Arbitration CAS 2017/A/5477 Aaron Sloan v. Australian Sports Anti-Doping Authority (ASADA) & Baseball Australia (BA), award of 12 October 2018

Panel: Mr Alan Sullivan QC (Australia), Sole Arbitrator

Baseball
Doping (methamphetamine)
Burden of proof of non-intentional anti-doping rule violation
Absence of corroboration for allegation
Admission in case of Adverse Analytical Finding of Prohibited Substance only prohibited in-competition
Filters for considering expert evidence

1. **In order for an athlete to show that his or her conduct was not "intentional" he or she must prove that he or she did not know that the conduct constituted an anti-doping rule violation or that he or she did not know that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and did not manifestly disregard that risk.**

2. **While the absence of corroboration of an allegation may, depending on the circumstances of a case, be of great weight in determining whether an athlete has discharged his or her onus of proof, it cannot be regarded as being legally or factually decisive especially when such a requirement does not appear expressly in the World Anti-Doping Code or its derivatives such as the ABF Anti-Doping Policy.**

3. **Where an anti-doping rule violation consists of an Adverse Analytical Finding of the presence of a Prohibited Substance which is only prohibited in-competition there can only be a relevant admission of the anti-doping rule violation if the athlete admits not only taking the Prohibited Substance but also taking it within the 12-hour time window before the relevant competition.**

4. **When considering expert evidence, the following filters shall be applied: (a) the expert's duty is not to represent the interests of the party calling him or her, but rather to express his or her views honestly and as fully as necessary for the purpose of a case; an expert should provide independent, impartial assistance to the CAS panel and should not be an advocate for any party; (b) the panel cannot completely disregard any expert evidence which is otherwise admissible or before it. Rather, it must pay regard to the content of the expert evidence, but it is not bound by it, or required to blindly follow it; (c) the expert opinion should be comprehensible and lead to conclusions that are rationally based, with reasoning explained. The process of inference that leads to conclusions must be stated or revealed in a way that enables conclusions to be tested and a judgment made about their reliability; (d) in order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable objective**

procedure for reaching the expert opinion so that qualified persons can either duplicate the result or criticise the means by which it was reached, drawing their own conclusions from the underlying facts; (e) the value of expert evidence depends upon the authority, experience and qualifications of the expert and, above all, upon the extent to which his or her evidence carries conviction; and (f) in cases where experts differ, the panel will apply logic and common sense in deciding which view is to be preferred, or which parts of the evidence are to be accepted.

I. THE PARTIES

1. Mr Aaron Sloan (the "Appellant") is a semi-professional baseball player who, at all relevant times, played for the Canberra Calvary team in the Australian Baseball League ("ABL").

2. The Australian Sports Anti-Doping Authority (the "First Respondent" or "ASADA") is a statutory agency that operates under the Australian Sports Anti-Doping Authority Act 2016 (the "ASADA Act") and the ASADA Regulations, including the National Anti-Doping Scheme, which is contained in Schedule 1 to the Regulations. ASADA is the independent national anti-doping organisation for Australia.

3. Baseball Australia (the "Second Respondent" or "BA") is the highest body controlling baseball in Australia and is responsible, among other things, for the running and conduct of the ABL. BA has adopted and implemented the ADP and it is common ground, or beyond dispute, that the ADP binds all parties in respect of the events the subject of this appeal.

4. Collectively, ASADA and BA are referred to as the "Respondents".

II. THE FACTS

5. Set out below is the summary of the relevant facts and allegations based on the parties' written and oral submissions, pleadings and evidence adduced at the CAS Hearing on 13 September 2018. Whilst the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to those parts of that material which he considers necessary to explain his reasoning.

6. This is an appeal from a Sanction Notice dated 30 November 2017 issued by the Second Respondent pursuant to Article 7.10.3 of the Australian Baseball Federation Inc. ("ABF") Anti-Doping Policy 2015 ("the ADP").

7. The Appellant was born on 26 December 1993. He became a contracted player with Canberra Calvary in 2017 and was paid thereafter at the rate of approximately $276 per fortnight. Canberra Calvary plays in the ABL.

8. On Thursday, 19 January 2017, the Appellant travelled to Sydney with the Canberra Calvary team for games against the Sydney Blue Sox team at Blacktown.

9. Relevantly, the first game was in the evening of 19 January 2017 and there was a second game to be played the following evening at 7.30pm, 20 January 2017.

10. It is admitted, and appears to be common ground, that after the 19 January 2017 game the Appellant met with friends and drank alcohol and used methamphetamine (commonly known as "ice") at a bar in Balmain, NSW and at a friend's house. He purchased the methamphetamine through a friend for either $100 or $200.

11. It appears that having lost the first game on 19 January 2017, the Appellant's team, Canberra Calvary could not make the play-off phase of the ABL competition. That is the reason given by the Appellant for his conduct on that night and into the early hours of 20 January 2017.

12. The Appellant asserted in evidence (and this was not contradicted by the Respondents) that he stayed up virtually all night with his friends drinking alcohol and using methamphetamine and returned to his hotel at about 4.00am or 5.00am in the morning when he then went to sleep.

13. According to the Appellant he stayed in bed from the time of returning to his motel at or about 4.00am or 5.00am on the morning of 20 January 2017 until about 2.30pm when awakened by his roommate. He denies taking any methamphetamine between 5.00am on 20 January 2017 and either the commencement of the game on 20 January 2017 at approximately 7.30pm or, indeed, before he was chosen for a drug test later in the evening of 20 January 2017 (at about 11.00pm). Thus, on the Appellants' version of events, he did not use or take any methamphetamine in the 12 hours immediately prior to the commencement of the game on 20 January 2017.

14. The Appellant participated in the game on Friday, 20 January 2017. According to his evidence (again which was not relevantly contradicted) his performance in that game was "below average".

15. After the conclusion of the game on 20 January 2017, at about 11.00pm and at the request of ASADA, the Appellant provided an *"in-competition"* urine sample to ASADA. That urine sample was subsequently tested or analysed by the Australian Sports Drugs Testing Laboratory ("ASDTL") which is a unit of the National Measurement Institute ("NMI").

16. On or prior to 4 April 2017, ASDTL reported to ASADA the presence of D-methamphetamine and its metabolite D-amphetamine in the urine sample provided by the Appellant at the conclusion of the game on 20 January 2017.

17. On 6 April 2017, the Appellant was notified of those findings by ASDTL.

18. It is common ground, or beyond dispute, that on 20 January 2017, D-methamphetamine was a substance prohibited *"in-competition"* pursuant to the Prohibited List published by the World Anti-Doping Agency and adopted and applied in the ADP.

19. D-methamphetamine or "ice" is, as noted, only prohibited when used *"in-competition"*. The expression *"in-competition"* is a defined one in the ADP. Consistently with the relevant provisions of the 2015 World Anti-Doping Code ("WADC") which is substantially identical to the ADP, the ADP defines *"in-competition"* as follows:

> *"Unless provided otherwise in the rules of an international federation or the ruling body of the Event in question, 'in-competition' means the period commencing 12 hours before a Competition in which the athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition".*

20. There was no evidence of any contrary rule among the rules of BA or the rules governing the ABL competition. Accordingly, for the purposes of this Appeal, there could only be an anti-doping rule violation ("ADRV") if the Appellant had taken or used the methamphetamine within the 12 hours preceding 7.30pm on 20 January 2017 (that is, on or after 7.30am on 20 January 2017).

21. As stated, the Appellant was notified of the positive finding for D-methamphetamine in his Part A sample on 6 April 2017. The Appellant waived his right to have his Part B sample analysed. However, notwithstanding that, the ASADA CEO exercised the right to have the Appellant's Part B sample analysed and that analysis confirmed the presence in the Part B sample of both D-methamphetamine and its metabolite D-amphetamine. On 26 April 2017, BA notified the Appellant that, pursuant to Article 7.9.1 of the ADP, a Provisional Suspension was being imposed upon him on and from the date of that letter. The letter of 26 April 2017 pointed out that the effect of the Provisional Suspension was that the Appellant was barred from temporarily participating in any activity in baseball or any other sport with an anti-doping policy.

22. By letter dated 6 September 2017, ASADA informed the Appellant that ASADA was referring the matter to the Anti-Doping Rule Violation Panel ("ADRVP") for consideration.

23. On or about 16 September 2017, the Appellant provided a submission to the ADRVP. By letter dated 29 September 2017 ASADA advised the Appellant that the ADRVP had considered his matter on 28 September 2017 and that the ADRVP was satisfied that there had been possible ADRVs committed by him, namely the use of a Prohibited Substance in-competition, D-methamphetamine.

24. The Appellant made further submissions to the ADRVP including a submission on 11 October 2017. However, by letter dated 31 October 2017, ASADA informed the Appellant that on 26 October 2017 the ADRVP made the assertion that there had been a possible anti-doping rule violation by him in respect of the use of D-methamphetamine. That letter advised that the Appellant would shortly receive an Infraction Notice from ASADA on behalf of BA notifying him of the nature and particulars of the ADRV and including the proposed sanction.

25. On 7 November 2017, ASADA, on behalf of BA, in accordance with Article 7.9A of the ADP, again wrote to the Appellant. This was the "Infraction Notice" referred to in previous correspondence.

26. Under the heading "Notice of Possible Sanctions" the Infraction Notice stated as follows:

> *"Article 10 of the Policy specifies the applicable sanctions for ADRVs. You have admitted to smoking methamphetamine in the morning before the doping control test (DCT). However, you do not admit to consuming the illicit drug within the 12 hours prior to the DCT.*
>
> *You have not provided sufficient evidence to establish that the Prohibited Substance was used out of competition in a context unrelated to your sport. While you have submitted that you smoked the methamphetamine in the morning prior to the DCT, you have not provided any corroborative evidence (for example, statements from third parties that corroborate the timing of ingestion). The statement of the …. ASDTL … which has been previously provided to you, indicates that the levels of the Prohibited Substance and its Metabolite in your sample were high in comparison to the study of Olyer et al and is (sic) therefore likely that you ingested the Prohibited Substance in the 12 hours prior to the DCT. In the circumstances, ASADA relies upon the evidence of the ASDTL. …".*

27. The Infraction Notice went on to state that the proposed period of ineligibility was four years. It also went on to state the alternatives available to the Appellant namely:

    (a) The right to have a hearing in relation to the alleged ADRVs;

    (b) The right to admit the alleged ADRVs; or

    (c) Deemed acceptance of the alleged ADRVs.

28. In respect of *"deemed acceptance"* of the alleged ADRVs, the Infraction Notice informed the Appellant that, in accordance with Article 7.10.2 of the ADP, if he did not respond within 14 days of receiving the Infraction Notice, or file an application in the CAS, he would be deemed to have admitted the ADRVS, to have waived his right to a hearing and to have accepted the consequences set out under the heading *"Notice of Possible Sanctions"*.

29. The Appellant did not respond within 14 days of receiving the Infraction Notice of 7 November 2017, nor, in that same period, did he lodge any appeal with CAS in respect of the ADRV. Thus, on 30 November 2017 BA wrote to the Appellant, noting these facts and informing him that, as a consequence, the Appellant had waived his right to a hearing and accepted the consequences set out in the Infraction Notice. The letter went on to inform the Appellant that BA *"hereby"* found that the Appellant had committed ADRVs under Articles 2.1 and 2.2 of the ADP. The letter also informed him of the sanction for those ADRVs, namely a period of ineligibility of four years. He was advised that he would be eligible to recommence competing in sport from 26 April 2021 (being four years from the date of the commencement of the mandatory Provisional Suspension).

30. It is from the imposition of this sanction on 30 November 2017 by BA that the Appellant appeals to CAS. It is conceded in the answer of ASADA that the athlete has the right to appeal that decision to CAS pursuant to Article 13.2.3 of the ADP.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 21 December 2017, the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). In his Statement of Appeal, the Appellant did not indicate whether he was requesting either a sole arbitrator or a three member panel. ASADA requested that the appeal be submitted to a three member panel and nominated Alan Sullivan QC as one of the three arbitrators. BA did not opine on the matter.

32. On 25 January 2018, the Appellant filed his Appeal Brief in accordance with Article R51 of the Code.

33. On 15 January 2018, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, appointed Mr Alan Sullivan QC of Sydney, Australia as Sole Arbitrator to determine that Appeal.

34. Pursuant to Article R55 of the Code, ASADA filed its Answer on 6 April 2018. The Second Respondent, BA, did not file a formal *"Answer"*. Rather it has taken no significant or substantial role in the Appeal although Mr Crook represented it at the hearing and asked, with leave of the Sole Arbitrator, a number of questions. Otherwise, BA was content to let the contest be one between the Appellant and ASADA.

35. There followed a series of directions hearings brought about by requests of each of the parties for extensions of time on various occasions which, invariably, were considered to and thus consent directions were made.

36. The parties signed an Order of Procedure on 21 June 2018 and, pursuant to directions given by CAS, the Appellant filed its Outline of Evidence and Submissions on 26 July 2018. The First Respondent filed its Outline of Evidence and Submissions on 30 August 2018 and the hearing, before the Sole Arbitrator, took place at the offices of Allens in Sydney, Australia on 13 September 2018.

37. The following persons attended the hearing:

    For the Appellants: Mr Sloan and Mr Sharman (counsel)

    For ASADA: Ms Younan (counsel), Ms Emily Fitton (Senior Lawyer at ASADA and Ms Carolyn Maher, Lawyer at ASADA

    For Baseball Australia: Mr Michael Crooks

38. The only witnesses called were Mr Sloan who gave oral evidence in chief and was cross-examined and Professor David Le Couteur AO who was called by the First Respondent. His evidence in chief was comprised of an affidavit attaching his expert's report dated 5 April 2018. Professor Le Couteur was cross-examined by Mr Sharman, on behalf of the Appellant.

39. At the conclusion of the hearing, the Sole Arbitrator indicated that he would reserve his decision.

IV. SUBMISSIONS OF THE PARTIES AND PRAYERS FOR RELIEF

A. The Most Relevant Provisions of the ADP

40. In order to do justice to the submissions of both the parties it is first necessary to set out the critical provisions of the ADP which are involved in this Appeal. Those provisions are contained in Article 10 of the ADP, which relevantly mirrors (as it must) Article 10 of the 2015 WADC.

41. Article 10.1.1 deals with a situation where an athlete can establish that he or she bears No Fault or Negligence. It has no application here and is not relied upon by the Appellant.

42. Article 10.2 is relevant as this appeal is only one against sanction. Article 10.2 relevantly provides:

> *"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension under Articles 10.4, 10.5 or 10.6:*
>
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *10.2.1.1 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.*
>
> ….
>
> *10.2.2 If Article 10.2.1 does not apply the period of Ineligibility shall be two years.*
>
> *10.2.3 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 significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. …. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In Competition shall not be considered 'intentional' if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-Of-Competition in a context unrelated to sport performance".*

43. Also of relevance in this Appeal is Article 10.11.2 dealing with the discretion as to when a period of ineligibility may be held to commence. Article 10.11.2 is headed *"Timely admission"*. It relevantly reads:

> *"Where the Athlete … promptly … admits the anti-doping rule violation after being confronted with the anti-doping rule violation by ASADA … the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case where this Article is applied, the Athlete … shall serve at least one-half of the period of Ineligibility going forward from the date*

the Athlete … accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed …".

44. It is in the context of these provisions of the ADP that the submissions of the parties need to be considered.

B. The Appellant's Submissions and Prayers for Relief

45. The Appellant's submissions as presented both in writing and orally may be summarised as follows:

(a) The Appellant admits that he did not appeal the Infraction Notice and is out of time. He thus concedes that he cannot appeal the Infraction Notice and the finding of use *"in-competition"*. However, the Appellant admits that it is open to the Sole Arbitrator on the Appeal to come to a different conclusion (namely that the use was not *"in-competition"*) which is relevant to the potential application of clause 10.2.3;

(b) The Appellant submits that to be successful he must establish on the balance of probabilities:

(i) That the anti-doping violation was not intentional;

(ii) That he did not know that the conduct in which he engaged constituted an anti-doping offence and did not know that there was a significant risk that it might; and/or

(iii) That the methamphetamine was not consumed in a context related to sports performance;

(c) The Appellant further submits that if he is successful in establishing the matters summarised above, then his prompt *"admission"* of taking the methamphetamine should result in the exercise of the discretion pursuant to Article 10.11.2 as to the commencement date of any suspension or period of ineligibility;

(d) In respect to the factual findings, and also, in particular, in respect of the expert evidence of Professor Le Couteur, the Appellant submitted that Professor Le Couteur's opinions should not be accepted because they were based on studies or medical research which was of extremely limited value and reliability due to the focus of that research and the very limited number of people who were the subject of such studies. The Appellant, however, called no expert evidence to contradict Professor Le Couteur's views;

(e) The Appellant submitted, in respect of the factual material that, despite some inconsistencies in his evidence, his evidence should be accepted and that, in particular, it should be accepted that he did not take methamphetamine within the relevant 12 hour "window" so as to make that use of a Prohibited Substance one which was *"in-competition"*.

46. The Appellant submits that if he is successful in arguing each of the above grounds then the period of suspension of four years from the date of the mandatory provisional suspension should be set aside and in lieu thereof a period of ineligibility of two years commencing from 20 January 2017 should be imposed.

47. In his Appeal Brief, the Appellant sought the following relief:

> *"Sanction reduction under Article 7.9A of the Australian Baseball Federation Inc. Anti-Doping Authority and other relevant legislation".*

C. The Respondents' Submissions

48. The Respondents' submissions may be summarised as follows:

(a) The Appellant has not discharged the onus of proof cast upon him by the ADP to prove that his taking of the Prohibited Substance was not *"intentional"*;

(b) That the evidence of the Appellant that he ceased taking methamphetamine by, at the latest, 5.00am on the morning of 20 January 2017 (and hence that he did not take the drug *"in-competition"*) should not be accepted;

(c) The expert evidence of Professor Le Couteur should be accepted. That evidence shows, as a matter of probability, that the Appellant did use methamphetamine within 12 hours of the commencement of the baseball game on 20 January 2017 and thus that there was a use of a Prohibited Substance *"in-competition"* so that the Appellant cannot rely on the relevant part of clause 10.2.3, namely that part which states that the ADRV shall not be considered *"intentional"* if the athlete can establish that the Prohibited Substance was Used Out of Competition in a context unrelated to sport performance;

(d) The Respondents further submit that even if the Appellant could establish that the Prohibited Substance was used *"Out of Competition"* that he also had to establish, for the purposes of clause 10.2.3, that it was used *"in a context unrelated to sport performance"* and the Appellant had failed to establish that;

(e) In respect of the factual finding as to whether or not the Appellant ceased to use methamphetamine by, at the latest, 5.00am on the morning of 20 January 2017, the Respondents point to the lack of corroborative evidence to support the Appellant's own evidence and submit that that lack of corroboration is fatal to acceptance of the Appellant's version of events or, at the very least, that the absence of corroboration in the circumstances of this case should make it impossible to find that the Appellant discharged his burden of proof;

(f) The Respondents also submitted that the Appellant's allegedly poor performance in the game on 20 January 2017 was irrelevant to the determination of whether or not the Appellant took the methamphetamine *"in-competition"*;

(g) So far as the discretion ground is concerned, the Respondents said that the provisions of Article 10.11.2 of the ADP were simply not engaged because the Appellant had never admitted the ADRV, that admission being a prerequisite to the exercise of the discretion.

49. In its Answer, the First Respondent (distinguish between First and Second) sought the following relief:

"The Athlete should be subject to a period of Ineligibility of four (4) years, commencing on 26 April 2017".

50. The Second Respondent did not submit an Answer.

V. JURISDICTION

51. Article R47 of the Code provides 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 him prior to the appeal, in accordance with the statutes or regulations of that body".

52. No party to this Appeal challenges the jurisdiction of CAS to determine it. As stated, in its Answer dated 6 April 2018, ASADA specifically concedes the athlete's right to appeal the imposition of the period of ineligibility to CAS. BA, for its part, made no submissions on the question of jurisdiction or, indeed, on any other matter. The Appellant did not make any submissions on the question of jurisdiction.

53. Further, the parties expressly agreed in clause 1 of the Order of Procedure that CAS had the jurisdiction to determine the Appeal.

54. The Sole Arbitrator is satisfied that CAS has jurisdiction.

VI. ADMISSIBILITY

55. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

56. The appealed decision was notified to the Appellant on 30 November 2017. The Statement of Appeal was filed on 21 December 2017. Therefore this Appeal was timely filed and complied with the requirements of the Code, including the payment of the CAS Court Office fee. No party disputes the admissibility of the Appeal.

57. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

58. Article R58 of the Code provides as follows:

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

59. Moreover, Article R28 of the Code provides that the seat of CAS and of each arbitration panel is in Lausanne, Switzerland. Swiss procedural law therefore applies to this Appeal.

60. It was ASADA, on behalf of BA, which issued the challenged decision. Each of ASADA and BA are domiciled in Australia.

61. The anti-doping rules applicable are those of BA. As BA is an Australian entity, Australian law applies subsidiarily.

VIII. MERITS OF THE APPEAL

62. As acknowledged by the parties, the central issue in this Appeal is the construction and application, on the facts of this case, of Article 10 of the ADP which is in relevantly identical terms to Article 10 of the 2015 WADC.

63. The Appellant accepts that he bears the onus under Article 10.2.1.1 of establishing that the ADRV was not intentional. Only if he discharges that onus can there be a reduction of the period of ineligibility as envisaged by Article 10.2.2.

64. As Article 10.2.3 makes clear, the term *"intentional"* is meant to identify athletes who cheat. Article 10.2.3 goes on to explain what *"cheating"* is for its purposes. It is said that cheating *"requires"* that the athlete 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.

65. Given the fact that the athlete bears the onus of proof, it follows that, subject to the remainder of Article 10.2.3, in order for the athlete to show that his or her conduct was not *"intentional"* he or she must prove that he or she did not know that the conduct constituted an ADRV or did not know that there was a significant risk that the conduct might constitute or result in an ADRV and did not manifestly disregard that risk.

66. In the present case, the Appellant has admitted that he took methamphetamine. In his oral evidence he said that he took *"the ice because I knew we were out of the finals so that I might as well go out and have fun with my mates"*. The Appellant further said that he didn't turn his mind at the time

of taking the methamphetamine to the fact that he was doing the wrong thing. He said that he would have known at the time that the taking of such a drug in-competition was prohibited but that he wasn't conscious of the time, wasn't aware of the 12-hour period, and thus didn't know whether he was taking the drug in or out of competition. The Appellant went on to say that he didn't expect to be tested. He said that his team couldn't make the finals so why should anyone test any member of his team?

67. Even on Mr Sloan's version of events, it is the view of the Sole Arbitrator that, in taking the methamphetamine in the period leading up to 5.00am on Saturday 20 January 2017, Mr Sloan knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation and that he manifestly disregarded that risk. The true situation appears to be that he was aware of that risk but thought it would never eventuate because he thought it was highly unlikely he would be tested since his team could not make the play offs.

68. Therefore, even if the Respondents bore the onus of proof, as opposed to the Appellant, in respect of this aspect of the matter the Sole Arbitrator would have found that there was the requisite knowledge for the purposes of this aspect of Article 10.2.3. The situation is *a fortiori* when the Appellant bears the onus of proof, as is the case here.

69. In such circumstances, the Sole Arbitrator is satisfied that the Appellant has not discharged his onus of proving that he did not know there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and that he did not manifestly disregard that risk.

70. However, Article 10.2.3 provides another avenue for an athlete to have his or her period of ineligibility reduced from four years to two years on the basis of proving that his or her conduct was not *"intentional"*. That avenue is afforded by the last sentence of Article 10.2.3 which relevantly reads:

> *"An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In Competition shall not be considered 'intentional' if … the athlete can establish that the Prohibited Substance was Used Out of Competition in a context unrelated to sport performance".*

71. Here there is no doubt that the ADRV resulted from an *"Adverse Analytical Finding"*. Likewise, there is no doubt that methamphetamine is a substance which is only prohibited in-competition. Thus, in the present case, the Appellant could establish that the admitted ADRV was not *"intentional"* if he satisfies the Sole Arbitrator of two matters, namely:

    (a) That the methamphetamine was *"Used Out of Competition"*; and

    (b) That the use was *"in a context unrelated to sport performance"*.

72. In saying this, the Sole Arbitrator is, in substance, agreeing with the construction of these words, urged upon him by ASADA. The language of the last sentence of Article 10.2.3 is intractable and that ordinary natural meaning gains strength from the clear purpose of Article 10.2.3 being to discourage cheating. However, as will appear from what follows, although the athlete has to

satisfy each of the two requirements set out in the last sentence of Article 10.2.3, the Sole Arbitrator does not consider it necessary to make a finding as to whether or not the use by him of the methamphetamine was *"in a context unrelated to sport performance"* because the Sole Arbitrator is not satisfied that the Appellant has established that the methamphetamine was Used Out of Competition.

73. In order to interpret or construe the last sentence of Article 10.2.3 it is first necessary to read the words of the defined terms into the substantive provision and then construe that provision in its extended sense and in its context bearing in mind the purpose that it was designed to overcome (see, *e.g.*, Kelly v The Queen (2004) 218 CLR 216 at 253 [103]; AIB Group (UK) Limited v Martin [2002] 1 WLR 94 at 96-97; Halford v Price (1960) 105 CLR 23 at 28).

74. Thus it is necessary for the Appellant to establish that the methamphetamine was *"ingested"* or *"consumed"* (being the two relevant parts of the definition of *"use"*) in a *"period which is not in-competition"* (being the definition of *Out of Competition*).

75. It is then necessary to turn to the definition of *in-competition* so that the relevant matter for the athlete to establish is that he ingested or consumed methamphetamine only in a period more than 12 hours before the commencement of the baseball game at 7.30pm on Friday 20 January 2017. In other words, the Appellant must prove that he last took "ice" prior to 7.30am on the morning of Friday 20 January 2017.

76. The only evidence that the Appellant proffers to prove that he did not take methamphetamine after 7.30am on 20 January 2017 is his own testimony. There is no corroboration whatsoever for that testimony. Although he says he was socialising with friends on the night of the 19th January and into the early hours of the morning of 20 January, not one such friend has been called to give evidence. He says that he was driven home at 4.00am or 5.00am and then went to bed and either slept or slipped in and out of sleep from then on until he was woken by his roommate at 2.30pm. Neither the person who drove him home, his roommate nor anyone else has been called to confirm or corroborate that version of events.

77. The Respondents rely upon the decision of the CAS Panel in CAS 2017/A/5017 to submit that in circumstances such as this where an athlete bears the onus of establishing a lack of intent then that onus cannot be discharged unless there is evidence corroborating the athlete's version of events.

78. The Sole Arbitrator cannot accept that submission. Properly viewed CAS 2017/A/5017 does not stand for any such proposition. In CAS 2017/A/5017 a canoeist had been found to commit an ADRV because urine samples taken from him revealed an adverse analytical finding for a prohibited substance. The athlete's case was that the prohibited substance must have been, unknowingly, in a bottle of supplement which he purchased and which had been contaminated. He sought to *"prove"* this by the test done (after he had been tested) on the open bottle of the supplement which showed the existence of the prohibited substance. The Panel placed no weight whatsoever on the positive test in respect of the opened bottle of supplement. It observed that *"it would be all too easy for an athlete to spike an open container of a food supplement with the*

prohibited substance for which he had tested positive, send such 'mix' to a testing institute which would obviously return a positive for that very substance".

79. The Panel, in CAS 2017/A/5017 was thus left with the situation that, in the absence of that evidence, all the athlete was putting up was a theory. In other words, there was no evidence at all (not even evidence from the appellant himself) to discharge the onus of proof. What the Panel in CAS 2017/A/5017 was saying was there must be corroborative evidence for the "theory" put forward by the appellant. This is very much different from saying that where an athlete in fact gives evidence (as opposed to merely putting forward a theory) then the athlete's evidence cannot be accepted unless it is corroborated.

80. In any event, even if CAS 2017/A/5017 did stand for the proposition that an athlete's own evidence of a lack of intent cannot be accepted without corroboration, the Sole Arbitrators declines to follow this line. While the absence of corroboration may, depending on the circumstances of a case, be of great weight in determining whether an athlete has discharged his or her onus of proof, it cannot, in my opinion, ever be regarded as being legally or factually decisive especially when such a requirement does not appear expressly in the WADC or its derivatives such as the ADP.

81. That said, however, the unexplained absence of any witnesses to corroborate the Appellant's version of events certainly does not assist his case. In order to accept the Appellant's version of events, on the balance of probabilities, the Sole Arbitrator *"must feel an actual persuasion of its occurrence or existence"* (compare Watson v Foxman (1995) 49 NSWLR 315 at 319; Woolworths Ltd v Strong (2012) 246 CLR 182 at [76]; Briginshaw v Briginshaw (1938) 60 CLR 336 at 350, 361; Plaintiff M64/2016 v Minister for Immigration and Border Protection (2015) 258 CLR 173).

82. It would be much easier for the Sole Arbitrator to form or have that actual persuasion if there was evidence from others corroborating or confirming the version of events put forward by the Appellant.

83. There is, of course, no such evidence. However, there is evidence to the contrary of the Appellant's version of events from a distinguished and impartial expert witness, Professor Le Couteur.

84. Professor Le Couteur swore an affidavit dated 6 April 2018 attaching his expert's report dated 5 April 2018. His expertise and impartiality were not challenged by the Appellant. He gave oral evidence at the hearing answering questions logically, responsively and objectively. He made appropriate concessions when required and did not, in any way, appear to be transgressing from the proper role of an independent expert intent on assisting the CAS into that of an advocate for the cause of the party who had called him.

85. In his report, Professor Le Couteur was asked to answer five questions. While all the questions, and Professor Le Couteur's answers, are relevant, it is, in the Sole Arbitrator's opinion, sufficient to focus on the first of the questions asked of him and his answer to it.

86. That question was:

> *"Given the estimated concentrations of D-methamphetamine and D-amphetamine in the athlete's urine sample, which was recorded at 11.48pm on 20 January 2017 (athlete's concentration levels), and any other factor you consider relevant, how likely is it that the athlete used D-methamphetamine in-competition (that is, within the period commencing 12 hours before the game which commenced at 7.30pm on Friday 20 January 2017)?".*

87. Professor Le Couteur's answer to this question was, relevantly, as follows:

> *"6. There are several factors which support the conclusion that the athlete used D-methamphetamine … in the period commencing 12 hours before the game commenced at 7.30pm.*
>
> *7. Firstly, the urine levels are high. In publications by Oyler et al (2002) and Kim et al (2004) the urine levels about 10 hours after ingestion of 10 or 20 milligram of D-methamphetamine were 6137 and 11267mg/ml respectively. The athlete was found to have a urine level of 26000mg/ml at 11.48pm. If the last dose was taken prior to between 4.00am and 5.00am, i.e., nearly 20 hours before the urine test – as stated by the athlete – then the dose would have had to have been much higher than the dose administered to the subjects in the studies by Oyler … and Kim … in order to lead to a urine level as high as this, and it would be unlikely that the athlete would have been able to sleep until approximately 2.30pm that day given that D-methamphetamine is a stimulant and causes insomnia and increases alertness.*
>
> *8. Secondly, the ratio of D-methamphetamine to D-amphetamine in the urine provides some insight into the timing that the last dose was taken. D-methamphetamine is slowly broken down (metabolised) to D-amphetamine, therefore the ratio of D-methamphetamine to D-amphetamine in the urine decreases slowly with time after the last dose. This has been quantified by Cook et al (1993) following intravenous injection of 15mg or smoking 30mg. In this study, 20 hours after D-methamphetamine had been administered, the urinary ratio of D-methamphetamine to D-amphetamine was about 6. For the athlete the ratio was 13 … This indicates that the athlete took the last dose of D-methamphetamine much later than between 4.00am and 5.00am. The athlete's ratio was 13 which is consistent with the last dose being taken 6 to 8 hours prior to the collection of the urine sample (i.e., about 4.00pm to 6.00pm).*
> *….*
>
> *9. Finally, methamphetamine has its psychostimulant effects within minutes after the dose has been taken, and the effects may last for some hours. The optimum time to take methamphetamine to increase concentration and reduce fatigue during a game would be shortly before starting the game particularly if the athlete had been out until the small hours of the night before the game using D-methamphetamine.*
>
> *10. Given these factors, it is my opinion that it is very likely that the athlete took methamphetamine within the time period of 12 hours before the game commenced. The athlete's ratio of D-methamphetamine to D-amphetamine when compared to figure 6 of Cook … suggests that the last dose was about 4.00-6.00pm".*

88. It should be added that in his report, Professor Le Couteur opined that the performance enhancing effects of D-methamphetamine are an increase in energy and wakefulness, a reduction in fatigue and increased concentration and alertness.

89. Before Professor Le Couteur's oral evidence is discussed, some comments need to be made about certain aspects of the answers just quoted. One of the factors relied upon by Professor Le Couteur for his opinion was that *"it would be unlikely that the athlete would have been able to sleep until approximately 2.30pm (on 20 January 2017) given that D-methamphetamine is a stimulant and causes insomnia and increases alertness"*.

90. The relevance of this reasoning rests on the assumption given to Professor Le Couteur, for the purposes of preparing his report, that assumption in turn being based on the Appellant's submission to ASADA dated 9 October 2017. In that submission the Appellant stated as follows:

> *"Below is the timeframe of what happened –*
>
> - *Game finished at approximately 10.30pm, Thursday*
> - *I was picked up from the ground at the end of the game*
> - *Arrived a friend's house at approximately 11.30pm*
> - *Took illicit drugs until approximately 5.00am*
> - *Was driven back to team motel, arriving just prior to approximately 6.00am on the Friday.*
>
> …
>
> *I was rooming with Kyle Perkins, who can validate that I was asleep in the room when he got up to go training early in the morning. Kyle then had to wake me up at 2.30pm to get on the team bus and go to the ground prior to the game. I slept the entire time and even skipped breakfast and lunch. There was no opportunity (nor did I look for any) for any activity as all I did was sleep. I reiterate that I did not consume any substances post 5.00am on the day of the game!"* (emphasis added).

91. Thus, the Appellant's story at all times prior to giving oral evidence at the hearing was that he was asleep the entire time from when he got back to the motel until the time he was allegedly woken to catch the team bus at 2.30pm. Hence the relevance of the reasoning of Professor Le Couteur about the inherent likelihood of this occurring given the stimulant qualities of D-methamphetamine.

92. However, when giving oral evidence, the Appellant changed his story. Whether this was a conscious or subconscious attempt to *"tailor"* his evidence to deal with the reasoning of Professor Le Couteur is a matter the Sole Arbitrator does not need to decide. However, the fact that his evidence changed on such a significant matter is a relevant factor when it comes to considering whether the Sole Arbitrator feels an *"actual persuasion"* that events occurred as asserted by the Appellant.

93. The first indication of a potential change of evidence was revealed in the Appellant's Outline of Evidence and Submissions filed on 26 July 2018. That document contained an outline of the Appellant's anticipated oral evidence. In relation to *"sleeping"* the Outline suggested that the evidence the Appellant would give was *"that he was woken up by a team mate at about 2.30pm but did not sleep well during that period"*. The Appellant's oral evidence at the hearing was that, in fact,

between the time he got back to the motel and the time he was woken up by his roommate he was *"resting – he was in and out of sleep but was asleep when his mate woke him up"*.

94. In cross-examination, the inconsistency between this evidence and the statements made in his submission of 9 October 2017 was put to him. He was reminded that he had previously indicated that he had slept the whole time and the Appellant's answer was *"no, I was in and out of sleep – I didn't sleep well"*.

95. No explanation was given by the Appellant for the change of recollection as to how well or badly he slept between his submission of 9 October 2017 and the giving of his oral evidence almost a year later. At worst, as stated, that change of evidence may have been to accommodate Professor Le Couteur's evidence but, even at best, it cast doubt on the reliability of the Appellant's recollection which I regard as relevant to determining whether the requisite level of *"actual persuasion"* about the validity of his version of events has been established.

96. However, reverting to Professor Le Couteur's oral evidence, in essence he maintained the views he had expressed in his expert's report. It was put to him that the studies relied upon were not studies seeking to estimate the time of use of methamphetamine but rather for other purposes. Professor Le Couteur agreed with this proposition but said that nevertheless the data which was created during the studies supported his conclusions. It may also be added that, of course, the studies, being controlled ones, would not be designed to estimate the time of the use of the methamphetamine. By definition, the scientists conducting the study would know the time of use of the D-amphetamine because they were administering it to subjects to enable them to study and evaluate over time the consequential changes in the subject.

97. Just as Professor Le Couteur regarded this factor as not eroding the value of the studies relied upon, so does the Sole Arbitrator.

98. It was next put to Professor Le Couteur that there were only a small number of participants in each study and that must limit the efficacy or validity of the conclusions reached by the studies. Professor Le Couteur agreed that there were a limited number of participants in each of the two studies but indicated that the limited numbers did not undermine the quality of the studies. In this regard, he also indicated that since giving his report, he had come across a third study which produced similar results to those relied upon in his report, namely those by Oyler and Kim. Professor Le Couteur also indicated in his evidence that to achieve a level of 26,000mg/ml 20 or 24 hours after the dose would indicate that the Appellant had taken a very high dosage of methamphetamine. He indicated secondly that if, in fact, the methamphetamine had been used 20 to 24 hours before the drug test (at 11.28pm on 20 January 2017) then the amphetamine level would have been higher than 2,000mg/ml.

99. Finally, it was suggested to Professor Le Couteur that the Appellant's poor performance in the 20 January 2017 game was an indicator that methamphetamine had not been used shortly prior to the game. Professor Le Couteur disagreed. He pointed out that there are many factors which can affect actual performance by an athlete. In the present case, he expressly indicated that the consumption by the Appellant on the night of 19 January/morning of 20 January of copious amounts of alcohol would have had an adverse effect on the athlete's performance the next

night. That consumption of alcohol may well counter any of the "positive" performance enhancing effects of taking methamphetamine. The Sole Arbitrator agrees, for the reasons given by Professor Le Couteur, that little weight can be placed on the Appellant's alleged poor performance.

100. In CAS 2016/A/4803, the CAS Panel set out some of the factors which a CAS Panel or Sole Arbitrator should take into account in determining the value or acceptance of expert evidence. Those factors were as follows:

(a) The expert's duty is not to represent the interests of the party calling him or her, but, rather, to express his or her views honestly and as fully as necessary for the purpose of the case. An expert should provide independent, impartial assistance to the Panel. An expert should not be an advocate for any party;

(b) The Panel cannot completely disregard any expert evidence which is otherwise admissible or before it. Rather the Panel must pay regard to the content of the expert evidence, but it is not bound by it, or required blindly to follow it;

(c) The expert opinion should be comprehensible and lead to conclusions that are rationally based, with reasoning explained. The process of inference that leads to the conclusions must be stated or revealed in a way that enables conclusions to be tested and the judgment made about their reliability;

(d) In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable objective procedure for reaching the expert opinion so that qualified persons can either duplicate the result or criticise the means by which it was reached, drawing their own conclusions from the underlying facts;

(e) The value of the expert evidence depends upon the authority, experience and qualifications of the expert and, above all, upon the extent to which his or her evidence carries conviction;

(f) In cases where experts differ, the Panel will apply logic and common sense in deciding which is to be preferred, or which parts of the evidence are to be accepted.

101. In the present case, the Appellant called no expert evidence to contradict that of Professor Le Couteur. In the view of the Sole Arbitrator and bearing in mind the factors just mentioned, together with the fact that, as already stated, Professor Le Couteur was an impressive, impartial and independent witness, the Sole Arbitrator has no hesitation in accepting and relying upon Professor Le Couteur's evidence.

102. Accepting Professor Le Couteur's evidence, it follows inexorably, as a matter of probability, that the Appellant used or smoked methamphetamine not only before 7.30am on Friday 20 January 2017 but also after 7.30am on that day which would mean that there was use of a Prohibited Substance *"in-competition"*.

103. However, it is not necessary for the Sole Arbitrator to make such a positive finding. The onus of proof is upon the Appellant and the Sole Arbitrator has to be actually persuaded that his version of events can be accepted on the balance of probabilities.

104. In the light of the demonstrated unreliability of the Appellant's evidence concerning how he slept on 20 January 2017, the lack of corroborating evidence for his version of events either from the person or people who allegedly he was out partying with or who took him back to the motel and from his roommate and, in particular, in the light of Professor Le Couteur's evidence the Sole Arbitrator is not satisfied that the Appellant's last use of methamphetamine on 20 January 2017 occurred prior to 7.30am on that day.

105. It follows that the Sole Arbitrator is not satisfied that the Appellant has established that the ADRV was not intentional for the purposes of Articles 10.2.1.1 and 10.2.3 of the ADP. Consequently, in the Sole Arbitrator's view, the period of ineligibility must remain at four years.

106. There remains the question of when the period of ineligibility should commence. This involves the possible application of Article 10.11.2 of the ADP and the possible exercise of the *"discretion"* given by that provision.

107. In the Sole Arbitrator's view, and as submitted by ASADA, it is a pre-condition of the exercise of the discretion concurred by Article 10.11.2 that the athlete promptly *"admits"* the ADRV.

108. In a situation where the ADRV consists of an Adverse Analytical Finding of the presence of a Prohibited Substance which is only prohibited *in-competition* there can only be a relevant admission of an ADRV if the athlete admits not only taking the Prohibited Substance but also taking it within the 12-hour time window before the relevant competition. At no stage, in the present case, did the Appellant admit that he took the methamphetamine after 7.30am on Friday 20 January 2017. Rather, to the contrary, he maintained at all times that he took the methamphetamine prior to 7.30am.

109. In these circumstances, in the Sole Arbitrator's view, it cannot be said that the Appellant *"admitted"* the ADRV for the purposes of Article 10.11.2 of the ADP. In this regard it is to be noted that ASADA's letter to the Appellant of 7 November 2017 expressly notified him of three options in respect of the matter, the second of which was to *"admit the alleged ADRVs"*. The Appellant chose not to respond to that letter by making the relevant admission.

110. In all the circumstances, it is the view of the Sole Arbitrator that the provisions of Article 10.11.2 are not engaged with the result that there is no discretion to vary the commencement date of the period of ineligibility.

111. In its letter dated 30 November 2017 to the Appellant, BA informed the Appellant that the applicable sanction was a four year period of ineligibility commencing on 26 April 2017 and continuing until 26 April 2021. It follows from the reasoning expressed above that the Sole Arbitrator agrees with, and confirms the decision so made by BA.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by Mr Aaron Sloan on 21 December 2017 against the Australian Sports Anti-Doping Authority and Baseball Australia concerning the decision of Baseball Australia rendered on 30 November 2017 is dismissed.

2. The decision of Baseball Australia dated 30 November 2017 to impose a sanction of four years ineligibility upon Mr Aaron Sloan commencing on 26 April 2017 is confirmed.

(…)

5. All further requests for relief are dismissed.