Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1767 Thys v. Athletics South Africa

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Lars Halgreen, attorney-at-law in Copenhagen, Denmark

Arbitrators: Mr Olivier Carrard, attorney-at-law in Geneva, Switzerland

Ms Sylvia Schenk, attorney-at-law in Frankfurt, Germany

in the arbitration between

GERT THYS, Kimberley, South Africa
Represented by Mr Howard Jacobs, attorney-at-law in Westlake Village, USA

-Appellant-

and

ATHLETICS SOUTH AFRICA, Johannesburg, South Africa
Represented by Mr Mark Gay, solicitor in London, UK

- Respondent-

1. THE PARTIES

1.1 Mr Gert Thys ("Mr Thys" or the "Appellant"), born on 12 November 1971, is a South African national who competes as a long-distance runner. He represented South Africa in the men's marathon at the Summer Olympic Games in Athens and became the first man to run three marathons sub 2:08 and to run two sub 2:08 marathons in one year (1998).

1.2 Athletics South Africa ("ASA" or the "Respondent") is the sole organisation administering and controlling athletics in South Africa and is an affiliated national member of the International Association of Athletics Federations (the "IAAF").

2. FACTUAL BACKGROUND

2.1 Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the pleadings and evidence adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

2.2 On 12 March 2006, Mr Thys was subjected to in-competition drug testing at the Seoul Marathon. Mr Thys' sample was separated into an "A" and a "B" sample and sent to the Doping Control Center of the Korea Institute of Science and Technology, Seoul, Korea (the "DCC"). The DCC is a laboratory accredited by the World Anti-Doping Agency ("WADA"). On 16 March 2006 the "A" sample was tested by Mr Young Dae Cho and the presence of the prohibited substance 19-norandrosterone was detected.

2.3 On 13 April 2006, the IAAF notified ASA of the results of the test and directed ASA to deal with the matter "*in accordance with the results management procedure set out in IAAF Rule 37*". Additionally the fax stated:

"*In accordance with IAAF Rule 37.2, please note that you must keep me updated in the conduct of this case all times. ... Equally, if I can provide any assistance or information in the course of the results management procedure, please do not hesitate to contact me.*"

2.4 On 17 April 2006, ASA notified Mr Thys of the positive test and advised him of his right to have the "B" sample tested.

2.5 Mr Thys did not offer any explanation for the presence of 19-norandrosterone in the "A" sample and on 25 April 2006, ASA provisionally suspended Mr Thys from all competitions.

2.6 On 16 May 2006 the "B" sample was analysed by Mr Young Dae Cho under the supervision of Dr Man Ho Choi and the presence of 19-norandrosterone was again detected.

2.7 On 10 September 2006 ASA commenced its first disciplinary hearing. After numerous adjournments, detailed in the parties' submissions, on 11 December 2008 the hearing commenced *de novo* before a newly constituted tribunal.

2.8 On 11 December 2008, ASA advised Mr Thys by letter that the newly constituted tribunal "*unanimously found that you committed a doping violation and declared you ineligible to participate in athletics from 25th April 2006 to the 11th December 2008 (Date of tribunal) – a period of 2 years seven and a half months. In terms of the decision you will forfeit all income, prizes and benefits derived from your participation in the Seoul Marathon on the 17th* (sic) *March 2006*". The tribunal's decision is contained in a one-page letter and does not set out any reasons or analysis.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 7 January 2009, Mr Thys filed an appeal at the Court of Arbitration for Sport (the "CAS") against the decision of ASA pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code").

3.2 In his appeal brief, Mr Thys' claims that the DCC violated section 5.2.4.3.2.2 of the WADA Code International Standard for Laboratories (the "ISL") by having the same analyst (Mr Young Dae Cho) test both the "A" and "B" samples. At the time the testing was carried out, ISL 5.2.4.3.2.2 provided that:

> "*The "B" sample confirmation must be performed in the same Laboratory as the "A" Sample confirmation. A different analyst must perform the "B" analytical procedure. The same individual(s) that perform the "A" analysis may perform instrumental set up and performance checks and verify results*"
>
> (Version 3, June 2003)

3.3 Mr Thys submits that Article 3.2.1 and 3.1 of the WADA Code provides that "*there is a presumption that WADA laboratories accredited to perform a particular test conduct that test in accordance with the ISL... An athlete may rebut that presumption by showing, by a "balance of probability," that a departure from the ISL has occurred*". Mr Thys further submits that based on Article 3.2.1 of the WADA Code and IAAF Anti-Doping Rule 33.4(b) "*If the athlete shows a departure from the ISL, the burden then shifts to (in this case) ASA to establish that such departure did not cause (or undermine) the Adverse Analytical Finding*". Mr Thys refers to CAS jurisprudence established in the case *CAS 2006/A/1119 UCI v. Landaluce* and a decision of the

American Arbitration Association in *USADA v. Jenkins (AAA No. 30 190 0019907)* where the Panel discussed the consequences of a departure from ISL 5.2.4.3.2.2.

3.4 Mr Thys submits that "*Here, there is a significant if not complete overlap in the individual who performed the "A" and "B" sample analyses. This is not a technical violation, but rather a serious breach of the International Standard for Laboratories*". On that basis, Mr Thys requests that the Panel exonerate him and set aside the positive test result.

3.5 Mr Thys requests the following relief "*that this Tribunal uphold the appeal of Gert Thys; declare that the alleged March 12, 2006 positive test result be set aside and that Gert Thys be exonerated; declare that Gert Thys is immediately eligible to compete without the necessity of any reinstatement testing (IAAF Rule 40.12); and award Mr. Thys a contribution toward his legal costs from respondent ASA*".

3.6 In its Response, ASA raises a point *in limine* that the CAS has no jurisdiction to hear the appeal as the ASA rules do not provide for any right of appeal to the CAS and that Mr Thys is not an international-level athlete and therefore, has no right of appeal to the CAS under the IAAF Anti-Doping Rules (the "IAAF Rules"). Alternatively, ASA submits that Mr Thys has failed to exhaust the internal remedies available to him. The issue of jurisdiction is discussed in detail below at paragraph 5 *et sequelae*.

3.7 On the merits of the appeal, ASA details the testing of the "A" and "B" samples. In conclusion, ASA "*concedes that there was an overlap in the personnel who carried out the analysis of the "A" and "B" samples*". On the basis that ISL 5.2.4.3.2.2 was not strictly complied with, ASA moves to show that the irregularity did not undermine the validity of the adverse analytical finding (IAAF Rule 33.4(a)).

3.8 ASA submits that the only two ways that departure from ISL 5.2.4.3.2.2 could have undermined the validity of the adverse finding are (i) bona fide errors by the analysts who conducted the tests or (ii) dishonesty on the part of the analysts.

3.9 In relation to its first point, ASA details the qualification of the laboratory personnel and the equipment available to them at the laboratory. ASA also submits as "*highly significant*" the fact that Mr Thys appointed an expert representative, Dr. Jong Ha Lee, to be present at the testing of the "B" sample and he "*did not raise any objection and was satisfied that the "B" sample analysis was satisfactory*". ASA submits that in light of the fact that both a qualitative and quantitative analysis of the samples were carried out "*the possibility that 19-norandrosterone was not present...is so remote that such a possibility can be disregarded*". Finally, ASA submits that ISL 5.2.4.3.2.2 has been removed from the 2009 version of the ISL Rules and accordingly "*at the time that the samples were analysed there was growing recognition of the fact that Rule 5.2.4.3.2.2 is not necessary in order to maintain confidence in the validity of an adverse analytical finding*".

3.10 In relation to its second point, ASA "*does not question the integrity of the analysts who performed the analysis*". ASA also points to the fact that Dr Lee was present during the testing of the "B" sample and did not object at any stage during the analysis. ASA concludes that there can be "*no doubt*" but that the results were honestly obtained.

3.11 ASA distinguishes the present case from the jurisprudence relied on by Mr Thys and concludes that any procedural irregularity in carrying out the testing did not undermine the adverse analytical finding. ASA requests that the Panel decline jurisdiction in this matter but if it finds that it has jurisdiction, that it dismisses the appeal.

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

4.1 On 25 February 2009, the CAS Court Office informed the parties that the Panel to hear the appeal had been constituted as follows: Mr Lars Halgreen, President of the Panel, Mr Olivier Carrard and Ms Sylvia Schenk, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel.

4.2 On 7 April 2009 the parties were informed by fax that "*the Panel has decided to deal with both the issue of jurisdiction and the merits of this dispute at the hearing to be held in Lausanne on 11 and 12 May 2009*".

4.3 On 5 May 2009 the Respondent send a fax to CAS expressing its "*preference to have the jurisdiction issue properly decided prior to a full hearing on the merits*" and requesting "*that the hearing scheduled for 11 and 12 May 2009 be postponed.*"

4.4 On 5 May 2009 the CAS Court Office informed the parties that the Panel had considered the Respondent's request to postpone the hearing and was not inclined to grant such request. The Panel also reminded the parties that they had been informed on 7 April 2009 that the Panel had decided to deal with both the issue of jurisdiction and the merits of the dispute at the hearing.

4.5 A hearing was held on 11 May 2009 at the CAS premises in Lausanne. The Panel set aside two days for the hearing. The parties confirmed that they had no objection to the composition of the Panel.

4.6 The following persons attended the hearing:
- Mr Thys, accompanied by his counsel, Mr Howard Jacobs
- For ASA, its counsel, Mr Mark Gay, assisted by Mr Neil Mackenzie

4.7 At the outset of the hearing, Counsel for ASA informed the Panel that he had only been instructed on Friday, 8 May 2009, and was in a position to deal only with jurisdiction and was not in a position to deal with the merits. Counsel acknowledged

that the parties had been informed by letter in advance of the hearing that the Panel would deal both with the issue of jurisdiction and the merits of the appeal at the hearing. Counsel stated that he wanted it to be made clear to the Panel that his client maintained its jurisdictional objection, that it would make no submission on the merits and reserved the right, should the Panel find it had jurisdiction, to "*withdraw from the arbitration and deal with the matter by way of enforcement*".

4.8 The Panel heard the parties' submissions on jurisdiction and adjourned to deliberate. After the break, the President of the Panel informed the parties orally that the Panel considered it had jurisdiction. Counsel for ASA stated that he "*wanted it explicitly stated in the decision that we made no appearance on the merits*". The President of the Panel asked Counsel whether he wanted time to reconvene and confer with his client. Counsel for ASA declined and withdrew from the hearing.

4.9 As outlined above, ASA did not make any submissions on the merits nor call any evidence on the merits at the hearing. In its written submissions on the merits, ASA indicated that it proposed to call Mr Chris Hatttingh, ASA representative at the hearing; Dr Kim, Dr Choi and Mr Cho to testify regarding their individual involvement in the analysis of the "A" and "B" sample and to the reliability of the analysis; and Ms Ebeth Grobbelaar (doping expert) to testify that a violation of ISL 5.2.4.3.2.2 does not necessarily and automatically invalidate the adverse analytical finding.

4.10 As he had outlined at the beginning of the hearing, Counsel for ASA withdrew from the hearing before the Panel commenced hearing submissions or evidence on the merits of the appeal. On the merits, the Panel heard evidence from the following persons:

- Dr. David Black, head of Aegis Sciences Corporation, Nashville, Tennessee, USA, by telephone. Dr Black is an expert in identification of substances by gas chromatography, mass spectrometry, and liquid chromatography and on drug testing in sports.
- Mr Thys

4.11 On 12 May 2009, the day after the close of the hearing, Dr Dolle wrote a letter to the Panel stating that his letter dated 10 April 2008 was not an offer to arbitrate and "*It is clear to me that you have simply misunderstood the terms of my letter*".

4.12 On 14 May 2009, Counsel for ASA wrote a letter to the Panel stating that the Panel's decision to found jurisdiction based on Dr Dolle's letter was "*manifestly wrong*" and suggesting that "*You should, in all conscience, therefore, reconvene the Panel by telephone and reverse yourselves*".

5. JURISDICTION OF THE CAS

5.1 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.*
>
> *An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance."*

PARTIES' SUBMISSIONS ON JURISDICTION

5.2 In his statement of appeal, Mr Thys relied on IAAF Rule 60.25 as conferring jurisdiction on the CAS to hear his appeal.

5.3 In its Response, ASA disputes the jurisdiction of the CAS on the grounds that the ASA rules do not provide for any right of appeal to the CAS and Mr Thys cannot appeal under the IAAF rules as he is not an international-level athlete. Alternatively, ASA submits that Mr Thys has not exhausted the internal remedies available to him.

5.4 ASA refers to Article R47 of the Code and submits that as no "*specific arbitration agreement*" has been concluded by the parties, an appeal only lies to the CAS where the "*statutes or regulations*" of ASA provide for an appeal. ASA submits that it is the ASA rules and regulations that apply as Mr Thys is not an international-level athlete and the ASA rules and regulations do not grant him a right of appeal to the CAS.

5.5 Alternatively, in the event it is found that the CAS has jurisdiction, ASA submits that Mr Thys has not exhausted the legal remedies available to him as he had a right of appeal to "*an independent board know as the Anti-Doping Appeal Board*", as contemplated by IAAF Rules 42.4 and 60.12, which Mr Thys failed to do. ASA also points to clause 31.1 of its Constitution which, it submits, "*confers a further domestic remedy, namely arbitration pursuant to clause 31.1 thereof*". ASA concludes that the CAS should not entertain the appeal for want of jurisdiction.

5.6 At the hearing, ASA produced a two-page document outlining the disciplinary procedure for national-level athletes and the corresponding procedure for international-level athletes.

5.7 In his written response to ASA's jurisdictional objections, Mr Thys submits that ASA and/or IAAF are estopped from denying CAS jurisdiction based on a letter dated 10 April 2008 sent from Dr Gabriel Dolle, the IAAF Anti-Doping Administrator, to

Mr Thys' lawyer. In the letter, Dr Dolle offers to resolve the matter for a 2-year suspension, subject to Mr Thys' acceptance of an anti-doping rule violation and informs Mr Thys of the following:

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

5.8 Mr Thys submits that he "*reasonably and detrimentally relied on that advice from the IAAF, and filed this appeal to CAS on his own initiative when he was dissatisfied with the ultimate decision of the ASA Disciplinary Tribunal.*"

5.9 Mr Thys further submits that IAAF Rule 38.7 "*required that the ASA Disciplinary Tribunal be completed within two months of the date that the athlete requested a hearing*" and that as the ASA violated that rule, IAAF Rule 60.10(d) provided Mr Thys with a right of appeal to the CAS. Mr Thys also submits that he is entitled to recourse to an appellate body which can provide a "*fair, impartial and independent hearing body*" something, he alleges, the South African Institute for Drug-Free Sport's Anti-Doping Appeal Board cannot provide. Finally, Mr Thys submits that the Panel can incorporate the current IAAF list of international events in which the Seoul Marathon is designated as an International Competition and thereby find that Mr Thys was an International-Level Athlete within the meaning of IAAF Rule 60.11.

5.10 At the hearing, ASA reiterated its submissions set out above and refuted Mr Thys' arguments on (i) estoppel, (ii) IAAF Rule 60.10 (iii) allegations of bias and (iv) Mr Thys' designation as an international level athlete. ASA argued that estoppel is an English-law doctrine and cannot be invoked to confer jurisdiction on a court or tribunal that would not otherwise have jurisdiction. ASA also submitted that Dr Dolle sought to broker a settlement on behalf of the IAAF and not on behalf of ASA. In relation to IAAF Rule 60.10, ASA submitted that it is irrelevant and inapplicable as here, a series of hearings were held. ASA argued that any allegation of bias against the South African Appeal Board ought to have been remedied at national level. Finally, ASA submitted that the status of an athlete is a matter of fact – not a procedural issue – and therefore the Panel should have regard to the IAAF list of international events which existed at the time Mr Thys competed in the Seoul marathon.

5.11 In response, Counsel for Mr Thys quoted that part of Article R47 of the Code which provides for an appeal where "*the parties have concluded a specific arbitration agreement*" and submitted that Dr Dolle's letter amounts to an arbitration agreement. Counsel for Mr Thys also submitted that it was not clear from the ASA rules what route of appeal was open to Mr Thys. Counsel referred to the CAS case *CAS 94/129 USA Shooting & Q. / Union Internationale de Tir (UIT)* and submitted that anti-doping

rules must be clear and unambiguous. Counsel for Mr Thys also submitted that in all the correspondence at no point did ASA tell Mr Thys what his rights of appeal were. ASA allegedly knew that Mr Thys was considering filing an appeal with the CAS because Mr Thys said so in the South African Press.

5.12 At this point, the President of the Panel asked Mr Thys to give evidence as to what guidance he was given in relation to his appeal possibilities.

5.13 Mr Thys gave evidence that ASA never outlined what his rights were. He said he made statements in the Press that he would take his case to the CAS and an article appeared in the Press after the first hearing in April. Mr Thys said that he got many calls from Mr Chris Hattingh (the ASA representative at the hearing) asking him to sign a document admitting his guilt or the case would continue to be postponed. Reference was also made to page 714 of the transcript of the ASA disciplinary hearing where the Chairman, Mr Monty Hacker, said "*One of the big problems that we have over here is that IAAF is watching this matter very, very closely, and the likelihood is, that if, in their view, an incorrect decision is taken, it will go straight to CAS*".

5.14 In rebuttal, Counsel for ASA stated that there was no evidence or facts proving any bias which could lead the Panel to come to a conclusion that there was bias and further, any alleged procedural irregularities could be dealt with on appeal. Counsel also stated that it is "*hotly disputed*" by the ASA that there had been any mistreatment of Mr Thys. Counsel for the ASA pointed out that the parties to this procedure are ASA and Mr Thys and no arbitration agreement exists between them. In relation to Dr Dolle's letter, Counsel submitted that Dr Dolle was simply giving advice; he was making an offer that was not accepted and it follows that an unaccepted offer is not an agreement. Counsel submitted that the relevant agreement is the agreement between the parties and the parties here have not concluded an agreement. Counsel also referred to Article 178 of the Swiss Federal Code on Private International Law (the "PILA"), which sets out the form of an arbitration agreement. Counsel refuted Mr Thys' submission that the sentence imposed was in excess of the maximum sanction.

5.15 In conclusion on the jurisdictional issue, Counsel for Mr Thys submitted that the case comes down to the Panel's interpretation of Dr Dolle's letter. Counsel also referred to the extract from the transcript of the ASA Disciplinary Tribunal where the Chairman said the IAAF would be watching the case very closely.

5.16 Counsel for ASA rebutted that the reason the IAAF was watching the case very closely was to consider whether it would exercise its right of appeal to the CAS.

PANEL'S ANALYSIS ON JURISDICTION

A THE CLAIMS OF THE PARTIES

5.17 The Appellant has argued that CAS has jurisdiction in this matter in accordance with Article R 47 of the Code. The claim for CAS jurisdiction is primarily based on four arguments:

a) ASA and/or the IAAF are estopped from arguing that CAS lacks jurisdiction due to the fact that Mr. Gabriel Dolle, who is the IAAF anti-doping administrator, in a letter of 10 April 2008 (Exhibit 15) has provided Mr. Thys with the right to appeal the decision of ASA on his own initiative directly to CAS;

b) IAAF anti-doping Rule 60.10 provides Mr. Thys with an independent basis for an appeal to CAS;

c) Fundamental principles of fairness and due process should guarantee Mr. Thys an appellate tribunal that is free from bias and conflict of interest, which cannot be obtained before the South African Institute for Drug Free Sport; and finally

d) The CAS Tribunal can incorporate the current IAAF list of International Events in deciding the procedural question of where Mr. Thys should have appealed the decision of the ASA disciplinary tribunal.

5.18 The Respondent, ASA, on the other hand, has disputed the jurisdiction of CAS stating that neither the ASA constitution nor the pertinent IAAF anti-doping rules and procedural guidelines for National-Level athletes provide Mr. Thys with the right to appeal the matter to CAS. Nor has Mr. Thys exhausted the legal remedies available to him in accordance with the statutes and regulations of the ASA constitution and the IAAF anti-doping statutes and regulations.

5.19 Based upon the parties' dispute on the question of jurisdiction of the CAS, the panel shall preliminary examine whether CAS in accordance with Article R47 has jurisdiction to decide this matter.

5.20 Article R47.1 of the Code is set out in full above at paragraph 5.1.

5.21 Given the wording of Article R47 the panel will firstly examine the question whether the relevant statutes or regulations of the ASA and/or the IAAF provide Mr. Thys with a right to appeal to CAS the decision of the ASA Disciplinary Commission, secondly whether "a specific arbitration agreement" exists and whether the legal remedies available to him prior to an appeal have been exhausted.

B THE CONSTITUTION OF ASA

5.22 Mr. Thys is a South African national and as a marathon runner and National Athlete of South Africa, he is subject to the rules and regulations laid down by ASA in the constitution of ASA (Exhibit F). In doping control matters, it is stated in the ASA constitution under clause 3.2.17.4 that the IAAF anti-doping rules and procedural guidelines are incorporated as the operative provisions of ASA. This provision states the following:

"3.2.17.4 All Athletes, Athlete support personnel and persons under the jurisdiction of ASA shall be bound by IAAF anti-doping rules and procedural guidelines".

C THE IAAF ANTI-DOPING RULES

5.23 The IAAF Anti-Doping Rules make an important distinction between National-Level Athletes and International-Level Athletes, when it comes to testing the Athletes in out-of-competition tests, result management, and the right to appeal decisions of national doping tribunals to CAS. The definition of an "International-Level Athlete" is found under the definitions in the IAAF Handbook on page 41, and this definition provides the following:

"International-Level Athlete

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

Further, the "Registered Testing Pool" is defined on page 33 in the IAAF Handbook, and this definition provides the following:

"Registered testing pool

The pool of top-rank athletes established by the IAAF, who are subject to both in-competition and out-of-competition testing as part of the IAAF's testing programme".

D THE STATUS OF MR. THYS AND THE 2006 SEOUL MARATHON

5.24 Mr. Thys was not in the Registered Testing Pool for out-of-competition testing at the time of the 2006 Seoul Marathon. This fact is not disputed by the parties. In order to be considered as an International-Level Athlete pursuant to IAAF rules, the 2006 Seoul Marathon should have been listed in 2006 as an International Competition by the IAAF.

5.25 The 2006 Seoul Marathon was not on the 2006 IAAF list of International Events. As pointed out in the Appellant's 'Response to Arguments Regarding Jurisdiction of CAS' of 25 March 2009, the 2006 IAAF list of International Events did, however, not

identify any marathons as international competitions, which clearly appears to have been an oversight that was corrected by the IAAF at a later stage. The current IAAF list of International Events as of at least 2008 – and maybe also 2007 – shows that the Seoul Marathon has been upgraded and now appears on the list of the IAAF's International Competitions (Exhibit D to the Appellant's Response).

5.26 The Appellant has argued that the IAAF list of International Events serves "*a purely procedural function with respect to the mechanics/procedure of an appeal*", and therefore the panel should apply the IAAF list of International Events that is currently in place as opposed to the 2006 IAAF list of the International Events; a submission, which, if accepted, would grant Mr. Thys the status of an International-Level athlete for the purposes of the IAAF Handbook, Chapters 3 and 4.

5.27 It is the opinion of the Panel that the substantive Anti-Doping Rules that ought to be applied in this matter are those that were in effect at the time of the alleged doping offence, *i.e.*, when the 2006 Seoul Marathon was held on 12 March 2006. At that time the Seoul Marathon was not on the IAAF list of International Events, and for the Panel the fact that the marathon event at a later stage, whether it was in 2007 or 2008, was upgraded to be on the list of International Events, should not have any legal significance on the status of Mr. Thys as a National-Level Athlete at the time that the doping test was conducted.

5.28 The Panel states that the distinction between an International-Level or a National-Level Athlete is not merely a procedural issue, as claimed by the Appellant, referring to the CAS cases *CAS 2000/A/274 S.V. FINA* and *CAS 2004/O/645 USADA vs. Montgomery* in which CAS relied on procedural rules presently in force regardless of when the facts at issue occurred.

5.29 The distinction between an International-Level Athlete and a National-Level Athlete in the IAAF doping rules is a matter of substantive law and throughout the IAAF Handbook, significant and materially important differences are made between the rights and obligations of International-Level and National-Level athletes. In addition, the Panel is satisfied that no legal basis exists in the IAAF rules to change the status of an athlete during or after a doping procedure, where an event changes status on the next annual IAAF list of International Events. The Panel is of the opinion that giving Mr. Thys the status of an International-Level Athlete due to the later upgrading of the Seoul Marathon as an International Event would be considered an unlawful retrospective amendment of a material rule.

5.30 On the issue of the status of the 2006 Seoul Marathon and subsequently the status of Mr. Thys, the Panel therefore must conclude that Mr. Thys is a National-Level Athlete, because he was not selected for the Registered Testing Pool for out-of-competition testing, and he did not compete in an International Competition under Rule 35.7 at the time, when he participated in the 2006 Seoul Marathon.

E DUE PROCESS REQUIREMENTS DURING THE DOPING HEARINGS AT THE NATIONAL LEVEL

5.31 The IAAF handbook sets out various disciplinary procedures in relation to conducting a proper hearing in a doping case. Rule 38.5 provides:

"Every athlete shall have the right to request the hearing before the relevant tribunal of his National Federation, before any sanction is determined in accordance with these Anti-Doping Rules .....".

Furthermore, certain time limits for the holding of the hearing are prescribed in Rule 38.7:

"If a hearing is requested by an athlete, it shall be convened without delay and the hearing held within 2 months of the date of notification of the athlete's request to the member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates as soon as they are fixed. The IAAF shall have the right to attend all hearings as an observer. However, the IAAF's attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal the Member's decision to CAS pursuant to Rule 60.23 below".

IAAF Rule 38.8 also provides the athlete with certain fundamental rights of due process. This rule provides:

"The athlete's hearing shall take place before the relevant hearing body constituted or otherwise authorized by the Member. The relevant hearing body shall be fair and impartial and the conduct of the hearing shall respect the following principles: the right of the athlete to be present at the hearing and to present evidence, including the right to call and question witnesses, the right to be represented by legal counsel and an interpreter (at the athlete's expense) and a timely and reasoned decision in writing".

5.32 The provisions under IAAF Rule 38 should be read in conjunction with the provision in Article 31.7 of the ASA Constitution, which also provides the athlete with a right of due process. This rule states as follows:

"All disputes effecting members involving athletes, athlete support personnel or other persons under its jurisdiction, however, arising, with a doping or non-doping related matter shall be submitted to a hearing before ASA's Disciplinary Committee or otherwise authorized by ASA. Such a hearing shall respect the following principles:

31.7.1 A timely Hearing before a fair and impartial Hearing Body;
31.7.2 The right of the individual to be informed of the charge against him;
31.7.3 The right to present evidence, including the right to call and question witnesses;
31.7.4 The right to be represented by legal counsel and an interpreter (at the individual's expense); and
31.7.5 The right to a timely and reasoned decision in writing."

5.33 These due process provisions in the IAAF doping rules and the ASA Constitution may play a significant part in an Athlete's ability to appeal a decision made by a National Disciplinary Committee. The IAAF provisions regarding appeals are found in Rules 60.09 – 60.17 and provide the following:

"Appeals

9. All Decisions subject to appeal under these rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provision set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23.24 below).

10. The following are examples of decisions that may be subject to appeal under these rules:
(a) Where a Member has taken a decision that an athlete, athlete support personnel or other persons has committed an anti-doping rule violation.
(b) Where an athlete accepts a Member's decision that he has committed an anti-doping rule violation, but seeks a review of the Doping Review Board's determination under Rule 38.18 that there are no exceptional circumstances in the case justifying a reduction of period of ineligibility to be served.
(c) Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed an anti-doping rule violation.
(d) Where testing has indicated the presence of a prohibited substance or the use of a prohibited method and, contrary to Rule 38.7, the Member has refused or failed to provide the athlete with a hearing within the relevant time period.
(e) Where the IAAF has taken a decision to deny an International-Level athlete a TUE under Rule 34.5(a).
(f) Where the IAAF has issued a sanction against the Member for a breach of the Rules.
(g) Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed a breach of Rule 22.

11. In cases involving International-Level athletes (or their athlete support personnel), or involving the sanction of a Member by the Council for a breach of the Rules, whether doping or non-doping related, the decision of the relevant body of the Member or the IAAF (as appropriate) may be appealed exclusively to CAS in accordance with the provisions set out in Rules 60.25-60.30 below.

12. In cases which do not involve International-Level athletes (or their athlete support personnel), whether doping or non-doping related, the decision of the relevant body of the Member may (unless Rule 60.17 below applies) be appealed to a national review body in accordance with the rules of the Member. Each Member shall have in place an appeal procedure at national level that respects the following principles: a timely hearing before a fair, impartial and independent hearing body, the right to represented by legal counsel and interpreter (at the appellant's expense) and a timely and reasoned decision in writing. The decision of the national review body may be appealed to CAS in accordance with Rule 60.16 below.

Parties entitled to appeal decisions

13. In any case involving International-Level athletes (or their athlete support personnel), the following parties shall have the right to appeal a decision 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 IAAF
(d) the IOC (where the decision may have an effect on eligibility in relation to the Olympic Gamnes); and
(e) WADA (in doping-related matters only).

14. In any case involving a decision by the Council to sanction a Member for a breach of the Rules, the Member affected shall have the sole right to appeal a decision to CAS.

15. In any case which does not involve International-Level athletes (or their athlete support personnel), the parties having the right to appeal a decision to the national level review body shall be as provided for in the rules of the Member, but shall include at a minimum:
(a) the athlete or other person the subject of the decision being appealed;
(b) the other party to the case in which the decision was rendered,
(c) the Member.
The IAAF and WADA (in doping-related cases only) shall have the right to attend any hearing before the national-level review body as an observer. The IAAF's attendance at a hearing in such capacity shall not affect its right to appeal the decision of the national-level review body to CAS in accordance with Rule 60.16 below.

16. The following parties shall have the right to appeal a decision of the national-level review body to CAS:
(a) the IAAF; and
(b) WADA (in doping-related cases only).
No decision may be appealed to CAS until the appeal procedure at national level has been exhausted in accordance with the rules of the Member.

16. If, however, in cases not involving International-Level athletes (or their athlete support personnel), the rules of a Member provide for the right of the IAAF and WADA (in doping-related cases only) to appeal a decision direct to CAS rather than to the national level review body as in Rule 60.15 above, provided the CAS appeal is conducted in accordance with the provisions of Rule 60 below, the CAS decision shall be final and binding upon the athlete, the Member, the IAAF and WADA and no further appeal to CAS shall thereafter be made".

F PROVISION OF AN INDEPENDENT BASIS FOR AN APPEAL TO CAS BY IAAF ANTI-DOPING RULE 60.10

5.34 The Appellant has argued that ASA has failed to comply with IAAF Rules 38.7 by not completing the disciplinary tribunal within 2 months of the date that Mr Thys requested a hearing. By failing to comply with this deadline in IAAF Rule 38.7, the Appellant claims that the IAAF Anti-Doping Rule 60.10 (d) provides Mr. Thys with an independent and immediate basis of appeal to CAS.

5.35 In response thereto, the Respondent has maintained that IAAF Rule 60.10 (d) does not confer jurisdiction upon CAS. Only Article R47 of the Code does this. Secondly, the Respondent maintains that Rule 60.10 (d) is not relevant or applicable to this case, as the provision only covers the situation, where a Member defaults in his obligation or refuses to provide an athlete with a hearing, which the Member is obligated to under IAAF rules. Only in those circumstances, rather than the hearing being staged by the Member, does Rule 60.10 (d) allow the athlete to transfer his initial level hearing to CAS, so that the hearing may be afforded at all. Thirdly, the Respondent argues that even though the hearing did not take place until some time after 2 months as stipulated in Rule 38.7, this delay cannot mean that a whole new hearing process can start before the CAS. Finally, the Respondent maintains that Mr. Thys is not appealing to the CAS to be given the right to a hearing, but rather that he appeals to the CAS to have the result of the initial hearing in South Africa overturned. Therefore, the CAS as a matter of subject matter jurisdiction does not have jurisdiction under Rule 60.10 (d).

5.36 It is the opinion of this Panel that Rule 60.10 (d) is not applicable under the factual circumstances of this case. It is true that the ASA Tribunal convened its first hearing in this matter on 10 September 2006 after having notified Mr. Thys of the positive test on 17 April 2006. Throughout the entire process Mr. Thys has claimed his innocence and at face value the Panel agrees with the Appellant that the 2 months' deadline in Rule 38.7 has not been correctly observed by the ASA in this case. However, Mr. Thys, represented by counsel during the entire hearing process in South Africa, did participate in the hearing proceedings, which went on for more than 30 months. Regrettable as this prolonged hearing process might have been, the Panel finds that the ASA has not "refused or failed to provide the athlete with a hearing within the relevant time period" within the meaning of Rule 60.10 (d). Even if one takes into consideration that Mr Thys' right "to a timely and reasoned decision in writing" according to rule 31.7.5 of the ASA constitution and 38.8 of the IAAF Rules may not have been respected by ASA, the Panel interprets Rule 60.10 (d) at its core as a remedy against "a denial of justice" by a member towards an athlete. Technically, it is not a right of appeal, which this provision sets out, but rather a right to a fair and timely hearing in case such a hearing has been refused to the athlete. The Panel agrees with the Respondent's argument that the Appellant's appeal must be construed as an appeal to have the decision of 11 December 2008 reached by the ASA Disciplinary Committee overturned. Thus, the Panel must conclude that Rule 60.10 (d) is not applicable in this case, nor does it confer jurisdiction onto CAS, given the circumstances of this case.

G OTHER PROVISIONS OF A DIRECT APPEAL TO CAS UNDER IAAF RULE 60

5.37 As concluded by the Panel above, Mr. Thys is to be considered a National-Level athlete under the IAAF rules, which prevents Mr. Thys from applying the right of an International-Level athlete to appeal a decision to CAS in accordance with IAAF Rule 60.13, cf. Rule 60.11. These appeal options are simply not available to Mr. Thys as a

result of the sharp distinction between the appeal possibilities of National-Level athletes versus International-Level athletes. Thus, none of these provisions, directly or by analogy, would provide CAS with jurisdiction to hear Mr. Thys' case.

5.38 The Appellant has argued that fundamental principles of fairness and due process should guarantee Mr. Thys an appellate tribunal, *i.e.*, the CAS, that is free from bias and conflict of interest, which in the eyes of the Appellant cannot be obtained before the South African Institute for Drug Free Sport. The Panel understands the Appellant's argument in such a way that if the alleged bias and conflict of interest of the South African Institute for Drug Free Sport could be established, this would provide Mr. Thys with a right to appeal the decision directly to the CAS, thereby asserting jurisdiction onto CAS.

5.39 The Respondent has, on the other hand, maintained that Rule 60.12 cannot be construed as providing CAS with jurisdiction. Firstly, the South African Institute for Drug Free Sport Act explicitly states in § 17 (4) (a) that the Anti-Doping Appeal Board may hear appeals involving National-Level athletes arising from decisions regarding sanctions for anti-doping rule violations including disqualification, provisional suspension or period of ineligibility. Mr. Thys is free to refrain from bringing his appeal before the South African Anti-Doping Appeal Board, if he is concerned about possible bias on the Appeal Board. The Respondent alleges further that Mr. Thys could have referred the matter to arbitration in accordance with Clause 31 of the ASA Constitution. If he also considered that the Arbitration Panel appointed under the constitution of the ASA might be biased, he would still have recourse to Section 13 of the South African Arbitration Act, which provides the court with a right to set aside the appointment of an arbitrator or umpire or remove him from office "on good cause shown".

5.40 The Respondent further points to the fact that the South African Institute for Drug Free Sport Anti-Doping Appeal Board is equally subject to Section 34 of the Constitution just as the South African Arbitration Act, if Mr. Thys was concerned that the Tribunal before whom he appeared in South Africa was biased. The Respondent thus concludes that South African legislation provides Mr. Thys with ample opportunities to remedy such a bias.

5.41 In reviewing Rule 60.12 and the Appellant's submission that the non-fulfilment of this provision's due process guarantees towards the athletes would automatically confer jurisdiction onto CAS, the Panel disagrees with the Appellant. The wording of Rule 60.12 cannot, in the opinion of the Panel, be construed such that an allegation of potential bias would result in CAS jurisdiction. The Panel sees that it would be almost impossible at this point to form an opinion about the question whether an appeals board appointed either in accordance with the South African Institute for Drug Free Sport Act or an arbitration tribunal under the ASA Constitution would be considered biased towards Mr. Thys. There is no hard evidence to suggest that such an allegation would be true for the very simple reason that neither an appeal board nor an arbitration

tribunal has even been appointed following Mr. Thys' appeal directly to CAS. The allegations made by the Appellant that a number of persons involved in the ASA Disciplinary Committee trial also sits on the current board of directors of the South African Institute for Drug Free Sport, does not in the opinion of the Panel disqualify the entire legal remedy available to Mr. Thys under the Act. The same would apply for the composition of an arbitration tribunal appointed under the ASA Constitution.

5.42 The Panel agrees with the Respondent's submission that it is not a legitimate concern of CAS to decide at this point whether or not Mr. Thys would have been granted a fair hearing on appeal. This decision would be for the South African courts to decide, not the CAS. For those reasons, the Panel must conclude that Rule 60.12 is not a provision which confers jurisdiction onto CAS.

5.43 Thus, based upon the above facts and submissions the Panel concludes that neither the ASA Constitution or other ASA regulations nor the IAAF Anti-Doping Rules provide Mr. Thys with a right to appeal the ASA Disciplinary Committee's decision of 11 December 2008 directly to CAS.

H SPECIFIC ARBITRATION AGREEMENT WITHIN THE MEANING OF ARTICLE R47 CONSTITUTED BY THE IAAF'S LETTER OF 10 APRIL 2008

5.44 In accordance with Article R47 of the Code, CAS jurisdiction can also be established provided the parties have concluded a specific arbitration agreement. In this matter one particular letter from the IAAF to Mr. Japie Van Zyl, who at the time represented Mr. Thys at the hearings in South Africa, has invoked the Appellant to claim that ASA and/or the IAAF are estopped from arguing that CAS lacks jurisdiction. The Appellant has argued that Mr. Thys has relied on the letter signed by Dr. Gabriel Dolle, and that no other recourse was mentioned in the ASA Disciplinary Committee's decision of 11 December 2008.

5.45 The Respondent has objected to the notion that a single letter sent by Dr. Dolle would confer jurisdiction onto CAS contrary to the rules of the IAAF for National-Level athletes. Dr Dolle was acting on behalf of the IAAF, not on behalf of ASA, who was unaware of Dr. Dolle's attempt to broker a settlement in the matter, which at the time the proposal was made, Mr. Thys had served a period of 2 years' ineligibility. The Respondent rejects the assertion that Mr. Thys had relied on the letter sent by Dr. Dolle.

5.46 The passage in Dr. Dolle's letter to Mr. Van Zyl, in a fax letter dated 10 April 2008, is set out above at paragraph 5.7. The passage quoted above is taken from the letter, in which Dr. Dolle on behalf of the IAAF offers what he considers to be a "*fair and expedite settlement*" of Mr. Thys' case, namely Mr. Thys' accepting of an anti-doping rule violation under IAAF rules and a 2 years sanction starting retroactively from the

date of his provisional suspension on 25 April 2006 and expiring on 24 April 2008. An offer which Mr. Thys refused.

I THE PANEL'S CONSIDERATIONS REGARDING CAS JURISDICTION BASED ON DR. DOLLE'S LETTER

5.47 Given the fact, that there is no specific provision in the Code regarding the meaning of a "specific arbitration agreement" contemplated by Article R47 of the Code, the principles in the PILA regarding the arbitration agreement are applicable, if, only by analogy, this agreement being a type of "*compromise arbitral*".

5.48 According to Article 178 (1) of the PILA, an arbitration agreement is valid as to the form, if it is made in writing, by any means of communication, which establishes the terms of the agreement by a text. This provision is interpreted by legal scholars as not requiring a signature and only calls for a "simplified written form" [1]. The agreement can be entailed in one or more documents[2]. There is a growing tendency among legal scholars towards a more liberal approach, considering that Article 178 (1) of the PILA doesn't provide for a form but requires only that the arbitral agreement be identifiable as a text. Therefore, even a written or oral proposal referring to a text, accepted orally or implicitly, would amount to an arbitral agreement[3]. For other scholars, less permissive, a written expression of both parties' will to arbitrate is necessary, however, under the condition of abuse of right[4].

5.49 Legal authors also consider that the principle of good faith (which is a general principle of transnational public policy or international law) prevents a party from raising a defect in the written arbitration clause, if that party offered to arbitrate, if such a way as to inspire the other party's confidence and under the condition that this confidence deserves protection[5].

5.50 As to its contents, the arbitral agreement should include the following elements: the will to submit to arbitration, the reference to a legal relationship between the parties and to a particular dispute (already existing or future)[6]. Article 178 (1) of the PILA provides that the contents of the arbitration agreement should either comply with the requirements of the law chosen by the parties or the law governing the object of the dispute or with Swiss law.

5.51 According to the case-law of the Swiss Federal Tribunal, if a party knows of the existence of the arbitration clause and does not object, it is deemed to have accepted such a clause, in light of the circumstances of the case and according to the principle of

[1] Jean-François POUDRET/Sébastien BESSON, Droit comparé de l'arbitrage international, Zurich, Basel, Geneva, 2002, n°193.
[2] Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, Arbitrage international, Droit et pratique à la lumière de la LDIP, Berne, 2006, n°215 -217.
[3] KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n°219 ; BLESSING, *op. cit.*, n°486; François KNOEPFLER/Philippe SCHWEIZER, Jurisprudence suisse en matière d'arbitrage international, *in : RSDIE 5/1995, p. 587-588.*
[4] POUDRET/BESSON, *op. cit.*, n°193 and n°205. A significant part of legal scholars are of this same opinion.
[5] BLESSING, *op. cit.*, n°487.
[6] POUDRET/BESSON, *op. cit.*, n° 150.

good faith[7]. According to the circumstances, a given behaviour can replace, according to the principle of good faith, the respect of formal requirements[8]. Thus, the formal requirements can be supplemented by the application of the principle of good faith.

5.52 In a case concerning a horse rider, who was member of a local horse riding club, and ultimately member of the Fédération Equestre Internationale, the Swiss Federal Tribunal examined the implications of the signature by the horse rider on documents referring to an arbitration procedure before the CAS. The Swiss Federal Tribunal ruled that, on the basis of the circumstances of the case and applying the principle of confidence, giving particularly the lack of objection to the arbitration clause, the signature of the horse rider bound him, whereby CAS accordingly had jurisdiction[9].

5.53 In another case between a basketball player and the Fédération Internationale de Basketball (FIBA), the Swiss Federal Tribunal even went further with this reasoning. Indeed, it considered that an arbitration agreement by reference can be accepted by an athlete by proceeding in conformity with such agreement. In its decision, the Swiss Federal Tribunal stated that Article 178 (1) of the PILA did not exclude arbitration agreements by reference to another document. As regards the substance of such agreement, it was examined under Article 178 (2) referring to Swiss law, which included, among others, the principle of good faith. The Swiss Federal Tribunal considered therefore that even if the athlete was not a member of the international federation, the federation made it clear that it wanted to handle the athlete as one of its members, and the athlete proceeded accordingly without objections. Thus, a valid acceptance of the arbitration agreement existed. The Swiss Federal Tribunal consequently ruled that the act of filing an appeal constituted an acceptance on behalf of the athlete and that the CAS therefore had jurisdiction[10]. In conclusion, the case-law of the Swiss Federal Tribunal is liberal as regards the form of the arbitration agreement, in particular of the arbitration clause by reference, as confirmed in several recent decisions[11].

5.54 This approach is also that of several CAS awards, for instance holding that the lack of protest from the athlete means that he silently has accepted the arbitration agreement[12]. Most of the above cited cases examine the consequences of the lack of opposition from an athlete, when he knows that the regulations of his federation provide for an appeal to the CAS. However, the same principles can and must be applied to the federations, which are also bound by the principle of good faith. Furthermore, in the Swiss Federal

[7] Decision of the Federal Tribunal of 7 February 2001, in the matter between Stanley Roberts v/ Fédération Internationale de Basketball, 4P.230/2000, § 2 b); Decision of the Federal Tribunal of 31 October 1996, in the case 4C.44/1996, English translation *in* Mathieu REEB, Digest of CAS Awards, vol. I, p. 585, § 3 c).
[8] Decision of the Federal Tribunal ATF 121 III 38 § 3 p. 45.
[9] Decision of the Federal Tribunal of 31 October 1996 cited above, § 3 c).
[10] Decision of the Federal Tribunal of 7 February 2001 cited above, § 2 a) and b).
[11] Decision of the Federal Tribunal of 22 March 2007, in the case 4P.172/2006, § 4.3.2.2.; Decision of the Federal Tribunal of 9 January 2009, in the case 4A_460/2008, § 6.2; Decision of the Federal Tribunal ATF 129 III 727, § 5.3.1.
[12] Award of 23 May 2003 in the case TAS 2002/A/431, Union Cycliste Internationale v/ R. & Fédération Française de Cyclisme, § 4 – 8, *in*: Mathieu REEB, Digest of CAS Awards, vol. III, p. 412.

Tribunal's case-law, the possibility of acceptance of a proposal to arbitrate by the filing of an appeal is accepted.

5.55 In the present case, the rules governing the dispute are those of the ASA, which have made the IAAF Anti-Doping Rules its operative provisions. Thus, the ASA Constitution only operates with the possibility of appeal, provided for in Article 60.12-60.16 in the IAAF Rules, but does not exclude a specific arbitration agreement. Therefore, only the Code and Swiss law apply to the substance of the arbitration agreement.

5.56 The possibility of a specific arbitration agreement bringing a claim before CAS is provided for by Article R47 of the Code. Under Swiss law, no provision prohibits such a course of action. The contents of the arbitration agreement in this specific case satisfy the general criteria stated above: it defines the parties (ASA as a member of IAAF acting under its rules and Mr. Thys), it refers to a legal relationship (Mr. Thys' status according to the IAAF rules as an athlete belonging to the ASA) and it defines the existing dispute, which should be submitted to the CAS (the decision of the ASA Disciplinary Commission about Mr. Thys' suspension). The question whether ASA is bound by the IAAF will be discussed later.

5.57 As to the form of the arbitration agreement, it does not conform at face value to the strict criteria of Article 178 (1) of the PILA. Indeed, the IAAF's letter was not formally accepted by Mr. Thys, other than through his appeal to the CAS. However, as discussed above, the principle of good faith supplements the formal defect in the arbitration clause. Mr. Thys could rightfully rely in good faith on the offer made to him by the IAAF and acted upon this by filing his appeal to the CAS.

5.58 The Panel is satisfied that the ASA was aware of the letter Mr. Dolle sent to Mr. Thys and thus of the fact that IAAF had proposed to Mr. Thys not only a settlement of the case but also that he could file a direct appeal to the CAS. During the original ASA hearing on 1 September 2008, Mr. Thys referred to the letter of IAAF offering a deal (page 803 ff of the minutes) and reported a telephone call between him and the representative of ASA before the ASA panel, Mr. Hattingh, where the latter said to him "*The IAAF need to speak to you.*" (Page 805 of the minutes) and even advised "*You should keep your phone open because they need speak to you*". This has not been disputed by ASA.

5.59 Given Mr. Thys' explanation during the hearing before the CAS combined with the minutes of the hearing before the ASA Disciplinary Committee, the Panel feels convinced that ASA had knowledge of and accepted the appeal procedure proposed by Dr. Dolle on behalf of IAAF.

5.60 Additionally the letter itself confirms that it is the IAAF as umbrella organization ruling this case. Dr. Dolle contacted Mr. Thys' counsel in this letter "*on behalf of the*

IAAF" – not as a personal initiative – not at all saying that this offer is still subject to any decision of ASA but only "*subject to Mr. Thys's acceptance of an anti-doping rule violation…*" and "*a two-year sanction…*"

5.61 Again in the email Mr Thomas Capdevielle wrote to Mr. Thys on 10 April 2008 (exhibit 16 of the Appellant's Appeal Brief) the IAAF acts as the one organization offering a settlement to this case allowing Mr. Thys "*to return to competition in a timely fashion and ensuring an acceptable conclusion for the IAAF, in compliance with its rules.*" No reference is made to any further confirmation needed by ASA, giving the impression that the IAAF acts for both, ASA as well as itself. When Mr. Thys answered the same day telling Dr. Dolle that he is "*willing to take the case to the Court for Sports of Arbitration (CAS)*" no objection was made by IAAF and/or ASA.

5.62 As pointed out above, the IAAF Anti-Doping Rules did in fact open up for a direct appeal to CAS for International-Level athletes. The Panel acknowledges that when Mr. Thys received the letter from IAAF, he could legitimately interpret it as referring to the procedure set forth by the provision in Article 60.12 understanding it as an exception made for him by the IAAF to use this direct appeal. It should not be forgotten in this context that the procedure before the ASA Disciplinary Commission had lasted more than 2 years, when Dr. Dolle made the settlement proposal. Given this exceptional length and the ongoing communication between ASA and the IAAF, Mr. Thys could in good faith understand from the behaviour of both the IAAF and ASA that they did not wish him to appeal on the national level, but to direct an appeal directly to the CAS.

5.63 The assumption of close links between ASA and IAAF in this case has been supported by the former chairman of the ASA panel who stated on 1 September 2008 that "*IAAF is watching this matter very, very closely, and the likelihood is, that if, in their view, an incorrect decision is taken, it will go straight to CAS.*" And further "*We do not have the power to lift* (the suspension) *but IAAF can authorize us to do so.*"

5.64 In addition, the decision taken by the Disciplinary Commission of the ASA, communicated to Mr. Thys in the form of a simple one-page letter dated 11 December 2008 does not contain one single indication of the appeal procedure, even less a denial of the IAAF's previous letter. The Panel feels satisfied that ASA and the Disciplinary Commission knew of the existence of Dr. Dolle's letter of 10 April 2008, and the Disciplinary Commission should have brought Mr. Thys' attention to the fact that he had to appeal to national authorities, if the direct appeal to the CAS was not possible in ASA's view. However, the decision of ASA does not contain any such precision, in fact nothing was said about Mr. Thys' possibility of an appeal, and he could therefore in good faith rely on the fact that this silence meant the approval of Dr. Dolle's letter. Thus, the letter of Dr. Dolle incorporates, by reference, Article 60.11 of the IAAF Rules. Such a reference is considered as valid by the Swiss PILA, as interpreted by the case-law of the Swiss Federal Tribunal. The Panel is of the opinion that such a liberal approach is correct, because it favours arbitration.

5.65 Therefore, it is clear that IAAF accepted to arbitrate with Mr. Thys, and that, on the other hand, Mr. Thys accepted the offer to arbitrate by bringing his claim before the CAS. What remains now to be examined is the question of the capacity of the IAAF to obligate ASA vis-à-vis the offer to arbitrate the case before CAS.

5.66 The letter of 10 April 2008 and the declarations of the IAAF at the hearings were factual elements known to ASA and to the arbitral tribunal, which rendered the decision of 11 December 2008. Given this fact and given that the procedural rules related to the appeal to the CAS are contained exclusively in the IAAF's own regulations, the Panel finds that ASA was bound by the agreement of IAAF to bring the dispute directly before the CAS.

5.67 The extension of the arbitration agreement to third parties is possible according to legal literature. If the third party is referred to in the arbitration agreement, the significance of this reference must be determined by way of interpretation[13]. Further, a tacit acceptance of the arbitration agreement is also possible by the represented party, for instance in a group of companies[14]. The issue of "extension" must be decided according to the most favourable law under Article 178 (2) of the PILA, thus Swiss law can be applied.

5.68 Under Swiss law, representation is regulated by Article 32 ff of the Swiss Code of Obligations (CO). Article 38 (1) of the CO provides that if a person obligates a third person without powers, this latter only becomes bound by the contract, if he ratifies it. However, according to the case-law of the Swiss Federal Tribunal, such ratification can result from the actions of the represented or from his silence, according to the circumstances[15]. Thus, the condition is that the co-contractor could believe in good faith that the represented party would protest against the lack of powers and consequently can interpret the former's silence as an acceptance[16].

5.69 Furthermore, the issue of "extension" must be dealt with using the test of the "fair and reasonable expectations of the parties", taking into account the behaviour of the parties[17]. Also the general principles of estoppel or good faith are crucially important[18].

5.70 According to the case-law of the Swiss Federal Tribunal, the conditions for the extension of the arbitration agreement are not strict. As a first condition, the agreement must respect the conditions of Article 178 (1) of the PILA (except in the case of abuse of process, where such a condition must be fulfilled). Then, the personal scope of the arbitration agreement is determined in accordance with Article 178 (2) of the PILA.

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[13] POUDRET/BESSON, *op. cit.*, n°250.
[14] POUDRET/BESSON, *op. cit.*, n°251. However, the will of the party to be represented must be proven without doubts according to some authors (POUDRET/BESSON, *op. cit.*, n°264).
[15] ATF 43 II 293 (=JT 1917 I 642); ATF 128 III 129 (=JT 2003 I 10, SJ 2002 I 389).
[16] ATF 124 III 355 (=JT 1999 I 394), consid. 5. Also, see the cases cited under footnotes n°7, n°8 and n°11, which consider the lack of protest by the party who is to be bound by the arbitration agreement as his acceptance.
[17] Marc BLESSING, Introduction to Arbitration – Swiss and International Perspectives, Basel, 1999, n°497.
[18] BLESSING, *op. cit.*, n°502-503.

Thus, the Swiss Federal Tribunal upheld the decision of an Arbitral Tribunal, which admitted its jurisdiction, based on an extension of the arbitral agreement to a non-signatory, in accordance with the usages of international commerce[19]. It can be deducted from this case-law that the Swiss Federal Tribunal treats the extension of the arbitration agreement in a liberal manner, as long as an initial agreement is determined.

5.71 In the present case, firstly the IAAF is the federation, which is responsible for all national athletic federations. As such, its rules and regulations bind the national federations, such as ASA. All Anti-Doping Rules of the IAAF are by reference incorporated into the constitution of ASA. This situation could be compared to that of an affiliate company and its parent company, which is a typical example of "extension"[20]. Accordingly, the decision of the IAAF to allow a direct appeal before the CAS binds ASA. In addition, the IAAF clearly expresses the view that it would be the ASA Disciplinary Commission's decision which would be brought to the CAS. Also the IAAF could not have intended to bind itself by the arbitration agreement, because Mr. Thys is not and was not in a direct relationship with IAAF. On the contrary, IAAF manifestly wanted to act for ASA.

5.72 Secondly, ASA was aware of the existence of the letter of Dr. Dolle as pointed out above. Accordingly, ASA was, in the Panel's view, perfectly aware of the existence of the assurances of Dr. Dolle and did not deny them, although it had the chance of doing so. ASA therefore implicitly accepted, by its behaviour, to allow Mr. Thys to appeal directly before the CAS. One could also ask the question: What should Mr. Thys have done otherwise after having received Dr. Dolle's letter and not having any indications pointing to another recourse in ASA's letter of 11 December 2008?

5.73 Thirdly, Mr. Thys could rely in good faith on the fact that if ASA did not wish to be bound by the IAAF declaration, it would have protested. This not having been the case, at least until the appeal was made before the CAS, Mr. Thys could presume in good faith that ASA agreed with a direct appeal to the CAS. Mr. Thys could also rely in good faith on the authority of IAAF over ASA, in the sense that he could presume that a decision of the IAAF binds ASA.

5.74 Fourthly, under these factual circumstances the IAAF and ASA could not validly claim that ASA was not bound by IAAF's letter of 10 April 2008. Such an argument, raised before the panel by ASA, would in the Panel's view constitute an abuse of process in the meaning of Article 2 (2) of the Swiss Civil Code, given the facts stated above.

5.75 Under these circumstances ASA is bound by the letter of Dr. Dolle on behalf of IAAF and by its own consequent silence. ASA has therefore also waived the necessity of any internal remedies, additionally by not giving Mr Thys any advice which remedy should

[19] Decision of the Federal Tribunal, ATF 129 III 727, § 5.3.2.
[20] POUDRET/BESSON, *op. cit.*, n°252. Although, according to the case-law of the Federal Tribunal, the group of companies doctrine is seldom applied in Switzerland (POUDRET/BESSON, *op. cit.*, n°260).

be taken and accepted to allow Mr. Thys to appeal directly to the CAS after its national decision.

5.76 The Panel finds that such an acceptance is understandable, given the extraordinary duration of the hearing before the Disciplinary Commission of ASA (nearly 3 years). Therefore, it seemed logical for ASA not to request from Mr. Thys a further appeal at the national level and to allow him to seize the CAS directly. Mr. Thys himself could not assume anything else after the given behaviour of ASA. Such a solution is also in conformity with the principle of good faith, which is a general principle of law.

5.77 The Panel gave the representative of the Respondent the possibility of conferring with his client after the Panel's decision on the jurisdictional issue was announced on Monday 11 May 2009. The legal representative of the Respondent quite explicitly stated that such a step would not be necessary and withdrew from the hearing. Subsequent to the close of the hearing, on 12 May 2009 Dr Dolle sent a letter to the Panel and on 14 May 2009 Counsel for ASA sent a letter to the Panel (both letters are referred to above at paragraphs 4.11 and 4.12). The Panel can therefore not accept the admission of Dr. Dolle's letter of 12 May 2009 or Counsel for ASA's letter dated 14 May 2009 after the oral communication of the hearing of the decision of the Panel admitting jurisdiction was given.

5.78 The letters filed by Dr Dolle and Counsel for the ASA not only have no legal value, but were communicated to the CAS after the close of the proceedings, in violation of Article R56 of the Code. Accordingly, the letters of 12 May 2009 from Dr. Dolle and 14 May 2009 from Counsel for ASA will not be taken into account by the Panel.

5.79 In conclusion, the Panel finds that IAAF's letter of 10 April 2008 to Mr. Thys' attorney constitutes "a specific Arbitration Agreement" within the meaning of Article R47 of the Code, and CAS subsequently has jurisdiction to rule in this appeal case.

J CONTINUATION OF THE HEARING

5.80 The Panel wishes to point out that the Code does not contain specific provisions regarding the rendering of an award on jurisdiction by the Panel. Therefore, the Panel will apply the PILA to this issue.

5.81 The PILA is applicable to the CAS by way of its Article 176 (1) combined with Article R28 of the Code, because the seat of each panel is in Lausanne. The PILA provides in the English translation of its Article 186 (3): "*In general the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision*". This means that the arbitral tribunal has the possibility to postpone the decision on jurisdiction to the merits stage,

if for example the validity of the arbitration clause is closely linked to the merits[21]. The arbitral tribunal thus has the necessary flexibility to join the jurisdiction to the merits[22].

5.82 The decision of the arbitral tribunal regarding its jurisdiction can then be challenged before the Swiss Federal Tribunal, even if it is contained in the decision on the merits[23]. Legal authors are of the opinion that if the arbitral tribunal accepts its jurisdiction, the tribunal can proceed to examine the merits, as the potential request for annulment to the Swiss Federal Tribunal does not have a suspensive effect[24].

5.83 Accordingly, the Panel was entitled in accordance with Article 186 (3) of the PILA to render its decision on jurisdiction at the end of the first part of the hearing on Monday 11 May 2009 devoted to this issue and then to proceed once jurisdiction was established to examine the merits of the case.

[21] KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n°429.
[22] BLESSING, *op. cit.*, n°538.
[23] KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n°430.
[24] KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n°431 ; POUDRET/BESSON, *op. cit.*, n°474.

6. APPLICABLE LAW

6.1 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."

6.2 In their submissions, the parties rely on provisions of the World Anti-Doping Code International Standards for Laboratories, the World Anti-Doping Code and the IAAF Anti-Doping Rules. Accordingly, these are the rules and regulations which shall be applicable to this dispute.

7. ADMISSIBILITY

7.1 IAAF Rule 60.25 provides that "*Unless the Council determines otherwise, the appellant shall have 30 days from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) in which to file his statement of appeal with CAS*".

7.2 The Decision was issued by the ASA on 11 December 2008 and notified to the Appellant on that date. The Statement of Appeal was filed on 7 January 2009. It follows that the appeal was filed in due time and is admissible.

8. MERITS OF THE APPEAL

A. GENERAL PRINCIPLES

8.1 According to Rule 33 of the IAAF Anti-Doping Rules:

" 1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred under these Anti-Doping Rules.
1. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.
2. Where these Anti-Doping Rules place the burden of proof on an athlete, athlete support personnel or other person alleged to have committed an anti-doping rule

violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

8.2 On the methods of establishing facts and presumptions, Rule 33.4 (a) of the IAAF Anti-Doping Rules sets out the following:

"WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding."

Rule 33.4 (a) must be applied to determine whether Mr. Thys has established that there was a departure, and if so, whether the Respondent can demonstrate that the departure did not undermine the validity of the adverse analytical finding.

8.3 According to point 5.2.4.3.2.2 of the ISL:

"The "B" Sample confirmation must be performed in the same Laboratory as the "A" Sample confirmation. A different analyst must perform the "B" analytical procedure. The same individuals(s) that performed the "A" analysis may perform instrumental set up and performance checks and verify results."

8.4 According to Rule 32.2 of the IAAF Anti-Doping Rules, Doping is defined as the occurrence of – among others – the following anti-doping rule violation:

" a) The presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids.
(i) It is each athlete's personal duty to ensure that no prohibited substance enters his body tisues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2 (a)."

8.5 The substance 19-norandrosterone is listed on the 2006 WADA Prohibited List as an Endogenous Prohibited Substance. Section 1 (b) of the 2006 WADA Prohibited List provides for the list of Anabolic Agents:

" Where an anabolic androgenic steroid is capable of being produced endogenously, a Sample will be deemed to contain such Prohibited Substance where the concentration of such Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production.

In all cases, and at any concentration, the Athlete's Sample will be deemed to contain a Prohibited Substance and the laboratory will report an Adverse Analytical Finding if, based on any reliable analytical method (e.g. IRMS), the laboratory can show that

the Prohibited Substance is of exogenous origin. In such case, no further investigation is necessary. ...

For 19-norandrosterone, an Adverse Analytical Finding reported by a laboratory is considered to be scientific and valid proof of exogenous origin of the Prohibited Substance. In such case, no further investigation is necessary."

B. APPLICATION OF THE GENERAL PRINCIPLES TO THIS CASE

8.6 In this particular case, the "A" sample screening results by GC-MS indicated the presence of 19-norandrosterone (19-NA) and 19-noretiocholanolone (19-NE). The analysis by GC-HRMS and GC-SIM/MS confirmed the presence of these substances, urinary concentration of 19-NA was estimated to be 24.16 +/- 1.58 ng/ml, that is higher than threshold concentration.

The "B" sample analytical report confirmed the "B" sample results with estimated urinary concentration of 19-NA to be 24.48 +/- 1.76 ng/ml. These findings show the presence of a prohibited substance or its metabolites or markers in Mr. Thys' body tissues or fluids.

8.7 Since the results of the analyses conducted by the DCC are positive, the Respondent has established a doping violation. The burden therefore shifts to Mr. Thys to demonstrate that there was a departure from the ISL in order to rebut the presumption that the analyses were conducted in accordance with prevailing and acceptable standards of scientific practice. Mr. Thys has to prove that a departure from the ISL has occurred in accordance with Rule 33.4 (a) of the IAAF Anti-Doping rules.

8.8 Mr. Thys contested the validity of the analyses claiming that the analyst who did the analysis of the "B" sample, had also been involved in the "A" sample analysis (point 5.2.4.3.2.2 of the ISL).

8.9 Mr. Thys used the documentation of the DCC to claim that the analyst who did the "A" sample analysis was also doing the "B" sample analysis. The summary of the "A" sample analysis (page 2) states that Young Dae-Cho performed the screening procedure, while the summary of the "B" sample analysis (page 2) states that Young-Dae Cho performed the confirmation procedure. The Aliquot Chain of Custody Documentation of the "A" Sample analysis (page 13) and the Aliquot Chain of Custody Documentation of the "B" Sample analysis (page 11) show the identical ID code and signature of Young-Dae Cho.

8.10 This finding was backed by Dr. Kim, the former director of the DCC, who gave evidence during the hearing before the ASA panel on 23 October 2007. Dr. Kim confirmed that "Young Dae-Cho has done the quantitative GCMS" of the "A" sample and "*the qualitative was done by Dr. Man-Ho Choi*" (page 204 of the transcript of the hearing), while for the "B" sample "*Young-Dae Cho started the confirmation*" and

"the qualitative analysis was done by GCHRMS by Dr. Man-Ho Choi" (page 230 of the transcript of the hearing).

8.11 When asked by the president of the ASA panel regarding ISL 5.2.4.3.2.2 Dr. Kim accepted *"that he did not follow the instruction 100 %"* (page 233 of the transcript of the hearing), excusing this departure with the size of the laboratory and stating that despite the departure *"there is no problem with the results", and that "the results are very accurate"*(page 236 of the transcript of the hearing). Dr. Kim further explained *"For not obeying the ISL Regulations, I'm not 100 % happy, I'm kind of upset, but then for the test results I'm very happy. I'm 100 % happy."* (Page 238 of the transcript of the hearing.)

8.12 At the CAS hearing Dr. Black, an experienced scientist regarding doping analyses and familiar with the requirements of the ISL, after having checked the whole data packet, gave evidence about the possible implications that the same individual performed most of the steps of the "A" and the "B" sample analyses. He stated: *"So the A sample data packet, that's indicated on page 13 of 46, this B sample data packet has the same sort of document to identify who was handling the samples for analysis , is identified on page 11 out of 59 pages, and, on both pages, it is indicated that an individual with the initials CYD who is identified on the signature page, as Dr Cho, this same individual handled both the A sample for analysis, performed the A sample analysis, and also performed the B sample analysis."*

8.13 Dr. Black further testified that the purpose of ISL 5.2.4.3.2.2 *"is to ensure the integrity of the testing process"*, especially if *"an analyst has an improper understanding of the status or has actually patent error in the A sample testing that they would not then replicate the error in B sample test."* In addition, Dr. Black pointed out the importance of having *"a complete second opinion of the analysis conducted"* and *"to have some insurance internally that there would be no bias introduced in the B sample test."*

8.14 Dr. Black stated that even if "A" sample analysis and "B" sample analysis came to the same result, this didn't *per se* reverse the conclusion to be drawn from the departure of ISL, thus repairing the non-compliance with the ISL.

8.15 Firstly, the Panel notes that the Respondent did not dispute that the same individual performed most of the steps of the testing of the "A" and the "B" sample and stated *"accordingly, Rule ISL 5.2.4.3.2.2 was not strictly complied with."* (See points 22, 26, 54 and 59 of Respondent's response dated 2 March 2009.)

8.16 According to R 57 of the Code, the Panel has full power to review the facts. Thus, the Panel is free to base its decision on the evidence regarding the departure of the ISL as stated above, even if one assumes that Mr. Thys made no attempt, and thus did not establish, a departure from the ISL before the reconstituted ASA-panel as claimed by

the Respondent (points 51, 52 of the Response). Additionally, the Panel disagrees that Mr. Thys "*deliberately elected not to participate*" in the proceeding directed by ASA after more than 2 and a half years of proceedings. The reconstituted ASA-panel should have taken into account the substantial pleadings in the hearings conducted by the original ASA panel and also could have noted – by merely looking at the documents – the departure itself.

8.17 The Panel is of the opinion that the burden shifts to the Respondent to demonstrate according to Rule 33.4 of the IAAF Anti-doping Rules that this – acknowledged – departure from the ISL did not undermine the validity of the adverse analytical finding.

8.18 The Panel concedes that in reality it will be very difficult, in most of the cases even impossible, to exclude completely that the departure from ISL 5.2.4.3.2.2 has undermined the results of the analyses. But once an athlete has fulfilled his burden to rebut the presumption that WADA-accredited laboratories conduct analyses in accordance with prevailing and acceptable standards of scientific practice in accordance with ISL, it will be up to the IAAF, or its Member, to demonstrate that this departure did not undermine the validity of the adverse analytical finding in accordance with Rule 33.4 (a).

8.19 The ISL, in combination with the specific IAAF Rules, clearly distributes the burden of proof thus taking into account the difficulties of both sides to demonstrate not only the specific facts, but also the causation. While on the one hand the athlete under the strict liability regime faces severe problems to demonstrate that he/she was not at fault or significant fault when a positive sample occurs, there is on the other hand no reason to lighten the burden for the anti-doping prosecuting authority, in whose responsibility a departure of the ISL falls.

8.20 In particular, Rule 33.2 and 3 of the IAAF Anti-Doping Rules differ between the standard of proof for the IAAF, the Member or other prosecuting authority – "to the comfortable satisfaction of the relevant hearing body" which "standard of proof is greater than a mere balance of probability" – and the athlete – "standard of proof shall be by a balance of probability".

8.21 Although ISL 5.2.4.3.2.2 has since been removed, this does not affect the decision in question. The Respondent "*does not suggest that the rule as it currently appears should apply retrospectively.*" (Response Nr. 90) and by conceding that "*the failure to have the "A" and "B" sample analysed by two different analysts does not by itself undermine the validity of a result so obtained*" accepts that this failure can undermine the result.

8.22 Based on Dr. Black's testimony, the Panel is convinced that ISL 5.2.4.3.2.2 is not a mere formal rule to regulate the process of testing in the laboratories or a mere technicality, but is a part of the ISL for good reason to protect the athlete from possible

errors, mistakes and dishonesty. It is not up to the Panel to adopt the change that has been made in the meantime but to apply the rule being in force at the time of the testing.

8.23 The scientific accuracy of the testing results does not automatically prove the negative fact that the departure from the ISL did not undermine the adverse analytical finding. If one accepts this argument, the integrity of the testing process would lose all importance. The laboratories would be free to ignore any standards as long as they manage to achieve similar results.

8.24 The DCC, its director and analysts knowingly departed from the ISL. They were all well aware of the departure, which, as the former director Dr. Kim testified, was due to "*the size of the laboratory*", so it did not occur by accident. Thus, the staff of the DCC indeed questioned the presumption that this WADA-accredited laboratory conducted analyses in accordance with prevailing and acceptable standards of scientific practice, in accordance with the International Standard for Laboratories ("ISL").

8.25 The attendance of Dr. Jong Ha Lee as the athlete's representative at the testing of the "B" sample does not give rise to a different view. Dr. Lee only observed the "B" sample testing and thus just witnessed the "B" sample analysis process itself. It was not his task to identify the individual performing the test or to compare the "A" sample and the "B" sample testing and especially to verify whether the DCC complied with ISL 5.2.4.3.2.2. Even the Respondent did not claim that Dr. Lee knew about this specific departure from the ISL.

8.26 The honesty of the analysts, which the Panel has no reason to doubt, does not exclude errors or mistakes by accident during the testing process and therefore can be neglected in assessing the compliance of the rule.

8.27 The difference between the wording of Article 3.2.1 of the WADA Code and Rule 33.4 (a) of the IAAF Anti-Doping Rules – requiring that the departure did not "*undermine the validity of the adverse analytical finding*" instead of not "*causing the adverse analytical finding*" – indicates that the burden the IAAF Anti-Doping Rules place on the anti-doping authority is even more difficult to meet. Undermining a result is clearly less than causing it, so in this case the Respondent has to erase any possible doubt regarding the result.

8.28 Previous CAS cases have dealt with the issue of the consequences of non-compliance with ISL 5.2.4.3.2.2. In *Landaluce* the facts were almost identical to this case. Here, the Panel exonerated the athlete and stated the following about the consequence of a violation of said ISL Rule:

"*It was not demonstrated that this was not at the origin of the adverse finding, nor that it was. It was however incumbent upon the UCI, according to article 18 of the UCI*

Anti-Doping Rules, to demonstrate that the departure from the ISL was not at the origin of the adverse finding, but this was not done. The UCI merely indicated in this appeal brief that: 'And even if there had been a departure – quod non – this couldn't have led to the adverse analytical finding, unless it is established that [the analyst] committed an error which caused the adverse analytical finding, quod non.' Also during the hearing, the UCI simply noted: 'As for the departures from the ISL which were brought up, I believe I can conclude that if they had took place, they are not significant and certainly not at the origin of the result.' It was indeed for the UCI to demonstrate that the failure to meet point 5.2.4.3.2.2 of the ISL was not at the origin of the adverse finding. To the extent that the UCI did not succeed in doing so, the Panel's only possible conclusion is to exonerate Mr. Landaluce."

In *Jenkins*, the individual who had prepared the "B" confirmation analysis was also involved in the "A" sample analysis. In *Jenkins*, USADA presented detailed scientific opinions that the violation of ISL 5.2.4.3.2.2 did not cause the adverse analytical finding, but the Tribunal came to the same conclusion as in *Landaluce*, starting the following about the proper understanding of the rule:

"On its face, ISL 5.2.4.3.2.2 clearly forbids an analyst who performs the "A" sample analysis from performing the "B" sample analysis: 'A different analyst must perform the "B" analytical procedure.' [emphasis added].
Nevertheless, controversy arose during the course of the proceeding in respect of the meaning of the term 'analytical procedure' and, more broadly, the proper interpretation of the standard for the purpose of identifying conduct which would amount to a violation of this standard. 'Analytical procedure' is not defined by the IAAF Rules ... However, two observations must be made. First, the singular use of the term 'analytical procedure' (i.e., as opposed to 'analytical procedures') suggests that, to the extent that an analytical procedure is composed of several steps, the drafters intended that an analyst involved in any step of the "A" sample analytical procedure must not perform any step of the analytical procedure on the "B" sample ... Second, the drafters have set out a closed list of steps that analysts are involved in the "A" sample analysis may also perform on the "B" sample analysis: instrumental set up and performance checks, and the verification of results. There is no basis on the face of the standard to import other activities into this list of acceptable areas of overlap." Id. *at ¶¶120-123.*

8.29 Having carefully reviewed the facts of this case, in particular the admission of Dr. Kim that the ISL 5.2.4.3.2.2 had not been properly observed at the DCC, and that the Respondent has acknowledged the departure, the Panel finds that the Respondent has not been able to demonstrate that this departure did not undermine the validity of the adverse analytical finding. The Panel reaches this conclusion based on the testimony of Dr. Black and on the fact that the Respondent has not presented any compelling evidence to lift its burden of proof in accordance with Rule 33.4 (a) of the IAFF anti-doping rules. The Panel is convinced, based on the *Landaluce* and *Jenkins* decisions that it is almost impossible to prove a negative fact, but nevertheless the Respondent has not presented anything, either in its written submissions or at the hearing before CAS that could lead the Panel to state that the Respondent has met its burden of proof.

C. CONCLUSION

8.30 In summary, the Panel concludes that

a. The Respondent has established an adverse analytical finding of 19-norandrosterone in the urine provided by Mr.Thys on 12 March 2006
b. Mr. Thys has successfully demonstrated the departure from ISL 5.2.4.3.2.2, and
c. The Respondent has failed to prove to the Panel's comfortable satisfaction that the departure from 5.2.4.3.2.2 did not undermine the validity of the adverse analytical finding.

9. COSTS

9.1 For disciplinary cases of an international nature ruled in appeal, such as the case in point, Article R65 of the Code 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."

9.2 As this is a disciplinary case of an international nature brought by Mr Thys, the proceedings will be free, except for the Court Office filing fee of CHF 500 already paid by Mr Thys, which is retained by the CAS.

9.3 As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. In the present case, in consideration of the outcome of the proceedings and the fact that the appeal of Mr Thys is upheld, the Panel rules that ASA shall pay a contribution towards Mr Thys' legal fees in the amount of CHF 13,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. It has jurisdiction to hear the appeal filed by Gert Thys on 7 January 2009.

2. The appeal of Gert Thys is upheld.

3. The decision of Athletics South Africa of 11 December 2008 is set aside.

4. Gert Thys is exonerated of any doping infraction and is eligible to compete without any prior reinstatement testing.

5. The prize money, income and benefits derived from the participation of Gert Thys in the Seoul Marathon in March 2006 shall not be forfeited.

6. The award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by Gert Thys, which is retained by the CAS.

7. Athletics South Africa shall pay Gert Thys a contribution towards his legal fees in the amount of CHF13,000 (thirteen thousand Swiss Francs), within 30 (thirty) days of notification of this award.

Lausanne, 24 July 2009

THE COURT OF ARBITRATION FOR SPORT

Lars Halgreen
President of the Panel