4A_456/2009[1]

Judgment of May 3, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

X._____
Appellant,
Represented by Dr. Martin BERNET and Mrs Sonja STARK-TRABER

v.

Y._____
Respondent,
Represented by Mr Antonio RIGOZZI

Facts:

A.

A.a Y._____ (the Respondent) is a successful long-distance runner. X._____ (the Appellant) is the National Athletic Federation of Z._____ and as such a member of the International Association of Athletics Federations (IAAF).

A.b On March 12, 2006 the Respondent was subjected to a doping test during the Marathon in Seoul South Korea. The Respondent's sample was divided into an A and a B-sample and sent to the doping center of the Korea Institute of Science and Technology, the laboratory of which is recognized by the World Anti-Doping Agency (WADA). On March 16, 2006, the A-

[1] Translator's note: Quote as X._____ *v.* Y._____, 4A_456/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

sample was examined by A._____ and the forbidden substance 19-Norandrosterone was found.

On April 13, 2006 the IAAF informed the Appellant of the result of the test and asked it to proceed according to Rule 37 of the IAAF Competition Rules.

On April 17, 2006 the Appellant advised the Respondent of the positive test result and informed him of his right to examine the B-sample.

The Respondent offered no explanation for the detection of 19-Norandrosterone in his A-sample. On April 25, 2006 he was temporarily banned from all competition by the Appellant.

On May 16, 2006, the B-sample was analyzed by A._____ under supervision by Dr. B._____. The substance 19-Norandrosterone was detected again.

B.

B.a On September 10, 2006 the Appellant held the first hearing in the framework of the disciplinary proceedings. After several postponements a new hearing took place in front of a newly constituted Disciplinary Committee on December 11, 2008.

In a letter of December 11, 2008 the Appellant advised the Respondent that the Disciplinary Committee had unanimously determined a doping violation and issued a ban between April 25, 2006 and December 11, 2008. The Respondent was also deprived of all medals and prizes in connection with the participation to the 2006 Seoul Marathon.

B.b The Respondent appealed the decision of the Disciplinary Committee of the Respondent of December 11, 2008 to the Court of Arbitration for Sport (CAS) in a brief of January 7, 2008. He argued essentially that Art. 5.2.4.3.2.2 of the WADA Code International Standard for Laboratories[2] had been violated because both the A and B-sample had been examined by the same person (A._____). The Appellant expressly challenged the jurisdiction of the CAS as neither the Statutes nor any of the other applicable Federation Regulations provided for an appeal to the CAS.

[2] Translator's note : In English in the original text.

The CAS considered that its jurisdiction could not be based on the Appellant's Federation Regulations. Yet it found that it had jurisdiction on the basis of a letter sent by Dr. C._____, the IAAF Anti-Doping Administrator, to the Respondent's representative on April 10, 2008. In a July 24, 2009 arbitral award the CAS upheld the Respondent's appeal, annulled the Appellant's decision of December 11, 2008 and authorized the Respondent to participate in competitions again without any further investigation.

C.
In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS award of July 24, 2009 and find that the CAS has no jurisdiction to decide the Respondent's appeal. Alternatively, the issue should be sent back to the CAS.

The Respondent submits that the matter is not capable of appeal, alternatively that the appeal should be rejected. The CAS submits that the appeal should be rejected.

The Appellant submitted a reply to the Federal Tribunal and the Respondent a rejoinder.

D.
In a decision of the presiding Judge of November 16, 2009 the Respondent's motion for security for costs was upheld. The Appellant consequently deposited CHF 6'000.- with the Registrar of the Federal Tribunal.
Reasons:

1.
According to Art. 54 (1) BGG[3] the Federal Tribunal issues its decision in an official language[4], as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As that is not an official language and the parties used different languages in front of the Federal Tribunal, the decision will be in the language of the appeal in conformity with practice.

2.

[3] Translator's note : BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[4] Translator's note: The official languages of Switzerland are German, French and Italian.

In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190 to 192 PILA[5] (Art. 77 (1) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne in this case. None of the parties had a seat or a domicile in Switzerland at the relevant time. As the parties did not exclude the provisions of chapter 12 PILA in writing they are accordingly applicable (Art. 176 (1) and (2) PILA).

2.2 A matter is only capable of appeal when the Appellant has a legally protected interest to the annulment or to the modification of the decision under appeal (Art. 76 (1) (b) BGG; in this respect see BGE[6] 133 III 421 at 1.1 p. 425 ff). The Federal Tribunal basically reviews *ex officio* whether a matter is capable of appeal or not (Art. 29 (1) BGG). Even so, the appeal must be sufficiently reasoned (Art. 42 (1) and (2) BGG), and the Appellant must also explain that the legal requirements of an appeal according to Art. 76 (1) BGG are given. The Respondent wrongly disputes the Appellant's present practical interest to legal protection. Whilst the Respondent's ban already ended as of December 11, 2008, the Respondent was deprived of all prizes obtained at the 2006 Marathon and denied further advantages. Contrary to the opinion expressed in the answer to the appeal the Appellant's interest to the enforcement of the sanctions it pronounced cannot be denied because the prize money of USD 80'000.- was not due by the Appellant but by the organizer of the Marathon. The Appellant, which is in charge of disciplinary actions with regard to doping tests as a National Federation, retains an interest in the annulment of the award under review with regard to the prizes the Respondent obtained at the 2006 Seoul Marathon.

The Respondent's argument that the Appellant would lack personal interest to the appeal because it was not acting for itself but pursuant to instructions by the IAAF, whilst relying in part on speculative claims, proves untenable. The fact that the Appellant as a member of the IAAF has certain duties in connection with disciplinary proceedings, the violation of which may bring about sanctions of the International Federation, does not lead to the conclusion that the Appellant would lack personal interest, contrary to the Respondent's view. The Appellant is entitled to appeal pursuant to Art. 76 (1) BGG.

2.3 The Respondent may not be followed when he claims that the matter would not be capable of appeal for failure to challenge all alternative reasons of the award under review,

[5] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

[6] Translator's note: BGE is the German abbreviation for the decisions of the Swiss Federal Tribunal.

particularly the main reasons, according to which the Appellant would have accepted the appeal proceedings to the CAS as proposed in the IAAF letter of April 10, 2008.

Contrary to the view expressed in the answer to the appeal this was not an independent reasoning in connection with other reasons, namely that the Respondent could have understood the April 10, 2008 letter as an offer to enter into an arbitration agreement or that under the circumstances the Appellant would be bound by the IAAF offer. Instead, the coming into being of an arbitration agreement requires first an offer to conclude a contract, which the Arbitral Tribunal saw in the IAAF letter. Thereupon the offer required an acceptance by the contractual counterpart. As the April 10, 2008 letter was a statement of intent from the IAAF according to the CAS, the Arbitral Tribunal ultimately had to explain why the Appellant would have to be bound by the agreement which came into being between the IAAF and the Respondent. An independent alternative reasoning to the ratification of a representation by the IAAF could at most be seen in the reasons of the award under review according to which the Appellant's attitude could also be understood as an offer to conclude an arbitration agreement in favour of the CAS. The award under appeal is not at all unequivocal in this respect and that argument contradicts peculiarly the repeated reasoning of the CAS, according to which the offer was issued by the IAAF, as well as the extensive developments as to the issue of the approval of the acts of the IAAF or their binding character for the Appellant, which could not be understood as alternative reasons. In any event the appeal aims at both reasons and therefore there can be no claim that the matter is not capable of appeal because of a failure to appeal the alternate reasons.

2.4 A Civil law appeal within the meaning of Art. 77 (1) BGG may fundamentally seek only the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that the latter allows the Federal Tribunal to decide the case itself). However to the extent that the dispute involves the jurisdiction of the arbitral tribunal there is an exception in this respect, as was the case in the framework of the old public law appeal and the Federal Tribunal may itself determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal (BGE 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 ff; Judgment 4A_240/2009 of December 16, 2009 at 1.2). The Appellant's main submission is therefore admissible.

2.5

2.5.1 The grievances limitatively set forth in Art. 190 (2) PILA are the only admissible ones (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward in the appeal and reasoned; this corresponds to the duty to reason contained in Art. 106 (2) BGG as to the violation of fundamental rights and of cantonal and inter-cantonal law (BGE 134 III 186 at 5 p. 187 with references).

2.5.2 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are blatantly wrong or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the applicability of Art. 105 (2) and Art. 97 BGG). Yet the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or when new evidence is exceptionally taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). Whoever argues an exception to the rule that the Federal Tribunal is bound to the factual findings of the lower court and wishes to rectify or supplement the factual findings on that basis must show with reference to the record that corresponding factual allegations were already made in the proceedings in conformity with procedural rules (see BGE 115 II 484 at 2a; 111 II 471 at 1c p. 473; both with references). The Respondent wrongly argues that when the CAS considered that the Appellant accepted the legal recourse proposed by the IAAF this would be a factual finding which binds the Federal Tribunal. Throughout the award the CAS rather relied on the principle of trust to assume the Appellant's acceptance.

3.
Based on Art. 190 (2) (b) PILA, the Appellant argues that the CAS wrongly assumed jurisdiction.

3.1 The CAS reviewed jurisdiction on the basis of Art. R47 of the CAS-Code according to which a decision by a sport federation may be appealed to the CAS to the extent that the statutes or the regulations of the federation provide for that or if the parties entered into a "specific arbitration agreement[7]".

[7] Translator's note : In English in the original text.

The CAS decided first that its jurisdiction could not be based on the statutes or on the applicable federation regulations. Whilst the Respondent was subject to the Appellant's rules and by reference to the Anti-Doping Rules and to the procedural rules of the IAAF, these drew however an important difference between National-Level[8] and International-Level[9] athletes as to doping tests and the possibility to appeal to the CAS. The Respondent was a National-Level Athlete[10] within the meaning of the applicable IAAF Anti-Doping Rules. As such, according to Art. 60.12 of the IAAF Competition Rules he was not entitled to appeal to the CAS as this was only open to international athletes according to Art. 60.11. The CAS also rejected the Respondent's argument that the possibility given to appeal to the South African Institute for Drug Free Sport would not satisfy the requirements of the rule of law due to existing conflicts of interest, especially since the South African courts had to decide in this respect according to the TAS and the submissions made in this respect were not such as to justify jurisdiction of the CAS.

The CAS then reviewed whether or not a specific arbitration agreement[11] could be found in the fax letter from Dr. C._____, the IAAF Anti-Doping Administrator of April 10, 2008, within the meaning of Art. R47 of the CAS Code. In this respect the CAS found that arbitration clauses had to meet the requirements of Art. 178 PILA and moreover stated that Swiss law applies to the issue of the occurrence of such a clause, something which is not put in question by any party (see Art. 178 (2) PILA).

The aforesaid letter was sent to the then legal representative of the Respondent and purported to persuade him to settle the matter by conceding a doping violation and acknowledging a two years ban. It contained particularly the following wording:

"I would remind you that the decision that will ultimately be taken by the relevant disciplinary commission of [the national athletics federation] after 16th May will still be subject to an appeal to the Court of Arbitration for Sport in Lausanne, on your initiative if you disagree with it or on the initiative of IAAF, if the decision is not in accordance with the IAAF Rules. This will inevitably lead to a costly and lengthy arbitration procedure until the final award is rendered by CAS."[12]

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[8] Translator's note : In English in the original text.
[9] Translator's note : In English in the original text.
[10] Translator's note : In English in the original text.
[11] Translator's note : In English in the original text.
[12] Translator's note : In English in the original text.

The Respondent rejected Dr. C._____'s offer, yet he relied on the excerpt quoted later as to the jurisdiction of the CAS. The CAS found with regard to the letter of April 10, 2008 that the Respondent, on the basis of the principle of trust, could have relied on an offer to enter into an arbitration agreement by the IAAF and that by appealing to the CAS he had acted accordingly. The Appellant would have been aware of the aforesaid letter and agreed to the appeal possibility offered by Dr. C._____ in the name of the IAAF. Moreover the Respondent could have understood the letter of April 10, 2008 as a reference to the procedure according to Art. 60.12 of the IAAF Competition Rules, which rules out an appeal to the CAS for national athletes and he could have assumed that the IAAF was making an exception to that provision for him, to the extent that it would authorize an appeal to the CAS based on Art. 60.11. In view of the long duration of the proceedings, more than two years in front of the Disciplinary Committee of the Appellant and based on the ongoing communication[13] between the Appellant and the IAAF, the Respondent could legitimately understand the behavior of both federations as meaning that they did not wish an appeal at the national level but a direct appeal to the CAS.

Moreover the decision of the Appellant's Disciplinary Committee of December 11, 2008 contained no indication as to an appeal and it did not dispute the contents of the IAAF letter. The existence of Dr. C._____'s letter of April 10, 2008 was known to the Appellant and to its Disciplinary Committee and the Disciplinary Committee should have advised the Respondent that a national appeal was the only one available, should it have thought that no direct appeal to the CAS was available. The Respondent could legitimately understand this silence as an approval by the Appellant of Dr. C._____'s letter.

The CAS considered the IAAF letter of April 10, 2008 to the then legal representative of the Respondent as a specific arbitration agreement[14] on that basis and found that it had jurisdiction on the Respondent's appeal.

3.2 The Federal Tribunal exercises free judicial review on the legal issue of jurisdiction according to Art. 190 (2) (b) PILA, including such material preliminary questions from which the determination of jurisdiction depends. Yet, even as to jurisdiction, this Court reviews the factual findings of the award under appeal only to the extent that some admissible grievances

[13] Translator's note : In English in the original text.
[14] Translator's note : In English in the original text.

within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.3 The first disputed issue in this case is whether or not the Respondent could legitimately (Art. 2 (1) ZGB[15]) understand the April 10, 2008 IAAF letter as an offer to enter into an arbitration agreement.

As the CAS correctly points out, an arbitration agreement must meet the requirements of Art. 178 PILA. Whilst the formal requirements of § (1) must be met on the one hand, the substantive requirements are determined in § (2) of that provision. The arbitral Tribunal examined the occurrence of an arbitration agreement on the basis of Swiss law pursuant to Art. 178 (2) PILA, which is not challenged by the parties.

The necessary contents of an arbitration clause are not defined by PILA. It is clear from the purpose of an arbitration clause that the intent of the parties must be expressed to submit existing or future disputes to an arbitral tribunal, *i.e.* not to a state court (BGE 130 III 66 at 3.1 p. 70; 129 III 675 at 2.3 p. 679 with references).

Akin to other legal transactions requiring compliance with some formal requirements, an arbitration clause (Art. 178 PILA) must be interpreted at first according to the general rules of interpretation (BGE 130 III 66 at 3.2 p. 71 ff with references). Furthermore it must be determined whether or not the contents of the contract as determined by the general methods of interpretation was expressed in the legally required format (BGE 122 III 361 at 4 p. 366). The thorough explanations of the CAS as to the issue of the form required and its reference to the generous case law of the Federal Tribunal as to the formal validity of arbitration clauses in the field of international arbitration (BGE 133 III 235 at 4.3.2.3 p. 244 ff) are accordingly relevant only to the extent that the interpretation of the statements at hand leads at all to the conclusion that a contract was concluded. By contrast, the developments in the award under review as to case law regarding the validity of global references to arbitration clauses contained in the statutes of a federation are not relevant (BGE 133 III 235 at 4.3.2.3 p. 244 ff; Judgment 4A_358/2009 of November 6, 2009 at 3.2.4; with references). On the one hand the applicability of the Federation Rules to the appeal (Art. 60.9 ff of the IAAF Competition Rules) is not at all in dispute (as according to the decision under appeal they do

[15] Translator's note : ZGB is the German abbreviation for the Swiss Civil Code.

not provide for CAS jurisdiction in this case) and no reference can be deducted from the aforesaid letter of April 10, 2008 on the other hand.

3.3.1 As indicated above (at 2.5.2) the CAS could not determine a factual consensus of the parties as to the arbitration clause in dispute. Accordingly it rightly interpreted it on the basis of the principle of trust the April 10, 2008 IAAF letter to the then representative of the Respondent and the Appellant's attitude (see BGE 132 III 268 at 2.3.2 p. 274 ff; 130 III 66 at 3.2 p. 71 ff; with references). The statements of the parties are accordingly to be interpreted as they could and should be understood on the basis of their wording and the context as well as under the overall circumstances (BGE 133 III 61 at 2.2.1 p. 67; 132 III 268 at 2.3.2 p 275; 130 III 417 at 3.2 p. 424 ff, 686 at 4.3.1 p. 689; with references).

The objective interpretation according to the principle of trust also determines whether or not a statement of intent exists at all (Gauch/Schluep/Schmid, Schweizerisches Obligationenrecht, Allgemeiner Teil, Bd. I, 9. Ed. 2008, Rz. 208; Alfred Koller, Schweizerisches Obligationenrecht, Allgemeiner Teil, 3. Ed. 2009, § 3 Rz. 184; Ingeborg Schwenzer, Schweizerisches Obligationenrecht, Allgemeiner Teil, 5. Ed. 2009, Rz. 27.43; Judgment 4A_437/2007 of February 5, 2008 at 2.4; see BGE 120 II 197 at 2b/bb p. 200; 116 II 695 at 2b p. 696).

Accordingly it must be determined whether or not a specific statement could be understood in good faith by the recipient as the expression of an intent to activate a legal transaction and to enter into a legally binding commitment towards him. An offer (Art. 39 ff OR[16]) is to be recognized only when the statement evidences a sufficient intent to be bound by the party making it, including the intent to be bound should the offer be accepted (Schwenzer, a.a.O, Rz. 28.09).

3.3.1.1 Dr. C._____ of the IAAF reminded the legal representative of the Respondent in the April 10, 2008 letter that the decision of the Disciplinary Committee, which would normally be taken after May 16, 2008 could still be appealed to the CAS and that such an appeal would inevitably lead to a costly and time consuming arbitration procedure before a final award could be reached. The introduction to the excerpt of the letter quoted by the CAS ("I would remind you that"[17]) cannot on the basis of its wording be understood as a

[16] Translator's note : OR is the German abbreviation for the Swiss Code of Obligations.
[17] Translator's note : In English in the original text.

statement of readiness to enter into a commitment towards the recipient but merely as a reference to the legal means available according to the writer. The choice of words ("will be subject to an appeal" "[t]his will lead to a costly and lengthy arbitration procedure", "final award is rendered by CAS")[18] suggests that the writer proceeded on the basis of a specific representation of the legal means available and wanted to draw the recipient's attention to their adverse consequences with regard to costs and duration of the proceedings. The wording chosen assumes that the legal recourse described indeed results from the procedural rules applicable and that they are known to the recipient of the letter.

Thus according to its wording the excerpt in dispute was to be understood as a reference to the procedural situation in the case at hand which had to be considered by the parties. One cannot deduct from that an offer to commit to appealing the decision of the Disciplinary Committee to an arbitral tribunal in deviation from the available legal recourse. The aforesaid excerpt contains no clue at all which could legitimate the recipient to assume that the writer wanted to commit himself procedurally in any way.

3.3.1.2 Nor do the circumstances justify to conclude in good faith that in the April 10, 2008 letter Dr. C._____ would have wanted to commit the IAAF and ultimately also the Appellant, to submit the existing dispute to an international arbitral tribunal as opposed to the legal recourses according to the Regulations.

Based on the factual findings of the CAS, which bind this Court (see Art. 105 (1) BGG) the letter from Dr. C. _____, the Anti-Doping Administrator of the IAAF was addressed to the then legal representative of the Respondent and purported to bring the proceedings to an end by settling them. In this respect Dr. C. _____ proposed in writing to dispose of the matter with a two years ban as long as the Respondent would admit to a doping violation. According to the award under review the Respondent rejected that offer. There is no basis in the factual findings of the CAS to hold that the parties discussed any additional items beyond the proposed settlement. The April 10, 2008 letter was rather limited to an offer to conclude the proceedings speedily against the acknowledgment of a doping offense. It is not perceptible that a dual offer would have been made to terminate the proceedings on the one hand and, in case a settlement could not be reached, to submit the dispute to the CAS on the other hand.

[18] Translator's note : In English in the original text.

Under the circumstances of the written settlement offer of April 10, 2008 the reference to the jurisdiction of the CAS must be understood as a warning of the time consuming proceedings and the costs related thereto. It served as an argument to move the Respondent towards an acknowledgment of the violation of the rules against the assurance of a minimal sanction. A contingent offer to change the legal recourses available under the Regulations should the offer of a settlement be rejected cannot be seen there. The conclusion of the letter also supports this understanding when stating that it was not the intent of the IAAF to step into the disciplinary proceedings but to find a fair and timely settlement.

The letter took place during the disciplinary proceedings, roughly eight months before a decision in the case. The fact that the December 11, 2008 decision contained no indications as to an appeal was therefore not to be understood at the time by the recipient of the April 10, 2008 letter in good faith as an expectation worthy of protection of the legal recourse mentioned there. Besides it is not apparent to what extent the lack of a reference to the appeal procedure could justify jurisdiction of the CAS.

The Respondent and counsel had accordingly to understand the April 10, 2008 letter in good faith as follows: either he accepted the settlement proposal of the IAAF, whereby the ban retroactively ordered would run out as of April 24, 2008 already and the proceedings would come to an end, or he refused it and the disciplinary proceedings would run their course. There was no discussion of a change in the proper procedure in case the offer was rejected. From the reference quoted to an appeal to the CAS it is not possible to deduct an offer by the IAAF to open a legal recourse for the Respondent in case the settlement proposal was rejected, which would not have been otherwise available.

The award under review irrelevantly considered that the letter contained an implicit reference to Art. 60.11 or 60.12 of the IAAF Competition Rules, which provide for an appeal to the CAS only for international athletes, which could have been understood by the Respondent as meaning that for him – although a national athlete within the meaning of these provisions - there would be an exception to the applicable rules. It is inexplicable to what extent such a reference to the aforesaid provisions (the applicability of which is undisputed) could result from the letter. Even less recognizable is a specific exception from such provisions, and neither from the reference to unusually lengthy proceedings or the ongoing exchange of information between the Appellant and the IAAF.

3.3.1.3 Neither from the wording of Dr. C._____'s letter of April 10, 2008 nor from the overall context of the expressions contained there could an offer to conclude an arbitration agreement in favor of the CAS be deducted. The interpretation of the letter according to the principle of trust rather leads to the conclusion that the IAAF meant to bind itself legally only as to the offer of a settlement; from an objective point of view there is no recognizable intent there to be bound any further in case of rejection of the settlement proposal.

3.3.2 If the Respondent could not understand the letter of April 10, 2008 in good faith as an offer by the IAAF to submit the legal dispute to the CAS, neither could it accept any proposal and effectively enter into an arbitration agreement by filing an appeal to the CAS. Thus the conclusion of an arbitration agreement with the Appellant based on the aforesaid letter falls out of consideration as well. The issue as to the formal validity is therefore not to be addressed.

Neither is it necessary to deal with the issue that the CAS examined as to whether the IAAF could validly bind the Appellant by its actions. The explanations of the CAS are anyway contradictory when on the one hand the CAS assumes practically throughout the award that Dr. C._____ acted in the name of the IAAF whilst on the other hand reviewing the ratification of a representative's acts based on Art. 38 (1) OR.

Contrary to the award under review no valid arbitration agreement according to Art. 178 (2) PILA came into being between the parties. The CAS wrongly found that it had jurisdiction to decide the dispute at hand on the basis of the April 10, 2008 letter.

3.4 The Respondent argues that the CAS should have found that it had jurisdiction on a different basis.

He takes the view that contrary to the award under review he would have to be qualified as an "International-Level Athlete"[19] within the meaning of the IAAF Anti-Doping Rules, which is why he could appeal to the CAS.

3.4.1 It is undisputed between the Parties that the Respondent would have been entitled to appeal to the CAS according to Art. 60.11 of the IAAF Competition Rules should he be

[19] Translator's note : In English in the original text.

deemed an International-Level Athlete[20] according to that provision. The IAAF hand-book contains the following definition in this respect:

"International-Level Athlete
For the purposes of the Anti-Doping Rules (chapter 3) and Disputes (Chapter 4) an athlete, who is in the Registered Testing Pool for out-of-competition testing or who is competing in an International Competition under Rule 35.7"[21]

According to the factual findings of the award under review, which are disputed by neither party, the Respondent was not listed in the Registered Testing Pool[22]. The only disputed issue in this appeal is whether or not the status which the Respondent claims as an International-Level Athlete[23] could be based on his participating in an International Competition[24].

3.4.2 The arbitral award under review found that the Seoul Marathon was not listed on the IAAF list of the international events of the year 2006 but that in the following years it was upgraded and appears as of now on the International Competition[25] list. The CAS accurately stated that the qualification of an event as International Competition[26] and the status of a sportsman as International-Level Athlete[27] in connection with that could not have mere procedural meaning. The difference between national and international athletes is better relevant for their respective rights and obligations in the framework of the Anti-Doping Rules of the IAAF. Contrary to the Respondent's view the corresponding classification is not tantamount to a procedural rule which would be applicable to facts that took place before it came into force.

The Respondent's argument that at the time the arbitral proceedings were initiated at the beginning of 2009 the Seoul Marathon had been classified as an international competition by the IAAF, thus opening the way to an appeal to the CAS, is not convincing. The sample assessed by the CAS was taken during the 2006 Seoul Marathon which was not recognized as an international competition by the IAAF. The legal recourse available, relying on the qualification as an international competition according to Art. 60.11 of the IAAF

[20] Translator's note : In English in the original text.
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[25] Translator's note : In English in the original text.
[26] Translator's note : In English in the original text.
[27] Translator's note : In English in the original text.

Competition Rules, does not lead to the CAS simply because another competition conducted later in the same place is classified differently. The fact that the 2008 Seoul Marathon (and according to the award under review perhaps even the 2007 one) was recognized as an international competition by the IAAF does not change the fact that the 2006 event did not have that status. Moreover the procedural rule according to which only an international athlete was entitled to appeal to the CAS remained unchanged. Contrary to the Respondent's view, it is not because the legal recourse changed since the doping test under review that it should be applied retroactively.

It cannot be claimed that in this case there would be some complex jurisdictional issue due to the applicability of various national and federation rules as in the case mentioned in the answer to the appeal (4P.149/2003 of October 31st, 2003 at 2.2.2). Moreover the issue in the aforesaid case was the exhaustion of legal remedies before an appeal to the CAS and not its jurisdiction. Contrary to the Respondent's view nothing can be derived to his benefit from that case.

Neither is the jurisdiction of the CAS justified by the argument that the IAAF itself informed the Appellant of the positive result of the doping test, thus making it an "IAAF test" within the meaning of Art. 36.5 of the IAAF Competition Rules, which could only be carried out in international competitions according to Art. 35.7. In the corresponding letter to the Appellant of April 13, 2006, the IAAF instead clearly stated according to the award under review that it behooved the Appellant to assess the test results, as prescribed for national competitions. The Respondent does not challenge that the provisional ban was issued by the Appellant as a national federation as prescribed in Art. 38.2 for national athletes. Also irrelevant is the reference to the fact that in the year 2006, marathon events were generally not conducted as international competitions by the IAAF due to an oversight and that his was corrected later. For what reasons the 2006 Seoul Marathon was not recognized as an international competition by the IAAF is not decisive. In any event it does not appear from the factual findings of the award under review that the 2006 Seoul Marathon would in fact have been treated by the IAAF as an international competition according to Art. 35.7 as to the doping tests conducted, even though it was not listed as such.

3.4.3 With regard to the jurisdiction of the CAS, the Respondent vainly relies on the principle of *lex mitior* according to Art. 25.2 of the WADA Anti-Doping Code. The principle means that as an exception to the principle of non-retroactivity, the new law is to be applied to a

doping offence committed before its entry into force when it provides for a milder sanction than the previous rules. The Respondent makes no convincing demonstration with his reference to the fact that arbitral proceedings in front of the CAS, as opposed to national proceedings, would provide an independent, quick and inexpensive arbitral proceeding. As the Appellant rightly points out, the principle of *lex mitior* applies to sanctions in doping cases but not to changes in material regulations impacting the applicable appeal procedures indirectly.

It is not apparent to what extent on the basis of the aforesaid principle there would be a right to appeal to the CAS instead of to a national body.

3.4.4 When the CAS found that the Respondent was to be denied the status of an International-Level Athlete[28] and therefore it had no jurisdiction according to Art. 60.11 of the IAAF Competition Rules, it did not violate the law.

4.
The CAS wrongly found that it had jurisdiction on the basis of the April 10, 2008 letter. Its jurisdiction cannot rely on the applicable Federation Regulations either. The award of the CAS of July 24, 2009 is accordingly to be annulled as a consequence of the appeal being allowed and the CAS must be found to lack jurisdiction.

In view of the outcome of the proceedings, the Respondent must compensate the Appellant and pay for the costs of the proceedings (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The Appeal is admitted and the CAS award of July 24, 2009 is annulled.

2. The CAS shall have no jurisdiction to decide the Respondent's appeal.

3. The court costs set at CHF 5'000.- shall be paid by the Respondent.

4. The Respondent shall pay to the Appellant an amount of CHF 6'000.- for the federal judicial proceedings.

[28] Translator's note : In English in the original text.

5. This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, May 31, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
KLETT (Mrs)	LEEMANN