CAS 2008/A/1652 Appeal by WADA v Mr Luke Troy & ARU

CAS 2008/A/1664 Appeal by IRB v Mr Luke Troy

PRELIMINARY AWARD ON JURISDICTION

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Malcolm **Holmes** QC, Sydney, Australia
Arbitrators:	Mr Alan **Sullivan** QC, Sydney, Australia
	Mr David **Williams** QC, Auckland, New Zealand
CAS Clerks:	Mr Tim Holden and Ms Katharine Lee, Sydney, Australia

between

WORLD ANTI-DOPING AUTHORITY, Montreal, Canada

represented by Mr Richard R. Young, Esq & Ms Jennifer S. Bielak, Esq., Holme Roberts & Owen LLP Colorado Springs, USA

- First Appellant -

INTERNATIONAL RUGBY BOARD, Dublin, Ireland

represented by Ms Susan Ahern, IRB General Counsel, Dublin, Ireland

- Second Appellant -

and

MR LUKE TROY (MR TROY), formerly of Newcastle, Australia
represented by Mr Paul J. Hayes, Barrister, Melbourne, Australia
instructed by Mr Grant Bonner, Deacons, Sydney, Australia

- First Respondent -

AUSTRALIAN RUGBY UNION LIMITED, Sydney, Australia

represented by Mr Tony O'Reilly, Kennedys, Sydney, Australia

- Second Respondent –

Date of Award: 18 March 2009

INTRODUCTION

1. By an application form dated 17 September 2008 the World Anti-Doping Agency (**"WADA"**) lodged an appeal against a decision of the Judicial Committee of the Australian Rugby Union (**"ARU"**) whereby the Judicial Committee decided to dismiss an allegation that Mr. Luke Troy had committed and anti-doping rule violation under the ARU Anti-Doping By-Law, Clauses 5.2.2 and 5.2.6.

2. WADA requested that the Court of Arbitration for Sport (**"CAS"**) conduct a de novo hearing on the issues in accordance with the Code of Sports-related Arbitration (**"CAS Code"**) and sought a finding that Mr. Luke Troy had committed an anti-doping rule violation by purchasing over the internet the prohibited substances DHEA and testosterone-1. WADA also sought an order imposing a period of two years ineligibility on Mr. Luke Troy.

3. By an application form dated 30 September 2008 the International Rugby Board (**"IRB"**) lodged an appeal against the same decision and sought the same relief. The IRB is the peak world body controlling and administering the sport of rugby union.

4. Each of the appellants asserts that it has the right to appeal the decision of the Judiciary Committee to the CAS pursuant to an agreement contained in:

   (i) WADA: By-Law 27.4.1 of the ARU Anti-Doping By-law;

   (ii) IRB: Regulation 21.27 and Regulation 21.28.2 of the IRB Anti-Doping Regulations and By-Law 27.4.1 of the ARU Anti-Doping By-law.

PROCEDURAL HISTORY

5. On 29 September 2008, WADA filed its Appeal Brief under R.51 of the CAS Code and on 11 October 2008, the IRB filed its Appeal Brief.

6. On 21 October 2008 the Secretary-General of the CAS formed a panel of arbitrators comprising Mr. Malcolm Holmes QC as President and Mr. David AR Williams QC and Mr. Alan Sullivan QC as arbitrators in each matter. Given the similarity of the appeals, the CAS Oceania Registry requested that all parties to each proceeding confirm that they would consent to the matters being joined. In response WADA consented on 6 October 2008, the ARU consented on 7 October 2008 and the IRB consented on 8 October 2008. On 19 November 2009 Mr Troy, through his counsel, agreed that both appeals related to the same subject matter and should be heard together.

7. The Panel held a preliminary teleconference by telephone on 31 October 2008 attended by the Appellants and the ARU. In accordance with directions made at the preliminary

conference, the ARU filed its Answer to the Appellants' Appeal Briefs on 10 November 2008.

8. There was a further preliminary teleconference on 19 November 2008 attended by representatives of all parties. Following the teleconference a draft Order of Procedure was prepared and circulated to the parties. All parties signed the terms of the Order of Procedure and agreed to be bound by its terms. Under the Order of Procedure, it was agreed that no party would be entitled to recover any costs or fees from any other party and Mr Troy was directed to serve his Answer under R55 of the Code which was to contain, inter alia, any defence of lack of jurisdiction.

9. On 8 December 2008, Mr Troy filed his Answer and sought access to certain documents by serving a Notice to Produce upon the Appellants.

10. The Panel held a further preliminary conference by telephone on 9 December 2008 when the parties were represented as follows:

WADA; Mr Richard Young and Ms Jennifer Bielak

IRB; Ms Susan Ahern

ARU; Mr Nick Weeks

Mr Troy; Mr. Paul J. Hayes and Mr. Scott Francis

11. At the preliminary conference Mr. Troy by his counsel confirmed that he wished to challenge the jurisdiction of the Panel to hear both appeals on the basis that each was time barred either under the ARU Anti-Doping By-law or under the CAS Code. The ARU indicated that it consented to CAS hearing the appeal and did not raise any objection to the admissibility of the appeals. The Panel, with the agreement of the parties, determined that it was appropriate to determine whether the appeals were time barred as a preliminary issue and made directions that certain documents be produced and that all parties file and serve any evidentiary material and written submissions in respect of this preliminary issue.

12. The Panel also determined it would hear oral argument in respect of the preliminary issue, if possible, by an international video conference to be held at 7.30am (AEST) on Wednesday 4 February 2009 when it was proposed that there would be a two hour oral hearing on the preliminary issue.

13. The parties subsequently served detailed written submissions in relation to the preliminary issue which were supplemented by evidentiary material as follows:

(a) 19 December 2008 – revised answer by Mr Troy and exhibits 2R1 to 2R11.

(b) 8 January 2009 – Response by WADA to the Answer by Mr Troy and WADA exhibits A to DD.

(c) 8 January 2009 – submissions by IRB in respect of the preliminary issues raised by Mr Troy and Exhibits A to E.

(d) 16 January 2009 – reply submissions by Mr Troy and letter of request to the Australian Sports Anti-Doping Authority.

(e) 30 January 2009 – submission of ARU.

(f) 2 February 2009 – response by WADA to submission by ARU (the attached affidavit was excluded).

(g) 2 February 2009 – letter from WADA describing telephone call on 3 April 2008 between Mr Richard Young and the director, legal affairs of WADA.

(h) The Panel was also provided with a transcript of the proceedings before the Judicial Committee on 28 February 2008.

14. The oral hearing took place on Wednesday 4 February 2008. Mr. Malcolm Holmes QC and Mr. Alan Sullivan QC were present in the video conference hearing room of Allens Arthur Robinson in Sydney assisted by Mr. Tim Holden, the CAS Clerk. Mr Troy and his counsel, Mr. Paul J. Hayes, instructed by Mr. Scott Francis were also present as was Mr. O'Reilly on behalf of the ARU.

15. Mr. David Williams QC attended by video link from Auckland, New Zealand. Ms. Ahern, on behalf of the IRB, attended by video link from Dublin, Ireland. Mr. Young and Ms. Bielak, on behalf of WADA, attended by video link from Colorado Springs, USA. All parties were heard and following the video hearing the Panel reserved its decision.

16. Following the hearing the representatives for Mr. Troy sought to put in further written submissions by letter dated 4 February 2009. In response the Panel received a letter dated 4 February 2009 from the IRB objecting to Mr. Troy making supplementary written submissions after the Panel had reserved its decision at the conclusion of the hearing by video conference. By letter dated 5 February 2009 Mr Troy withdrew the supplementary submissions dated 4 February and sought to tender a letter dated 29 February 2008 from the ARU to Mr Troy advising that his suspension had been lifted. No objection was raised to the receipt of this letter.

17. The factual background on which the preliminary issue is based is largely uncontested and is based on the background facts stated in the decision under appeal and on the additional material placed before the Panel by the parties. The preliminary issue relates to the timing of certain events and it is necessary to set out the factual chronology in some detail.

FACTUAL HISTORY

18. Mr. Troy engaged in the sport of rugby union and has played the sport at the senior level for the Newcastle Waratahs.

19. On 7 February 2006 the Australian Customs Service intercepted a parcel which had been sent by post from the United Kingdom on 30 January 2006 addressed to Mr. Troy.

20. On 13 February 2006 the Australian Customs Service wrote to Mr. Troy enclosing a Seizure Notice in respect of the parcel. The covering letter noted that Mr. Troy could, if he wished, make a claim for the parcel and its contents. No claim was made then, or at any later time, by or on behalf of Mr. Troy for the return of the goods which had been seized.

21. On 21 February 2006, the goods were received into an Australian Customs Service storehouse and held by way of storage. These goods were later destroyed by incineration on Friday 5 May 2006.

22. On 17 August 2006, Australian Customs Service again seized a second parcel which was addressed to Mr. Troy. On 31 August 2006 Australian Customs Service wrote to Mr. Troy enclosing a Seizure Notice in respect of these goods. Again, Mr. Troy was informed that no action was required by him unless he wished to make a claim for the seized goods. It appears that these goods in the second shipment were also subsequently destroyed by the Australian Customs Service.

23. About 15 months after the second seizure of goods, by letter dated 22 November 2007 ASADA wrote to Mr. Troy stating that ASADA believed that he may have attempted to use prohibited substances and that he may have possessed prohibited substances. Mr. Troy then provided a submission to ASADA following which ASADA made a decision that Mr. Troy had, within the meaning of the ARU Anti-Doping By-law, both possessed prohibited substances and attempted to use prohibited substances on or about the dates of the first and second seizures by the Australian Customs Services. ASADA then notified the ARU.

24. On 1 February 2008 the ARU provisionally suspended Mr Troy and notified him a right to a hearing before an independent tribunal. On 1 February 2008, the ARU wrote to the IRB and notified the existence of a "*doping matter*".

25. On 7 February 2008 the ARU provided Mr. Troy with a formal notice of an alleged anti-doping rule violation and the matter came before the Judicial Committee of the ARU on 28 February 2008 for hearing.

26. On 28 February 2008 there was a hearing before the ARU Judicial Committee attended by Mr. Troy and his legal representative, Mr MacDonald. Mr. Weeks, general counsel with the ARU presented the case to the Committee assisted by Ms. Campbell and Ms. Pogson. Also attending the meeting was Mr. Redman, principal solicitor at ASADA. There was no objection to Mr. Redman being present throughout the hearing. Mr Peter Rowles, the Head of Rugby, ARU Rugby Services Division and responsible for doping, also attended. The hearing proceeded before the Judiciary Committee for approximately 45 minutes following which there was a break in the proceedings so that the three members of the Judiciary Committee could consider the matter.

27. After a break in the proceedings the Judiciary Committee returned and a verbatim transcript of the proceedings records that the following took place:

Chairman of Judiciary Committee, Mr Gleeson:

> *"I'm sorry we've kept you waiting but we wanted to give a closer consideration to this, what we considered to be an important point against the question of the prescribed substance. So we've considered the evidence of the ARU which had been produced and considered the question of whether the shipments had been proved to contain a prohibited substance, because that seems to me to be the essential element in that preliminary element. We've taken into account the onus of proof. We are not satisfied the shipments contain a prohibited substance. Since it is an essential element of each of the anti-doping rule violations alleged, that the shipments do contain a prohibited substance, we have and we cannot be satisfied that an anti-doping rule violation has been proved. So we will dismiss the allegation – I don't know what it's called, what's it called?"*

Member of the Judiciary Committee, Mr Garling:

> *"It's an information, I think."*

Chairman of Judiciary Committee, Mr Gleeson:

> *"Information, is it? We have dismissed the information. We will publish full reasons at a later date. I think that's all I need to say tonight. We will publish full and detailed reasons for other parties to look at – not next week but in the near future. That being so, this matter is adjourned and good luck.*

Mr. Weeks (ARU): *"Thank you."*

Mr MacDonald (Mr Troy)

> *"Sir, can I just ask – and I don't know if this is the appropriate forum to ask – but does the finding mean that Luke can commence training forthwith?*

Chairman of Judiciary Committee, Mr Gleeson:

> *"That's not something that I can tell you about."*

Member of the Judiciary Committee, Mr Garling:

"Mr Rowles will know."

Chairman of Judiciary Committee, Mr Gleeson:

"Yeah, Mr Rowles."

Mr Rowles (ARU):

"Yes, my understanding is he can commence training."

Mr MacDonald (Mr Troy):

"Is there a document of some nature?"

Mr Weeks (ARU):

"Well, we'll write to you tomorrow and confirming that."

Mr MacDonald (Mr Troy):

"Thank you. Thank you, Your Honours."

Chairman of Judiciary Committee (Mr Gleeson):

"You'll get the rules and you'll see what the procedure is for reviews and things like that. It may not be the end of the matter there."

Mr MacDonald (Mr Troy):

"Thank you, sir."

Chairman of the Judiciary Committee (Mr Gleeson):

"Good night."

28. On the following day, 29 February 2008, Mr. Weeks of the ARU sent an email to Mr Darren Bailey of the IRB, advising that:

> *"The Independent Judiciary Committee met last night and the charges were dismissed ...*
>
> *... We have lifted his provisional suspension and now consider the matter closed.*
>
> *I will forward a copy of the written decision when it is available.*
>
> *Please call me if you are interested in finding out more information."*

29. On 12 March 2008 the ARU Judiciary Committee produced a typewritten document headed *"REASONS FOR DECISION 12 MARCH 2008"*. This was a 15 page document setting out the factual background relating to the first and second seizures, and then a description of the action taken by ASADA and that taken by the ARU. The document then analysed the relevant provisions of the ARU Anti-Doping By-Law, described the hearing before the Judiciary Committee and outlined the reasons for the Judicial Committee reaching its decision. Relevantly, the last two paragraphs of the document stated as follows:

> *"47. Shortly put, it is simply not open to the Judicial Committee to conclude that the goods that were seized by Customs in fact contained a prohibited substance. In those circumstances, the Judicial Committee must and did on 28 February 2008*

dismiss the allegations that were made and declines to make a finding that there has been any Anti-Doping Rule Violation by the Player.

48. The decision of the Judicial Committee is unanimous.

Dated: 12 March 2008

Signed

John N Gleeson QC"

30. It is reasonable to infer that ASADA received a copy of the 12 March 2008 document on or shortly after 12 March 2008.

31. On 3 April 2008 Mr Olivier Niggli, Director Legal Affairs at WADA, received a telephone call from Mr. Richard Young then acting for ASADA, and who later represented WADA at the hearing before the Panel. Mr Niggli said that he was informed that:

> *"Mr. Troy, an Australian rugby player, had ordered both testosterone and DHEA over the internet. The products had been seized by Australian customs and so they were never delivered to Mr. Troy. Mr. Troy subsequently told an investigator for ASADA that if customs would not have intercepted these imports, that he would have used the substances. Mr. Young further told me that the ARU hearing body in the Troy case had exonerated Mr. Troy because the bottles had long since been destroyed and ARU was not able to prove that the bottles seized by customs actually contained what was on the label.*
>
> *Mr. Young informed me that under ARU's rules, ASADA was not permitted to appeal to ARU's internal appellate review body but WADA was so permitted. ASADA was offering to pay for and handle the internal ARU appeal on WADA's behalf. ASADA had advised Mr. Young that WADA should be received a copy of the ARU decision exonerating Mr. Troy directly from ARU because WADA was an entity entitled to appeal that decision under ARU's rules."*

32. Again, we think it is reasonable to infer that Mr Young, when conveying this information to Mr Niggli, was summarising the reasoning contained in the 12 March 2008 document.

33. Following further communications between the ARU and WADA, there was an attempt on 23 April 2008 by the ARU to fax a copy of the 12 March 2008 document to WADA. Due to what appear to be a transmission problem the document was not transmitted in full although WADA by letter dated 22 May 2008 admitted that *"WADA was not advised of the outcome of this matter by the ARU until 23 April 2008".* However there appears to be no dispute that, on 30 April 2008, WADA received for the first time, a full copy of the document dated 12 March 2008.

34. On 6 May 2008 WADA, requested the ARU to refer the decision of the Judicial Committee to a Post-Hearing Review Body.

35. In response, the ARU on 12 May 2008, informed WADA that the ARU believed that the referral sought was made out of time and should have been made within seven days of the date of the decision on 28 February 2008 and invited WADA to provide reasons why the referral request was within time. Correspondence concerning this issue continued between WADA and the ARU on 22 May 2008, 26 May 2008 and 30 May 2008. After the ARU took independent advice, the ARU by letter dated 11 July 2008 advised WADA that it believed that WADA had been "notified" of the decision at the latest on 23 April 2008 and that the request was out of time. As a result, on 11 July 2008 the ARU advised WADA that it had decided that it would not refer the decision of the ARU Judicial Committee to a Post-Hearing Review Body.

36. On 20 July 2008 WADA advised the ARU of its intention to appeal the decision of the ARU Judicial Committee to the CAS and requested a copy of the file upon which the Judicial Committee had based its decision.

37. On 21 August 2008 the IRB received from the ARU for the first time a copy of the 12 March 2008 document which was then considered by the IRB's Anti-Doping Manager who referred it to the IRB's Anti-Doping Advisory Committee. On 27 August 2008 the IRB's Anti-Doping Advisory Committee recommended that the IRB appeal to CAS.

38. On 17 September 2008 WADA lodged its appeal against the decision of the ARU Judicial Committee with CAS and on 30 September 2008 the IRB lodged its appeal with the CAS.

39. In these circumstances it is submitted on behalf of Mr Troy that both appeals were inadmissible as they were filed out of time. Further it was submitted that the appeals were inadmissible as neither of the appellants had exhausted the legal remedies available to them prior to an appeal *"in accordance with the statutes or regulation of the said sports-related body"* as required by the CAS Code and Article 13 of the World Anti-Doping Code 2003.

RELEVANT PROVISIONS OF THE APPLICABLE STATUTES AND REGULATIONS

The ARU Anti-Doping By-law

40. The ARU in common with most sporting organisations, condemns the use of performance enhancing drugs and doping practices in its sport and has adopted an Anti-Doping By-law (**"ARU By-law"**) under which a Judicial Committee is appointed by the ARU to hear cases involving alleged anti-doping rule violations.

41. The Judicial Committee, which is made up of three members, has power to regulate its own procedure however it is required to conform generally with the procedural guidelines set out in ARU By-law 22.5. These provisions involve the giving of notice to the parties, allowing the party to be represented by legal counsel and to have an interpreter where necessary and to endeavour to ensure that proceedings are not heard in the absence of the parties affected.

42. When the Judicial Committee makes its decision it is then required to notify the parties.

43. ARU By-law 22.6 provides:

> *"The decision of the Judicial Committee shall be advised to all parties as soon as practicable after the conclusion of the hearing. When it considers it appropriate, the Judicial Committee may deliver a short oral decision at the conclusion of the hearing with its reasons to be put in writing and communicated to the parties at a later date., or it may reserve its decision. The decision of the Judicial Committee shall be binding upon notification to the Player, Person or entity concerned and/or their Rugby Body."*

44. Where the Judicial Committee has made its decision and finds that an anti-doping rule violation has been committed, the Judicial Committee is authorised under ARU By-law 23 to impose various sanctions on the person concerned and is also required to advise the party adversely affected of the right to request a review by the Post-Hearing Review Body.

45. ARU By-law 22.11 provides:

> *"Where a Player, Person or entity is adversely affected by a decision of the Judicial Committee in relation to an Anti-Doping Rule Violation, the Player, Person or entity shall be advised by the Judicial Committee of their right to request a review of the decisions to the Post-Hearing Review Board."*

46. The IRB, the ARU and WADA are also entitled to seek a post hearing review.

47. ARU By-law 26.1.1 relevantly provides:

> *"26.1.1. A Person or other entity who has been found by a Judicial Committee to have committed an Anti-Doping Rule Violation shall be entitled to have the finding and/or sanction referred to the Post-Hearing Review Body. ... The IRB, the ARU and WADA shall also be entitled to refer a case dealt with by a Judicial Committee to the Post-Hearing Review Body whether a Player or Person in the case concerned has been found to have committed an Anti-Doping Rule Violation or otherwise."*

48. There is a time limit for a referral to a post-hearing review body. ARU By-law 26.2.1 which provides:

> *"26.2.1 A referral to the Post-Hearing Review Body must be made within 7 days from the date of notification of the decision of the Judicial Committee. A notice of review signed by the party seeking review must be lodged with the CEO of the ARU within 7 days of the decision of the Judicial Committee and shall specify:*
>
> *(A) the name of the party seeking the review;*
>
> *(B) the decision to be the subject of the review;*
>
> *(C) the date of the decision; and*
>
> *(D) the specific grounds for the referral request. Except as provided, no specific form of a notice of review is required."*

49. The post-hearing review body is made up of three members and is empowered to determine the basis upon which any review will proceed (ARU By-law 26.3.3). It may re-hear the entire case de novo or such part of the evidence as it considers appropriate (ARU By-law 26.3.3, 26.3.4, 26.3.5 and 26.3.9).

50. The post-hearing review body is obliged to advise its "*decision*" to the parties in similar terms to that applicable to the Judicial Committee. Under ARU By-law 26.3.11 it is provided that:

> *"26.3.11 The decision of the Post-Hearing Review Body shall be advised to the parties as soon as practicable after the conclusion of the hearing. When it considers it appropriate, the Post-Hearing Review Body may deliver a short oral decision at the conclusion of the hearing with its reasons to be put in writing and communicated to the parties at a later date, or it may reserve its decision."*

51. Two points of distinction are apparent between the provisions relating to the "decision" of the Judicial Committee and those relating to the "decision" of the Post-Hearing Review Body. First, ARU By-law 22.6 expressly states that *"[t]he decision of the Judicial Committee shall be binding upon notification to the Player, Person or entity concerned and/or their Rugby Body."*. A similar provision is not present in ARU By-law 26.3.11 which applies to a Post-Hearing Review Body. Secondly, the Post-Hearing Review Body is expressly required to generally conform with procedural guidelines which include *"[t]he provision of a timely, written, reasoned, decision"* (ARU By-law 26.3.5(c)). A similar provision is not present in ARU By-law 22 which applies to the Judicial Committee.

52. There is no provision in the ARU By-laws for an appeal directly to CAS from a decision of the Judicial Committee. However, appeals from "decisions" made under ARU By-law 26

are dealt with by ARU By-law 27 and a decision that no anti-doping rule violation was committed may be appealed exclusively to CAS.

53. ARU By-law 27 relevantly provides:

> *27 Appeals*
>
> *27.1 Decisions Subject to Appeal*
>
> *26.1.1(sic) Decisions made under By-Law 26 of these Anti-Doping By-Laws may be appealed as set forth below. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review authorised in By-Law 26 must be exhausted.*
>
> *27.2 Appeals from decisions regarding Anti-Doping Rule Violations and consequences*
>
> *27.2.1 ... a decision that no Anti-Doping Rule Violation was committed, ... may be appealed exclusively as provided in this By-Law 27.*
>
> *(a) In cases ... of Doping Control initiated by the ARU ... or in relation to any other case under this By-Law the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court and which will resolve definitively the dispute in accordance with the code of sports related arbitration.*
>
> *(1) In cases under By-Law 27.2.1, the following parties shall have the right to appeal to CAS: ... (c) the IRB, ... (e) WADA.*
>
> *...*
>
> *27.2.2 Any appeal must be solely and exclusively resolved by the CAS. The determination of the CAS will be final and binding on the parties to the appeal and no Person may institute or maintain proceedings in any court or tribunal other than the CAS.*
>
> *27.4 Time for Filing Appeals*
>
> *27.4.1 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 in accordance with these By-Laws but which was not a party to the proceedings having lead to the decision subject to appeal:*
>
> *(a) Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;*

(b) *If such a request is made within the ten-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.*

IRB ANTI-DOPING REGULATION 21

54. The IRB which is the global governing body for rugby union has adopted an Anti-Doping Regulation 21 (**"IRB 21"**)which applies to every National Rugby *"Union for the time being in membership of the* [IRB] *and each of their constituents"* (IRB 21.14.1 and A: Definition of Union). Under IRB 21.14.1 each National Rugby Union, including the ARU, *"is responsible for ensuring (and must ensure) that it has in place anti-doping regulations in conformity with these Regulations . These Anti-Doping Regulations shall also be incorporated either directly or by reference into each Member Union's rules. All Member Unions shall include in their regulations the procedural rules necessary to effectively implement these Anti-Doping Regulations."*

55. The ARU in compliance with the IRB 21 has adopted the ARU By-law. ARU By-law 2.3 states that the *"IRB Anti-Doping Regulations are incorporated into and form part of this By-Law"* Under the ARU By-law 2.4 where there is a conflict between the ARU By-law and the IRB 21 then *"the IRB Anti-Doping Regulations shall take precedence and shall apply ...."* The ARU By-law contains an exception which is not relevant to present circumstances and which was not referred to by the parties.

56. Under IRB 21 when there is an allegation that there has been an anti-doping rule violation each player or person alleged to have committed the anti-doping rule violation shall, *"as a minimum requirement,"* have the right to a hearing before a suitably qualified disciplinary body established by the National Union (IRB 21.14.4). IRB 21.14.4 states what the disciplinary body *"should consist of"* and how it *"shall deal with the matter"*. IRB 21.14.4 also states that *"[a]ll decisions by the disciplinary body must be produced in writing and incorporate the reasoning behind the findings and decisions."* The disciplinary body referred to in IRB 21.14.4 in the case of the ARU, is the Judicial Committee appointed by the ARU under the ARU By-law 22.

57. Each National Rugby Union which believes that an anti-doping violation may have been committed is required under IRB 21.14.6 *"to notify the CEO of the* [IRB} *immediately"*. Further, each National Rugby Union *"...must keep the Board fully appraised as to the status of pending cases and results of all hearings..."* (IRB 21.14.5) and must provide a full report of all hearings including the written decision of the hearing body.

58. IRB 21.14.16 provides

"Notification

21.14.6 When a Union, Tournament Organiser or NADO (as the case may be) receives an Adverse Analytical Finding or where a Union or Tournament Organiser believes, or becomes aware, that a anti-doping rule violation may have been committed, that Union, Tournament Organiser or NADO must notify the CEO of the Board immediately. The CEO shall be entitled to receive from a Union, Tournament Organiser or NADO such additional information, as he may consider necessary in relation to any alleged anti-doping rule violation. In any event, the CEO is entitled to receive from and shall be provided with a full report of all hearings including (without limitation) the written decision of the hearing body(ies) incorporating the reasoning behind the findings and decisions in respect of anti-doping rule violations by the relevant Union, Tournament Organiser or NADO (as the case may be) as soon as practicable and in any event within 72 hours of a final decision having been made."

59. The IRB then considers each case by following the procedure set out in IRB 21.28.2 which provides:

"21.28.2 Without limiting the reporting and notification requirements set out in Regulation 21.14.5 and 21.14.6 each Union or Tournament Organiser (as the case may be) shall submit to the Board's CEO a full report of the proceedings and conclusions of all hearings resulting from anti-doping rule violations arising out of or within its jurisdiction within 72 hours of the final decision on the anti-doping rule violation having been made. Such cases shall be considered by the IRB Anti-Doping Manager who, on behalf of the Board shall be entitled to (a) accept the result and decision or (b) refer the matter to representatives of the Board's Anti-Doping Advisory Committee who on behalf of the Board may accept the result and decision or subject to these Regulations refer the matter to the applicable review body or appeal the matter to CAS. Both the IRB Anti-Doping Manager or representatives of the Board's Anti-Doping Advisory Committee may take such other steps and/or make such other recommendations to the Board as it deems appropriate."

60. Once a case has been considered by the IRB Anti-Doping Manager it may be referred to the IRB's Anti-Doping Advisory Committee to review the matter. The outcome of this review may be to require the IRB to appeal the matter to the Court of Arbitration for Sport in accordance with the powers under IRB 21.28.2. The time for filing appeals to CAS is dealt with in IRB 21.27.5.

61. IRB 21.27.5 provides as follows:

"Time for Filing Appeals to CAS

21.27.5 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 in accordance with these Regulations but which was not a party to the proceedings having lead to the decision subject to appeal:

(a) Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;

(b) If such a request is made within the ten-day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file and appeal to CAS."

CONSIDERATION OF THE PRELIMINARY ISSUE

The Appeal by WADA

62. It was submitted on behalf of Mr Troy that the appellants were seeking to appeal the decision of the ARU Judicial Committee of 28 February 2008 and in the circumstances, as neither of the appellants sought a post-hearing review within seven days, no appeal could be made from the decision of the Judiciary Committee or any other determination or non-determination of the ARU to the CAS. As recorded in the transcript of the proceedings on 28 February 2008 which is set out above, the Judicial Committee delivered a short oral decision at the conclusion of the hearing purportedly acting under the powers authorised by ARU By-law 22.6. The Judicial Committee said that it dismissed the complaint against Mr Troy but said that it "*will publish full reasons at a later date*". On the following day, 29 February 2008, the ARU wrote to Mr Troy advising him that his provisional suspension had been lifted as the allegations against him had been dismissed by the Judicial Committee. Subsequently on 12 March 2008, the Judicial Committee published its written reasons and purported to confirm its earlier *decision*.

63. In response WADA submitted that on a proper construction of ARU By-law 26.2.1 the requirement that a referral to the Post-Hearing Review Body be made *"within 7 days from the date of notification of the decision of the Judicial Committee"* is a reference to the date on which WADA received a copy of the full written decision of the Judicial Committee. WADA submitted that the *"decision"* referred to in ARU By-law 22.6 was the later written document dated 12 March 2008 produced by the Judicial Committee which was received by WADA on 30 April 2008. Further, the request by WADA on 6 May 2008 that the decision be referred to a Post-Hearing Review Body was made within seven days of being notified of this decision. As the ARU then decided to deny WADA's request to refer the decision to the Post-Hearing Review Body on 11 July 2008, this was a "*decision not to hold the Post-Hearing Review Body hearing"* and in accordance with ARU By-law 27.4.1(a) WADA had 10 days from notice of that decision *to "request from the body having issued the decision* [the ARU] *a copy of the file on which such body relied"*. This request was made to the ARU within 10 days by WADA on 20 July 2008 and the file was received on 28 August 2008. In those circumstances it was submitted by WADA that ARU By-law 27.4.1(b) applied and that it had 21 days from "*receipt of the file*" to file an appeal to CAS which WADA complied with when it filed its appeal to CAS on 17 September 2008.

64. The submissions of Mr Troy and WADA first parted company on the initial question of what was the "*decision*" of the Judicial Committee referred to in ARU By-law 26.2.1. All parties accepted that the request for a referral must be made within seven days under ARU By-law 26.2.1 from the date of notification of the "*decision*" of the Judicial Committee.

Applicable law

65. In considering the parties submissions, the Panel notes that under R58 of the CAS Code the law of the merits, being the substantive law of the disputes, shall be the applicable

regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. Thus in the present case, the applicable regulations are the ARU By-law and IRB 21 and as the decision was made by the Judicial Committee in Sydney where the ARU is domiciled, the law of New South Wales will also apply (see ARU By-law 2.4).

"decision"

66. The word "*decision*" in ARU By-law 26.2.1 must be construed objectively, in accordance with the ordinary and fair meaning of the words used and having regard to a consideration of the whole of the ARU By-law (*Re Media Entertainment and Arts Alliance: Ex parte Hoyts Corporation Pty Limited* (1993) 178 CLR 379 at 386-387). The ARU By-law must be read as a whole and the words of each clause should be interpreted so as to bring them into harmony with the other provisions of the ARU By-law. *"The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction"* (*Toll (FGCR) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at 179 at para [40]).

67. As noted above, the ARU By-law 2.3 incorporates the IRB 21 as part of the ARU By-law. Further ARU By-law 2.4 stipulates that in the event of any inconsistencies between the ARU By-Law and the IRB 21, the latter takes precedence save for some irrelevant exceptions. Thus under the terms of the composite document and the express terms of the IRB 21, all decisions by the Disciplinary Body, that is the Judicial Committee, must be "*produced in writing and incorporate the reasoning behind the findings and decisions*" (IRB 21.14.4). The requirement that a decision be "*produced in writing*" would not permit a Judicial Committee to announce its decision verbally on one date, either in full or in a shortened abbreviated form, and then to publish its written reasons for the decision on a later date. The phrase "*produced in writing*" indicates that the "*decision*" must take the form of a written document and that the document must contain the reasoning for the decision. A decision given verbally would not satisfy the requirements of IRB 21.14.4. There is therefore an apparent inconsistency between the dominant provisions of IRB 21.14.4 of the IRB 21 and the ARU By-law provisions of 22.6 which purport to authorise the Judicial Committee "*to deliver* [produce] *a short oral decision*".

68. However, it is necessary to seek to construe the two sets of provisions so as to bring them in harmony with one another if that is possible (*North-Eastern Railway v Hastings* (1900) AC 260 at 267; *North v Marina* [2003] NSWSC 64 at [45]). The two sets of provisions may be reconciled if this reference in ARU By-law 22.6 to "*a short oral decision*" is construed as authorising the Judicial Committee to give a brief oral indication of what was to be the intended effect of the later written reasoned decision and the short oral decision was not a

final and binding decision. On this construction, the only decision which is final and binding as referred to in ARU By-law 22.6 (and in the case of the Post-Hearing Review Body, in 26.3.11) is the later written reasoned decision of a kind required by IRB 21.14.4.

69. The nature of the overall scheme for processing and considering allegations of anti-doping violations in the sport of rugby union which is established by the interconnected provisions of the ARU By-law and the IRB.21 supports the construction that the time within which to appeal only starts to run from the notification of the written decision produced by the Judicial Committee. The CEO of the IRB under IRB 21.14.6 is expressly *"entitled to receive from and shall be provided with a full report of all hearings including (without limitation) the written decision of the hearing body(ies) incorporating the reasoning by the findings and decisions in respect of anti-doping rule violations by the relevant Union ... as soon as practicable and in any event within 72 hours of a final decision having being made".* The availability of a written document is manifestly necessary to allow the global supervisory role to be performed by the IRB. It allows the IRB to obtain the document and place the report and decision before the IRB Anti-Doping Manager for consideration and, if appropriate, referral to the Board's Anti-Doping Advisory Committee to review the matter and for the outcome of the Board's Anti-Doping Advisory Committee's review to be implemented in accordance with the powers under IRB 21.28.2.

70. It is inherently unlikely that a global system of sports administration would have contemplated a short oral decision being effective as the decision upon which all parties in the system must act and that notification across the world to several persons and committees, of that short oral decision would be sufficient to start the time within which to appeal, running before the reasons have been formulated in writing. WADA and the IRB are not parties to the proceedings before the Judicial Committee. The agreed procedure contemplates that all "*decisions*" of this nature of the Judicial Committee, wherever in the rugby playing world it may be located, are to be notified to the IRB in Ireland and to WADA in North America so that those bodies may take such steps as may be necessary to consider whether "*specific grounds*" (26.2.1) exist such as would reasonably justify a referral request, and then further take steps to seek a referral to a Post-Hearing Review Body all within *"7 days from the date of notification of the decision of the Judicial Committee"* (26.2.1). The parties must have contemplated a reasonable opportunity, if necessary, to obtain and review the decision upon being advised that a decision had been reached. There would be no effective opportunity to a non party to the proceedings to review or consider what action or non action should be taken if a written documented decision was not available.

71. Having regard to the surrounding circumstances of the scheme established by these instruments which were well known to the parties and to the manifest purpose of these provisions, on a proper construction of ARU By-law 22.6.1, the Panel finds that the word *decision* in ARU By-law 26.2.1 means the written documented decision produced by the Judicial Committee on 12 March 2008. The contrary construction asserted on behalf of Mr

Troy would undermine the effectiveness of the provision for its obvious purpose of facilitating the global supervision of the handling of anti-doping rule violation allegations in the sport of rugby. It would lead to the absurd consequence of WADA lodging a request for a referral in every case upon being advised that a decision had been reached by a National Union's disciplinary body so as to not be out of time in the event that at a later time when the written decision had been notified to WADA, there were proper grounds for such a request.

72. Moreover, the contrary construction put forward on behalf of Mr Troy would also lead to ARU By-law 22.6 being directly inconsistent with IRB 21 and thus make the judicial committee's oral decision of 28 February 2008 one which was not authorised by the ARU By-laws and hence a nullity. This obviously unsatisfactory result is avoided by construing the provisions harmoniously as discussed in paragraphs [66] and [68] above.

73. Further, the construction we prefer is also supported by a consideration of the provisions of ARU By-law 26.1.1. Under ARU By-law 26.1.1 the IRB and WADA are given an entitlement to refer a case to the Post-Hearing Review Body only after a case has been *"dealt with by a Judicial Committee"*. This wording suggests that the entitlement only arises once the Judicial Committee has concluded the matters required of it under the By-law. If the Judicial Committee has delivered a short oral decision, it must then put its reasons in writing and communicate its reasons to the parties. The Judicial Committee only finishes dealing with a case when it produces a written decision for the parties.

"notification" of the decision

74. The next question which arises is what was the date of *"notification"* to WADA of the decision of 12 March 2008 as referred to in ARU By-law 26.2.1. What amounts to notification depends upon the proper construction of the relevant provisions in the ARU By-law.

75. WADA submitted that *"notification"* meant more than mere notice that the decision existed and notice of the nature and general effect of the decision. It was submitted that on a fair reading of the provision, it would require the recipient party to be provided with the full written decision. As this only occurred when the decision was transmitted in full by facsimile on 30 April 2008, WADA then had seven days to request a review. WADA requested a review on 6 May 2007 and thus, it was submitted, complied with ARU By-law 26.2.1. This view is said to be supported by a consideration of the broad objective of the provisions which is to allow WADA to be a fully informed participant in the process. On this approach, the words in ARU By-law 22.6 that the decision of the Judicial Committee shall be *"advised to all parties"* and the words *"notification of the decision"* in ARU By-law 26.2.1 both convey that the decision and the reasons must be transmitted before there can be a "decision" and before there can be "notification" of the decision. In substance, the submission of WADA was that there is no real difference between the date of receipt of the

decision, which includes the reasons in view of construction adopted above, and the *"date of notification of the decision".*

76. The procedure to determine whether an anti-doping rule violation has occurred involves a three stage process and additional interested non party stakeholders are or may be involved at the second and third stages. The three stages are, first, a hearing before the Judicial Committee, secondly a hearing by the Post-Hearing Review body and, thirdly, an appeal to CAS. The provisions have different requirements to be satisfied as to the means of informing parties and interested non party stakeholders of the existence or contents of a decision and when the time for appealing or commencing the next stage in the process starts to run.

77. The first stage culminates in a decision of the Judicial Committee. ARU By-law 22.6 states that this decision (which must be produced in writing) is to be *"advised to all parties ... ."* ARU By-law 22.6 also uses the words *"communicated"* and *"notification"* to the parties of the decision and the reasons.

78. The time within which there must be a request made by a party, or additional interested non party, to initiate the second stage, begins to run from *"the date of notification"* of the decision. In contrast, the time within which there must be an appeal filed by a party to initiate the third stage, begins to run from *"the date of receipt of the decision by the appealing party"* (ARU By-law 27.4.1, underlining added). Additionally, an appeal by a non party to initiate the third stage, is subject to that non party requesting the file within ten (10) days from *" notice of the decision"* (ARU By-law 27.4.1 (a), underlining added) and then filing an appeal within twenty-one (21) days *"from receipt of the file .. "* (ARU By-law 27.4.1 (b) underlining added).

79. The ARU By-law has specifically created the possibility of two different points in time by express use of the different concepts of *notice* of a written decision and *receipt* of a written decision. A non-party may have notice of a decision before receiving the written decision or a copy of that decision. On the natural and ordinary meaning of the words used in the particular contractual context, the requirement that there be *"notification"* of a written decision is met when the substance of the written decision is made known to a person.

80. A person can be notified of a written decision when that person is informed or advised of the nature of that written decision. There needs to be more that mere knowledge of the fact or existence of the decision (cf. the discussion of early English cases which had considered the phrase *"notice of an award"* meant *"notification of the fact of an award"* in *Doran Constructions Pty Limited (In Liquidation) v Beresfield Aluminium* [2002] NSWCA 95 and where it was held that the relevant period which ran from *"the date on which notice of the award is given by the arbitrator,"* does not commence when a party receives a copy of the reasons for the award). The essential element in the present context is that the person

becomes aware of the decision and its general effect. It is being informed of the substance of the decision and its reasoning. As was said in a particular statutory context, *"a person is notified of a decision when the substance or outcome of the decision ...* [of the tribunal] *is actually communicated to the person "* (*Wang v Minister for Immigration*, (1991) FCR 386 per Merkel J at 390 E-F, underlining added). By contrast, *receipt* of the decision would only be satisfied in the present circumstance when a full copy of the decision was received by facsimile as occurred on 30 April 2008.

81. The evidence establishes that WADA was notified of the decision on 3 April 2008 (see [30] – [32] above). On that day, Mr Young communicated to Mr Niggli of WADA the substance of the written decision.

82. Furthermore or alternatively, WADA's letter of 22 May 2008 to the ARU acknowledged that it had been *"advised of the outcome"* by the ARU on 23 April 2008 (underlining added). This fact was fairly acknowledged when seen in the context of the terms of the verbal advice given by Mr Young to Mr Niggli concerning the written decision on 3 April 2008 as set out in paragraph [31] above. On 3 April 2008, WADA, although not in possession of a complete copy of the written decision, had been fully apprised of the nature of the decision and its substance and effect. WADA rightly, did not point to any particular fact or matter in the written decision of which it was unaware at that time. All that it lacked was "receipt" or "possession" of the written document. WADA was aware of the outcome, there had been an extensive telephone conversation in which WADA was advised of the nature and effect of the decision, and WADA had a verbatim copy of the first 9 pages of the written document. For all intents and purposes, at that time WADA was a fully informed participant in the process. Accordingly in the present case as WADA made its request for a referral to a Post-Hearing Review Body on 6 May 2008, it was made more that seven days after notification of the decision and the second stage was not validly initiated by WADA. The Appeal by WADA is therefore inadmissible.

83. It may well be that distinction we have drawn between notice of a written decision and receipt of such a decision is one which was not actually intended by the ARU but construction of the ARU By-Laws is an objective not subjective task. If the ARU wishes to eliminate that distinction, for example by providing that notification only occurs on the receipt of the written decision of the Judicial Committee, we think its only course is to amend its By-Laws appropriately.

84. An alternative submission was made on behalf of Mr Troy based on R49 of the CAS Code insofar as it states that the *"time limit for appeal shall be 21 days from the receipt of the decision appealed against"*. However R49 only applies in the absence of a time limit set in the statutes or regulations of the sports related body concerned. In the present case the time for filing appeals is specifically dealt with under ARU By-law 26, and accordingly R49 does not apply.

Has WADA exhausted all internal remedies?

85. The Panel notes the present appeal is against the decision of the Judicial Committee. As discussed above, WADA has failed to seek a review within the time provided for in the ARU By-law and therefore has also failed to comply with R47 of the CAS Code which requires that an appellate "has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulation of the sports-related body".

86. Even if WADA had sought a review within the time provided for in the ARU By-law, a further issue was raised by Mr Troy in relation to the provisions of the ARU By-law relating to the right to bring an appeal to CAS which contemplate that the third stage of the process will arise from a decision following the hearing by the Post-Hearing Review Body. It was submitted on behalf of Mr Troy that as there was no decision taken by a Post-Hearing Review Body on the matter that WADA was not entitled to appeal to CAS. Alternatively it was submitted that WADA and the IRB should have appealed against the "refusal" by the ARU to appoint a post hearing review body whereas the present appeal by WADA was from the decision of the Judicial Committee. In response WADA submitted that the decision which it had a right to appeal and the decision for the purposes of calculating the time limits within which to appeal was the decision by the ARU on 11 July 2008 not to appoint a Post-Hearing Review Body.

87. Given the views we have already expressed, it is unnecessary to resolve these issues. However, for the guidance of the parties and others in future we think it is appropriate to express some tentative views on these matters. Had WADA made its request for a referral to the Post-Hearing Review Body within time we would have been minded to reject the submissions made on behalf of Mr Troy that as there was no decision taken by a Post-Hearing Review Body on the matter WADA was not entitled to appeal to CAS. If WADA's contractual entitlement to appeal to CAS was dependent on the condition that there be a hearing by the Post-Hearing Review Body then that contractual entitlement would have been thwarted by the decision by the ARU on 11 July 2008 not to appoint a Post-Hearing Review Body. Had WADA acted within time, that would have been a wrong decision on the part of the ARU and WADA would be entitled to appeal. "[A]*n appeal from the denial of formal justice is possible where the authority concerned refuses, without reason, to make a ruling or it delays beyond a reasonable period*", (CAS 2007/A/1373 *FINA v CBDA & Gusmao*, at paragraph [8.6], following the award in CAS 2005/A/899 *FC Aris Thessaloniki v/ FIFA & New Panionios NFC*, at 63, where the Panel said there may be an appeal *"in the case of a denial of justice, an absence of ruling where there should have been a ruling*") In this respect the CAS jurisprudence is consistent with the general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect . In such circumstances, consistently with the implied duty of co-operation which existed in the

present case, the condition that there had been a hearing and adverse decision by the Post-Hearing Review Body would have had to be taken to have been fulfilled (see *Mackay v Dick* (1881) 6 App Cas 254 (especially at 264, 270 and 272; see also *Secure Parking (WA) Pty Ltd v Wilson* [2008] WASCA 268 at [88] – [92] and the cases there referred to). The Panel notes that the duty of co-operation is well known and of universal application, e.g. the *Mackay v Dick* principle was applied by the New Zealand Court of Appeal in *Devonport Borough Council v Robbins* [1979] 1 NZLR 1, per Cooke and Quilliam JJ at 23 (CA).

88. Once more, given the views we have formed, it is not necessary for the panel to finally determine the alternative submission of Mr Troy relating to whether or not WADA and IRB had a right of appeal against the 'refusal' by the ARU to appoint a post hearing review body. Given the implied duty to co-operate to which we have just referred, and its consequences, there would be no need to strain to construe the relevant provisions in order to find such a right of appeal. However, our tentative view is that if it was intended that there should be a right to appeal from a decision not to appoint a Post-Hearing Review Body, such right should have been specifically and clearly provided for in the ARU By-law. As we read the present wording of the ARU By-law there is no such right of appeal in the provisions of ARU By-law 27.

The Appeal by the IRB

89. The IRB relied upon different provisions which were said to confer a right of appeal and the procedure which must be followed on such an appeal. The IRB relied upon the provisions of IRB 21 which form part of the interlocking agreement binding the IRB, the ARU and Mr Troy.

90. Under IRB 21.28.2 the ARU was obliged to submit to the IRB *"a full report of the proceedings and conclusions of all hearings resulting from anti-doping rule violations arising out of or within its jurisdiction within 72 hours of the final decision on the anti-doping rule violation having been made"*. The IRB was notified of the verbal pronouncement of the decision on 29 February 2008 when it was advised that a copy of the written decision when it was available would be forwarded to the IRB.

91. However, the subsequent written decision of 12 March 2008 was only forwarded to the IRB on 21 August 2008 following a request made apparently by the IRB. This decision was then considered by the IRB Anti-Doping Manager who then referred the matter to the IRB Anti-Doping Advisory Committee for its review.

92. Under IRB 21.28.2 the IRB Anti-Doping Advisory Committee *"may accept the result and decision or subject to these regulations refer the matter to the applicable review body or appeal the matter to CAS"*. The IRB Anti-Doping Advisory Committee in the present case

undertook an expedited review and the IRB on 29 August 2008 requested the complete file of the Judicial Committee. IRB 21.7.5 states that where a non party is entitled to appeal (as the IRB is under IRB 21.28.2) that party may appeal to CAS if within 10 days from *"notice of the decision"* that party has requested the file from the body that issued the decision and the appeal to CAS is filed within 21 days *"from receipt of the file .."*.

93. This request for the file was made within ten days of being notified of the written decision. It was not suggested by any party that the IRB had any notice or notification of the written decision of 12 March 2008 between 12 March 2008 and 21 August 2008. The ARU file of the Judicial Committee was received on 10 September 2008 and the IRB by Application Form filed with CAS on 20 September 2008, sought to appeal the decision of the Judicial Committee. As there are specific time limits in the provisions of IRB 21, the 21 day time limit from *"receipt of the decision appealed against"* in R.49 of the CAS Code does not apply and the specific time limits for a non party set out in IRB 21.7.5 have been satisfied. The appeal by the IRB was therefore made within the time limits contained in IRB 21.

Has the IRB exhausted internal remedies?

94. An alternative argument was advanced by Mr Troy, that the IRB had not exhausted *"the legal remedies available to* [the IRB] *prior to the appeal, in accordance with the statutes or regulations of the said sports-related body"* as required by R. 47 of the CAS Code.

95. Insofar as the IRB 21 is a stand alone agreement binding the IRB, the ARU and its constituent, Mr Troy, the IRB has exhausted the internal remedies available to it.

96. Insofar as there is a composite agreement which includes the ARU By-law, the IRB has not sought a referral to Post-Hearing Review Body before appealing to CAS. WADA made an attempt out of time but the obligation to exhaust internal remedies is on the appellant, the IRB. The decision made by the ARU on the request by WADA for a referral indicates that any such request by the IRB is likely to have been unsuccessful but that does not answer the obligation resting on the IRB under R.47 to exhaust internal remedies. Under the ARU By-law the IRB has a right to seek a referral within 7 days of "notification" of the decision as part of the remedies under the three stage appeal process in the ARU By-law and it clearly has not done so. In those circumstances insofar as the IRB has sought to appeal under the ARU By-law (see paragraph 5 of the IRB Application Form), it is inadmissible because the legal remedies available to it under that three stage appeal had not been exhausted.

97. In the present case insofar as the appeal is brought under IRB 21.27 and 21.28.2, the process does not envisage a three stage process and there are no further intermediate steps which are available under the IRB process for the IRB to exhaust. Further, where a contract grants a party two avenues of appeal from a decision, one which has intermediate steps and one which provides for a direct right of appeal to CAS, it would be contrary to,

and a denial of, that express right to a direct appeal to CAS to require the party to undertake the intermediate steps involved in the alternate avenue of appeal. In such a situation, the party with the two alternative rights has a right to elect which route to pursue and if that route does not involve intermediate steps the other party cannot complain (see, e.g., *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 2 Qd R 261 at 262; Halsbury's Laws of Australia [110-8075]). The appeal under IRB 21.27 and 21.28.2 is admissible.

ON THESE GROUNDS

The Court of Arbitration for Sport Rules:

1. The appeal by WADA (CAS 2008/A/1652) is inadmissible and is dismissed.
2. The appeal by IRB (CAS 2008/A/1664) is admissible.

Sydney, 18 March 2009

THE COURT OF ARBITRATION FOR SPORT

Mr Malcolm **Holmes** QC
President of the Panel

Mr Alan **Sullivan** QC
Arbitrator

Mr David **Williams** QC
Arbitrator