TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

**CAS 2021/A/7730 Clement Krobakpo v. Badminton World Federation (BWF)**

# ARBITRAL AWARD

**delivered by the**

# COURT OF ARBITRATION FOR SPORT

**sitting in the following composition:**

President: Mr. Jeffrey G. Benz, Attorney-at-law and Barrister, Los Angeles, California and London, United Kingdom

Arbitrators: Dr. Shouzhi An, Attorney-at-law, Xiamen, P. R. China
Dr. Ucheora Onwuamaegbu, Attorney-at-law, Washington, DC, United States of America

**in the arbitration between**

**Clement Krobakpo, Nigeria**

Represented by Mr. John Duru, Attorney-at-law, Lagos Island, Nigeria

**Appellant**

**and**

**Badminton World Federation (BWF), Kuala Lumpur, Malaysia**

Represented by Thomas Delaye Fortin, Head of Legal and Governance, Canada

**Respondent**

## I. THE PARTIES

1. The Appellant, Mr. Clement Krobakpo, is a badminton player from the Federal Republic of Nigeria.

2. The Respondent, Badminton World Federation ("BWF"), is the international sports federation governing the sport of badminton and is recognized as such by the International Olympic Committee.

## II. FACTUAL BACKGROUND

3. This matter is related to an appeal filed by Mr. Krobakpo against the decision rendered by the Court of Arbitration for Sports ("CAS") Anti-Doping Division on 16 October 2020 (the "Appealed Decision") to impose a 4-year suspension on him for an anti-doping rule violation ("ADRV"). The grounds of the Appealed Decision were notified to the Appellant on 21 January 2021 by means of an email and courier from the CAS Court Office to his counsel.

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, oral pleadings and evidence adduced in connection with these proceedings. Additional facts and allegations found in the Parties' written submissions, oral pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

### A. The doping control and result

5. Mr. Krobakpo's urine sample was collected in competition on the occasion of the African Games on 25 August 2019 in Rabat, Morocco ("Sample").

6. The Sample was analyzed at the World Anti-Doping Agency ("WADA") accredited laboratory in Lausanne, Switzerland ("Laboratory").

7. On 25 September 2019, Mr. Krobakpo was advised that the test of the A Sample resulted in an Adverse Analytical Finding ("AAF") for the presence of Heptaminol and Octodrine, both Specified Substances under the WADA Prohibited Substances List, and an Atypical Finding ("ATF") for the presence of Clenbuterol, a non-specified substance set out under the section titled "Other Anabolic Agents" of the WADA Prohibited Substances List.

8. On the same date, the Athlete had taken himself out of competition voluntarily once he was notified of the results of his A sample.

9. Mr. Krobakpo did not request the opening or analysis of his B Sample.

10. The Organizing Committee of the African Games ("COJAR") was the entity charged with results management authority for the Event.

11. On 30 September 2019, BWF requested COJAR to review the ATF for Clenbuterol following WADA's Stakeholder Notice regarding meat contamination.

12. Appellant submits that after the request was made to COJAR by BWF, nothing was heard from COJAR or BWF until 27 July 2020 (approximately 11 months later) when the Disciplinary Committee of COJAR decided to disqualify Mr. Krobakpo's results from the Event and subsequently referred the matter back to BWF to take the appropriate decision beyond the Event.

13. On 14 August 2020, BWF issued a Notice of Charge against Mr. Krobakpo formally charging him with the commission of an anti-doping rule violation for the following: "*An Adverse Analytical Finding [ ] for presence of heptaminol and octodrine . . .*" in the Sample.

14. In the same notice, the BWF informed the Appellant that "*an Atypical finding was reported for the presence of Clenbuterol in the same sample.*"

15. BWF concluded that it would conduct a review in accordance with the WADA instructions. As request was thus made by BWF for Mr. Krobakpo to explain the presence of Clenbuterol in his sample.

16. On 26 August 2020, Mr. Krobakpo, in response to the Notice of Charge, stated that the Sample was collected from him, and that by virtue of the scientific finding that his urine sample contained the prohibited substances will not contest that he had committed an ADRV under Article 2.1 of the BWF Anti-Doping Regulations ("ADR") for the presence of Heptaminol and Octodrine, however that it was unintentional and he pleaded for no sanction under then BWF ADR 10.4 (now 10.5) or at least that the sanction be reduced in accordance with Article 10.5.1 (now 10.6) of the BWF ADR. For all intents and purposes the BWF ADR and the World Anti-Doping Code ("WADA Code") are substantively identical or substantially similar, and in this case the Panel is treating them as identical.

17. On 3 September 2020, Mr. Krobakpo made further explanations regarding his positive Sample. In the explanation he stated that he had in 2018 been tested, in competition, during the African Championships in Algeria, while he was taking similar nutritional supplements, like "Freedom Juice", and tested negative for prohibited substances.

18. On 17 September 2020, BWF issued an updated Notice of Charge, wherein BWF notified Mr. Krobakpo that BWF would pursue the ADRV for Clenbuterol as an AAF in application of the WADA Clenbuterol Guidelines as Mr. Krobakpo had not traveled to "at risk" counties in the months prior to the August 2019 doping control. The BWF accepted that the presence of the two specified substances had arisen from his ingestion of "Freedom Juice" and that the presence of these substances was unintentional.

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ANTI-DOPING DIVISION ("CAS ADD")

19. On 25 September 2020, the BWF filed a Request for Arbitration with the CAS ADD. With its Request for Arbitration, the BWF filed a request for Provisional Suspension,

seeking the provisional suspension of the athlete in accordance with Article 7.9 of the BWF ADR.

20. On 28 September 2020, the CAS ADD opened its procedure and invited the athlete to file his comments on the Request for Provisional Suspension and an Answer to the Request for Arbitration.

21. On 13 October 2020, in accordance with Article A17 of the Rules of the CAS Anti-Doping Division, the CAS Court Office informed the Parties that the Sole Arbitrator to decide this procedure was as follows:

Sole Arbitrator: Mr. Patrice Brunet, Attorney-at-Law in Montreal, Canada

22. On 19 November 2020, the CAS Court Office notified the Order on the Application for Provisional Suspension issued by the Sole Arbitrator, whereby it confirmed the provisional suspension of Mr. Krobakpo as from 16 October 2020.

23. On 30 November 2020, by agreement of the Parties and the order of the Sole Arbitrator, Mr. Krobakpo filed his Answer dated 27 November 2020 and prayed for the relief of a finding of no fault or negligence on his part pursuant to then Article 10.4 (now 10.5) and then 10.5 (now 10.6) of the BWF ADR. Mr. Krobakpo also filed an expert report of Prof. Suleiman Folorunsho Ambali.

24. In its Answer to the Request for Arbitration before the CAS ADD, the BWF sought the following relief:

> "*a. That BWF's Request for Arbitration is admissible.*
> *b. That Mr. Krobakpo is sanctioned with a period of ineligibility of four years. Any period of ineligibility served (whether imposed on, or voluntarily accepted by, Mr. Krobakpo) before the entry into force of the CAS award shall be credited against the total period of ineligibility.*
> *c. That the period of ineligibility commences on 25 November 2019.*
> *d. That all competitive results obtained by Mr. Krobakpo from and including 25 August 2019 are disqualified, with all resulting consequences (including forfeiture of any medals, points and prizes).*"

25. On 15 December 2020, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties that this latter considered himself sufficiently well informed at this juncture to render a decision in this procedure based solely on the Parties' written submissions and without a hearing. The CAS Court Office further reminded the BWF to file an expert report (if needed) in response to Prof. Ambali's report within 20 days thereafter as stated in its letter of 10 December 2020.

26. On 2 January 2021, the Sole Arbitrator issued his Arbitral Award by upholding the Request for Arbitration and sanctioning Mr. Krobakpo with a four-year period of ineligibility starting from 16 October 2020.

## IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ON APPEAL

27. On 11 February 2021, the Appellant, filed a Statement of Appeal at the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code") against BWF with respect to the Arbitral Award of the CAS ADD rendered on 2 January 2021. The Appellant nominated Dr. Ucheora Onwuamaegbu as arbitrator.

28. By letter of 18 February 2021, the CAS Court Office invited Mr. Krobakpo to complete the appeal, within three (3) days from receipt of the letter, with the full address of the Respondent in the Appellant's Statement of Appeal pursuant to Article R48 para. 1 of the CAS Code. Furthermore, the CAS Court of Arbitration for Sport requested the Appellant, within the same deadline, to provide proof of filing by courier, the Statement of Appeal and enough copies as required by Article R31 of the CAS Code.

29. On 22 February 2021, the Appellant filed an amended Statement of Appeal and the accompanying documents. The Appellant, pursuant to Article R32 of the CAS Code, applied for a 10 days extension of time to file his Appeal Brief, during which he would be able to interview and gather his witnesses and the necessary documentation to support his Appeal.

30. By letter of 24 February 2021, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal and the amended version, *inter alia,* transmitting same to the Respondent with copies of correspondence to date with the Appellant and granting the Appellant the requested additional time for filing his Appeal Brief.

31. On 2 March 2021, BWF nominated Dr. Shouzhi An as arbitrator.

32. On 15 March 2021, the Appellant filed his Appeal Brief, in accordance with Article R51 of the CAS Code.

33. On 25 March 2021, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that the Panel was constituted as follows:

| | |
|---|---|
| President: | Mr. Jeffrey Benz, Attorney-at-law, Los Angeles, CA, USA, and Barrister, London, United Kingdom; |
| Arbitrators: | Dr. Ucheora Onwuamaegbu, Attorney-at-law, Washington DC, USA; |
| | Dr. Shouzhi An, Attorney-at-law, Xiamen, China. |

34. On 7 April 2021, the Respondent filed its Answer, in accordance with Article R55 of the CAS Code, and indicated that it did not deem a hearing necessary in this case.

35. By letter dated 15 April 2021, the Appellant also confirmed that he did not consider a hearing necessary in this case, but sought consent of the Respondent and or the President of the Panel to file a Reply to the Answer of the Respondent.

36. On 10 May 2021, the CAS Court Office acknowledged and granted the Parties a second round of submissions in accordance with Article R56 of the CAS Code. The Appellant

was granted a 10-day deadline to file his reply to the Respondent's Answer, and a similar deadline was granted to the Respondent for its response.

37. On 19 May 2021, the CAS Court Office acknowledged the Appellant's Reply to the Respondent's Answer dated 17 May 2021. The Appellant uploaded his Reply to the Respondent's Answer on the CAS E-filing Platform on 18 May 2021 at 19:56 (CEST).

38. On 7 June 2021, CAS acknowledged the Respondent's Answer to the Appellant's Reply dated 31 May 2021. The Respondent uploaded its Answer to the Appellant's Reply on the CAS E-filing Platform on 31 May 2021 at 17:43 (CEST).

39. On 4 August 2021, the CAS Court Office invited the Parties to confirm by 11 August 2021 whether they prefer a hearing to be held or for the Panel to issue an Award based solely on the Parties' submissions.

40. On 23 August 2021, pursuant to Article R57 of the CAS Code, the Parties were advised that the Panel deemed itself sufficiently well-informed to decide the case based solely on the Parties' written submissions, without the need to hold a hearing.

41. By 30 August 2021, the Parties, respectively, signed and returned the Order of Procedure to the CAS Court Office.

## V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

### A. The Athlete submits in summary as follows:

42. That Appellant and Respondent agree that the presence of Octodrine and its metabolite Heptaminol in the Athlete's urine sample was unintentional, which is why the Respondent did not seek an increased sanction.

43. That the Parties were in agreement that the Appellant established the origin of the two substances and thus a possibility for a reduced sanction or complete elimination of a sanction under the relevant rules.

44. That the Parties differed with regard to the degree of fault, if any, attributable to the Athlete, and the Athlete had explained in the proceedings below that:

- He is a self-trained badminton player;
- The sport has a lack of qualified coaches in Nigeria who could act as his mentor and keep him updated with new developments in the sport;
- There is a lack of qualified sport doctors in Nigeria who could have given him adequate advice;
- He spoke to friends and sought their opinion as to the supplements he was taking and was advised to check the label to ensure that it does not contain any banned substance

and that the Respondent concedes that the label of "Freedom Juice" does not indicate the presence of Octodrine or its metabolite; and

- With strict American manufacturing practices, no banned substances would enter his body in any form or manner given the absence of the substances being listed on the label (and the Athlete was uneducated about these matters in any event).

45. That Appellant did not in the month prior to the doping control travel to a country with higher risk of meat contamination such as China, Guatemala, or Mexico.

46. That in Nigeria he consumes large amounts of meat such as beef, pork, and goat at nearly every meal.

47. That he takes precautions to avoid contamination by refrigerating unconsumed meat and by buying meat in the "overt market" (as opposed to a lesser quality market). He suggested that contamination might have occurred at the point of sale or due to the unstable electricity supply in Nigeria that may have affected meat storage of meat products he ingested.

48. That prior to the positive doping control he had tested negative during the African championships in Algeria in 2018, while taking a similar nutritional supplement to Freedom Juice.

49. That he relied on expert testimony from an expert in Nigeria (discussed below in detail) the major highlight of which is the following excerpt:

> "*Therefore, it is difficult to certify the sanctity of our meat products in terms of freedom from banned drugs, including clenbuterol. In addition, there has been no known study to ascertain the level of clenbuterol in the imported poultry and beef products. However, going by the high level of dumping of contrabands in the country, it will not be out of place to suggest that banned substances including clenbuterol may have found their way into the body of man, including athletes through the contaminated meat. This may therefore be the source of contamination experienced by Mr. Clement Krobakpo, a Nigerian athlete that has 20 pg/ml of clenbuterol in his urine sample which is equivalent of 0.02 ng of clenbuterol/ml of urine. This is 25 times lower than the maximum limit of 5 nglml prescribed by WADA. This certainly shows that the athlete may have not deliberately consumed the drug but the lower level must have likely come from contaminants such as meat. Although, we have not had any documented report of deliberate usage of clenbuterol by livestock farmers in Nigeria, the fact that most of the meat consumed in the country are imported, many of them illegally through our various porous land and sea borders is a pointer to the danger of consuming contaminated meat*".

50. The Athlete agreed with the dictum in *CAS 2017/A/5112* that the Appellant is not under a duty to show how the prohibited substance entered his sample; however, a careful examination of the expert witness testimony here shows that the Appellanthas discharged the presumption of intent by providing the factual basis on

which the Arbitrators can base such a conclusion. In this regard, the Athlete commended the Panel to that aspect of the witness testimony wherein the expert witness testified as follows:

> "*Mr. Clement Krobakpo, a Nigerian athlete that has 20 pg/ml of clenbuterol in his urine sample which is equivalent of 0.02 ng of clenbuterol ml of urine. This is 25 times lower than the maximum limit of 5 ng/ml prescribed by WADA. This certainly shows that the athlete may have not deliberately consumed the drug but the lower level must have likely come from contaminants such as meat. Although, we have not had any documented report of deliberate usage of clenbuterol by livestock farmers in Nigeria, the fact that most of the meat consumed in the county are imported, many of them illegally through our various porous land and sea borders is a pointer to the danger of consuming contaminated meat*".

51. In summary, the 20 pg/ml of clenbuterol found in the Appellant's urine sample is much lower than the minimum required performance level ("MRPL") of 0.2ng/ml and this clearly rules out the possibility of intentional direct ingestion of the drug with the only viable alternative being contamination by meat.

52. That in trying to discharge the presumption of intent it is submitted that the Appellant does not have to prove how the substance entered his urine sample. In CAS 2017/A/5112, the CAS Panel noted that:

> "*109. A Player seeking to discharge the presumption of intent does not necessarily have to show exactly how the Prohibited Substance entered his sample. However, without showing how the Prohibited Substance entered his sample, it will be very difficult for an Athlete to discharge the presumption of Intent, as the factual basis on which the Panel can base such a conclusion will be absent (...)*
>
> *(...)*
>
> *111. There may be circumstances in which a Panel can be satisfied that the ADRV was not intentional, despite the source of the Prohibited Substance not being established. The Panel may be so satisfied where it finds, for example, the testimony of the Player credible, that such evidence is corroborated by experts and other relevant individuals, and where the scenario submitted by the Player appears to the Panel to be the most plausible.*"

53. Moreover the definition of "intentional" in Article 10.2.3 of the BWF-ADR does not expressly require such a threshold requirement. In *CAS 2016/A/4534* and the recent one of *CAS 2019/A/6313* the two cases concluded that there is no strict need for the Appellant (Applicant) to establish the origin of the Prohibited Substance in order to prove that the ADRV was not intentional. The above two cases were cited with approval in *CAS A1_2020* in this case the panel went further to hold that:

> "*78 ... it would be very helpful, from the perspective of an Applicant, to be able to prove how the Prohibited Substance was ingested and such proof would facilitate discharging the onus of proof placed upon her but it does not follow that, absent such proof an applicant cannot discharge the relevant onus*".

54. That taking into consideration that the default sanction, for a first offender, for such an ADRV (which is four years) is very severe, it follows that Article 10.2.3 of the BWF-ADR makes it plain that the term "intentional" is meant to identify those athletes who *cheat.* That Article makes it plain that the athlete must engage in conduct which he knew constituted in an ADRV or that he did know that there was a significant risk that that conduct might constitute or result in an ADRV and must show that he did not manifestly disregard the risk. It is thus submitted that a finding that an Athlete has intentionally committed an ADRV is tantamount to a finding that the athlete *had cheated* and that the sanction is *appropriately proportional* to such finding. The Sole Arbitrator, in this matter, at no point made any finding that the Appellant attempted to cheat but instead was more concerned about the origin of the meat contamination, and being unable to find it, concluded that presumption of intention had not been discharged. Furthermore, on this same issue on discharging the onus of proving that the ADRV was not intentional the Athlete hereby commended to the panel the dictum in *CAS A1_2020* at paragraph 81 where the panel held as follows:

> "*81. It has been suggested that, absent an athlete proving how a Prohibited Substance came into his or her system, there is "only the narrowest of corridors" or "only extremely rare cases" where an athlete will be able to discharge the onus of proving that the ADRV was not intentional (see e.g., Villanueva and Lawson). With respect, however, the Sole Arbitrator believes that such descriptions are an unhelpful, unnecessary and unwarranted gloss on the wording employed in Article 10.2.3 or its equivalents. Given the severe default sanction, even for a first offender, the actual language employed in Article 10.2.3 and the actual practical difficulties for an applicant in seeking to discharge his or her onus of proof in circumstances such as the present, the Sole Arbitrator considers that it is unwarranted to approach the consideration of which an Athlete has discharged the onus place upon him or her from a perspective that he or she must be able to fit within "the narrowest of corridors" or show that his or her case is an "extremely rare" one. Rather, the proper approach is to determine whether, on the totality of the evidence, the Applicant has proven on the balance of probabilities that she did not, or did not attempt to, cheat*".

55. As a result, the Sole Arbitrator's insistence on finding the source of meatcontamination as a means of discharging the presumption of intent was grossly unfair to the Appellant as even the Respondent in its request for Arbitration in the first instance proceedings had conceded that "*the BWF recognizes that tracing the pieces of meat consumed by the player more than 11 months prior would be impossible*".

56. Moreover the doping control took place in Morocco after a period of 10 days from the date of arrival of the Nigerian contingent. It is therefore possible that the meal contamination took place in Morocco a country where an athlete had in the past tested positive for Clenbuterol in his sample. On 18 August 2020, *France News 24* had reported that a Moroccan Athlete, Jamel Chatbi, had tested positive for Clenbuterol during the August 15-22 World championship held in Berlin. Morocco it appears has a history of Clenbuterol poisoning and so it stands to reason that there is a very strong likelihood that the contamination took place there and not in Nigeria as hitherto suspected.

57. That the Sole Arbitrator, it appears, was obsessed with finding the source or origin of the alleged meat contamination. In the opinion of the Sole Arbitrator, any other explanation would amount to "speculation". However, the Appellant's burden to prove meat contamination was made more difficult by the Respondent's failure to render a decision on the Clenbuterol positive test for almost 12 months. Though the Respondent surprisingly and without any basis, argued that this was due to the fact that *"the player was not responsive,* " when it did not show any effort to contact the Appellant or the Nigerian Badminton Federation for the period. This was a breach of the Respondent's duty pursuant to Article 73 of the WADC which requires anti-doping organizations to "promptly notify" athletes of positive tests. During this 11 months delay, it is submitted, the opportunity to secure vital evidence was lost. In CAS 2019/A/6313 the panel held:

> "*aggravating this situation of course* is *the slowness of the lab's notification of the results of its analysis of the A sample. The panel agrees with the athlete that this inexplicable tardiness may well have caused potentially relevant evidence regarding the source of the prohibited substance to become unavailable to him*".

58. That it is also submitted that from the expert report of the Athlete's expert and taking into consideration the tardiness of the result management process, it became impossible to know how the prohibited substance entered the Appellant's body. What is known and so far and not controverted by the Respondent is that the amount of the prohibited substance found in the Appellants body was a *pharmacologically irrelevant* dose-meaning that it was insufficient, *per se,* to provide any positive benefits to the Appellant.

59. That the Sole Arbitrator on 16 October 2020imposed a provisional suspension on the Athlete to commence on the same day for the positive A sample test made on the 25 August 2019 that ignored a) the submission of the Respondent here that out of fairness the date of any period of ineligibility should start on 25 November 2019 (3 months after sample collection), a date that corresponds roughly to the date when a hearing have taken place for a procedure of this nature, and b) the Athlete that he had taken himself out of competition voluntarily once he was notified of the results of his A sample and he should be suspended from 25 September 2019. The Athlete here argued that the relevant provisions of the BWF-ADR, modelled on Article 10.13.1 of the WADA Code, should apply permitting this Panel to order an earlier start date for the Athlete's suspension, should one be found, because of delays not attributable to the Athlete.

60. In Mr. Krobakpo's Statement of Appeal and the Appeal Brief, the Appellant sought the following relief:

"

i. *Uphold the Appellant's appeal.*

ii. *Set aside the Arbitral Award of the Anti-doping Division of the Court of Arbitration For sports dated 22 January, 2021.*

iii. *Find that the Appellant bears no fault or negligence and eliminate his period of ineligibility so that he is immediately eligible to compete.*

*iv. In a worse case scenario find that his anti-doping Rule violation was unintentional and that his period of eligibility should be reduced to 2 years, back dated to 25th August 2019, the date of sample collection.*

*v. Order any other relief for the Appellant that this panel deems to be just and equitable.*"

**B. The BWF made the following submissions in summary:**

61. That the Appellant does not dispute that on 25 August 2019, he provided an in-competition urine sample and that this urine sample was found to contain three prohibited substances: Heptaminol, Octodrine, and Clenbuterol; this appeal only concerns the Consequences (as defined in the BWA-ADR) for these adverse analytical findings.

62. That the Appellant has not adduced or submitted any additional evidence before this Panel and in those circumstances the Panel should only review the materials and evidence before the CAS-ADD Panel and the CAS-ADD Decision. In addition, this Panel should afford considerable weight to the decision of the CAS-ADD Panel as it is comprehensive and substantial.

63. That a period of 17 months passed between collection of the urine sample and the resulting first-instance decision of the CAS-ADD and the WADA Code and the BWF-ADR provide for such circumstances to be taken into account through the provisions on commencement of the period if ineligibility.

64. That the CAS ADD Panel considered that since there were ADRVs arising from three different substances the Consequences should be based on the ADRV that carries the most severe sanction, in application of Article 10.7.4.1 of the BWF-ADR.

65. That the BWF agrees that the origin of the Heptaminol and Octodrine were established (with the source being the supplement ingested by the Athlete, Freedom Juice) which opens the door to reduction of the sanction under the applicable rules. The Parties disagree as to the extent of any sanction reduction.

66. That for ingestion of Heptaminol and Octodrine, given his high level in his discipline, failure to consult a doctor before ingesting the supplement relying instead only his friends and entourage, the label of Freedom Juice mentions "2-aminoisoheptaine" which is an alternative name for Octodrine, research of that substance name would raise concerns on a google search for that name, and the Athlete declared the Freedom Juice on his doping control form, he should be found to have been at a moderate level of fault under CAS 2013/A/3327, with the applicable sanction being 12 months, and there is no possibility of finding No Fault or Negligence here.

67. That the ADRV for Clenbuterol is established and this was not contested by the Appellant.

68. That the Parties disagree as to "intention" and as to potential sanction reductions. The

Appellant argues that the precedent of CAS 2017/A/5112 applies and that the Appellant is not strictly bound to establish the origin of the substance in order for his lack of intention to be established. The BWF agrees that establishing the origin of the substance is not strictly necessary for the Appellant to establish his lack of intention. To quote CAS 2017/A/5223, on which the Appellant relies:

> "*109. There may be circumstances in which a Panel can be satisfied that the ADRV was not intentional, despite the source of the Prohibited Substance not being established. The Panel may be so satisfied where it finds, for example, the testimony of the player credible, that such evidence is corroborated by experts and other relevant individuals, and where the scenario submitted by the Player appears to the Panel to be the most plausible.*" (emphasis added)

69. This reference needs to be read together with other CAS precedents which commented on the athlete's burden of proof:

a. In the case of CAS 2014/A/3820, the Panel noted that (in the context of establishing the origin):

> *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation".* (emphasis added)

b. In the case of CAS 2010/A/2230, the Sole Arbitrator expressed the athlete's burden of proof in the following terms:

> "*11.12. To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.*" (emphasis added)

70. That in the present case, beyond his own word, the Appellant relies on the following to establish his lack of intention and the origin of the substance: The small amount of the substance found in his urine sample; the expert opinion by Professor Ambali, and a news report by France News 24 about a Moroccan athlete testing positive for clenbuterol.

71. That in relation to the small amount of clenbuterol found in the Appellant's urine sample, the BWF notes that: Clenbuterol is not a threshold substance. For this reason, any trace can lead to an ADRV; and as the Sole Arbitrator noted in paragraph 89 of the CAS-ADD Decision, a minute amount of clenbuterol could be caused by many factors other than meat contamination, such as micro dosing or end-of-cycle residues in the body. The BWF submits that while a minute concentration is compatible with meat contamination, it could also have many other hypothetical reasons, some of which are related to intentional doping. For this reason, it cannot by itself justify a finding of meat contamination.

72. That in relation to the Appellant's expert opinion, the Appellant refers to the findings of the Sole Arbitrator in paragraph 100 of the CAS-ADD Decision:

> "*100. The Athlete's witness is an expert in veterinary pharmacology and toxicology. He confirmed that there "have not been any known study to ascertain the level of clenbuterol in the imported poultry and beef products*".

73. That the Sole Arbitrator noted the expert's opinion on the "*dumping of contrabands in the country...*" and his recognition that "*... we have not had any documented report of deliberate usage of clenbuterol by livestock farmers in Nigeria...*". The Sole Arbitrator has also noted the expert witness' statement to the effect that "*...most of the meat consumed in the country are imported, many of them illegally through our various porous land and sea borders is a pointer to the danger of consuming contaminated meat.*" However, the witness is not an expert in international commerce. While his comment is appreciated, the Sole Arbitrator could not give any weight to it. It can only be categorized as anecdotal without additional supporting evidence nor expertise. The BWF notes that the Appellant has not provided any additional information that can give credence to the opinion of Professor Ambali. For this reason, the BWF submits that the Panel should come to the same findings as the Sole Arbitrator and conclude that the witness statement of Professor Ambali does not support the theory of meat contamination to clenbuterol in Nigeria. Such conclusion is supported by the following material from WADA: The WADA Stakeholder Notice regarding meat contamination does not include Nigeria in the countries for which widespread use of clenbuterol has been reported; and, WADA's Legal Department, on 9 September 2020, reported that it "[had] not received any ATFs or AAFs for clenbuterol from Nigerian athletes since the clenbuterol notice was published." For the above reasons, the BWF submits that the Sole Arbitrator's findings should be left unchanged.

74. That in relation to the news report by France News 24 about a Moroccan athlete testing positive for clenbuterol, the BWF submits that the Panel would be ill-advised to make inferences regarding innocent justifications for ingesting clenbuterol in Morocco from the case of Mr Chatbi, in particular considering his subsequent ADRV record, which included a suspension of 2 years and 8 months for Whereabouts failures in June 2016 and a suspension of 8 years for a second ADRV involving the Athlete Biological Passport.

75. That the BWF submits that the above arguments related to "intention" are also relevant to the question of establishing the origin of the substance. Specifically in relation to the origin of the substance, the Appellant argues that it would be impossible for him more than 11 months after the collection of the urine sample, to secure evidence showing the origin of the clenbuterol. The BWF answers as follows: The BWF recognises the practical difficulty in collecting direct evidence more than 11 months after the sample collection. Such direct evidence could have been gathered, for example, by collecting and analysing meat samples in places visited by the athlete. In spite of these difficulties, the Appellant still could have provided evidence showing that meat contamination does exist in Nigeria. He chose not to do so. In addition, the Appellant could have used this Appeal to supplement Professor Abali's report and address the concerns raised by the Sole Arbitrator in the CAS-ADD Decision. He chose not to do so. As detailed in

paragraph 6, the Appellant was in fact notified about the procedure on 30 September 2019, slightly more than a month after the sample collection. While the BWF appreciates that the Appellant may not have been aware of the intricacies of establishing meat contamination at that time, he could have sought counsel or asked questions to the result management authority about, as it was then, an atypical finding to clenbuterol.

76. That Article 24.7.2 of the 2021 BWF-ADR allows for the application of *lex mitior* in cases where newer rules allow for more favourable Consequences for the athlete. The BWF submits that the 2021 BWF-ADR are substantially similar to the 2017 BWF-ADR: The Consequence for multiple ADRVs is based upon the ADRV that carries the most severe Consequences (Art. 10.9.3.1, 2021 BWF-ADR); the base sanction for a positive to a non-specified substance such as clenbuterol is four years (Art. 10.2.1); and where the athlete is unable to show that the ADRV was not intentional, this sanction remains a period of ineligibility of four years (Art. 10.2.1.1). Without establishing the origin of the substance, further reductions are not possible under Articles 10.5 and 10.6. Article 10.13 on the commencement of the period of ineligibility period is the same, in substance, as in previous versions of the BWF-ADR and in the WADA Code. For the above reasons, the BWF submits that the Appellant may not make claims in relation to potential *lex mitior* under the 2021 BWF-ADR. The Appellant submits in particular that: The results management procedure was "prejudicial" and "unfair to the extreme" to the Appellant because the provisional suspension was not imposed in a timely fashion, and should therefore be set aside; and the period of ineligibility should have commenced at an earlier time. The BWF submits that the result management procedure was in line with the principles set out in the BWF-ADR and the WADA Code. The BWF further submits that the above claims by the Appellant fail to consider the Appellant's own failure to respond to the COJAR's requests, as describedabove. If the Appellant had responded to COJAR's three emails in 2019, the procedure before the COJAR would certainly not have lasted 11 months. While the BWF submits that the Appellant is at least partly responsible for the delays in the COJAR result management, it does acknowledge that the process could have been faster than 11 months. However, neither the BWF-ADR nor the WADC provide for any rules allowing for adjustment of the decision beyond setting an earlier date of commencement for the resulting period of ineligibility. The BWF disagrees with the Appellant's claims about BWF delay and submits that its own part of the result management process could barely have been carried out faster: The BWF received the COJAR Disciplinary Committee decision on 8 August 2020. The BWF sent its initial Notice of Charge to the Appellant on 14 August 2020. The BWF sent its updated Notice of Charge to the Appellant on 17 September 2020, after receiving information from the Appellant. The BWF submitted its Request for Arbitration on 25 September 2020.

77. That the BWF notes that the Sole Arbitrator in the CAS-ADD Decision did not follow the BWF's initial request from its Request for Arbitration to set the start date as of 25 November 2019 (i.e., 3 months after the sample collection, when a hearing could have reasonably taken place). The BWF further notes that the Sole Arbitrator did not find Article 10.11.1 of the BWF-ADRto apply to the procedure, because the Appellant had failed to be responsive to the COJAR's emails in its phase of the result management process (paragraph 114 of the CAS-ADD Decision). Despite its initial request, the BWF

agrees with the finding of the Sole Arbitrator and submits that any period of ineligibility should only start as of the date of imposition of the provisional suspension, i.e., 16 October 2020. Indeed, as illustrated above, at least part of the substantial delays in the procedure can be explained by the Appellant's own failure to answer communications from COJAR. Had the Appellant been responsive to COJAR's requests, the result management procedure at COJAR's level could have been completed in a timely fashion.

78. That the BWF respectfully submits that this Panel does not have the power to set aside the provisional suspension at this point of the procedure. Such request should have been made via an appeal of the Provisional Suspension. If anything, the Appellant benefits from the Provisional Suspension as it provides a potential for an earlier starting date for the period of ineligibility.

79. In its Answer, the BWF sought the following relief:

> "a. *The Decision of the CAS-ADD Panel was properly reached and is correct.*
> *b. There is nothing in the Points of Appeal or any matter raised in the Appeal Brief that should cause the CAS Panel to disturb the Decision whether on breach of the BWF-ADR or on Sanction.*
> *c. The Appeal should be dismissed.*"

## VI. JURISDICTION

80. Article R47 of the CAS Code provides as follows:

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

81. The CAS ADD Arbitration Rules provide in Article A21 in pertinent part as follows:

> ". . . *the award may be appealed to the CAS Appeals Arbitration Division within 21 days from r eceipt of the notification of the final award with reasons . . . in accordance with Articles R47 et seq. of the Code of Sports-Related Arbitration, applicable to appeals procedures.*"

82. The appeal was filed here in accordance with this provision of the CAS ADD Arbitration Rules. No party contested jurisdiction here and all Parties participated fully in these proceedings.

83. Accordingly, the Panel determines it has jurisdiction.

## VII. ADMISSIBILITY

84. Article R49 CAS Code reads 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against [...].*"

85. Art. 13.6.1 of the BWF ADR (2020 edition) correspond to Art. R49 CAS Code. Article A21 of the CAS ADD Arbitration Rules, as set forth above, has a similar 21-day limitation for appeals.

86. The grounds of the Appealed Decision were communicated to the Appellant on 21 January 2021.

87. On 11 February 2021, the Appellant filed his Statement of Appeal against the Appealed Decision with the CAS Court Office.

88. No party has objected to the admissibility of this appeal and in fact both Parties have participated in this proceeding fully without objection.

89. Consequently, the Appellant complied with the time limits prescribed by the CAS Code. The Panel finds that the Appeal was therefore filed in time.

## VIII. APPLICABLE LAW

90. Article R58 of the CAS Code provides the following:

"*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.*"

88. Article 23.1 of the BWF Statutes (2020 edition) specifies that:

"*Where these Procedures are silent, proceedings shall be governed by and be construed in accordance with the law of England and Wales.*"

89. Therefore, the Panel finds that the applicable regulations under which the appeal will be decided are the BWF ADR, supplemented, if necessary, by the law of England and Wales. For the sake of clarity, the Panel did not find it necessary to apply the law of England and Wales.

## IX. ANALYSIS

### *A. The scope of the Appeal*

90. As both sides accept that an ADRV for Clenbuterol occurred, this appeal basically focuses on:

a. whether or not the four-year suspension imposed on the Appellant by the CAS ADD should be eliminated or reduced, and

b. when the provisional suspension should commence, or, in other words, when the period of ineligibility should commence for Appellant.

91. The Appellant also tested positive for the presence of two other substances, both Specified Substances, Heptaminol and Octodrine, which are subject to dramatically lesser suspension periods than Clenbuterol. The only issue potentially at issue with respect to those substances would be fault, allowing for sanction reduction, as the BWF agreed, given the facts, that the source of these substances was established as a result of the Athlete drinking a product called "Freedom Juice".

92. Given the relevant BWF ADR rule on the case where multiple substances are found in a single sample, which rule is consistent with the equivalent rule in the WADA Code, consideration by the Panel of penalties resulting from the ADVR for these substances is only relevant if the period of suspension for Clenbuterol is less than 4 years, nee less than 2 years, which is the maximum period that would apply to the other two substances. Accordingly, the Panel will proceed in this manner.

### *B. Classification of Clenbuterol*

93. It is an undisputed fact that the samples taken from the Player revealed the presence of Clenbuterol, classified as non-Specified Substance set out in Section S1.2 "Other Anabolic Agents" of the 2019 WADA Prohibited List.

94. Therefore, it follows, and was accepted, that the Appellant committed an ADRV as a prohibited substance, Clenbuterol, was found to be present in his sample.

95. What is debated is how this substance entered his body, and the length of sanction that should be imposed on him and its start date.

### *C. The Sanction*

96. Consistent with the equivalent provisions of the applicable version of the WADA Code, Article 2.1 of the BWF ADR, under which the Appellant was charged, provides in pertinent part as follows:

> "*2.1.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*"

The Parties accepted that the metabolites for the Prohibited Substance Clenbuterol were present in the Appellant's sample here.

97. Consistent with the equivalent provisions of the applicable version of the WADA Code, Article 10.2 of the BWF ADR provides in pertinent part as follows:

> *"The period of Ineligibility for a violation of Article 2.1 . . . shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*
>
> > *10.2.1 The period of Ineligibility, subject to Articles 10.2.4, shall be four (4) years where:*
> >
> > > *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance . . ., unless the Athlete . . . can establish that the anti-doping rule violation was not intentional. . . ."*

The footnoted Comment to Article 10.2.1.1 states as follows:

> *"While it is **theoretically possible** for an Athlete or other Person to establish that the anti-doping rule violation **was not intentional without showing how the Prohibited Substance entered one's system**, it is **highly unlikely** that in a doping case under Article 2.1 a**n Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source** of the Prohibited Substance."*

98. The Parties dispute the facts on how the substance entered the body of the Appellant, so, subject to the Player meeting his burden of proof, the maximum four-year ineligibility period may only be reduced to a maximum two-year ineligibility period if the Appellant can show the source of the prohibited substance, and if he is able to do so may only be eliminated or reduced based on a finding of No Fault or Negligence or No Significant Fault or Negligence by the Appellant under the BWF ADR in accordance with Articles 10.5 and 10.6.

99. Both Parties accept that CAS 2017/A/5112 has some bearing on ameliorating the seemingly strict application of the above cited BWF ADR provisions when it states in its paragraph 109 that:

> *"There may be circumstances in which a Panel can be satisfied that the ADRV was not intentional, despite the source of the Prohibited Substance not being established. The Panel may be so satisfied where it finds, for example, the testimony of the player credible, that such evidence is corroborated by experts and other relevant individuals, and where the scenario submitted by the Player appears to the Panel to be the most plausible."*

100. Accordingly, as a threshold matter, the Panel must determine if the Appellant was able to demonstrate the source of the Clenbuterol, or if there is some other non-prohibited basis upon which could be relied to accept his explanation of the source of the Clenbuterol.

101. In this regard, the Panel notes that both sides have argued their case in relation to the decision of the first instance CAS ADD arbitrator. The Panel rejects any such notion. Appeals cases before CAS are determined *de novo* pursuant to Article R57 of the CAS Code, and the Panel takes up its analysis anew, without reference to the case below save for any appropriate reference to evidence given below that either may not have been presented on appeal or that is inconsistent with the evidence submitted on appeal. To

find otherwise would obviate the procedural guarantees guaranteed to parties on appeals in CAS proceedings.

***a) Can or should the maximum 4-year ineligibility period be reduced?***

102. The Appellant invites the Panel to issue a warning or reprimand and eliminate his period of ineligibility, or at the very least, reduce it, on grounds that he was not at fault or negligent, or not significantly at fault or negligent under Articles 21 and 22 AFC ADR.

*(i) Applicable standard of proof*

103. Article 3.1 of the BWF ADR establishes that where an athlete bears the burden of proof, the athlete must establish a fact by a balance of probabilities. *Prima facie*, the Panel sees no reason to, or that it can, depart from this standard.

*(ii) Source of Prohibited Substance*

104. The Appellant argues that the Clenbuterol in his sample must have come from ingestion of contaminated meat in Nigeria. The Appellant has provided no direct proof of this fact, but has submitted as his evidence his own statement providing in summary that he did not take Clenbuterol but that he ate a lot of meat in Nigeria, the low levels of the substance found in his sample, a news report by France News 24 about a Moroccan athlete testing positive for Clenbuterol, and an expert report of Professor Suleiman Folorunsho Ambali, a professor of veterinary pharmacology and toxicology at the University of Ilorin in Nigeria.

105. The Panel notes at the outset that it has been well-referenced in the CAS cases that the self-expressions or protestations of innocence of athletes who have had their samples test positive for a prohibited substance are the common currency of both the innocent and the guilty. As a result, the cases have rightfully required more than the simple statement of an athlete that he or she did not commit the violation to establish the absence of a violation. The Panel sees no good reason to stray from this fundamental principle here.

106. The Panel also notes that there is no need to consider application of the doctrine of *lex mitior* here as the relevant rules, and sanctions, remain fundamentally the same as between the various versions of the BWF-ADR that could apply to this case.

107. With respect to the small amount of Clenbuterol in the Appellant's sample here, many different conclusions can be drawn. First, the Panel notes that Clenbuterol is not a threshold substance; it does not occur naturally, or endogenously, in human beings. As a result, any level of Clenbuterol in the body must come from an exogenous source and it results in a positive test. Second, a small or even minute amount of Clenbuterol in a sample could be the result of food contamination, just as reasonably as it could be the result of micro-dosing or being the result of end of doping cycle residue. There is simply no way for the Panel to assess this information in a vacuum simply because it was a low level of Clenbuterol.

108. The Panel finds unpersuasive and irrelevant the news report by France News 24 about a Moroccan athlete testing positive for Clenbuterol years earlier. A news report about another athlete from another country testing positive for the same substance simply does

not allow by its imputation any conclusion to be drawn concerning the athlete here and the source of the Clenbuterol in his sample. The Panel notes that evidence was submitted that the athlete in question from Morocco subsequently was suspended for 2 years and 8 months for Whereabouts failures in June 2016 and suffered a later suspension of 8 years for a second ADRV involving his Athlete Biological Passport.

109. Accordingly, the Panel must consider the expert witness statement and its contents.

110. The Appellant's expert was an expert in veterinary pharmacology and toxicology. Among other things, he confirmed that there "*has been no known study to ascertain the level of clenbuterol in the imported poultry and beef products [in Nigeria]*" and noted that there might have been "*dumping of contraband*" in Nigeria but that " *...we have not had any documented report of deliberate usage of clenbuterol by livestock farmers in Nigeria . . .*" The expert also noted that ". . . *most of the meat consumed in the country are imported, many of them illegally through our various porous land and sea borders is a pointer to the danger of consuming contaminated meat.*"

111. The expert also referenced documented instances of livestock industry uses of Clenbuterol and Clenbuterol contamination of meat in many countries (such as Canada, the US, China, Mexico, Guatemala, and Germany), but not in Nigeria.

112. In short, the expert submitted that there are benefits to using Clenbuterol in livestock and athletes, that there have been documented cases of use or contamination in other countries but no documented cases of use or contamination in Nigeria, and that there is a lot of meat imported into Nigeria and that meat may be contaminated with Clenbuterol (though there is no documented proof or case). While not in doubt about the facts presented by the expert, the Panel does not find them persuasive in determining, as required, *by a balance of probabilities*, the source of the Clenbuterol here.

113. Further, the Panel notes that Nigeria is not among the countries on the WADA Stakeholder Notice regarding meat contamination in countries where widespread use of Clenbuterol has been reported. Similarly, the Panel notes the undisputed evidence submitted from the WADA legal department on 9 September 2020 reporting that WADA "*[had] not received any ATFs or AAFs for clenbuterol from Nigerian athletes since the clenbuterol notice was published.*"

114. On appeal, as the case is *de novo*, the Appellant could have submitted additional evidence, having had the benefit of facing the arguments of the Respondent challenging his evidence in the first instance proceeding and having seen the determinations of the CAS ADD arbitrator. Such evidence could have included more conclusive evidence of facts and figures on meat contamination in Nigeria, or the use of Clenbuterol in domestic or imported meat or other food sources in Nigeria, testing of meat or food sources from locations where the Appellant might have eaten meat or other food in Nigeria or elsewhere during the relevant half-life period for Clenbuterol metabolites, or even evidence from food providers relied upon by the Appellant showing that they could have used imported meat from an at risk country. This kind of evidence is typically submitted in food contamination cases. The Panel was not able to consider any of this kind of evidence for the benefit of the Appellant as it was not offered.

115. The Panel is mindful that the delay of 11 months from the time of sample collection until when the Appellant was informed of the nature of the charges against him makes it difficult to determine the source of the Clenbuterol. But it appears that here the Appellant made little effort to determine the source aside from two communications with COJAR. It is one thing to argue difficulty or impossibility after showing efforts to try to determine the source of a prohibited substance, but it is an entirely different, and ultimately unsuccessful, thing to make such an argument in the absence of much effort.

116. Accordingly, the majority of the Panel is of the view that the Appellant failed to establish by a balance of probabilities that the source of the Clenbuterol in his sample was the result of meat contamination or some other reasonable source unrelated to sport performance.

*(iii) Appellant's degree of fault*

117. As the majority of the Panel was unable to establish the basis for reducing the base sanction from 4 years to 2 years, the Panel is unable to assess the fault of the Appellant in causing the presence of Clenbuterol in his sample.

*(iv) Consequences*

118. As a result of the analysis above, the Panel is bound to determine that the Appellant shall suffer a sanction of 4 years Ineligibility under the BWF ADR.

119. The Panel wishes to make clear that the record before it did not indicate that this athlete was a cheater. The amounts of Clenbuterol found in his sample were relatively small. But the presence of Clenbuterol required application of certain standards in determining the appropriate sanction in this case and the Panel majority was bound to find what it did given the evidence before it. The fact that the Panel was split in its view on the length of sanction emphasizes the difficult facts and circumstances of this case and makes clear that this athlete cannot be considered to be a cheater.

120. The Appellant has argued that the doctrine of *lex mitior* is somehow beneficial to the Appellant in the application of any sanction. The Panel has reviewed the submissions on this point and the relevant rules and finds that there is no difference as between the 2021 WADA Code and the 2019 WADA Code on any provision applicable to the Panel's determination in this proceeding and thereby finds it inappropriate, and declines, to apply the doctrine here.

121. As a result of this determination, the Panel does not need to determine the applicable sanction applying to the Appellant's use of Heptaminol and Octodrine, as the sanction for the presence or use of these substances, given the acceptance by both Parties of the source of ingestion, would be less, if not substantially less, than 4 years.

***b) Commencement of the period of ineligibility***

122. Having determined the period of Ineligibility, the Panel must next turn to the question of when the period of Ineligibility should start.

123. The Appellant argues that because of the undue delay in processing his case within the BWF, he should be entitled to as early a start date as possible under the BWF ADR, namely the date of sample collection.

124. The BWF argues in summary that it was not responsible for the delays in handling this case, and that these delays were occasioned by the organizing committee of the event in Rabat. In any event, the BWF argues that the decision of the CAS ADD arbitrator to start the provisional suspension commensurate with the date originally requested by the BWF was correct and should not be disturbed.

125. The Panel notes that the BWF ADR provide in its Article 10.13.1 that substantial delays not attributable to the athlete in the processing of his case permit the Panel to backdate the start of the period of Ineligibility to as early as sample collection.

126. Put simply, athletes should not be subject to the risk of serious harm occasioned by anti-doping authorities' failure to function effectively at a high level of performance. As put well by an early CAS panel populated by esteemed arbitrators:

> "*The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable.*" CAS 94/129, para. 34.

127. Article 10.3.1 of the BWF-ADR provides as follows:

> "***10.13.1*** *Delays Not Attributable to the Athlete or other Person*
>
> *Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to the Athlete or other Person, BWF or CAS ADD, if applicable, may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.*"

128. The Panel has considered the following facts:

> -It is conceded there was substantial delay in resolving this dispute that was not attributable to the Athlete;
>
> - The Athlete stated that he did not compete in the intervening days after notification of the ADRVs on 25 September 2019 (effectively self-suspending), and there is no evidence to the contrary;
>
> -No evidence was presented that the Athlete competed between the date of sample collection, 25 August 2019, and the date of his self-imposed suspension, 25 September 2019; and
>
> -The Panel notes that the BWF accepted before the CAS ADD that the period of Ineligibility should start from 25 November 2019, and the period of time between

25 August 2019, and November 25, 2019, is not material to the overall length of the sanction (though it may be material to the Athlete).

129. As a result, the Panel is of the view that the period of Ineligibility should commence on the date of his sample collection. In other words, the Panel is of the view that the Appellant should receive a 4-year period of Ineligibility commencing on the date of this Award, with credit for the time from the date of the commencement of his sample collection, 25 August 2019, to the present, resulting in a forward period of Ineligibility equal to the difference between 4 years and the time from 25 August 2019, until the date of this Award.

130. The Panel wishes to note that it does not intend to create a new doctrine of "self-suspension" as being determinative of start dates in cases where Article 10.3.2 of the WADA Code applies. Rather, the Panel has considered the facts and circumstances in this case, most notably the delay in processing this case, that was no fault of any of the Parties to this proceeding, the lack of the Athlete's participation in competition subsequent to the date of the sample collection, and the relevant anti-doping organization's agreement to an early start date a mere two months later than that proposed by the Athlete. In light of the broad discretion given to the Panel under Article 10.3.2 of the WADA Code in cases of substantial delay, of which this unquestionably was one, and the above-stated factors, the Panel is of the view that applying the earliest possible start date is appropriate here. The Panel is of the view that, as has existed to date, there will only be limited circumstances in future cases in which such factors (and possibly others) as considered by the Panel here congeal to permit imposition of a start date earlier than the imposition of a provisional suspension.

## X. THE REQUEST TO VACATE THE PROVISIONAL SUSPENSION

131. The Panel considered the request of the Appellant to vacate the provisional suspension imposed on the Appellant in the Order on Application for Provisional Suspension issued by the CAS ADD arbitrator on 16 October 2020.

132. Based on the Panel's determination of start date for the Athlete's period of Ineligibility, the Panel determines that the request to vacate the provisional suspension is moot. The Panel has addressed this issue by determining that the Athlete's period of Ineligibiity shall commence from the date of this Award with credit for the time from the date of sample collection until the date of this Award.

## XI. COSTS

133. This appeal is brought against a disciplinary decision issued by an international sports-body. Therefore, according to Articles R65.1 and R65.2 of the CAS Code, the proceedings are free of charge, except for the court office fee, which the Athlete has already paid and is retained by the CAS.

134. In addition to the arbitration costs, the Award shall also determine to the prevailing party or parties a contribution towards its legal fees and other expenses incurred in connection with the proceedings.

135. Article R65.3 of the CAS Code provides as follows:

> "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

136. Given the outcome of these proceedings and taking into account the fact that the Appellant was found to have committed an anti-doping offense and the fact of the procedural irregularities that required the Panel to backdate the start date of the sanction considerably, as well as the financial resources of the Appellant, which the Panel is informed prevented him from challenging the test results even if he wanted to, the Panel finds that the arbitration costs of these proceedings, in an amount to be notified by the CAS Court Office, shall be borne by the Parties equally.

137. For the reasons above, and also considering the same facts, the Panel is of the view that the Parties shall bear their own legal and other costs in relation to these proceedings.

# ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Mr Krobakpo against the decision of the CAS ADD of 21 January 2021 is partially upheld.

2. Mr Clement Krobakpo is sanctioned with a four years period of ineligibility as from the date of this Award with credit given for the period of ineligibility already served since the date of sample collection, 25 August 2019.

3. Each Party shall bear their respective legal fees and expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 20 October 2022

## THE COURT OF ARBITRATION FOR SPORT

Jeffrey Benz
President of the Panel

Shouzhi An
Arbitrator

Ucheora Onwuamaegbu
Arbitrator