, the Panel should therefore exercise the discretion provided under article 10.4 of the IWF Code. The Appelant's degree of fault is low and therefore justifies the application of 10.5.2 of the IWF Code if not of 10.4 IWF Code.

38. The Respondent stressed that the Appelant did not meet the level of proof required by the IWF Code and could not prove to the comfortable satisfaction of the Panel that there was no intention from him to enhance his sporting performance. The Appellant did not take any precaution at all despite the numerous warnings available on food supplements. The Appellant also changed his version from the proceeding before the IWF Doping Panel to the proceeding before CAS. The fault of Dr. Petrov is the Appellant's fault.

39. After both Parties having had the opportunity to expose their factual and legal arguments and as both Parties confirmed that they were satisfied with the proceedings conducted before the CAS and notably during the hearing, the President of the Panel closed the hearing.

4. JURISDICTION OF CAS

40. Article R47 of the Code of Sports-related Arbitration (CAS Code) provides as follows:

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

(...)"

41. Article 13.2.1 of the IWF ADP provides as follows:

"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."

42. Based on the foregoing, the Panel finds that CAS has jurisdiction in the present proceedings, which is undisputed.

5. APPLICABLE LAW

43. Article R58 of the CAS Code sets out the law applicable to resolving disputes using the Appeal Arbitration Procedure. That provision provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such 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 rule of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

44. In the case at hand, the applicable regulations are the IWF ADP, which is not in dispute after both parties had confirmed at the hearing that the issue related to the four-year ban had been resolved. Subsidiarily, Swiss law is applicable as the IWF is domiciled in Switzerland, which is also not in dispute.

6. THE PANEL'S FINDINGS ON THE MERITS

6.1 The first of the grounds for appeal: the four-year ban and the issue of proportionality

45. Article 10 of the IWF ADP "Sanctions on Individuals" states:

(...)

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), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Four (4) years' Ineligibility.

(...)"

46. The wording of Article 10.2 of the IWF ADP is identical to the wording of Article 10.2 of the WADA Code, with the sole exception that the WADA Code provides for two (2) years' ineligibility for a first offence. At the outset of the appeal proceedings, the parties were arguing about the compatibility of article 10.2 IWF ADP with the WADA Code and about the proportionality and compatibility with Swiss law, and the Appellant's personality rights pursuant to the latter law.

47. With the decision passed on 9 May 2012 by the IWF Executive Board to reduce the ineligibility period from 4 to 2 years, the discrepancy between the IWF ADP and the WADA Code no longer exists.

48. In other words, since 9 May 2012, article 10.2 of the IWF ADP provides a two-year ineligibility period for a first offence. In application of the principle of the *lex mitior*, the Panel decides that the Appellant is to benefit from the amended version of article 10.2 of the IWF ADP. This has been put forward by the Respondent itself in its letter to CAS dated 15 May 2012. In addition, both parties have agreed on this during the hearing, so that the application of the amended article 10.2 of the IWF ADP to the present proceedings is undisputed.

49. Based on the above, and in the absence of any of the aggravating circumstances alleged by the Respondent, the Panel finds that the Appellant's period of ineligibility is not to exceed two years starting on 13 May 2011.

6.2 The second of the grounds for appeal: reduction of the period of ineligibility based on article 10.4 of the IWF ADP

50. The second of the Appellant's grounds for appeal is that the period of ineligibility should be eliminated altogether or reduced pursuant to article 10.4 of the IWF ADP.

51. The relevant parts of Article 10.4 IWF ADP provides as follows:

> *"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's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."*

52. The commentary to article 10.4 IWF ADP explains the scope of the article in the sense that "*there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non doping explanation.*"

53. The Appellant tested positive to methylhexanamine (dimethylpentylamine) following the anti-doping control of 17 April 2011. Methylhexanamine (dimethylpentylamine) is a Specified Substance listed under class S6 Stimulants and is prohibited in competition according to the IWF ADP and the 2011 WADA list of prohibited substances. All this is not in dispute.

54. The Appellant was able to explain the presence of the Specified Substance in his bodily sample by the ingestion of the Supplement M5 Extreme. This is not disputed either.

55. What the parties are arguing about are the reasons why the Athlete took the Supplement.

56. The Appellant claims that he had to recover from two surgical operations and from the flu and was advised by his team doctor to take vitamins and amino acids. With the approval of Dr Petrov, a non-practicing doctor but a vice-president of the RWF for anti-doping support, the Appellant took the supplement M5 Extreme in order to recover from his operations and from the flu. Before the IWF Hearing Panel, the Appellant explained that he took the Supplement for "ergogenic effect and better well feeling". During the hearing, the Appellant's counsel maintained the argument that a Specified Substance could actually be taken during training and was only prohibited during competition. According to the Appellant's

counsel, what is crucial is that the Appellant did not intend to enhance his athletic performance during the competition.

57. The Respondent argues that the clear description on the Supplement's box of its effects on the user, as well as the contradictions between the first and second and last statements of the Appellant, show that his intention was to improve his athletic performance.

58. After having carefully reviewed all the evidence produced during the proceedings, notably the statements of the Appellant and Dr Petrov, the Panel finds that the Appellant was not able to establish to the Panel's comfortable satisfaction that it was not the Appellant's intention to enhance his athletic performance.

59. Indeed, the Panel finds that article 10.4 IWF ADP covers cases where a Specified Substance enters an athlete's body without him knowing it at the time of the intake. This point is essential in order to give any sense to the possibility of reducing a sanction on the basis of article 10.4 IWF ADP. It goes without saying that an athlete who knowingly takes a Specified Substance and who is eventually tested positive cannot benefit from a reduction of the period of ineligibility simply by arguing that he did not take the Specified Substance to improve his athletic performance, as allowed for by article 10.4 IWF ADP.

60. The Panel also refers here to the possibility of granting TUEs, which when granted allow an athlete to take a Prohibited Substance, notably a Specified Substance. If article 10.4 IWF ADP were to apply to cases where athletes knowingly ingested Specified Substances, the system of granting TUEs would be rendered useless, which obviously is not the intention of the IWF ADP.

61. It is therefore worth pointing out that all of the athletes in, for example, CAS 2007/A/1395, 2010/A/2107, CAS A2/2011, CAS 2011/A/2645 did not know that the supplement they had taken contained a Specified Substance. It is only in such cases where the athlete does not know that the supplement contained a Specified Substance will such athlete only have to prove that he/she did not take the Specified Substance with the intent to enhance athletic performance and will not have to prove that he/she did not take the product (e.g. a food supplement) with the intent to enhance athletic performance (see the discussions in CAS 2011/A/2645 para. 80 sec.; CAS 2010/A/2107 para. 9.14 and 9.17; against it CAS A2/2011 para. 47).

62. In the present case, the Panel thus finds it decisive that the Athlete confirmed on 5 July 2011 and – on explicit request – at the hearing that he and Dr Petrov checked the ingredients contained in the Supplement against the WADA-List and had noticed the presence of dimethylamilamine. The Athlete admitted in his statement dated 5 July 2011 that this substance had a "*similar name however not from the WADA list of prohibited substances*". Dr Petrov admitted that the name was

similar, but apparently had realized that this was the same substance only upon further inquiries after the Appellant had been tested positive.

63. However, a quick research in the internet would have directly revealed to the Appellant and Dr Petrov that "dimethylamilamine" was another word for the Specified Substance "Methylhexanamine (dimethylpentylamine)".

64. In light of:

a. the large degree of similarity between the description of the Supplement on its box, which contained a clear reference to its performance-enhancing effect, and the relevant WADA-List of prohibited substances with;

b. the numerous warnings made by WADA, the IOC, and nearly all of the sport federations on the risks associated with the intake of food supplements (see notably CAS 2003/A/484; 2005/A/847 or CAS 2009/A/1915);

c. the fact that the Appellant, a top professional athlete with many years of experience, had to have known that he was personally responsible for checking whether or not the Supplement contained a Specified Substance; and

d. the fact that the 2011 WADA list, which the Appellant had admitted on several occasions to have carefully consulted both on his own and with his doctor, makes reference to "*methylhexaneamine (dimethylpentylamine)* (...) *and other substances with a similar chemical structure or similar biological effect(s).*" [Emphasis added],

the Panel holds that by not checking whether the substance "dimethylamilamine", which the Athlete had found on the Supplement's box, was the same substance as the substance "dimethylpentylamine", which the Athlete had found on the 2011 WADA List, the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "*dolus eventualis*", the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance within the meaning of Art. 10.4. IWF ADP.

65. Based on the foregoing, the Panel finds that this degree of intent on the part of the Appellant excludes any application of the reduction provided for under article 10.4 IWF ADP. Indeed, an athlete who intentionally ingests a Prohibited Substance accepts, beyond any reasonable doubt, that it may enhance his/her athletic performance. The Appellant's intent to ingest the Prohibited Substance therefore prevents him *per se* from comfortably satisfying the Panel that he did not intend to enhance his performance. Notwithstanding this, the requirements for such proof would have been extremely difficult in light of the fact that the

supplement's box explicitly mentions the quality/feature "[...] enhances athletic performance."

66. In his situation, the Athlete should have clearly switched to another product that contained vitamins and amino acids, bearing in mind that his doctor had not advised him to take any other type of supplements. Alternatively, the Athlete should have made sure that no trace of the Specified Substance would remain in his body during the competition. In this respect, Dr Petrov himself admitted that the intake program of the Athlete had perhaps been "*too ambitious*".

67. The Athlete not only took the risk of ingesting a Prohibited Substance, but decided to take it up to the last moment in order to benefit from the effects of the Supplement as long as possible. This double acceptance of the risk by the Athlete led to the Adverse Analytical Finding.

68. Again the Panel stresses that it carefully reviewed the extensive case law put forward by the Appellant and found support for its interpretation of article 10.4 IWF ADP. In all of the cases cited by the Appellant, there was no intent on the part of the athlete to ingest the prohibited substance. The athletes in those cases were able to demonstrate that the ingestion was not intentional and that it was accidental, either due to contamination, wrong labelling, or light degrees of negligence. The case of the Appellant - who was ingesting a Supplement that contained a prohibited substance indicated on its box - is therefore not comparable to the cases cited in the appeal brief and at the hearing.

69. After a careful review of the relevant case law, the Panel is thus convinced that a period of ineligibility of two years is appropriate as far as article 10.4 IWF ADP is concerned.

6.3 The third of the grounds for appeal: reduction of the period of ineligibility based on article 10.5.2 of the IWF ADP

70. Article 10.5.2 IWF ADP provides in its relevant part as follows:

"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."

71. The Appellant's arguments in relation to this ground of the appeal are similar to those in relation to the previous one, namely that the Appellant did not know that

the Supplement contained a Prohibited Substance and that it was not his intention to enhance his athletic performance.

72. The Panel finds again here that the approach taken by the Appellant speaks against him. Referring to the reasoning developed above, the Panel stresses again that the Supplement's box indicated the presence of a Prohibited Substance in that product and that the Appellant can therefore not insist on benefitting from a reduction of the applicable period of ineligibility only for the simple fact that he could explain that the Prohibited Substance entered his system through the intentional intake of such Prohibited Substance, which was expressly indicated on the Supplement's box, with reference to the 2011 WADA List.

73. Furthermore, under this article 10.2.5 IWF ADP, the Panel considers that even without reference to the Athlete's intention to take the Prohibited Substance, the approach taken by the Athlete lacks any satisfactory justification and excludes any reduction of the period of ineligibility provided for under article 10.2 IWF ADP.

74. After a careful review of article 10.5.2 and its related case law, notably CAS 2011/A/2518, 2010/A/2107, 2010/A/2229, 2008/A/1489 and 2009/A/1870, where all the athletes did not know about the presence of the Prohibited Substance in the food supplement they had ingested before being tested positive, the Panel is thus convinced that this article does not apply to the present case, and that in any case, the approach taken by the Appellant cannot allow a reduction of the period of ineligibility of two years.

75. The Panel eventually wishes to underline that it is perfectly aware of the harsh consequences of its decision, which will prevent the Appellant from taking part in the London 2012 Olympics. Nevertheless, for all the reasons explained above, the Panel does not see any legal justification for a reduction of the period of ineligibility, for example and in particular based on the doctrine of proportionality. Proportionality has focused on perceived fairness to the athlete based upon the pretence that the sanction imposed is deemed excessive or unfair on its face (see Richard H. McLaren, CAS Doping Jurisprudence: What Can We Learn?, Paper delivered at the seminar for the members of CAS held in Divonne, France on 15th & 16th June 2005, p. 26, 27). Accordingly, CAS case law shows that an athlete has a high hurdle to overcome if he or she wants to prove the existence of such exceptional circumstances (see for example CAS 2005/A/830, 10.24 et seq., CAS 2010/A/2268, 133 et seq.). Likewise the Swiss Federal Court held that the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement on individual rights that was extremely serious and completely disproportionate to the behaviour penalised (see Richard H. McLaren, ibidem, p. 30). In the case at hand such exceptional circumstances have neither been asserted by the Appellant, nor are they evident. The risk that an important sports event such as the Olympic Games may accidentally fall within the period of a ban is inherent in the system and even constitutes a crucial element

of this sanction. Therefore, a reduction solely based on the occurrence of an important sports event would undermine the whole system of doping sanctions.

76. Based on all of the above, and after reviewing the evidence, the submissions, and the case law produced in the written proceedings and at the hearing, the Panel comes to the conclusion that the Appellant is to be sanctioned with a period of two years of ineligibility starting on 13 May 2011.

7. COSTS

77. Pursuant to Article R65.2 of the CAS Code, disciplinary cases of an international nature are free of charge, except for the Court Office fee to be paid by the Appellant and retained by the CAS.

78. Article R65.3 of the CAS Code states: "*(t)he costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

79. The Appellant brought this appeal and has partially failed. Considering however that the Appellant's final sanction has been reduced from a period of ineligibility of four years to two years, the Appellant having requested in his appeal brief a period of ineligibility between nine months and 14 months, and that the Respondent had requested in its answer that the period of ineligibility be kept at four years, the Panel finds that each party should pay its own legal fees.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Dmitry Lapikov on 26 December 2011 against the decision dated 23 November 2011 rendered by the IWF Doping Hearing Panel is partially allowed.

2. The decision rendered by the IWF Doping Hearing Panel on 23 November 2012 is partially reformed in the sense that Mr Dmitry Lapikov is ineligible to compete in weightlifting competitions for a period of two years starting from 13 May 2011.

3. The present award is pronounced without costs, except for the Court Office fee of CHF 1'000 (one thousand Swiss Francs) already paid by the Appellant, which is retained by the CAS.

4. Each party must pay its own legal costs and expenses incurred in this procedure

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

Lausanne, 10 July 2012

THE COURT OF ARBITRATION FOR SPORT

Mr. Martin **Schimke**
President

Mrs Alexandra **Brilliantova**,
Arbitrator

Mr Denis **Oswald**
Arbitrator

Mr. Nicolas **Cottier**
Ad hoc clerk