Tribunal Arbitral du Sport
Court of Arbitration for Sport

**CAS 2009/A/1759 FINA v. Max Jaben & ISA**
**CAS 2009/A/1778 WADA v. Max Jaben & ISA**

# ARBITRAL AWARD

Pronounced by the

## COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

**President:** Mr John A. **Faylor**, Attorney-at-law, Frankfurt am Main, Germany

**Arbitrators:** Mr Quentin **Byrne-Sutton**, Attorney-at-law, Geneva, Switzerland
Mr Michele **Bernasconi**, Attorney-at-law, Zurich, Switzerland

in the arbitration between

**Fédération Internationale De Natation (FINA)**, Avenue de l'Avant-Poste 4, 1005 Lausanne, Switzerland
Represented by Mr Jean-Pierre **Morand**, Attorney-at-law, Place Saint-Francois 1, 2002 Lausanne, Switzerland

**Appellant 1**

and

**World Anti-Doping Agency (WADA)**, Stock Exchange Tower, 800 Victoria Square, Suite 1700, P.O. Box 120, Montreal, Quebec, H4Z 1B7, Canada
Represented by Mr Francois **Kaiser**, Attorney-at-law, Place Saint-Francois 1, 2002 Lausanne, Switzerland

**Appellant 2**

against

Mr Max **Jaben**, c/o Mr Michael **Jaben**, 2601 North West Tullison Rd, Riverside, Missouri 64150 USA

**Respondent 1**

and

**Israel Swimming Association (ISA)**, Wingate Institute, Netanya 42902, Israel
Represented by Mr Amichay **Weinberger**, 4 Bezalel St., Ramat Gan, Israel 52521

**Respondent 2**

# I. FACTS

## 1. THE PARTIES

1.1. The Fédération Internationale de Natation (hereinafter also referred to as "**FINA**") is the international federation which promotes the development of five disciplines of aquatic sports throughout the world. It is also dedicated to providing a drug-free sport. FINA claims a membership of 201 national federations, amongst which the Israel Swimming Association is included. Founded in 1908, the home office of FINA is located in Lausanne, Switzerland. FINA is a signatory of the WADA Code.

1.2. The World Anti-Doping Agency (hereinafter also referred to as "**WADA**") is the international and independent organization founded in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA has established a uniform set of anti-doping rules, the World Anti-Doping Code (the "**WADA Code**").

1.3. Mr Max Jaben, 22 years of age, is an Israeli swimmer who is affiliated with the Israel Swimming Association. He is an international-level athlete and was qualified to participate in the 200- and 400-meter freestyle events at the 2008 Olympic Games in Beijing.

1.4. The Israel Swimming Association (hereinafter also referred to as "**ISA**") is the national association which governs and administers aquatic sports in Israel. It is a member of FINA.

## 2. SUBJECT MATTER OF THIS APPEAL; THE DOPING OFFENCE AND THE SANCTION IMPOSED BY THE ISA DISCIPLINARY COMMITTEE

### A. The Adverse Analytical Finding

2.1. On 30 April 2008, Mr Jaben underwent an out-of-competition anti-doping test conducted by the Israel Anti-Doping Committee which is organized under the Olympic Committee of Israel.

2.2. On 7 May 2008, the A and B samples of the urine specimens were sent to the Doping Control Laboratory of Athens (the "**Athens Laboratory**"), a WADA-accredited laboratory. The laboratory analysis which took place on 13 and 14 May 2008 using GC/MSD showed a screening result for 5β-androst-1-ene-17β-ol-3-one (boldenone metabolite) which was confirmed again on 3 June 2008 upon analysis of a new aliquot of the A sample using the same GS/MSD procedure.

2.3. On 5 June 2008, an additional aliquot of the A sample was sent by the Athens Laboratory to the WADA-accredited laboratory at the Institute of Biochemistry of the German Sport University Cologne (the "**Cologne Laboratory**") for the purpose of performing a specific isotope ratio mass spectrometric analysis (IRMS). As of this date, 5 June 2008, Mr Jaben was provisionally suspended from competition.

2.4. On 26 June 2008, the Cologne Laboratory reported the analysis results from the A sample to the Athens Laboratory, noting in its report of the same date that "*the GC/C/IRMS results are consistent with an exogenous origin of boldenone and boldenone metabolite.*"

2.5. On 3 July 2008, the results of the analyses were reported to the NOC Israel, FINA and WADA by telefax.

2.6. In the Laboratory Documentation Package ("**LDP**") for the A sample which was later furnished to the parties and dated 27 July 2008, the Cologne Laboratory assistant who conducted the IRMS analysis noted in handwriting on page 48:

*"1) E + A mit co-elution sh Anhang*
*2) 50195-Bo nicht mehr identifizierbar, da zu dünn"*

[Translation by Panel: *1) E [= Etiocholanolone] + A [= Androsterone] with co-elution see Appendix*

*2) 50195-Bo [= Boldenone] no longer identifiable, because too thin.*]

2.7. In early July 2008, Mr Jaben was informed of the adverse analytical finding in the A-Analysis Report dated 3 July 2008 of the Athens Laboratory. The report identifies the presence of both the substance boldenone and its metabolite and states:

*"# Boldenone is an anabolic steroid and its metabolite 5β-androst-1-ene-17β-ol-3-one confirmed in sample A2268850. Other parameters of the sample A2268850 are: Ph= 6.1, s.g. =1.008, normal appearance, IRMS data proved the exogenous origin of Boldenone."*

2.8. On 18 July 2008, Mr Jaben was sent a short analysis report for the B sample from the Athens Laboratory. The report stated that with regard to the finding:

*"# Boldenone is an anabolic steroid and its metabolite 5β-androst-1-ene-17β-ol-3-one was confirmed in sample A 2268850."*

2.9. The B sample analysis conducted by the Athens Laboratory did <u>not</u> include an IRMS test result.

2.10. On 14 November 2008, following the receipt of the B sample for IRMS testing just one week before, the Cologne Laboratory reported the presence of boldenone metabolite in the sample. In the same B-Analysis Report, however, the head of the Institute stated in an "*Annotation*":

*"Detection of 5β-androst-1-ene-17β-ol-3-one is consistent with the administration of the prohibited substance boldenone."*

2.11. However, in an "Additional B-Analysis Report" also dated 14 November 2008, the Cologne Laboratory re-confirmed the presence of boldenone metabolite, but disclosed the following finding:

*"The β13 C value of boldenone was not considered valid because of a co-eluting substance."*

**B. The Decision of the ISA Disciplinary Committee**

2.12. The ISA Disciplinary Committee comprised of three judges held a hearing of the matter on 19 November 2008 to decide whether prohibited substances were present in the body of Mr Jaben on 30 April 2008. Mr Jaben was represented at this hearing by legal counsel.

2.13. Referring to the A-Sample Analysis Report dated 18 July 2008 and corresponding laboratory documentation, the Committee established that the sample contained the prohibited substance boldenone, an anabolic steroid, in the form of a metabolite of boldenone.

2.14. The Committee's protocol of the hearing recorded that the A sample was sent to the Cologne Laboratory on 6 June 2008 where it was determined by IRMS analysis that the sample contained boldenone metabolite with the same molecular identification as determined by the Athens Laboratory. However, the Cologne Laboratory also determined the presence of additional boldenone of a different molecular identification.

2.15. The protocol of the hearing also established that the B sample tested by the Athens Laboratory confirmed the findings of the A sample analysis, namely that boldenone metabolite was present in the urine.

2.16. The Committee cited the "*conclusion*" of the Cologne Laboratory that "*the GC/C/IRMS results are consistent with an exogenous origin of boldenone metabolite*", but disclosed that it had requested the IRMS analysis of the B sample as recently as 12 October 2008 from the Cologne Laboratory in order to better evaluate the claim of Mr Jaben that the analysis "*was not conducted with the relevant sensitivity.*"

2.17. The Committee also addressed Mr Jaben's charges that (1) the "*chain of events*" from the taking of the A sample until its arrival in the laboratory was "*disorderly*", that (2) the "*testing process*" at the laboratory was "*disorderly*" and that (3) the results of the Cologne Laboratory presented a "*confused picture*" in which the B sample test, in contrast with the A sample test, showed only the presence of boldenone metabolite without the substance boldenone.

2.18. The Committee determined that the "*chain of events*" concerning the taking of the sample was correctly executed:

*"Even if there was some disparity such as the recording of the date of birth and the identification means of the accused, these faults are not of cardinal importance in order to disqualify the process and had no relation to the laboratory results."*

2.19. The Committee then addressed Mr Jaben's third objection (see 2.17 above) that "*no common identification*" existed between the IRMS tests on the A and B samples and that "*the result of the B bottle test can not be a basis to confirm the A bottle test.*"

2.20. The Committee rejected this objection on the grounds that the prohibited substances listed in the WADA Prohibited List included both the metabolites and "*allied substances*". The Committee stated:

> " *[In] the results of the bottle A test done in Athens the prohibited substance is referred to as Boldenone even though its molecular identification was BM [boldenone metabolite].*
> " *The results of bottle B done in Cologne in November 2008 showed the presence of only BM but in our opinion it is a substance that the body produces as for taking Boldenone which is of an exogenous source, as stated at the Cologne lab answer under the heading "Annotation".*

2.21. Based on the above, the Committee held that the "*B bottle test confirms the results of [the] A bottle test and that the accused used prohibited substance[s].*"

2.22. The Committee imposed the following sanction in its decision of 19 November 2008:

> *"After weighing the claims of the parties involved regarding the punishment and bearing in mind that the swimmer was denied participation at the last Olympic Games, and in the light of this being his first violation, we pass sentence on him of one year ineligibility suspension starting of [sp] the date of his provisional suspension by us [on] 5.6.08."*

**C. ISA's Notification of the Decision to FINA; FINA's Response to ISA**

2.23. One day later, on 20 November 2008, ISA informed FINA of the one-year sanction which it had imposed upon Mr Jaben.

2.24. In FINA's response dated 2 December 2008 to this notification, the Executive Director of FINA stated:

> *"We would like to stress out that, in application of rule DC 10.2, the regular sanction for use of such substance (Boldenone: Class S.1.a. Anabolic Agent) is 2 years. Only very particular circumstances (where competitor has to establish that he bears no significant fault or negligence and show how the prohibited substance entered his system) can justify a reduction to maximum 1 year in accordance with DC 10.5.2.*
>
> *We do not believe that the non-participation at the Beijing 2008 - Olympic Games and a first violation, have met the requirements to reduce the sanction.*
>
> *Therefore, FINA wants to exercise its right to appeal against the decision in accordance with DC 13.2.1 and DC 13.2.3 which provide that FINA has a right to appeal before [the] Court of Arbitration for Sport in cases involving International Level Competitors.*
>
> *Thank you for your kind attention."*
>
> [Underlining taken from the original]

2.25. On the same day, 2 December 2008, the Executive Director of ISA responded to FINA's letter as follows:

*"I confirm receiving your fax of today concerning Max Jaben.*

*I am here to inform you that the Israel Swimming Association has already acted at this matter and has appealed to the High Court of Arbitration of the Israeli Swimming Association in a demand to sentence the swimmer for at list [sp] two years of suspension.*

*Therefore, I would like to allow as an extension of 30 days in order to [complete] all internal legal procedures at this case."*

The file contains no response from FINA to this letter from the ISA Executive Director.

**D. The Appeal before the ISA High Court**

2.26. Following ISA's announcement to FINA that it wished to appeal the decision of its Disciplinary Committee to its High Court, a hearing took place before the ISA High Court on 15 December 2008. Mr Jaben was represented at this hearing by counsel. The ISA petitioned the High Court to increase the ineligibility sanction imposed on Mr Jaben from one year to two years to accord with the sanctions of the FINA Doping Control Rules (hereinafter "**FINA DC Rules**").

2.27. At this hearing, Mr Jaben's counsel petitioned the High Court to dismiss the appeal on the grounds that pursuant to clause 13.2.1 of the FINA Doping Control Rules and in view of Mr Jaben's status as an international-level athlete, the High Court had no jurisdiction to decide the case brought before it. In the view of Mr Jaben, "*the case may be appealed exclusively to the Court of Arbitration for Sport.*"

2.28. In response to the judge's question as to why FINA's letter of 2 December 2008 to the ISA contains no reference that the High Court has no power to hear this appeal, counsel for Mr Jaben stated as follows:

*"The first court according to the Fina regulations is the Disciplinary Committee which has given its final decision. Now we have to check whether the athlete is at an international level. If so, only Fina has the right of appeal according to clause 13.2.2. If the swimmer isn't of an international level – then there was a possibility for a first internal appeal. When we are talking about an athlete at an international level the internal courts are the first level of jurisdiction after which there is a need to turn directly to the CAS. Therefore, the FINA letter of the 2.12.08 represents the situation correctly.*

2.29. In continuing his pleadings, counsel for Mr Jaben continued:

*"All over the world, appeals that have an international element against the rulings of internal courts are referred to the CAS. This ensures a sense of unity and supervision. Therefore Fina has rightfully said that as long as the swimmer is at a*

*national level, do what you want in your internal system. However if he participates in international competitions, the first court would be that of his home country after which it would be referred to the CAS. This way the world of sports can be conducted in a unified form."*

2.30. In rebuttal hereto, ISA pleaded that FINA regulations have no authority with regard to the "*our internal courts*" of ISA. Hence, the High Court, in the view of ISA, indeed had jurisdiction to hear the appeal and to overrule the Disciplinary Committee:

*"The Fina regulations do apply, but we have our internal courts and our own supervision of these courts. When there is a deviation from authority at our courts, it is clear that the correct procedure must be decided on by the High Court."*

2.31. ISA further pleaded to the High Court with regard to its letter of 2 December 2008 that "*FINA knows about the appeal and confirms it.*":

*"They have given us an extension and confirmed this appeal before the High Court. According to the FINA letter in this respect, the High Court has the power of authority."*

2.32. After consideration of these arguments, the High Court ruled that it had no jurisdiction to decide the appeal when it involved an international-level athlete such as Mr Jaben:

*"The defence has referred us to DC 8.2.1 of the FINA Regulations and determined that the first court in case of an anti-doping offence would be the local Disciplinary Committee of the local association. According to DC 13.2.1 an appeal relating to an international competitor may be appealed exclusively to the Court of Arbitration for Sport (CAS) of FINA as per the rules of the noted regulations."*

2.33. In its further reasoning, the High Court stated that ISA had integrated the FINA DC Rules "*in their entirety*" into its own disciplinary rules. It continued:

*"In matter of fact there is also great logic in the decision of the I.S.A. as adoption of those regulations for athletes at an international level will result in unity of obligations and punishments."*

**E. Notification of the High Court Decision to FINA and WADA**

2.34. By letter dated 18 December 2009, the president of ISA notified the Executive Director of FINA that the High Court had held in favor of Mr Jaben and that the decision of the ISA Disciplinary Committee could be appealed "*exclusively*" to the CAS in Lausanne.

2.35. By letter dated 5 January 2009 which was dispatched by courier on 6 January 2009 from Geneva, FINA informed Mr Kirwen Clarke, Legal and Results Management of WADA, that:

*". . . you will find attached all the information in the case of Mr Max Jaben. Please note that FINA is intending to file an appeal before the Court of Arbitration for Sport."*

2.36. The tracking protocol of the courier indicates that the shipment was delivered to WADA "*in good condition*" in Montreal on 12 January 2009.

## 3. FINA's Statement of Appeal and Appeal Brief dated 7 January 2009

3.1. On 7 January 2009, FINA filed its Statement of Appeal to CAS which, in the accompanying letter of the same date, was declared by FINA to serve simultaneous as the "*first appeal brief*." A later Appeal Brief pursuant to R51 of the Code of Sports-related Arbitration of CAS (hereinafter "**CAS Code**") was not filed.

3.2. Citing the communication date of the ISA High Court decision to FINA on 18 December 2008 and claiming the timeliness of the appeal within the 21 day period set forth in art. DC 13.5 of the FINA DC Rules, FINA asserted that the "*appeal is directed against the High Court decision and materially against the content of the decision of the ISA Disciplinary Committee.*"

3.3. FINA submitted that the substance at stake, a metabolite of Boldenone, is a prohibited anabolic steroid. The applicable sanction for a first violation is a 2 year period of ineligibility pursuant to art. DC 10.2 of the FINA DC Rules. A reduction of the ineligibility period to a minimum of 1 year is possible only if the conditions of art. DC 10.5.2 of the FINA DC Rules (absence of significant fault or negligence) are met.

3.4. FINA further asserted that the fact that Mr Jaben's violation would be a first violation "*is not per se a ground to reduce the sanction provided specifically for this case.*" Secondly, the fact that the period does or does not include the Olympic Games or any other significant event is not a relevant circumstance. FINA continued:

> *"In any event, the competitions covered by the sanction bear no relation to the negligence of the concerned athlete which is the relevant element to be taken into consideration when considering a potential reduction pursuant to art. DC 10.5.2."*

3.5. Based on the above, FINA requested CAS to decide as follows:

> *"a. Confirm that Mr Jaben has committed a doping violation.*
>
> *b. Declare Mr Jaben to be ineligible for a period of 2 years starting from June 5, 2008.*
>
> *c. Order that all results achieved by Mr Jaben since April 30, 2008 shall be annulled together with [the] consequence thereof (hand-back of medals/ prizes, reimbursement of prize money).*
>
> *d. Grant FINA an Award for Costs.*

**4. WADA's Statement of Appeal dated 30 January 2009 and its Appeal Brief dated 18 February 2009**

**A. The Admissibility of the Appeal**

4.1. Citing art. DC 13.2.1 of the FINA DC Rules, WADA asserts that:

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

4.2. WADA's right of appeal before CAS is provided for under art. DC 13.2.3 of the FINA DC Rules. As Mr Jaben is an international-level athlete, WADA asserts that the decision rendered by the ISA Disciplinary Committee on 19 November 2008 may be appealed to CAS after the exhaustion of internal review procedures before national reviewing bodies pursuant to art. DC 13.2 of the FINA DC Rules. In the words of WADA:

> *"The decision of December 15, 2008 of the High Court of ISA has exhausted any possible legal remedies available against the decision of the ISA Discipline Committee Board, except for this appeal to CAS."*

**B. Compliance with Appeal Deadlines**

4.3. Citing art. DC 13.5 of the FINA DC Rules and the 21 day deadline for filing an appeal to CAS from the date of receipt of the decision, WADA refers to FINA's letter dated 5 January 2009 to Mr Kerwin Clarke of WADA in which is stated:

> *"Dear Mr Clarke,*
>
> *You will find attached all the information in the case of Mr Max Jaben. Please note that FINA is intending to file an appeal before the Court of Arbitration for Sport.*
>
> *We remain at your disposal for any further question you may have.*
>
> *Yours sincerely,*
> *Johan Lefebver*
> *Doping Control Administrator"*

4.4. Because WADA's Statement of Appeal was filed with CAS on 30 January 2009, the filing was, in the view of WADA, within the 21 day filing deadline.

**C. The Anti-Doping Rule Violation**

4.5. WADA asserts that the metabolic boldenone present in Mr Jaben's A and B samples on 30 April 2008 was an anabolic androgenic steroid. It appears on the WADA 2008 Prohibited List under class S1 and is prohibited in and out of competition.

4.6. As a result, in the view of WADA, art. 2.1 of the WADA Code and art. DC 2.1 of the FINA DC Rules have been violated by Mr Jaben. The athlete admitted this fact by not filing an appeal to the ISA Disiplinary Committee decision. He thus implicitly admitted the violation.

4.7. Pursuant to art. DC 10.2 of the FINA DC Rules, the period of ineligibility to be imposed for a violation of art. DC 2.1 of the FINA DC Rules is two years for a first violation.

4.8. WADA points out that Mr Jaben may legitimately request an elimination or reduction to this sanction to one year pursuant to art. DC 10.5.1 (No Fault or Negligence) or art. DC 10.5.2 (No Significant Fault or Negligence) and art. DC 10.5.3 of the FINA DC Rules (Substantial assistance in discovering or establishing an anti-doping rule violation by another person), provided he is able to meet the "balance of probability" test.

4.9. In the view of WADA, Mr Jaben has failed this test as he "*did not give an explanation about the origin of the prohibited substance in his body.*"

**D. The Alleged Discrepancy in the Testing Procedures**

4.10. Moreover, WADA alleges that Mr Jaben's challenges to the orderly process of the sample analysis are without merit. Both the Athens and the Cologne Laboratories are WADA-accredited. Mr Jaben criticizes only the analysis process, but he does not establish any departure from the International Standard for Testing.

4.11. With regard to Mr Jaben's challenge that the result of the B sample IRMS analysis in the Cologne Laboratory did not confirm the results of the A sample IRMS analysis, WADA submits that the Athens Laboratory clearly identified the presence of boldenone metabolite in both samples. WADA quoted from the A and B Analysis Reports of the Cologne Laboratory as follows:

A-Sample:

*"The GC/C/IRMS results are consistent with an exogenous origin of Boldenone and Boldenone metabolite."*

B-Sample:

*"The GC/C/IRMS results are consistent with an exogenous origin of Boldenone metabolite".*

4.12. Pointing out that the IRMS test had been requested by the Athens Laboratory only to determine the exogenous origin of the Boldenone and not to identify the prohibited substance found in the athlete's bodily sample, WADA states as follows:

> *"The IRMS test has confirmed the results of the Athens Laboratory, i.e., the presence of Boldenone metabolite. The only difference is that the IRMS test performed on the A-sample determined also the presence of the product Boldenone itself. This discrepancy shall not void the testing procedure as metabolic Boldenone is a substance that is produced by the human metabolism when Boldenone is taken. Thus, it is not unusual to find Boldenone and its metabolite in the same bodily sample. On [the] contrary, it is a confirmation that the athlete has ingested this prohibited substance."*
>
> [Bold lettering contained in the original.]

4.13. WADA also submits the statement of Dr Hans Gayer, Deputy Head of the Cologne Laboratory who, in a letter submitted into evidence, explained that the substance Boldenone could not be detected in the B sample because of a co-eluting substance. WADA quotes Dr Gayer as follows:

> *"The results for boldenone do not influence the final conclusion: the IRMS analyses prove the exogenous origin of the boldenone metabolite both in the A- and in the B-sample."*

4.14. In the view of WADA, Mr Jaben's allegations regarding the validity of the IRMS analyses are erroneous. In the view of WADA, he has failed to bear his burden of proof regarding how the prohibited substance entered his system. The reasoning of the ISA Disciplinary Committee to reduce the sanction is therefore irrelevant:

> *"The only way to reduce a sanction is for an athlete to establish that he committed no fault or negligence or no significant fault or negligence. Mr Max Jaben has failed to provide such proof."*

4.15. After all of the above, WADA petitions the Panel to rule as follows:

> *"1. The Appeal of WADA is admissible.*
>
> *2. The decision of the ISA Discipline Committee in the matter of Mr Max Jaben is set aside.*
>
> *3. Mr Max Jaben is sanctioned with a two years period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Max Jaben) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
>
> *4. All competitive results obtained by Mr Max Jaben from April 30, 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*

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

**5. Mr Jaben's Answer to the Statement of Appeal filed by FINA**

5.1. On 30 January 2009, Mr Jaben filed his Answer to FINA's appeal and requested the following relief:

*"1. To dismiss the Appeal due to lack of jurisdiction. The appeal was submitted late and out of the time limit and the CAS has no jurisdiction with regard to it.*

*2. Alternatively, if the appeal is not dismissed due to its late submission, to uphold the counterclaim and to acquit the Respondent and order to cancel immediately the suspension imposed on him pursuant to the decision of the ISA Disciplinary Committee.*

*3. If the Appeal is not dismissed as per section 1 above and the Respondent is not acquitted – to dismiss the Appeal and to confirm the one year suspension."*

**A. FINA violated its own rules by waiting for the ISA High Court to render its decision. FINA's Appeal to CAS is filed past the deadline**

5.2. Citing art. DC 13.5 of the FINA DC Rules, Mr Jaben contends that the 21 day deadline for FINA to file an appeal to CAS commenced to run on 20 November 2008, the date upon which ISA notified FINA of the decision of its Disciplinary Committee. Accordingly, the deadline to file the appeal expired on 11 December 2008.

5.3. FINA, however, in the view of Mr Jaben, violated its own Doping Control Rules, namely art. DC 13.2.1 of the FINA DC Rules by not filing, or at least not filing in time, its appeal. In its letter of 2 December 2008, FINA stated clearly that it:

*". . . wants to exercise its right to Appeal against the decision in accordance with article DC 13.2.1 and DC 13.2.3 which provides that FINA has a right to Appeal before the Court of Arbitration for Sport in cases involving International level Competitors."*

5.4. Mr Jaben continues:

*"FINA decided to wait for the results of the Appeal of the ISA to its High Court. It is reasonable to assume that FINA are well aware of their own Doping Control Regulations and they had no legal or other justification to wait for the decision of the High Court of the ISA since the High Court of ISA has no competence on such an Appeal and it had no authority to rule on the Appeal. It is clear that . . . since the Appeal was lodged on January 7th, 2009, way over the 21 day deadline provided for in the FINA Regulations, the Appeal should be dismissed and struck out for lack of authority."*

5.5. In conclusion, in the opinion of Mr Jaben, the ISA High Court did not have jurisdiction to deal with the appeal on the decision of the ISA Disciplinary Committee and FINA could not wait for the ISA High Court decision to be rendered. He points out:

> *"This is also what the ISA High Court itself decided when it dismissed the ISA Appeal and accepted my request for rejection of the ISA Appeal because of "lack of authority" of the Prosecutor to Appeal to a local court."*

**B. Alleged Procedural Defects and Discrepancies of the Analytical Findings**

5.6. Mr Jaben asserts that he has never taken Boldenone.

5.7. Mr Jaben states furthermore that the reports of the analytical findings of the Athens and Cologne Laboratories were contradictory. At the beginning of July 2008, more than two months following the date of the sample collection, he was informed that the substance Boldenone was identified by the Athens Laboratory in the A sample. It was also stated that Boldenone metabolite was confirmed in the A sample and that an IRMS test performed by the Cologne Laboratory proved the exogenous origin of the Boldenone.

5.8. On 18 July 2008, he was sent a short analysis report for the B sample in which the substance identified was again boldenone. This report did <u>not</u> state, however, – as was the case in the A sample – that boldenone metabolite was also present. The B sample analysis did not include "*the required IRMS test*". This IRMS test, in the view of Mr Jaben, is mandatory pursuant to the WADA Code 2008 Prohibited List. The latter states:

> *"In extremely rare individual cases, boldenone of endogenous origin can be consistently found at very low nanograms per millilitre (ng/mL) levels in urine. When such a very low concentration of boldenone is reported by a laboratory and the application of any reliable analytical method (e.g. IRMS) has not determined the exogenous origin of the substance, further investigation may be conducted by subsequent tests."*

5.9. Mr Jaben contends that "*since no IRMS test was made from the beginning for Sample "B", the Sample "B" did not and could not confirm the analytical findings of Sample "A" which did undergo an IRMS test.*" Mr Jaben cites art. DC 7.1.9 of the FINA DC Rules:

> *"If the sample "B" proves negative, the entire test shall be considered negative and the Competitor, his Member Federation, and FINA shall be so informed."*

5.10. Indeed, in the view of Mr Jaben, even Section 5.2.4.3.2.9 of the WADA International Standard for Laboratories states that:

> *"If the "B" sample confirmation does not provide analytical findings that confirm the "A" sample result, the sample shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding."*

5.11. Mr Jaben asserts, however, that it was not until 5 August 2008 when he received the LDP for the A and B samples that he determined that the Package did not contain "*all the information on the IRMS test of the A Sample performed in the Cologne Laboratory.*" On 27 August 2008, Mr Jaben submitted on his own behalf an expert opinion of Dr Douwe de Boer which questions the presence of boldenone.

5.12. Mr Jaben further submits that, following his objections, it took more than five months after the collection date of the sample that the ISA Disciplinary Committee requested the Athens Laboratory to send the B Sample to Cologne to perform an additional IRMS test.

5.13. In the view of Mr Jaben, the discrepancies between the two IRMS tests and the fact that the "B" sample did not confirm the "A" sample result, "*must lead to an acquittal.*" In summarizing his position, he points out:

> *"As opposed to the Sample "A" IRMS results, in which it was stated that Boldenone and its Metabolite were found – the Cologne Lab did not find on November 14th, 2008 Boldenone in my "B" sample – they only found its metabolite (and there is a huge difference between the two). In the IRMS analysis performed on November 14th, 2008 on the "B" sample, the Cologne laboratory did not confirm the "A" sample results in which both Boldenone and its metabolite were claimed to be found and hence I should be acquitted as per DC 7.1.9.* ***It should be clear that if only a metabolite of a prohibited substance is found in both samples- one may be found guilty of using prohibited substances – but if in one Sample the Substance and its metabolite are found and in the other sample only the metabolite is found- there is no confirmation by sample "B" of Sample "A" results and the test should be treated as negative."***
>
> [Underlining and bold lettering taken from the original text.]

5.14. Citing the above errors and the delays in the laboratory procedures, the unsafe chain of custody and the discrepancies in the laboratory findings, in addition to CAS precedent, Mr Jaben claims that he should be "*acquitted.*"

## 6. Mr Jaben's Answer to the WADA Statement of Appeal and Appeal Brief

### A. As Parties with the same interest, the late appeal filed by FINA must also be ascribed to WADA

6.1. In his Answer to WADA's Appeal Brief received by CAS on 5 March 2009, Mr Jaben repeats the same requests for relief which he raised in his Answer to the FINA Statement of Appeal (see Pt. 5.1 above).

6.2. Citing art. DC 13.2.1 of the FINA DC Rules and the 21 day deadline for filing an appeal as set forth in art. DC 13.5 of those Rules, Mr Jaben asserts that WADA was first notified by FINA of the decision of the ISA Disciplinary Committee on 12 January 2009.

6.3. Mr Jaben asserts with regard to the time-span until the date of the ISA Disciplinary Committee decision:

> *"This, with all due respect, is not acceptable and may lead to extreme absurd situations in which WADA have an unlimited time to appeal and the competitors rights are hurt, breached and compromised just because FINA and/or the Member Federation forgot, neglected or intentionally failed to report disciplinary cases to WADA immediately. This also creates a situation that WADA has an interest not to receive decisions and by that extending its time limit to appeal."*

6.4. Mr Jaben submits that the Disciplinary Committee's decision in his case was also published in the media in Israel and North America. Moreover, WADA has never stated "*if and when the ISA notified it of my case and why it did not actively ask about my case.*"

6.5. In the view of Mr Jaben, there is:

> *"... no possible nor reasonable nor justifiable explanation why FINA waited almost two months to notify WADA of the decision, unless FINA knew WADA was already aware of the Decision. It took ISA one day following the date of the Disciplinary Committee decision on 19 November 2008 to notify FINA. Why did it take FINA 53 days to update WADA?"*

6.6. Citing art. DC 14.6 sent. 2 of the FINA DC Rules, Mr Jaben asserts that it was ISA's duty:

> *"... to regularly update FINA and WADA on the status and findings of any review or proceedings conducted pursuant to DC 7 (Results Management), DC 8 (Right to a Fair Hearing) or DC 13 (Appeals) ..."*

6.7. In light of the above, Mr Jaben submits that "*the most favourable interpretation*" FINA and WADA can derive from the 14 day period required in DC 14.6 sent. 1 for reporting Adverse Analytical Findings regarding a competitor to FINA and WADA is to apply the same deadline analogously to the regular updates required to be given in art. DC 14.6 sent. 2 of the FINA DC Rules.

6.8. In conclusion, Mr Jaben argues that the WADA appeal should have been submitted no later 25 December 2008 (21 days from 4 December 2008) which was 14 days after 20 November 2008, the day on which FINA was notified by ISA. Mr Jaben states:

> *"No legal system in the world and most of all not sport law, where the decision of the sport organization may have huge impacts on the life of an athlete, can allow two parties sharing the same interest in an appeal to fix by their own behaviour the time limit for an appeal."*

**B. Alleged Procedural Defects and Discrepancies of the Analytical Findings**

6.9. With regard to the A and B Sample IRMS tests, Mr Jaben cites the fact that neither he nor WADA received the complete LDP until WADA filed its Appeal Brief and until WADA itself, on 12 February 2009, requested the LDP. The fact of the incompleteness of the LDP did not deter the ISA Disciplinary Committee from disqualifying him and holding that he had committed a doping offence. "*I was denied my rights for a fair hearing and therefore I should be acquitted.*"

6.10. With regard to the discrepancies found in the B Sample IRMS tests, Mr Jaben states the following:

> *"Please note that even if the LDP of the IRMS tests will be accepted by the CAS, the LDP of the sample "A" IRMS test supports my case, since in page 46 of the Cologne IRMS LDP (Exhibit 16 of the Appeal Brief) the meaning of what is written in handwriting at the bottom of the page is that Boldenone was not identified because the concentration was insufficient. How could they claim afterwards that Boldenone was found in my body? This clearly proves that the Boldenone identification in the test was inadequate and that there was a reason to hide the IRMS LDP from me and my experts in the hearing – again I say I must be acquitted."*

6.11. The discrepancy between the A and B Sample IRMS tests (the A Sample Test proving the exogenous origin of Boldenone and Boldenone metabolites; the B Sample Test proving only the exogenous origin of the Boldenone metabolite) require compellingly the consequences set forth in art. DC 7.1.9 of the FINA DC Rules and Section 5.2.4.3.2.9 of the WADA International Standard for Laboratories, namely that the samples have tested negative.

6.12. Mr Jaben alleges that WADA "*is ignoring the Athens Laboratory results that showed that the A sample analysis showed the presence of Bodenone itself and its metabolite.*" These are two separate substances, in the view of Mr Jaben.

6.13. But, according to Mr Jaben, the "*problem*" with the Athens Laboratory is much bigger:

> *". . . as its "B" sample conclusions were wrong and different from Cologne IRMS results . . . The Athens lab report . . . states that only Boldenone was found in Sample "B". In the Athens lab remark under the "Analysis Results", the lab states that the Boldenone metabolite was confirmed in Sample A2268850 (meaning the metabolite was found in sample "A" and not in sample "B"). In the Cologne lab IRMS analysis report of November 14th, 2008 (which was performed many months after the Athens lab issued Exhibit 5 to the Appeal Brief [the Analysis Report of the B Sample dated 18 July 2008], the Cologne lab reached a completely different result in which Boldenone was not found in the "B" sample and only Boldenone Metabolite was found . . . This clearly proves the Athens lab did not follow the International Laboratory Standards and I should be acquitted and in any case the "B" sample result did not confirm the "A" sample result."*

[underlining from the original; bracketed language inserted by the Panel for purposes of better understanding.]

6.14. In further support of his position, Mr Jaben cites the expert opinion of Dr de Boer who confirmed that:

> *"the presence of Boldenone Metabolites of extrogenous origin does not necessarily mean that Boldenone was found, meaning that there are "false-positive" results in which Boldenone Metabolites are found but no Boldenone is or was actually present."*

6.15. After all of the above, it is clear in the mind of Mr Jaben that the discrepancy in the test results proves that no confirmation exists that Boldenone was present in his body, that the discrepancy proves a "*mistake*" in the analysis of the Laboratories. For this reason, Mr Jaben requests that he be acquitted.

## 7. Consolidation of both Procedures; Waiver of Hearing; Appointment of the Panel

7.1. By letter dated 16 February 2009, the President of the CAS Appeals Division informed the parties that he had decided to consolidate both cases into one proceeding pursuant to art. 50 para. 2 of the CAS Code "*as both procedures concern the same decisions rendered by the Disciplinary Committee of the ISA on 19 November 2008 and by the High Court of the ISA on 15 December 2008 with regard to Mr Jaben.*"

7.2. By letter dated 5 February 2009, FINA stated that "*the holding of a hearing in this case is not absolutely necessary.*" It requested the possibility, however, to file "*brief written observations in regard to the arguments set forth in the Respondent's Answer and which were not addressed in the Appeal Statement and Brief.*"

7.3. WADA stated in its letter to CAS dated 31 March 2009 that it had no objection if the Panel were to render its award on the basis of the written submissions only.

7.4. By letter of 6 February 2009 and 17 March 2009 to CAS, Mr Jaben agreed that the holding of a hearing would "*not be necessary*" and to accept an award "*on the basis of the written submissions only.*"

7.5. By letter to the CAS dated 31 March 2009, ISA waived its right to request the holding of a hearing in the matter.

7.6. On 13 March 2009, the parties were informed on behalf of the President of the CAS Appeals Division that pursuant to art. R54 of the Code, the following Arbitration Panel was appointed to decide the consolidated procedures:

> Mr John Faylor, Attorney-at-law, Frankfurt am Main, Germany
> (President of the Panel)
>
> Mr Quentin Byrne-Sutton, Attorney-at-law, Geneva, Switzerland
> (Arbitrator)
>
> Mr Michele Bernasconi, Attorney-at law, Zurich, Switzerland
> (Arbitrator)

7.7. By letter dated 9 April 2009, the parties to the consolidated procedure were informed that the President of the Panel had decided to grant the Respondents a deadline until 16 April 2009 to file their last "*short written observations*" with respect to WADA's letter of 31 March 2009 and the complementary report from the Deputy Head of the Cologne Laboratory submitted by WADA. The President informed the parties that no further submissions would be accepted by the Panel from any party following the receipt of the Respondents' said written observations.

7.8. Following the above instructions to the parties, Mr Jaben filed a last written statement dated 13 April 2009 which was received by the CAS on the following day. No further statement was made by ISA.

## II. In Law

### 1. Jurisdiction

1.1. As a Member Federation of FINA, ISA is undisputedly the recognized sole governing body in Israel for aquatic sports.

1.2. Art. 7.2 of the FINA Constitution states that:

> *"The Constitution and rules of a Member must not be in conflict with those of FINA. Where there is a conflict, FINA rules shall prevail."*

1.3. Correspondingly, the FINA DC Rules provides in art. DC Rule 14.1 that:

> *"All Member Federations shall comply with these Anti-Doping Rules. The regulations of Member Federations shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to and shall be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the respective Member Federations."*

1.4. In recognition of ISA's obligations under the FINA Constitution and the FINA DC Rules, ISA's High Court in its decision of 15 December 2008 made pointed reference to clause 11 of the ISA Disciplinary Regulations and quoted this clause in its decision as follows:

> *"11. Rules in a case of Anti-Doping Violations:*
>
> *In case of any violation noted in the FINA Anti-Doping Regulations, all FINA regulations that were valid on the day of performing the offence would apply, including all legal procedures, rights to hearings and the punishment regulations as outlined in the FINA Doping Control Rules."*

1.5. In accordance with the FINA DC Rules, the Athens Laboratory, as a WADA-accredited laboratory, sent its positive results to ISA with copies also being sent to WADA and FINA. Therefore, there can be no doubt that ISA is, and considers itself to be, subject to the FINA DC Rules.

1.6. In light of the above, it can only be deemed consequential and in accordance with the rules that the ISA High Court should first cite art. DC 8.2.1 of the FINA DC Rules in its decision of 15 December 2008:

> *"DC 8.2.1. When it appears, following the Results Management process described in Article 7, that an anti-doping rule violation has occurred in connection with a Member Federation's Test, the Competitor or other Person involved shall be brought before a disciplinary panel of the Competitor or other Person's Member Federation for a hearing to adjudicate whether a violation of these Anti-Doping Rules occurred and if so what Consequences should be Imposed."*

1.7. In cannot be denied, and is indeed not challenged by the Appellants 1 and 2, that the ISA Disciplinary Committee is a 1st instance adjudicative body which has authority to decide whether a violation of its Disciplinary Regulations has occurred.

1.8. The Protocol of the hearing which took place on 19 November 2008 before the Disciplinary Committee makes specific reference to its three judges, cites the ISA as being the "*prosecutor*" represented by counsel and Mr Jaben as being the "*accused*". Mr Jaben was also represented by counsel at the hearing on 19 November 2008 and was given uncontested opportunity to defend against the charges which had been raised against him.

1.9. Accordingly, the decision of the Disciplinary Committee on 19 November 2008 was rendered not by an administrative body of the ISA, but by a judicial body of the ISA charged with the responsibility to make a finding of fact and to apply the relevant law.

1.10. Mr Jaben is undisputedly an International Level Competitor. His right to appeal the decision of his national federation is set out in art. DC 13.2.1 of the FINA DC Rules:

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

1.11. Taking into consideration the reasoning of the ISA High Court, which the Panel unreservedly underscores, there can be no room for the interpretation promulgated by the Appellants 1 and 2 and the Respondent 2 that the appeal to its "*internal court*", meaning the ISA High Court, represents merely the exhaustion of "*any possible legal remedies available against the decision of the ISA Discipline Committee Board, except for this appeal to CAS.*" It would also contradict the restrictive meaning of art. DC 8.2.7 of the FINA DC Rules which states:

> *"8.2.7 Hearing decisions by the Member Federation shall not be subject to further administrative review at the national level except as provided in Article 13 or required by applicable national law."*

1.12. If the interpretation proposed by the Appellants 1 and 2 and the Respondent 2 were to be upheld, the differentiation made in art. DC 13.2.1 of the FINA DC Rules between "*International-Level Competitors*" who have the right to appeal "*exclusively*" to CAS

and all other national-level competitors "*that do not have a right to appeal under DC 13.2.1*" as set out in art. DC 13.2.2 of the FINA DC Rules would be needlessly obscured and rendered impossible to apply.

1.13. Art. DC 13.2.2 of the FINA DC Rules lays down very explicitly the "*principles*" which are to apply to the appeals procedures of Member Federations in matters regarding those (national-level) competitors "*that do not have a right to appeal under DC 13.2.1.*" These "*appeal procedures*" shall ensure that the national-level athlete has the right to "*a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the person's expense; and a timely, written reasoned decision.*"

1.14. In the view of the Panel, it was not the intention of FINA in adopting articles DC 13.2.1, DC 13.2.2 and DC 13.2.3 of the FINA DC Rules to permit or tolerate an intermediary appeals instance on the national level with regard to doping decisions involving International-Level Competitors, except if required by applicable national law and national rules.

1.15. In light of the above, the jurisdiction of CAS rests on art. DC 13.2.1 of the FINA DC Rules and art. R47 of the CAS Code. Neither of the parties have challenged the jurisdiction of the CAS as evidenced by their unanimous acceptance of CAS jurisdiction in the Order of Procedure.

1.16. Under art. R57 of the CAS Code, the Panel has full power to review the facts and the law.

## 2. Applicable Law

2.1. Art. R58 of the CAS Code provides:

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

2.2. The above provision was expressly mentioned in the Order of Procedure and was accepted by all of the parties.

2.3. The amended and currently governing FINA DC Rules in the version adopted by the FINA Extraordinary Congress in Manchester, England, on 8 April 2008 and which became effective on 1 January 2009 (the "**Effective Date**") find no application in the case at hand.

2.4. Art. DC 17.7 of the amended and currently governing FINA DC Rules which adopted and implemented the 2007 WADA Code Amendment provides as follows:

*"DC 17.7 Non-Retroactive Unless Principle of Lex Mitior Applies*

*With respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of lex mitior appropriately applies under the circumstances of the case."*

2.5. Inasmuch as the anti-doping rule violation in the instant case occurred on 30 April 2008, *i.e.*, prior to the Effective Date of the 2007 WADA Code Amendment (see art. 24.5 of the WADA Code and art. DC 17.5 of the amended FINA DC Rules), the "*applicable regulations*" in this case are the FINA Doping Control Rules in the version adopted by the FINA Extraordinary Congress in Barcelona, Spain, on 11 July 2003.

2.6. The Panel further holds that the principle of *lex mitior* finds no specific application in the dispute at hand.

2.7. With regard to issues arising from the FINA DC Rules in their 11 July 2003 version which require legal interpretation, Swiss law as the law of FINA's registered domicile shall apply. However, the Panel recognizes art. DC 17.1 of the FINA DC Rules (which implemented art. 24.3 of the unamended WADA Code) which states:

*"These Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes."*

## 3. Admissibility of the FINA Statement of Appeal dated 7 January 2009

3.1. Art. DC 13.5 sent. 1 of the FINA DC Rules provides as follows:

*"DC 13.5 The deadline to file an appeal shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA."*

3.2. With regard to time limits under the CAS Code, art. R32 of the CAS Code also has relevance to the case at hand:

*"The time limits fixed under the present Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under the present Code are respected if the communications by the parties are sent before midnight on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day."*

3.3. FINA was notified of the decision of the ISA Disciplinary Committee on 20 November 2008, one day following the issuance of the decision of the Committee.

3.4. On 7 January 2009, 48 days after receiving the notification of the decision from ISA, FINA filed its Statement of Appeal to CAS.

3.5. The Panel has noted that FINA applies the date of 18 December 2008, the date upon which it learned from ISA of the decision of the ISA High Court, as the commencement date for the 21-day filing deadline. If the Panel were to assume 18 December 2008 as the notification date, with the first day of the 21-day filing period to commence on 19 December 2008, 20 days would have expired prior to FINA's filing of its Statement of Appeal on 7 January 2009. Under this assumption, FINA would have filed a timely appeal.

3.6. After due consideration of the facts, however, the Panel holds that FINA's filing deadline to CAS must be deemed to have commenced on 21 November 2008, one day following the day upon which it received notification from ISA of the Disciplinary Committee's decision. In the view of the Panel, FINA's appeal to CAS must be denied for being manifestly late.

3.7. The Panel finds no grounds upon which the 21-day filing deadline pursuant to art. DC 13.5 of the FINA DC Rules can be held to have been extended in mutual agreement of ISA and FINA by reason of ISA's request for an additional 30 days "*in order to [complete] all internal legal procedures*" as contained in ISA's letter to FINA of 2 December 2008 (see Pt. 2.25 above). This argument was raised by ISA in its pleadings before the ISA High Court.

3.8. The exchange of letters dated 2 December 2008 between FINA and ISA provide no evidence that FINA ever granted ISA an extension of 30 days nor that it recognized the appeal to the ISA High Court as an integral part of ISA's appeals process. To the contrary, ISA's letter of 2 December 2008 requesting the 30 day extension followed FINA's letter of the same date in which FINA announced that it would "*exercise its right to appeal against the decision in accordance with DC 13.2.1 and DC 13.2.3.*"

3.9. Moreover, FINA stated explicitly in the same letter that "*FINA has a right to appeal before the Court of Arbitration for Sport in cases involving International-Level Competitors*". The submitted correspondence of the parties to CAS contains no response from FINA to ISA's letter containing the extension and confirmation request.

3.10. Notwithstanding the above, it would violate fundamental principles of fairness if procedural deadlines such as the filing deadline in art. DC 13.5 of the FINA DC Rules were to stand at the free disposition of the prosecuting parties, here ISA and FINA, especially if the accused athlete remains uninformed of such communications which ultimately affect his procedural rights.

3.11. The Panel also finds no legal basis to postpone the commencement of the 21-day filing deadline until 18 December 2008, the day upon which FINA was informed of the ISA High Court decision. ISA erred in assuming that its High Court possessed jurisdiction under the ISA Disciplinary Rules to rule on a doping violation involving an International-Level Competitor. In referring to art. DC 8.2.1 of the FINA DC Rules, the ISA High Court correctly held that a proper adjudication had been held by the ISA Disciplinary Committee and that, as Mr Jaben was an International-Level Competitor, an appeal was to be lodged "*exclusively to the Court of Arbitration for Sport*".

3.12. In this regard, it is noteworthy that ISA did not exercise its right to appeal to CAS, but instead refrained from filing such an appeal, presumably in recognition that the 21-day deadline pursuant to art. DC 13.5 of the FINA DC Rules had already expired on 15 December 2008, the day upon which the ISA High Court decision was issued.

3.13. There can be no dispute, however, that FINA was notified already on 20 November 2008 of the decision of the ISA Disciplinary Committee. FINA also declared in its letter of 2 December 2008 to ISA that, in light of the Disciplinary Committee's erroneous application of art. DC 10.2 of the FINA DC Rules, FINA, acting for itself, wished to file an appeal to CAS.

3.14. Moreover, in citing articles DC 13.2.1 and DC 13.2.3 of the FINA DC Rules in its letter, there can be no question that FINA was also aware that Mr Jaben was an International-Level Competitor and that the decision of the ISA Disciplinary Committee was to be "*appealed exclusively to the Court of Arbitration for Sport in accordance with the provisions applicable before such court.*"

3.15. If indeed FINA erroneously assumed that the ISA High Court possessed (internal) jurisdiction to hear ISA's appeal of the Disciplinary Committee's decision, it must also bear the risk of losing its right to appeal for having exceeded the 21-day deadline pursuant to art. DC 13.5 of the FINA DC Rules. The consequences of this error cannot be placed at the burden of Mr Jaben.

3.16. In the basis of the above, the Panel rules that the Statement of Appeal filed by FINA on 7 January 2009 must be denied admissibility.

## 4. Admissibility of the WADA Statement of Appeal dated 30 January 2009

4.1. With regard to parties entitled to appeal to CAS, but which were "*not a party to the proceedings having led to a decision subject to appeal*", art. DC 13.5 of the FINA DC Rules provides as follows:

> *"The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having led to a decision subject to appeal:*
>
> - *Within a deadline of ten (10) days from receipt of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied.*
> - *If such request is raised within the above deadline, then a new appeal deadline will run for the concerned party from the day the copy of the file is received."*

4.2. On the basis of the file and the courier tracking protocol, the Panel has concluded that WADA did not learn of the decision of the ISA Disciplinary Committee until it was informed by FINA of the ISA High Court decision on 12 January 2009. ISA did not inform WADA of the decision at the time and in the same manner as it had informed FINA of the Disciplinary Committee decision on 20 November 2008 or the ISA High Court decision on 18 December 2008.

4.3. Except for the laboratory analysis reports issued by the Athens Laboratory on 3 July 2008 and possibly other subsequent routine laboratory reports, WADA had only knowledge of a pending doping violation. There is no evidence that WADA, in fact, learned of the ISA Disciplinary Committee or High Court decisions from the newspapers or other publications.

4.4. Upon receipt of the ISA High Court decision on 12 January 2009, WADA filed its Statement of Appeal within the 21-day deadline set forth in art. DC 13.5 of the FINA DC Rules.

4.5. The Panel recognizes that Mr Jaben has raised significant arguments in favor of striking WADA's Statement of Appeal on the grounds that it, like the FINA appeal, was filed too late. If the prosecutorial side of a doping adjudication comprised of both FINA and WADA are able to delay the run of the filing deadline by withholding notification of the decision, the athlete can indeed be unjustly disadvantaged.

4.6. In this regard, the Panel concurs that the absence of specific provisions addressing filing deadlines applicable to non-parties such as WADA to sanctioning proceedings in the 2003 FINA DC Rules represented a weakness in these former rules. Under the 2009 FINA DC Rules, ISA would have been bound under the revised language of art. DC 14.8 to send "*all hearing and appeal decisions*" within ten (10) days to <u>both</u> FINA and WADA.

4.7. More importantly, however, under the new provision of art. DC 13.5 of the 2009 DC FINA Rules, WADA in the present case would have been subject to a <u>defined</u> and calculable filing deadline for an appeal or intervention, such deadline being the later of:

> "*(a) Twenty-one (21) days after the last day on which any other party in the case could have appealed,*
> *(b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision.*"

4.8. In the case at hand, the Panel also notes Mr Jaben's argument that, under art. DC 14.6 of the 2003 FINA DC Rules, the Member Federation:

> "*. . . shall also regularly update FINA and WADA on the status and findings of any review or proceedings conducted pursuant to . . . . DC 13 (Appeals), and, in any case in which the period of Ineligibility is eliminated under DC 10.5.1 (No Fault or Negligence) or reduced under DC 10.5.2 (No Significant Fault or Negligence). FINA and WADA shall be provided with a written reasoned decision explaining the basis for the elimination or reduction. . .*"

4.9. The Panel does not view the above provision as being sufficiently defined to provide a marking date for the commencement of the appeals filing period, the expiration of which would justify forfeiture of the right to appeal. The use of general concepts and meanings open to interpretation is common in legal draftsmanship. Because the drafters of this provision have, intentionally or unintentionally, applied general and undefined terms such as "*regularly update*" and "*status and findings*", it cannot be inferred *ipso jure* that they intended to provide a legal basis justifying the forfeiture of the right to appeal for any party to an anti-doping procedure in the event that party violates the provision.

4.10. CAS rulings exist on the issue whether the failure of a federation to notify a decision to WADA in a timely manner provides sufficient cause to deny the admissibility of an appeal filed by WADA.

4.11. In CAS 2006/A/1153 WADA v/Portuguese Football Federation & Nuno Assis Lopes de Almeida, more than 20 days had lapsed between the date of receipt of the national tribunal's decision and its notification by the national federation to WADA. The latter filed its Appeal to CAS 21 days later. More than 40 days had therefore passed between the receipt of the decision by the national federation and the date on which the appeal was filed by WADA.

4.12. The CAS Panel ruled in this case that WADA's appeal was filed in due time. It called the delay "*regrettable*", but considered that:

> "*. . . the delay is acceptable and cannot be regarded as arbitrary or resulting in a breach of any procedural rights of Mr Nuno Assis Lopes de Almeida. The matter might be different if the delay was more significant than in the present case.*"

4.13. In the CAS decision CAS 2007/A/1284 and CAS 2007/A/1308 WADA v/FECNA & Lina Maria Prieto, more than (4) months had elapsed between the decision of the 1st instance Disciplinary Commission on 28 November 2006 and notification of the decision to WADA on 10 April 2007. FINA was notified of the decision by the national federation on 28 February 2007 and took more than one month to notify the decision to WADA.

4.14. Here, also, the CAS Panel held that the fact that the FINA waited over a month to pass the decision to WADA "*is regrettable.*" The Panel admonished both the national federation and FINA that "*it is the duty of all International sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with their anti-doping rules and policies contained within their organization's rulebook.*" However, the Panel concluded:

> *"Nevertheless, such a delay cannot be held against the WADA. Should it be otherwise, it would imply for the WADA to intervene in national cases and take measures or make inquiries which obviously fall into the competence of the FECNA or the FINA."*

4.15. In both of the above cases, the CAS Panel rejected the notion that notification of the decision could have been obtained by WADA from the print or electronic media. The fact that WADA was informed prior to the decision both of the positive tests and the

provisional suspension of the athlete was deemed by the Panel to be "*not sufficient to impose a good faith obligation on WADA to enquire about a decision issued by such federation.*"

4.16. The Panel in the present case shares the opinion set out in WADA v/FECNA & Lina Maria Prieto. Placing an active duty on WADA -- a non-party to the appealed decision -- to unilaterally enquire about a decision to be issued by a federation in order to preserve its own right to appeal would place an undue burden upon the WADA and possibly hinder the fight against doping. It would require that WADA actively monitor each and every of the hundreds of 1st instance disciplinary decisions on the national level.

4.17. Such a responsibility would defeat the purpose of art. DC 13.5 of the FINA DC Rules which clearly states that the 21-day filing period begins to run "*from the date of receipt of the decision by the appealing party and FINA.*" As the panel stated in WADA v/FECNA & Lina Maria Prieto:

> *"It would . . . impose an unreasonable burden on WADA, which would have to constantly inform themselves about the current status of the pending proceedings to avoid the risk of losing its right to appeal decisions. One can expect from the relevant international federation (here: FINA) that it keeps track of the national disciplinary procedures initiated under its supervision . . . ."*

4.18. Based on the above, the Panel holds that, although the notification of the decision to WADA on 12 January 2009 represents a delay of more than 32 days (assuming that notification could have, and should have, been made to WADA by either ISA or FINA on 20 November 2008), the delay is not of such a nature and duration as to warrant the striking of the WADA appeal.

4.19. The 21-day time limit pursuant to art. DC 13.5 of the FINA DC Rules was therefore met by WADA when it submitted its Statement of Appeal on 31 January 2009.

## 5. Mr Jaben's Violation of the FINA Doping Control Rules

5.1. The relevant provisions of art. DC 2 of the FINA DC Rules state as follows:

> *"DC 2 ANTI-DOPING RULE VIOLATIONS*
>
> *The following constitute anti-doping rule violations:*
>
> *DC 2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Competitor's bodily Specimen.*
>
> *DC 2.1.1 It is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body. Competitors 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 Competitor's part be demonstrated in order to establish an anti-doping violation under DC 2.1.*

*DC 2.1.2 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 a Competitor's Sample shall constitute an anti-doping rule violation.*

*DC 2.1.3 As an exception to the general rule of DC 2.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously."*

5.2. The 2008 Prohibited List (valid as of 1 January 2008) states under S1. Anabolic Agents (the "**List**") the following:

"*S1. ANABOLIC AGENTS*

*Anabolic agents are prohibited.*

*1. Anabolic Androgenic Steroids (ASS)*

*a. Exogenous* AAS, including:*

***1-androstendiol** (5a-androst-1-ene-3β-diol); **1-androstendione** (5a-androst-1-ene-3, 17-dione); **bolandiol** (19-norandrostenediol), **Bolasterone; boldenone; boldione** (androsta-1,4-diene-3, 17-dione) . . . ."*

5.3. The urine samples provided by Mr Jaben were found to contain the prohibited substance boldenone. Although boldenone is listed under exogenous anabolic androgenic steriods in S1 1 a), meaning that it is a substance which is not ordinarily capable of being produced by the body naturally (see definition of "*exogenous*" under * S1), the List also clarifies that boldenone forms an exception to its otherwise clear qualification as an exogenously-produced substance. Under "*b. Endogenous** AAS*" of the List, it is stated with regard to boldenone as follows:

*"In extremely rare individual cases, boldenone of endogenous origin can be consistently found at very low nanograms per milliliter (ng/mL) levels in urine. When such a very low concentration of boldenone is reported by a laboratory and the application of any reliable analytical method (e.g. IRMS) has not determined the exogenous origin of the substance, further investigation may be conducted by subsequent test(s)."*

5.4. Being primarily an exogenous AAS "*in extremely rare individual cases*", the testing laboratory must, in the event of being confronted with an extremely "*rare individual case*", submit the specimen to additional reliable analytical testing methods such as IRMS in order to prove the exogenous or endogenous origin of the prohibited substance found. The explanation under "*b. Endogenous ** AAS*" states as follows:

*"Where an anabolic androgenic steroid is capable of being produced endogenously, a* Sample *will be deemed to contain such* Prohibited Substance *and an* Adverse Analytical Finding *will be reported 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. A* Sample *shall not be deemed to contain a* Prohibited Substance *in any such case where an* Athlete *proves that the concentration of the* Prohibited Substance *or its metabolites or markers and/or the relevant ratio(s) in the* Athlete's Sample *is attributable to a physiological or pathological condition.*
>
> *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."*

5.5. Having reviewed the results of the laboratory analyses conducted on the samples, the Panel concludes that the prohibited substance boldenone and boldenone metabolite were found in Mr Jaben's A sample. The Analysis Report S2008 002 190 of the Cologne Laboratory dated 26 June 2008 establishes clearly and beyond question that "*the GC/C/IRMS results are consistent with an exogenous origin of boldenone and boldenone metabolite*".

5.6. The IRMS analysis of the B sample in the Cologne Laboratory resulted in establishing only the presence of boldenone metabolite in the analyzed aliquot of the B sample. Here, also, the B-Analysis Report confirmed that "*the GC/C/IRMS results are consistent with an exogenous origin of the boldenone metabolite*".

5.7. The Cologne Laboratory raised no issue that the concentration of the boldenone metabolite found in the specimen was of such "*very low*" nanogram per milliliter (ng/mL) level as to provide cause for suspecting a possible endogenous origin. To the contrary, the Laboratory states clearly that the concentration found confirms the exogenous origin of the boldenone metabolite. The substance boldenone could not be confirmed in the B sample due to the presence of a "*co-eluting substance.*"

5.8. If Mr Jaben takes the position that he never ingested boldenone, thus implying that the origin of the substance must have had an endogenous origin, it falls to his burden to prove:

> "*. . . that the concentration of the Prohibited Substance or its metabolites . . . in the Athlete's Sample is attributable to a physiological or pathological condition.*" (see S1 b. Endogenous AAS of the 2008 Prohibited List).

5.9. Mr Jaben has provided no proof of a physiological or pathological condition which may account for the presence of the boldenone metabolite in his bodily fluids.

5.10. In its statement to WADA dated 16 February 2009, Dr Hans Geyer, Deputy Head of the Cologne Laboratory, stated as follows:

> "*For an adverse analytical finding the proof of the exogenous origin of the boldenone metabolite is sufficient. This could be shown for the A- and B-sample (annex 1-3).*

*In the A sample additionally the exogenous origin of boldenone could be proven (see annex 1). This was not completely possible in the b-sample, because of a co-eluting substance (see comment annex 3). Therefore we reported only the boldenone metabolite (see annex 2).*

*The results for boldenone do not influence the final conclusion: The IRMS analyses prove the exogenous origin of the boldenone metabolite both in the a- and in the B-sample."*

5.11. The expert opinion submitted by Mr Jaben and issued by Dr Douwe de Boer dated 19 November 2008 does not contradict the finding of Dr Geyer. Dr de Boer confirms that "*the Boldenone that was identified in the A-sample analysis certificate was not identified in the B-sample analysis*", but asserts the following:

"*A) Despite some remarks, the Cologne WADA doping laboratory adequately proved that the presence of the boldenone metabolite 5β-androst-1-ene-17β-ol-3-on in the B- sample was of exogenous origin.*

*B) The Cologne WADA doping laboratory did not prove adequately the presence in the B-sample of boldenone and its conclusion for the B-sample does not include the boldenone itself (as opposed to its conclusion for the A sample IRMS).*

*C) The presence of boldenone metabolite 5β-androst-1-ene-17β-ol-3-on of exogenous origin can be the result of the presence of one of its precursor steroids such as boldione and 1,4,6 androstatriene-3,17-dione-meaning the presence of boldenone metabolite 5β-androst-1-ene17β-ol-3-on of exogenous origin does not mean boldenone was present in the athletes urine."*

5.12. Dr de Boer was correct in his earlier expertise dated 27 August 2008 to have pointed out that "*the IRMS analysis is extremely relevant as it proves the endogenous or exogenous origin of the compound of interest.*"

5.13. The IRMS analysis of the B sample was, however, conducted prior to the hearing before the ISA Disciplinary Committee and it resulted in the finding, confirmed by Dr de Boer, that boldenone metabolite of exogenous origin was present in <u>both</u> the A and B samples.

5.14. After reviewing the laboratory results and the expert opinions, the Panel does not share the view of Mr Jaben that the B sample conclusions of the Athens Laboratory "*were wrong and different from Cologne IRMS results*". Boldenone metabolite was found to be present in <u>both</u> the A and B sample analyses and on the basis of the IRMS test to be of exogenous origin.

5.15. The fact that the substance boldenone was <u>not</u> found in the B sample does not invalidate the finding of an anti-doping violation on the grounds of art. DC 7.1.9 of the FINA DC rules, namely that:

*"If the sample "B" proves negative, the entire test shall be considered negative and the Competitor, his Member Federation, and FINA shall be so informed."*

5.16. The same conclusion must be drawn with regard to Section 5.2.4.3.2.9 of the WADA International Standard for Laboratories ("ISL") which provides that:

> *"If the "B"* Sample *confirmation does not provide analytical findings that confirm the "A"* Sample *result, the* Sample *shall be considered negative and the Testing Authority, WADA and the International Federation notified of the new analytical finding."*

5.17. The B sample tested by the Cologne Laboratory in IRMS analysis did not prove negative. Dr de Boer, does not refute the fact that boldenone metabolite 5ß-androst-1-ene-17ß-ol-3-on was present nor that it was of exogenous origin.

5.18. The Panel understands Dr de Boer's opinion of 19 November 2008 to mean that the uncontested presence of boldenone metabolite could also be the result of other precursor steroids such as boldione and 1,4,6 androstatriene-3,17-dione. At the very least, Dr de Boer is not clear on this point. If, however, Dr de Boer takes the position that the precursor steroid can be attributable to another ASS other than boldenone, it becomes the burden of Mr Jaben to prove such origin.

5.19. Dr de Boer's lack of clarity is, however, not deciding of issue. The purpose of IRMS testing is, as Dr de Boer himself emphasizes, to prove the endogenous or exogenous origin of the prohibited substance, in this case the boldenone metabolite which was proved to be present in both samples. In this regard, the task of IRMS testing is not unlike the testing for the exogenous origin of a Threshold Substance as governed under Section 5.2.4.3.2.4 of the ISL. That provision states:

> *"For exogenous Threshold Substances, the "B" Sample results need only confirm the "A" Sample identification for the Adverse Analytical Finding to be valid."*

5.20. In the case at hand, the identity of the substance in both samples had been established both by the Athens and Cologne Laboratories on the basis of their respective analyses. The task of the IRMS analysis was to prove the exogenous origin of the boldenone metabolite. In the view of the Panel, the Cologne Laboratory confirmed such exogenous origin.

5.21. Lastly, apart from the delayed processing of the samples by the Athens and the Cologne Laboratories, Mr Jaben's claims of other departures from the International Standard for Laboratories and the International Standard for Testing remain unsubstantiated. This is particularly the case with regard to his charge that "*chain of custody*" in the handling of the samples has been breached. Mr Jaben does not claim that these alleged violations of the International Standards have caused the adverse analytical finding (art. DC 3 of the FINA DC Rules).

5.22. After all of the above, the Panel holds that the presence of boldenone metabolite in both specimens, which was proved in IRMS testing to be of exogenous origin, is sufficient to support the doping violation. '

## 6. The Sanction

6.1. Having established that Mr Jaben committed a doping violation by reason of the presence of the boldenone metabolite in his bodily specimen, it is not necessary to consider Mr Jaben's possible intent, fault, negligence, knowing or unknowing use of boldenone. Pursuant to art. DC 2.1.2 of the FINA DC Rules, "*the detected presence of any quantity of Prohibited Substance or its Metabolites or Markers in a Competitor's Sample shall constitute an anti-doping violation.*"

6.2. Pursuant to art. DC 10.2 of the FINA DC Rules, the period of Ineligibility imposed for a violation of art. DC 2.1 of the same Rules (presence of Prohibited Substance or its Metabolites or Markers) shall be two (2) years in the event of a first violation. The doping violation took place out-of-competition.

6.3. Art. DC 10.5 of the FINA DC Rules governs the elimination or reduction of the period of ineligibility based on exceptional circumstances:

> "*DC 10.5.1. If the Competitor establishes in an individual case involving an anti-doping rule violation under DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under DC 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (Presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. . . . .*"

6.4. Art. DC 10.5.2 of the FINA DC Rules establishes the parameters of a reduced ineligibility sanction:

> "*If a Competitor establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.*"

6.5. In reviewing the facts of the present case, the Panel is unable to find grounds which argue in favor of a reduction in the sanction from two (2) years to one (1) year pursuant to art. DC 10.5.2 of the FINA DC Rules.

6.6. The Panel notes Mr Jaben's vehemence in denying that he ever took boldenone. The Laboratory results have, however, proven the contrary. It has been established to the comfortable satisfaction of the Panel that boldenone metabolite was found to be present in his body on 30 April 2008. Mr Jaben has provided no information as to how the precursor substance, inadvertently or unconsciously, may have entered his body.

6.7. Based on the above, the Panel takes the position that the ISA Disciplinary Committee erred in imposing a one (1) year term of ineligibility. For the above reasons, the Panel holds that the term to be imposed upon Mr Jaben shall be increased from one year to two years.

## 7. Commencement of the Period of Ineligibility

7.1. Art. DC 10.8 of the FINA DC Rules permits an adjustment of the commencement date of the period of ineligibility where such modification is appropriate for considerations of fairness:

> *"DC 10.8 The Period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Competitor, the period of Ineligibility may start at an earlier date commencing as early as the date of the Sample Collection."*

7.2. In the instant case, the ISA Disciplinary Committee set the starting date of Mr Jaben's period of ineligibility on the first date of his provisional suspension on 5 June 2008.

7.3. The Panel has taken into consideration the number of the delays which have occurred in both the testing and the adjudicative process in this matter. These begin with the inordinate delay in the completion of the laboratory analyses. The latter commenced upon the receipt of the samples in the Athens Laboratory on 7 May 2008 and ended with the report of the IRMS findings of the Cologne Laboratory on the B sample on 14 November 2008.

7.4. No explanation has been given by WADA regarding the delay in requesting the IRMS analysis of the B sample, the completion of which was, in a doping violation such as in this case which involves boldenone, a prerequisite for the validation of the sample testing.

7.5. Taken together, the laboratory analyses spanned a period of more than 6 months. As a result of this delay, the hearing before the ISA Disciplinary Committee could not take place until 19 November 2008. The Panel considers this span to pose an undue burden upon the athlete.

7.6. Over and above the time span required for the laboratory analyses, the Panel notes that FINA's delay of almost one month between its receipt of ISA's notification of the decision and the filing of FINA's appeal to CAS was unduly long.

7.7. Although the ISA High Court acted swiftly (less than 4 weeks) in determining that it lacked jurisdiction to hear the appeal under art. DC 13.2.1 of the FINA DC Rules, the fact that ISA omitted notifying the High Court decision to WADA resulted in further delaying the WADA appeal. Taking into consideration the time needed for the ISA High Court to render its decision, almost seven weeks passed from the date of the Disciplinary Committee decision of 19 November 2008 until 7 January 2009, the date of the FINA appeal, and almost eleven weeks passed until WADA filed its appeal. With regard to the WADA appeal, the filing was further delayed by the need for WADA to request the sending of the complete file.

7.8. Mr Jaben had no control over these delays and bears no responsibility for them. The athlete has a right to an expeditious hearing and timely completion of the adjudicative process. This is clearly articulated in articles DC 8.2 and DC 8.2.1 of the FINA DC Rules.

7.9. In light of these delays, the Panel considers that it is fair and appropriate to move the commencement date of the ineligibility period from 5 June 2008, the date of the provisional suspension, to 30 April 2008, the date of the sample collection.

## 8. Costs

8.1. Subject to the payment of the CAS Court Office fee of Swiss francs 500,-- by the Appellants 1 and 2, art. R 65.1 of the CAS Code provides that the CAS proceedings shall be free. The CAS will in both cases retain the Court Office fees. The fees and costs of the arbitrators are borne by the CAS (art. R 65.1 of the CAS Code).

8.2. Art. R 65.3 provides that 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 these costs or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

8.3. In the case at hand, the WADA's appeal was admitted, the FINA appeal was, in contrast, declared inadmissible for being late. As a general rule, the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. WADA was assisted by a professional legal adviser. Accordingly, the Panel deems it to be fair to order Mr Jaben to contribute to the costs incurred by WADA in an amount of CHF 1,000.

8.4. With regard to ISA and the outcome of this arbitration, the Panel takes the view that it should be ordered to participate in the cost contribution to WADA in an amount of CHF 2,000.

8.5. With regard to FINA, to ISA and to Mr Jaben, respectively, and having taken into account the outcome of the arbitration, the Panel is of the view that each should bear their own legal fees and other expenses incurred in connection with this arbitration.

**ON THESE GROUNDS**

The Court of Arbitration for Sport rules:

1. The appeal of the World Anti-Doping Agency against the decisions of the Disciplinary Committee of the Israel Swimming Association dated 19 November 2008 and of the High Court of the Israel Swimming Association dated 15 December 2008 is declared admissible and is partially upheld.
2. The appeal of the Fédération Internationale de Natation against the decisions of the Disciplinary Committee of the Israel Swimming Association dated 19 November 2008 and of the High Court of the Israel Swimming Association dated 15 December 2008 is declared inadmissible.
3. The decision of the Disciplinary Committee of the Israel Swimming Association dated 19 November 2008 is modified; Mr Jaben is declared ineligible for a period of two (2) years, commencing as of 30 April 2008 without any interruption.
4. All competitive results achieved by Mr Jaben from 30 April 2008 through 5 June 2008, the date of his provisional suspension, and between the date he resumed competition pursuant to the decision of the Disciplinary Committee of the Israel Swimming Association dated 19 November 2008 until the date of this award shall be invalidated with the consequence that all medals, points and prizes shall be forfeited.
5. This award is pronounced without costs, except for the non-reimbursable Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by each of the Appellants and to be retained by the CAS.
6. Mr Jaben is ordered to pay to the World Anti-Doping Agency an amount of CHF 1,000 (one thousand Swiss Francs) as a contribution towards the latter's legal and other costs incurred in connection with the present arbitration.
7. The Israel Swimming Association is ordered to pay to the World Anti-Doping Agency an amount of CHF 2,000 (two thousand Swiss Francs) as a contribution towards the latter's legal and other costs incurred in connection with the present arbitration.
8. Mr Jaben, the Israel Swimming Association and the Fédération Internationale de Natation shall bear their own legal and other costs.
9. All other motions or petitions for relief are dismissed.

Done in Lausanne, 13 July 2009

THE COURT OF ARBITRATION FOR SPORT

John C. Faylor

President of the Panel
John A. Faylor