CAS 2019/A/6180 World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA) and Ryan Hudson

AWARD ON JURISDICTION

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator:	The Hon Michael J. Beloff QC, Barrister, London, United Kingdom
Ad hoc Clerk:	Mr Tiran Gunawardena, Solicitor, London, United Kingdom

in the arbitration between

World Anti-Doping Agency (WADA), Montreal, Canada

Represented by Messrs Ross Wenzel and Magnus Wallsten, Attorneys-at-law, Kellerhals Carrard, Lausanne, Switzerland

- Appellant -

and

United States Anti-Doping (USADA), Colorado Springs, United States

Represented by Messrs William Bock and Jeff Cook, Attorneys-at-law, Kroger Gardis & Regas LLP, Indiana, United States of America

- First Respondent -

&

Mr Ryan Hudson, Oregon, United States of America

- Second Respondent -

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms, including by enforcing its World Anti-Doping Code ("WADC").

2. The United States Anti-Doping Agency ("USADA" or the "First Respondent") is the National Anti-Doping Organization ("NADO") in the United States of America for Olympic, Paralympic, and Pan-American Sport, responsible for protecting clean athletes and the integrity of sport.

3. Mr Ryan Hudson (the "Athlete" or "Second Respondent") is an American citizen and professional weightlifter, born on 16 December 1978.

II. INTRODUCTION

4. The substantive issue in this proceeding is whether USADA's Acceptance of Sanction dated 27 November 2018 (imposing a four-year period of ineligibility starting on 14 June 2017) in the Athlete's case should be set aside; and whether, in lieu, he be found to have committed a second anti-doping rule violation ("ADRV") and be sanctioned with an eight-year period of ineligibility starting on 24 May 2020, i.e. the date immediately following the end of the period of ineligibility accepted by him in respect of a first ADRV (the "First ADRV") (the "Substantive Issue").

5. Aside from the Athlete, who has opted not to participate actively in most aspects of this proceeding, the Parties in the interest of procedural economy have agreed (as appears from WADA's letter of 7 June 2019 and USADA's letter of 12 June 2019), that the Sole Arbitrator should decide certain threshold issues (the "Preliminary Issues"), namely:

    a. whether the Court of Arbitration for Sport ("CAS") has jurisdiction over the appeal ("Jurisdiction");

    b. if the CAS does have jurisdiction, what is the scope of the appeal, i.e. does it extend to whether the Athlete committed a second ADRV or is it limited to the sanction for such violation ("Scope"); and

    c. whether a "presence" violation is committed (for the purposes of Article 10.7.4.1 of the WADC) on the date of ingestion of a prohibited substance or on the date of the doping control test ("Date").

6. Although any decision on the Substantive Issue might be of limited significance given that, as will be seen below, the Athlete has apparently retired from his sport of weightlifting, decisions on the jurisdiction and the date issues would have by contrast more general impact.

III. FACTUAL BACKGROUND

7. As a preliminary remark, the Sole Arbitrator notes that the brief factual description which follows is based on the Parties' submissions to date, which are sufficient to decide the issue of the jurisdiction of the CAS. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties on the threshold issues in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

8. On 5 December 2015, the Athlete underwent a doping control test by USADA at the American Open. The sample collected resulted in an Adverse Analytical Finding ("AAF") for stanozolol (and its metabolites 16B-hydroxystanozolol and 4B-hydroxystanozolol).

9. On 14 December 2016, the Athlete accepted an ADRV (i.e. the First ADRV). The Athlete was sanctioned with a four-year period of ineligibility as described in the International Weightlifting Federation ("IWF") Anti-Doping Policy ("ADP") and the WADC, beginning on 24 May 2016.

10. On 14 June 2017, the Athlete underwent an out-of-competition doping control test by USADA.

11. On 11 July 2017, the WADA-accredited laboratory in Salt Lake City, Utah, United States of America (the "Salt Lake Laboratory") reported that the Athlete's A-Sample resulted in an AAF for dehydrochlormethyltestosterone ("DHCMT").

12. On 18 July 2017, the Athlete was informed of the AAF, and of his right to request the relevant laboratory documentation package. The Athlete was also informed that if "*it is ultimately determined that a doping violation has occurred, a sanction may be imposed that will include [...] an eight-year period of Ineligibility for* [his] *second anti-doping rule violation pursuant to the IWF Anti-Doping Policy and Articles 10.1, 10.2, 10.7 and 10.8 of the* [the WADC]."

13. On 11 August 2017, the Salt Lake Laboratory reported that the B-Sample analysis confirmed the results of the A-Sample.

14. On 17 August 2017, the Athlete was informed that, following confirmation of the AAF in the B-Sample, the matter was being forwarded to the USADA Anti-Doping Review Board.

15. On 10 September 2017, the Athlete signed a "Stipulation of Uncontested Facts and Issues" (the "Stipulation"), which specified as follows:

- *"That USADA collected urine sample designated as USADA urine specimen number 1595217 out-of-competition on June 14, 2017;*

- *That USADA sent USADA urine specimen number 1595217 to the World Anti-Doping Agency ('WADA') accredited laboratory in Salt Lake City, Utah (the 'Laboratory') for analysis;*

- *That the Laboratory's chain of custody for USADA urine specimen number 1595217 was conducted appropriately and without error;*

- *That the Laboratory, through accepted scientific procedures and without error, determined that both the A and B Sample of USADA urine specimen number 1595217 contained dehydrochloromethyltestosterone (DHCMT) metabolite M3;*

- *DHCMT and its metabolites are prohibited substances in the class of Anabolic Agents on the WADA Prohibited List, adopted by both the Protocol and the IWF Anti-Doping Policy;*

  [...]

- *That Mr. Hudson understands that in accordance with Section 13 of the Protocol, he has the right to a review by a Panel of the independent Anti-Doping Review Board (the 'Review Board') of his urine specimen number 1595217, and that he voluntarily and knowingly waives his right to a review of his case by the Review Board;*

- ***Mr. Hudson acknowledges he has committed his second anti-doping rule violation***." [emphasis added]

16. On 7 March 2018, the Athlete informed USADA that he intended to retire from competing in the sport of Weightlifting.

17. On 13 March 2018, USADA confirmed receipt of the Athlete's notice of retirement. USADA informed the Athlete that his retirement effectively "tolled" (i.e. paused) his prescribed period of ineligibility.

18. On 10 August 2018, USADA charged the Athlete with an ADRV for the presence of DHCMT in his Sample and for the use and/or attempted use of DHCMT pursuant to Articles 2.1 and 2.2 of the IWF ADP and Articles 2.1 and 2.2 of the WADC (the latter of which has been incorporated into the USADA Protocol for Olympic and Paralympic Movement Testing - the "USADA Protocol"). The USADA Charge Letter also stipulated that USADA would seek up to an eight-year period of ineligibility for the Athlete's second ADRV.

19. On 27 November 2018, the Athlete signed an "Acceptance of Sanction" for an ADRV (the effect of which will be discussed below). The Athlete was sanctioned with a four-year period of ineligibility beginning on 14 June 2017 (the "Appealed Decision"). The Appealed Decision was rendered by USADA in application of the USADA Protocol.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 4 March 2019, in accordance with Article R47 of the Code of Sports-related Arbitration (2019 edition) (the "CAS Code"), WADA filed a Statement of Appeal with the CAS challenging the Appealed Decision. In its Statement of Appeal, WADA requested the nomination of a sole arbitrator to determine this case.

21. On 19 March 2019, in accordance with Article R51 of the CAS Code, WADA filed its Appeal Brief.

22. By USADA's letter of 1 April 2019, WADA's letter of 3 April 2019 and the Athlete's email of 3 April 2019, the Parties agreed to nominate the Hon Michael J Beloff QC, Barrister in London, United Kingdom, as Sole Arbitrator.

23. On 29 April 2019, the CAS Court Office informed the Parties that the Athlete had not filed an Answer within the deadline and that, pursuant to Article R55 of the CAS Code, the Sole Arbitrator could nonetheless proceed with the arbitration.

24. On 15 May 2019, the Parties were informed that the Hon Michael J Beloff QC had accepted his appointment as Sole Arbitrator but wished to make a disclosure further to Article R34 of the CAS Code.

25. Also on 15 May 2019, in accordance with Article R55 of the CAS Code, USADA filed its Answer, in which it raised an objection to the CAS' jurisdiction.

26. On 24 May 2019, pursuant to Article R54 of the CAS Code and in light of the fact that none of the Parties had submitted a challenge further to the disclosure made by the Hon Michael J Beloff QC, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that the Panel appointed to hear the dispute was constituted as follows:

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27. On 7 June 2019, WADA filed its observations on USADA's Objection to Jurisdiction and raised the other two Preliminary Issues (i.e. the issues of scope and date).

28. On 29 June 2019, USADA filed its Response on Jurisdictional and Preliminary Issues.

29. On 8 July 2019, WADA filed a further response to USADA's position ("WADA's Further Response").

30. On 9 July 2019, USADA protested that, absent agreement or order under Article R56 of the CAS Code, WADA's Further Response should not be admitted.

31. On 17 July 2019, further to USADA's 9 July 2019 protest, the Parties were informed that the Sole Arbitrator, taking into account both the need for fairness to all Parties and his own need for maximum assistance on the issues, directed that: (i) within 10 days, WADA either provide English translations of any materials upon which it wished to continue to rely and which are in a language other than English (English being the language selected for these proceedings) or formally accept that materials not in English be struck from the record; and (ii) USADA be permitted to respond to WADA's Further Response (which the Sole Arbitrator subsequently decided to admit) within 10 days thereafter.

32. On 23 July 2019, WADA submitted English versions of the materials on which it wished to rely.

33. on 2 August 2019, USADA filed a further response, which repeated its objections to the

timeliness of WADA's response and subsequent submission but did not engage further with any substantive arguments.

34. On 29 August 2019, the CAS Court Office wrote to the Parties confirming that Mr Tiran Gunawardena, Solicitor, London, United Kingdom was appointed as *ad hoc* clerk in the proceeding.

35. The Athlete has chosen not to participate actively in the Appeal, other than, e.g., by email on 27 May 2019 to the CAS Court Office to express his reliance on USADA's submissions.

36. Further to the agreement or lack of objection of the Parties, the Sole Arbitrator has decided to issue a decision on the preliminary issues identified in paragraph 5 above.

V. SUBMISSIONS OF THE PARTIES

A. The Parties' Submissions on Jurisdiction

37. WADA's submissions may be summarised in essence as follows:

- It is a fundamental tenet of the WADC, founded on the need for harmonisation in the fight against doping in sport, that WADA has a right of appeal against, *inter alia*, all first instance decisions (including agreed outcomes such as Acceptances of Sanction).

- All provisions of the WADC are mandatory, although only those set out at Article 23.2.2 must be incorporated verbatim.

- Article 13.2.2 WADC is not one of the provisions that must (or even can) be incorporated verbatim because it requires that decisions not covered by Article 13.2.1 (which can only be appealed to the CAS) must be appealable to an independent and impartial reviewing body in accordance with rules established by the relevant NADO, which in this instance is USADA.

- USADA's alternative position is irrational since it is all the more important that there be review before the CAS of decisions that are agreed between the athlete and a NADO without a hearing process or prior review of an independent tribunal. The signed Acceptance of Sanction (i.e. the Appealed Decision) itself explicitly provides for WADA to appeal to the CAS.

38. USADA's submissions, in essence, may be summarized as follows:

- WADA in its pleadings relied only on the USADA Protocol; an argument that there are other bases for its appeal to the CAS should not be entertained at all.

- WADA has no right of appeal under Article 13.2.2 of the WADC against the Appealed Decision since Article 13.3.2 has not been incorporated into the USADA Protocol.

- More generally (and consistently with the WADC), WADA has no right of appeal against any USADA/American Arbitration Association ("AAA") decisions that does not involve International-Level Athletes or arise from testing at International Events, neither of which criteria apply to the Athlete.

- Alternatively, there is a right of appeal to the CAS in national cases, but only where they are adjudicated by the AAA as opposed to agreed/settled between the athlete and USADA.

B. The Parties' Submissions on Scope

39. WADA's essential submission is that:

- The issue of whether the Athlete committed a second ADRV has been already determined;

- WADA's prayer for relief that the CAS find the Athlete has committed a second ADRV, is a mere formality.

40. USADA's essential submission is that:

- It is for WADA to establish that the Athlete committed a second ADRV before any question of sanction can arise;

- WADA's prayers for relief that the CAS find the Athlete has committed a second ADRV, has made whether he has done so an issue in these proceedings.

C. The Parties' Submissions on the Date

41. WADA's essential submission is that a presence violation is established only at the date of the sample collection.

42. USADA's essential submission is that a presence violation is committed at the date of ingestion.

VI. APPLICABLE LAW

43. Article 176(1) of the Swiss Private International Law Act ("PILA") provides that Chapter 12 of PILA shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

44. The CAS is an arbitral institution with its seat in Switzerland. Article S1 of the CAS Code states that the "*seat of both ICAS and CAS is Lausanne, Switzerland*". In this case, neither of the Respondents have their domicile or their usual residence in Switzerland. Consequently, Chapter 12 of PILA applies to this arbitration.

45. The Sole Arbitrator also determines, and the Parties do not dispute, that the WADC and USADA Regulations are applicable to the present dispute.

VII. JURISDICTION

46. The Sole Arbitrator has the authority to decide on his own jurisdiction pursuant to Article 186 PILA, which reflects the principle of *Kompetenz-Kompetenz* recognised in both international arbitration and CAS jurisprudence.

47. The validity and scope of the arbitration agreement are governed by Article 178(2) PILA, which provides (in English translation):

> *"As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law."*

48. An appellant (such as WADA) may therefore establish the validity of the arbitration agreement based on either: (i) the law chosen by the parties; (ii) the law governing the subject matter of the dispute; or (iii) Swiss law.

49. The Swiss Federal Tribunal ("SFT" or "ATF") has consistently held that an approach which favours arbitration should be taken with respect to the resolution of sports disputes:

> "*With respect to formal requirements (Article 178, paragraph 1, SPIL), in sport cases, the Federal Tribunal reviews the agreement of the parties to submit disputes to an arbitral tribunal with benevolence [in the original text: "Wohlwollen")]; this aims at promoting swift resolution of disputes by specialized panels which, as the CAS, meet appropriate requirements of independence and impartiality (ATF 133 III 235, Nr. 4.3.2.3 p. 244 et seq. with references). The liberal approach that characterizes federal case law in this respect appears, in particular, in the fact that arbitration clauses integrated by reference are considered as valid (decision of the Federal Tribunal 4A_460/2010 of 18 April 2011, Nr. 3.2.2; 4A_548/2009 of 20 January 2010, Nr. 4.1; 4A_460/2008 of 9 January 2009, Nr. 6.2 with references).*" ATF 138 III 29, paragraph 2.2.2. (See also 4A_460/2010, SFT judgment of 18 April 2011.)

50. Article R47 of the CAS Code provides so far as material, that:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with the 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 him prior to the appeal, in accordance with the statutes or regulations of that body.*"

51. It follows from R47 of the CAS Code that CAS jurisdiction can be based on either: (i) a specific arbitration agreement; or (ii) a provision in the applicable regulations. WADA relies upon both such grounds, which the Sole Arbitrator will accordingly address in turn below. *Pace* USADA's argument, it is not necessary in the Sole Arbitrator's view, although it is clearly desirable, for WADA (or any other appellant in appeal proceedings) to have identified in its pleadings the basis for CAS jurisdiction. However, Article R47 of the CAS Code does not so require. It requires only that at the time of initiation of an appeal one or other or both of the bases exists – a matter to be determined by the Panel seized of the Appeal (see Mavromati & Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Kluwer Law International, 2015, at page 27).

A. Specific Arbitration Agreement

52. The Appealed Decision that was signed by the Athlete and USADA on 27 November 2018 states, *inter alia*:

> "*I* [the Athlete] *understand that USADA will communicate my acceptance to USA Weightlifting who will impose this sanction, and to the World Anti-Doping Agency ('WADA'), IWF and the USOC. I understand that neither IWF nor WADA is bound by this resolution and that either or both may appeal this resolution to the Court of Arbitration for Sport ('CAS'). In the event of an appeal, CAS has the authority to impose any sanction it chooses in accordance with the applicable rules if requested to do so by IWF or WADA. Also, in the event of such an appeal I reserve the right to file a cross-appeal with CAS and request that the sanction be reduced or eliminated.*"

53. The Sole Arbitrator draws attention to the following matters:

- The Appealed Decision is inscribed on a USADA form;
- The Athlete's Acceptance of Sanction itself determined by USADA is addressed to USADA;
- USADA's acceptance of the Athlete's Acceptance of Sanction is unqualified and does not purport to exclude the excerpt quoted in paragraph 47 above;
- It is, therefore, in the Sole Arbitrator's view, part of the agreement reached in the Appealed Decision that USADA would communicate the Athlete's Acceptance of Sanction to, *inter alia*, WADA, which may appeal it to the CAS if it so wished.
- WADA accepted the offer made to it to appeal the Appealed Decision to the CAS by duly filing such appeal.

54. Under Swiss law, consent to the arbitration agreement results from the entirety of all the parties' expressions of intent evidenced by the text found therein. (See Dr. M. Arroyo, *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, para. 22. See also ATF 130 III 66.)

55. The Sole Arbitrator concludes on the basis of his analysis in paragraph 48 that the Appealed Decision does contain an agreement providing for WADA to appeal to the CAS against the sanction imposed on the Athlete. USADA, by being a party to the Appealed Decision but seeking nonetheless to disavow part of it, is, in the Sole Arbitrator's view, impermissibly blowing hot and cold.

56. The Sole Arbitrator would add that WADA's appeal against the Appealed Decision does not *ipso facto* mean that it cannot rely upon that part of it which constitutes an Arbitration Agreement: Article 178(3) of the PILA expressly provides that "*the Validity of an Arbitration Agreement cannot be contested on the ground that the main contract may not be valid*" (see further SFT Judgement 121 III 495 at p 499). It is indeed consistent with a principle found in many jurisdictions that an arbitration clause is severable from other parts of an agreement as providing the mechanism by which the validity *vel non* of the

agreement itself may be resolved.

57. If, in accordance with that conclusion under Swiss law, the Appealed Decision contains an arbitration agreement establishing a right for WADA to submit an appeal to the CAS, that by itself is dispositive in WADA's favour of the jurisdiction issue. Nonetheless, out of, *inter alia*, deference to the Parties' submissions and because of the importance of the question raised, the Sole Arbitrator will consider below whether the same conclusion on the jurisdiction issue can be reached by another route.

B. Arbitration agreement in the applicable regulations

58. The Sole Arbitrator will consider for this purpose: (i) the WADC; (ii) the USADA Protocol; and (iii) the IWF ADP.

a. WADC

59. The WADC provides the context in which WADA and USADA's rival arguments must be evaluated. The WADC is "*to be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or Governments*" (Article 24.3 WADC). Although drafted in both English and French, in the event of conflict, the English version prevails (Article 24.1 WADC).

60. As its very title suggests, WADC is intended to be comprehensive in its reach. Such is evident from, e.g., the Introduction thereto, which provides that "[a]*ll provisions of the Code are mandatory in substance and must be followed as applicable by each Anti-Doping Organization and Athlete or other Person.*"

61. This intention is to be fulfilled in different ways, which respects a distinction between substance (obligatory) and form (sometimes flexible). Again the Introduction is instructive in this regard, providing that:

> "*Code provisions not listed in Article 23.2.2* [which comes under the Article 23.2 rubric Implementation of the Code and lists its key articles] *are still mandatory in substance even though an Anti-Doping Organization is not required to incorporate them verbatim. Those provisions generally fall into two categories. First, some provisions direct Anti-Doping Organizations to take certain actions but there is no need to restate the provision in the Anti-Doping Organization's own anti-doping rules. [...] Second, some provisions are mandatory in substance but give each Anti-Doping Organization some flexibility in the implementation of the principles stated in the provision. As an example, it is not necessary for effective harmonization to force all Signatories to use one single results management and hearing process. At present, there are many different, yet equally effective processes for results management and hearings within different International Federations and different national bodies. The Code does not require absolute uniformity in results management and hearing procedures; it does, however, require that the diverse approaches of the Signatories satisfy principles stated in the Code.*"

62. This distinction reflects itself what is said at the outset of the WADC:

> "*PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE CODE*

The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:

> • *To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and*
>
> • *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.*

The Code

The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented."

63. Article 13 (APPEALS) of the WADC provides, so far as material at Article 13.2 (Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences [...]) "[a] *decision that an anti-doping rule violation was committed, a decision imposing consequences [...] may be appealed exclusively as provided in this Article 13.2.*"

64. Article 13 WADC further provides at Article 13.2.1 (Appeals Involving International-Level Athletes or International Events):

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

65. It appears to be common ground that the Athlete is not an international-level athlete (and WADA, while noting that he has competed abroad, does not claim that his ADRV arose from participation in an International Event). Therefore, the Sole Arbitrator concludes that Article 13.2.1 WADC does not apply to him. Nor for the same reason does Article 13.2.3 WADC (Persons Entitled to Appeal) in so far as it provides "*Appeal In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) [...] (f) WADA.*"

66. Article 13 WADC continues:

"*Article 13.2.2 Appeals Involving Other Athletes or Other Persons*

In cases where Article 13.2.1 is not applicable, the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization."

67. The Parties are at odds as to how to classify the Athlete. WADA claims he is a national-

level athlete and as such indubitably falls within the definition of "Athlete" in the WADC. USADA describe him as a "*relatively low-level competitor who competes below national level in the US.*"

68. In the Sole Arbitrator's view, given that:

- the same WADC definition gives a NADO discretion to apply anti-doping rules to an athlete who is neither international nor national level, and so brings such athlete within the definition of "Athlete" for the purposes of the WADC; and

- USADA has treated the Athlete as being one to whom the anti-doping rules apply and who is subject to testing as provided for in the USADA Protocol, his precise classification need not be determined for the purposes of resolving the jurisdiction issue. He is clearly an Athlete other than an International-Level Athlete and, even if not a National-Level Athlete, is therefore one to whom Article 13.2.2 WADC applies.

69. Article 13.2.3 WADC (Persons Entitled to Appeal) also provides:

"*In cases under Article 13.2.2, the parties having the right to appeal to the national-level appeal body shall be as provided in the National Anti- Doping Organization's rules but, at a minimum, shall include the following parties: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organization of the Person's country of residence; (e).....and (f) WADA. For cases under Article 13.2.2, WADA, and the relevant International Federation shall also have the right to appeal to CAS with respect to the decision of the national-level appeal body.*"

70. The key issue of interpretation which arises at this juncture is whether a signatory to the WADC must establish an independent and impartial body to which non-international athletes – if found to have committed and/or been sanctioned for an ADRV – can appeal, so giving WADA, in consequence, a right to appeal its decisions to the CAS (this being WADA's position), or whether the establishment of such a body is a matter for the discretion of the signatory and its NADO, so (if it does not do so) depriving WADA of any such a right (this being USADA's position).

71. The Sole Arbitrator agrees with WADA's position. In his view, Article 13 WADC has a coherent structure. Article 13.2 WADC gives athletes found to have committed an ADRV and sanctioned for it the right to appeal; the word 'may' is a word of enablement – i.e. the athlete does not have to appeal, but can do so if he or she wishes. WADC Articles 13.2.1 and 13.2.2 provide different routes to exercise the right of appeal depending upon the category into which the athlete falls. The word 'may' in Article 13.2.2 WADC does not give the Signatory a choice of whether to provide an appeal to the body referred to therein, but rather a choice to the athlete as to whether or not to use an appeal so provided to such body. The word 'may' in Article 13.2.1 WADC likewise gives the athlete a choice of whether or not to use the only prescribed forum i.e. the CAS.

72. Furthermore, in the Sole Arbitrator's view, the denial of an opportunity to WADA to challenge a decision of a national body before the CAS by simply not establishing such a

body at all would be wholly inconsistent with the WADC's intention to create a harmonized global code and would further allow for the possibility of unredressable, so called "home-town", decisions.

73. It is a fundamental principle of *lex sportiva* that in international sport all who are bound by the sports rules must in fairness be treated equally thereunder irrespective of the idiosyncrasies of national jurisdictions (see *inter alia, Peñarol v Bueno, Rodriguez & PSG CAS 2005/A/983 & 984*, para 24; *Comitato Olimpico Nazionale Italiano (CONI) CAS 2000/C/255*, para 56; *Valcke v FIFA CAS 2017/A/5003*, para 265; *ICC v Ikope*, ICC Disciplinary Tribunal, 5 March 2019 at para 6.16). In the Sole Arbitrator's view, this principle must extend to the process by which alleged ADRVs and/or sanctions therefor are made subject to scrutiny and adjudication.

74. The Sole Arbitrator notes that Paul David, in his well-known commentary on the WADC (A Guide to the Word Anti-Doping Code 3rd ed. ("David") p 464), writes in the Chapter on Appeals:

"*By providing that Signatories have to adopt Article 13 verbatim (with the exception of Rule 13.2.2 which provides for the appeal structure at a national level) the Code reinforces the central role of CAS as the appeal tribunal for disputes under the Code. By this means and by widening the possible parties which have a right of appeal to CAS to include WADA...the provisions of Article 13 provide a process of appeal which can be used to foster a consistent approach to the application and interpretation of the Code by all signatories.*"

75. The Sole Arbitrator respectfully agrees with the comments quoted above.

76. Article 23.2.2 WADC, to which David makes reference, provides:

"*The following Articles as applicable to the scope of the anti-doping activity which the anti-doping organization performs must be implemented by signatories without substantive change [...].*

[...]

Article 13 (Appeals) with the exception of 13.2.2."

77. In the Sole Arbitrator's view, this does not disturb the conclusion he has reached in paragraphs 70-74 above. The verbatim incorporation of Article 13.2.2 WADC into a NADO's rules would clearly not be possible. The NADO rules, when implementing Article 13.2.2 WADC, must refer to the specific reviewing body in question rather than deploying the generic wording "*the National Anti-Doping Organisation*" used in the WADC. Further, the Comment (an aid to interpretation WADC Article 24.2) to Article 13.2.2 WADC specifically indicates that NADOs have the flexibility to "*comply with this Article by providing for the right to appeal directly to CAS*" (i.e. as opposed to any national reviewing body) which again militates against such a verbatim incorporation of that Article).

78. Accordingly, in the Sole Arbitrator's view, the exclusion of Article 13.2.2 WADC from the list of those Articles which must be implemented without variation means only that it

need not be incorporated verbatim. It does not mean that its substantive content, including, materially, WADA's right of appeal to the CAS from a national decision of a national level, to which decision WADA objects, can be ignored.

b. USADA Protocol

79. Article 23.1 WADC provides, *inter alia*, that signatories "*accept the Code* [WADC]". Article 23.2.1 WADC provides that "*[t]he signatories shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority.*" USADA is a signatory to the WADC.

80. The USADA Protocol states in its first paragraph that it is "*intended to implement the requirements of the World Anti-Doping Code (the "Code") on a national basis within the United States.*"

81. The appeal provisions (as with other provisions from the WADC) are set out at Annex A to the USADA Protocol, described as setting out "*Articles from the (WADC) which are incorporated verbatim into the USADA Protocol for Olympic and Paralympic Movement Testing*". These provisions include Article 13 WADC, with certain exceptions of which Article 13.2.2 WADC (but not Article 13.2.1 WADC) is one.

82. Article 13.2.3 of WADC is also included, not excluded. It provides, so far as material as follows:

"*Persons Entitled to Appeal*

In cases under Article. 13.2.1[...]

In cases under Article 13.2.2, *the parties having the right to appeal to the national-level appeal body shall be as provided in the National Anti-Doping Organization's rules but, at a minimum, shall include the following parties: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation(d)....(e)....; and (f)* ***WADA****.*

For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to CAS with respect to the decision of the national-level appeal body." [emphasis added]

83. Where there is a hearing before the AAA, resulting in a final AAA award, Article 17 of the USADA Protocol provides that there is a right of appeal in all instances (whether or not covered by Article 13.2.1 of WADC) as follows:

"*The following procedures apply to all hearings under this Protocol:*

[...]

b. Subject to the filing deadline for an appeal filed by WADA as provided in Article 13.2.3 of the Code, the final award by the AAA arbitrator(s) may be appealed to

> *the CAS within twenty-one (21) days of issuance of the final reasoned award [...] The appeal procedure set forth in Article 13.2 of* ***Annex A*** *shall apply to all appeals not just appeals by International-Level Athletes or other Persons.*" [underlined emphasis added]

84. The deletion of Article 13.2.2 in Annex A of the USADA Protocol clearly does not remove a right of appeal to the CAS against AAA awards in national cases (which *ex hypothesi*) fall outside of the ambit of Article 13.2.1 WADC, given that such appeal is expressly provided for by Article 17(b) of the USADA Protocol. The question raised by such deletion is whether, in consequence, there is no appeal from decisions in national cases which are not made by the AAA, which is, absent consent of the parties, the unique forum for appeals against ADRVs and/or sanctions. (See USADA Protocol Article 17 and 17(a)).

85. WADA contends that "[i]*t is understandable that Article 13.2.2 has been deleted from Annex A as there is no appellate instance in the US anti-doping system*" (the "First Proposition") and that "[t]*herefore, it is logical that the Article 13.2.1 system (of appealing directly to CAS) is applied by analogy to cases that would otherwise fall under article 13.2.2.* (the "Second Proposition").

86. In the Sole Arbitrator's view, the First Proposition is circular; it begs the threshold question as to whether the fact that verbatim incorporation into a NADO's rules is not required means that Article 13.2.2 WADC can simply be ignored (as on the face of the USADA Protocol, read literally, it has been, save in so far as an AAA hearing is provided for).

87. Moreover, in the Sole Arbitrator's view, the Second Proposition is in any event on its face a *non sequitur*. The more logical conclusion (if logic were the only criterion) is that, as USADA contends, there is no appeal against any decision relating to a national athlete, other than one of which the AAA is seized for, *inter alios*, WADA.

88. However, the Sole Arbitrator rejects such interpretation denying WADA the appeal for which it contends for the following reasons:

    a) By immunizing a USADA decision with respect of a non-international athlete subject to the WADC, who did not appeal a USADA proposed sanction to the AAA, it would render the USADA Protocol non-compliant with the WADC;

    b) The avowed intention of the USADA Protocol is precisely to "*implement the requirements of the Code*". In the Sole Arbitrator's view, it should be presumed that such intention has been fulfilled *ut magis valeat quam pereat*;

    c) The mistake, if any, in the USADA Protocol is not in omitting a provision reflecting the *ipsissima verba* of Article 13.2.2 WADC but in not providing *mutatis mutandis* a comprehensive analogous provision;

    d) The conclusion for which USADA contends is not compelled by the USADA Protocol's language. The Protocol does not expressly prohibit WADA from appealing USADA decisions about national athletes to the CAS. It simply does not expressly provide for one;

e) Article 13.2.3 in Annex A to the USADA Protocol itself refers to the omitted Article 13.2.2 WADC and therefore assumes the existence in some form of Article 13.2.2 WADC;

f) Article 13(i) of the USADA Protocol provides as follows:

"*An Athlete or other Person may also elect to avoid the necessity for a hearing by accepting the sanction proposed by USADA.* ***In all cases where USADA has agreed with an Athlete*** *or other Person to the imposition of a sanction without a hearing,* ***USADA shall give notice thereof as set forth in Articles 14.1 and 14.2 of the Code to other ADOs with a right to appeal under Article 13.2.3 of the Code***." [emphasis added]

It therefore envisages that all agreed sanctions can be appealed in accordance with the WADC given that USADA is required to give notice of *any* agreed sanction to those entities with a right of appeal under Article 13.2.3 of the WADC (which include WADA);

g) In principle, it is especially important that there be review before the CAS of decisions that are agreed between an athlete and a NADO without a hearing process or prior review of an independent tribunal.

h) The general principles of *lex sportiva* referred to in paragraph 68 above are engaged.

89. For all those reasons, the Sole Arbitrator concludes that, in order to ensure that USADA is code-compliant (i.e. by accepting and implementing the WADC in accordance with, *inter alia*, WADC Article 23.1 and so avoiding the possible consequences of non-compliance provided for by WADC Article 23.6), such right of appeal by WADA to the CAS against a decision affecting a non-international level athlete, who did not appeal a proposed sanction to the AAA, should be implied. Such exercise of interpretation by adding words is not unknown where such addition is required by a superior legal norm. (See, for example, where English domestic, including statutory, law has to be modified to comply with the law of the European Union or of the European Convention on Human Rights.)

90. The simplest implication would be to add to the existing words in Annex A of the USADA Protocol Article 13.2.3 the additional words as emphasised below:

"*For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to CAS with respect (i) to the decision of the national-level appeal body* ***(ii) to a decision taken by USADA where no appeal is provided to such body***."

91. In reaching this conclusion, the Sole Arbitrator has taken due account of the pragmatic consideration that, given that the resources available are finite, it makes sense to differentiate between the degree of scrutiny in the battle against doping accorded, on the one hand, to international athletes and, on the other, to those who compete at lower levels.

However, in the Sole Arbitrator's view, if in this context harmony and economy are at odds, the former must prevail.

92. The Sole Arbitrator accepts that USADA has, for many years, operated the USADA Protocol in a manner consistent with its submissions in the present case, but the issue is not what USADA thought its Protocol meant, but what, objectively it must be taken to mean, in the context of the paramount WADC.

c. The IWF Anti-Doping Policy

93. WADA also seek to rely upon the provisions of the IWF ADP.

94. However even assuming, but not finding, that the IWF ADP envisages a right of appeal by WADA to the CAS in the circumstances of the present case, in the Sole Arbitrator's view, the Appealed Decision is not a decision of the IWF. Therefore, Article R47 of the CAS Code (which requires the relevant regulations to be those of the body whose decision is being appealed), is not engaged. The IWF is not a respondent to the appeal.

95. It is true that the IWF ADP itself contemplates an appeal to the CAS in respect of decisions involving athletes other than international athletes at Article 13.2.2, in providing so far as material as follows:

"*In cases where Article 13.2.1 is not applicable, the decision may be appealed to a national-level appeal body, being an independent and impartial body established in accordance with rules adopted by the National Anti-Doping Organization having jurisdiction over the Athlete or other Person. [...] If the National Anti-Doping Organization has not established such a body, the decision may be appealed to CAS in accordance with the provisions applicable before such court.*"

96. In the Sole Arbitrator's view, the sundry references to the IWF ADP in the Appealed Decision reinforces the conclusion that the Appealed Decision contains an arbitration agreement for the purposes of Article R47 of the CAS Code, but does not provide an independent basis for an appeal by WADA to the CAS.

C. The Sole Arbitrator's conclusions on Jurisdiction

97. For all the reasons set out above, the Sole Arbitrator holds that there is a specific arbitration agreement in the Appealed Decision entitling WADA to appeal it to the CAS. Moreover, an applicable regulation – the USADA Protocol – properly interpreted, also provides such a right of appeal to WADA.

VIII. Other Preliminary Issues

98. In the light of his decision on the jurisdiction issue, the Sole Arbitrator will now consider the other Preliminary Issues in turn (namely, scope and date).

A. Scope

a. Sole Arbitrator's Analysis

99. The Sole Arbitrator considers that the issue of whether the Athlete committed a second ADRV is closed. Throughout the history of this matter, USADA itself has proceeded on the basis that it was concerned with a second ADRV, as shown by the following matters:

i. At paragraph 10 of the Stipulation signed by the Athlete on 10 September 2017 and by USADA on 11 September 2017, the former acknowledged that he had "**committed his second anti-doping rule violation**." [emphasis added]

ii. In its 17 August 2017 Notification of Case to the USADA Anti-Doping Review Board, USADA stated as follows:

"*If it is ultimately determined that an anti-doping rule violation has occurred, a sanction may be imposed that will include disqualification of your competitive results achieved on or subsequent to June 14, 2017, the date your urine Sample #1595217 was collected,* ***and an eight-year period of ineligibility*** *pursuant to the IWF Anti-Doping Policy and Articles 10.1, 10.2, 10.7 and 10.8 of the World Anti-Doping Code (the 'Code') which may be reduced as set forth in the IWF Anti-Doping Policy and in Articles 10.4, 10.5, and 10.6 of the Code.*" [emphasis added]

iii. In its Notice of Charge dated 10 August 2018, USADA stated that "*[t]he Applicable Rules specify that* ***the period of ineligibility for your second anti-doping rule violation is eight (8) years in the event that your violation was intentional.***" [emphasis added]

iv. In its email to the Athlete of 18 November 2018, USADA wrote the following:

"*While the rules require proof of source for a sanction to be reduced below four years* ***in your case for a second violation*** *or two years if it was your first violation (see definition of no significant fault or negligence in the World Anti-Doping Code),* ***there is no such requirement to reduce a sanction from eight to four years (for cases involving a second violation).*** *Eight year would be the applicable sanction for an intentional violation.*" [emphasis added]

100. In addition, the USADA Press Release of 20 December 2018, while not a document with legal force, accurately described the position reached and contained the following statements:

"*USADA announced today that Ryan Hudson, of Sisters, Oregon, an athlete in the sport of weightlifting,* ***has accepted a four-year sanction for his second anti-doping rule violation.***" [emphasis added]

and

"*[...] a reduction to the otherwise applicable period of ineligibility* ***for a second violation*** *was appropriate due to the low DHCMT M3 concentration in the athlete's sample and the length of time low levels of DHCMT metabolites may persist in the body and remain detectable in urine, making it difficult to identify the source of the positive test result in the event of a low concentration of DHCMT metabolites in an athlete's sample.* ***As a result of this combination of factors, which has increased the difficulty of ascertaining***

the source of his positive test result, USADA found that the athlete's degree of fault for his positive test was diminished." [emphasis added]

101. The Appealed Decision was concerned with the sanction to be imposed on the Athlete, on the accepted premise that the Athlete had committed a second ADRV. This is illustrated by the letter from USADA on 3 January 2019 notifying WADA and the IWF of the agreed sanction, in which USADA stated that "*after a thorough review of the case and taking into account the human pharmacokinetic characteristics of the M3 metabolite based on data to which USADA has access indicating the metabolite may persist in the body for long periods of time and in consultation with scientific experts, USADA concluded that the low level of DHCMT M3 found in Mr. Hudson's sample may well have originated from a source ingested long before his sample collection. Therefore, USADA determined that this case presented a unique circumstance* ***wherein an arbitrator would not require Mr. Hudson to establish the source of his positive test to prove that his ingestion was not intentional*** *[...] Accordingly, USADA determined in this instance that* ***a sanction reduction was appropriate*** *under Code Article 10.2 and consistent with other sanctions USADA has imposed.*" [emphasis added] (USADA Answer Exhibit 32)

102. In the Sole Arbitrator's view, the reality of the position as set out above is not disturbed by the paragraph of WADA's prayers for relief which is both formal and indeed gratuitous. WADA's pleadings naturally do not seek to open up the issue of the commission of the first ADRV (Appeal Brief paragraphs 34-38), and in the Sole Arbitrator's view, it is not open to USADA to seek to re-open an issue which is the very foundation of the Appealed Decision. Again it cannot blow hot and cold.

b. Sole Arbitrator's Conclusions on Scope

103. USADA's attempt to change the basis of the agreed sanction – i.e. that the DHCMT positive should be treated as a second ADRV – should not, in the Sole Arbitrator's view, be entertained. The fact of the Athlete's second ADRV is the very premise of WADA's appeal and hence outwith its scope. The scope of WADA's appeal is limited to the appropriate sanction for the Athlete's second ADRV; his commission of that second violation is to be treated as *res judicata*.

B. Date

a. Sole Arbitrator's Analysis

104. Article 10.7.4.1 of Annex A of the USADA Protocol provides that "*an anti-doping rule violation will only be considered a second violation if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti- doping rule violation after the Athlete or other Person received notice pursuant to Article 7, or after the Anti-Doping Organization made reasonable efforts to give notice of the first anti-doping rule violation*".

105. If WADA's submission is correct, the DHCMT violation would be a second ADRV; if USADA's submission is correct, maybe not.

106. In the Sole Arbitrator's view, WADA's submission is to be preferred for the following reasons:

i. Article 2.1 WADC (Presence of a Prohibited Substance or its metabolites or markers in an Athlete's sample) provides, so far as material:

> "*2.1.1 It is each Athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance found to be present in their samples.*"

ii. Both the title and text of Article 2.1 WADC "presence violation" show that the *actus reus* of this violation is the presence of the prohibited substance **in a doping control sample**, even if, all but inevitably, such substance must have been present in the athlete's body before he or she was subject to the doping control test which proved that presence. The violation is necessarily established and therefore committed on the date of the doping control (regardless of when the prohibited substance was ingested);

iii. As a matter of logic, there can be no proven "presence" before there is a sample;

iv. A previous CAS panel held in *UCI v Pasquale Muto & CONI CAS 2011/A/2684* (paras 62, 64, and 70-71) that the athlete's second violation was held to be committed on the date of the sample control itself and not the date of ingestion. Comity, if not precedent, encourages the Sole Arbitrator to follow its reasoning;

v. It would be unreasonable to require NADOs to ascertain the moment of ingestion or use, as it would depend on factors such as dose, regimen, mode of administration etc. that may be known to the athlete (but are certainly not known to the NADO); and

vi. The principle of legal certainty tells powerfully in favour of WADA's submission.

b. Sole Arbitrator's Conclusions on Date

107. An ADRV contrary to Article 2.1 WADC (i.e. a "presence" violation) cannot be committed on any date other than the date of the sample on which the prohibited sample is found to be present.

IX. COSTS

108. As it has been determined that the Sole Arbitrator has jurisdiction to proceed to adjudicate on the merits of this dispute, the decision on the allocation of costs is, subject to the proviso below, deferred until the conclusion of the substantive proceedings.

109. If, for any reason, the substantive issue between the Parties does not ultimately fall for adjudication but the Parties cannot agree on the allocation of costs incurred up to that point, the Sole Arbitrator will decide upon them at that juncture.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has jurisdiction over the appeal filed by the World Anti-Doping Agency on 4 March 2019 against the decision rendered by the United States Anti-Doping Agency on 27 November 2018, regarding Ryan Hudson.

2. The scope of the appeal filed by the World Anti-Doping Agency on 4 March 2019 is limited to the appropriate sanction for Ryan Hudson's second Anti-Doping Rule Violation; his commission of that second violation is to be treated as *res judicata*.

3. An Anti-Doping Rule Violation contrary to Article 2.1 (i.e. a "presence" violation) of the World Anti-Doping Code cannot be committed on any date other than the date of the collection of the sample in which the prohibited substance is found to be present.

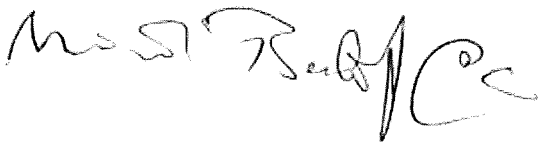
4. The substantive proceedings will now go forward in the basis of the above premises 1-3.

5. The costs of this award will be allocated in the final award.

6. All other claims or issues will be assessed and determined in the final award.

Seat of arbitration: Lausanne, Switzerland
Date: 10 March 2020

THE COURT OF ARBITRATION FOR SPORT



Michael J. Beloff QC
Sole Arbitrator

Tiran Gunawardena
Ad hoc Clerk