

CAS 2016/A/4632 Alexei Lovchev v. International Weightlifting Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Hon. Michael J. Beloff QC, Barrister, London, United Kingdom
Arbitrators: Mr Ulrich Haas, Professor, Zurich, Switzerland
Mr Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

in the arbitration between

Alexei Lovchev, Moscow, Russia
Represented by Mr Artem Patsev, attorney-at-law in Moscow, Russia

- Appellant -

and

International Weightlifting Federation, Lausanne, Switzerland
Represented by Mr Yvan Henzer of Kellerhals Carrard in Lausanne, Switzerland

- Respondent -

I. PARTIES

1. Mr Alexei Lovchev (“the Appellant”) is a 26 year old Russian weightlifter of international level. He was third at the 2013 World Championships in the men’s +105 kg category, and won the gold medal at the European Championships 2014 in the Snatch, Clean and Jerk and Total. He appeals the decision of the IWF Hearing Panel (“the IWF Panel”) dated 13 May 2016 (“the Decision”) imposing upon him the sanctions set out in para 10 below.
2. International Weightlifting Federation (“the IWF” or “the Respondent”) is the governing body for the sport of weightlifting worldwide with its registered seat in Lausanne, Switzerland, and its headquarters situated in Budapest, Hungary.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence before and at the hearing. Additional facts and allegations found in the parties’ written submission, 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 its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. The Appellant was a part of the Russian national weightlifting team at the 2015 IWF World Championships in Houston, USA. He won the gold medal and set two world records.
5. On 28 November 2015, the analysis of an in-competition sample # 1581098A, provided by the Appellant in Houston, USA, and collected by the IWF, returned an adverse analytical finding (“AAF”) for a prohibited substance, Ipamorelin, in extremely low concentration (100 pg/ml).
6. The analysis was performed on 10 December 2015 by the Laboratoire de controle du dopage at INRS-Institut Armand-Frappier, WADA-accredited laboratory in Montreal (“Montreal Laboratory”).
7. On 29 February 2016, the B-sample analysis performed by the Montreal Laboratory using the same method, confirmed the AAF of the A-sample analysis.
8. The IWF has an IWF Anti-Doping Policy 2015 (“the IWF ADP”) which is based on the revised 2015 World Anti-Doping Code (“the WADC”), and came into effect on 1 January 2015. The IWF ADP applies to both the Appellant and the IWF who have agreed to be bound by it and submitted to the jurisdiction of the hearing panels specified in the IWF ADP to hear and determine cases and appeals.

B. Proceedings before the IWF Panel

9. On 26 April 2016, the IWF Panel held a hearing in Budapest Hungary.
10. On 13 May 2016, in the Decision, the IWF Panel held that it was comfortably satisfied that the analytical reports confirmed the presence of Ipamorelin, a prohibited substance, in the Appellant’s bodily specimen and imposed the following sanctions:

“Further to Article 9 of the ADP, all results obtained by the Athlete at the 2015 World Championships are disqualified with all resulting consequences, including forfeiture of any medals, points (including Olympic Games qualification points) and prizes won.

Further to article 10.8 of the ADP and where applicable to the Athlete, all results obtained in competitions subsequent to the 2015 World Championships are also disqualified with any resulting consequences including forfeiture of any medals, points and prizes.

A sanction of ineligibility for four (4) years from the date of this decision, with that period to be reduced by the time for which the athlete was provisionally suspended.”

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 1 June 2016, in accordance with Articles R47 *et seq.* of the Code of Sports-Related Arbitration (“the Code”), the Appellant filed his statement of appeal with the Court of Arbitration for Sport (“the CAS”).
12. On 2 June 2016, in accordance with Article R51 of the Code, the Appellant filed his “initial” appeal brief. By his statement of appeal and his “initial” appeal brief the Appellant filed certain requests for provisional measures and for disclosure of documents.
13. On 9 June 2016, the Respondent filed its submissions on the Appellant’s request for provisional measures and disclosure of documents.
14. On 21 June 2016, the CAS Court Office was informed of the Panel’s decision on the Appellant’s request for provisional measures and disclosure of documents and instructed the parties accordingly.
15. On 23 June 2016, the Respondent filed its submissions and documents as requested by the Panel on 21 June 2016.
16. On 25 June 2016, the Appellant filed his submissions as requested by the Panel on 21 June 2016.

17. On 27 June 2016, in accordance with Article R51 of the Code, the Appellant filed his appeal brief.
18. On 29 June 2016, the Respondent filed its response to the Appellant's submissions of 25 June 2016.
19. On 1 July 2016, in accordance with Article R55 of the Code, the Respondent filed its answer.
20. On 1 July 2016, the Appellant filed its reply to the Respondent's submissions of 29 June 2016.
21. On 4 July 2016, Appellant and Respondent returned the signed Order of Procedure to the CAS Court Office.
22. In accordance with Article R57 of the Code, the parties, experts, and witnesses, were heard at the hearing, held on 6 July 2016 at the CAS offices, in Lausanne Switzerland.

The following were in attendance:

Panel:

The Hon Michael J Beloff QC, President;
Prof. Ulrich Haas, Arbitrator;
Prof. Luigi Fumagalli, Arbitrator;
Assisted by Daniele Boccucci CAS Counsel.

For the Appellant:

Mr Artem Patsev, attorney-at-law;
Mr Alexei Lovchev, Appellant;
Dr Arthur Kopylov, expert;
Dr Nicholas Faber, expert;
Dr Douwe De Boer, expert.

For the Respondent:

Mr Yvan Henzer, attorney-at-law;
Prof. Christiane Ayotte, Director of the WADA-accredited Montreal Laboratory, expert.

23. On 15 July 2016, the Panel issued the operative part of the award.

IV. SUBMISSIONS OF THE PARTIES

24. The Appellant's submissions (all of which were carefully considered) are amply set out in the Section on MERITS below. They, in essence, may be summarized as saying that

the Respondent had failed to establish to the standard of comfortable satisfaction that the substance in his samples was Ipamorelin as distinct from some other benign substance.

25. In his Appeal Brief, the Appellant made the following request for relief:

“On an interim basis:

The Appellant respectfully requests:

- *The Further Analysis of the Appellant’s B-sample (resealed with a green cap #3700449) be ordered to be performed in a WADA-accredited laboratory designated by the CAS, using HRMS method to be run in full MS (or t-SIM) in combination with t-MS2, with ion mobility separation, in the presence of the parties and/or their representatives.*

On the merits

The Appellant respectfully requests the CAS Panel to rule that:

- *Mr Lovchev’s appeal is upheld;*
- *The IWF failed to establish that Mr Lovchev’s sample #1581098 contained any prohibited substance, and therefore failed to establish that an anti-doping rule violation has occurred;*
- *The IWF Hearing Panel decision dated 13 May 2016 with respect to the case of Mr Lovchev is annulled;*
- *All results achieved by Mr Lovchev at the IWF World Championships 2015 remain unaffected with all resulting consequences (including any medals, points (including Olympic Games qualification points) and prizes won);*
- *The IWF shall reimburse Mr Lovchev his legal costs and other expenses pertaining to these appeal proceedings before CAS;*
- *The IWF bears the costs of the arbitration.”*

26. The Respondent’s submissions (all of which were also carefully considered) are also amply set out in the section on MERITS below. They in essence, may be summarised as saying that the analysis of the Appellant’s samples had in all material respects been properly conducted and led to the inevitable conclusion that they contained Ipamorelin.

27. The Respondent made the following request for relief

“The IWF respectfully requests that the CAS Panel issues a decision holding that:

I. The Appeal filed by Mr Alexei Lovchev is dismissed.

II. The International Weightlifting Federation is granted an award for costs.

V. JURISDICTION

28. 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 as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.”

29. The Appellant relies on Article 13.2.1. IWF ADP as conferring jurisdiction on CAS. The jurisdiction of CAS is not contested by the IWF and is confirmed by the signature of the Order of Procedure.

VI. ADMISSIBILITY

30. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.”

31. As appears from above, the Appellant’s statement of appeal was filed within 21 days of the Decision. Admissibility is not contested by the IWF.

VII. APPLICABLE LAW

32. Article R58 of the Code provides as follows:

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

33. The applicable regulations within the meaning of the above provision are the IWF ADP and the WADC 2015 as well as, with respect to the conduct of the analysis, the International Standard for Laboratories, 2015 (ISL) as well as the WADA Technical Documents TD2015IDCR and TD2015MRPL. Since the IWF that has issued the challenged decision is a Swiss Association, Swiss Law applies subsidiarily.

VIII. PROCEDURAL ISSUES

34. As respected the Appellant's request for interim relief, the Panel (i) declined to bifurcate the proceedings, (ii) declined to order a fresh analysis of the B sample, (iii) did not make the order for disclosure requested. The reasons for decisions (i) and (ii) are sufficiently set out in paras 36 and 37 below. The reason for decision (iii) is the Panel's recognition that the documents requested were at least potentially germane to the way in which the Appellant sought to advance his case and that their disclosure by the laboratory would not be oppressive or otherwise impracticable.

IX. MERITS

1. The Issue

35. There is, underlying the debate between the parties, a single (but decisive) question. Have the IWF proved to the standard of comfortable satisfaction pursuant to Article 2.1 IWF ADP that the substance found in the Appellant's urine was Ipamorelin (or its metabolites) as distinct from some other (non-prohibited) substance? ("The Issue").
36. There is no dispute that (i) the samples tested were the Appellant's; (ii) Ipamorelin is a prohibited substance according to the WADA Prohibited List (S2, Peptide hormones, growth factors, related substances and mimetics); (iii) the presence of Ipamorelin entailed the conclusion that the Appellant committed an anti-doping rule violation ("ADRV"); no free standing point arises as to the sanction imposed – the four year ban is compliant with article 10.2.1 IWF ADP given that the ADRV does not involve a specified substance, and the Appellant has not discharged the burden on him of showing that the ADRV was not intentional (Article 10.2.1 IWF ADP).

2. No further Analysis needed

37. The Panel observes that the main thrust of the Appellant's argument, here and below, is that the Issue could and should be resolved one way or another by a further analysis bearing on the detected substance's ion structure.
38. In the Panel's view, beguiling though that argument is, there can be no basis for requiring such further analysis (even assuming such to be permissible under the applicable regulations) unless the Appellant can cast sufficient doubt on the Montreal Laboratory's conclusions, and if indeed he can do so, he would not need it. Even if such further analysis might indeed resolve the Issue and free the Panel from its duty to consider the complex evidence before it and the complex arguments addressed to it, the Panel is not tempted to open this Pandora's box. This is all the more true considering that – contrary to the proposition of the Appellant – no claim for reanalysis or further analysis arises from Article 6.5 WADC (or IWF ADP) or any other rule. Furthermore, it is disputed whether or not the analysis proposed by the Appellant is more reliable (see letter from Prof. Thevis dated 27 June 2016). In any event it is not a validated method available for Ipamorelin.

3. The various explanations forwarded by the Appellant for the AAF

39. The Panel notes that the Appellant appears to have sought various and inconsistent explanations for the AAF reported by the Montreal Laboratory, initially suggesting that Ipamorelin might have been present in one of the supplements or medications that he duly declared in his doping control form (see his e-mail to IWF of 28 February 2016). However after all such items were tested and found Ipamorelin-free, this line of argument was (rightly) abandoned.
40. The Appellant next sought to argue that the A and B samples analyses were themselves inconsistent, that the former, but not the latter, disclosed metabolites of Ipamorelin (see his letter to IWF of 24 March 2016). The Panel, after study of the analytical data, could find no such inconsistency; it was Ipamorelin and not its metabolites that were detected in both samples.
41. The Appellant then sought ingeniously to turn the argument on its head and to contend that the absence of such metabolites was itself a source of reasonable doubt. The short answer to that contention, in the Panel's view, is that Article 2.1 of the IWF ADP makes the presence of prohibited substance per se an ADRV, there is no added requirement for metabolites.
42. Apart from claiming that it would be irrational for weightlifter to use Ipamorelin (because of the detrimental effects to the ligaments when taking regularly), his own denials of ever having consciously taken Ipamorelin (which carries limited weight since the offence which he was found by the IWF panel to have committed is one of strict liability) and of a hitherto unblemished doping record (which cannot trump laboratory evidence of a first time blemish) the Appellant relied on the testimony of three experts.

(i) No Departures from the ISL

43. Dr Faber provided the Panel with what was in effect a lecture on probability theory. The Panel had to draw its conclusions on the material before it by reference to uncontroversial principles as to standard and burden of proof and therefore with due respect to Dr Faber's expertise, did not find his evidence useful.
44. Dr Kopylov sought to establish that the Montreal Laboratory had confused Ipamorelin with another benign substance. The Panel will consider the detail of his testimony which was at odds with that of Prof. Ayotte separately hereafter, but notes that it was severely compromised by the evidence of Dr de Boer who could put his case no higher than that both substances (prohibited and permitted) were shown to be present in the Appellant's samples. However that of itself, if correct, would require the Panel to dismiss the appeal. As one of its members pithily observed during the course of Dr de Boer's evidence, if gin were a prohibited substance, it would not avail someone charged with drinking gin to say that he had taken tonic with it.

45. The very variety of the discrepant assaults on the Montreal Laboratory findings did not encourage confidence in the Appellant's case. Prima facie the simplest explanation was the most obvious one. The identification criteria for Ipamorelin as set out in TD2015IDCR were fulfilled as Dr de Boer readily accepted; not only was there no such departure from them such as to cast doubt on the findings – there was no departure at all. It was therefore presumptively Ipamorelin that was detected.
46. The Appellant, however, sought to undermine this presumptive conclusion in a number of ways in arguing with the support of, inter alios, Dr Kopylov of the Institute of Biomedical Chemistry in Moscow ("IBCM") arguing as follows:

(ii) Measurement of Uncertainty

47. It was argued on the side of the Appellant that the concentration of Ipamorelin found in the Appellant's A and B samples, i.e. 1 ng/mL would be close to the limit of detection ("LOD") of the Montreal Laboratory, and hence lead to a false-positive result (see para. 37, 107-117 of the appeal brief) which is why the Appellant requested further information regarding the measurement of uncertainty ("MU").
48. The Panel notes that Ipamorelin is not a threshold substance; therefore (irrespective of the concentration of the substance) the sample can be returned positive by the laboratory. Additionally as to MU, such data is not relevant for non-threshold substances, see the evidence of (a) Prof. Mario Thevis of the Cologne Laboratory that the term uncertainty is used in relevant WADA documents exclusively in the context of threshold substances; (b) Prof. Ayotte, who also explained that MU was not relevant for Ipamorelin and sought the opinion of the Dr Osquel Barraso, WADA Deputy Director Science, who stated as follows:

"The estimation of the uncertainty of the measurement procedure is only applicable to quantitative confirmation procedures for determination of Threshold Substances, as established in the ISL and the technical document on decision limits (TD DL).

For qualitative determinations of Non-threshold substances, MU estimations are not applicable. The Laboratory must demonstrate the identity of the analyte and, when possible, the laboratory should make an estimation of the concentration, with no qualification about the precision (ie certainty) of this determination."

49. Insofar as Dr Faber argued that the MU forms part of a proper validation also for qualitative assays, the Panel notes that this amounts to a challenge of the analytical method that requires observance of specific procedural rules (see Article 3.2.1 WADC/IWW ADP), which are not fulfilled in the case at hand.

(iii) WADA Technical Document TD2015MRPL and LOD

50. It is undisputed that for non-threshold substances such as Ipamorelin the laboratory has to comply with WADA Technical Documents TD2015MRPL, which addresses the minimum required performance level (“MRPL”) for detection and identification of such substances.
51. As to this, the Montreal Laboratory fully complied with TD2015MRPL and all the requirements for detection and identification of Ipamorelin were met (see the report of 22 June 2016 of Prof. Ayotte) noting that the estimated limit of detection for Ipamorelin was 0.1 ng/mL. This figure was contested by the Appellant in an unsubstantiated manner. In light of the concentration of Ipamorelin found in the Athlete’s samples and of the LOD, a false-positive is excluded.
52. In short, while the concentration of Ipamorelin found in the Appellant’s samples was low; all the criteria provided for under TD2015IDCR and TD2015MRPL are met, entitling, indeed obliging the Montreal Laboratory to report an AAF.

(iv) Unknown Interfering Compound

53. Dr Kopylov further opined that the method used by the Montreal Laboratory was not selective enough, because it could not be excluded that a non-prohibited compound interfered with the analysis. According to Dr Kopylov a compound of beta-ecdysterone nutritional supplement interfered in the analyses “*so that a putative metabolite of this nutritional supplement is likely to be confused with Ipamorelin*” the nutritional supplement being “Ekdisten”, which was disclosed by the Appellant in his doping control form.
54. In a first report dated 28 February 2016, IBCM submitted a theory according to which the interfering compound (a metabolite of a nutritional supplement) has a mass of 356.19 amu and presented the following composition: C₂₂H₂₈O₄ (p. 98 *in fine*). As to this in a report dated 20 March 2016, Prof. Ayotte stressed that the molecular weight and the structure of Ipamorelin compared to the alleged interfering compound were different. The molecular mass of Ipamorelin is 711.38512 amu and the composition is: C₃₈H₄₉N₉O₅. For Prof. Ayotte, the suggestion that such a different compound (not containing any nitrogen atoms) might have produced results exactly coherent with Ipamorelin is not plausible.
55. In a Second Report dated 25 March 2016, IBCM admitted that their first theory was erroneous. IBCM now submitted that the mass of the interfering compound would be 355.1909356 amu and the composition would be C₂₂H₂₇O₄. As to this as highlighted by Prof. Ayotte in a report of 30 June 2016: “*There cannot be a correct chemical composition for a molecule composed of carbon, oxygen and hydrogen atoms like the one proposed, that would give an odd-number molecular mass (...)*”. The revised proposition of IBCM is contrary to the so-called “nitrogen rule”, i.e. a basic rule in organic mass spectrometry.

56. Dr de Boer (produced another report dated 20 May 2016) in which he opined that the allegedly interfering compound had a yet different composition: C₂₃H₃₃O₃. In support of his thesis that Ipamorelin and the interfering compound would be similar, Dr de Boer compared two figures on the page 5 of his report (Figure 2A and Figure 2B) in an effort to show that the spectral data of Appellant's urine (Figure 2A) presented similar features to the spectral data of the interfering compound (a metabolic compound of an edysteroid). Dr de Boer opined that the data are very similar because the Appellant's urine contains an edysteroid, the original of which comes from the nutritional supplement Ekdisten which the Appellant had admittedly ingested.
57. As to this, Dr de Boer made a critical mistake (which to his credit he acknowledged) in that he did not compare the alleged interfering compound with the Appellant's sample, but rather with the positive Ipamorelin control sample used by the Laboratory, a negative blank urine sample spiked with Ipamorelin, i.e. provided by someone who did not ingest the supplement Ekdisten. Dr de Boer's inadvertent error rather supports the findings of the Montreal Laboratory and excludes the possibility that the "interfering compound" would come from the supplement Ekdisten. In fact, the so-called "interfering compound" is observed in the blank urine (negative control), both in the Appellant's sample and in the positive control. According to Prof. Ayotte, this "interfering compound" seems to be a urinary constituent and, more importantly, it does not interfere with the presence of Ipamorelin.
58. The Panel has already commented on the significance of Dr Boer's retreat, confronted with his error, from the position taken in his report (see para 57 above). As to the debate which it witnessed between Dr Kopylov and Prof. Ayotte, the Panel is constrained to observe that the former had a clear agenda which was to find some way of exculpating the Appellant and while it does not accuse him of data manipulation, found him too ready to don the garb of an advocate rather than of that of an (objective) expert. The latter by contrast aptly noted that the Montreal Laboratory had no interest in inculcating sportsmen or women but only in ascertaining with the best analytical tools available to it, whether or not a doping offence had been committed.
59. Where the two witnesses were at odds the Panel preferred the evidence of Prof. Ayotte as being more authoritative compelling and dispassionate. It seemed to it that this somewhat volatile interfering compound was not shown by either of the two Appellant's experts who sought to pronounce on the issue to have either the structure or the molecular mass of Ipamorelin such as could realistically have given rise to any confusion between such compound and the prohibited substance.

4. The Additional Analysis by the Montreal Laboratory

60. Because the Appellant was claiming that the Montreal Laboratory reported a false positive, the Montreal Laboratory decided to repeat the analysis on the QExactly Orbitra Instrument in the high resolution mode.

61. The Appellant protested that such further analysis conducted though it was in his interest would constitute a “*blatant violation of both the WADA Code and of the ISL*” and (notwithstanding that he himself was asking for further analysis). In any event the protest was ill-founded; the facts related to an ADRV may be established by “*any reliable means*” (Article 3.2 IWF ADP).
62. The results of this further analysis clearly showed the presence of Ipamorelin in the Athlete’s B Sample and the absence of interference. It added belt to already adequate braces.

X. COSTS

63. Article R65 of the Code provides as follows:

“R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. [...]

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.- without which CAS shall not proceed and the appeal shall be deemed withdrawn. [...]

R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, 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.

R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.”

64. Since the present appeal is lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to CAS by the parties beyond the Court Office fee of CHF 1,000 paid by the Appellant and which is in any event retained by the CAS.
65. (...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Alexei Lovchev on 1 June 2016 against the decision issued by the Hearing Panel of the International Weightlifting Federation on 13 May 2016 is dismissed.
2. The decision issued by the Hearing Panel of the International Weightlifting Federation on 13 May 2016 is confirmed.
3. This award is pronounced without costs, with the exception of the CAS Court Office fee of CHF 1,000,00 (one thousand Swiss francs), paid by Mr Alexei Lovchev, which shall be retained by the CAS.
4. (...).
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Operative part of the award notified on 15 July 2016

Date: 1 December 2016

THE COURT OF ARBITRATION FOR SPORT

The Hon Michael J Beloff QC
President

Professor Ulrich Haas
Arbitrator

Professor Luigi Fumagalli
Arbitrator