



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2009/A/1755 Adam Seroczynski v/ IOC**

**ARBITRAL AWARD**

**Delivered by the**

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

President: Mr Lars **Halgreen**, Attorney-at-law, Copenhagen, Denmark

Arbitrators: Mrs Maria **Zuchowicz**, Attorney-at-law, Warsaw, Poland  
Mr Ulrich **Haas**, Professor, Zurich, Switzerland

Ad hoc Clerk: Mr Nicolas **Cottier**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

**Adam Seroczynski**, Olsztyn, Poland,  
represented by Mr. Ludwik Zukowski, attorney-at-law, Warsaw, Poland,

As Respondent

and

**International Olympic Committee (IOC)**, Lausanne, Switzerland,  
represented by Messrs François Carrard and Yvan Henzer, Attorneys-at-law, Lausanne,  
Switzerland,

As Respondent

\* \* \* \* \*

## **I. FACTUAL BACKGROUND**

### **1. Parties**

1. Adam Seroczynski (hereinafter “the Appellant” or “the Athlete”) is a Polish paddler, who took part to the Games of the XXIX Olympiad in Beijing.
2. The International Olympic Committee (hereinafter “the Respondent” or “the IOC”) is the international sports organization which, in particular, promotes, coordinates and monitors the Olympic Games. It is a Swiss private law association with corporate seat in Lausanne, Switzerland.

### **2. Facts**

3. On August 22, 2008, the Appellant competed in the Kayak double (K2) 1000m Men team event, in which he placed 4th.
4. On the occasion of a doping control performed on August 22, 2008, on an urine sample provided by the Appellant, immediately following the completion of his participation in the Kayak double 1000m Men event, the Appellant tested positive for clenbuterol, as stated in the Analytical Report for Adverse Finding issued by the WADA accredited National Anti-Doping Laboratory in Beijing on August 25, 2008.
5. The IOC President set up a Disciplinary Commission on September 1, 2008 and notified the adverse analytical finding to the Athlete, by letter dated September 2, 2008.
6. At the request of the Appellant, who was then back in Poland, the B-sample was opened on September 4, 2008, and analyzed by the Beijing WADA-accredited laboratory. The Appellant could not attend the opening personally but was represented.
7. The B-sample analysis confirmed the presence of clenbuterol in the urine sample of the Appellant, as stated in the second Analytical Report for Adverse Finding issued by the WADA accredited National Anti-Doping Laboratory in Beijing on September 4, 2008.
8. The Athlete made his written submissions to the IOC Disciplinary Commission on September 8, 2008, stating, in essence, that:
  - he was innocent and had not attempted to use intentionally clenbuterol;
  - he suspected food tampering by “the organizers”;
  - there was a clerical error on the analytical report of his A sample concluding that there was either two B samples or “a mistake in the file”.

9. The IOC provided the Athlete on September 10, 2008 copies of the full scientific documentation regarding the analysis of the A and of the B samples. Such documentation evidenced that a clerical error was made on the A sample report, by mistakenly referring to a "B sample" on such sample report relating to the A sample. This clerical error has been acknowledged and corrected accordingly by the Head of the WADA accredited laboratory in Beijing.
10. A hearing was held by the IOC Disciplinary Commission on September 21, 2008, in the presence of the Athlete, assisted by his attorney, a representative of the National Olympic Committee (NOC) of Poland, the IOC Medical Director, the IOC Director of Legal Affairs and the IOC Doping Control Administrative Coordinator.
11. During the hearing, the Athlete and the representative of the NOC of Poland declared that they did not have any objection as to the conduct of the disciplinary procedure. The Athlete however asked for an extension in order to have the scientific documentation studied by an expert and be able to submit additional written submissions once the expert's opinion has been provided to him.
12. The Athlete explained at the hearing that he had no clear explanation on how clenbuterol ended up in his body. He explained that he had taken some supplements prior to the Olympic Games as allowed and prescribed by the doctor of the Polish national team. He had however not taken any nutritional supplements during the Olympic Games. The Athlete then raised the possibility that clenbuterol might have been present in the food he had consumed in Beijing, alleging that such substance was used in the chain of production of meat in China. As he had stayed in the Olympic Village and had eaten both there and at the Canoe competition site, the Athlete thus concluded that food contamination should be considered.
13. Upon questioning from the Disciplinary Commission, Dr Patrick Schamasch, the IOC Medical Director, indicated that scientific research showed that, while adverse analytical findings caused by contaminated food may not be totally excluded, such a situation was very rare and unlikely to occur and, even then, solely under very specific and extreme circumstances, such as the quantity of substance in the contaminated food and the important volume of food consumed.
14. The Disciplinary Commission also noted that the Athlete was the only clenbuterol case during the Beijing 2008 Olympic Games and that the Beijing Organizing Committee for the Olympic Games had taken a series of measures prior to and during the Olympic Games in relation to food safety, in particular to prevent contamination of food served in the Olympic venues.
15. After having heard the Athlete, his lawyer and the representative of the NOC of Poland, the Disciplinary Commission communicated to the Athlete that it agreed to grant him the requested extension until October 1<sup>st</sup>, 2008 to submit additional written submissions. The parties agreed that the decision would be taken by the Disciplinary Commission without any new oral hearing.

16. The Athlete made a second written submission on October 1<sup>st</sup>, 2008, reassessing the arguments made orally and providing further details regarding the arguments of a scientific nature, challenging in particular the validity of the testing process by the WADA Accredited Laboratory in Beijing. The Athlete did however not provide any expert report which would support his claim that the testing of his A and B samples departed from the international standards.
17. After reviewing the scientific arguments raised by the Athlete and the relevant material available, the Disciplinary Commission found that no departure from the WADA International Standards had been established by the Athlete.
18. The Disciplinary Commission unanimously concluded that the Athlete had committed an anti-doping rule violation pursuant to Article 2.1 of the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008 (hereinafter "the Rules") in that there was the presence of the prohibited substance Clenbuterol in his body.
19. In a decision dated December 11, 2008, the IOC Disciplinary Commission decided that :

*"I. The athlete Adam Seroczynski, Poland, Kayak:*

- (i) is disqualified from the Kayak double (k2) 1000m Men event, where he had placed 4th;*
- (ii) shall have his diploma in the above-noted event withdrawn;*

*II. The International Canoe Federation is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*

*III. The NOC of Poland is ordered to return to the IOC, as soon as possible, the diplomas awarded to the above-mentioned athletes in relation to the above-noted event.*

*IV. The decision shall enter into force immediately."*

**3. Proceedings before the Court of Arbitration for Sport**

20. The Athlete filed a statement of appeal with CAS on December 31, 2008 and completed it with an appeal brief which was received by CAS on January 13, 2009.
21. The Athlete's submissions, in essence, may be summarized as follows:
22. The Athlete does not dispute the fact that a prohibited substance, namely clenbuterol, was found in his urine samples collected on August 22, 2008. It further admits that this substance reduces fat and weight of bodies, that it is used as bronchodilator in human medicine and has a strong warming up effect in muscles. The Athlete however claims that the substance is counterproductive in endurance sports and can heavily affect heart abilities.

23. The Athlete then refers to his various oral and written defense statements made before the IOC Disciplinary Commission and to several scientific articles published in various countries and especially in China regarding mass clenbuterol poisoning. In this respect, the Athlete claims that he had required the procedure of the WADA accredited laboratory in Beijing to be verified by an auditor who could however not issue a report due to his illness. The Athlete further explains to CAS the various procedural measures that he required from the IOC Disciplinary Commission, notably with regard to an inquiry on the measures taken to avoid food poisoning and on the likelihood of a contamination of food by clenbuterol. The Athlete claims that no convincing answer was provided to him, notably in the IOC Disciplinary Commission's decision.
24. Referring to the Rules and Swiss law, the Athlete then argues that article 7.2.8 of the Rules provides with a sharp time limit of 24 hours to close the disciplinary procedure. He claims to have drawn the IOC Disciplinary Commission's attention that in his case due to the one week delay in notification by the IOC President of the Analytical Report for Adverse Finding of his A sample he had not been given any opportunity to provide the Disciplinary Commission with any relevant evidence.
25. The Athlete then reproaches that the IOC Disciplinary Commission did not take position on the various scientific arguments raised by the Athlete, some of them referring to scientific evidence which was known to the public only after the Games of the XXIX Olympiad.
26. According to the Athlete, the fact that he belonged to the best competitors of the world in his discipline for many years and had as such participated in antidoping monitoring programmes such as "whereabouts" and others, proved that he knew that he could be tested any time and that he would never take the risk to ingest a prohibited substance. The Athlete further notes that the level of concentration of the prohibited substance was very low and wonders what could have been his motivation to take a prohibited substance which he claims to be counterproductive in his discipline. All those circumstances lead the Athlete to conclude that the IOC Disciplinary Commission should have precisely verified whether the Athlete was tested positive due to external factors which were beyond his control.
27. The Athlete then requires that his complete file be produced by the IOC and that one or two "top international experts" regarding poisoning of food or toxicologists be appointed in order to assess the correctness of the scientific position of the IOC Disciplinary Commission. The Athlete further requests that the IOC provides CAS with all existing documents proving the measures taken by the Beijing organization committee in order to prevent food contamination during the Games of the XXIX Olympiad.
28. Based on these submissions, the Athlete filed the following request for relief:
  - to abolish and nullify the decision of the IOC Disciplinary Commission ,
  - to declare the Athlete not guilty of the violation of the Anti- Doping Rules,
  - to request from the IOC to change its subsequent , relevant decision regarding the Kayak Team (K2),
  - to award costs to the Appellant as the CAS will determine appropriate in accordance with the applicable rules of the Code."

29. The IOC replied to the Athlete's submissions in an answer dated February 4, 2009, which can be summarized, in essence, as follows:
30. The IOC first refers to the facts contained in the decision of the IOC Disciplinary Committee. It does not dispute CAS jurisdiction and the admissibility of the Appeal.
31. Referring to the Rules and Swiss law as well as to the Olympic Charter, the IOC explains then in details the legal reasoning which it deems to be applicable to the present case.
32. The IOC explains first that the presence of clenbuterol was detected by the WADA-accredited Beijing laboratory in both samples A and B provided by the Appellant. Clenbuterol is an Anabolic Agent that appears on the WADA 2008 Prohibited List under class S1 Anabolic Agents. Clenbuterol is prohibited at all times, in and out-of competition, as indicated in the Prohibited List.
33. The IOC reminds the Panel that according to article 3.2.1 of the Rules "*WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedure in accordance with the International Standard for Laboratories. The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred, which could reasonably have caused the Adverse Analytical Finding.*"
34. The IOC then claims that the Appellant alleged before the IOC Disciplinary Commission that a departure from the International Standard occurred but did not file any evidence supporting his claim, even though the IOC Disciplinary Commission granted him an additional deadline to do so.
35. Referring to the Appellant's claim that a very low concentration of the prohibited substance was found in his urine, the IOC points out that the 2008 Prohibited List does not set a minimum threshold for clenbuterol. It deduces from this that the presence of this substance, constitutes a violation of the anti-doping rules, regardless of its level of concentration.
36. The IOC then stresses that the Appellant did not provide any evidence to rebut the presumption provided for under article 3.2.1 of the Rules, and considers that the presence of the prohibited substance in the bodily sample provided by the Appellant in the course of the Beijing Olympic Games is therefore established. This constitutes a violation of article 2.1 of the Rules.
37. As a consequence, the IOC claims that according to article 8.1 of the Rule, a violation of the Rules in connection with doping control automatically leads to the disqualification of the athlete, with all other consequences, including forfeiture of any medals, points and prizes. Furthermore, the Appellant's disqualification from the Kayak double (K2) 1000m Men event and the withdrawal of his diploma decided by the IOC Disciplinary Commission automatically derive from the violation of article 2.1 of the Rules by the Appellant. This consequence of the violation of anti-doping rules is independent from a fault or negligence of the Appellant and is thus based on the principle of strict liability.

38. According to the IOC, the Appellant's submissions as to how he might have absorbed the substance clenbuterol found in his urine are therefore irrelevant for the issue of his disqualification and the consequences thereof. CAS should as well disregard the Appellant's claim that the source of the prohibited substance found in his urine sample might be contaminated meat consumed during the Olympic Games in Beijing. This claim, to the IOC's view is not supported by any evidence and must be disregarded.
39. The IOC argues however further that an adverse analytical finding for clenbuterol caused by contaminated food is a situation which is scientifically known as extremely rare and unlikely to occur and, even then, solely under very specific and extreme circumstances. Such a situation is most unlikely. The IOC claims that the fact that the Appellant is the only athlete who tested positive for Clenbuterol during the Beijing Olympic Games proves that his submissions cannot be accepted. Furthermore, the Beijing Organizing Committee for the Olympic Games had taken measures prior to and during the Olympic Games in relation to food safety, in particular to prevent contamination to athletes.
40. In view of the foregoing, the IOC concludes that the violation by the Appellant of article 2.1 of the Rules has been duly established. It claims that the disqualification of results with all other consequences including withdrawal of his diploma, as provided under article 8.1 of the Rules is applicable and that all submissions of the Appellant as to contaminated food shall be rejected.
41. In order to support its submissions and following the Appellant's requests, the IOC filed various documents, notably the Athlete's doping file with all documentation package including the chain of custody, an expert witness statement of Prof. David Cowan and a statement from the Beijing Municipal Food Safety Office.
42. Professor David Cowan is head of the Department of Forensic Science and Drug Monitoring and Director of the Drug Control Centre, a WADA accredited laboratory, at King's College London. He holds a personal chair in pharmaceutical toxicology and has extensive experience in the control of drug abuse in sport being since 1978.
43. The IOC asked Professor Cowan to confirm whether or not an adverse analytical finding for clenbuterol caused by contaminated food is a situation, which is very rare and unlikely to occur and, even then, solely under very specific and extreme circumstances.
44. In his written statement, Professor Cowan refers to various scientific analyses including the ones performed by his laboratory and provides references to it in the scientific literature. With respect specifically to clenbuterol, Professor Cowan quotes one specific case which happened in Spain in 1990 where bovine liver was found to contain clenbuterol and consumption of this liver caused illness with palpitations and tachycardia. Urins collected from two subjects were found to have concentrations of clenbuterol of 2 and 4 nanograms per millilitre. Professor Cowan confirms that this is sufficient to cause an adverse analytical finding in a doping control test and concludes that the evidence would indicate the theoretical possibility that if clenbuterol is present in food for human consumption, it may cause an adverse analytical finding.

45. Professor Cowan then points out that clenbuterol is not permitted to be used in animals. Furthermore, he indicates that he has been informed that the Beijing Organizing Committee for the Olympic Games had taken a series of measures prior to and during the Olympic Games in relation to food safety, in particular to prevent contamination of food served in the Olympic venues. Professor Cowan is of the opinion that, even if contaminated food was served, it is highly unlikely for the contamination to be solely in one piece of food eaten by the Athlete, who was the only one tested positive to clenbuterol. Furthermore, Professor Cowan considers as unlikely that, even if one piece of food was contaminated with clenbuterol, the contamination would remain only on that piece of food during the cooking process. That is to say, any contamination would have, at least in part, been transferred to other pieces of food. This would increase the chances of another athlete ingesting clenbuterol and this being found in a doping control test, which apparently did not happen. Thus, taking all of these factors together, Professor Cowan considers that the possibility of the Athlete ingesting clenbuterol in the Olympic venues is so unlikely as not to be reasonable.
46. Based on the foregoing, Professor Cowan confirms the following:
- "I have considered the statement made by Dr Schamasch where he points out that "adverse analytical findings (for clenbuterol) caused by contaminated food is a situation, which is very rare and unlikely to occur and, even then, solely under very specific and extreme circumstances "I agree with this statement and, would add that, I consider that this situation is so unlikely as not to be reasonable."*
47. The Beijing Municipal Food Safety Office confirms in its statements that food safety was regarded as the number one priority for the Olympic Games and that a whole set of strict measures were taken to ensure food safety. Raw materials for Olympic catering services were supplied exclusively by designated Olympic food sponsors and suppliers. The Beijing Municipal Food Safety Office explains further that it exercised a strict examination and monitoring over the food production and supply through high-tech information systems. Therefore, food for the Olympic Games was under full control from production base to all the Olympic venues. Food safety examinations were conducted and food samples were tested regularly to ensure hygiene standards of catering services. The Beijing Municipal Food Safety Office concludes that *"with all above-mentioned measures strictly taken, there was not a single case of nor any possibility for food contamination to take place in the Olympic Village, competition and other venues during the Beijing 2008 Olympic Games."*
48. Based on the above, the IOC submitted to CAS the following requests for relief:
1. *The Appeal filed by the Appellant on December 31, 2008 is dismissed.*
  2. *The decision of the IOC Disciplinary Commission of December 11, 2008 is confirmed.*
  3. *The IOC is granted an Award for costs."*
49. On March 27, 2009, the Athlete filed supplementary submissions and evidences, although the deadline granted to the Appellant to do so had expired. As invited to do so by CAS, the IOC explained in a letter dated April 20, 2009, that it left it to the Panel to decide whether the supplementary arguments and evidences could be admitted or not. The IOC stressed however that it had already not objected one time that the Appellant be authorized to supplement his arguments and produce new evidence, despite the very clear rule of article R56 of the Code of



Sports-related Arbitration. The Appellant did however fail to file his additional submissions and evidences within the set deadline and did not even request for an extension of such deadline before its expiry. Eventually the IOC stressed that the report of Ms Bulska, which was attached to the Appellant's supplementary submissions as a new evidence was already expected to be filed on October 1<sup>st</sup>, 2008 before the IOC Disciplinary Commission.

50. On June 3, 2009, the IOC filed a written witness statement of Dr Schamasch, IOC Medical Director, who could not attend the hearing. In his statement, Dr Schamasch confirms that 4770 anti-doping controls were performed by the WADA accredited laboratory in Beijing. 9 adverse analytical findings were reported and the Athlete was the only one to be tested positive for clenbuterol.
51. The parties signed the order of procedure before the hearing which was held on June 9, 2009. The Athlete was assisted by Mr. Ludwik Zukowski, attorney-at-law in Warsaw and the IOC was represented by Mr. Christian Thill, IOC Senior Legal In-house Counsel and Mr. Yvan Henzer, attorney-at-law in Lausanne, and the Athlete called Professor Ewa Bulska as an expert witness to verify the correctness of the laboratory procedure in Beijing.
52. During the hearing and notably during the final oral pleadings, the Parties confirmed the factual background and legal developments made in their previous written submissions. The Athlete insisted again on the fact that he had never taken any prohibited substance during his career and that the numerous tests he had been submitted to proved it. He could only explain the adverse analytical finding with food contamination and claimed that the very low concentration found in his urine did not only exclude any enhancement of his performances but showed as well that there might have been mistakes in the testing procedure which was evidenced by Professor Bulska's expert witness statement. The Appellant repeated that he considered the IOC not to have acted diligently which prevented him from being able to react directly in Beijing to the accusation of doping offense, to prove his innocence and to attend the opening of the B sample. Those unjustified delays were violating the Athlete's procedural rights, notably its right to be heard and should lead CAS to disregard the results. The IOC stressed on its side that no threshold existed for clenbuterol and that there was no evidence whatsoever that the WADA accredited laboratory in Beijing departed from the applicable procedures. The IOC referred notably to the two written expert witness statements produced with its answer. The IOC explained further that food contamination is irrelevant in this case as the Athlete's fault does not enter into consideration as a decision on withdrawal of medals or diploma. As to the question of the delay raised by the Appellant, the IOC stressed that the competition took place at the end of the Olympic Games and that the result was announced after the closing ceremony. The Athlete was maybe not informed as soon as he had wished but this could not lead to the conclusion that the IOC had departed from the IOC and WADA standards in terms of antidoping procedures.
53. The Panel first decided that it would allow Professor Bulska's expert witness statement at the hearing plus the other evidence brought forward by the Appellant in relation with food contamination. It would however grant the IOC a ten days deadline to rebut Professor Bulska's statement. All other evidence in the Appellant's supplementary brief will not be accepted as no extraordinary circumstance could justify the late production of those

documents. The Appellant admitted that this preliminary decision was fair and declared that he accepted it.

54. The articles provided by the Appellant in its complementary brief refer to food safety in Asia, to clenbuterol epidemic poisonings of contaminated beef which took place in Spain in 1992, in Italy in 1996 and in China in 2006, as well as to various scientific studies which state that athletes who have consumed contaminated meat could have a positive test for anabolic agents in doping controls. According to those studies, this could be the case if an athlete ingests contaminated veal liver when such liver presents high clenbuterol levels.
55. In her written statement, Professor Bulska explains that the reference sample used by the WADA accredited laboratory in Beijing contained 5ng/mL, which was an order of magnitude much higher than compared to the concentration of clenbuterol in the Athlete's urine samples, which was below 0.4 ng/mL, according to this expert. In Professor Bulska's view, this is a departure from the International Standards for Testing which may affect the adverse analytical finding. Professor Bulska then points out that the Minimum Required Performance Limit (MRPL) for clenbuterol, set by WADA, is 2ng/mL, which is much higher than the concentration found in the Athlete's urine samples and which shows, to the expert's view, that the uncertainty on the results is high. To her view only the validation report may confirm that the results are accurate and allow to check whether the results are positive or false positive.
56. The Panel heard first the Athlete, who explained that this antidoping case had crushed his career and had a devastating impact in his private life, so that he wants now to know how the substance could enter his body. He confirmed to the Panel that he had stopped his career since Beijing and is only fighting to prove his innocence. The proceedings before the Polish federation were now finished but the Athlete explained to the Panel that an anti-doping proceeding before the international kayak federation is currently suspended until CAS issues its decision. The Athlete then confirmed that he had come back from Beijing on August 27, 2008.
57. The Panel heard then Professor Cowan per telephone conference, who confirmed the content of his written witness statement and explained that the Athlete's statements were not realistic. The expert confirmed that it was not only very unlikely that the Athlete was contaminated by the food he ingested but that it was even more unlikely that he would have been the only one. If a contamination had taken place, it would have spread among other pieces of meat and not only one athlete would have been found positive. Professor Cowan then explained that the ingestion of the prohibited substance by the animal does not lead to the type of positive results found in the Athlete's urine samples. The Professor then confirmed that he had been impressed by the care taken in controlling the food when it was entering the village and that it had not seen any departure from the international standards and had no reason to believe that the adverse analytical finding was not reliable. The expert then reacted to the report of Professor Bulska and explained that he disagreed with Professor Bulska's conclusions, considering that the results should be put into their context. According to Professor Cowan, there seems to be a confusion by Professor Bulska with the need to measure a threshold, which is not the case here. The equipment in Beijing was outstanding, which explains that such precise data could be measured. While answering the Appellant's questions, Professor Cowan explained that he had consulted the Appellant's file, including the documentation

package and the decision of the IOC Disciplinary Commission. He had then consulted Professor Bulska's statement in a second stage, only. His statements regarding food contamination were based on the assumption that it would have taken place but the Professor is far from considering that it actually did. In a nutshell, Professor Cowan finds that the results are clearly reliable.

58. The Panel eventually heard Professor Bulska, who is professor of chemistry at the University of Warsaw and an authorized assessor accredited with WADA. The Professor confirmed that the documentation package was formally well prepared but that after examination of all data at hand, she was wondering whether all evidence was produced in order to prove the reliability of the findings. A validation report is missing in the file and there is no information on the determination level. At the very low level of concentration found in the Athlete's urine sample, the uncertainty is indeed between 20 and 30%. Addressing the Panel's question on the question of the presence or not of the prohibited substance, Professor Bulska explained that there was a 50% probability that this was a "false positive result". In a nutshell, Professor Bulska explained that a validation report was necessary in order to ensure that this was not a "false positive result". Addressing the questions raised by the IOC, Professor Bulska confirmed that she had no proof that there was a deviation from the standards but she explained that she was missing the information needed to decide whether a deviation took place or not. She explained further that this document must be provided under the International Standards if the customer asks for it. Professor Bulska referred notably to the ISO 17025 standards which WADA applies and which govern, under their chapter 5 "technical requirements", the procedure to validate the method. Professor Bulska however confirmed that the fact that the document is missing does not mean that there had been a departure from the international standards. She confirmed as well that modern instruments can detect very low levels of prohibited substances but this does not prevent the laboratory from checking whether the instrument is functioning properly or not.
59. Based on Professor Bulska's statement, the Appellant confirmed in his closing arguments that he finds the adverse analytical finding questionable and that there is a dispute regarding the presence of the prohibited substance in the Appellant's urine. The Athlete concludes that it is at the moment impossible to know whether this is a "true or false positive result". In accordance with the principle "jura novit curia", the Panel should thus apply the ISO standards which are part of the WADA standards and are to be considered as part of the regulations.
60. The IOC expressed its surprise that the presence of prohibited substance is for the first time disputed at the hearing before CAS. The presumption provided under article 8.1 of the Rules has not been rebutted there must thus be a disqualification. As to the departure from the international standards, the IOC refers to the report of Professor Cowan dating back from March 2009. The IOC stresses that the Appellant did not file any of the rules on which it relies now. The missing documentation is in any case not mandatory and nobody asked for it. The IOC then points out that the results were known on August 25 and that the Athlete left on August 27. The Athlete would have anyway been back in Poland if the communication had been made earlier. Moreover the term "promptly" used in the Rules must be interpreted according to the circumstances that the result was communicated during the games and not after the games. As to the absence of the Athlete during the opening of the B sample, the IOC

stresses that no departure from the international standards is claimed or at least proven by the Appellant in this respect. One cannot thus find that the Appellant's right to be heard was breached.

61. Within the deadline set by the Panel, the IOC filed an additional written statement from Prof David Cowan on Professor Bulska's expert opinion. Professor Cowan stresses first that it is correct that the exact concentration of clenbuterol is not indicated in the Analytical Report as no threshold applies to it. Professor Cowan then explains that in practice, laboratories do their best in order to match samples against reference standards which are better than 5 to 1. Yet, the expert states that being outside of this range does however not necessarily invalidate, or even weaken, the reliability of the identification of the prohibited substance. Professor Cowan is therefore of the view that the data presented show that the wide range did not make the identification of clenbuterol unreliable. Professor Cowan then considers Professor Bulska's assertion regarding the need to have a probability of the value above 95% as inappropriate since a qualitative identification is required in the present case and not a quantitative one. Eventually, this expert states, contrary to Professor Bulska's opinion, that the "limit of determination" of the results was easy to achieve, since high resolution mass spectrometry was used in Beijing in one of the most sensitive modes. Providing the Panel with detailed scientific explanation, Professor Cowan concludes that *"the laboratory has demonstrated in the data provided, in accordance with WADA standards, that the sample A/B1844355 contains clenbuterol."* As to the issue related to ISO 17025, Professor Cowan confirms that ISO has inspectors that accredit laboratories to ensure that they have undertaken an appropriate validation for all of the assays under their scope of accreditation. Professor Cowan is therefore confident that the WADA and ISO 17025 accredited laboratory in Beijing has met the required standards for accreditation.

## II. IN LAW

### 4. CAS Jurisdiction and admissibility

62. The jurisdiction of CAS is not disputed and all parties signed the order of procedure where a specific reference is made to the competence of CAS based on article 12 of the Rules, which CAS jurisdiction derives from.
63. As to the time limit to lodge an appeal before CAS, article 12.5 of the Rules provides that the appeal must be lodged *"within twenty-one (21) days from the date of receipt of the decision by the appealing party."* The appeal was filed on December 31, 2008 against the decision of the IOC Disciplinary Commission which is dated December 11, 2008. The Appeal was lodged within the statutory time limit set forth by the Rules, which is undisputed.
64. It follows that the appeal is admissible.

**5. Applicable law**

65. Art. R58 of the Code provides the following:  
*“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.”*
66. The Panel notes that the decision was issued by the IOC Disciplinary Commission which is a jurisdictional body of the IOC, a Swiss association with registered seat in Lausanne Switzerland. The present case relates to an anti-doping procedure in relation with the participation of the Athlete to the Games of the XXIX Olympiad in Beijing. The IOC issued the Rules which are applicable to the Games of the XXIX Olympiad.
67. The Panel will decide the present case according to the Rules and Swiss law, which is not disputed.

**6. Merits**

*Doping offence*

68. Articles 4.1 and 4.2 of the Rules provide that the Prohibited Substances and Methods under the Rules are identified on the Prohibited List issued by WADA. Article 2.1 of the Rules provides that the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's bodily specimen constitutes an anti-doping rule violation. As provided under article 2.1.1 of the Rules *“it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation.”* Article 2.1.2 provides further that *“excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample shall constitute an anti-doping rule violation.”*
69. Based on the analysis of the A and B samples of his bodily specimen, the Player was tested positive to clenbuterol, an Anabolic Agent that appears on the WADA 2008 Prohibited List under class S1, Anabolic Agents. As indicated in the Prohibited List, Clenbuterol is prohibited at all times (in and out-of competition) and no quantitative reporting threshold is specifically identified for it.
70. The Athlete claims that the positive results related to the A and B samples should be disregarded for the reason that the IOC did not inform him immediately of the first positive result on the A sample. Because of this alleged delay, the Athlete argues that he could not prove his innocence and attend in Beijing to the opening of the B sample. His procedural

rights were therefore violated, which to the Athlete's view should lead to the annulment of the anti-doping tests.

71. The Panel does not find the Athlete's submissions conclusive. It notes first that article 7.2.5 of the Rules provides for a prompt notification of the Athlete but does not fix any specific deadline. The positive result was found on August 25, 2008, the day before the end of the Olympic Games. The Athlete left Beijing on August 27, 2008 and the results were communicated to him on September 4, 2008. Bearing in mind that the antidoping procedure started at the end of the Olympic Games, the Panel does not see in this case any departure from the Rules. Moreover, the Athlete fails to explain how an earlier notification of the results and his presence in Beijing could have helped him to better prove his innocence.
72. As to the opening of the B sample in Beijing, the Panel considers first that it was indeed difficult for the Athlete, who was then in Poland, to attend it personally. It stresses however that the Athlete was represented to it, as provided under article 7.2.5 lit. c. The Panel notes as well that the Athlete did not request a postponement of the B sample opening, which he could have done if he absolutely wanted to be personally present. At last, the Panel points out that CAS jurisprudence 2002/A/385, which is quoted by the Athlete, is clearly irrelevant in the present case as the Athlete was informed of the date and time of the opening of the B sample, which was not the case of the athlete in CAS 2002/A/385. It was this lack of information of the athlete, which constituted a violation of the athlete's procedural rights to the view of the panel in CAS 2002/A/385.
73. The Panel notes further that it is only through Professor Bulska's report and at the hearing that the Athlete claimed that the analytical findings could be "false positive". Before the IOC Disciplinary Commission and in its appeal brief, the Player did only vaguely questioned the results and argue that the positive results were due to food poisoning. Subject to the issue of the alleged delay in the notification of the results, the Athlete did otherwise not dispute the way the antidoping procedure was conducted by the IOC Disciplinary Commission and nothing in the file leads the Panel to conclude that the IOC Disciplinary Commission departed from the Rules.
74. As to the process of analytical finding, the Panel considered carefully Professor Bulska's witness statement, despite its late production and the late submissions of the Athlete with regard to the alleged "false positive" results. It noted that Professor Bulska did not conclude in her witness statement that the results were false positive but did not exclude it on the basis of the very low concentration of Clenbuterol found in the Athlete's urine samples. Professor Bulska claimed that the laboratory's validation report was needed in order to be completely sure that the results were valid.
75. The Panel notes first that the IOC Disciplinary Commission had already granted a deadline until October 1, 2008, to the Athlete in order to make statements or requests with regard to the anti-doping procedure and notably the adverse analytical findings. The Athlete had already had access to the documentation package and disposed of the necessary time to have it analysed and to request the validation report. The Athlete indeed referred already at that time to his expert's written statement but never filed it. Neither did the Athlete file such report with his appeal brief or ask for the validation report.

76. Article 3.2.1 provides that “*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, occurred, which could have caused the Adverse Analytical Finding.*” (al.1). “*If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding, then the IOC shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*” (al.2).
77. Based on the clear wording of the Rules, the Panel finds first that it was the Athlete’s duty to question the validity of the results and to ask for the validation report in his appeal brief, at the latest. The Athlete failed to do so and his claim that the adverse analytical findings must be disregarded due to the absence of the validation report in the IOC file is considered by the Panel as belated. Nevertheless, the Panel considered the issue of the validity of the Adverse Analytical finding carefully. It notably took good note of Professor Bulska’s doubts in relation with the relatively low level of clenbuterol found in the Athlete’s urine and the risk that the result be “false positive”. However, based on Professor Cowan’s witness statements, notably his second witness statement where this expert addresses in details that question, the Panel finds that there is no more room for doubt concerning the validity of the Adverse Analytical Finding and the fact that the WADA-accredited laboratory in Beijing conducted the sample analysis in accordance with the International Standard for Laboratories as requested under article 3.2 of the Rules.
78. Professor Cowan indeed confirmed that the equipment used by the WADA-accredited laboratory in Beijing was highly sophisticated and allowed beyond any doubt to detect very low levels of prohibited substances in the athletes’ urine. Professor Cowan explained moreover that the data presented in the Athlete’s case show that the wide range in the analytical result did not make the identification of clenbuterol unreliable. Professor Cowan then considered Professor Bulska’s assertion regarding the need to have a probability of the value above 95% as inappropriate since a qualitative identification is required in the present case and not a quantitative one as no threshold applies to clenbuterol according to the WADA list of prohibited substances. Eventually, this expert states, contrary to Professor Bulska’s opinion, that the “limit of determination” of the results was easy to achieve, since high resolution mass spectrometry was used in Beijing in one of the most sensitive modes. This lead Professor Cowan to conclude that “*the laboratory has demonstrated in the data provided, in accordance with WADA standards, that the sample A/B1844355 contains clenbuterol.*” As to the issue raised during the hearing and related to ISO 17025, the Panel noted as well that Professor Cowan confirmed that ISO had inspectors that accredit laboratories to ensure that they have undertaken an appropriate validation for all of the assays under their scope of accreditation. The Panel found particularly convincing the fact that Professor Cowan, an expert in toxicology, stated that the WADA and ISO 17025 accredited laboratory in Beijing has met the required standards for accreditation.
79. Contrary to Professor Bulska, who admitted that her opinion was solely grounded on the IOC file and not on further information, Professor Cowan had access personally to the information regarding the equipment used by the WADA-accredited laboratory in Beijing and the procedures applied by it. The Panel concludes that Professor Cowan was in a position to

address Professor Bulska's remarks in a proper manner. The explanations provided by this expert thus lead the Panel to exclude that the result of the test in the present case was "false positive".

80. The Athlete did thus not only fail to rebut the presumption in favor of the WADA-accredited laboratory and to show that a departure from the International Standards occurred, but the IOC proved, through Professor Cowan's witness statement, that no departure from those standards caused the Adverse Analytical Finding. The Panel stresses once again that the 2008 Prohibited List does not set a minimum threshold for clenbuterol. The presence of clenbuterol is therefore proven and this constitutes a violation of the anti-doping rules, under article 2.1 of the Rules.

*Strict liability principle and sanction*

81. The Athlete then claims that the positive test results were due to food poisoning and provides various articles on food poisoning with clenbuterol, notably in China. The IOC refers to Professor Cowan's witness statement, who considers the Athlete's opinion as "*unreasonable*", considering notably the information provided by the Beijing Municipal Food Safety Office on food controls performed during the Olympic Games and the fact that the Athlete was the only one to be tested positive to clenbuterol although 4770 anti-doping controls were performed by the WADA accredited laboratory in Beijing.
82. The scientific evidence brought by Professor Cowan appears conclusive to the Panel and it would probably lead to exclude any mitigating circumstance in the Athlete's favor should this be an applicable criteria, which is however not the case in the present proceeding. The IOC Disciplinary Commission did however "only" sanction the Athlete with an automatic disqualification of individual results in one competition, namely the one in which the anti-doping rule violation occurred.
83. Article 8.1 of the Rules on Automatic Disqualification reads as follows: "*A violation of these Rules [red: notably article 2.1] in connection with Doping Control automatically leads to Disqualification of the Athlete with all other consequences, including forfeiture of any medals, points and prizes.*" This article is based on the principle of strict liability and no room is left for mitigating circumstances like the absence of fault or negligence. The only reference to "*No Fault or Negligence*" with regard to an athlete's disqualification from the Olympic Games can be found under article 9.1.1 of the Rules which provides that "*if the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's results in the other Competition (red.) shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.*"
84. *A contrario*, it can be deducted from the clear wording of article 9.1.1 that the athlete's results in a competition in which the anti-doping violation occurred must be disqualified, without any further consideration on his fault or negligence. The Panel thus concludes that the issue of food poisoning and the Athlete's fault or negligence related to it, is irrelevant in the present case. The Athlete's anti-doping rule violation indeed occurred in the very competition from



which he was disqualified by the IOC Disciplinary Commission. In other words the decision appealed against is based on article 8.1 in relation with article 2.1 of the Rules.

85. Based on the foregoing, the Panel considers that the IOC Disciplinary Commission was right and that its decision must be upheld. Accordingly, all other prayers for relief must be rejected.

7. Costs

86. As this is a disciplinary case "*of an international nature ruled in appeal*", Article R65 of the Code governs the allocation of the costs.

According to article 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.*"

Article R65.2 of the Code provides:

*"Upon submission of the statement of appeal, the Respondent shall pay a minimum Court Office fee of CHF 500 (five hundred Swiss francs) without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee."*

Article R65.3 of the Code provides:

*"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."*

87. As this is a disciplinary case of an international nature brought by the Appellant, the proceedings will be free, except for the minimum Court Office fee, already paid by the Appellant, which is retained by CAS.
88. Having taken into account the outcome of the arbitration, the financial resources of the parties and their conduct during the proceedings, the Panel is of the view that each party shall bear its own legal costs in connection with this arbitration proceeding.

\* \* \*

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of the Athlete, Adam Seroczynski, is rejected.
2. The decision issued by the IOC Disciplinary Commission on December 11, 2008 is upheld.
3. The Athlete, Adam Seroczynski, is disqualified from the Kayak double (K2) 1000m Men event, where he had placed 4<sup>th</sup> and his diploma in this event shall be withdrawn.
4. All other motions or prayers for relief are dismissed.
5. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss francs) paid by Adam Seroczynski, which is retained by CAS.
6. Each party shall otherwise bear its own legal costs and all other expenses incurred in connection with this arbitration.

Lausanne, 20 August 2009

THE COURT OF ARBITRATION FOR SPORT

**Lars Halgreen**  
President of the Panel

**Maria Zuchowicz**  
Arbitrator

**Ulrich Haas**  
Arbitrator

**Nicolas Cottier**  
Ad hoc Clerk