Arbitration CAS 2017/A/5178 Tomasz Zieliński v. International Weightlifting Federation (IWF), award of 15 March 2018

Panel: Prof. Ulrich Haas (Germany), President; Mr Jeffrey Benz (USA); Mr Murray Rosen QC (United Kingdom)

Weightlifting
Doping (19-Norandrosterone)
Balance of probability
No necessity to establish source in order to establish lack of intent

1. **The IWF Anti-Doping Policy places the burden of proof upon the athlete that s/he did not act intentionally. Furthermore, according to Article. 3.1 of the IWF ADP the athlete has to either rebut a presumption or establish specified facts or circumstances "by a balance of probability", which means that the circumstances established by the athlete have to be "more likely than not".**

2. **Whilst the route of the ingestion of a prohibited substance is an important fact in order to establish whether or not an athlete acted intentionally, it is not a mandatory condition to prove lack of intent on the part of the athlete.**

I. PARTIES

1. Tomasz Zieliński ("the Athlete" or "the Appellant"), born on 29 October 1990, is a weightlifter residing in Poland.

2. The International Weightlifting Federation ("the IWF" or "the Respondent") is the international governing body for the sport of weightlifting and is recognized as such by the International Olympic Committee ("the IOC"). IWF has its registered office in Budapest, Hungary.

II. FACTS

3. The Athlete was a member of the Polish weightlifting team and competed for Poland at the 2012 Olympic Games in London. He finished in ninth place in the 94 kg division.

4. While participating in a weightlifting competition in Poland, on 1 July 2016, the Athlete underwent an in-competition doping control ("the First Doping Test") carried out by the Polish Commission against Doping in Sport ("the Polish NADO").

5. During the Olympic Games in Rio de Janeiro, on 31 July 2016, the Athlete underwent an out-of-competition doping control ("the Second Doping Test"), which was carried out by the IOC.

6. On 6 August 2016, the Athlete was notified by the IOC that the A sample from the Second Doping Test produced an Adverse Analytical Finding ("the AAF") for 19-Norandrosterone, which is a prohibited substance according to the Prohibited List 2016 of the World Anti-Doping Agency ("the WADA 2016 Prohibited List"), in class S1.1 Anabolic Agents ("the Prohibited Substance").

7. On the same day, the Athlete requested analysis of the B sample of the Second Doping Test.

8. On 7 August 2016, the IOC filed an application before the Anti-Doping Division of the Court of Arbitration for Sport ("the CAS ADD") requesting the provisional suspension of the Athlete.

9. On 9 August 2016, the CAS ADD issued an Order on an Application for Provisional Suspension, granting the IOC's application and provisionally suspending the Athlete.

10. On the same day, the positive test result for the B sample from the Second Doping Test was notified to the CAS ADD. The analysis confirmed the presence of the Prohibited Substance found in the A sample.

11. On 12 August 2016, the CAS ADD issued an award. The operative part of the award reads as follows:

> *"On the basis of the facts and legal arguments set forth above, the application is granted.*
>
> *1. The Athlete is declared ineligible to compete at the Olympic Games Rio 2016.*
>
> *2. The Athlete is excluded from the Olympic Games Rio 2016.*
>
> *3. The Athlete's Accreditation (number 1051326) is withdrawn.*
>
> *4. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the International Weightlifting Federation being the applicable International Federation".*

12. On 13 September 2016, the IWF confirmed the provisional suspension of the Athlete imposed by the CAS ADD. The case was referred to the IWF for results management.

13. On 15 May 2017, the IWF Hearing Panel ("IWF HP") issued a decision ("the Appealed Decision") imposing on the Athlete a period of ineligibility of four years. In summary the main grounds of the Appealed Decision (taking account of the Athlete's explanations as referred to further below) were that:

(a) the IWF HP accepted the accuracy of the AAFs and was in no doubt that the anti-doping rule violation ("the ADRV") occurred, and the burden was on the Athlete to demonstrate lack of fault or negligence by first establishing on the balance of probabilities how the Prohibited Substance entered his body;

(b) the IWF HP reviewed the evidence as to the Athlete's vitamin B12 supplements, by reference also to his brother's results and their use of a non-accredited laboratory's analysis and decided that he had failed to establish that the tested substances were those which had caused his ADRV; and

(c) the IWF HP considered that there was no evidence beyond the Athlete's unsupported explanations and concluded that he had failed to prove that the ADRV was unintentional or that the sanction was not proportionate to his individual situation.

14. With regard to the commencement of the period of ineligibility, the IWF HP stated as follows:

> *"The Panel notes that the Athlete's provisional suspension imposed by the CAS ADD has been confirmed by the IWF on 13 September 2016 and thus, in accordance with Article 10.10.3 IWF ADP 2015* [2015 IWF Anti-Doping Policy]*, the ineligibility period imposed upon him shall begin on the date of the provisional suspension".*

III. PROCEEDINGS BEFORE CAS

15. On 5 June 2017, the Appellant filed an appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision and nominated Mr Jeffrey G. Benz as an arbitrator.

16. By an e-mail dated 14 June 2017, the Appellant requested a four-day extension of the time limit to file his Appeal Brief. In accordance with Art. R32.2 of the Code of Sports-related Arbitration ("the CAS Code"), the request was granted the next day.

17. On 19 June 2017, the Appellant filed his Appeal Brief.

18. By an e-mail dated 22 June 2017, the Respondent nominated Mr Murray Rosen, QC as an arbitrator.

19. On 14 July 2017, the Respondent requested an extension of its deadline to file the Answer until 31 July 2017. This request to which the Athlete had consented was subsequently granted by the Panel.

20. On 27 July 2017, the CAS Court Office informed the Parties that Mr Ulrich Haas was appointed as President of the Panel by the CAS Deputy Division President in accordance with Art. R54 of the CAS Code.

21. On 31 July 2017, the Respondent filed its Answer.

22. On 9 August 2017, the Appellant advised the CAS Court Office of his preference for a hearing.

23. On the same day, the Respondent informed the CAS Court Office that it left the decision as to whether a hearing is necessary or not to the Panel.

24. By letter dated 21 August 2017, the CAS Court Office, on behalf of the Panel, requested the Appellant to provide the photographical documentation referred to in the Test Protocol of the National Medicines Institute (Exhibit 6 of his Appeal Brief).

25. By an e-mail dated 23 August 2017, the Appellant provided the CAS Court Office with the photographical documentation which it had requested on behalf of the Panel.

26. By letter dated 5 September 2017, the CAS Court Office advised the Parties that Ms Zdravka Bozic had been appointed to assist the Panel as an *ad-hoc* clerk.

27. On 12 September 2017, the CAS Court Office informed the Parties that the hearing in this case will be held on 30 October 2017 at 09:30 CET.

28. By letter dated 26 September 2017, the Respondent informed the CAS Court Office that the following persons would attend the hearing on its behalf:

    1. Ross Wenzel, counsel;
    2. Nicolas Zbinden, counsel and
    3. Eva Nyirfa, IWF legal counsel.

29. The same day the Appellant informed the CAS Court Office that the following persons would be attending the hearing on his behalf:

    1. Thomas Zieliński, the Appellant (in person);
    2. Łukasz Klimczyk, counsel (in person);
    3. Krzysztof J. Jankowski, private interpreter (in person);
    4. Adrian Zieliński, witness (in person);
    5. Jerzy Śliwiński, witness (in person) and
    6. Daniel Kopko, witness (via tele-conference)

30. On 2 October 2017, the CAS Court Office, on behalf of the President of the Panel, invited the Appellant to explain his reservation contained in para. 15 of his Appeal Brief, stating that he *"reserves the right to expand (elaborate) on his statement of facts in case the Respondent's answer contains factual allegations that need to be rebutted"*.

31. By a letter dated 6 October 2017, the CAS Court Office invited the Parties to sign and return a copy of the Order of Procedure ("the OoP") by 13 October 2017.

32. On 9 October 2017, the Appellant – in response to the CAS letter dated 2 October 2017 and referring to his reservation contained in para. 15 of his Appeal Brief – informed the CAS Court Office that he had no additional comments.

33. On 9 and 15 October 2017 respectively, the Respondent and the Appellant provided the CAS Court Office with a signed copy of the OoP.

34. On 26 October 2017, the Appellant requested a postponement of the hearing. In support of his request, the Appellant stated – *inter alia* – the following three reasons justifying his request:

    1. the state of health of the Appellant: because of illness the Appellant could not attend the hearing in person;
    2. the Appellant's interpreter could not attend the hearing because he had to be part of an exam for interpreters and translators in Poland on the same date; and
    3. the submission of new evidence: the Appellant had conducted a polygraph test which was being translated into English and which he wanted to submit to the Panel as new evidence.

35. On the same day, on behalf of the Panel, the CAS Court Office invited Appellant to provide it with a detailed medical description of his illness in English. Further, the Appellant was advised that the unavailability of his interpreter would not be considered as a basis to postpone the hearing.

36. By an e-mail dated 27 October 2017, the Appellant provided a medical report in response to the Panel's request.

37. On the same day, the Respondent was invited to comment on the Appellant's request to postpone the hearing.

38. Also on the same day, the Respondent informed the CAS Court Office that it opposed the request for a postponement of the hearing for the following main reasons:

    1. the medical diagnosis of bronchitis did not prevent the Appellant from appearing via Skype or by phone;
    2. the unavailability of the translator should not be considered a ground to postpone the hearing;
    3. the IWF Legal Counsel who was going to attend the hearing on behalf of the Respondent was travelling from Hungary. If the hearing would need to be rescheduled, there would be significant unnecessary costs for the IWF for flights and hotel; and
    4. the Respondent's external counsel were already at an advanced stage of preparation.

39. On the same day, on behalf of the Panel, the CAS Court Office informed the Parties that:

    1. the request for rescheduling of the hearing was rejected;
    2. the reasons for this decision will be provided in the award;
    3. the Appellant should make arrangements (and inform the CAS Court Office accordingly) to be available on Skype;

4. the Appellant was invited to provide the CAS Court Office with the name of the interpreter who would attend the hearing; the Appellant was further invited to provide the CAS Court Office with the name(s) of the person(s) who would attend the hearing in person on his behalf; and
5. the question whether or not to admit the "lie detector test" on file would be addressed at the outset of the hearing.

40. By an e-mail dated 30 October 2017, the Appellant informed the CAS Court Office that the following persons would be attending the hearing on his behalf:

1. Thomas Zieliński, the Appellant (in person or via Skype/tele-conference depending on his health);
2. Łukasz Klimczyk, counsel (in person);
3. Jakub Bober, private interpreter (in person);
4. Adrian Zieliński, witness (in person);
5. Jerzy Śliwiński, witness (in person) and
6. Daniel Kopko, witness (via tele-conference).

41. The hearing was held before this Panel on 30 October 2017 at the CAS Headquarters in Lausanne, Switzerland. The Appellant was represented by Mr Łukasz Klimczyk. The Respondent was represented by Messrs Ross Wenzel, Nicolas Zbinden and Ms Eva Nyirfa. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel and the other party's counsels. At the end of the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

42. By an e-mail dated 4 December 2017, the Appellant informed the CAS Court Office about *"new circumstances of the case"* stating – *inter alia* – that the pharmacy that had provided the dietary supplements, medicines and vitamins to the Polish Weightlifting Federation had closed its business activity. This showed according to the Appellant that the witness statement of Mr. Daniel Kopko who informed the Panel at the hearing that the Polish Weightlifting Federation is still cooperating with the pharmacy and that it is a reliable business partner is not true. Furthermore, the Appellant provided the CAS Court Office with an English version of the polygraph test.

43. On 5 December 2017, on behalf of the Panel, the CAS Court Office informed the Parties that:

1. the issue of the polygraph test had already been dealt with by the Panel;
2. the respective document was not admitted on file; and that
3. the Respondent was invited to comment on the remaining issues contained in the Appellant's submission.

44. On the same day, the Respondent informed the CAS Court Office that it finds the Appellant's submission regarding the pharmacy unsubstantiated and irrelevant to the case.

45. On 8 December 2017, on behalf of the Panel, the Parties were advised by the CAS Court Office to refrain from any further unsolicited submissions.

IV. THE PARTIES' SUBMISSIONS

46. 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 provided in their written submissions as well as orally presented during the hearing. In considering and deciding upon the Parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below. The Panel will discuss the additional submissions made and evidence adduced by the Parties in the hearing in the section on the merits where relevant.

A. The Appellant

47. In his Statement of Appeal dated 5 June 2017 the Appellant requested:

> *"**In the principal:***
>
> *The Appellant hereby respectfully request* [sic] *that this Panel finds and rules as following* [sic]*:*
>
> *1) the Athlete established on basis of Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy] *No Significant Fault or Negligence and that the detected Prohibited Substance came from the Contaminated Product;*
>
> *2) on basis of Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy] *and taking into consideration 'light degree of fault' sentence the Athlete for reprimand or Ineligibility in a period which includes period of Provisional Suspension;*
>
> *3) the IWF shall reimburses* [sic] *the Appellant* [sic] *legal costs.*
>
> ***In the alternative:***
>
> *Alternatively, should Panel finds* [sic] *that in the present case the Athlete has not met the prerequisites prescribed in the Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy]*, the Athlete hereby kindly request* [sic] *this Panel to:*
>
> *1) establish on the basis of the Article 10.2.3 of IWF ADP* [IWF Anti-Doping Policy]*, that the commission of the ant-doping* [sic] *rule violation by the Athlete was not intentional and to find the basis for sentencing in the Article 10.2.2 of IWF ADP* [IWF Anti-Doping Policy]*, i.e. 2 (two) years of ineligibility;*
>
> *2) establish on the basis of the Article 10.5.2 of IWF ADP* [IWF Anti-Doping Policy]*, that in this individual case the Athlete established No Significant Fault or Negligence, what in consequence allows*

to reduce the period of ineligibility to one half of period of ineligibility prescribed by the Article 10.2.2. IWF ADP [IWF Anti-Doping Policy]*, i.e. to 1 (one) year of ineligibility;*

3) *sentence the Athlete on the basis of Article 10.5.2 of IWF ADP* [IWF Anti-Doping Policy] *and Article 10.2.3 of IWF ADP* [IWF Anti-Doping Policy] *for the penalty of 1 (one) year of ineligibility;*

4) *according to the Article 10.11.1 IWF ADP* [IWF Anti-Doping Policy] *declare that period of ineligibility starts from the date of sample collection;*

5) *the IWF shall reimburses* [sic] *the Appellant* [sic] *legal costs.*

In the second alternative:

Alternatively, should Panel [sic] *finds* [sic] *that in the present case the Athlete has not met the prerequisites prescribed in the Art. 10.5.1.2 and Art. 10.2.2 IWF ADP* [IWF Anti-Doping Policy]*, the Athlete hereby kindly request* [sic] *this Panel to applied* [sic] *in this case fundamental principle of proportionality between rule violation* [sic] *and sanction and imposed* [sic] *on the Athlete sanction less than 4 year* [sic] *and that the IWF shall reimburses* [sic] *the Appellant* [sic] *legal costs.*

Moreover, the Appellant respectfully requests this Panel to apply the Article R65 (2) of Code [the CAS-Code] *which stipulates that the Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sporty-body* [sic]. *As the present proceeding falls into the scope of application of the quoted provision, the Appellant seeks to be exempted from covering proceeding costs.*

Alternatively, should this Panel find differently and hold that the Article R65 of Code [the CAS-Code] *does not apply in the present case, the Appellant hereby requests the Panel to award her* [sic] *the cost of this proceeding, including the costs of legal representation".* (emphasis added by the Appellant)

48. In his Appeal Brief dated 19 June 2017, the Appellant amended his prayers for relief as follows:

*"**In the principal:***

The Appellant hereby respectfully request [sic] *that this Panel finds and rules as following* [sic]*:*

1) *that this Appeal of Appellant is admissible;*

2) *that the challenged decision is set aside and this Panel rules on merits of the case by finding that:*

   a. *the Athlete established on the basis of the Article 10.2.3 of IWF ADP* [IWF Anti-Doping Policy]*, that the commission of the anti-doping rule violation by the Athlete was not intentional and to find the basis for sentencing in the Article 10.2.2 of IWF ADP, i.e. 2 (two) years o* [sic] *ineligibility;*

   b. *the Athlete established on basis of Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy] *No Significant Fault or Negligence and that the detected Prohibited Substance came from the Contaminated Product;*

   c. *on basis of Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy] *and taking into consideration 'light degree of fault' the Athlete is sanctioned with a sanction of reprimand or ineligibility in a period which includes period of provisional suspension;*

d. *according to Article 10.11.1 IWF ADP* [IWF Anti-Doping Policy] *the period of ineligibility starts from the date of sample collection (1st June 2016);*

3) *that the Respondent shall bear the costs of the arbitral proceedings and contribute an amount of the legal costs and other expenses incurred in connection with the proceedings of the Appellant according to Rule R 64.5 of the Code [the CAS-Code].*

In the alternative:

Alternatively, should Panel finds [sic] *that in the present case the Athlete has not met the prerequisites prescribed in the Article 10.5.1.2 of IWF ADP* [IWF Anti-Doping Policy]*, the Athlete hereby kindly request* [sic] *this Panel finds and rules as following* [sic]*:*

1) *that this Appeal of Appellant is admissible;*

2) *that the challenged decision is set aside and this Panel rules on merits of the case by finding that:*

a. *the Athlete establish* [sic] *on the basis of the Article 10.2.3 of IWF ADP* [IWF Anti-Doping Policy]*, that the commission of the anti-doping rule violation by the Athlete was not intentional and to find the basis for sentencing in the Article 10.2.2 of IWF ADP* [IWF Anti-Doping Policy]*, i.e. 2 (two) years of ineligibility;*

b. *the Athlete establish* [sic] *on the basis of Article 10.5.2 of IWF ADP* [IWF Anti-Doping Policy]*, that in this individual case the Athlete established No Significant Fault or Negligence, what in consequence allows to reduce the period of ineligibility to one half of period of ineligibility prescribed by the Article 10.2.2 IWF ADP* [IWF Anti-Doping Policy]*, i.e. to 1 (one) year of ineligibility;*

c. *on basis of Article 10.5.2 and Article 10.2.3 of IWF ADP* [IWF Anti-Doping Policy] *and taking into consideration 'normal degree of fault' the Athlete is sanctioned with a penalty of 1 (one) year of ineligibility;*

d. *according to the Article 10.11.1 IWF ADP* [IWF Anti-Doping Policy] *the period of ineligibility starts from the date of sample collection (1st June 2016);*

3) *that the Respondent shall bear the costs of the arbitral proceedings and contribute an amount of the legal costs and other expenses incurred in connection with the proceedings of the Appellant according to Rule R 64.5 of the Code* [the CAS-Code].

In the second alternative:

Alternatively, should Panel finds [sic] *that in the present case the Athlete has not met the prerequisites prescribed in the Art. 10.5.1.2 and Art. 10.2.2 IWF ADP* [IWF Anti-Doping Policy]*, the Athlete hereby kindly request* [sic] *this Panel to applied* [sic] *in this case fundamental principle of proportionality between rule violation and sanction and imposed* [sic] *on the Athlete sanction less than 4 year and that the IWF shall reimburses* [sic] *the Appellant* [sic] *legal costs.*

Moreover, the Appellant respectfully requests this Panel to apply the Article R65 (2) of Code [the CAS-Code] *which stipulates that the Article R68 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sporty-body* [sic]. *As the present proceeding falls into the scope of application of the quoted provision, the Appellant seeks to be exempted from covering proceeding costs.*

Alternatively, should this Panel find differently and hold that the Article R65 of Code [the CAS-Code] *does not apply in the present case, the Appellant hereby requests the Panel to award her* [sic] *the cost of this proceeding, including the costs of legal representation"* (emphasis added by the Appellant).

49. The Appellant's submissions on the merits can be summarised in their main parts as follows:

a) The Appealed Decision imposed *"*[…] *on the Appellant the penalty being too harsh, in which the Hearing Panel did not take into consideration the mitigating circumstances influencing the ultimate severity of penalty* [sic] *i.e. that the prohibited substance came from Contaminated Product, that in this case anti-doping rule violation was not intentional and the principle of proportionality between rule violation and sanction".*

b) According to the Appellant there were circumstances *"*[…] *justifying the reduction of penalty of ineligibility* [based on the applicable rules] *due to the issues of Contaminated Product clause* [sic]*"* and according to the *'intentional clause'".*

1) With respect to Art. 10.5.1.2 of the IWF ADP

c) The Appellant submitted that the burden of proof is upon him and that he must show on a balance of probability, *i.e. "at a minimum of 51% probability"* that the product was contaminated and that his negligence was not significant.

d) The term Contaminated Product is defined in Annex 1 of the IWF ADP. According thereto a Contaminated Product is *"*[…] *a product that contains Prohibited Substance* [sic] *that is not disclosed on the product label* ***or*** *in information available in a reasonable Internet search".* (emphasis added by the Appellant) According to the Appellant the ampoules that he injected constitute a "Contaminated Product" within the above meaning. This follows from the *"analytical documentation from the laboratory".* In particular *"the test protocol no. NI-1816-16 from 28th November 2016"* shows that both ampoules found in the garage of the Appellant's brother contain *"cyanocobalamin (vitamin B12)"* and that in one ampoule the *"presence of nandronole phenylpropionate was established additionally".* That the Appellant had used these ampoules is *"confirmed* […] *by independent and reliable witnesses: the Athlete's brother (also using the same product), the sports club coach, the coach preparing the Athlete to international competitions, and also the doctor of national team of PWF* [the Polish Weightlifting Federation, "the PWF"] *and the fact that those products were at that time ordered by the PWF was confirmed by the representative of PWF".* Consequently, *"the product* [ampoules[1]] *provided by the PWF to the Athlete was contaminated with the prohibited substance which was not disclosed at the product label (provided in sealed blisters, each containing several ampoules) and as to which no information can be found in the Internet-accessible resources that it could possibly be present in such products. What is more, the product itself (vitamin B12) in comparison with other products applied by sportsmen (pre-training nutrients or fat burners) could hardly be classified as a risky one to use".*

e) Furthermore, the Appellant submitted that his negligence was not significant, since:

- He *"*[…] *has never consciously used the prohibited substance which was found in his body; what is more, he has been applying verified training and nutrition methods and has not been aware that any*

[1] Inserted for better understanding.

of his actions or activities may constitute a violation of anti-doping rules or, if he knew that any of his actions or activities could constitute a serious risk of violation of anti-doping provisions, he has never consciously ignored such risk".

- Throughout his long sporting career he has *"*[…] *tired [sic] to be duly diligent and take care to evict any possible risk of violation of anti-doping rules, what has been confirmed in numerous anti-doping controls which have never shown a presence of any prohibited substances in the Athlete's body, until 1st July 2016 and 9th August 2016".* He has been using *"*[…] *almost the same training and nutrition methods* […] *for years"* and *"those methods include also the use of verified* [sic] *and provided exclusively by the Polish Weightlifting Federation* […] *diet supplements and vitamins which are acquired by the PWF in procurement proceedings, in a result of which a providers of diet supplements, vitamins and other products used during sport trainings are chosen".* Among the products provided by the PWF were vitamin B12 ampoules to be applied by injection.
- These ampoules *"*[…] *were applied to the athletes by injection only by doctor of medicine of national team Mr. Daniel Kopko or by doctor of medicine of sport club Mr. Andrzej Galaj* […]*".* The latter applied the injections during training at the Appellant's club. However, when the Appellant was in training camps with *"*[…] *the Polish National Team* […] *in Spala (Poland)* […] *any injections were made by dr. Daniel Kopko".*
- The Appellant claims that he applied due diligence to ensure that he was not using a prohibited substance. In particular, he verified the *"*[…] *label of the product"*, checked whether vitamin B12 was *"on the WADA List of Prohibited Substances and Methods"* and was knowledgeable that *"the vitamin B12 is not the prohibited substance and the method of its application by an injection performed by a doctor of medicine in the amount less than 50ml in the period of 6 hours is not the prohibited method".* He also checked on *"*[…] *the Internet general information regarding a given product (and he did it also in regard to the said vitamin B12 and the method of its application) out of which it did not result that the product in question could possibly raise any legitimate doubts as to its application or that it could be a risky product".* The Appellant also notes that *"*[…] *all products used* […] *are of known and verified origin as they were provided by the PWF, which concluded commercial contracts for deliveries of such kind of products, stipulating the obligation of each provider to deliver products free of any prohibited substances".* Furthermore, the Appellant states that *"*[…] *before a use of given product, the Athlete consults it with the doctor of national team and with the doctor of his sports club".*

f) The Appellant submitted that he had established the above circumstances surrounding the usage of the ampoules by providing witness statements, *"not only by his brother* […] *but also by the representative of the Sport Club (Mr. Jerzy Sliwinski and written statement of Mr. Piotr Wysocki) and medical support of the Polish Weightlifting Federation (Mr. Daniel Kopko and written statement of Mr. Andzej Galaj).* […]*".*

2) With respect to the level of fault

g) Art. 10.5.1.2 of the IWF ADP provides for a sanction a reprimand as a minimum and two years of ineligibility as a maximum. Referring to CAS jurisprudence (CAS 2013/A/3327 & 3335), the Appellant differentiates between three levels of fault:

- Significant/considerable degree of fault: 16 – 24 months of ineligibility; "standard" significant degree of fault - 20 months of ineligibility.
- Normal degree of fault: 8 – 16 months of ineligibility; "standard" normal degree of fault - 12 months of ineligibility.
- Light degree of fault: 0 – 8 months of ineligibility; "standard" light degree of fault - 4 months of ineligibility.

h) The Appellant submitted that based on the *"factual circumstances"* his *"*[…] *level of fault* […] *was not significant* [but rather light]*"*, because he

- *"*[…] *was not aware that his behaviour amount* [sic] *to the violation of anti-doping rules; he did not know also that there was a serious risk that such behaviour could amount* [sic] *or cause the violation of anti-doping provisions and he consciously ignored such risk – the Athlete used the product provided by the PWF which had been previously used by him and his brother for already long time, what allowed the Athlete to trust the used products and the used method of application. Also, the fact that none of the results of anti-doping controls was ever positive throughout his whole sports carrier fortified a conviction of the Athlete, that all training and nutrition methods guarantee not only the best, but also the safest preparation to sport competitions (the jurisprudence of CAS confirms that it is a mitigating circumstance influencing the level of athlete's fault: CAS 2011/A/2515)";*
- *"This kind of product (Vitamin B12) is commonly used in this specific form by weightlifting athletes and by people training sports professionally and even by people who do not train at all";*
- *"The used product was neither classified as the 'risky' one, nor it could* [sic] *improve sport results in the effect. At the same time, it is the pro-health product, necessary not only to maintain good mental health and mental capacities, but it is also the product helpful in regulating a level of homocysteine";*
- *"The used product was previously provided by the PWF, tested and consulted with the experts – the doctor of national team of PWF and with the doctor of the sport club";*
- *"The used product was of verified origin – the PWF acquires products from providers meeting the obligations prescribed in public procurement proceedings, the one of which is to ensure that the provided products are safe and do not contain any prohibited substances (also contaminated product was delivered by PWF supplier it is Mr Damian Rus who is leading pharmacy "Pigulka")";*
- *"The product was used under the supervision of medical expert, who was also applying the product to all team members of the national team of PWF";*
- "The Appellant had *"*[…] *not received a considerable education and knowledge in the field of anti-doping rules and obligations of athletes arising out of those rules (nor from Polish NADO or PWF)* […]*"*, which constitutes a mitigating factor*;*
- *"The Athlete was under the pressure of stress, which was caused by the sportive factors (the most important sport event in the 4-year period was upcoming) and family factor (the brother of the Athlete, with whom the Athlete is in very close relations, at that time of relevant events was expecting a child, and due to the sports preparations the Athlete could not participate in family lif* [sic] *and was* [sic] *is more his wife has got some pregnant problems) – the jurisdiction of CAS confirms that the*

circumstance of this kind constitutes the mitigating factor, influencing the level of athlete's fault (CAS 2012/A/2756)".

i) According to the Appellant, the Panel, when fixing the appropriate sanction should also take account of the facts that:

- *"*[…] *since August 2016 the Athlete has been de facto temporarily suspended, what causes that to the present day, the period of temporary suspension equals 11 months"; and*
- the Athlete was deprived of participating in the Olympic Games in Rio *"*[…] *which in his individual case was connected with the withdrawal of accreditation and expulsion of the Athlete from the Olympic village* […]*"* and that *"*[…] *the expulsion of the Athlete from the Olympic village led to a huge scandal of an international dimension, for which the Athlete is blamed in Poland* […]*".*

3) With respect to the commencement of the period of ineligibility

j) According to the Appellant the period of ineligibility should start on the day of the First Doping Test, *i.e.* 1 July 2016, because *"in this individual case the delay in the disciplinary proceeding or in other activities related to anti-doping control was not caused by the Athlete, that is that he bears no fault for that* […]. [Although] *the Athlete was informed by the anti-doping controllers that if he does not receive an information* [sic] *on the adverse analytical finding within 3-4 weeks, then it shall be deemed as a confirmation of lack of infringement of anti-doping provision,* [he was not informed until 10 August 2016]*".*

4) With respect to Art. 10.2.2 of the IWF ADP

k) On a subsidiary basis the Appellant submitted that in any case he did not act intentionally. In order to show lack of intent the Appellant need not show how the Prohibited Substance entered his system. In any case the Appellant submits that *"even if this Panel will decided* [sic] *that presented in this case Contaminated Product will not meet the burden of proving source of prohibited substance for purpose of applying Article 10.5.1.2 IWF ADP, then it should be treated as a more probable than not possibility how the prohibited substance entered Appellant body which credible Appellants explanations".*

l) The Appellant submitted that his lack of intent followed from the facts that:

- he was aware that he would undergo various anti-doping tests after the Polish Championship, in particular in preparation for the Olympic Games in Rio and during the latter;
- he never intended to cheat. According to the Oxford Dictionary, *"a '**cheat**' is a '**person who behaves dishonestly in order to gain an advantage**' and the act of 'cheating' amount to 'a fraud or deception'. Therefore the Athlete who 'cheat' are athletes who have acted knowingly and dishonestly to gain an unfair advantage"* (emphasis added by the Appellant);
- he was always convinced *"*[…] *that he is able to win with other athletes thanks to his hard work, training, devotion, not by using any Prohibited Substances"*;

- the Athlete was in *"*[…] *the IWF registered group of athletes* […] *with the obligation to inform about his current place of stay and with the possibility of undergoing unexpected anti-doping controls. For all that period, the Athlete was honestly meeting his obligation and underwent the significant number of anti-doping controls. …* [H]*e was one of the most often controlled Polish athletes and none of the anti-doping controls showed that the Athlete could possibly be using any prohibited substances* […]. *What is more registered group of athletes should not only be consider* [sic] *as an obligation and mechanism to fight with doping but in a cases* [sic] *like the Appellant's it should be also considered as an circumstances* [sic] *which confirms 'lack of intent' on the side of the athlete because any top athlete would not knowingly or intentionally violate anti-doping rule having in mind that he could be subjected to daily anti-doping control"*;

- *"[B]eing in the top weightlifters in the World and the main candidate to the medals in Olympic Games in Rio in the same discipline,* [he] *was fully aware that he would be undergoing anti-doping controls in the year 2016, including also preparation to the Olympic Games such as training camp in Bydgoszcz on* [sic] *May 2016, Polish Championship on* [sic] *June 2016, training camp in Spala on* [sic] *July 2016 or before and after Olympic Games in August 2016"*;

- he *"did not have any purpose or goal during the Polish Championship which would be worth to intentionally use prohibited substance to gain some advance […]. [T]he Athlete treated the Polish Championship only as training ground allowing him to verify his current sport condition before the upcoming Olympic Games";*

- *"scientific sources from 2005 […] clearly shows that one injection of 150 mg of nandrolone […] remains detectable in concentration exceeding the allowed WADA decisive limit for the period between* ***6 and 8 months****, from the moment of application of injection. […]. In consequence, if the Athlete applied nandrolone by injection consciously (and just in the amount of one dose, what however would be illogical and would not have any influence on the Athlete's results or sport performance), the prohibited substances would have been detected also in other 3 anti-doping tests conducted after the day of 1st July 2016";*

- if the Appellant *"use[d] nandrolone intentionally in doses which are recommended to use to gain an advantage then all another* [sic] *anti-doping controls will also be positive (anti-doping control dated on 12th July 2016 and 22nd July 2016 […])"* (emphasis added by the Appellant).

5) With respect of the principle of proportionality

m) The Appellant submitted that he is eligible to a reduced sanction. The CAS cases cited by the Respondent should not be used as a benchmark (in particular CAS 2015/A/4160), because the facts and circumstances in this case and in CAS 2015/A/4160 differ considerably. Instead the Panel should take guidance in particular from cases where the Athlete acted non-intentionally, such as CAS 2015/A/4129, CAS 2016/A/4643 or CAS 2016/A/4676.

n) The Appellant noted that despite the wording of the World Anti-Doping Code ("the WADA Code") and the enactment of its latest version there remains *"the obligation of*

disciplinary panels to measure the sanctions applied in any particular case against the principle of proportionality" according to CAS jurisprudence[2].

o) Finally, the Appellant requested the Panel to also take into account the negative impact of the whole matter on his everyday life. Not only was he sentenced by the sporting authorities, but had to endure a lot of pressure and criticism by the media and the community.

B. The Respondent

50. The Respondent requested, in its Answer dated 31 July 2017 that:

1. *"The Appeal filed by Mr Tomasz Zielinski is dismissed.*
2. *The IWF is granted an award for costs".*

51. The Respondent's submissions on the merits can be summarised in their main parts as follows:

1) Facts

a) The Respondent had acknowledged that the First Doping Test carried out by the Polish NADO produced an AAF for 19-Norandrosterone.

2) The intentional violation

b) Referring to Art. 10.2.1.1 and Art. 10.2.3 of the IWF ADP as well as CAS jurisprudence, the Respondent submitted that *"*[a]*s the athlete bears the burden of establishing that the violation was not intentional* […], *he/she must necessarily establish how the substance entered his/her body* […]*"*. (emphasis added by the Respondent)

c) The Respondent was however *"*[…] *aware of three CAS awards which found that in 'extremely rare' cases, an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance* […]*"*.

d) Applying these criteria to the case at stake, the Respondent concluded that *"*[…] *there are no exceptional circumstances in this case, which show to the relevant standard of proof that the violation was not intentional (without the Athlete having to establish the origin of the prohibited substance)"*. In particular, lack of intention cannot be assumed from *"protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, apparently diligent (but unsuccessful) attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record"*.

3) The establishment of the origin of the Prohibited Substance

e) In order to prove the origin of the Prohibited Substance on a "balance of probability" the Athlete had to show that the occurrence of the circumstances asserted is more probable than their non-occurrence. Therefore, the Athlete *"*[…] *must adduce concrete*

2 CAS 2005/A/830.

evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question".

f) Referring to CAS jurisprudence (CAS 2010/A/2230, CAS 99/A/234, CAS 99/A/235, CAS 3025/A/3820, CAS 2006/A/1067, CAS 2014/A/3615, CAS 2006/A/1032) and the jurisprudence of the Anti-Doping Tribunal of the International Tennis Federation the Respondent submitted that the Athlete was responsible for ensuring that no prohibited substance enters his/her body. Therefore, an athlete has to provide concrete evidence, instead of mere speculation, unverified hypothesis or protestations of innocence. This burden cannot be discharged by showing that the athlete made reasonable efforts to establish the origin, but they are without success. The Respondent submitted that *"*[t]*he resolution of the issue which arises at this first stage does not relate to the presence or absence of fault or negligence, or, if it is present, its degree. Such matters are relevant only to the second stage. The resolution of the issue which arises at the first stage depends upon the answer to a simple question: has the person charged established what the source is? Mere assertion as to what the source is, without supporting evidence, will be insufficient". "[T]o prove that the concentrations of 19-NA in her sample supplied during the Paris test were caused in part by the ingestion of nutritional supplements, and in what proportion, the player would need to adduce very specific evidence regarding what type of supplement was taken, in what doses and intervals and during what periods".*

g) Applying these criteria to the case at stake, the Respondent submitted that *"[t]he Athlete and/or his brother had different supplements and other products tested by the National Medicines Institute in Poland and an ampoule was found to contain 'nandrolone phenylopropionate'".* With reference to the grounds for the Appealed Decision, the Respondent concluded that the Appellant failed *"to establish the origin of the prohibited substance"*, since

- The explanation provided by the Appellant *"simply relies on two ampoules allegedly found by the Athlete's brother while he was cleaning out his garage* […].
- *The ampoules had no label, no brand, no indication of their content, no indication of a batch or series number, no indication of the manufacturer* […], *and there was no information as to (i) where and when they were purchased, by whom, or when, (ii) whether and when they were administered to the Appellant and/or his brother or (iii) where and how they were transferred to the laboratory after being found in the garage.*
- *The product, which was administered by injection, is not disclosed by the Athlete on any doping control form either* […]. *In short, there is no provenance and no chain of custody".*

h) Furthermore, the Respondent noted that the Appellant did not use a WADA-accredited laboratory to analyse the supplements, although the Polish NADO offered such possibility to the Appellant. Instead, the Athlete's brother chose a non-accredited laboratory "in order to reduce costs".

i) The Respondent also objected to the Appellant's presentation of facts on the grounds that:

- *"The only vitamin B12 product ever mentioned in this case to the IWF's knowledge is the product 'Lophakomp-B12 (3000 mcg)'. It was referred to by Dr. Kopko before the Polish NADO, as the*

preparation provided to the athletes by the PWF that he was administering to "all the athletes taking part in the training camp" in Spala in July 2016 (POL) […], *which included the Athlete* […].

- *However, the ampoules that were provided by the Athlete for analysis do not look similar to the "Lophakomp-B12 (3000 mcg)" ampoules* […]. *Unlike the unidentified ampoule, the "Lophakomp-B12 (3000 mcg)" ampoules have a proper label on them and indicate their manufacturer.*
- *Moreover, the analysis of the two ampoules provided by the Athlete showed that only one of them contained nandrolone, while the other one was composed only of vitamin B12 (cyanocobalamin). The laboratory noted that the ampoule, which was found to contain nandrolone, had "oily drops"* […]. *Although they were allegedly found together, it appears that both had on their face a different content.*
- *It is also noteworthy that no Polish athlete, other than the Athlete and his brother, tested positive for nandrolone or any other Prohibited Substance during the period from 15 May until the Rio Olympic Games, despite some of them having also received injections of B12 vitamins as indicated by Dr. Kopko* […]. *In total, 96 doping controls were performed in this period, including three positive tests of the Athlete and his brother* […]*".*

j) The Respondent submitted that there is no evidence that the alleged injection of the contaminated ampoules could have caused the concentration of the Prohibited Substance in the Athlete's sample and that the report provided by Appellant from the Polish laboratory *"does not give any indication in this respect". "An Athlete must also demonstrate that the source could have caused the actual adverse finding".*

k) Finally, the Respondent pointed out that in the case of the Athlete's brother the Polish NADO found that the origin had not been established and, consequently, sanctioned him with an ineligibility period of four years.

V. JURISDICTION

52. The jurisdiction of the CAS derives from Art. R47 of the CAS Code in connection with Art. 13.2.1 and 13.7.1 of the IWF ADP (edition 2015). Art. R47 para 1 of the CAS Code reads as follows:

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

53. Pursuant to Art. 13.2.1 and 13.7.1 of the IWF ADP (edition 2015), in cases arising from participation in an IWF Event, in cases involving International-Level Athletes or in cases when a decision is issued by IWF concerning International-Level Athletes or National-Level Athletes, the appeal shall be lodged with CAS within twenty-one (21) days from the date of receipt of the decision. The Panel, thus, has jurisdiction with respect to all Parties involved pursuant to Art. 13.2.1 and 13.7.1 of the IWF ADP.

54. The jurisdiction of the CAS further follows from the OoP that has been duly signed by the Parties. Finally, the Panel notes that the jurisdiction of the CAS has not been contested by any of the Parties to this proceeding. In light of the above, it must be concluded that the Panel enjoys jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

55. In order for an appeal to be admissible, Art. R47 of the CAS Code requires that there is a decision that forms the object of the appeal. The second prerequisite stipulated by Art. R47 of the CAS Code is that all internal remedies available to the parties must be exhausted before filing an appeal to the CAS. Finally, the time limits for appeal must be observed for an appeal to be admissible (Art. R49 of the CAS Code). According to Art. 13.7.1 of the IWF ADP appeals to the CAS shall be filed within twenty-one (21) days from the date of receipt of the decision. As the Appealed Decision was issued on 15 May 2017 and the Appellant filed his appeal with CAS on 5 June 2017, the appeal was filed within the prescribed deadlines.

56. As the Appealed Decision qualifies as a "decision" within the meaning of Art. R47 of the CAS Code and the appeal complies with all other requirements of Art. R47 of the CAS Code, it follows that the appeal is admissible.

VII. OTHER PROCEDURAL ISSUES

A. The reservation of right

57. In his Appeal Brief dated 19 June 2017, the Appellant reserved his right *"to expand (elaborate) on its statement of facts in case the Respondent's answer contains factual allegations that need to be rebutted"*.

58. Even though a party cannot unilaterally deviate from the clear wording in Art. R56 of the CAS Code by reserving its right to complement or amend its submissions, the Panel by letter dated 2 October 2017 sought clarification of the nature of Appellant's reservation of right contained in his Appeal Brief.

59. On 9 October 2017, the Appellant – referring to his reservation contained in para. 15 of his Appeal Brief – informed the CAS Court Office that he did not intend to present any further written submissions. Consequently, the Appellant's reservation has become moot or has been waived.

B. The Appellant's request for postponement of the hearing

60. On 26 October 2017, the Appellant requested a postponement of the hearing on the grounds set forth above (see No. 34 - 36).

61. The Respondent objected to such postponement and the Panel has declined such postponement in its letter dated 27 October 2017.

62. At the hearing the Appellant stated that he no longer requested a postponement. Consequently, the Appellant has waived his request and any decision by the Panel has become moot. Thus, the Panel no longer needs to address the issue. This is all the more true, considering that the Appellant expressly stated at the end of the hearing that his procedural rights have been respected in full.

C. The Appellant's request to admit a polygraph test

63. With his letter dated 26 October 2017, the Appellant requested leave by the Panel to submit new evidence on file, *i.e.* the results of a polygraph test. The Appellant justified the late filing of the polygraph test by explaining that it was not available at the time when he submitted his Appeal Brief. He felt compelled to submit to such test because of the pressures he experienced in Poland, where he was treated and regarded as an intentional doper. According to the Appellant the test was conducted on 19 October 2017, and on 25 October 2017 the respective results were transmitted to the Appellant, who thereupon further transmitted them to be translated into English language. The Appellant stated that the polygraph test only served to confirm the submissions that he had already provided in the Appeal Brief. With reference to Art. R56 of the CAS Code the Respondent opposed the admissibility of the polygraph test.

64. Considering and weighing the arguments brought forward by the Parties, the Panel decided to dismiss the Appellant's request. There were no exceptional circumstances within the meaning of Art. R56 of the CAS Code that justify the admission of the polygraph test as evidence at this stage of the procedure. Art. R56 of the CAS Code requires the Parties to act diligently, in particular to refer to all the available evidence at the time of their submissions. The polygraph test was only commissioned after the Appellant had submitted his Appeal Brief. However, nothing prevented the Appellant from ordering such test at an earlier point in time, *i.e.* before the deadline to file the Appeal Brief elapsed. In particular, in view of the contents of the Appealed Decision the Appellant knew that he was being charged with intentional doping. There are no exceptional circumstances that forced the Appellant to commission the polygraph test only in October 2017 rather than earlier.

65. Furthermore, and as discussed above (No. 30) the Appellant had reserved his right to make further submissions in his Appeal Brief. When addressed by the Panel by letter dated 2 October 2017 to clarify what additional comments he intended to make, the Appellant responded that he did not wish to submit further written statements. Accordingly, any reservation the Appellant might have claimed to submit this evidence later was expressly waived.

66. To conclude, the Panel found that there are no exceptional circumstances and the results of the polygraph test could not be admitted as new evidence on the file. This decision was communicated to the Parties at the hearing.

D. The testimony of Mr Jerzy Sliwinski

67. In the course of the hearing the Parties agreed not to call Mr Jerzy Sliwinski as a witness and, thereby waived his testimony.

E. Appellant's e-mail dated 4 December 2017

68. On 4 December 2017, *i.e.* after the closing of the proceedings, the Appellant filed additional submissions. The Appellant thereby submitted an English translation of the polygraph test, thereby implicitly requesting (again) that the polygraph test be admitted on file. The Panel has already dealt with the issue of the polygraph test and communicated its decision to the Parties. The Appellant did not file any valid reasons why the Panel should come back and overturn its previous decision not to admit the polygraph test on file. This is all the more true, considering that the Appellant acknowledged at the end of the hearing that his right to be heard had been fully respected (No. 41).

69. As for the new argument brought forward by the Appellant, *i.e.* that the pharmacy that provided the dietary supplements, medicines and vitamins to the Polish Weightlifting Federation had closed its business activity, the Panel finds that such submission is not only belated, but also immaterial to the outcome of this case. Even if such argument were to be admitted on file, the Panel finds that it would not alter the outcome of these proceedings.

VIII. APPLICABLE LAW

70. Art. R58 of the CAS Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

71. In its submissions the Respondent relied on the provisions of Art. 176 and Art. 182 para. 2 of the Swiss Private International Law Act (hereinafter referred to as "the PILA") and submitted that CAS should primarily apply the CAS Code to the procedural aspects of the case. According to the Appellant the IWF ADP and, subsidiarily, Swiss law should apply to the merits of the case.

72. The Panel finds that the "applicable regulations" within the meaning of Art. R58 of the CAS Code are the IWF ADP. Furthermore, in the absence of a choice of law by the Parties, the Panel notes that the federation which has issued the Appealed Decision – *i.e.* the IWF – is domiciled in Switzerland. Therefore, and in accordance with Art. R58 of the CAS Code the Panel shall apply Swiss law subsidiarily.

IX. MERITS

A. The Anti-doping rule violation

73. According to Art. 2.1 of the IWF ADP the *"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample"* constitutes an ADRV.

74. It is not disputed between the Parties that the A sample of both Doping Tests (the First Doping Test conducted on 1 July 2016 and the Second Doping Test conducted on 31 July 2016) produced an AAF for 19-Norandrosterone, which is a prohibited substance according to the WADA 2016 Prohibited List, in class S1.1 Anabolic Agents.

75. Despite the fact that the Appellant has tested positive on two occasions, he has only committed a single ADRV. The latter follows from Art. 10.7.4 of the IWF ADP, since the Appellant was not notified of the analytical results from the first sample before he tested positive as a result of giving the second sample.

B. Period of Ineligibility

76. Art. 10.2.1 of the IWF ADP provides as follows:

> *"The period of Ineligibility shall be four years where:*
>
> *The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*
>
> *The anti-doping rule violation involves a Specified Substance and IWF can establish that the anti-doping rule violation was intentional".*

77. The term "intentional" is defined in Art. 10.2.3 of the IWF ADP as follows:

> *"As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.* […]*".*

78. The Appellant submitted that he did not act intentionally and that, therefore, Art. 10.2.1 of the IWF ADP does not apply. In particular, the Appellant submits that either the AAF resulted from a contaminated product or it was the result of a sabotage directed against him. Be it as it may, in both circumstances the Appellant would not have acted intentionally.

79. The Parties agree that the IWF ADP places the burden of proof upon the Athlete that he did not act intentionally. Therefore, according to Art. 3.1 of the IWF ADP the Appellant has to either rebut a presumption or establish specified facts or circumstances by a balance of probability which according to CAS jurisprudence means that the circumstances established by the Appellant have to be *"more likely than not"*.

1) The contamination theory

80. The Appellant stated – *inter alia* – that the AAF resulted from vitamin B12 ampoules that were contaminated. In support of his submission the Appellant submitted the report of a laboratory that shows that one of the ampoules contained the Prohibited Substance 19-Norandrosterone.

81. In the view of the Panel the contamination theory is fundamentally flawed. There are several reasons:

(a) first of all, the ampoules referred to by the Appellant cannot be qualified as "contaminated products". The IWF ADP refers to a "contaminated product" in Art. 10.5.1.2. According thereto a contaminated product is defined as a *"product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search"*;

(b) the purpose of the provision is to acknowledge on the one hand that athletes use sports-related products (such as – *e.g.* – nutritional supplements) and on the other hand to protect those athletes that show a minimum level of diligence before using such sports-related products, *i.e.* by reading the label and searching the internet to make sure that no prohibited substances are contained in it (RIGOZZI/HAAS/WISNOSKY/VIRET, Breaking down the process of determining a basic sanction under the 2015 World Anti-Doping Code, 15 (2015) The International Sports Law Journal 3, 38 *et seq*.);

(c) the ampoules referred to and submitted for analysis to the laboratory by the Appellant, however, did not have any labelling whatsoever. The ampoules did not show the manufacturer nor any expiry date;

(d) furthermore, there was no information regarding their contents. If an athlete uses a product in a sport-related context that has no information on it, the athlete – from the very outset – is not entitled to any protection; and

(e) on the contrary, such behaviour fully qualifies as *"intentional"* within the meaning of Art. 10.2.3, because using such a product is knowingly engaging in conduct that exposes the athlete to a significant risk resulting in a possible ADRV.

82. The Athlete objected to the above finding by stating that the ampoules were provided to him by the Polish Weightlifting Federation and were applied to him by doctors, but there is no evidence that ampoules without any labelling were provided by the Polish Weightlifting Federation to the Appellant.

83. The Panel finds the Appellant's testimony highly contradictory. He changed his story several times after being confronted with inconsistencies. According to him the ampoules sometimes were labelled (with a sticker and/or a loose banderole), sometimes had engravings/scratchings on them and sometimes had no markings whatsoever. This is rather surprising considering that allegedly the ampoules all came from the same manufacturer and the same source. In addition, the Appellant's statement did not match with the testimony of his brother. The latter did not remember any ampoules with engravings and scratchings. This is quite astonishing to the Panel considering that both the Appellant and his brother allegedly shared the ampoules frequently.

84. Furthermore, there is no evidence that any unlabelled ampoules were ever injected to the Appellant by a doctor:

(a) upon the Appellant's request the Panel heard the witness testimony of Dr. Daniel Kopko at the hearing. The latter stated that he would never inject the contents of an ampoule

that did not contain any labelling or expiry date on it. Dr. Kopko further credibly asserted that he would always check the data on the ampoule before applying an injection to a patient or an athlete;

(b) furthermore, Dr. Kopko stated that he had never seen any vitamin B12 ampoules in his whole career that were not labelled. There is no other evidence on file that such unmarked and unlabelled ampoules were ever applied to the Appellant by another doctor; and

(c) consequently, the Panel concludes that if the ampoules were the source of the AAF, they must be qualified as highly suspicious and that an athlete applying a minimal duty of care would never have applied or used them. Thus, if one were to follow the Appellant's submission his behaviour would have to be qualified as intentional within the meaning of Art. 10.2.1.1 in conjunction with Art. 10.2.3 of the IWF ADP.

2) The sabotage theory

85. At the hearing the Appellant supplemented his arguments and stated that if the AAF did not stem from a contaminated product he must have been the victim of a sabotage. The Panel is not prepared to accept this theory. It is speculative, unsubstantiated and unconvincing for the following main reasons:

(a) to sabotage an ampoule is extremely difficult and needs highly sophisticated equipment. If someone really intended to sabotage the Athlete there would have been much easier ways to achieve this than by manipulating a vitamin B12 ampoule;

(b) if someone was sufficiently sophisticated to manipulate the ampoule he or she would have done so in a way not to stir any suspicion. In particular, he or she would have labelled the ampoule so that any doctor would have injected the contents of the ampoule without hesitation;

(c) the ampoule that had been analysed by the laboratory and that contained the Prohibited Substance had been found in the garage of the Appellant's brother. The Appellant's brother explained that he had shared his ampoules with the Appellant. However, if someone wanted to sabotage the Appellant he or she would not have delivered manipulated ampoules to the Appellant's brother hoping that the latter would share the ampoules with the Appellant. Instead, the person orchestrating the sabotage would have delivered the manipulated ampoules to the Appellant directly.

(d) the person behind the sabotage would not have delivered some manipulated and some clean ampoules to the Appellant's brother. Instead, the offender would have manipulated all ampoules in order to securely target the Appellant; and

(e) finally, the Appellant's submission as to who would have an interest in sabotaging him were imprecise, blurred and generic in nature. No names were advanced, and no theory submitted as to who might have devised or participated in the sabotage scheme.

3) Other Aspects that might speak in favour of unintentional use

86. The Parties disagree whether in order to prove unintentional doping the Appellant must show how the Prohibited Substance entered into his body. If the latter were true (as submitted by the Respondent), this Panel would have to assume intentional use without any further examination, since both the Appellant's contamination theory and the sabotage theory failed to convince this Panel on a balance of probability. However, the Panel is not prepared to follow such restrictive approach of Art. 10.2 of the IWF ADP. The Panel feels comforted in its view when looking at the legislative history of Art. 10.2.1 of the IWF ADP (which corresponds to Art. 10.2.1 of the WADA Code). The legislative history clearly evidences that in order to rebut the presumption of intent the athlete need not show how the prohibited substance entered into his or her system.

87. The drafting team of the WADA Code 2015 had contemplated at the time to introduce such requirement into Art. 10.2 of the WADA Code and had requested a supplementary expert opinion by Judge Jean-Paul Costa on this issue, *i.e.* the new draft wording. The latter stated in his expert opinion as follows:

> *"Une telle preuve est difficile à rapporter. Ce durcissement est-il excessif ? On peut éprouver des doutes à cet égard, car une preuve impossible aboutirait à un renversement de la charge de la preuve ou à l'institution d'une présomption quasi-irréfragable de violation des règles antidopage.* […] *J'en conclus donc, non sans quelque hésitation je l'admets, que la nouvelle rédaction du projet de révision peut être considérée comme acceptable, étant bien entendu précisé que ce seront les juridictions compétentes en cas de litige qui auront à apprécier les éléments de preuve fournis par les parties, et à les peser".*
>
> free translation: *"Such proof* [how the substance entered the body][3] *is difficult to provide. Is such aggravation excessive? One could have doubts in this respect, because an impossible proof either leads to a reversal of the burden of proof or to the irrefutable assumption of an anti-doping rule violation* […] *I conclude, thus, not without some hesitation, that this new text of the draft may be considered acceptable, subject however that it will be for the competent jurisdiction in the individual case to assess the elements of evidence adduced by the parties".*

88. In view of Judge Jean-Paul Costa's concerns (*"I conclude, thus, not without some hesitation"*), the WADA Code redaction group went back to the initial text of the draft (which corresponds to the final text enacted) and acknowledged that whilst the route of the ingestion of the prohibited substance is an important fact in order to establish whether or not an athlete acted intentionally, it should not be a mandatory condition to prove lack of intent on the part of the athlete.

89. In the case at hand the Appellant has failed to establish how the Prohibited Substance entered his system. However, this does not exempt the Panel from examining all the other facts advanced by the Athlete whether or not he acted intentionally. Consequently, the Panel has considered and weighed all arguments on file to determine whether in its view the Athlete acted with intent.

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3 Inserted for better understanding.

90. The Athlete stated in his submissions that it did not make any sense for him to dope, because he was enrolled in the IWF registered testing pool, *i.e.* to the pool of the athletes that must inform the IWF on their whereabouts in order to be submitted to (unannounced) out-of-competition tests at any time. However, this is no proof that the Appellant lacked intent. The history of the fight against doping is replete with examples of athletes that were included in an international federation's registered testing pool and committed an intentional ADRV. In fact, that is the very object being guarded against by enrolling athletes in the registered testing pools of international federations, and is necessary to further the deterrent effect of having the registered testing pools under the WADA Code in the first place.

91. The Panel is similarly unconvinced by the Appellant's other arguments such as that:

(a) he had various negative anti-doping tests;

(b) in 2016 he was one of the most controlled Polish athletes;

(c) his awareness that in 2016 (before and during the Polish Championship and the Olympic Games in Rio) there would be many anti-doping tests; or

(d) his early arrival in the training camp.

92. The Panel does not find these facts sufficiently proven, but even if they were, none of them would establish on a balance of probability that the Athlete lacked intention when committing the ADRV under the relevant standards.

93. The Appellant's claim that his stressed emotional and financial situation caused him not to consider the negative consequences of using the unmarked ampoules is of no assistance to him. The Appellant submitted that he lost everything due to the ADRV and that he would have never risked his livelihood and sporting career by doping. Again, the fight against doping is full of examples of athletes gambling in order to obtain an (undue) advantage. Of course, no athlete will dope if he knows in advance that he will be caught.

94. It is common knowledge that a considerable number of athletes, however, are not caught by the net cast by the anti-doping authorities. It is in the belief that there are or may be loopholes in the anti-doping system that some athletes can feel the irrational and speculative incentive to dope. Thus, the harsh consequences that the Appellant had to endure after the AAFs were discovered are no indication that the latter did not act intentionally at the time. They flow from and are the consequences of the Athlete's act itself.

95. The Appellant submitted that it would not have made any sense for him to dope at the Polish Championship because his participation at this event was only intended as a training ground for the Olympic Games in Rio. In addition, the Appellant submits that it is nonsensical to use a substance that has such a long detection window as 19-Norandrosterone. Furthermore, one dose/injection of said substance – according to the Appellant – would have no influence on his performance. That he is not a repeated user can be followed – according to the Appellant – from the fact that the two anti-doping tests he submitted to on 12 and 22 July 2016 were negative.

96. These arguments do not convince the Panel on a balance of probability that the Appellant did not dope intentionally. It is true that the analysis of the Appellant's tests of 12 and 22 July 2016 were reported negative. It is equally true, though, that the analysis showed the presence of 19-Norandrosterone in the Appellant's sample, but below the reporting threshold. Thus, there is evidence on file that the Prohibited Substance entered the Appellant's system on multiple occasions. Instead, the findings are compatible with a repeated application of the Prohibited Substance over a longer period of time and this factor speaks in favour of an intentional use of the substance.

4) The principle of proportionality

97. The Appellant submitted that the period of ineligibility provided for in Art. 10.2.1 of the IWF ADP must be reduced based on the general principle of proportionality. The Panel is aware of this principle. The rules contained in the IWF ADP according to which the period of ineligibility may be reduced based on fault-related and non-fault-related criteria are an expression of this principle of proportionality. The Appellant has not brought forward any valid argument that the possibilities to reduce the period of ineligibility built into the IWF ADP only insufficiently incorporate or implement the general principle of proportionality. In addition, no facts have been established by the Panel that would justify a reduction based on such principle.

98. Thus, the Panel is not prepared to reduce the period of ineligibility provided for in the IWF ADP for intentional doping. This is all the more true, when looking at the substance detected in the Appellant's bodily specimen, which is an anabolic agent that has a significant performance enhancing effect.

C. Conclusion

99. Taking into account the written and oral submissions of the Parties the Panel cannot conclude otherwise than that he committed the ADRV intentionally. The Athlete could not establish on a balance of probability any reasons to reduce the normally applicable period of ineligibility enshrined in Art. 10.2.1 of the IWF ADP. Therefore, the period of ineligibility shall be four years.

100. The Panel does not see any reason to reconsider its decision in view of the last e-mail of the Appellant dated 4 December 2017. The submissions provided by the Appellant in that e-mail are not only belated, but also completely unsubstantiated and immaterial for the outcome of the case.

D. The commencement of the period of ineligibility

101. Art. 10.10, 10.10.1 and 10.10.3.1 of the IWF ADP provide as follows:

> *"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed".*

"Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, IWF 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. […]*".*

"[…] *If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".*

102. In application of these rules the Panel rules that the period of ineligibility starts on the date of the final hearing, *i.e.* on 30 October 2017. However, the Appellant shall receive credit for the period of ineligibility already served.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 5 June 2017 by Mr Tomasz Zieliński against the decision issued on 15 May 2017 by the IWF Hearing Panel is dismissed.

2. The decision issued on 15 May 2017 by the IWF Hearing Panel is confirmed.

(…)

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