CAS 2022/A/8978 Natalia Kropska v. Polish Anti-Doping Agency (POLADA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms. Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany

in the arbitration between

Ms. Natalia Kropska, Bytom, Poland
Represented by Mr. Michal Kaczmarek, Attorney at law, Poznan, Poland

- Appellant -

and

Polish Anti-Doping Agency (POLADA), Warsaw, Poland

- Respondent -

I. THE PARTIES

1. Ms. Natalia Kropska (the "Athlete" or the "Appellant") is a twenty-two years old professional Polish judoka and a member of the Polish Judo Association. She is an international-level athlete.

2. The Polish Anti-Doping Agency ("POLADA" or the "Respondent") is the national anti-doping organisation ("NADO") for the country of Poland, recognized as such by the World Anti-Doping Agency ("WADA"). POLADA has its registered seat in Warsaw, Poland.

3. The Appellant and the Respondent are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

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

5. Judo is a sport with weight classes. Until the end of 2018, the Athlete competed in the 52-57 kg category. From 2019 on and due to a recommendation from her dietitian, the Athlete decided to complete in the 57-63 kg category.

6. On 1 October 2021, during the Polish Senior Judo Championship at the "*Stegu Arena*" in Opole, Poland, the Athlete underwent an in-competition anti-doping control ("Doping Control"), where she provided a urine sample (sample no. 0002992, the "Sample"). The Doping Control was taken after three fights, which the Athlete had won and which had resulted in her winning the gold medal. It was the Athlete's first in-competition doping control.

7. It is undisputed between the Parties that the Doping Control proceeded as follows: Around 6:00 p.m. after her last fight, the POLADA Doping Control Officers ("DCOs") informed the Athlete that she was selected to undergo the Doping Control. Before the initiation of the doping control procedure, the Athlete did not wash her hands. The Athlete followed the DCOs to the doping control station ("Doping Control Station").

8. According to the Athlete's doping control form ("Doping Control Form"), the Doping Control lasted one (1) hour and thirty-five (35) minutes, from 6:00 p.m. until 7:35 p.m. During that time, three other athletes underwent a doping control in the same Doping Control Station, namely:

    1. Mr. Adam Stodolski 6:12 p.m. – 6:25 p.m. (approx. 13 mins);
    2. Ms. Karolina Pieńkowska 6:50 p.m. – 6:59 p.m. (approx. 9 mins);

3. Mr. Patryk Wawrzyczek 6:45 p.m. – 7:41 p.m. (approx. 56 mins).

9. The Doping Control Station was placed in the same locker room in which the checkweigher was placed. As a result, the same room was used to conduct both the doping controls and the weight checks preceding the formal weighing by any athlete who competed in the event.

10. After her arrival in the Doping Control Station, the DCOs asked the Athlete to choose a sealed collection vessel ("Collection Vessel") for the donation of her urine. The Athlete then proceeded to the toilet, where she was unable to stand still and had to sit down. She placed the Collection Vessel inside the toilet in order to collect the released urine. The urine provided during this attempt ("First Partial Sample") did not meet the required volume. The Athlete placed the First Partial Sample, which was stored in the Collection Vessel, on a table located in the Doping Control Station close to the checkweigher. The Collection Vessel was covered with a lid, but remained unsealed otherwise.

11. When the Athlete was ready to donate further urine, she was ordered to take the same Collection Vessel (which already included the First Partial Sample) for further collection. The Athlete again sat down on the toilet and placed the Collection Vessel inside the toilet bowl for the collection of additional urine ("Second Partial Sample"). The Second Partial Sample was still insufficient to meet the required minimum volume. The Collection Vessel was again placed on the table and covered with a lid (but not sealed).

12. The described sample collection procedure was repeated two more times. As a result, the Athlete donated urine at four occasions into the same Collection Vessel. During one of the attempts, the Athlete touched the inner part of the toilet.

13. After her donation of the fourth partial sample, the Athlete was informed by the DCOs that the Collection Vessel contained the required minimum volume of urine. Following the instruction of the DCOs, the Athlete divided the content of the Collection Vessel into bottle A ("A-Sample") and bottle B ("B-Sample"). Because the division of the urine (which was the very minimum required amount) into the two bottles was not made evenly, the Athlete had to pour urine back and forth between the A and B bottle. The DCO assisted the Athlete in this exercise by holding her arm during the process of pouring urine from one to the other bottle. When the A Sample and B Sample included the required amount of urine, the Athlete closed and sealed the bottles.

14. During the entire sample collection process, several people who were not subjected to a doping control entered the Doping Control Station to use the checkweigher. At least one of those persons also used the toilet designated for the doping controls. The DCOs did not prevent persons not subjected to a doping control from entering the Doping Control Station.

15. The Collection Vessel did not leave the Doping Control Station at any time during the Athlete's Doping Control. Between the Partial Samples, the Collection Vessel, which was not sealed but covered with a lid, was either placed on a table or on a bench in the

Doping Control Station, but remained at all times within the sight of the DCOs.

16. After the Doping Control, the Athlete signed the Doping Control Form, according to which the Athlete's Sample had a total volume of 90 ml of urine (which is the minimum required volume) and a specific gravity of 1,024 g/ml. The Doping Control Form did not contain any remark about the process of the Doping Control. The box *"Partial Sample"* was not completed by the DCOs.

17. The analysis of the Athlete's A-Sample by an accredited laboratory in Warsaw, Poland, revealed the presence of *furosemide* and its metabolite *furosemide glucuronide*, at a concentration of 275 ng/ml (*furosemide*) and 408 ng/ml (*furosemide glucuronide*). *Furosemide* is a specified substance prohibited at all times under *"S.5 Diuretics and Masking Agents/furosemide and its metabolite furosemide glucuronide"* of the WADA 2021 Prohibited List. It is a threshold substance, meaning that an adverse analytical finding shall only be reported if the estimated concentration in the sample is greater than (>) 20 ng/mL (see 2021 WADA Technical Letter – TL24).

18. *Furosemide* is recognized as a potent loop diuretic that acts on the kidneys to ultimately increase water loss from the body. In professional sports with weight classes, it is misused to reduce the body weight by increasing water excretion.

19. On 22 October 2021, the Respondent notified the Athlete of the Adverse Analytical Finding ("AAF") in her A-Sample and provisionally suspended the Athlete with immediate effect ("Provisional Suspension").

20. On 29 October 2021, the Athlete waived her right to request that her B-Sample be analysed.

III. THE PROCEEDINGS BEFORE THE POLADA DISCIPLINARY PANEL

21. On 10 November 2021, POLADA initiated disciplinary proceedings against the Athlete before the POLADA Disciplinary Panel (case reference no. 16/2021) for committing an anti-doping rule violation ("ADRV") pursuant to Article 2.1 and 2.2 of the POLADA Anti-Doping Rules (the "POLADA ADR" 2021 version).

22. On 24 November 2021, the Athlete submitted a letter to the POLADA Disciplinary Panel in which she rejected the charges brought against her on the grounds that (1) the Doping Control suffered from various departures from the 2021 International Standard for Testing and Investigations ("ISTI"), which is an integral part of the POLADA ADR pursuant to Article 24.3 of the POLADA ADR, and that, therefore, (2) the presence of *furosemide* in her body could have been caused by the contamination of her Sample. Moreover, the Athlete requested the annulment of her Provisional Suspension.

23. On 19 December 2021, upon request from the Respondent, POLADA Scientific Officer Mr. Andrzej Pokrywka rendered a written report regarding the possible contamination of the Sample.

24. Between 20 December 2021 and 10 February 2022, a total of four hearings took place before the POLADA Disciplinary Panel. During those hearings, the POLADA Disciplinary Panel examined the DCOs and four athletes which were present in the Doping Control Station during the Athlete's Doping Control.

25. On 6 April 2022, Dr. Ewa Kłodzińska rendered a written expert opinion commissioned by the Athlete (the "Kłodzińska Expert Opinion"). The Kłodzińska Expert Opinion came to the following conclusions:

> *"Urine samples of Ms. Natalia Kropska's, judo competitor, collected in a manner that is inconsistent with the WADA procedures, but also with the general standards of laboratory practice, violations of these procedures and the very conditions of collecting the urine sample, which actually create the possibility of contamination of the sample, as well as the mixing of samples A and B disqualify their further use for analytical tests for the presence of prohibited substances in sport.*
> *It should be emphasized that both the failure to use partial samples in this case and the mixing of sample A with B (or vice versa) constitute two independent reasons that prevent further analytical work on biological material collected in such manner.*
> *The concentrations of furosemide and its metabolites ascribed to the urine sample collected from the judo competitor, Ms. Natalia Kropska, do not mean that the competitor used this substance, as there was a real possibility of external contamination of the collected sample and a number of individual factors concerning a given analytical test, related to the adopted methodology and which may have an impact on the final value of the determined concentrations. The condition of the test equipment, the degree of wear of the chromatography column and other consumable parts of the apparatus may also affect the obtained concentration values."*

26. On 27 April 2022, the POLADA Disciplinary Panel rendered its decision (the "Appealed Decision"). The operative part of the Appealed Decision reads as follows:

> *"I. Ms Natalia Kropska is considered guilty of the aforementioned violation of the Anti-Doping Rules of the Polish Anti-Doping Agency;*
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> *II. A disciplinary sanction of 2 years of ineligibility is imposed on the respondent;*
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> *III. The period of the respondent's provisional suspension is credited against the period of the ineligibility sanction referred to in point II, and the sanction starting date is 22 October 2021;*
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> *IV. The individual results achieved by the respondent in the competition in which the antidoping rule violation took place, and all other results achieved by her in the competitions held between the sample collection date and the starting date of the provisional suspension are disqualified, which includes the forfeiture of all medals, points and prizes won by her in those competitions;*
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> *V. The present decision will be made public."*

27. On 28 April 2022, the Athlete received the operative part of the Appealed Decision via e-mail.

28. On 5 May 2022, POLADA requested the International Judo Federation ("IJF") to provide details on the Athlete's professional status at the time of the Doping Control.

29. On 13 May 2022, the anti-doping coordinator of the IJF confirmed that the Athlete, as a regular participant of IJF and EJU events, had the status of an "International Athlete" in the sense of the IJF ADR at the relevant time of the ADRV.

30. The reasons of the Appealed Decision were provided to the Athlete on 1 June 2022. In relevant part, the POLADA Disciplinary Panel held as follows:

> *"In the light of the collected evidence, it should be stated that the act committed by the respondent constitutes a disciplinary offense referred to in Article 2.1 of the POLADA Anti-Doping Rules, and there exist no doubts as to the respondent's being guilty of the said act.*
> *Firstly, it should be remembered that according to Article 2.1.1 POLADA ADR 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.*. [sic] *The athletes will be disciplined when any prohibited substance, or its metabolites or markers, is detected in their physiological specimens. It should be emphasized that, according to Article 2.1 POLADA ADR, 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.*
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> *The main issue to be resolved in the case has been to determine whether, in connection with the athlete's doping control, there had been any departures from the standard of the control procedure, and if so, whether this could impact, and to what extent, the result of the test. It should be recalled that, in the light of the anti-doping rules, any suspicion of a departure from the international standard for testing requires establishing whether such a departure indeed took place, and whether it could have a real impact on the sample test result (see P. David, A Guide to the World Anti-Doping Code, Cambridge 2008, pp. 133 et seq.). These requirements also entail the requirements regarding the burden of proof. According to Article 3.2.3 POLADA ADR, "*[quote]*". It follows from the above that if there has been a departure from any international standard (including a standard set out in ISTI), this does not automatically invalidate the test result. The invalidation may be made only if an athlete has jointly met two main conditions. Firstly, has proven that the departure from the international standard has taken place. Secondly, has proven that the departure could result in an antidoping rule violation.*
>
> […]
>
> *In light of the above, it is necessary to uphold, in part, the respondent's allegations that the doping control officers have failed to comply with some of the requirements*

for conducting doping controls (ISTI). However, the gathered evidence does not make it possible to draw a justified conclusion that the irregularities could impact the result of the doping test. In the light of the circumstances of the case and the evidence gathered, the possibility of such impact is questionable. In the opinion of the First Instance Panel, no evidence has been found of any manipulation with the urine sample. There has been no possibility either of its contamination by a person from outside. Also, the First Instance Panel cannot uphold the statements of the respondent and her attorney that the irregularities have been so significant that they require automatic invalidation of the test results, without assessing their impact potential. Therefore, based on the collected evidence it has been concluded that the result of the test of the sample collected from Natalia Kropska was correctly classified as an adverse analytical finding (AAF). Consequently, it has been found that the respondent was correctly charged with violating Article 2.1 of the POLADA Anti-Doping Rules.

The respondent is an international-level athlete. According to Article 13.2.1 of the POLADA ADR, in cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS. […]*"*

IV. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 21 June 2022, the Appellant filed her Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision, pursuant to Articles R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code") (the "Appeal"). The Appellant requested the appointment of a Sole Arbitrator in accordance with Articles R48 and R50 para. 1 of the CAS Code. The Athlete also filed an application for legal aid ("Legal Aid Application").

32. On 28 June 2022, the CAS Court Office informed the Parties about the Appeal, requested the Appellant to file her Appeal Brief in accordance with Article R51 of the CAS Code and noted the Appellant's choice to proceed with her appeal in the English language.

33. On 28 June 2022, the CAS Court Office, in accordance with Article R32 of the CAS Code, and on behalf of the CAS Director General, extended the time limit for the Appellant to file her Appeal Brief by ten (10) days.

34. On 25 July 2022, the CAS Court Office advised the Parties that, in absence of any comments from the Respondent on the number of arbitrators to be appointed for the case, and pursuant to Article R50 of the CAS Code, the President of the CAS Appeals Arbitration Division, or her Deputy, would decide on the issue.

35. On 23 August 2022, the CAS notified the Appellant that her Legal Aid Application had been granted.

36. On 30 August 2022, pursuant to Article R54 para. 1 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed

the Parties that the Panel appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Ms. Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany.

37. In the same correspondence, the CAS Court Office informed the Parties that the time limit for the Appellant to file her Appeal Brief would resume as from 30 August 2022.

38. On 13 September 2022, the Appellant filed her Appeal Brief in accordance with Article R51 of the CAS Code. In her Appeal Brief, the Appellant requested a hearing to take place.

39. On 14 September 2022, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondent to submit its Answer within twenty (20) days, pursuant to Article R55 of the CAS Code.

40. On 4 October 2022, the Respondent filed its Answer. On the same day, the CAS Court Office invited the Parties to inform it on whether they would prefer to hold a hearing to be held in this matter.

41. On 11 October 2022, the Appellant filed an unsolicited *"Reply for the Statement of Defence"* ("Reply") to the Respondent's Answer.

42. On 2 November 2022, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to admit the Appellant's Reply on the basis of exceptional circumstances in accordance with Article R56 para. 1 of the CAS Code. The Respondent was invited to file its position on the Appellant's Reply within fourteen (14) days ("Rejoinder"). Moreover, the Parties were advised that, pursuant to Article R57 para. 2 of the CAS Code, the Sole Arbitrator had decided to hold a hearing in this matter.

43. On 11 November 2022, after further consultation with the Parties, the CAS Court Office informed the Parties that the hearing would be held on 8 December 2022 via videoconference.

44. On 16 November 2022, the Respondent filed its Rejoinder.

45. On 2 December 2022, the CAS Court Office, on behalf of the Sole Arbitrator, transmitted the Order of Procedure to the Parties which was duly signed and returned by the Parties within the prescribed time limit.

46. On 8 December 2022, a hearing via video-conference was held. At the outset of the hearing, all Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

47. In addition to the Sole Arbitrator and Ms. Andrea Sherpa-Zimmermann, Counsel to the CAS, the following persons attended the video hearing:

For the Appellant: Ms. Natalia Kropska, Athlete;
Mr. Michael Kaczmarek, Counsel;
Ms. Jagoda Ratajczak, interpreter;

For the Respondent: Mr. Michael Rynkowski, POLADA Director;
Mr. Lukasz Krych, POLADA Legal Counsel.

48. Dr. Ewa Kłodzińska, expert witness offered by the Appellant, was unavailable and did not attend the hearing. The Appellant confirmed that the hearing could proceed and be concluded without securing Dr. Klodzinska's oral testimony.

49. The hearing began at 9:30 a.m. and ended at 12:10 p.m. without any technical interruption or difficulty. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions. The Appellant was questioned by each of the Parties' representatives and by the Sole Arbitrator. After the Parties' final and closing submissions, the hearing was closed and the Sole Arbitrator reserved her detailed decision for this written Award.

50. At the end of the hearing, the Parties expressly confirmed that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

V. THE POSITIONS OF THE PARTIES

51. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that she has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Appellant's Position and Request for Relief

52. The Appellant submits the following in substance:

- During the Doping Control, the DCOs did not comply with the *Partial Sample Collection Process* described in Annexes C and E of the ISTI. Specifically:
    - It was not permitted to use the same Collection Vessel for each of the four partial samples;
    - It was not permitted to "mix up" urine during the division of the Sample into the A- and B-Sample. If the DCO has doubts as to whether the collected volume of urine is sufficient, he or she is free to repeat the Partial Sample Collection Procedure before completing the Doping Control. "Mixing" the B-Sample with the A-Sample violates the integrity of the Sample. The integrity of the sample is particularly protected by Article 7.1 of the ISTI and Article 5 of the WADA 2021 International Standard for Laboratories ("ISL"), which references the ISO/IEC 17025;
    - The DCOs should have instructed the Athlete to wash her hands before the Doping Control.
- The Doping Control Station was not organized in a manner required by the ISTI. Specifically:

- It was unlocked;
- It was set-up in the same room where the checkweigher was placed, as a result of which the Doping Control Station was accessible for all athletes who wanted to check their weight;
- The toilet used for doping controls could be used by any athlete checking his or her weight, or by other athletes. It is rather common that athletes checking their weight in order to meet the weight level required for their respective category use the toilet before the weighing.

- Because of the DCOs' blatant disregard, during the Athlete's Doping Control, of fundamental procedural safeguards guaranteed under the ISTI, the results of the Sample analysis have to be invalidated automatically (see the respective CAS jurisprudence, e.g. CAS 2010/A/2161; CAS 2008/A/1607; CAS 2014/A/3639; CAS 2001/A/337; CAS 2009/A/1752 & 1753), *i.e.* without any need to demonstrate a specific impact on the test result. The principle of guaranteeing the protection of an athlete's fundamental rights in anti-doping proceedings has been consistently confirmed by the CAS (e.g. CAS 2014/A/3487).

- In any event, it is evident that, as a result of the departures from the *Partial Sample Collection Process* (Annexes C and E of the ISTI), the Athlete's Sample, collected through such flawed Doping Control procedure, could have been contaminated by someone else's biological material, or any other substance contaminated with *furosemide* or its metabolites. Such contamination could have specifically occurred:
  - During the repeated openings and closures of the Collection Vessel in which the partial samples were stored;
  - During the donation of urine, when the Athlete, with unwashed hands and while sitting on the toilet, accidentally touched the inner part of the toilet with the open Collection Vessel;
  - During the donation of urine, when released urine contacted the inner part of toilet before being added to the Collection Vessel;
  - During the distribution of urine between the bottles for the A- and B-Sample, when the DCO grabbed the (unwashed) hand with which the Athlete was pouring urine back and forth between the bottles. Physical "mix-up" of the B-Sample with the A-Sample distorts the possibility of a reliable analysis of the sample, *i.e.* a reliable finding of a *furosemide* concentration above the 20 ng/ml threshold required for an adverse analytical finding.

- Because the proven departures from the ISTI could have reasonably caused the AAF (Article 3.2.3 of the POLADA ADR), the burden of proof to demonstrate that such departures did <u>not</u> cause the AAF shifts to POLADA.

- The restrictive enforcement of anti-doping rules against all athletes participating in sport requires symmetrical compliance with the standards of conducting a doping control and the management of the results by anti-doping agencies and laboratories. Taking a different approach could encourage non-compliance by these entities with the standards addressed to them, including the ISTI, which would effectively invalidate these standards and allow for its application upon the sole discretion of the anti-doping authorities (see CAS 2014/A/3487). The ISTI establishes mandatory safeguards. The strict application of the rules is the *quid pro quo* for the imposition of a regime of strict liability for doping offenses.

- *Furosemide* is a component of dozens of different medicines, which can be bought over-the-counter. Combined with the fact that almost anyone had access to the Doping Control Station and the toilet used by the Athlete to collect the Sample, it is evident that there was a significant risk of external contamination of the Sample. Recent research established that *furosemide* and its metabolites can be found in ground waters, environment and even in running water. This is proven by the Appellant's Expert Opinion of Dr. Ewa Kłodzińska.

- The DCOs breached the ISTI knowingly and intentionally. They were fully aware of the procedures stated in Annex E of the ISTI. The DCOs allowed for similar ISTI violations during the sample collection process of other athletes at the same event. Thus, it is very likely that the DCOs disregarded the ISTI requirements regularly, thereby compromising mandatory and crucial safeguards of the anti-doping process.

- The Athlete had never been educated on the *Partial Sample Collection Process* (Annex E of the ISTI). It had happened before, in other doping controls in which she had provided partial samples, that the procedural standards mandated by Annex E of the ISTI were disregarded. Hence, the Athlete was unaware of the applicable standards, as a result of which she was unable to make any objection or protest when she signed the Doping Control Form. In any Event the content of the Doping Control Form is not set in stone (despite the Athlete's signature) and can be rebutted.

- The Athlete had no motive to use *furosemide*, as she was under no pressure to lose weight before the Polish Senior Judo Championship. The Athlete never struggled to reach the appropriate weight for her competitions.

- Despite her young age, the Athlete has always taken great care to verify the composition of the supplements she takes in order to avoid the (inadvertent) use of substances prohibited in sport.

53. The Appellant requests the following relief:

> *"The Athlete request for **1)** set aside the Decision of the Disciplinary Panel of First Instance issued on 27th April 2022, case ref. 16/2021 in whole; **2)** declare, that the results of analytical examination of the Athlete's sample no. 0002992 collected on 1st October 2021 are invalidated and therefore, there is no valid or admissible*

evidence upon which it can be established, that the Athlete has committed an anti-doping rule violation and therefore, no consequences can be imposed on the Athlete thus she is reinstated to sports with immediate effect; ***3)*** *order the Respondent to reimburse to the Appellant the costs of proceedings as well as any legal, translation and expert witnesses' fees or any other related to case (in case on upholding the appeal); or alternatively declare, that the costs of proceedings as well as any legal, translation and expert witnesses' fees or any other related to case shall be borne by the parties respectively (in case on dismissing the appeal)."*

B. The Respondent's Position and Request for Relief

54. The Respondent submits the following in substance:

- The Appealed Decision is to be upheld. The Athlete committed an ADRV pursuant to Article 2.1 of the POLADA ADR.
- The ISTI does not prohibit that urine is poured back and forth between the two bottles designated for the A- and B-Sample before sealing. Moreover, Article C.4.13 ISTI makes it clear that the minimum Suitable Volume of Urine for Analysis is 30 ml for B bottle and 60 ml for A bottle (90 ml in total). Due to the fact that the Appellant provided the absolute minimum of 90 ml into the Collection Vessel, it is evident that a re-distribution between the two bottles had to be conducted to ensure that the exact minimum amount was filled both into the A bottle and the B bottle.
- Dr. Kłodzińska's Expert Report makes unsupported and arbitrary interpretations and fails to explain why the process of distributing urine coming from the same Collection Vessel into two different bottles may negatively impact the analytical result of the Athlete's Sample.
- The presence of other people at the Doping Control Station during the Doping Control had no impact on the integrity of the Sample. The evidence provided by the Appellant to support this allegation does not have any value in light of CAS 2008/A/1608.
- The DCOs requested the Appellant to wash her hands before the Doping Control. The Athlete knew that she should have washed her hands. The Doping Control was her fifth doping control. She had also participated in anti-doping training before. It is every athletes' obligation to know the anti-doping rules (Article 20.1 of the POLADA ADR).
- The Collection Vessel was under permanent supervision by the DCOs. At least one DCO was present in the Doping Control Station during the entire Doping Control. There have not been any attempts to manipulate the Collection Vessel.
- The Appellant has not met her burden to prove that the alleged departures from the ISTI could reasonably have caused the AAF under Article 3.2.3(i) of the POLADA ADR. The demonstration that a departure from ISTI occurred is – in

isolation – insufficient to invalidate the results of the Sample analysis. It is on the Athlete to show a potential impact of the departure on the results of the Sample. In the present case, the Appellant introduced only hypothetical scenarios of how the Sample could have been contaminated during the Sample collection process. According to CAS case law (e.g. CAS 2015/A/3925 and CAS 2018/A/5651), it cannot automatically be assumed that a departure from the ISTI erodes the integrity of a sample. Such conclusions must be based on concrete and compelling evidence.

- The Appellant has not produced any evidence to support the alleged "outside" or environmental contamination of her Sample (for example through tap water, contact with toilet facilities etc.). The Athlete has failed to prove that the alleged ISTI departures could have reasonably caused the AAF. In light of the extremely high concentration of *furosemide* in the Sample, it is impossible that any of the alleged contamination scenarios caused the AAF.

- The Appellant had signed the Doping Control Form without raising any objections.

55. The Respondent requests the following relief:

"1. To dismiss an appeal formulated by Natalia Kropska cause of obvious violation of anti-doping rules of art 2.1. or/and art. 2.2. of POLADA Anti-Doping Rules;

2. The Appellant to cover all proceedings costs related to the recognition of CAS admissibility, at the same time stating that the Respondent do not express any interest to cover procedural costs related to the case;

3. To reserve a possibility to provide additional evidence and statements in the course of the proceedings;

4. To allow recognition of Exhibits from 1 to 4 (The Respondent declares to deliver English translation of Exhibit 4 after a positive decision to allow recognition of this evidence);

5. To dismiss requests of the Appellant to review following evidence due to the lack of relevance:

(i) Instant messaging between the Athlete and her dietitian Marcin Magiera on 27-28-02.2018 with translation to English; (ii) Interview with the Athlete published on 18.03.2018 on Polish Judo Association web page with translation to English;

(ix) Instant messaging between the Athlete and her coach Marek Słyk of 01.10.2021 from 18:01 to 19:19 with translation to English;

(xiv) InBody electronic scale excerpt of 05.07.2021 with translation to English;

(xv) Instant messaging between the Athlete and Izabela Socha of 17.04.2021 with translation to English;

(xvi) Instant messaging between the Athlete and Izabela Socha of 13.09.2021

with translation to English;

(xvii) Instant messaging between the Athlete and Izabela Socha of 30.09.2021 with translation to English;

(xviii) Instant messaging between the Athlete and MZ-store.pl of 12.05.2018 with translation to English;

(xix) Instant messaging between the Athlete and Trec.pl store of 11.02.2020 with translation to English;

(xx) E-mail of Sandra Lickun to the Polish Anti-Doping Agency dated on 19.11.2021 with translation to English;

(xxi) instant messaging between the Athlete and her mother on 28.04.2018 with translation to English."

VI. JURISDICTION

56. Article R47 para. 1 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 if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*"

57. The POLADA ADR, which is applicable to the procedural aspects of the present appeal, provides for the jurisdiction of the CAS on the Athlete's challenge of the Appealed Decision. In relevant part, Article 13 of the POLADA ADR provides as follows:

> *"**13.1** Decisions Subject to Appeal*
>
> *Decisions made under the Code or these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards.* […]
>
> ***13.2** Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Implementation of Decisions and Authority*
>
> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed;* […] *may be appealed exclusively as provided in this Article 13.2.*
>
> ***13.2.1** Appeals Involving International-Level Athletes or International Events*
>
> *In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.*

> […]
>
> ***13.2.3*** *Persons Entitled to Appeal*
>
> ***13.2.3.1*** *Appeals Involving International-Level Athletes or International Events*
>
> *In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed;* […]*"*

58. The Appellant is an international-level Athlete. The Appealed Decision is a decision rendered by the POLADA Disciplinary Panel within the meaning of Article 13.2.3.1 of the POLADA ADR. Hence, in accordance the above-cited provisions of the POLADA ADR, the CAS has jurisdiction to decide on the Appeal.

59. The Parties further confirmed that CAS has jurisdiction by signature of the Order of Procedure.

VII. ADMISSIBILITY

60. Article 13.6.1 of the POLADA ADR provides as follows:

> *"The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed:*
>
> *(a) Within fifteen (15) days from the notice of the decision, such party/ies shall have*
>
> *the right to request a copy of the full case file pertaining to the decision from the*
>
> *Anti-Doping Organization that had Results Management authority;*
>
> *(b) If such a request is made within the fifteen (15) day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.* […]*"*

61. The Athlete received the operative part of the Appealed Decision on 28 April 2022, and the reasons to the Appealed Decision on 1 June 2022. The time limit for an appeal against the decision starts running with the receipt of the reasons of the decision, as otherwise the Athlete would not have any possibility to make an informed decision on whether the Appealed Decision is erroneous and should be appealed.

62. Therefore, the 21-day time limit to file the Appeal expired on 22 June 2022. The Athlete's Statement of Appeal submitted on 21 June 2022 was, therefore, filed in time.

63. The Statement of Appeal also complied with the requirements of Article R48 of the CAS

Code. Furthermore, the admissibility of the Appeal is not challenged by any Party.

64. The Appeal is therefore admissible.

VIII. APPLICABLE LAW

65. For appeal proceedings, Article R58 of the CAS Code provides the following:

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

66. The "*applicable regulations*" for the purposes of Article R58 of the CAS Code are those contained in the POLADA ADR because the Appeal is directed against a decision issued by the POLADA Disciplinary Panel, which was passed applying the POLADA ADR. Subsidiarily, Polish law applies in case of a *lacuna* in the POLADA ADR, as the POLADA is domiciled in Poland.

IX. SCOPE OF REVIEW

67. According to Article R57 para. 1 of the CAS Code,

> "*the Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...*".

68. The unlimited scope of review is also confirmed by Article 13.1.1 of the POLADA ADR which provides – in its pertinent parts – as follows:

> "*The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker.* […]"

69. Against this background, the Sole Arbitrator finds that her power to review the facts and the law of the present case is not limited.

X. MERITS

70. Considering all Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete commit the ADRV contemplated by Article 2.1 of the POLADA ADR? In particular, was there a fundamental departure from an applicable international standard or anti-doping rule or policy, or a departure that could reasonably have caused the AAF?

B. In case the first question is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete commit an ADRV?

1. The undisputed facts

71. The Sole Arbitrator begins her analysis of the merits by noting that there is no dispute between the Athlete and the POLADA about the following factual matters:

(a) The Athlete underwent an in-competition doping control on 1 October 2022. The Athlete's urine sample collection was conducted by two DCOs of POLADA.

(b) The Doping Control Station was freely accessible for all athletes competing in the Judo Championship. A checkweigher was placed in the Doping Control Station, which was used by numerous athletes checking their weight before the beginning of their respective competitions.

(c) The toilet designated for the donation of urine by athletes subjected to an official doping control were freely accessible for other athletes as well, and was used during the Athlete's Doping Control by at least one other athlete.

(d) The Sample Collection Process entailed the following:

i. The Athlete did not wash her hands prior to conducting the Doping Control.

ii. The Sample which produced the AAF consisted of four partial samples collected by the Athlete subsequently (over a period of more than one hour) into one and the same Collection Vessel. The DCOs did not provide the Athlete with a fresh collection vessel after any of the partial samples.

iii. After collecting each of the partial urine samples (into the same Collection Vessel), the DCOs failed to store the respective partial sample in a sealed, special-purpose collection vessel. As a result, the partial samples remained in the unsealed Collection Vessel covered only with a lid, while the Athlete was waiting to produce further urine.

iv. In between the collection of the partial samples, the unsealed Collection Vessel stood on a table or on a bench in the Doping Control Station. It never left the Doping Control Station during the Doping Control, and at least one of the DCOs had an eye on the Collection Vessel at all times.

v. Every time she collected urine, the Athlete placed the Collection Vessel inside the toilet bowl. During one of the attempts, the Athlete touched the inner part of the toilet bowl.

vi. After the collection of the fourth and final partial sample, the Athlete divided the content of the Collection Vessel into bottle A and bottle B. Because the division of the urine (which was the minimum required amount) into the two bottles was not made evenly, the Athlete had to pour urine back and forth between the A and B bottle. The DCO assisted the Athlete in this exercise by holding her arm during the process of pouring urine from one to the other bottle.

vii. The DCOs who oversaw the sample collection failed to record any information about the partial sample collection when completing the mandatory Doping Control Form.

(e) The Athlete signed the Doping Control Form without recording any objections.

(f) The Athlete's A-Sample tested positive for the presence of *furosemide* (at a quantity of 275 ng/ml), and its metabolite *furosemide glucuronide* (at a quantity of 408 ng/ml).

(g) *Furosemide* is a specified substance prohibited at all times under the 2021 WADA Prohibited List. It is a threshold substance resulting in an AAF if the estimated concentration in the sample is greater than (>) 20 ng/mL.

(h) The Athlete rejected the analysis of her B-Sample.

(i) Prior to the doping test on 1 October 2021, the Athlete had never tested positive for any performance enhancing substance.

2. The POLADA's proven departures from the ISTI

72. Based on the undisputed facts summarized at **1.** above, the Sole Arbitrator finds that the DCOs who obtained the Sample from the Athlete violated provisions of the ISTI, including general and specific provisions on the *Collection of Urine Samples* (Annex C of the ISTI) and on the *Partial Sample Collection Process* (Annex E of the ISTI). The Sole Arbitrator highlights the following deviations (collectively referred to as the "ISTI Departures"), which have been established by the Appellant and which have remained uncontested:

- Inappropriate set-up of the Doping Control Station by using one and the same room also for check-weighing. The room and toilets were accessible for all athletes, including those that were not subjected to a doping control, see Article 6.3.2 ISTI and Article C.4.7 ISTI:

  *"**6.3.2** The DCO shall use a Doping Control Station which, at a minimum, ensures the Athlete's privacy and where possible is used solely as a Doping Control Station for the duration of the Sample Collection Session. The DCO shall record any significant deviations from these criteria. Should the DCO*

determine the Doping Control Station is unsuitable, they shall seek an alternative location which fulfils the minimum criteria above."

*"**C.4.7.** The DCO/Chaperone and Athlete shall proceed to an area of privacy to collect a Sample."*

The DCOs did also not record the significant deviations of the set-up of the Doping Control Station from the ISTI.

- Failure by the DCOs to ensure that the Athlete washes her hands, see Article C.4.6 ISTI:

  *"**C.4.6.** The DCO/Chaperone shall, where practical, ensure the Athlete thoroughly washes their hands with water only prior to the provision of the Sample or wears suitable (e.g. disposable) gloves during provision of the Sample."*

- Failure to use separate collection vessels for each partial sample, and to properly seal such samples, see Article E.4.2 – E.4.6 ISTI and Article C.4.13 ISTI:

  *"**E.4.2** The DCO shall instruct the Athlete to select partial Sample Collection Equipment in accordance with Annex C.4.3.*

  ***E.4.3** The DCO shall then instruct the Athlete to open the relevant equipment, pour the insufficient Sample into the new container (unless the Sample Collection Authority's procedures permit retention of the insufficient Sample in the original collection vessel) and seal it using a partial Sample sealing system, as directed by the DCO. The DCO shall check, in full view of the Athlete, that the container (or original collection vessel, if applicable) has been properly sealed.*

  ***E.4.4** The DCO shall record the partial Sample number and the volume of the insufficient Sample on the Doping Control form and confirm its accuracy with the Athlete. The DCO shall retain control of the sealed partial Sample.*

  […]

  ***E.4.6** When the Athlete is able to provide an additional Sample, the procedures for collection of the Sample shall be repeated as prescribed in Annex C - Collection of Urine Samples, until a sufficient volume of urine will be provided by combining the initial and additional Sample(s)."*

  […]*"*

  ***C.4.13** The Athlete shall pour the minimum Suitable Volume of Urine for Analysis into the B bottle or container (to a minimum of 30 mL), and then pour the remainder of the urine into the A bottle or container (to a minimum of 60 mL). The Suitable Volume of Urine for Analysis shall be viewed as an absolute minimum. If more than the minimum Suitable Volume of Urine for Analysis has been provided, the DCO shall ensure that the Athlete fills the A bottle or*

container to capacity as per the recommendation of the equipment manufacturer. Should there still be urine remaining, the DCO shall ensure that the Athlete fills the B bottle or container to capacity as per the recommendation of the equipment manufacturer. The DCO shall instruct the Athlete to ensure that a small amount of urine is left in the collection vessel, explaining that this is to enable the DCO to test the residual urine in accordance with Annex C.4.15."

- Failure to record the partial sample collection, or any of the above-described deviations from the ISTI, in the Doping Control Form (see also CAS 2018/A/5651: "*Provided the Doping Control Form contains a box entitled 'Partial Sample', this box must be completed by the Doping Control Officer whenever a partial sample is obtained during the sampling process. Failure to tick the box results in errors and violations during sample collection process which constitute a departure from the International Standard for Testing and Investigation (ISTI)*)".

3. Do the ISTI Departures invalidate the test results of the Sample?

73. The next question is whether any of the identified ISTI Departures – individually or collectively – result in the invalidation of the AAF, and eventually, of the Athlete's ADRV.

74. The Sole Arbitrator notes that, in principle, a breach of the applicable international standards does not automatically invalidate the analytical results. This follows from Article 3.2.3 of the POLADA ADR, pursuant to which an athlete must establish that a departure could reasonably have caused the AAF. Article 3.2.3 of the POLADA ADR reads as follows:

"Departures from any other International Standard or any anti-doping rule or policy set forth in the Code or these Anti-Doping Rules shall not invalidate analytical results or other evidence of any anti-doping rule violation; provided, however, if the Athlete or other Person establishes that a departure from one of the specific International Standard provisions listed below could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or whereabouts failure, the POLADA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the whereabouts failure:

(i) a departure from the International Standard for Testing and Investigations related to Sample collection or Sample handling which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding, in which case POLADA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding;

[…]*"*

75. Apart from this ground rule, certain international testing standards and anti-doping rules are considered so fundamental and central in ensuring integrity in the administration of

sample collection that departures therefrom could result in the automatic invalidation of the test results, without the necessity for the athlete to demonstrate reasonable causation. This has been confirmed in a number of CAS awards. As the Sole Arbitrator put it in CAS 2014/A/3639 (para. 68), "*certain departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing and adjudication process to such an extent that it is impossible for the Sole Arbitrator to be comfortably satisfied that a doping violation occurred*" (see also CAS 2014/A/3487 para. 142-152; CAS 2018/A/5990 para. 134, 135).

76. One example for an automatic invalidation of the test results is the violation of an athlete's right to attend the opening and analysis of the B sample. This right is so fundamental that, if not respected, the B sample results must be disregarded (see, e.g., CAS 2002/A/385 (para. 26-34), CAS 2008/A/1607 (para. 25-29), and CAS 2010/A/2161 (para. 9.8-9.9); CAS 2018/A/5990 para 136). In addition to the right to attend the opening and analysis of the B sample, the other relevant question is whether a breach or breaches, together or alone, reach "*a level which may call into question the entire doping control process*" (see CAS 2001/A/337 para. 68), after which "*it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred*" (see CAS 2014/A/3487 para. 152 and CAS 2016/A/4707 para. 85).

77. In her attempt to invalidate the results of her Sample, the Athlete relies on both concepts, *i.e.* she argues that certain fundamental departures that occurred during the sample collection process require the automatic invalidation of the test results (below at **a.**), and that she has also demonstrated that the ISTI Departures could have reasonably caused the ADRV (below at **b.**).

a. Automatic invalidation of the test results?

78. The Appellant contends that the DCOs violated the fundamental integrity of the Sample (in her view protected by Article 7.1 of the ISTI and Article 5 of the ISL) by "mixing" the A- and B-Sample, *i.e.* by having her pour urine stored in the Collection Vessel back and forth between the A and B bottle in an attempt to obtain the required minimum volume for each bottle before they were sealed. In the Appellant's view, "mixing" urine between the A and B bottles is prohibited under the WADA Code, the ISTI, the ISL and the IOS/IEC 17025 Standard, because at the moment an athlete's biological material is separated as a "Sample" from the athlete's body or the collection vessel into bottles A and B, it must not be mixed.

79. The Sole Arbitrator does not find any indication in the applicable regulatory framework in support of the Appellant's contention that urine donated into the same collection vessel must not be mixed between bottles A and B during the distribution process, i.e. *before* the sealing of the bottles. Article 7.1 of the ISTI, on which the Appellant primarily relies, only sets forth the general "objective" that sample collection shall be conducted "*in a manner that ensures the integrity, security and identity of the sample*". The specific requirements for the collection of urine samples to ensure this objective are enshrined in Annex C of the ISTI. Article C.1 c) of the ISTI sets forth that the collection process shall ensure that the Sample "*has not been manipulated, substituted,*

contaminated or otherwise tampered with in any way". In this respect, Article C.4 of the ISTI provides for specific requirements, none of which prohibits the re-distribution of urine stemming from the same collection vessel between the A and B bottle before the sealing. Article C.4.13 of the ISTI, which is concerned with the distribution of urine into the A and B bottles from the collection vessel, only provides for the minimum volumes to be added in each bottle. It does not forbid that urine exceeding the required minimum quantity in one bottle is poured (back) into the other bottle. In fact, there is no reason why such a re-distribution should not be permitted. The Sole Arbitrator does not see, and the Appellant fails to explain, how urine stemming from one and the same collection vessel may be manipulated, contaminated, or otherwise tampered with by pouring it back and forth between the A and B bottles before sealing and before further analysis. Such a manipulation could only occur – in theory – if the sample kit selected by the Athlete (or a part of it, for example only one bottle) is contaminated, which not even the Athlete alleges in the present case. The Athlete took no issue with her selection of the sample collection kit, which she had the right to check before she took it (see Article C.4.3 of the ISTI). Therefore, the Sole Arbitrator finds that the procedure of re-distributing urine between the A and B bottle before sealing does not constitute a departure from the ISTI. It may, therefore, not result in the invalidation of the test results, let alone in an automatic invalidation.

80. The Athlete's further argument is that a contamination could have occurred as a result of the DCO holding her arm while she was pouring urine from one bottle to the other to obtain the required minimum volume. The Sole Arbitrator finds that this fact is inconceivable to explain the AAF found in her Sample. There is no explanation how the Sample could have been contaminated through the DCO holding the Athlete's arm while she was pouring urine from the Collection Vessel into the A and B bottles. More specifically, there is no indication suggesting that the DCO got in direct contact with the Athlete's urine, or that his hands were unclean, or that his (unclean) hands added the substance found in the Sample to the Athlete's urine.

81. In no event does the alleged "mixing up" of urine result in the automatic invalidation of the test results. The integrity of the Appellant's Sample is neither compromised by the re-distribution of urine, which was necessary in light of the fact that the Athlete had produced the absolute minimum volume of urine required for testing, nor by the fact that the DCO assisted the Athlete during this process. This is also not suggested by the WADA ISL, which is concerned only with the analysis of samples and not with its collection.

82. Similarly, the Sole Arbitrator does not find that any of the ISTI Departures identified above at **2.** compromise the integrity of the doping control process or the Sample *per se*, i.e. to an extent that it would be "*impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred*" (see CAS 2014/A/3487 para. 152 and CAS 2016/A/4707 para. 85). In this respect, the Sole Arbitrator does not neglect the fact that the established ISTI Departures are deplorable and give rise to concerns about the integrity of the POLADA's anti-doping process. However, those departures, individually and in their entirety, are not so serious that, by their nature, they will be considered to undermine the fairness of the testing process. They require a more detailed

explanation as to how – under the specific circumstances at hand – they could reasonably have caused the ADRV. This issue will be discussed in the next section.

83. As a result, the Sole Arbitrator finds that the Appellant has not established grounds for an automatic invalidation of the test results.

b. Reasonable causation of the ADRV?

84. As explained above, in the absence of an automatic invalidation of the test results, it is for the Athlete to demonstrate that the ISTI Departures *"could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding"*. In accordance with constant CAS jurisprudence (see, in particular, CAS 2014/A/3487, para. 139 et. seqq.), the Athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the ISTI departures and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible.

85. If the Athlete succeeds in establishing a reasonable causative link, the burden of proof shifts back to POLADA in the sense that it is then on POLADA "*to establish that such departure did not cause the Adverse Analytical Finding*" (Article 3.2.3(i) of the POLADA ADR). This is necessary, as the mandatory ISTI are designed to eliminate the possibility of contamination affecting the outcome of anti-doping tests. To ensure that anti-doping bodies strictly adhere to those standards, and to ensure that athletes are not unfairly prejudiced if they failed to do so, Article 3.2.3(i) of the POLADA ADR must be interpreted in such a way as to shift the burden of proof onto the anti-doping organisation whenever a departure from an ISTI gives rise to a material – as opposed to merely theoretical – possibility of sample contamination (see CAS 2014/A/3487, para. 157).

86. The crucial question in the present case, therefore, is whether it would be reasonable for the Sole Arbitrator to conclude that the ISTI Departures could be the cause of the *furosemide* (and its metabolites) presence in the Athlete's Sample. As a preliminary point, the Sole Arbitrator notes that it will be relatively rare for an ISTI departure to directly cause an AAF (CAS 2014/A/3487, para. 142). Instead, it appears that Article 3.2.3 of the POLADA ADR is intended to address situations where the ISTI departure creates an opportunity for (accidental) contamination or (deliberate) sabotage to compromise the integrity of the Athlete's Sample. Addressing this issue requires careful consideration of the evidence adduced by the Parties concerning the precise circumstances of the Doping Control and any possible mechanisms through which the Sample could have been contaminated.

87. Considering the undisputed facts of the case, the Sole Arbitrator identifies four potential theoretical explanations for the presence of *furosemide* in the Athlete's Sample (compare CAS 2014/A/3487, para. 166):

(1) Deliberate consumption of *furosemide*;

(2) Inadvertent consumption of *furosemide* as a result of unintentional food or water contamination;

(3) Deliberate manipulation of the Sample by a third party (e.g. through the addition of a third party's urine); or

(4) Inadvertent environmental contamination of the Sample occurring as a result of the ISTI Departures.

88. Possibilities **(1)** and **(2)** would both involve the commission of an ADRV and would, therefore, not exculpate the Athlete.

89. Possibility **(3)** may be rejected as a possible cause of the AAF. It is uncontested that the Collection Vessel containing the Athlete's biological material remained in the Doping Control Station at all times during the Athlete's Doping Control, and that the DCOs had full sight on the table and bench on which the Collection Vessel was placed in between the Athlete's attempts to donate enough urine. The video taken in the Doping Control Station, which became part of the evidentiary record in these proceedings, shows that the DCO sat next to the table on which the Collection Vessel was placed. It is also uncontested that at least one DCO was present in the Doping Control Station at all times, and that the Collection Vessel, while not sealed, was covered with a lid. A manipulation of the Collection Vessel could not have remained undiscovered und would have raised the attention of the DCOs or another person. There is, however, no evidence, and it has not been contended by the Athlete, that any individual (whether identified or unidentified) behaved suspiciously in the doping control area, or that any individual was even present in the doping control area with suitable equipment and sufficient skill to spike the Athlete's Sample during the windows of time between the collection of the partial samples. There is also no indication whatsoever that any individual had a motive to manipulate the Athlete's Sample. Hence, even if one took the opinion of the Athlete's expert, Dr. Ewa Kłodzińska, for true that *"*[…] *a small amount of urine from a person treated with this preparation could raise the concentration of furosemide in the urine sample collected by the competitor up to the values obtained in the study"*, the Athlete has not explained how even a small quantity of third party urine could have entered the Collection Vessel. As a result, the possibility of deliberate spiking can be discounted.

90. The remaining question is whether possibility **(4)** could have been the cause of the AAF under the applicable legal standard. If the answer is "yes", then the burden shifts back to POLADA to persuade the Sole Arbitrator that the Athlete did ingest the prohibited substance. If the answer is "no", then it follows that the Athlete has committed the charged ADRV.

91. On the basis of the evidence before her, the Sole Arbitrator finds that none of the ISTI Departures, or other circumstances surrounding the Athlete's Doping Control, can reasonably explain the Prohibited Substance found in the Athlete's Sample, for the following reasons:

- The inappropriate set-up of the Doping Control Station, which was freely accessible for all competitors, is in itself insufficient to explain the AAF. While

the fact that other competitors used the same room and even the same toilet as the Athlete increases the contamination risk in theory, there is no indication that this risk was anything else but theoretical in the present case. The Appellant has not offered any plausible explanation on how the presence of other people could have reasonably caused the contamination of her Sample. As explained above, there is no hint for a deliberate manipulation. Absent any intentional spiking, it is extremely unlikely, if not impossible, that the mere presence of certain individuals in the doping control area could have contaminated the Athlete's Sample. There is no indication that another individual touched the Collection Vessel (let alone the material contained therein), or that the prohibited substance accidentally entered the Collection Vessel, which (while not sealed) was covered with a lid.

- To the extent that the Athlete's expert, Dr. Kłodzińska explains in her written report that the frequent use of the Doping Control Station, including the toilets, by other persons "*may significantly increase the risk of the research material collected in such a room being contaminated by external factors*", and that even "*a small amount of urine from a person treated with this preparation could raise the concentration of furosemide in the urine sample collected",* this explanation does also not meet the Appellant's burden to demonstrate that these circumstances provided for a concrete and reasonable likelihood of contamination in her specific case. Dr. Kłodzińska provides no analytical proof on how urine residues from third parties on the toilet seat or in the toilet bowl can result in the level of *furosemide* found in the Athlete's Sample. She also provides no analytical proof for a contamination of the urine sample through ground water or drinking water. Even if taken at face-value that the common use of medications containing *furosemide* for the treatment of "*lifestyle diseases*" is responsible for ground water or drinking water pollution in Poland, she does not explain how the Athlete's AAF could have been caused through polluted water. Instead of analyzing how alleged residues of third party urine or toilet water could have triggered the concentration of *furosemide* found in the Athlete's Sample, she generically concludes that "[i]*t is possible*" that a contamination could have occurred as a result of other individual's use of the same room and toilet.
- The concentration of *furosemide* found in the Athlete's Sample was more than 10 times as high as permitted under the WADA Prohibited List. If tiny residues of someone else's urine or toilet water could trigger the detected *furosemide* concentration, there would be many more samples testing positive for *furosemide*, even during the competition at issue here. It is, however, uncontested that no one else was tested positive for *furosemide* on the day of the Athlete's Doping Control.
- Similarly, the fact that the Athlete had not washed her hands before sample collection could not have reasonably caused the AAF. This fact could only be causative for the AAF if the Athlete's hands contained *furosemide,* and if the substance went into her urine during sample collection. The Athlete has, however, not further elaborated on this scenario (chemically or biologically), let alone submitted any evidence. In short, she has failed to explain how her unwashed hands could have reasonably caused the AAF.

- For the same reason, the DCO's holding of the Athlete's arm during the re-distribution of urine between the A and B bottle can be excluded as a potential cause of the AAF.
- Finally, the Sole Arbitrator also does not find environmental contamination allegedly arising out of the failure to comply with the *Partial Sample Collection Process* to be a plausible cause for the AAF. The Kłodzińska Expert Opinion, on which the Appellant primarily relies in support of this contention, is again unspecific and unconvincing. It only contains generic views on the purpose of the various safeguards in place for partial sample collection (e.g. use of separate collection vessels for each partial sample) and the theoretical contamination risks arising from the non-compliance with the ISTI requirements (e.g. from multiple openings and closures of the same collection vessel). However, it does not include any chemical or biological analysis of any of the contamination possibilities. There is no scientific link of any of the abstract risks described in the report to the specific AAF detected in the Athlete's Sample. Again, if it were true that the pollution of ground water and drinking water in Poland can cause the test results found for the Athlete, a larger number of positive samples for *furosemide* would have to be expected.

92. The Sole Arbitrator can also not ignore the fact that the Athlete signed the Doping Control Form after the taking of her Sample, and that she confirmed her satisfaction with the manner in which the Sample had been collected and did not raise any concerns or comments regarding the procedure (compare CAS 2018/A/5651, para. 79). The Athlete's submission that she did not know how to make remarks on the Doping Control Form because she has not had any appropriate training is without merit. No previous training or education is required for reading a document and confirming whether or not a certain fact can be confirmed. This all the more true given that the Doping Control Form was available in Polish, the Athlete's native language.

93. In summary, the Athlete's alleged contamination scenarios are solely hypothetical without concrete reference to a possible course of the contamination. Therefore, the Sole Arbitrator concludes that the Athlete has not established that the alleged scenarios (based on the undisputed ISTI Departures) could have reasonably caused the ADRV. The Sole Arbitrator therefore finds that the Athlete committed the ARRV contemplated by Article 2.1 of the POLADA ADR.

B. What Is the Appropriate Sanction to be Imposed on the Athlete?

94. The second question that the Sole Arbitrator has to answer concerns the consequences of the ADRV committed by the Athlete.

95. Article 10.2 of the POLADA ADR reads as follows:

> *"The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 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 Article 10.2.4, shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance or a Specified Method and POLADA can establish that the antidoping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years."

96. As stipulated in Article 10.2.1 of the POLADA ADR, the basic duration of the ineligibility period for a violation of Article 2.1 is four (4) years, except where the prohibited substance is a specified substance and POLADA cannot establish that the ADRV was intentional; in such case, the period of ineligibility is two (2) years (Article 10.2.2 of the POLADA ADR).

97. *Furosemide* is a specified substance. Furthermore, in its respective submissions, POLADA undertook no effort to establish that the ADRV was intentional.

98. The Athlete did not file any submissions before the CAS regarding the length of the ban or any other consequence of the ADRV. In particular, the Athlete has not submitted to the CAS that the period of ineligibility should be mitigated for some reason. The Athlete has not argued or even tried to establish the origin of *furosemide*, how the substance has entered her body, and that she did not know or suspect − and could not have known or suspected − that she had used or been administrated *furosemide*.

99. Hence, the Sole Arbitrator finds that the Athlete has not shown that she bears no fault or negligence or that her fault or negligence was not significant, and that as a consequence, the period of ineligibility should be eliminated or reduced.

100. Therefore, the Athlete shall be sanctioned with a two-year Period of Ineligibility under Article 10.2.2 of the POLADA ADR.

101. Pursuant to Article 10.13 of the POLADA ADR, the Period of Ineligibility shall start on the date of this CAS Award. According to Article 10.13.2.1 of the POLADA ADR, the Appellant shall receive credit for the period of the provisional suspension (imposed on her by POLADA on 22 October 2021) served by her until the date of this CAS Award.

102. The second point concerns disqualification. In the present case, the Doping Control took place in-competition, following the Polish Senior Judo Championship. Therefore, Article 9 of the POLADA ADR applies in this case and, as an inevitable consequence, the Athlete's results must be disqualified with all resulting consequences, including

forfeiture of any medals, points and prizes.

103. Article 10.10 of the POLADA ADR reads as follows:

> *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes."*

104. The Sole Arbitrator rules that pursuant to Article 10.10 of the POLADA ADR, the results obtained by the Athlete as from 1 October 2021, when the Sample was collected, until 22 October 2021, when the Provisional Suspension commenced, shall be disqualified, including the forfeiture of any medals, points and prizes.

XI. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms. Natalia Kropska on 21 June 2022 against the Anti-Doping Agency of Poland with respect to the decision rendered on 27 April 2022 and notified with grounds on 1 June 2022 by the Disciplinary Panel of POLADA is dismissed.

2. The decision rendered by the POLADA Disciplinary Panel on 27 April 2022 is confirmed.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 3 October 2023

THE COURT OF ARBITRATION FOR SPORT

Annett Rombach
Sole Arbitrator