



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2008/A/1558 WADA v/ SANEF & Gertenbach**  
**CAS 2008/A/1578 FEI v/ SANEF**

**ARBITRAL AWARD**

issued by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

**President:** Mr Ercus Stewart SC, Barrister-at-Law in Dublin, Ireland  
**Arbitrators:** Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland  
Mr Jeffrey Mishkin, Attorney-at-Law in New York, USA  
**Ad hoc Clerk:** Mr David Casserly, Barrister-at-Law in Dublin, Ireland

in the arbitration CAS 2008/A/1558 between

**WORLD ANTI-DOPING AGENCY (WADA)**, Montreal, Canada  
represented by Carrard et Associés, Lausanne, Switzerland

v/

**SOUTH AFRICAN NATIONAL EQUESTRIAN FEDERATION (SANEF)**, Kyalami, South Africa

represented by Mr Jimmy Dewar, SANEF Secretary General, Kyalami, South Africa

&

**JASYN GERTENBACH**, South Africa

represented by Stuart Harris Attorneys, Sandton, South Africa

and the arbitration CAS 2008/A/1578 between

**FÉDÉRATION EQUESTRE INTERNATIONALE (FEI)**, Lausanne, Switzerland  
represented by Lenz & Stachelin, Geneva, Switzerland

v/

**SOUTH AFRICAN NATIONAL EQUESTRIAN FEDERATION (SANEF)**, Kyalami, South Africa

represented by Mr Jimmy Dewar, SANEF Secretary General, Kyalami, South Africa

## 1. PARTIES

- 1.1 The World Anti-Doping Agency (hereinafter “WADA”), the Appellant in the case *CAS 2008/A/1578*, is an international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law Foundation, with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. It coordinates the development and implementation of the World Anti-Doping Code (the “WADC”), the document harmonizing anti-doping policies in all sports and all countries.
- 1.2 The South African National Equestrian Federation (hereinafter “SANEF”), the first-named Respondent in the cases *CAS 2008/A/1558* and *CAS 2008/A/1578*, is recognised by the South African Government as the national governing body of equestrian sports in South Africa. SANEF is affiliated to the Fédération Equestre Internationale (hereinafter “FEI”) and holds the status of a National Federation under its statutes.
- 1.3 Mr Jasyn Gertenbach (hereinafter “Mr Gertenbach”), the second-named Respondent in the case *CAS 2008/A/1558*, is a South African horse rider, who has represented South Africa in the Vaulting event in international competitions. Mr Gertenbach was born on 16 November 1989 and was seventeen-years-old at the time of the events at issue. He is a member of the Gauteng Horse Society (GHS), the governing body of competitive equestrian sport in its region for the disciplines of Dressage, Driving, Equitation, Eventing, Showing, Showjumping and Vaulting.
- 1.4 FEI is a non-governmental association of national equestrian federations recognized by the IOC as the international federation governing horse sport, as defined in its Statutes. FEI has its registered office in Lausanne, Switzerland.

## 2. FACTUAL BACKGROUND

- 2.1 Mr Gertenbach was selected as a member of the South African equestrian team to compete at the European Vaulting Championships on 7-12 August 2007 in Kaposvar, Hungary.
- 2.2 On 1 July 2007, representatives of the South African Institute for Drug-Free Sport (hereinafter “SAIDS”) carried out sample collections on several athletes at an equestrian event in South Africa, including Mr Gertenbach’s fifteen-year-old sister and other members of the South African equestrian team which would compete at the European Vaulting Championships. Mr Gertenbach attended this event, but did not compete and did not undergo a sample collection.
- 2.3 On 5 July 2007, at approximately 8pm, Mr Stephen James Van der Walt, a very experienced SAIDS Doping Control Officer (hereinafter the “DCO”) presented himself at Mr Gertenbach’s home, in order to carry out an out-of-competition urine sample collection on Mr Gertenbach. The DCO was allowed on to Mr Gertenbach’s property by Mr Gertenbach himself, whereupon the DCO presented himself and entered into a brief conversation with Mr Gertenbach regarding the purpose of the DCO’s visit.
- 2.4 Mr Gertenbach’s father, Mr Jacobus Johannes Gertenbach, subsequently joined the two men and engaged in conversation with the DCO. The DCO explained the purpose of his visit to

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- Mr Gertenbach's father, and showed him his identification card and his Letter of Authority from SAIDS, which contained, inter alia, the following warning, in bold type: "**WARNING: The refusal or failure by an athlete to submit to doping control when requested to do so by a doping control officer/chaperone may result in a sanction being imposed under its national or international federation rules**".
- 2.5 At that point Mr Gertenbach's father indicated that he wished to seek legal advice from his lawyer before allowing Mr Gertenbach to submit to the sample collection. Both Mr Gertenbach and his father entered their house at that point and Mr Gertenbach's father told the DCO to remain outside, which he did.
- 2.6 Mr Gertenbach's father subsequently rejoined the DCO outside the house and advised the DCO that he had spoken to his lawyer and that Mr Gertenbach would not be submitting to a sample collection on that day, and that the DCO should arrange to return on another day, having given advance notice. During the hearing, Mr Gertenbach's father testified that he called his attorney, Ms Tracy Nixon, on the telephone, and she advised him not to allow Mr Gertenbach to submit to the sample collection.
- 2.7 Mr Gertenbach remained in the house and had no further contact with the DCO. In his written witness statement, Mr Gertenbach's father stated that he instructed his son to go to his room. During the oral hearing, Mr Gertenbach's father testified that it was Mr Gertenbach's decision not to come back out of the house, and that he did not instruct Mr Gertenbach to stay in the house.
- 2.8 The DCO advised Mr Gertenbach's father that a refusal by Mr Gertenbach to submit to a sample collection would lead to a sanction for Mr Gertenbach, although he did not indicate what that sanction would be. The DCO admits that he did not directly advise Mr Gertenbach of the risk of a sanction for refusal to submit to a sample collection, as he was prevented from doing so by Mr Gertenbach's father and was barred from entering the house. The DCO testified that he asked the father to allow Mr Gertenbach to provide a sample, but did not specifically ask him to bring Mr Gertenbach out of the house in order that he could explain the possibility of a sanction to him directly. Mr Gertenbach's father testified that he did not think that he would have allowed the DCO to enter the house if he had tried to do so, as "*at that stage we were not going to take the test*".
- 2.9 The DCO requested that Mr Gertenbach's father confirm Mr Gertenbach's refusal to submit to the sample collection in writing. Mr Gertenbach's father wrote the following note on the DCO's 'Doping Control Memo' form: "*Could you please return at a decent time and notify me in advance – in the presence of a parent*".
- 2.10 At this point, Mr Gertenbach's father advised the DCO that he was trespassing on private property and directed him to leave. During the hearing, the DCO testified that Mr Gertenbach's father threatened to shoot him, although the DCO never saw a gun, and put DCO in fear of his life. Mr Gertenbach's father denies threatening to shoot the DCO.
- 2.11 Following the submission of the DCO's report of Mr Gertenbach's failure to submit to a sample collection, a SANEF Judicial Committee, constituted of C. Von Ludwig, T.G. Payne and C.J. McAslin, convened an oral hearing to consider this matter and heard evidence from Nicole de Villiers, the DCO, Mr Gertenbach, Tracy Nixon, and Mr Gertenbach's parents, Jacobus Johannes and Barbara Gertenbach.

- 2.12 On 7 April 2008 the SANEF Judicial Committee issued a decision (the “SANEFJC Decision”), imposing the following sanction on Mr Gertenbach:

*“Jasyn Gertenbach is suspended from all equestrian events under the auspices of the FEI, SANEF and/or GHS for a period of 4 months calculated from the date of this finding.”*

### 3. PROCEDURAL BACKGROUND

- 3.1 On 23 May 2008, by submission of a Statement of Appeal, WADA filed an appeal with the CAS against the SANEFJC Decision. WADA named SANEF and Mr Gertenbach as respondents to the appeal.
- 3.2 In accordance with Rule R52 of the Code of Sports-related Arbitration (the “Code”), the CAS initiated an appeals arbitration procedure under the reference *CAS 2008/A/1558 WADA v/SANEF & Gertenbach*.
- 3.3 On 5 June 2008 WADA filed an Appeal Brief.
- 3.4 On 13 June 2008, by submission of a Statement of Appeal, FEI filed an appeal with the CAS against the SANEFJC Decision. FEI named SANEF as the sole respondent to the appeal.
- 3.5 In accordance with Rule R52 of the Code, the CAS initiated an appeals arbitration procedure under the reference *CAS 2008/A/1558 WADA v/SANEF & Gertenbach*.
- 3.6 On 24 June 2008 FEI filed an Appeal Brief.
- 3.7 On 24 June 2008 SANEF informed the CAS that it would *“not be submitting an answer to the appeal brief of the two Applicants in the [cases CAS 2008/A/1558 & CAS 2008/A/1578] and will accordingly accept the decision of the Court”*.
- 3.8 On 14 July 2008 Mr Gertenbach filed an Answer to both appeals.
- 3.9 By correspondence of 23 and 24 June 2008, the parties agreed that the CAS procedures *2008/A/1558 & CAS 2008/A/1578* would be consolidated and decided by the same arbitration panel.
- 3.10 On 2 September 2008, the CAS notified the parties that the arbitration panel (the “Panel”) appointed to decide the consolidated procedures *2008/A/1558 & CAS 2008/A/1578* was constituted as follows:

President: Mr Ercus Stewart SC, Barrister-at-Law in Dublin, Ireland  
Arbitrators: Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland  
Mr Jeffrey Mishkin, Attorney-at-Law in New York, USA

- 3.11 On 5 September 2008 the Panel, having consulted the parties, decided to convene an oral hearing on 10 November 2008 at the Court of Arbitration for Sport offices in Lausanne, Switzerland.

- 3.12 On 29 September 2008 the Panel appointed Mr David Casserly, Barrister in Dublin, Ireland, to act as *ad hoc* clerk in these proceedings.
- 3.13 On 10 October 2008, following a request from Mr Gertenbach that the oral hearing be conducted by video-conference, the Panel advised the parties that it would allow Mr Gertenbach and his counsel to participate in the hearing via video-conference.
- 3.14 The parties submitted witness statements for the following individuals:

Submitted by WADA

Mr Stephen James Van der Walt, SAIDS Doping Control Officer (statement dated 9 July 2007)

Submitted by FEI

Mr Stephen James Van der Walt, SAIDS Doping Control Officer (statement dated 18 June 2008)

Submitted by Mr Gertenbach

Mr Jasyn Gertenbach (statement dated 16 October 2008)

Mr Jacobus Johannes Gertenbach (statement dated 16 October 2008)

- 3.15 On 7 November 2008 the Panel issued an Order of Procedure to the parties for signature, which was duly signed by all parties. On the Order of Procedure signed by Mr Gertenbach, he made the following note: *"The Second Respondent disputes the jurisdiction of CAS to hear the present Appeal. The grounds for the denial of jurisdiction are set out in the Second Respondent's Answering brief and in the Heads of Argument"*.
- 3.16 By their signature of the Order of Procedure, the parties agreed, *inter alia*, that *"should the statement of evidence of any of the witnesses not be accepted by the other parties, that witness shall be subject to cross-examination at the hearing. If a party or witness does not attend the hearing, and is therefore unavailable for cross-examination, the Panel will nevertheless continue with the hearing and decide this matter in the absence of that (those) person's(s') evidence. The statement of evidence furnished is the evidence of the witness, subject to cross examination. If no statement of evidence is furnished then the panel must proceed. If the witness or party does not appear the Panel will nevertheless continue with the hearing as above"*.
- 3.17 On 10 November 2008, an oral hearing was convened at the Court of Arbitration for Sport offices in Lausanne, Switzerland. In addition to the Arbitration Panel, the *ad hoc* Clerk and the CAS Counsel, the following persons were present at the hearing:

For WADA

Claude Ramoni, Carrard & Associés, Counsel for WADA

Julien Sieveking, WADA Legal Manager

Witness: Mr Stephen James Van der Walt, SAIDS Doping Control Officer (via video-conference)

For FEI

Xavier Favre-Bulle, Lenz & Staehelin, Counsel for FEI

Marjolaine Viret, Lenz & Staehelin, Counsel for FEI

Alex McLin, FEI Secretary General

Carolin Fischer, FEI Legal Counsel

Witness: Mr Stephen James Van der Walt, SAIDS Doping Control Officer (via video-conference)

For Jasyn Gertenbach

Stuart Harris, Stuart Harris Attorneys, Counsel for Mr Gertenbach (via video-conference)

Caroline de Villiers, Stuart Harris Attorneys, Assistant to Mr Harris (via video-conference)

Barbara Gertenbach, mother of Jasyn Gertenbach (via video-conference)

Witness: Jacobus Johannes Gertenbach, father of Jasyn Gertenbach (via video-conference)

Mr Jasyn Gertenbach did not attend the hearing in person or by video or tele-conference. During the oral hearing, Mr Gertenbach's father testified that Mr Gertenbach was in Mauritius and was unable to attend the hearing.

For SANEF

No SANEF representative attended the hearing.

The CAS hearing room in Lausanne was directly linked by video-conference to a location in South Africa, where all persons who participated by video-conference were present in one room together.

3.18 Following the hearing, the Panel entered deliberations and subsequently issued this award.

#### 4. PARTIES' SUBMISSIONS

Procedural Submissions of WADA

- 4.1.1 WADA submits that the FEI Anti-Doping Rules for Human Athletes (the "FEI AD Rules") are applicable to this dispute. The FEI AD Rules state, in the section entitled 'Scope', that they "*shall apply to the FEI, each National Federation of the FEI, and each participant in the activities of the FEI or any or its National Federations by virtue of the Participant's membership, accreditation, or participation in the FEI, the National Federation's activities or Events*". The FEI AD Rules are therefore applicable to the present case. The SANEF Regulations or the rules of the GHS may also be applicable, in as much as such Rules do not conflict with the FEI AD Rules, but that there are no specific SANEF anti-doping rules.
- 4.1.2 Like all international Olympic federations, FEI is a signatory of the WADC. According to SANEF's Constitution "*the prime responsibility of the Federation is to ensure that the statutes, regulations, rules and policies of the FEI are observed at all times [...]*". The SANEF Constitution further states that "*this Constitution contains rules to provide for local conditions in the Republic and these rules may be added to or amended where the necessity arises. These rules are supplementary to and in no way conflict with FEI rules and, in case of dispute, the relevant FEI rules will apply*". Mr Gertenbach is a rider affiliated to SANEF.

He is therefore required to comply with the SANEF regulations, as well as with FEI rules and regulations. In case of conflict between the SANEF and the FEI rules, the FEI rules shall prevail. Furthermore, the SANEFJC Decision expressly stated that it was rendered under the FEI AD Rules in conjunction with the WADC.

- 4.1.3 WADA submits that pursuant to Articles 13.2.2 and 13.2.3 of the FEI AD Rules, in cases involving national-level athletes, WADA have the right to appeal to the national-level reviewing body provided for in the rules of the applicable national federation (in this case, SANEF).
- 4.1.4 Neither the SANEF Constitution, nor the SANEF General Regulations, provide for a “national level reviewing body”. On the contrary, Article 03.2.4 paragraph 7 of the SANEF General Regulations states that:-

*“There is no right of appeal against decisions of the Judicial Committee”*

- 4.1.5 The SANEFJC Decision is a final decision, therefore it may be appealed to the CAS by WADA pursuant to Article 13.2.3 of the FEI AD Rules, and the appeal shall be admissible as WADA is appealing against a decision of the body of final instance.
- 4.1.6 WADA contends that it is undisputed that its appeal was filed within the relevant time limit.

#### **Substantive Submissions of WADA**

- 4.1.7 WADA submits that the DCO had the authority to conduct out-of-competition testing on Mr Gertenbach at his domicile on 5 July 2007, but Mr Gertenbach refused to submit to sample collection after having received a notification as provided for in the applicable Anti-Doping Regulations. In the present case, no deviation from the WADA International Standard for Testing (the “IST”) occurred. WADA confirms that Mr Gertenbach, a minor, was accompanied at all time by his father, as his representative. WADA further submits that the DCO duly notified Mr Gertenbach that he was required to undergo a sample collection and showed him a Letter of Authority with the following text: *“WARNING: The refusal or failure by an athlete to submit to doping control when requested to do so by a doping control officer/chaperone may result in a sanction being imposed under its national or international federation rules”*.
- 4.1.8 WADA states that the DCO fulfilled all relevant duties in this case. Specifically, WADA contends that the DCO showed Mr Gertenbach the only documentation that he was obliged to present *i.e.* the SAIDS Letter of Authority and his personal identification.
- 4.1.9 WADA referred the Panel to CAS case *CAS 2008/A/1470*, and made specific reference to paragraph 84 of the arbitral award issued in that case, which provides as follows:

*The panel observes that article 5.4.1 b IST does not require any specific form for the required communication to be made. It is regrettable that the presentation of the letter was awkward and could raise doubts. However, this cannot put into question the fact that Mr Richard Brooks and Mr Tommy Nevill passed the information that they were acting on behalf of WADA, which is not disputed. Consequently, Mr Abdelfattah was informed. Furthermore, and for the reasons already exposed, article 5.1 ADR authorizes the USADA and the WADA to collect Mr Abdelfattah's urine samples. Once Mr Richard*

*Brooks and Mr Tommy Nevill validly identified themselves as official USADA agents, the Wrestler had no ground to refuse to submit to the sample collection session. In this regard, had Mr Richard Brooks not handed the said letters of authority to the Wrestler, the latter would have had no excuse for not accepting to be tested. In other words, the said documents must be considered as complementary information made available to the athlete. The form of the said letter does not in the opinion of the Panel violate any right of the Wrestler.*

- 4.1.10 WADA states that Mr Gertenbach was therefore fully informed of his rights and obligations, in particular the consequences of possible failure to comply. He was given ample opportunity to seek further advice, including from an attorney, and to obtain all complementary information on testing control and doping rules and sanctions.
- 4.1.11 WADA submits that Mr Gertenbach refused to submit to a sample collection by the DCO on 5 July 2007 and provided no justification to refuse the sample collection except the time of the visit. His refusal is confirmed by the aforementioned note written by Mr Gertenbach's father on the letter of instruction.
- 4.1.12 WADA states that Mr Gertenbach, through his father, further violated the IST by asking the DCO to stay outside of his house while he was calling his lawyer.
- 4.1.13 WADA submits that Mr Gertenbach's refusal constituted an anti-doping rule violation pursuant to Article 2.3 of the FEI AD Rules, as rightly held by the SANEF Judicial Committee.
- 4.1.14 WADA submits that pursuant to Article 10.4.1 of the FEI AD Rules, violations of Article 2.3 of the FEI AD Rules are sanctioned with the ineligibility period set forth in Article 10.2 of the FEI AD Rules *i.e.* two years for a first doping offence.
- 4.1.15 WADA submits that according to Article 10.5.2 of the FEI AD Rules, if in an individual case an athlete establishes that he bears no significant fault or negligence, the period of ineligibility may be reduced, but in any case the reduced period of ineligibility may not be less than one year.
- 4.1.16 In order to benefit from a reduction of the sanction on the basis of no significant fault or negligence, Mr Gertenbach must establish that his fault or negligence, when viewed in the totality of the circumstances, and taking into account the criteria for "no fault or negligence", was not significant in relation to the violation of the FEI AD Rules. A reduction of the otherwise applicable period of ineligibility is meant to occur only in cases where the circumstances are truly exceptional, *i.e.* where Mr Gertenbach could show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relation to the doping offence. WADA submits that there existed no exceptional circumstance in this case which would justify such a reduction.
- 4.1.17 WADA directed the Panel to two awards of the CAS, in which the arbitration panel held that a young age was not an exceptional circumstance justifying a reduction of the otherwise applicable sanction (*CAS 2005/A/847 Knauss v/ FIS, Subsection 7.5.4 and CAS 2006/A/1032 Karan Tachevia v/ ITF, Subsection 144 et seq.*)



- 4.1.18 WADA further submits that Mr Gertenbach's reliance on the advice of his father and of an attorney does not constitute an exceptional circumstance which could justify a reduction of the ordinary two-year period of ineligibility. WADA sought to rely on the jurisprudence of the CAS case *CAS 2006/A/1032* in this regard. WADA also stated that Mr Gertenbach had submitted no evidence regarding his claim that he relied on the advice of his attorney.
- 4.1.19 WADA submitted to the Panel that several decisions rendered by national arbitration panels refused to recognise the presence of exceptional circumstances for athletes who refused to submit to sample collection on the advice of a parent or of a lawyer or attorney. The cases relied upon by WADA in this regard were an award of the Sport Dispute Resolution Centre of Canada dated 6 September 2005, *CCES and BCS -v- Zardol*, and an award of the American Arbitration Association dated 7 December 2005, *USADA -v- Hainline*.
- 4.1.20 WADA submitted that in the absence of exceptional circumstances, whereby Mr Gertenbach would bear no significant fault or negligence, the ordinary two-year period of ineligibility provided for under Article 10.4.1 of the FEI AD Rules is the appropriate sanction.
- 4.1.21 WADA made no specific submissions regarding costs other than to request in its prayer for relief that "*WADA is granted an award for costs*".
- 4.1.22 WADA submitted that the appropriate date of commencement for any period of ineligibility of Mr Gertenbach would be the date on which the present CAS award is issued, with any period of ineligibility imposed before the entry into force of the CAS award to be credited against the total period of ineligibility.
- 4.1.23 In response to questioning from the Panel, WADA stated that Mr Gertenbach should not be considered to be an 'International-Level Athlete' for the purposes of the FEI AD Rules, as he was not within FEI's Registered Testing Pool.
- 4.1.24 WADA submitted the following prayer for relief in its Appeal Brief:
- "WADA hereby respectfully requests the CAS to rule that:*
- 1. The Appeal of WADA is admissible.*
  - 2. The Decision of the SANEF Judicial Committee rendered on April 7, 2008 in the matter of Mr Jasyn Gertenbach is set aside.*
  - 3. Mr Jasyn Gertenbach is sanctioned with a two-year period of ineligibility starting on the date on which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Jasyn Gertenbach) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
  - 4. All competitive results obtained by Mr Jasyn Gertenbach from July 5, 2007 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes;*

*5. WADA is granted an award for costs."*

**Procedural Submissions of FEI**

- 4.2.1 FEI submits that Mr Gertenbach is a member of the GHS and SANEF, and as rightly held by the SANEF Judicial Committee, by virtue of that membership Mr Gertenbach is bound by the Constitution, Regulations and Rules of FEI and SANEF. Before the SANEF Judicial Committee, Mr Gertenbach also argued that the FEI Rules, including the FEI AD Rules, prevail over the GHS and SANEF Rules.
- 4.2.2 According to the GHS Constitution, the object and prime responsibility of GHS is to ensure that the constitutions, regulations, rules and policies of FEI and SANEF are observed (preamble and Article 3.1). The preamble of the GHS Constitution provides that: "*These rules are supplementary to and in no way conflict with the FEI rules or the SANEF rules and, in cases of dispute, the relevant FEI or SANEF rules will apply*". Furthermore, Article 25 of the GHS Constitution reads as follows:
- "25.1 To the extent that this Constitution (including its regulations) is in conflict with the FEI Constitution or the SANEF Constitution, such other Constitutions have precedence to the extent that they are applicable.*
- 25.2 All members are bound by the FEI Constitution and the SANEF Constitution by virtue of their membership of the society and undertake under this Constitution not to contravene such other Constitutions".*
- 4.2.3 Similarly, according to the SANEF Constitution, the prime responsibility of SANEF is to ensure that the statutes, regulations, rules and policies of FEI are observed at all times (Article 1.2); its object is to "*uphold the Constitution of the FEI*" (Article 4.6). Article 1.3 of the SANEF Constitution provides that: "*these rules are supplementary to and in no way conflict with FEI Rules and, in cases of dispute, the relevant FEI Rules will apply*".
- 4.2.4 The SANEF General Regulations also provide that "*the regional body shall ensure that the FEI Rules and/or the SANEF Rules are observed in the jurisdiction areas*" (Article 00.2.1); "*The Regional Bodies shall ensure that contraventions by their members of the FEI Rules and/or the SANEF Rules are also contraventions by those members of the constitutions, rules or regulations of the Regional Bodies*" (Article 00.2.2); "*To the extent that these constitutions [of all Regional Bodies] (including the Rules and Regulations) are in conflict with the FEI Rules or the SANEF Rules, the FEI and the SANEF Rules take precedence to the extent that they are applicable.*" (Article 00.2.4).
- 4.2.5 FEI contends that at the time of the occurrence of the events in 2007, it is common ground that Mr Gertenbach was also a registered FEI competitor. FEI registered riders must abide and comply with FEI Rules and Regulations and the WADC.
- 4.2.6 When Mr Gertenbach signed the Athletes Agreement on 1 July 2007 (the duration of which will continue until thirty days after the last day of the event) to participate in the European Vaulting Championships, Mr Gertenbach agreed to comply with SANEF's Constitution and observe and comply with the applicable anti-doping provisions and in particular the rules and procedures formulated by SANEF which automatically includes FEI Rules such as the FEI AD Rules since the SANEF Rules expressly provide that FEI Rules prevail over them.

- 4.2.7 When a sanction is imposed by the SANEF Judicial Committee, neither the Constitution nor the General Regulations of SANEF provide for a specific national-level appellate or reviewing body. FEI sought to have the Decision of the SANEF Judicial Committee reviewed at the SANEF level, with SANEF declining that request.
- 4.2.8 Thus, if a decision of the SANEF Judicial Committee is flawed and should be set aside, it must be challenged directly before the CAS, in accordance with the applicable FEI Rules as described. There are no legal remedies available to the appellant to exhaust prior to the appeal before the CAS, within the meaning of Article R45 of the Code.
- 4.2.9 FEI stated that, in previous CAS case law, several arbitration panels had emphasised the need for an International Federation to be entitled to challenge decisions of National Federations in doping matters before the CAS. FEI made specific reference to the CAS cases *CAS 2006/A/1119 UCI v/ Landaluce & RFEC* and *CAS 2006/A/1159 IAAF v/ FFA & R. Es-Saadi*.
- 4.2.10 According to Article 35.2 of the FEI Statutes, any dispute between a National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal, shall be settled definitively by the CAS in accordance with the CAS Code.
- 4.2.11 According to the Scope of the FEI AD Rules, those Rules apply to each National Federation of FEI and each participant in the activities of FEI or any of its National Federations, by virtue of the participant's membership, accreditation or participation in FEI, its National Federations or their activities or events. The National Federation agrees to ensure that all national-level testing on the National Federation's athletes complies with the FEI AD Rules. The FEI AD Rules apply to all doping controls over which FEI and its National Federations have jurisdiction.
- 4.2.12 FEI contends that the Regulations of FEI and the FEI AD Rules are primarily applicable to these proceedings. Furthermore, FEI contends that pursuant to Article 35.3 of the FEI Statutes, the parties involved in proceedings before the CAS, including a National Federation Member of FEI, acknowledge and agree the seat of the CAS is in Lausanne, Switzerland, and the proceedings therein "*are governed by Swiss Law*". FEI therefore contends that, as a clear choice of law clause is comprised within the FEI Statutes and agreed between the parties, the Panel shall apply the FEI Regulations and AD Rules and, subsidiarily, Swiss law.
- 4.2.13 FEI considers that the present case is not one in which Article 13.2.1 of the FEI AD Rules may be applied, as Mr Gertenbach is not an 'International-Level Athlete', as (i) the testing was carried out by the national agency, and (ii) Appendix 3 of the FEI AD Rules, which sets out the criteria for inclusion in the registered testing pool, does not provide for any riders competing in the sport of vaulting to be included in the registered testing pool.
- 4.2.14 According to Articles 13.2.2 and 13.2.3 of the FEI AD Rules, FEI has the right to appeal to the CAS in cases of decisions regarding anti-doping rule violations that arise either from competition in an international event or from cases involving international-level athletes as defined in Appendix 1 of the FEI AD Rules, as is the case with the SANEFJC Decision. Thus, the CAS has full jurisdiction to hear the appeal by FEI.

- 4.2.15 At the outset of its oral presentation at the hearing, FEI stated that as a preliminary procedural point, it wished to indicate that FEI was not acting against Mr Gertenbach in this case. Instead, it was challenging the SANEF Decision, which should be set aside for incorrect application of FEI rules and should be replaced with a *de novo* decision by the CAS Panel.
- 4.2.16 FEI stated that, following the consolidation of the arbitral procedures *CAS 2008/A/1558* and *CAS 2008/A/1578*, Mr Gertenbach was a party to this arbitration, but he did not attend the oral hearing. FEI expressed surprise that Mr Gertenbach, “a party and a witness”, did not participate. FEI stated that Mr Gertenbach had only filed a witness statement on 16 October 2008, which created cause for complaint, and, in addition, his witness statement could not be confirmed, as he was not present at the oral hearing and therefore could not undergo cross examination. FEI objected to the admission of Mr Gertenbach’s witness statement, based on principles of natural justice, and stated that its position in this regard was confirmed by paragraph 9 of the Order of Procedure (as quoted in paragraph 3.16 above), which was signed and accepted by Mr Gertenbach’s lawyer.
- 4.2.17 FEI also queried why Mrs Barbara Gertenbach was participating in the oral hearing via video conference, as her presence or participation was not announced by Mr Gertenbach in advance of the hearing, which was a requirement. However, Mrs Gertenbach did not actively participate in the oral hearing and her presence did not interfere with the process.

#### **Substantive Submissions of FEI**

- 4.2.18 The submissions of FEI regarding the substantive issues arising in this appeal were similar to those submitted by WADA. At the hearing FEI stated that it sought to rely largely on the content of its written submissions regarding the facts of the case.
- 4.2.19 FEI submitted that Article 2.3 of the FEI AD Rules was breached by Mr Gertenbach, and considered that Mr Gertenbach had raised a far-fetched defence in this case. FEI contended that the SANEF Judicial Committee erred when deciding on the sanction of Mr Gertenbach for breach of Article 2.3 of the FEI AD Rules.
- 4.2.20 FEI stated that according to Article 10 of the FEI AD Rules, there should be a sanction of two years. Instead of applying Article 10 of these Rules, the SANEF Judicial Committee incorrectly held that it should follow SANEF’s own disciplinary system and not that of FEI. The SANEF Judicial Committee wrongly considered that it was not bound by the mandatory two-year period of ineligibility provided for in the FEI AD Rules in compliance with the World Anti-Doping Code, with a possible maximum reduction to one year of suspension.
- 4.2.21 The decision to suspend Mr Gertenbach for only four months had no valid basis. It must be annulled and the case decided afresh by the CAS Panel in accordance with Article 10 of the FEI AD Rules.
- 4.2.22 FEI submitted that the question as to whether, under Article 10.5 of the FEI AD Rules, the two-year suspension period ordinarily imposed may actually be reduced to between one and two years in this case due to mitigating circumstances, is a question to be decided by the CAS Panel under the requirements of Article 10 of the FEI AD Rules.

4.2.23 FEI considers that, based on precedents, there are no exceptional circumstances which would justify a reduction. The Panel should not give too much weight to submissions regarding the young age of Mr Gertenbach, as he had almost reached the age of majority. Mr Gertenbach was represented by his father, and it would be unfair for the Panel to disregard the actions of the father. Furthermore, FEI contends that any legal advice proffered to Mr Gertenbach by his lawyer is irrelevant and the fact that he may have relied on such advice cannot be used as an excuse for a breach of the FEI AD Rules. In this regard, FEI directed the Panel to another CAS case involving a South African rider, in which the panel imposed a suspension period of two years (*CAS 2007/A/1415 FEI v/ B*). FEI contends that should the Panel consider that there are exceptional circumstances which would merit a reduction in the two-year period of suspension, the minimum suspension imposed should be one year.

4.2.24 FEI made reference in its oral submissions to the CAS case *CAS 2007/A/1416 WADA v/ USADA & Scherf*, for the purposes of distinguishing it from the present case. FEI made particular reference to paragraph 9.13 of the award issued in the *Scherf* case, in which the Panel stated the following:

*"The Panel would, however, wish to make it clear that this is a rare case in which an athlete who has failed or refused to provide a sample will be able to satisfy a CAS Panel that the sanction is to be reduced on the ground of No Significant Fault or Negligence. Such cases will not often occur."*

4.2.25 FEI further submits that the commencement of the ineligibility period shall be determined in accordance with Article 10.8 of the FEI AD Rules, to be applied by the CAS Panel in light of the circumstances of this case.

4.2.26 Finally, FEI submitted that the CAS Panel should determine, under Article 10.7 of the FEI AD Rules, whether any competitive results obtained by Mr Gertenbach from the date of the anti-doping rule violation shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

4.2.27 FEI made the following submissions regarding costs:

*"These appeal arbitration proceedings are of a disciplinary nature. According to Article 65.1 of the CAS Code, they shall be free."*

*Since the present proceedings originate in a wrong application of the Anti-Doping Rules for Human Athletes by the SANEF Judicial Committee in its Decision, it is respectfully submitted that it is SANEF that should bear any and all costs of the proceedings, including a participation toward the legal costs incurred by the FEI."*

4.2.28 FEI submitted the following prayer for relief in its Appeal Brief:

*"The Fédération Equestre Internationale respectfully requests the CAS Panel to make an Award to:*

- *Annul the decision of SANEF of 7 April 2008 in the matter of Mr Jasyn Gertenbach;*
- *Impose a sanction upon Mr Jasyn Gertenbach in accordance with the statutes,*

*regulations and rules of the FEI, in particular the FEI Anti-Doping Rules for Human Athletes in conjunction with the World Anti-Doping Code;*

- *Order SANEF to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the FEI;*
- *Dismiss any other relief sought by SANEF or Mr Jasyn Gertenbach should he be joined as a party to these proceedings;*
- *Order such other relief as might be necessary."*

#### **Submissions of SANEF**

- 4.3.1 On 24 June 2008 SANEF informed the CAS that it would "*not be submitting an answer to the appeal brief of the two Applicants in the [cases CAS 2008/1558 & CAS 2008/A/1578] and will accordingly accept the decision of the Court*".
- 4.3.2 No written submissions were filed by SANEF and SANEF did not attend the oral hearing, either in person or by video or tele-conference.

#### **Procedural Submissions of Jasyn Gertenbach**

4.4.1 Mr Gertenbach contends that:

1. The SANEF Judicial Committee lacked jurisdiction to hear the case in the first instance and the SANEFJC Decision is, as a result, a nullity. This point was raised before the SANEF Judicial Committee, but was dismissed. The case should have been heard in the first instance before the FEI Judicial Committee. If the CAS finds that the SANEFJC Decision is a nullity, the CAS cannot act as a first instance tribunal.
2. If the SANEF Judicial Committee does have jurisdiction and its Decision is held to have been validly issued, which is denied, then an appeal from that Decision is expressly excluded. If SANEF did have jurisdiction, then SANEF regulations are binding and in this case Article 03.2.4 paragraph 7 of the SANEF General Regulations states that there is no right of appeal against decisions of the SANEF Judicial Committee. This ousts the jurisdiction of the CAS, as Article R47 of the CAS Code requires that an appeal is expressly provided for by the relevant statutes or regulations.
3. FEI rules providing for appeals to the CAS are aimed only at decisions made by FEI, not by other bodies such as SANEF. Article 13.1 of the FEI AD Rules states that decisions taken *under these Anti-Doping Rules*, may be appealed. At the very least, this must involve a decision of the FEI Judicial Committee, as Article 8.1.1 of the FEI AD Rules provides that the FEI Judicial Committee shall hear all cases of violation of the FEI AD Rules. The SANEF Judicial Committee stated that it was not making its Decision on the basis of FEI AD Rules (paragraph 24 of the SANEFJC Decision), so it was clearly made under the SANEF regulations. Therefore, the requirement that the

decision must be issued under FEI rules was not met, which implies that there is no right of appeal.

4. Article 13.2.1 of the FEI AD Rules states that in cases arising from competition in an International Event or involving International Level Athletes, the decision may be appealed to the CAS. If Mr Gertenbach is not an International Level Athlete, Article 13.2.2 is applicable. Therefore Mr Gertenbach ought to have a right of appeal to SANEF, which would constitute a further ground upon which the CAS's jurisdiction is ousted.

Furthermore, in a situation where WADA and FEI were not previously involved in the case, the provisions of Article 13.2.3 only allow them to appeal in a case involving an International Level Athlete. Also, the last line of Article 13.2.3, which provides for a right of appeal of WADA and FEI, only applies where an internal appeal has been exhausted, so these bodies have no right of appeal in the present case.

4.4.2 SANEF, in the notification issued to Mr Gertenbach, contended that it had jurisdiction to hear all cases of violation of anti-doping rules. Mr Gertenbach submits that this contention is without merit and is not supported by the aforesaid Constitutions.

4.4.3 The scheme of the aforesaid Constitutions is ultimately directed at ensuring compliance with FEI Statutes, Regulations, Rules and Policies. In this regard:

1. The preamble of the GHS Constitution provides that the GHS Rules are *"supplementary to and in no way in conflict with the FEI Rules or the SANEF Rules and, in cases of dispute, the relevant FEI or SANEF Rules will apply"*.
2. Clause 3 states the object of the GHS as including *"to ensure that the FEI Constitution and the SANEF Constitution is observed in the Society Provinces (i.e. Gauteng)"*.
3. Clause 25.1 of the GHS Constitution provides that in the event of a conflict between the GHS Constitution, the FEI Constitution or the SANEF Constitution, the latter two should have precedence.
4. The SANEF Constitution provides that its prime responsibility *"is to ensure that the statutes, regulations, rules and policies of the FEI are observed at all times..."*.
5. One of the objects of SANEF, according to clause 4.6 of the SANEF Constitution is *"to uphold the constitution of the FEI."*
6. Members of SANEF are bound by the FEI Constitution and undertake not to contravene the FEI Constitution.
7. Clause 22 of the SANEF Constitution provides that; *"to the extent that [the FEI Constitution] including its regulations is in conflict with FEI statutes, the FEI statutes and regulations have precedence to the extent that they are applicable"*.

4.4.4 Mr Gertenbach contends that it is clear from the foregoing that the provisions of the FEI Constitution take precedence over the other two Constitutions. FEI, in turn, has adopted the FEI AD Rules in conjunction with the WADC. The introduction to the FEI AD Rules provides that each International Federation agrees to ensure that all national-level testing complies with the FEI AD Rules and that the FEI AD Rules apply to all Doping Controls over which FEI and the National Federations have jurisdiction.

4.4.5 Clause 8.1.1 of the FEI AD Rules provides that:

*“The FEI Judicial Committee shall hear all cases of violation of these Anti-Doping Rules”.*

4.4.6 Accordingly, the FEI Constitution takes precedence over the other two constitutions. This requires that the FEI Judicial Committee shall hear all cases in which anti-doping offences are alleged to have been committed. Mr Gertenbach contends that at best for SANEF, there is a conflict between the FEI Constitution and the GHS Constitution, in which event the former prevails.

4.4.7 The FEI AD Rules also require that they are adopted and implemented by FEI members, including SANEF. Mr Gertenbach makes further submissions regarding the harmonisation of international procedures and standards and states that the FEI procedure allows for an appeal to the CAS, whereas SANEF expressly precludes any right of appeal.

4.4.8 The procedural differences between an FEI hearing and a SANEF hearing are material. They include the following:

- FEI has a defined procedure, including the exchange of statements of case and statement of defence. Other than stating that the SANEF Judicial Committee has the right to regulate its own proceedings, the SANEF procedure is not defined in any detail.
- The FEI procedure allows for an appeal to the CAS. SANEF expressly precludes any right of appeal.

4.4.9 The SANEF Judicial Committee is constituted and, theoretically empowered, pursuant to the SANEF Constitution and the SANEF General Regulations.

4.4.10 However, the same regulations expressly provide that there is no right of appeal against decisions of the Judicial Committee. If it is found that the SANEF Judicial Committee has jurisdiction, then both the procedure and the legal framework that governs any decision must similarly be based strictly upon the SANEF Constitution and the Regulations thereto. The appeal provision that is relied upon by the Appellants applies only to a decision that is made by FEI. Mr Gertenbach submits that if it is held that the SANEFJC Decision is not a nullity, then that Decision is not subject to appeal.

4.4.11 Mr Gertenbach rejects the Appellants' contention that they are entitled to appeal against the SANEFJC Decision, as an appeal can only be lodged insofar as decision has been made by an FEI Judicial Committee. Mr Gertenbach directed the Panel to Articles 8.1.1, 8.1.8, 8.2 and 13 of the FEI AD Rules in this regard.



- 4.4.12 Mr Gertenbach submits that having regard to the foregoing, the CAS does not have jurisdiction to make any order insofar as Mr Gertenbach is concerned, or indeed any order that adversely affects his rights in circumstances where he was expressly prohibited from availing himself of an appeal process. He contends that he has been subjected to an appeal where he himself does not have a right of appeal, which is unjust in any jurisdiction.
- 4.4.13 Mr Gertenbach submits that the CAS may declare the SANEF Decision to be a nullity, but it is not empowered to make any further finding against Mr Gertenbach. He submits that SANEF failed to properly implement the FEI AD Rules and this failure is a source of confusion, and is extremely prejudicial to Mr Gertenbach's rights. The right to a fair hearing encompasses a broad range of rights including the right to be informed clearly of the rules applicable, the proposed outcome and whether or not there is a right of appeal. SANEF's conduct has compromised Mr Gertenbach's rights. Mr Gertenbach submits that in these circumstances the SANEF Judicial Committee did not have jurisdiction to impose any sanction arising out of the FEI AD Rules or to determine whether Mr Gertenbach had contravened the FEI AD Rules.
- 4.4.14 If the CAS finds that the SANEF Judicial Committee did have jurisdiction, that very finding ousts the jurisdiction of the CAS. Conversely, if the CAS finds that the SANEF Judicial Committee did not have jurisdiction, that finding simply confirms that the finding of the SANEF Judicial Committee is a nullity.

#### **Substantive Submissions of Jasyn Gertenbach**

- 4.4.15 Mr Gertenbach did not give evidence. However, in his Answer, he addressed the issues and submissions contained in the appeal briefs of both FEI and WADA, and contradicted some of the factual contentions made by the Appellants' in their respective appeal briefs.
- 4.4.16 Mr Gertenbach submitted that the DCO's Letter of Authority was defective in that it did not clearly identify Mr Gertenbach and was not actually signed but instead used a 'pp' signature. Mr Gertenbach states that the DCO did not state under which authority he was empowered to test Mr Gertenbach, and he merely showed Mr Gertenbach the Letter of Authority. It is submitted by Mr Gertenbach that this letter, in itself, did not confirm the authority of the DCO to act under the auspices of SAIDS. Mr Gertenbach further states that the DCO did not expressly communicate to him that he had authority to conduct out-of-competition testing. Mr Gertenbach contends that there were several deviations from Articles 4.1(b), (d), (e) of the IST. Mr Gertenbach further submits that the DCO did not adhere to his duties under Article 5.2(b), (c), (d) and (e) of the IST, and that Mr Gertenbach was not sufficiently apprised of the disciplinary consequences that would ensue should he fail to submit to sample collection. These submissions regarding alleged deviations from the IST were addressed by the parties and witnesses during the oral hearing.
- 4.4.17 Mr Gertenbach submitted that he was not given sufficient notification and accordingly he did not refuse or fail to submit to the sample collection, as an athlete can only refuse or fail without compelling justification to submit to sample collection after he has received notification as contemplated by Article 5.4.1 of the IST. Mr Gertenbach also states that as a minimum requirement, the DCO should have apprised him in respect of the requirements of notification, as the IST places an active duty on the DCO to inform athletes of the

requirements and responsibilities involved in sample collection. He submitted that athletes need to know what their rights are and understand what the system is.

- 4.4.18 Mr Gertenbach submits that had the disciplinary consequences been properly highlighted by the DCO, Mr Gertenbach's attorney, who is not an expert in sports arbitration disputes, would have endeavoured to obtain the FEI Rules, the WADC and the Constitutions of GHS and SANEF in order to assess the potential disciplinary consequences imposed for contravention of Article 2.3 of the FEI AD Rules. Mr Gertenbach states that his attorney was not aware of the severity of the situation as the sanction was not described in detail in the Letter of Authority.
- 4.4.19 Mr Gertenbach's principal substantive submission in response to the Appellants' Appeal Briefs is that he did not refuse to, or fail to, "*take the doping control test when requested to do so*", as there can only be a refusal if one has received proper notification of what one is refusing. Mr Gertenbach's father informed the DCO that he would not allow Mr Gertenbach to take the test and that the DCO should return at a decent time and should provide advanced notification. Had the DCO fully appraised Mr Gertenbach's father of the consequences and had the wording of the letter referred to a mandatory sentence, Mr Gertenbach's father would have allowed for Mr Gertenbach to submit to the sample collection. During the oral hearing, Mr Gertenbach's father stated that SANEF "*has a duty to advise all of us*". He further stated that he didn't want his son to submit to sample collection, because he was not aware that the DCO was "*allowed to walk on to private property and do drug tests*", but that he now realises that that is "*part and parcel of the system*". He also stated that he "*would most likely have allowed the test*", if he had known that Mr Gertenbach was liable to have a two-year sanction imposed upon him.
- 4.4.20 Should it be found that Mr Gertenbach did commit a breach of Article 2.3 of the FEI AD Rules, Mr Gertenbach submits that the Panel is required to reduce any period of ineligibility to a minimum period of one year based on exceptional circumstances, in accordance with Article 10.5.2 of the FEI AD Rules. Mr Gertenbach states that the erroneous advice of his attorney should not be regarded as an exceptional circumstance but that the defective performance of the DCO in executing his duties as required under the IST should be regarded as an exceptional circumstance. Also, the Panel should take into consideration the fact that Mr Gertenbach was a minor at the time of the incident.
- 4.4.21 Mr Gertenbach's counsel informed the Panel that vaulting is not a lucrative sport, and that Mr Gertenbach is currently assisting underprivileged children in Mauritius. He also advised the Panel that Mr Gertenbach has not competed since December 2007.
- 4.4.22 Mr Gertenbach submitted the following prayer for relief in his Answer:

*"The Second Respondent respectfully requests the above Honourable Court to make an Award in the following terms:*

- 1. Declare the Decision of the SANEF Judicial Committee dated the 7 April 2008 in the matter of Jaysn Gertenbach a nullity;*
- 2. Dismiss any relief sought by WADA or FEI;*
- 3. Order SANEF to pay all costs of these appeal proceedings, including a costs on an*

*attorney-own-client scale incurred by the Second Respondent;*

4. *Order further or alternative relief as may be necessary.*”

#### **Further Submissions of the Parties**

4.4.23 As previously mentioned, Mr Gertenbach signed an Athletes Agreement on 1 July 2007. However, Mr Gertenbach did not comply with the instruction on the first page of such Agreement to initial each page of the Agreement. The Panel questioned the parties as to the effect, if any, that Mr Gertenbach's signature of the Agreement had on the Panel's jurisdiction. FEI stated that it was of no importance and cited the CAS case *CAS 2007/A/1415 FEI v/ B*. WADA stated that the most important factor in this regard is that Mr Gertenbach was a member of SANEF. Mr Gertenbach stated that the Agreement is entirely irrelevant and relates only to one event, and that Mr Gertenbach's membership of the GHS means that he is subject to FEI and SANEF regulations.

### **5. JURISDICTION & ADMISSIBILITY**

5.1 WADA and FEI both contend that the CAS has jurisdiction to hear this appeal, and no objection has been filed by SANEF regarding CAS jurisdiction. However, Mr Gertenbach contests the jurisdiction of the CAS to hear this appeal and his arguments in this regard are detailed at paragraphs 4.4.1 - 4.4.14 above.

#### **Competence of the CAS to rule on its own jurisdiction**

5.2 As the Court of Arbitration for Sport is an international arbitral tribunal having its seat in Switzerland within the meaning of Article 176 of the Swiss Private International Law Act (PILA), the provisions of Chapter 12 of the PILA are applicable to the present arbitral proceedings.

5.3 Article 186 of the PILA provides as follows:

1. *The arbitral tribunal shall rule on its own jurisdiction.*
2. *The objection of lack of jurisdiction must be raised prior to any defence on the merits.*
3. *In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision.*

5.3 According to Swiss legal scholars, this provision “*is the embodiment of the widely recognized principle in international arbitration of ‘Kompetenz-Kompetenz’*. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement” [ABDULLA Z., *The Arbitration Agreement*, in: KAUFMANN-KOHLER G./STUCKI B. (eds.), *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague 2004, p. 29]. “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (...). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the*

*ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement” [MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zurich et al. 2004, pp. 115-116]. “It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence” [WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, Basel et al. 2000].*

- 5.4 It is therefore evident that, in accordance with Swiss private international law, the Panel itself has the power to decide whether it has jurisdiction in the present case.

#### **Competence of the CAS to rule on the substantive issues on appeal**

- 5.5 In accordance with CAS procedure, when a request for arbitration or a statement of appeal is filed with the CAS, a preliminary examination of the file is undertaken by the CAS Court Office, in order to identify cases where there is manifestly no arbitration agreement referring to the CAS. Pursuant to Articles R39 and R52 of the Code, if there is manifestly no arbitration agreement referring to the CAS, the parties are informed as such in writing by the CAS Court Office and, in the absence of an alternative agreement between the parties, the arbitration procedure is discontinued. In the present case, having examined the Statements of Appeal filed by WADA and FEI, the CAS Court Office did not conclude that there manifestly existed no arbitration agreement providing for this appeal to be considered by the CAS. An objection to the jurisdiction of the CAS having been filed by Mr Gertenbach, it was therefore for the Panel to examine whether the CAS has jurisdiction to rule on the substantive issues on appeal.

- 5.6 Article R47 of the Code provides as follows:

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

- 5.7 In order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body whose decision is being appealed must provide for an appeal to the CAS, or the parties must have concluded a specific arbitration agreement to that effect.

- 5.8 The GHS Constitution contains the following provisions:

*Preamble            The prime responsibility of the [GHS] is to ensure that the constitutions, regulations, rules and policies of FEI and SANEF are observed at all RECOGNISED SHOWS in the SOCIETY PROVINCES*

*These rules are supplementary to and in no way conflict with the FEI rules or the SANEF rules and, in cases of dispute, the relevant FEI or SANEF rules will apply.*

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*Article 3.8 The objects of the [GHS] are ... to ensure that the FEI CONSTITUTION and the SANEF CONSTITUTION are observed where applicable in all activities of the [GHS] or conducted under the auspices of the [GHS];*

*Article 25.1 To the extent that this Constitution (including its regulations) is in conflict with the FEI Constitution or the SANEF Constitution, such other Constitutions have precedence to the extent that they are applicable.*

*Article 25.2 All members are bound by the FEI Constitution and the SANEF Constitution by virtue of their membership of the society and undertake under this Constitution not to contravene such other constitutions”.*

5.9 The SANEF Constitution contains the following provisions:

*Article 1.2 The prime responsibility of [SANEF] is to ensure that the statutes, regulations, rules and policies of the FEI are observed at all times ...*

*Article 1.3 ... These rules are supplementary to and in no way conflict with FEI rules and, in cases of dispute, the relevant FEI rules will apply.”*

*Article 4.6 The objects of [SANEF] are [...] to uphold the Constitution of the FEI.*

5.10 The SANEF General Regulations contain the following provisions:

*Article 00.2.1 The Regional Bodies shall ensure that the FEI Rules and/or the SANEF Rules are observed in their jurisdiction areas.”*

*Article 00.2.2 The Regional Bodies shall ensure that contravention by their members of the FEI Rules and/or the SANEF Rules are also contraventions by those members of the constitutions, rules and regulations of the Regional Bodies.”*

*Article 00.2.4 To the extent that these constitutions [of all Regional Bodies] (including the rules and regulations) are in conflict with the FEI Rules or the SANEF Rules, the FEI Rules and the SANEF Rules take precedence to the extent that they are applicable.”*

5.11 The FEI Statutes contain the following provisions:

*Article 35.2 Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration.*

5.12 The FEI AD Rules contain the following provisions:

*Preface Anti-Doping Rules, like Competition rules, are sport rules governing the conditions under which sport is played. Athletes accept these rules as a condition of participation.*

*Scope* [The FEI AD Rules] shall apply to the FEI, each National Federation of the FEI, and each Participant in the activities of the FEI or any of its National Federations by virtue of the Participant's membership, accreditation or participation in the FEI, its National Federations or their activities or events.

[...]

*The National Federation agrees to ensure that all national-level Testing on the National Federation's Athletes complies with [the FEI AD Rules]. In some cases, the National Federation itself will be conducting the Doping Control described in these Anti-Doping Rules. In other countries, many of the Doping Control responsibilities of the National Federation have been delegated or assigned by statute to a National Anti-Doping Organization. In those countries, references in these Anti-Doping Rules to the National Federation shall apply, as applicable, to the National Federation's National Anti-Doping Organization.*

*[The FEI AD Rules] shall apply to all Doping Controls over which the FEI and its National Federations have jurisdiction.*

5.13 On 1 July 2007 Mr Gertenbach signed an Athletes Agreement to participate in the European Vaulting Championships. Such Agreement contained the following provisions:

3.1 *In accordance with the requirements of SANEF, [Mr Gertenbach] agrees to comply with SANEF's Constitution (including, but not limited to, the regulations, byelaws and code of conduct promulgated thereunder).*

11.1 *[Mr Gertenbach] acknowledges that the current International Olympic Committee's list of doping classes and methods will be used at the Games.*

16.2 *[Mr Gertenbach] agrees to undergo such medical testing as may be reasonably required by SANEF, including, but not limited to giving blood and/or urine samples for analysis (including, but not limited to testing for doping or for HIV).*

5.14 It is clear from the various provisions set out above that as Mr Gertenbach is a member of the GHS, he is bound by the Constitution, Statutes, Regulations and Rules of SANEF and FEI. This is not a matter of dispute between the parties and was expressly accepted by Mr Gertenbach in his written and oral submissions. As it is expressly provided in the SANEF Constitution that FEI rules will take precedence in cases of dispute between FEI rules and SANEF rules, it is evident to the Panel that Mr Gertenbach is subject to the provisions of the FEI AD Rules.

5.15 The question which must therefore be addressed by the Panel is whether the fact that Mr Gertenbach is bound by the provisions of the FEI AD Rules effects a direct right of appeal to the CAS for WADA and FEI in the present case.

**5.16 Article 13.2 of the FEI AD Rules provides as follows:****13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions**

*A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the FEI or its National Federation lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or otherwise in violation of Article 7.4 may be appealed exclusively as provided in this Article 13.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.*

**13.2.1** *In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.*

**13.2.2** *In cases involving Athletes that do not have a right to appeal under Article 13.2.1, each National Federation shall have in place an appeal procedure that respects the following principles: a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the person's expense; and a timely, written, reasoned decision. The FEI's rights of appeal with respect to these cases are set forth in Article 13.2.3 below.*

**13.2.3** *In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FEI and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (e) WADA. In cases under Article 13.2.2, the parties having the right to appeal to the national-level reviewing body shall be as provided in the National Federation's rules but, at a minimum, shall include: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FEI; and (d) WADA. For cases under Article 13.2.2, WADA and the FEI shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body.*

**5.17** All parties accept that Mr Gertenbach is not an International Level Athlete for the purposes of Article 13.2.1 of the FEI AD Rules. Therefore, of the provisions of the FEI AD Rules which provide for a right of appeal to the CAS, the applicable provisions in the present case are Articles 13.2.2 and 13.2.3.

- 5.18 Article 13.2.2 provides that "*National Federation shall have in place an appeal procedure*". In addition, Article 13.2.3 provides that "*For cases under Article 13.2.2, WADA and the FEI shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body*". Ordinarily, this would provide for a right of appeal from the SANEFJC Decision to a SANEF appeals body, with an additional right of appeal to the CAS existing for WADA and FEI against the final decision of SANEF *i.e.* that of its appeals body.
- 5.19 In the present case, however, the Constitution and General Regulations of SANEF do not provide for any right of appeal from the SANEFJC Decision, either to an SANEF appeals body or to the CAS. The SANEFJC Decision, being a final decision with no further legal remedies available within the SANEF structure, is therefore equivalent in effect to the *national-level reviewing body* referred to in Article 13.2.3 of the FEI AD Rules. This is confirmed by SANEF's refusal or failure to act upon SAIDS request to SANEF of 23 April 2008 to review the SANEFJC Decision. It is also supported by FEI's uncontested statement that "*the SANEF explained to the FEI that its Constitution did not provide for any review process*", in response to FEI's request that the SANEFJC Decision be reviewed and overturned.
- 5.20 As the GHS and SANEF regulations provide that in event of their non-conformity with the FEI rules, the FEI rules will apply, the Panel finds that notwithstanding the absence of a right to appeal from decisions of the SANEF Judicial Committee in the SANEF rules, the right of appeal to CAS expressly provided for in the FEI AD Rules must be upheld. It is the Panel's decision that as the FEI AD Rules provide for a right of appeal to the CAS from the final decision of SANEF, and as the final decision of SANEF in the present case was the SANEFJC Decision, there exists a right of appeal from the SANEFJC Decision for WADA and the FEI to the CAS, and the CAS has jurisdiction to hear the present appeals.
- 5.21 The inclusion of Article 13.2.3 in the FEI AD Rules was clearly intended to allow FEI and WADA to perform a supervisory role in domestic anti-doping cases. This supervisory role is facilitated by the Panel's ruling in paragraph 5.20 above. This approach is supported by previous CAS caselaw, which holds that in order to create a 'level playing field' and ensure equity in international competition, it is essential that international federations have a right of appeal against the decisions of national federations in cases involving anti-doping rule infractions (*CAS 2006/A/1119 UCI v/ Landaluce & RFEC; para. 42* and *CAS 2006/A/1159 IAAF v/ FFA & R. Es-Saadi; para. 41*).
- 5.22 A further question, which does not arise for consideration by the Panel in the present case but should be considered carefully by SANEF and FEI in order to ensure equitable treatment of athletes, is whether there exists a right of appeal from decisions of the SANEF Judicial Committee for parties other than WADA and FEI. As mentioned above, this issue does not require consideration by the Panel in the present case, as Mr Gertenbach is not prejudiced by this ambiguity, having had the opportunity to fully argue his case before the CAS, and to file his counterclaim requesting that the SANEFJC Decision be declared a nullity. However, the question arises as to whether, and in what forum, Mr Gertenbach would have had the opportunity to make such submissions had WADA or FEI not filed an appeal.
- 5.23 Having confirmed its jurisdiction to hear the present appeals, the Panel considered the nature and scope of these appeals. Article R57 of the Code provides that "*The Panel shall have full power to review the facts and the law*". Therefore, in accordance with Article R57 of the



Code and established CAS jurisprudence, the Panel considered the present case as a *de novo* appeal.

### **Admissibility of the Appeals**

5.24 Article 13.5 of the FEI AD Rules provides as follows:

#### *13.5 Time for Filing Appeals*

*The time to file an appeal to CAS shall be thirty (30) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings 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 thirty (30) days from receipt of the file to file an appeal to CAS.*

- 5.25 On 7 April 2008 the SANEF Judicial Committee issued the SANEFJC Decision, imposing a sanction on Mr Gertenbach.
- 5.26 By e-mail dated 23 April 2008, SAIDS sent the SANEFJC Decision to WADA.
- 5.27 On 23 May 2008, by submission of a Statement of Appeal, WADA filed an appeal with the CAS against the SANEFJC Decision.
- 5.28 The Statement of Appeal filed by WADA on 23 May 2008 was therefore filed within the time limit prescribed under the FEI AD Rules.
- 5.29 The SANEFJC Decision was transmitted by WADA to FEI on 7 May 2008.
- 5.30 On 8 May 2008 FEI requested from SANEF a copy of the file on which SANEF relied for its Decision.
- 5.31 On 15 May 2008 the complete file was notified to FEI by SANEF.
- 5.32 On 13 June 2008, by submission of a Statement of Appeal, FEI filed an appeal with the CAS against the SANEFJC Decision.
- 5.33 The Statement of Appeal filed by FEI on 13 June 2008 was therefore filed within the time limit prescribed under the FEI AD Rules.
- 5.34 WADA and FEI both complied with the provisions of Article R48 of the Code, including payment of the minimum CAS filing fee of CHF 500 in accordance with Article R65.2 of the Code.
- 5.35 As described in paragraph 5.19 above, the legal remedies available to the appellants were exhausted before the filing of the present appeals, in accordance with Article R47 of the Code.

5.36 In light of the above, the Panel concludes that the appeals filed by WADA and FEI are both admissible.

## 6. APPLICABLE LAW

6.1 FEI's position regarding applicable law is summarised in paragraph 4.2.12 above.

6.2 WADA's position regarding applicable law is summarised in paragraphs 4.1.1 and 4.1.2 above. WADA made no express submissions to the Panel regarding the applicability of a particular national law.

6.3 SANEF made no submissions regarding admissible law.

6.4 Mr Gertenbach's position regarding applicable law, as summarised in paragraph 4.4.4 above, is that the FEI AD Rules are applicable, as they take precedence over SANEF and GHS rules. Mr Gertenbach made no submissions regarding the applicability of a particular national law.

6.5 Article R28 of the Code provides that the seat of the CAS and of each Arbitration Panel is in Lausanne, Switzerland. Swiss procedural law therefore applies to this arbitration.

6.6 The question of what law is applicable to the merits of the present dispute shall be decided by the Panel in accordance with the provisions of Chapter 12 of the PILA and Article R58 of the Code.

6.7 Article 187(1) of the PILA provides as follows:

*"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".*

6.8 Article 187(1) of the PILA constitutes in itself the entire private international law or conflict of laws system applicable to arbitral tribunals having their seat in Switzerland and its provisions confirm that the type of conflict of laws rules contained in the Swiss private international law are not applicable to the determination of the applicable substantive law in international arbitrations (Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland*, Zurich 2004, Schulthess, pg. 116).

6.9 The parties' agreement regarding the choice of law is not required to take a particular form and can be concluded either expressly or tacitly. Such a tacit agreement can result from, for example, a common attitude adopted by the parties during the arbitration procedure, where both parties refer to the same law in their submissions to the Panel (Lalive, Poudret & Reymond, *Le Droit de L'Arbitrage Interne et International en Suisse*, Lausanne 1989, Payot, pg. 390). However, circumstances such as the place of arbitration, the place of residence or the nationality of the parties, or the choice of a procedural law, do not imply a choice of substantive law. Nor can a choice of law be derived from a so-called hypothetical intent of the parties, i.e. the intent that the parties would presumably have had – but in the event did not have – if they had thought about the question of applicable law (Bucher & Tschanz, *International Arbitration in Switzerland*, Basle 1989, Hebling & Lichtenhahn, pg. 99).

- 6.10 In order for a choice of law to exist in the sense envisaged by 187(1) para. 1 of the PILA, there must be an awareness and a willingness by the parties to adopt such a choice of law (Lalive, Poudret & Reymond, *Le Droit de L'Arbitrage Interne et International en Suisse*, Lausanne 1989, Payot, pg. 390). Once the arbitral tribunal has established the actual intent of the parties, it must enforce their agreement, without examining the merits of the parties' choice or second-guessing whether this choice is legitimate or appropriate. In particular, the arbitral tribunal may not refuse to apply the chosen law because it is incomplete, surprising or unfair in the circumstances of the contractual relationship (Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland*, Zurich 2004, Schulthess, pg. 119).
- 6.11 The parties may indirectly choose the applicable substantive law by reference, for example, to a set of arbitration rules. Therefore, if the parties have not specifically agreed upon the applicable substantive law but have made reference to arbitration rules setting forth a method for determining such law, the arbitral tribunal will apply these rules as the law chosen by the parties. An express choice of law clause will, however, prevail over a reference to arbitration rules (Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland*, Zurich 2004, Schulthess, pg. 120-121).
- 6.12 The wording of Article 187(1) of the PILA, which states that the parties may choose the 'rules of law' to be applied, does not limit the parties' choice to the designation of a particular national law. It is generally agreed by academics and commentators that the parties may choose to subject the contract to a system of rules which is not the municipal law of a State and that such choice is consistent with Article 187 of the PILA (Dutoit, *Droit international privé suisse*, Bâle 2005, pg. 657; Lalive, Poudret & Reymond, *Le Droit de L'Arbitrage Interne et International en Suisse*, Lausanne 1989, Payot, pg. 392 ff.; Karrer, in Honsell/Vogt/Schnyder (publ.) *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, Basle 1996, Art. 187, N. 69 et seq.). The relevant statutes, rules or regulations of a sporting governing body may therefore be designated by the parties as the applicable rules of law for the purposes of Article 187(1) of the PILA (Rigozzi, *L'arbitrage international en matière de sport*, Basle 2005, Hebling & Lichtenhahn, pg. 599-600).
- 6.13 The Panel having found that the CAS has jurisdiction to hear the present appeals, in the absence of any express agreement of the parties in the alternative, the parties can be deemed to have tacitly accepted the application to these proceedings of the CAS procedural rules, contained in the Code.
- 6.14 In consideration of paragraph 6.11 above, it follows that acceptance by the parties of the provisions of the Code implies a choice by the parties of the substantive law that is identified by application of the relevant provisions of the Code (Rigozzi, *L'arbitrage international en matière de sport*, Basle 2005, Hebling & Lichtenhahn, sect. 3 Chap. 2 (I)), specifically Article R58 for the purposes of appeals arbitration proceedings. As the parties can be said to have chosen the substantive law that is identified by application of Article R58 of the Code, there is no need for the Panel to decide what is the "law with which the action is most closely connected", as described in Article 187(1) of the PILA.
- 6.15 Article R58 of the Code provides as follows:

*"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has*

*issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

- 6.16 The Panel must therefore decide whether the parties in this case have made a choice regarding “*the applicable regulations and the rules of law*” described in Article R58 of the Code and, if so, what regulations and rules of law the parties have chosen.
- 6.17 In the present case the parties have not advised the Panel of any explicit agreement between them regarding the applicable law. However, as detailed in paragraph 5.14 above, the Panel finds that the FEI Statutes, Rules and Regulations, in particular the FEI AD Rules, are applicable in these proceedings.
- 6.18 The Panel considered what national law, if any, should be applied in addition to the FEI AD Rules.
- 6.19 Articles 35.2 and 35.3 of the FEI Statutes provide as follows:

**35.2**

*Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration.*

**35.3**

*The parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS are governed by Swiss Law.*

- 6.20 It is therefore apparent that the parties can be said to have, at least implicitly, agreed to the applicability of Swiss Law to these proceedings.
- 6.21 As an express choice of law clause will prevail over an implied choice, had the parties explicitly agreed to the application of an alternative national law, notwithstanding the reference in the FEI Statutes to the applicability of Swiss Law, this express choice of law would have been enforced by the Panel, to the extent that the chosen law was compatible with the applicable FEI Statutes, Rules and Regulations. However, no such express agreement was entered into by the parties.
- 6.22 The Panel therefore concludes that the FEI Statutes, Regulations and Rules, including the FEI AD Rules, are applicable in the present case and Swiss law applies complementarily.

## **7. SUBSTANTIVE ISSUES**

- 7.1 Having confirmed its jurisdiction and the admissibility of the appeal, the Panel addressed the substantive aspects of the appeal.
- 7.2 The Panel first of all considered whether Mr Gertenbach had committed a breach of the FEI AD Rules.
- 7.3 Article 2.3 of the FEI AD Rules provides as follows:

*The following constitute anti-doping rule violations:*

*2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in these Anti-Doping Rules or otherwise evading Sample collection.*

7.4 The Panel therefore had to consider whether Mr Gertenbach refused, or failed without compelling justification, to submit to a sample collection after notification as authorised in the FEI AD Rules or otherwise evaded sample collection. When considering this point, the Panel was cognisant of the fact that Mr Gertenbach was still a minor at the time of the incident, and in that context concluded that the behaviour of Mr Gertenbach's father, as his legal guardian, was pertinent. However, the Panel decided nevertheless that it was the behaviour of Mr Gertenbach himself that was most relevant when considering whether he had breached Article 2.3 of the FEI AD Rules.

7.5 As a preliminary issue, the Panel examined the authority of the DCO to conduct an out-of-competition test on Mr Gertenbach. In particular, the Panel considered the provisions of Article 5.1 of the FEI AD Rules, which provide as follows:

*"All athletes affiliated with the National Federation shall also be subject to Out-of-Competition testing at any time or place, with or without advance notice, by the FEI, WADA, the Athlete's National Federation, the National Anti-Doping Organisation of any country where the Athlete is present, the IOC during the Olympic Games and the IPC during the Paralympic Games".*

7.6 The Panel therefore considers that Mr Gertenbach was legitimately subject to out-of-competition testing by SAIDS, as the National Anti-Doping Organisation of South Africa, and the DCO did have authority to conduct a sample collection on Mr Gertenbach 'at any time or place'. The evidence before the Panel indicated that the DCO advised Mr Gertenbach of his authority to do so.

7.7 On the basis of the evidence submitted by the parties, the Panel considered that having been notified of his obligation to provide a urine sample, Mr Gertenbach refused to do so. As Mr Gertenbach did not attend the oral hearing, the Panel did not have the benefit of direct testimony regarding his will, or lack thereof, to submit himself to a sample collection. However, Mr Gertenbach's father stated during his testimony that Mr Gertenbach was free to come back outside the house to where the DCO was located at any time, but chose not to. Having considered the circumstances of the sample collection, as described in section 2 above, it appears that Mr Gertenbach's behaviour constituted a breach of Article 2.3 of the FEI AD Rules.

7.8 Mr Gertenbach argues that he did not breach Article 2.3 of the FEI AD Rules and his arguments in this regard are summarised in paragraphs 4.4.15 to 4.4.19 above. Mr Gertenbach principally argues that in the present case there were several departures from the IST, and it is his contention that he cannot be said to have refused to submit to the sample collection, as he could only have refused to submit to sample collection if he had received notification as contemplated by the IST. He states that he was not aware of what he was refusing and that had he been made aware of the consequences of refusing to submit to sample collection, he would not have refused.

7.9 Article 5.3 of the FEI AD Rules provides as follows:

*5.3 Testing Standards*

*Testing conducted by the FEI and its National Federations shall be in substantial conformity with the International Standard for Testing in force at the time of Testing.*

7.10 Article 3.2.2 of the FEI AD Rules provides as follows:

*3.2.2 Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the FEI or its National Federation shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.*

7.11 The Panel must therefore examine whether there were departures from the IST, and if so, whether such departures caused the factual basis for breach of Article 2.3 of the FEI AD Rules by Mr Gertenbach.

7.12 Having considered the arguments advanced by Mr Gertenbach regarding alleged departures by the DCO from the IST and his arguments as to why the Panel should consider that his behaviour did not constitute a breach of Article 2.3 of the FEI AD Rules, the Panel largely agree with, and adopt, the substantive findings of the SANEF Judicial Committee in this regard. Paragraphs 15-18 of the SANEF Decision, addressing the arguments advanced on behalf of Mr Gertenbach by his attorney, Mr Harris, on this point, provide as follows:

*On the face of it Mr Harris' submission is an attractive one. However, notwithstanding that it was persuasively argued, it does not bear up to scrutiny. The fundamental flaw in the submissions is that whilst non-compliance with Article 4.6.1 and/or Article 5.4.1 of the International Standards could conceivably constitute grounds for impugning the validity of a test result, it cannot be relevant where no test result exists because the sample collection was refused. This much is apparent from Article 3.2.2 of the Anti-Doping Rules which provides, inter alia:*

*If the Athlete establishes that departures from the International Standard occurred during Testing then the FEI or its National Federation shall have the burden to establish that such departures did not cause ... the factual basis for the anti-doping rule violation.*

*Thus, departures from the International Standards are only material where they caused the factual basis for the anti-doping rule violation. In the case of Article 2.3 of the Anti-Doping Rules the factual basis for the violation is the refusal to submit to a sample collection. On the facts of this matter it cannot be said that Jasyn refused to submit to a sample collection because Article 4.6.1 and Article 5.4.1 of the International Standards had not been complied with. By their own admission none of the defence witnesses knew the provisions of the Anti-Doping Rules let alone those of the International Standards. The reasons for a sample not being collected from Jasyn are set out above and it is clear that none of the reasons have a direct bearing on Article 4.6.1 or 5.4.1 of the International Standards. Whilst the defence witnesses did*

*attempt to broaden the grounds for not allowing Mr van der Walt to collect a sample from Jasyn, the complaints and objections which they apparently had are placed into context when one considers their consistent testimony that if they only knew that Jasyn could face a suspension of two years they would have allowed Mr Van der Walt to carry out the test. That is a stance which is wholly inconsistent with a reliance on the non-compliance with Article 4.6.1 and/or 5.4.1 of the International Standards.*

*There is another consideration which counts against Mr Harris' submissions insofar as it concerns Article 4.6.1 of the International Standard, and that is that Article 3.2 of the Anti-Doping Rules speaks only of a refusal "after notification". It does not expressly incorporate the requirements for the selection of athletes as prescribed in Article 4.6.1, which would appear to be more apposite for a contravention of Article 2.4 of the Anti-Doping Rules.*

*Insofar as "notification" is concerned the facts are against Mr Harris' submissions. Notification of athletes is dealt with in Article 5.4 of the International Standards and much was made of the fact Mr van der Walt did not inform Jasyn of what he was entitled to know such as, in particular, the nature of the sample collection. Although Mr van der Walt testified that he told Jasyn that it would be a urine sample under supervision, Jasyn's father was equally adamant that no such information was conveyed to Jasyn. Again, in our view not much turns on the dispute because Jasyn testified in chief that he knew a urine sample would be required because that was the nature of the sample collection on 1 July 2007 when his sister and four other athletes were tested. Furthermore, Mr van der Walt testified that he was not given the opportunity to inform Jasyn of all the requirements for notification contained in Article 5.4.1 of the International Standards because upon his arrival Jasyn's father almost immediately asked to consult his attorney and then upon his return refused to allow a sample to be taken from Jasyn. In our view it would be somewhat of an anomaly to allow an athlete to contest his/her refusal to submit to a sample collection on the basis that Article 5.4.1 of the International Standards was not complied with in circumstances where that athlete's refusal was the cause of the non-compliance.*

- 7.13 Regarding the question of whether Mr Gertenbach could be found to have refused to submit to a sample collection, the SANEF Judicial Committee stated in its Decision that it was:

*"mindful of the fact that the decision not to submit Jasyn to a sample collection was taken by his father on the advice of Ms Nixon. We also take cognisance of the fact that Jasyn testified that he wanted to submit himself to a sample collection but did not do so on the instruction of his father. In our view the reasons for Jasyn not submitting to a sample collection can only be relevant to the question of the sanction. As a matter of principle, athletes and especially athletes which compete at an international level need to respect the Anti-Doping Rules and the policies that underpin those rules. They cannot pass on their responsibility to abide by the Anti-Doping Rules on to anybody, even if the athlete is a minor".*

- 7.14 The Panel concurs with the findings of the SANEF Judicial Committee in this regard. The Panel considers that if the Panel were to take Mr Gertenbach's submissions regarding the alleged departures from the IST at their high point, and thereby accepted that the alleged departures had occurred, the Panel nevertheless would not consider that these departures caused Mr Gertenbach's refusal to submit to sample collection, particularly as the IST placed

no obligation on the DCO to advise Mr Gertenbach of the precise consequences of his refusal to comply, or to advise him of what specific sanction he was likely to incur.

- 7.15 In light of the above, the Panel finds that on 5 July 2007 Jasyn Gertenbach breached Article 2.3 of the FEI AD Rules in that he refused to submit to a sample collection after notification as authorised in the FEI AD Rules.
- 7.16 Having found that Mr Gertenbach committed a breach of Article 2.3 of the FEI AD Rules, the Panel considered what sanction should be imposed on Mr Gertenbach.
- 7.17 Article 10.4.1 of the FEI AD Rules provides as follows:

*The period of Ineligibility for other violations of these Anti-Doping Rules shall be:*

*10.4.1*

*For violations of Article 2.3 (refusing or failing to submit to Sample collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility periods set forth in Article 10.2 shall apply.*

- 7.18 Article 10.2 of the FEI AD Rules provides as follows:

*10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods*

*Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Methods) shall be:*

*First violation: Two (2) years' Ineligibility.*

*Second violation: Lifetime Ineligibility.*

*However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.*

- 7.19 The present case being Mr Gertenbach's first anti-doping rule violation, the Panel concluded that the appropriate sanction for his breach of Article 2.3 of the FEI AD Rules shall be a period of two years' ineligibility.
- 7.20 The Panel then considered whether there were any grounds to reduce the two-year period of ineligibility provided for by Article 10.2 of the FEI AD Rules.
- 7.21 Article 10.5 of the FEI AD Rules is entitled 'Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances'. Article 10.5.2 provides as follows:

*10.5.2*

*This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection*



*under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

- 7.22 The Panel considered whether the present case was one in which Mr Gertenbach bore no significant fault or negligence, and could thereby benefit from a reduction in sanction. Having regard to the provisions of Article 10.5.2 of the FEI AD Rules, the Panel concluded that in any event, Mr Gertenbach's period of ineligibility could not be reduced to a period of less than one year.
- 7.23 The following are the definitions of 'No Fault or Negligence' and 'No Significant Fault or Negligence' contained in the FEI AD Rules:

*No Fault or Negligence.*

*The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.*

*No Significant Fault or Negligence.*

*The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.*

- 7.24 FEI and WADA both argued that there were no grounds to reduce the sanction on the basis of Article 10.5.2 of the FEI AD Rules. Mr Gertenbach argued that although the erroneous advice of his attorney should not be regarded as an exceptional circumstance, the defective performance of the DCO in executing his duties as required under the IST should be regarded as an exceptional circumstance. He argues that the Panel should therefore find that Mr Gertenbach bore No Significant Fault or Negligence for his breach of Article 10.2 of the FEI AD Rules and that his sanction should be reduced to a period of one year's ineligibility. Mr Gertenbach also contended that the Panel should take into consideration the fact that he was a minor at the time of the incident.
- 7.25 It must be noted again that Mr Gertenbach did not give any evidence, as he declined to appear before the Panel to give his own evidence. The Panel found that the explanation proffered by Mr Gertenbach's legal representative - that Mr Gertenbach couldn't appear because he was in Mauritius - was unsatisfactory, considering the Panel's willingness to hear Mr Gertenbach by video-conference. The very experienced DCO confirmed that he drew Mr Gertenbach's attention to the possible consequences of refusing to provide a sample, but Mr Gertenbach has provided the Panel with absolutely no explanation for his refusal that could be regarded as possible mitigating circumstances. SANEF itself found

there was no reasonable excuse for Mr Gertenbach to fail to give a sample – a conclusion shared by the Panel. The Panel does not agree with Mr Gertenbach's evaluation of the performance of the DCO and it rejects the argument that the allegedly defective performance of the DCO in executing his duties as required under the IST should be regarded as an exceptional circumstance. Nor does the Panel consider that the young age of Mr Gertenbach, who was less than a year from his eighteenth birthday, should be regarded as an exceptional circumstance. CAS caselaw provides that young athletes cannot escape responsibility for the actions of parents who are in control of their athletic careers. In any case, in the present matter, Mr Gertenbach's father testified clearly that his son was free at all times to come downstairs and provide a sample if he wished to do so. The Panel therefore finds that there are no grounds in the present case to reduce Mr Gertenbach's sanction on the basis of the provisions of Article 10.5.2 of the FEI AD Rules.

- 7.26 In light of the above, the Panel confirms its finding that that the SANEF Judicial Committee erred by imposing a four-month period of ineligibility on Mr Gertenbach and confirms that Mr Gertenbach's period of ineligibility shall be increased to two years.
- 7.27 Having established the length of Mr Gertenbach's suspension, the Panel considered what the starting date for such suspension should be.
- 7.28 Article 10.8 of the FEI AD Rules provides as follows:

*Commencement of Ineligibility Period*

*The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the FEI or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.*

- 7.29 In accordance with Article 10.8 of the FEI AD Rules, the Panel finds that as Mr Gertenbach has not competed since 7 April 2008, the date of commencement of the period of suspension imposed on him by the SANEF Judicial Committee, Mr Gertenbach's two-year suspension shall be served from 7 April 2008.
- 7.30 Article 10.7 of the FEI AD Rules provides as follows:

*Disqualification of Results in Competitions Subsequent to Sample Collection*

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

7.31 In consideration of Article 10.7 of the FEI AD Rules, the Panel rules that all competitive results obtained by Mr Gertenbach between 5 July 2007 and the commencement date of his period of ineligibility, 7 April 2008, shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

## 8. COSTS

8.1 The present case being a Disciplinary Case of an International Nature Ruled in Appeal, Article R65 of the Code applies to these proceedings.

8.2 Article R65 provides as follows:

### *R65.1*

*Subject to Articles R65.2 and R65.4, the proceedings shall be free.*

*The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.*

### *R65.2*

*Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.*

### *R65.3*

*The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

### *R65.4*

*If all circumstances so warrant, the President of the Appeals Arbitration Division may decide to apply Articles R64.4 and R64.5, 1st sentence, to an appeals arbitration, either ex officio or upon request of the President of the Panel.*

8.3 In accordance with Article R65.1 of the Code, the fees and costs of the arbitrators together with the costs of the CAS are borne by the CAS.

8.4 The Court Office fee of CHF 500, payable in each case, was paid by WADA on 26 May 2008 and by FEI on 12 June 2008, in accordance with Article R65.2 of the Code. These fees, totalling CHF 1,000 for both cases, shall be retained by the CAS.

8.5 Article R65.3 of the Code states that the Panel shall decide which party shall bear the parties' costs, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

8.6 Having taking into account the outcome of the proceedings, the conduct of each party and the financial resources of each party, the Panel considers that no party should be required to

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**make a contribution towards the costs of the other parties. Therefore, the Panel has decided that each party shall bear its own costs.**

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### **ON THESE GROUNDS**

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

1. The Appeal filed by the World Anti-Doping Agency against a decision of the Judicial Committee of the South African National Equestrian Federation dated 7 April 2008 is upheld.
2. The Appeal filed by the Fédération Equestre Internationale against a decision of the Judicial Committee of the South African National Equestrian Federation dated 7 April 2008 is upheld.
3. The period of ineligibility of four months that was imposed on Mr Jaysn Gertenbach by the Judicial Committee of the South African National Equestrian Federation is hereby increased to two years, commencing on 7 April 2008.
4. All competitive results obtained by Mr Jaysn Gertenbach between 5 July 2007 and 7 April 2008 shall be disqualified.
5. This award is rendered without costs, except the CAS Court Office fee of CHF 500 (five hundred Swiss francs), which was paid by the World Anti-Doping Agency in the case CAS 2008/A/1558 and by the Fédération Equestre Internationale in the case CAS 2008/A/1578. This total amount of CHF 1,000 (one thousand Swiss francs) is retained by the CAS.
6. Each party shall bear its own costs.
7. All other prayers for relief are dismissed.

Lausanne, 4 March 2009

**THE COURT OF ARBITRATION FOR SPORT**



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Mr Ercus Stewart  
President of the Panel