Arbitration CAS 2010/A/2311 & 2312 Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W., award of 22 August 2011

Panel: Prof. Michael Geistlinger (Austria), President; Prof. Ulrich Haas (Germany); Mr Menzies Campbell QC (United Kingdom)

Skating
Doping (norandrosterone)
Arbitration agreement and waiver of access to public courts
Unequal bargaining power and renouncement of the right of access to public court
Specific advantages of arbitration in the field of sports
Arbitration under Dutch Law
Non-applicability of Art. 6.3 ECHR to sport-related disciplinary proceedings
No need for explanation for the analysis of the B sample
Application of doping rules to minors

1. **Switzerland is a contracting party to the European Convention on Human Rights (ECHR), but whether or not the ECHR is applicable to arbitration in general or to arbitration agreements specifically, is open to questions. The case law of the Swiss Federal Tribunal insofar lacks a clear line. The jurisprudence of the European Court of Human Rights (ECtHR) as to articles 6.1 and 7 ECHR holds that by concluding an arbitration agreement the parties validly renounce their right of access to public courts in the sense of article 6.1 ECHR.**

2. **The fact that one party may have more bargaining power than the other does not invalidate the fact that by concluding an arbitration agreement, the parties renounce their right of access to public court. If – according to the jurisprudence of the ECtHR – the right of access to the courts enshrined in Art. 6.1 ECHR can be subject to a weighing up in the event that arbitral jurisdiction is prescribed by statute, then the same must apply also in a case of unequal bargaining power. Therefore, only if there were no reasons in terms of "good administration of justice" in favour of arbitration a violation of article 6.1 ECHR could be acknowledged.**

3. **In addition to the general advantages which arbitration is said to have, there are specific advantages of arbitration in the field of sports. The principle of uniformity in sport is a defining characteristic of organised sport – particularly at an international level. For, in order to be able to compare sports performances internationally, competitive sport must be performed in accordance with the same and uniform rules. The consistency of rules and decisions is therefore an essential feature of international sport. However, the risk to consistency increases with the number of fora before state courts and – as a consequence thereof – of national legal standards that apply. This is not only contrary to the interests of sports organisations, but also to the interests of an individual athlete.**

For, the latter has only submitted to a sports federation's sovereignty because he believed his competitors to be bound in the same way. If therefore sport wishes to preserve its global character and the principle of uniformity this is only possible by concentrating jurisdiction at a single forum in the form of arbitration.

4. **With regard to arbitration, Dutch law follows general European legal standards. The relevant provisions of the Dutch Code of Civil Procedure do neither restrict the parties' autonomy to submit a dispute to arbitration in the case of a child or minor, in case of a Dutch or other European citizen, nor do they limit arbitration to the obligatory use of the Dutch language by the arbitration bodies.**

5. **Art. 6.3 ECHR applies to criminal proceedings only. According to Swiss Law, sport-related disciplinary proceedings conducted by a sport federation against an athlete are qualified as civil law disputes and not as criminal law proceedings. This finding is also in line with constant CAS jurisprudence.**

6. **According to the World Anti-Doping Code (WADC), the Anti-Doping Organization has the discretion to have the B sample analysed even if the athlete does not request its analysis. No explanation is needed and no violation of the WADC takes place.**

7. **There is no special anti-doping regime for minors. However, the young age of an athlete can be taken into account inasmuch as it has an impact on the athlete's fault.**

The First Appellant, Stichting Anti-Doping Autoriteit Nederland (NADO or "First Appellant"), is the National Anti-Doping Organization for the Netherlands, and so designated by the government of the Netherlands in accordance with the World Anti-Doping Code; it has its headquarters in Capelle aan den Ijssel, the Netherlands. The party was originally referred to by its name in English *"National Anti-Doping Organisation (NADO) of the Netherlands"* following the Statement of Appeal and the Appeal Brief, submitted by the First Appellant. This practice is in line with previous CAS jurisprudence (see CAS 2009/A/2012) all the more since the official language of the present proceedings is English. However, when the Respondent by numerous letters in Dutch and English argued that there was no party registered under such name under Dutch law, the Panel decided to use the Dutch name for the First Appellant.

The Second Appellant, Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB), is the Dutch National Federation for the sport of skating and has its headquarters in Amersfoort, Netherlands. The party was originally referred to by its name in English, based on the Statement of Appeal and Appeal Brief of the Second Appellant. However, when the Respondent by numerous letters in Dutch and English language argued that there was no party registered under such name under Dutch law, the Panel decided to use the Dutch name for the Second Appellant, as was the case with the First Appellant.

The Respondent, W., is a skater, born on 9 November 1993. He was affiliated to an ordinary member of the KNSB, namely of the association with full legal personality Y.C. "In Beweging", according to article 5 (1) (a) KNSB's Articles of Association and holder of a KNSB licence for the 2008/2009 season in the category Junior according to article 6 (1) (a) KNSB's Articles of Association (licence n° 10020003 for the disciplines Speed skating, Short track and Marathon). He still holds a KNSB licence. Furthermore, he participated in the Dutch all-round championships for C juniors, organized by the KNSB on 31 January 2009 (the "Competition"), where he finished second.

Since the Respondent was non-cooperative during the proceedings before the CAS, but instead submitted numerous letters in Dutch or English language, which did not relate to the facts of the case, the Panel established the facts of the case at hand not only based on the submissions of the two Appellants and the decisions of the KNSB's Disciplinary Committee dated 8 September 2009, 30 October 2009 and 12 March 2010 as well as in the decisions of the KNSB's Appeals Committee dated 6 July 2010 and 26 November 2010 but also on the basis of the decision of the Rotterdam District Court/Civil Division, case list number 330122/KG ZA 09-467, which was submitted by Second Appellant in its Appeal Brief. The decision of the Rotterdam District Court relates to a request for preliminary relief filed by the parents of the Respondent, both in their capacity as his legal representatives.

Further to the establishment of the facts by the bodies and court mentioned above, the Panel took note of the establishment of the facts by the Utrecht District Court / Commercial and Family Law Division, case number 274511 / KG ZA 09-988, which court has been approached by the father of the Respondent, E., in his capacity as legal representative of the Respondent in preliminary proceedings.

On 31 January 2009, prior to the start of the Competition, the Respondent was selected for an in-competition anti-doping test. This test was conducted by the First Appellant. According to the First Appellant's athlete notification form, which was used in this case, the Respondent was requested to report to the doping control station with a valid ID document on the same day prior to 18h05. The form stated inter alia as follows: *"Failure to appear on time, failure to sign forms, lack of cooperation with the doping control procedure and/or any other form of refusal to comply may result in disciplinary sanctions"*.

The Doping Control Official (DCO), Mr Cees Smid, approached the Respondent immediately after the competition when the Respondent was taking off his skates. Mr Smid showed the Respondent the notification form and asked him for an ID in order to prove his identity. Since the Respondent did not have such document with him, Mr Smid and the Respondent walked over to the Respondent's father in order to find an ID. The mother of the Respondent stood next to the Respondent's father and they talked to each other whether there was proof of the Respondent's identity. Since this was not the case, the Respondent's mother brought the Respondent's father's ID from the car and the Respondent's father accompanied the Respondent to the doping control station in the presence of Mr Smid. There they completed the athlete notification form by indicating the Respondent's father's ID together with his father's signature after the ID document. The form was signed by the Respondent and the DCO.

After completion of Respondent's doping control, the DCO filled the First Appellant's doping control form. The doing control form contains – inter alia – the following information: the Respondent's father's driving licence as ID, that the Respondent was satisfied with the procedure, that he did not have any reservation as to the conduct of the doping control and that Respondent's father was present throughout the doping control. Furthermore, the form bears the signature of the Respondent, his father and the DCO. Next to these initials the form reads as follows: *"By signing this form you declare you are familiar with the information provided on the front and back of this form, that you transfer ownership of the urine sample to the client and give your consent for the testing of the urine sample and the processing of your particulars in connection with this doping control by the Doping Authority, the laboratories whose services it engaged and the sports organization, as provided in the doping regulations, disciplinary code or similar regulations to which you are subject, and you sign for receipt of a copy of this form".*

The Respondent's sample was analysed by the WADA-accredited Anti-Doping Laboratory in Zwijnaarde (Belgium). The laboratory report showed the presence of the prohibited substance norandrosterone in a concentration of 72.8 ng/ml, which was well above the threshold level of 2.0 ng/ml. Norandrosterone is a metabolite of nandrolone or its precursors which is an anabolic androgenic steroid belonging to class S.1 Anabolic Agents of the WADA 2009 List of Prohibited Substances which according to articles 13.1 and 13.2 of the 2008 National Anti-Doping Regulations for Dutch Sport (the "Doping Regulations") was applicable for the sport of skating at the relevant time.

The Respondent was not in possession of a Therapeutic Use Exemption and did not apply for such. He was informed by the First Appellant about the adverse analytical finding and his right to have the B sample analysed as well as to be present at the B sample analysis. The Respondent did not react to said letter and did not request a B sample analysis. The First Appellant then ordered the analysis of the B sample on its own initiative in accordance with article 3.4 of the Doping Regulations. The analysis of the B sample confirmed the result of the analysis of the A sample.

The adverse analytical finding concerning the Respondent was reported to the Second Appellant on 13 February 2009 and the Respondent according to the rules provisionally suspended from 18 February 2009.

KNSB brought the case before its Disciplinary Committee which by an interim decision of 4 September 2009 appointed Prof. Dr. Rainer Stephany as its expert. Prof. Stephany was asked to answer the following two questions:

> *"Does the analysis performed by the laboratory comply with the applicable requirements imposed by the International Standard for Laboratories (ISL), including the Technical Documents?*
>
> *Did the laboratory follow the standard procedure?"*

On 20 January 2010, Prof. Stephany, having been provided with the Laboratory Documentation Package and the Standard Operating Procedure (SOP), answered both questions in the affirmative.

During the time that the case was pending before the Disciplinary Committee, the Respondent filed two civil law suits against the Appellants before the Rotterdam District Court/Civil Division claiming a violation under Dutch data protection law. Furthermore, he filed another law suit before the Utrecht

District Court /Commercial and Family Law Division requesting the lifting of the provisional suspension imposed on the Respondent on the basis of article 31.2 of the Doping Regulations. On 9 June 2009, the Rotterdam District Court dismissed all claims and requests of the Respondent. On 30 September 2009, the Utrecht District Court ruling on provisional matters decided that all claims and requests of the Respondent were denied.

The KNSB Disciplinary Committee issued interim decisions on 8 September, 15 October and 30 October 2009. On 2 December 2009, the KNSB Disciplinary Committee denied the Respondent's request to lift the provisional suspension, but limited its duration to 18 February 2010, if no final judgment had been given in the main proceedings by then.

On 12 March 2010, the KNSB Disciplinary Committee decided that the Respondent had committed an anti-doping rule violation and imposed a two year period of ineligibility, of which one year was suspended. The operative part of the decision reads as follows:

> *"The Disciplinary Committee*
>
> *i. imposes a period of ineligibility of two years, less the duration of the disciplinary measure, of which one (1) year suspended, with a probationary period ending on 9 November 2011.*
>
> *ii. Orders W. to pay the costs of the expert".*

In the decision of 12 March 2010, the KNSB Disciplinary Committee explains its conclusions concerning the length of the period of ineligibility as follows:

> *"4.1 The KNSB is seeking ineligibility for a period of two (2) years.*
>
> *4.2 The Doping Regulations contain a limited number of grounds for mitigation of the penalty. The Disciplinary Committee sees no grounds for mitigation pursuant to article 38.1 of the Doping Regulations. It has not been demonstrated that W. bears no significant fault or negligence in connection with the violation. Given W.' age and lack of experience, as contemplated in article 18.3 of the Doping regulations, the Disciplinary Committee is of the opinion that one (1) year of the penalty should be suspended, subject to a probationary period ending on 9 November 2011.*
>
> *4.3 The duration of the disciplinary measure will be deducted from the period of ineligibility to be imposed pursuant to article 46.4 of the Doping Regulations. The non-suspended part of the period of ineligibility therefore ends on 18 February 2010".*

The Respondent filed an appeal against the decision of the KNSB Disciplinary Committee of 12 March 2010 with the KNSB Appeals Committee. After an interim decision of 6 July 2010, the KNSB Appeals Committee rendered its final decision on 26 November 2010 and ruled as follows:

> *"The Committee:*
>
> - *sets aside the decision of the Disciplinary Committee of 12 March 2010,*
> - *finds the charge of the Association inadmissible,*
> - *gives W. the opportunity to submit a declaration to the secretary of the Committee of the costs that he has incurred for the purposes of his defence in the present doping case and to submit documentary evidence to support this declaration,*

- *adjourns the decision relating to the amount of the costs to be awarded".*

The KNSB Appeals Committee based its decision on the fact that the Second Appellant did not provide the Respondent with the documentation necessary to prepare and conduct his defence properly. It reasoned as follows:

> *"5.12 In these circumstances – in other words if an athlete requests documentation that is available only from the laboratory that is essential for the defence – the documentation should be supplied because refusal could place the athlete at a disadvantage in bearing his burden of proof. This legal rule is expressed in section 5.162 of the CAS decision referred to above, which reads as follows:*
>
> *"In consequence of the Laboratory's refusal, the Panel holds that it cannot place the Appellants at a procedural disadvantage in bearing their burden of proof, where the evidence requested is critical to their defence and the laboratory remains in exclusive control of disclosure".*
>
> *5.13 Accordingly, the Committee considers it to be unacceptable for the Association to have refused, in the present case, to supply the requested document. By acting in this way, the Association has frustrated in appeal a fundamental right of the defence. In disciplinary law, this should have the same consequences as in criminal law (see Supreme Court, 5 December 1989, Dutch Case Law 1990, 719) which means that the decision given in the first instance will be set aside and the charge made by the Association will be declared inadmissible".*

On 15 December 2010, the First Appellant filed its Statement of Appeal against the KNSB Appeals Committee's decision. On 16 December 2010, the Second Appellant filed its Appeal against the same decision. On 18 January 2011, the CAS informed the parties that the two matters have been consolidated into one procedure by decision of the Deputy President of the CAS Appeals Arbitration Division.

The Respondent did not comply generally with the rules of the Code of Sports-related Arbitration (the "Code"), in particular he did not file an answer to the Statements of Appeal and Appeal Briefs, did not provide the CAS with a power of attorney for Mr Manders, who had signed all the correspondence to the CAS Court Office and did – in most parts – not comply with the language of the procedure. Most letters submitted by Mr Manders were in Dutch. The CAS Court Office registered the following letters by Mr Manders on behalf of Respondent prior to the constitution of the Panel: 23 December 2010, 26 December 2010, 29 December 2010, 17 January 2011, 23 January 2011, 26 January 2011, 31 January 2011, 2 February 2011 and 21 February 2011.

The parties did not raise any objection as to the constitution and composition of the Panel. The Respondent did not comply with the language of the arbitration and kept on sending letters partly in English, partly in Dutch with documents mainly in Dutch on 13, 24, 26 and 28 March 2011.

On 7 April 2011, pursuant to Article R44.3 of the Code, the Panel issued a list of questions for the parties to answer:

"a) Questions to the Appellants:

aa) Why does the Zwijnaarde laboratory collect 5 ions instead of 3 ions for detecting norandrosterone? Is this general practice of laboratories (Standard Operating Procedure/SOP) or a specific procedure used only by the Zwijnaarde laboratory?

ab) The WADA Technical Document - TD2003IDCR reads in the relevant part as follows: "If the Laboratory protocol requires three ions to be within a tolerance window to identify a substance, it is not permissible to collect additional ions and select those ion ratios that are within tolerance and ignore others that would not result in meeting identification criteria without a valid explanation. "Could you, please, comment on this provision in the context of the facts of the case and specify, in particular, what you held as "a valid explanation"?

ac) The Appellants are requested to submit the Report of Prof. Dr. Rainer Stephany of 20 January 2010 with his signature and further arguments as to ab) above.

b) Questions to the Respondent:

ba) Do you agree to the description of the facts of the case ("Summary of Case") as shown by the First Appellant in para 1.2 Appeal Brief and by the Second Appellant in numbers 2 - 19 Appeal Brief?

bb) Please, deliver your arguments why the Zwijnaarde laboratory by analysing the sample of W. has deviated from the requirements of article 5.4.4.2.2 ISL? To which pages of the Exhibits 7 and 12 of the First Appellant's Appeal Brief and of Enclosure 9 of the Second Appellant's Appeal Brief do you refer specifically? Please, comment on these means of evidence.

bc) Which link do you see between article 5.4.4.2.2 ISL and WADA Technical Document TD2003IDCR?

bd) If any deviation from article 5.4.4.2.2 ISL is argued, please, give your arguments why this deviation could reasonably have caused the Adverse Analytical Finding?

be) For the case, the Panel might find that W. committed an anti-doping-rule violation, please, give your arguments for the Panel reducing or eliminating the otherwise applicable period of two years ineligibility (arts 38, 40, 41 National Anti-Doping Regulations for Dutch Sport).

bf) Could you comment on exhibit 15 of the First Appellant's Appeal Brief, please?

bg) Which are your arguments with regard to the non-respect of the International Convention on the Rights of the Child and right to privacy as well as with regard to articles 6, 6.1, 6.2, 6.3, 6.3a and 6.3c as well as 7 European Convention on Human Rights?".

By letter dated 26 April 2011, the Second Appellant informed the CAS, that the First Appellant would answer these questions on behalf of the Second Appellant. The First Appellant answered these questions by letter dated 29 April 2011 and supplemented its answers by letter dated 19 May 2011. The Respondent did not answer the questions, but submitted instead a letter in English dated 13 April 2011 and another dated 14 April, the latter together with a document in Dutch.

Both Appellants signed an Order of Procedure on 27 May 2011. The Respondent did not sign the Order of Procedure, but submitted another letter to the CAS in English dated 25 May 2011, as well as a letter dated 29 May 2011, together with another document in Dutch and a letter in Dutch including attachments dated 31 May 2011, irrespective of the fact that the parties had been advised by the CAS by letter dated 26 May 2011, that no further correspondence from the parties as to the

facts, procedure, applicable law and merits prior to the hearing would be considered by the Panel. The same letter of 31 May 2011 and another undated letter were sent to the CAS by the Respondent on 3 June 2011.

The hearing took place in Lausanne at the CAS headquarters on 3 June 2011.

In summary, the First Appellant submits the following in support of its appeal:

- The decision of the KNSB Appeals Committee is wrong. According to the First Appellant the Respondent has committed an anti-doping rule violation within the meaning of article 3.1 of the Doping Regulations. The latter follows from the presence of a prohibited substance in the Respondent's bodily specimen which – again – is evidenced by the results of the analysis performed in the WADA-accredited laboratory.
- The analysis procedure performed by the laboratory does not violate WADA Technical Document TD2003IDCR. The Laboratory Documentation Package that supports the adverse analytical finding for norandrosterone in the Respondent's sample contains a figure that shows 5 ions. Of these 5 ions, the laboratory selected 3 ions and based the adverse analytical finding on these 3 ions. This procedure complies – according to the First Appellant – with WADA Technical Document TD2003IDCR, because the additional ions are not "collected" in the understanding of this document, but appear automatically. The laboratory all the time selects the same 3 ions (n° 420, 405 and 315) as standard procedure for establishing adverse analytical findings for norandrosterone. This is confirmed by the expertise submitted by Prof. Stephany.
- The analysis procedure applied by the laboratory is sufficiently validated. It is true that the Second Appellant did not provide evidence for the validation of the SOP to the KNSB's Appeals Committee. However, the reason for this is that SOPs are never validated. Instead, the validation of detection methods in accordance with the ISL is established, proven and monitored through ISO-certification requirements. It is, however, uncontested that the laboratory was ISO certified for the detection method applied in the case at hand.
- The Respondent has not established any departure from the ISL or any other International Standard, which occurred and could reasonably have caused the adverse analytical finding. Accordingly, the Respondent has not rebutted the presumption that the laboratory has conducted the sample analysis and custodial procedures in accordance with the ISL.
- The Respondent has failed to rebut the presumption that the laboratory has followed the procedures as required by the ISL. Hence, the reported adverse analytical finding is not invalidated and constitutes an anti-doping rule violation under article 3.1 of the Doping Regulations.
- The laboratory report and documentation package clearly identify the presence of the prohibited substance norandrosterone in the Respondent's A sample. The sample also contained other metabolites like 19-NE (noretiocholanolone). This is a further indication of doping.
- Based on article 12.2 of the Doping Regulations there is a presumption that the laboratory has conducted the sample analysis and custodial procedures in accordance with the ISL. Since the

laboratory is WADA-accredited there is a presumption that the laboratory has developed, validated and is able to document its methods for detection of prohibited substances.

- No procedural right of defense of the Respondent has been violated. In particular the procedure followed did not place the Respondent at a procedural disadvantage in bearing his burden of proof. The KNSB's Appeals Committee ignored the requirements of the ISO-certification with respect to validation that have to be met and in fact were met by the laboratory and the explanations and evidence provided by the laboratory which show that the validation and specificity of the detection method are included in the ISO-certification.
- The Respondent failed to establish how the laboratory's detection method cannot be validated, considering the fact that the laboratory has been ISO-certified and taking into account the laboratory's explanations.
- The KNSB's Appeals Committee could not rely on the decisions CAS 2009/A/1752 and CAS 2009/A/1753. To compare the case at hand with these CAS decisions would be incorrect, unjustified and out of order. In the CAS cases the panel appointed independent expert discovered that some irregularities had occurred during the sample analysis procedure (i.e. departures from the ISL) and that the explanations provided by the laboratory for these irregularities were – absent any evidence - of a speculative nature.
- The findings of the laboratory in the present case are not invalidated by Prof. Stephany's final remarks in his report according to which it should not be concluded from his explanations that the Respondent *used* prohibited substances. These remarks are irrelevant for the present case, because here the anti-doping violation is based on the "presence of a prohibited substance" and not on the "use of a prohibited substance". Therefore, no IRMS test was performed or needed in order to establish the exogenous origin of the substance. IRMS is not required for establishing the presence of norandrosterone. Furthermore, this case is not a border-line case, but a clear case of an adverse analytical finding constituting an anti-doping rule violation under article 3.1 of the Doping Regulations.
- The findings of the laboratory are further not invalidated by the expert report submitted by Dr. Faber in front of the KNSB bodies. Firstly, Dr Faber no longer has authority to act on behalf of the Respondent. His declarations in the course of the CAS proceedings can, therefore, not be admitted. Secondly, Dr Faber's general doubts as to the specificity of the detection methods used by all WADA-accredited laboratories were forwarded by WADA to the members of the WADA Laboratory Committee. The independent experts in that committee rejected Dr. Faber's concerns which show that they lack any pertinence or credibility.
- The fact that the Respondent is a minor who was only 15 years old at the time of the test is irrelevant in the light of article 18.2 and all the other articles of the Doping Regulations. They do not differentiate between athletes who are minors and athletes who are adults and are in line with CAS case law, in particular CAS OG 00/011, CAS 2003/A/459, CAS 2005/A/830, CAS 2006/A/1032.
- The Respondent claimed that KNSB did not fulfil one of its contractual obligations under Doping Authority's general terms and conditions with respect to conducting tests. These general terms and conditions, however, do not affect or apply to the Doping Regulations. Their non-fulfillment is, thus, irrelevant for the application of the Doping Regulations.

- The First Appellant was entitled by article 3.6 of the Doping Regulations to have the B sample analysed and did so because the athlete was a minor and because of the significant amount of prohibited substance found in the athlete's A sample.
- Neither the Respondent nor his father was forced to undergo the test and sign the doping control form. They were just informed by the DCO of the possible consequences of not cooperating with the test.

Since the prohibited substance found in the Respondent's samples is not a specified substance and since the Respondent does not fulfill any criteria for a possible reduction of the period of ineligibility, and since the Respondent and his expert display a systematic and obstructive behavior causing considerable material and immaterial damage for the First Appellant and high costs of procedure, the First Appellant's Prayers of Relief are as follows:

"First Appellant respectfully requests:

1. *That the Panel rules that Respondent committed an anti-doping rule violation (presence of a prohibited substance or method);*
2. *That a minimum period of two years ineligibility is imposed on respondent;*
3. *With regard to the costs, that:*
    a. *Respondent is ordered to pay First Appellant all the costs First Appellant incurred related to this appeal before CAS; and*
    b. *The Panel signs a significant cost award as deterrence against the tactics and methods applied by Respondent (and/or any experts and legal counsel appearing on his behalf) in this case".*

In summary, the Second Appellant submits the following in support of its appeal:

- The Second Appellant bases the jurisdiction of the CAS on article 53 (1) of the Doping Regulations.
- The Second Appellant submits that the decision issued by the KNSB's Appeals Committee was wrong. The view expressed in the decision that the Second Appellant violated the Respondents' procedural rights by refusing to provide information that was essential to the Respondent's defense cannot be upheld. Instead the Second Appellant provided the KNSB Appeals Committee with the SOP relevant to the detection method for norandrosterone. Furthermore, it has explained why it did not provide a validation of the SOP, the reason being that such validation is not required by the ISL. However, it provided the KNSB Appeals Committee with proof of the WADA accreditation of the laboratory as well as a written explanation from the laboratory as to the process of validation of detection method in the accreditation process.
- The Respondent has not established a departure from the ISL or any significant question, unusual circumstance or irregularity regarding the testing process. The Respondent also has not established why the validation of the detection method should be questioned or doubted, considering the ISO-certification and WADA-accreditation requirements as to the validation and specificity of the detection method.
- The Respondent violated article 3.1 of the Doping Regulations. The laboratory report and documentation package give clear evidence to this end. Based on article 12.2 of the Doping

Regulations there is a presumption that the laboratory has conducted the sample analysis and custodial procedures in accordance with the ISL. Based on the WADA-accreditation there is a presumption that the laboratory has developed, validated and is able to document its detection methods. Therefore, the claim of the KNSB's Appeals Committee that the Respondent *"has a fundamental right" "to know"* that in his case the detection method used by the Zwijnaarde laboratory has been validated by a research that establishes that this method fulfils (among others) the requirements regarding specificity was incorrect and held no grounds, because neither the ISL nor the Technical Document (especially TD2009LDOC) require laboratories to support an adverse analytical finding in the way the KNSB's Appeals Committee had asked for.

- It was also incorrect of the KNSB's Appeals Committee to hold that the Respondent had sufficiently explained why he required proof of the validation of the detection method used by the laboratory, that this proof was essential to his defense and that the refusal to provide such proof would have placed the Respondent at a procedural disadvantage in bearing his burden of proof. This is contrary to CAS jurisprudence in nandrolone cases, against the requirements of the ISO-certification and WADA-accreditation that have to be met by laboratories.
- The KNSB's Appeals Committee failed to explain why it ignored the above requirements. The Respondent failed to establish how the laboratory's detection method cannot be validated against such background of ISO-certification and WADA-accreditation. The Committee failed to explain why the Respondent had sufficiently clarified the reasons for his need of such proof of validation in addition to ISO-certification and WADA-accreditation.
- The Second Appellant rejects the comparison made by the KNSB's Appeals Committee with the decisions in CAS 2009/A/1752 and CAS 2009/A/1753 as incorrect, unjustified and out of order, because there the independent expert found some irregularity in certain test results, because the explanations provided by the laboratory were of a speculative nature and because a departure from the ISL could be proven in the other cases. None of these elements were present in the case at hand.
- The Respondent has not established any departure from the ISL or any other International Standard, which occurred and could reasonably have caused the adverse analytical finding. Accordingly, the Respondent has not rebutted the presumption that the laboratory has conducted the sample analysis and custodial procedures in accordance with the ISL. Since the Respondent has not rebutted the presumption that the laboratory has followed the procedures as required by the ISL, the reported adverse analytical finding is not invalidated and constitutes an anti-doping rule violation under article 3.1 of the Doping Regulations.
- Since the prohibited substance found in the Respondent's samples is not a specified substance and since the Respondent does not fulfill any criteria for a possible reduction of the period of ineligibility, the Second Appellant requests the CAS to impose a period of ineligibility no less than two years.
- The Second Appellant points in its Appeal Brief to the Respondent's civil court suit before the Rotterdam District Court where the First and Second Appellants were confronted in the preliminary relief proceedings with submissions by the Respondent that the doping control and the further processing of the doping data violated the Dutch Data Protection Act and articles 6 and/or 8 of the European Convention on Human Rights ("ECHR"), article 16 of the International Covenant on the Rights of the Child and privacy legislation and, besides, were

unlawful. All Respondent's claims were dismissed by the court and the Respondent was ordered to pay the litigation costs to the Appellants, but they did not receive any money from the Respondent. The Respondent lodged an appeal in time, but withdrew this appeal later, thus, no action on the merits was brought.

- The Second Appellant also mentioned a second proceeding, which was initiated by the Respondent before the District Court of Utrecht and aimed at lifting the provisional suspension imposed on the Respondent, irrespective of the fact that the disciplinary proceedings were pending before the KNSB Disciplinary Committee. The Respondent's claims were dismissed by the court and the Respondent was ordered to pay the litigation costs to the Appellant, but it did not receive any money from the Respondent.
- The Second Appellant describes that the Respondent and his expert displayed a systematic and obstructive behavior causing considerable material and immaterial damage for it and high costs of procedure.

The Second Appellant's Prayers of Relief are as follows:

"De KNSB respectfully requests:

1. *that the Panel rules that Respondent committed an anti-doping rule violation (presence of a prohibited substance or method)*
2. *the imposition of the minimum period of two years ineligibility on Respondent;*
3. *with regard to the costs, that:*
    a. *Respondent is ordered to pay the KNSB all the costs the KNSB incurred related to this appeal before CAS; and*
    b. *The Panel award significant costs as deterrence against the tactics and methods applied by Respondent (and/or any experts and legal counsel appearing on his behalf) in this case".*

The Respondent did not formally submit arguments and Prayers for Relief. From the documents submitted by the Appellants as exhibits and from the letters of the Respondent to the CAS in Dutch and English including attachments the following arguments of the Respondent in defense can be deduced:

- The Respondent submits that the CAS lacks jurisdiction. Since the CAS is located in Switzerland, the CAS is not competent to decide on a case involving a child with EU citizenship, and because the CAS is not a Court established by law (which in turn violates article 6.1 of the ECHR. The fact that the CAS Panel decides the dispute on the basis of regulations (and not state law) constitutes – according to the Respondent – a violation of article 7 of the ECHR with the consequence that the CAS is not competent to decide on the case.
- Initially, the Respondent argued that the denomination used for the Appellants was incorrect when the appeals were filed. When the CAS changed the denomination of the Appellants in its correspondence, the Respondent upheld his objections, however, without giving further reasons.
- The Respondent submits that the CAS is deciding on a case, which it has no jurisdiction to decide on, in violation of articles 6, 6.1, 6.3, 6.3 (a) and 7 of the ECHR. The Respondent argues

that since the CAS is violating articles 6, 6.1, 6.3 and 6.3 (a) of the ECHR, it is not a "recognized jurisdiction". In particular, the Respondent argues as follows: Article 6.1 of the ECHR has been violated because the CAS is not a tribunal established by law and because it is not situated in the Respondent's country of domicile. Article 6.3 (a) of the ECHR has been violated because the Respondent is deprived of his right to be informed, in a language he understands, of the nature and cause of the accusation against him. Article 7 of the ECHR has been violated because the CAS decides on the basis of regulation rather than legislation.

- The First Appellant's rules provide that in case the person to be controlled for doping is a minor, the counterparty (i.e. the party who gave instruction for the doping tests to be effectuated) should ensure the possibly required consent of the parents or tutor prior to the doping test taking place. Respondent contends that the Second Appellant should have filed the documents attesting of the parents' consent to such tests with the First Appellant before the competition took place. Since it failed to do so, the evidence of doping has been unlawfully obtained.
- Moreover, the Respondent, who was 15 years old at the time of the relevant facts, was forced under constraint of sanctions, on 31 January 2009, to produce a urine sample and sign the related documents. The doping test was thus conducted in an irregular manner and, as a consequence, the evidence was unlawfully obtained.
- The report of the expert, Prof. Stephany, was not signed although the KNSB Disciplinary Committee had requested the report to be signed. Since it was not signed, the report is not valid.
- The expert report of Prof. Stephany provides that further testing is recommended. However, this did not happen, even though this could have been possible. The sealed B sample could have been used to this end, had it not already been used by the First Appellant without the Respondent's consent. The Appellants, thus, used the B sample in an unlawful manner, i.e. in violation of the applicable WADA Code rules at the time.
- The KNSB Disciplinary Commission and the direction of KNSB unlawfully maintained the suspension, the duration of which is contrary to criminal law.
- The Second Appellant failed to file before the KNSB's Appeals Committee the validation documents regarding the laboratory of Zwijnaarde, although the Committee had expressly asked the Second Appellant to provide these documents.
- Under criminal law, the First Appellant is not a formal party to the present proceedings in as much as it is only acting at the instruction of the Second Appellant.
- The Second Appellant should bear all the costs of the CAS proceedings. The Respondent is forced to participate in the CAS proceedings although proceedings are also being held before a tribunal in the Netherlands (i.e. the Civil Tribunal of Arnhem) at a lower cost and in Dutch, a language that Respondent understands.
- The Respondent is a citizen of the European Union and thus has the right to a fair trial in the country of his domicile. Respondent contends that his rights pursuant to the ECHR have been violated. The Respondent has filed a claim before the European Court of Human rights.

- The Appellants are not being referred to under their official denomination. The CAS should use the denomination of the parties as registered in the Dutch Trade registry. The correct denomination of Second Appellant is "Koninklijke Nederlandsche Schaatsenrijders Bond (K.N.S.B.)". The correct denomination of First Appellant is Stichting Anti-Doping Autoriteit Nederland.
- The Respondent does not accept that additional documents be submitted to the CAS after 15 December 2010. The Respondent is opposed to any extension of the time limits provided by the CAS rules. The Respondent requests the CAS to stop and annul the proceedings.
- The Respondent submitted a variety of documents that were attached to his letters. Among them were an extract of the ECHR (article 5: right to liberty and security; article 6: right to a fair trial; article 7: no punishment without law; article 17: prohibition of abuse of rights); an extract of the European Social Charter 1961 (article 1: the right to work; article 2: the right to just conditions of work; article 3: the right to safe and healthy conditions of work; article 4: the right to fair remuneration); an extract of the Universal Declaration of Human Rights (article 11: presumption of innocence; article 13: freedom of movement; article 23: the right to work); an extract of the Dutch Data Protection Act dated 6 July 2000 (conditions for valid processing of personal data); an extract of a Dutch Decree on Alcohol Examination and a copy of a letter sent by the Dutch Ministry of Social affairs to Mr. Manders on 2 October 2008, regarding the legal rights to be respected during a job interview; an extract of correspondence with the European Court of Human Rights demonstrating the right to the use of the national language in Court; an extract of the Dutch Trade registry regarding the Second Appellant; an extract of the general conditions of the First Appellant stating the correct denomination of the NADO (First Appellant); a press article; various marked-up copies of CAS correspondence and documents; a letter from the Dutch Chamber of Commerce dated 26 May 2011 stating that Dutch law requires the company to check that its details are correctly registered in the national Trade registry; and extracts of national courts case law.
- The Respondent submits that article 6.2, 6.3 (b), (c), (d) and (e) and 7 of the ECHR and the International Convention of the Rights of the Child have been violated but he does not indicate the reasons for such alleged violations. Although the Respondent submits copies of other national or international legislative texts, he does not indicate whether and to what extent the CAS proceedings would violate those texts.

LAW

CAS Jurisdiction

1. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific

arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

2. Article 53.1 of the Doping Regulations reads as follows:

"In the case of suspected violations other than those referred to in article 52.1, an appeal may be filed to the CAS (Council of Arbitration for Sport) only after all appeal options within the federation have been exhausted. Such an appeal shall be subject to the conditions of the CAS".

A. Conclusion of the Arbitration Agreement

3. Since the present disputes involves parties that do not have their domicile in Switzerland and since the CAS is an arbitral tribunal that has its seat in Switzerland (cf. article R28 of the Code) the substantive validity of the arbitration agreement is governed by article 178 (2) of the Swiss Private International Law Act (PIL). Art. 178 (2) PIL reads as follows:

"As to the substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law".

4. According to Swiss law the parties are bound by an arbitration agreement if the latter is contained in an agreement or if the agreement refers to a document which contains an arbitration clause (arbitration agreement by reference).

5. In the case at hand, article 53.1 of the Doping Regulations contains an arbitration clause. According to this provision the last instance in doping-related proceedings (other than those involving athletes included in the international testing pool) is the Court of Arbitration for Sport (CAS). The Panel notes that article 53.1 of the Doping Regulations refers to the "Council" of Arbitration for Sport; however, the Panel is satisfied that this is simply a drafting error and should be read as a reference to the Court of Arbitration for Sport, a body governed by the International Council of Arbitration for Sport (ICAS). According to article 53.2 lit. d and b of the Doping Regulations the First Appellant and the Second Appellant are entitled to appeal to the CAS. The provision reads as follows:

"53.2. In doping proceedings of the kind referred to in article 53.1, the following parties may appeal:

a. …

b. the federation;

c. …

d. Doping Authority Netherlands;

e. …

f. …".

6. The arbitration clause contained in article 53 of the Doping Regulations is only binding on the parties in the present proceedings if they have submitted to these rules.

7. Since the Respondent was a member at the time of the argued infringement on 31 January 2009 and continues to be a member of an ordinary member of the KNSB, and was and is still a holder of a KNSB licence, he has submitted to these rules.

8. The Respondent was and is a member of the KNSB ordinary member Y.C. "In Beweging", which is a skating association. In order to become an ordinary member of the KNSB, this association had to ensure the following according to article 8 (4) b. of the KNSB Articles of Association, which reads as follows:

"4. The ordinary members, … are also required:

a. To include a provision in their articles of association, and to maintain the same provision, stating that natural persons with or without a paid position now or in the future with the ordinary member in question …will be subject to the articles of association, regulations, decisions of the association and the bodies of the association.

b. in order to ensure that the natural persons defined under a. are also subject to the Articles of Association, regulations and decisions of the association and the bodies of the association, to take all necessary measures and introduce all regulations required; if necessary, an ordinary member … is obliged to enter into an agreement to that effect with every individual person of this kind,

c. to ensure that their Articles of Association and regulations contain the provisions that are required to be included under or pursuant to these Articles of Association and/or the the regulations of the association;

d. …".

9. At the relevant time the Respondent held a KNSB licence 2008/2009 for the category Junior C, competition nr DV17376, licence nr 10020003, which stated as follows:

"The holder of this licence is subject to the regulations and instructions of the KNSB. …".

10. It can be concluded, from both, the membership and the holding of a licence that the Respondent has agreed to be subject to the KNSB regulations.

11. Furthermore, Respondent has submitted to the KNSB regulations by filing an appeal before the KNSB Disciplinary Committee and KNSB Appeals Committee. Based on the foregoing, the Panel is satisfied that the parties have concluded an arbitration agreement.

B. Formal Validity of the Arbitration Agreement

12. In relation to the formal validity the PIL provides in article 178 (1):

"As to the form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by text".

13. In the case this formal requirement is met. The arbitration clause to which the parties have submitted is evidenced in writing. According to Art. 178 (1) PIL the agreement need not be signed by the parties.

C. Substantive Validity of the Arbitration Agreement

14. The substantive validity of the arbitration agreement is – like the question of the conclusion of an arbitration agreement – governed by article 178 (2) of the PIL. According thereto, the arbitration agreement is valid if it complies with Swiss law. The Respondent has not submitted that the arbitration agreement violates provisions of Swiss law. However, the Respondent has submitted that the arbitration agreement violates the ECHR, in particular article 6 and 7.

15. The Panel acknowledges that Switzerland is a contracting party to the ECHR. However, the Panel cannot see inasmuch an arbitration agreement concluded between the parties violates the fundamental rights enshrined in article 6 and 7 of the ECHR. Whether or not the ECHR is applicable to arbitration in general or to arbitration agreements specifically, is open to questions. The case law of the Swiss Federal Tribunal insofar - at least at first sight - lacks a clear line (cf. POUDRET/BESSON, Comparative Law on International Arbitration, 2007, no. 87; FAVRE-BULLE, in : *L'arbitrage et la Convention Européenne des Droits de l'Homme*, 2001, p. 69, 73). This Panel need not decide the question because even if the ECHR was applicable, the arbitration agreement concluded between the parties would not be contrary to the provisions of the ECHR.

a) Arbitration Agreement Contains Implied Waiver of Access to Courts

16. The jurisprudence of the European Court of Human Rights (ECtHR) as to articles 6.1 and 7 ECHR hold that by concluding an arbitration agreement the parties validly renounce their right of access to public courts in the sense of article 6.1 ECHR (see eg HAAS U., *Internationale Sportschiedsgerichtsbarkeit und EMRK*, SchiedsVZ 2/2009, pp 73 – 84 (78) with references to respective EHRC decisions).

b) Unequal Bargaining Power Immaterial

17. The fact that one party may have more bargaining power than the other does not invalidate the foregoing. The ECtHR stated in the Lithgow and others v The United Kingdom case (8 July 1986, application nrs 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81) at para 194 that even mandatory arbitration by law is compatible with article 6.1 ECHR if the following requirements are met:

"(a) The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".

(b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

(c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

18. If – according to this jurisprudence of the ECtHR - the right of access to the courts enshrined in Art. 6.1 ECHR can be subject to a weighing up in the event that arbitral jurisdiction is prescribed by statute, then the same must apply also in a case of unequal bargaining power. Therefore, only if there were no reasons in terms of *"good administration of justice"* in favour of arbitration a violation of article 6.1 ECHR could be acknowledged.

c) Arbitration Is In the Good Administration of Justice

19. In the case at hand there are reasons in terms of good administration of justice that speak in favour of arbitration and, thus, the recognition of the arbitration agreement. In addition to the general advantages which arbitration is said to have, there are specific advantages of arbitration in the field of sports. The principle of uniformity in sport is a defining characteristic of organised sport - particularly at an international level (CAS 2005/A/983 & 984, no. 67 *et seq.;* SIMON G, *Puissance sportive et ordre juridique étatique*, 1990, p. 23 *et seq.*; LOQUIN E., Clunet 2001, 259, 268). For, in order to be able to compare sports performances internationally, competitive sport must be performed in accordance with the same and uniform rules. The consistency of rules and decisions is therefore an essential feature of international sport. However, the risk to consistency increases with the number of *fora* before state courts and – as a consequence thereof – of national legal standards that apply. This is not only contrary to the interests of sports organisations, but also to the interests of an individual athlete. For, the latter has only submitted to a sports federation's sovereignty because he believed his competitors to be bound in the same way (SIMON G., Rev. Arb. 1995, 185, 188; ADOLPHSEN J., SchiedsVZ 2004, 169, 170 ; cf. CAS 2005/A/983 & 984, marg. no. 67 *et seq*). If therefore sport wishes to preserve its global character and the principle of uniformity this is only possible by concentrating jurisdiction at a single forum in the form of arbitration (SIMON G., Rev. Arb. 1995, 185, 188 *et seq.*; NETZLE S., ASA Bull. 1998 Special Series No. 11 p. 45, 47).

d) Supportive Jurisdiction of the Swiss Federal Tribunal

20. The Panel sees itself comforted in its analysis by the jurisprudence of the Federal Tribunal (cf. 4P.172/2006, E. 4.3.2.3):

"Qu'il y ait un certain illogisme, en théorie, à traiter de manière différente la convention d'arbitrage et la renonciation conventionnelle au recours, sous les rapports de la forme et du consentement, est sans doute vrai (dans ce sens, cf. François Knoepfler, in François Knoepfler/Philippe Schweizer, Jurisprudence suisse en matière d'arbitrage international, in RSDIE 2006 p. 105 ss, 159). Toutefois, en dépit des apparences, ce traitement

différencié obéit à une logique qui consiste, d'une part, à favoriser la liquidation rapide des litiges, notamment en matière de sport, par des tribunaux arbitraux spécialisés présentant des garanties suffisantes d'indépendance et d'impartialité (au sujet du TAS, cf. ATF 129 III 445 consid. 3.3.3.3), tout en veillant, d'autre part, à ce que les parties, et singulièrement les sportifs professionnels, ne renoncent pas à la légère à leur droit d'attaquer les sentences de la dernière instance arbitrale devant l'autorité judiciaire suprême de l'Etat du siège du tribunal arbitral. Exprimée d'une autre façon, cette logique veut que le maintien d'une possibilité de recours constitue un contrepoids à la "bienveillance" avec laquelle il convient d'examiner le caractère consensuel du recours à l'arbitrage en matière sportive".

e) Reference to Arbitration under Dutch Law

21. Irrespective of the fact that the Panel holds, that Art. 178 (2) PIL applies to this arbitration, the Panel finds it necessary to answer the argument of the Respondent as to the admissibility of arbitration under Dutch law in the perspective of articles 6.3 and 7 ECHR with regard to an arbitral tribunal seated outside of the Netherlands and running the arbitration involving a European minor and Dutch citizen in another language than Dutch.

22. With regard to arbitration, Dutch law follows general European legal standards. The rules on national and international arbitration are to be found in Book 4 of the Dutch Code of Civil Procedure read together with Article 8 Dutch Code of Civil Procedure.

23. Article 8 Dutch Code of Civil Procedure reads as follows:

"Explicit choice of forum

- 1. A Dutch court has jurisdiction if parties, with regard to a specific legal relationship that only affects their own interests, by agreement have empowered a Dutch judge or Dutch court to consider disputes that have arisen or may arise out of this legal relationship, unless there is no reasonable interest to make this choice of forum.

- 2. Dutch courts have no jurisdiction if parties, with regard to a specific legal relationship that only affects their own interests, by agreement have exclusively empowered a specific judge or a foreign court to consider disputes that have arisen or may arise out of this legal relationship. »

24. The relevant provisions of Book 4 of the Dutch Code of Civil Procedure read as follows:

"Book 4 Dutch Code of Civil Procedure

Arbitration

Title 1 Arbitration in the Netherlands

Section 1 Arbitration agreement and appointment of arbitrators

Article 1020 Arbitration agreements in general

- 1. Parties may agree to submit to arbitration disputes which have arisen or may arise between them out of a defined legal relationship, whether contractual or not.

- 2. The arbitration agreement mentioned in paragraph (1) includes both a submission by which the parties bind themselves to submit to arbitration an existing dispute between them and an arbitration clause under which parties bind themselves to submit to arbitration disputes which may arise in the future between them.

- 3. The arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose.

- 4. Parties may also agree to submit the following matters to arbitration:

(a) the determination only of the quality or condition of goods;

(b) the determination only of the quantum of damages or a monetary debt;

(c) the filling of gaps in, or modification of, the legal relationship between the parties referred to in paragraph (1).

- 5. The term "arbitration agreement" includes an arbitration clause which is contained in Articles of association or rules which bind the parties.

- 6. Arbitration rules referred to in an arbitration agreement shall be deemed to form part of that agreement.

Article 1021 Form of arbitration agreement

The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. The arbitration agreement may be proven also by electronic means. Article 227a paragraph 1 of the Civil Code applies accordingly.

Article 1022 Arbitration agreement and substantive claim before Court; Arbitration agreement and interim measures by Court

- 1. A court seized of a dispute in respect of which an arbitration agreement has been entered into shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid.

- 2. An arbitration agreement shall not prevent a party from requesting a court to grant interim measures of protection or from applying to the Provisional Relief Judge of the District Court for a decision in summary proceedings in accordance with the provisions of Article 254. In the latter case the Provisional Relief Judge shall decide the case in accordance with the provisions of Article 1051.

- 3. An arbitration agreement shall not prevent a party from requesting the court to order a preliminary hearing of witnesses, a preliminary report of experts or a preliminary inspection of the place or thing in question, unless at the time of the request one or more arbitrators had been appointed already.

…

Title 2 Arbitration outside the Netherlands

Article 1074 Foreign arbitration agreement and substantive claim before Dutch Court; foreign arbitration agreement and provisional measures by Dutch Court

- 1. A court in the Netherlands seized of a dispute in respect of which an arbitration agreement has been concluded with the result that arbitration shall take place outside the Netherlands shall declare that it has no jurisdiction

if a party appeals to the existence of the said agreement before submitting a defence, unless the agreement is invalid under the law applicable thereto.

- 2. The agreement mentioned in paragraph (1) shall not prevent a party from requesting a court in the Netherlands to grant interim measures of protection, or from applying to the Provisional Relief Judge of the District Court for a decision in summary proceedings in accordance with the provisions of Article 254.

Article 1075 Recognition and enforcement of foreign award under Treaties

An arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable may be recognised and enforced in the Netherlands. The provisions of Articles 985 to 991 inclusive shall apply accordingly to the extent that the treaty does not contain provisions deviating therefrom and provided that the Provisional Relief Judge of the District Court shall be substituted for the District Court and the time limit for appeal from his decision and for recourse to the Supreme Court shall be two months".

25. The relevant provisions of the Dutch Code of Civil Procedure do neither restrict the parties' autonomy to submit a dispute to arbitration in the case of a child or minor, in case of a Dutch or other European citizen, nor do they limit arbitration to the obligatory use of the Dutch language by the arbitration bodies. This can be seen in line with the jurisprudence of the EHRC as to articles 6.1 and 7 ECHR and has been discussed above at para. 6.15 with regard to the identical situation under Swiss law.

26. Since the admissibility of arbitration in the Netherlands and with regard to the Netherlands is based on the Dutch Code of Civil Procedure, it is based on legislation or law, irrespective of the fact that the applicable rules for the arbitration are laid down by provisions of rules (regulations) of sport federations or other legal persons under Dutch private law, entitled to do so by Dutch law. The general admissibility of arbitration under Dutch and ECHR law in view of article 6.1 ECHR covers also that regulations on arbitration instead of legislation are sufficient in order to have the system complied with article 6.1 and the other provisions of the ECHR. Also this is in line with the EHRC. In the Lithgow case, the EHRC referring to earlier decisions holds at para 201 as follows:

"The Court cannot accept this argument. It notes that the Arbitration Tribunal was "established by law", a point which the applicants did not dispute. Again, it recalls that the word "tribunal" in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, inter alia, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 39, para. 76); thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees. The Court also notes that, under the statutory instruments governing the matter, the proceedings before the Arbitration Tribunal were similar to those before a court and that due provision was made for appeals".

f) Conclusion

27. To conclude the CAS finds itself to have jurisdiction to deal with this case.

Applicable Law

A. Applicable Law as to the Substance

28. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

29. Since the Respondent was a member at the time of the argued infringement on 31 January 2009 and continues to be a member of an ordinary member of the KNSB, and was and is still a holder of a KNSB licence, the KNSB regulations are the applicable regulations chosen by the parties.

30. It can be concluded, from both, the membership and the holding of a licence that the Respondent has agreed to be subject to the KNSB regulations. The Panel, thus, considers that the parties have chosen the KNSB regulations. These regulations are, in particular, the KNSB Articles of Association, the KNSB Association Doping Procedures, and the Doping Regulations.

31. Since the KNSB, of which the Appeals Committee issued the challenged decision, is seated in the Netherlands, Dutch law is applicable subsidiarily, i.e. as far as no rule can be found in the KNSB regulations mentioned at para 7.3 above.

B. Applicable Law as to the Procedure

32. This arbitration procedure is governed by Art. 176 et seq of the PIL and the Code. Respondent claims that in addition to the cited set of rules Art. 6.3 ECHR applies to the procedure at hand and that this provision has been violated by the Panel – inter alia – because the procedure has been conducted in English. This reasoning cannot be followed.

33. First, it is already disputed whether or not the ECHR applies to arbitration. However, even if one does apply the provision to an arbitration seated in Switzerland, Art. 6.3 ECHR is not applicable to the case at hand. The provision applies to criminal proceedings only. According to Swiss Law sport-related disciplinary proceedings conducted by a sport federation against an athlete are qualified as civil law disputes and not as criminal law proceedings. This finding is also in line with constant CAS jurisprudence (cf. CAS OG 98/002, in REEB (ed.), Digest of CAS Awards I 1986 – 1998, p. 419, 425: *"CAS is not, however, a criminal court and can neither promulgate nor apply penal laws"*; CAS 98/208, in REEB (ed.), Digest CAS Awards II 1998 - 2000, 2002, p. 234, 247: *"To adopt criminal standard … is to confuse the public law of the state with the private law of an association …"*; CAS 2006/A/1102 & 1146, no. 52: *"Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties"*).

34. Even if one would extend – contrary to the view held by this Panel – the scope of applicability of article 6.3 ECHR to the arbitration proceeding at hand, no violation of this provision can be observed. Respondent was fully aware of the accusation against him. Hence, Article 6.3(a) of the ECHR was satisfied – as this provides simply that the accused has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. Given that the procedures before the KNSB bodies were conducted in Dutch and that this is an appeal against the decision of the Appeals Committee, it cannot be said that the Respondent did not understood the nature and cause of the accusation against him. Furthermore, at all times it was open for the Respondent to appoint an interpreter both to assist with the written procedure and at the hearing. The Panel notes that its finding is in line with the reasoning of the Panel in TAS 2009/A/2014 (see paragraph 91 *et seq.*)

35. To sum up, therefore, the Panel finds that no violation of articles 6(3), 7 ECHR occurred. In the present case, the Respondent could make and made use of all legal remedies offered by the KNSB and in parallel state courts of the Netherlands. The Respondent did not provide any arguments that might raise doubts at the appeal system set up by KNSB and the rules of procedure which finally lead to the CAS, except that the CAS does not accept the Dutch language as language of the proceedings before CAS. Since the facts of the case, the KNSB provisions arguably violated by the Respondent, the applicable statutory provisions and legal arguments of the Appellants were known to the Respondent from the proceedings before the KNSB Disciplinary Committee and Appeals Committee, as well as the Rotterdam and Utrecht District Courts, which all procedures were run in Dutch language, the CAS cannot see any violation of articles 6 or 7 ECHR. The CAS based its establishment of the facts on the submissions of the two Appellants, on the decisions of the KNSB's Disciplinary Committee dated 8 September 2009, 30 October 2009 and 12 March 2010 as well as on the decisions of the KNSB's Appeals Committee dated 6 July 2010 and 26 November 2010 and refers to the establishment of the facts by the Rotterdam District Court/Civil Division and by the Utrecht District Court/Commercial and Family Law Division. Apart from this, the CAS considered all letters and attachments of the Respondent, irrespective of their language. The CAS offered the Respondent a hearing, where he could have made use of an interpreter for the Dutch language. The Respondent preferred not to appear at the hearing.

Admissibility

36. With regard to admissibility, the Respondent raises two objections in his letters to CAS. The Respondent holds that there is a procedural flaw since the CAS did not name the Appellants in its correspondence according to their *"true Dutch names"*, but used a translation of their names into English. The Panel does not share the Respondent's view that there is a procedural flaw in that respect. First, the Panel notes that English is the language of the current proceedings. It is therefore perfectly admissible to translate the names of the parties into the language of the proceedings. This is all the more true as both Appellants have used the English denomination in their respective Statement of Appeal and Appeal Brief themselves. The use of the (literal) English denomination of the Appellants could not lead – at any time – to any kind confusion on the side of the Respondent. His right to defense was not impaired by this at any time.

However, in order to encourage the Respondent to better cooperate with the CAS, the Panel informed the parties by letter dated 7 April 2011 to – henceforth – use the Dutch names for the Appellants. The contents of the numerous letters of the Respondent shows that he was perfectly aware what entities were meant by the English names. Since the identity of the parties was never doubtful at any time, the Panel dismisses the Respondent's objection as to admissibility.

37. The Respondent draws from the same argument of denomination of the Appellants in English instead of Dutch the conclusion, that the appeal was not raised in time. Since the Panel found that the matter of denomination in English or in Dutch did not touch at the existence and identity of the parties, the Panel finds that the appeals were filed timely. The two Appellants had received the decision of the KNSB Appeals Committee on 29 November 2010. According to article 56.1 of the Doping Regulations the time limit for filing an appeal to CAS of 21 days ended on 20 December 2010. The Statement of Appeal of the First Appellant was filed on 15 December 2010, the Statement of Appeal of the Second Appellant on 16 December 2010. Thus, both appeals were filed in time.

38. In relation to the Respondent's argument that under criminal law, the First Appellant is not a formal party to the present proceedings as it is only acting at the instruction of the Second Appellant, the Panel is unclear of the application of such a principle in arbitration proceedings. In any event, the Panel notes that it is not unusual in arbitration where there are multiple parties with similar requests for relief that the parties may act in cooperation. As to the current appeals the Panel notes that although it may be true that the Appellants acted in cooperation this does not in any way impact the status of the First Appellant as a party to these proceedings.

39. No concerns were raised regarding the exhaustion of legal remedies within KNSB or any other arguments as to admissibility.

Merits of the Appeal

A. The Issue of Three Ions and Validation of SOP

40. The KNSB Appeals Committee set aside the decision of the KNSB Disciplinary Committee which found that the Respondent committed an anti-doping rule violation mainly because KNSB failed *"to submit the documentation demonstrating the validation of the SOP*" used by the laboratory in Zwijnaarde, *"accompanied by an explanatory note if so desired"*.

a) The Position of the Parties

41. The Appellants argue that the KNSB Appeals Committee's request was not justified since the Committee was provided with the SOP relevant to the detection method for norandrosterone. The Second Appellant had explained to the Committee that the ISL does not require the validation of SOPs. It provided the relevant SOP and proof of the accreditation of the

laboratory of WADA as well as a written explanation from the laboratory as to the process of validation of detection method in the accreditation process.

42. According to the Appellants the Respondent had not established a departure from the ISL or any significant question, unusual circumstance or irregularity regarding the testing process. The Respondent also had not established why the validation of the detection method should be questioned or doubted, considering the ISO-certification and WADA-accreditation requirements as to the validation and specificity of the detection method.

43. The Appellants hold that the Respondent violated article 3.1 of the Doping Regulations. The laboratory report and documentation package give clear evidence to this end. Based on article 12.2 of the Doping Regulations there is a presumption that the laboratory has conducted the sample analysis and custodial procedures in accordance with the ISL. Based on the WADA-accreditation there is a presumption that the laboratory has developed, validated and is able to document its detection methods. Neither the ISL nor the Technical Document (especially TD2009LDOC) require laboratories to support an adverse analytical finding in the way the KNSB's Appeals Committee had asked for.

44. The Respondent does not add any additional arguments in the present context in the proceedings before CAS to those already discussed in the proceedings before the KNSB Disciplinary Committee and KNSB Appeals Committee. There the Respondent refers to an expertise of Dr. Faber and argues that the laboratory for detecting the prohibited substance norandrosterone (a metabolite of nandrolone or its precursors) uses a defective testing method and follows an approach of its own, which is permissible under article 5.4.4.2.2 of the ISL, but where the specificity of the method must be validated. The Laboratory Documentation Package which supports the adverse analytical finding for norandrosterone in the Respondent's sample contains a figure showing 5 ions. Of these 5 ions, the laboratory selected 3 ions and based the adverse analytical finding on these 3 ions. By showing 5 ions, but selecting only 3 of these ions (ions 420, 405 and 315) as SOP in order to establish an adverse analytical finding the Respondent holds that WADA Technical Document TD2003IDCR has been violated. Apart from that, the selection of these three ions stated in the SOP does not take place in an intelligent manner. A proper selection of diagnostic ions beforehand is decisive in order to distinguish between a 'true' positive and a 'false' positive.

b) The Applicable Provisions

45. Article 3.1 of the Doping Regulations reads as follows:

"The presence of a prohibited substance and/or evidence of a prohibited method, the associated metabolites and/or markers in an athlete's sample constitute a violation of these regulations".

46. Article 3.4 of the Doping Regulations provides as follows:

"Presence shall be considered to have been proven when:

a. There is a positive result after the analysis of the A sample when the athlete waives analysis of the B sample; and/or

b. There is a positive result when the analysis of the B sample confirms the result of the analysis of the A sample".

47. Article 11.1 of the Doping Regulations rules with regard to the burden of proof as follows:

"The board of the federation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the board has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt".

48. With regard to methods of establishing facts and assumptions and, in particular, as far as laboratories are concerned, articles 12.2, 12.3 and 12.4 of the Doping Regulations read as follows:

"12.2 The laboratories referred to in article 21.8" (*id est* WADA-accredited or WADA-approved laboratories) *"are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete or other person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the adverse analytical finding or the factual basis for the violation of these regulations.*

12.3 If the athlete or other person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred of the kind referred to in this article, then the federation shall have the burden to establish that such departure did not cause the adverse analytical finding.

12.4 Departures from these regulations or any other international standard or other anti-doping rule or policy which did not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate such results. If the athlete or other person establishes that a departure from the international standard(s) and/or these regulations which could reasonably have caused the adverse analytical finding or other anti-doping rule violation occurred, then the board shall have the burden to establish that such departure(s) did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation".

c) The Holding of the Panel

49. At the relevant date ISL version 6.0 was applicable. With regard to the ISL's legal relevance reference is made to its introductory part, which contains the following sentence:

"Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures covered by the International Standard were performed properly".

50. How the ISL operates, thus, is that the accreditation process to which a laboratory is submitted by WADA the latter must prove that it is capable of conducting its procedures according to the ISL. Hence, the mere fact that a laboratory is WADA-accredited is – under normal conditions – sufficient evidence of compliance with the ISL and, therefore, with article 5.4.4.2.2 of the ISL. This provision reads as follows:

"Confirmation methods for Threshold Substances shall be validated. Factors to be investigated to demonstrate that a method is Fit-for-purpose include but are not limited to:

- Specificity. The ability of the assay to detect only the substance of interest shall be determined and documented. The assay shall be able to discriminate between compounds of closely related structures;

- …".

51. This means that validation as to specificity is assumed as given by the fact that the Zwijnaarde laboratory has been accredited by WADA. The question that remains to be answered is, therefore, whether or not the specific analysis conducted on the Respondent's sample was in compliance with the ISL. The onus of proof of this lies with the Respondent. The latter must show that a departure from the ISL occurred. The Respondent – in the previous instances – submitted a violation of the WADA Technical Document TD2003IDCR. The alleged violation regards the following provision of this Technical Document:

"If the Laboratory protocol requires three ions to be within a tolerance window to identify a substance, it is not permitted to collect additional ions and select those ion ratios that are within tolerance and ignore others that would not result in meeting identification criteria without a valid explanation".

52. In their answers to the questions raised by the Panel in its letter to the Parties dated 7 April 2011 and at the hearing the Appellants demonstrated to the Panel's comfortable satisfaction that the SOP ANAL-89, para. 7.2 (p. 12), used for the detection of norandrosterone, automatically makes five ions appear. But from the outset and prior to the start of the analysis only 3 ions are identified by the laboratory, and these are always the same ions: 420, 405 and 315. Since the WADA Technical Document, as cited above in para 9.12, requires a valid explanation in case of 'collection' of additional ions, the mere appearance of additional ions without the laboratory's intention to 'collect' them does not create an obligation of explanation. The Panel does not find a violation of the WADA Technical Document TD2003IDCR and, therefore, the Panel finds no departure from the ISL.

53. Since the Respondent, thus, could not demonstrate a departure from the ISL, the adverse analytical finding for norandrosterone by the laboratory's analysis of the A sample is considered to be proven. The decisions of CAS 2009/A/1752 and CAS 2009/A/1753, mentioned by the parties, cover different facts and legal background and do not contradict the Panel's conclusion.

B. No Follow-up Test

54. The report of Prof. R. W. Stephany, appointed by the KNSB Disciplinary Committee as independent expert, which was submitted to the Panel duly signed by Professor Stephany concludes as follows:

"The doping laboratory in Zwijnaarde, using its normal Standard Operating Protocol, demonstrated the presence of norandrosterone in urine sample no. 1862553 in both the WADA-compliant AB070 analysis and in the WADA-compliant AB409 analysis. The results of these routine analyses were reported to NADO as per WADA requirements via the Laboratory Documentation Package.

Use of a prohibited substance may not, however, be automatically concluded from the above without elimination of the possibility by follow-up laboratory testing that this is a rare case of endogenous formation in the athlete of the substance that sometimes occurs naturally in mammals, including humans, i.e. nortestosterone/nadrolone. This steroid results via metabolisation in the formation of norandrosterone. This follow-up laboratory testing is in the interests of both the KNSB and the athlete W.".

55. At the hearing the Appellants confirmed that no such follow-up test was organized irrespective of the recommendation of Prof. Stephany. The reasons were, that there was no respective request by the Respondent, that the result was clear due to the fact that the threshold was exceeded by more than 35 times, and that the SOP did not require such follow-up test.

56. The Panel holds, that the Appellants were under no obligation to order a follow-up test ex officio. The Panel finds that it was sufficient for the KNSB that the laboratory had established that a Prohibited Substance was found in the Respondent's samples. In the case at hand there were and there are no doubts as to whether or not the adverse analytical finding was caused endogenously or by external administration. Since the Respondent did not submit any facts or circumstances that could lead to the assumption that the adverse analytical finding was the result of some endogenous process, no further investigation, in particular no follow-up test was necessary.

C. The B Sample Testing

57. The Respondent has claimed – in the lower instances – that by analysing the B sample without the Respondent's consent, the Appellants have made the follow-up test required by Prof. R. W. Stephany impossible. In the Respondent's opinion the Appellants used the B sample in an unlawful manner and against the World Anti-Doping Code (WADC). The First Appellant explained the opening and analysis of the B sample with the sensitivity of the case, considering that the athlete was a minor and the amount of a prohibited substance found in the athlete's body was significant.

58. The Panel finds that no explanation for the analysis of the B sample is needed and no violation of the WADC took place by opening and analysis of the B sample irrespective of the fact that the Respondent did not request such opening and analysis. Article 3.6 of the Doping Regulations reads as follows:

"Doping Authority Netherlands has the right to conduct or issue instructions for the analysis of the B sample, even if the athlete waives analysis of the B sample".

59. The provision of article 3.6 of the Doping Regulations is in full conformity with the WADC. The commentary to article 2.1.2 WADC reads as follows:

"The Anti-Doping Organization with results management responsibility may in its discretion choose to have the B Sample analysed even if the athlete does not request analysis of the B Sample".

D. The Respondent Is a Minor

60. The Respondent referred in his letters to the CAS many times to the fact that the Respondent is a minor and was only 15 years old at the time of the test.

61. There is a general provision with regard to minors in article 18 of the Doping Regulations, paragraphs 1 – 3 of which read as follows:

"18.1 For the purposes of the application of these regulations, a minor shall be considered to be a natural person who has not yet reached the age of 18 years.

18.2 If the articles of association and the regulations of the federation do not include or make any distinction with respect to the rights and obligations of minors and adult members, all of the rights and obligations included in these regulations shall apply equally to minor and adult members, unless these regulations and/or one or more International Standards explicitly state otherwise.

18.3 Notwithstanding the provisions of article 18.2, age and lack of experience can be factors that, in cases involving minors, may be taken into consideration when determining sanctions on the basis of Part IX.

…".

62. The KNSB regulations do not otherwise differentiate between athletes who are minors and athletes who are adults.

63. As far as Annex C of the International Standard for Testing provides for special treatment of minors in doping sampling (e.g. parental clause on doping notification and doping control form; admission and presence of representative), the facts of the case do not indicate any violation of any applicable provision.

64. The doping notification form provided for the signature of a representative of the Respondent, which actually was done by his father, who also showed his ID document instead of the Respondent's to the DCO at the time of notification. The same took place with regard to the doping control form, which also included the signature of the Respondent's father. The Respondent and his father were advised by the DCO of the consequences of non-cooperation with the DCO, but not forced to cooperate under threat.

65. The Respondent submitted to the CAS *inter alia* an Extract of certain provisions of the ECHR; an Extract of the European Social Charter 1961; an Extract of the Universal Declaration of Human Rights; an Extract of the Dutch Data Protection Act dated 6 July 2000 and also referred in general to the International Convention on the Rights of the Child.

66. The Panel cannot find any element in the facts that could be of relevance in view of these documents. This goes, in particular, with regard to article 3 para. 1 and article 40 of the International Convention on the Rights of the Child, dealing with the respect of the best interests of the child as primary consideration *inter alia* by courts of law (article 3 para. 1) and of the rights of a child alleged, accused or found of having infringed penal law (article 40).

67. The Panel holds this result in line with previous CAS case law involving minors and confirming the application of doping rules to minors (see CAS 2003/A/459, CAS 2005/A/830, CAS 2006/A/1032. According thereto there is no special anti-doping regime for minors. However, the young age of an athlete can be taken into account inasmuch as it has an impact on the athlete's fault. Respondent has not submitted any facts in this respect in the case at hand that show that there is a link between his age and his degree of fault.

68. The Panel, thus, finds that the Respondent is guilty of having committed an anti-doping rule violation of article 3.1 of the Doping Regulations by presence of the prohibited substance norandrosterone in his A sample on 31 January 2009.

E. Period of Ineligibility

69. The KNSB Disciplinary Committee imposed a period of ineligibility of two years, less the duration of the disciplinary measure, of which one (1 year) suspended, with a probationary period ending on 9 November 2011. This period of ineligibility started on 18 February 2009 and lasted until the entry into force of the decision of the KNSB Appeals Committee and the subsequent returning of his licence to the Respondent, which happened on 18 February 2010. Thus, the whole one year (1 year) period of ineligibility has passed *de facto*, also the probationary period has ended in the meanwhile.

70. The Appellants, who did not appeal the decision of the KNSB Disciplinary Committee, request that a minimum period of two (2) years is imposed on the Respondent.

71. The Appellants are right in that the period of ineligibility – absent any mitigating circumstances – is two years. However, in the case at hand the Appellants have not appealed the first instance decision of the KNSB Disciplinary Committee. When being asked in the hearing on the motives why they did not appeal the decision the Appellants submitted, that even though they were not fully satisfied by the decision, they nevertheless felt that they could "live with it" and, thus, were willing to accept it. It was the Respondent that appealed the first instance decision successfully. The Panel is of the view that its mission in these proceedings is identical to the one of the second instance. The mission of the latter, however, was confined by the contents of the first instance decision and the request by the Respondent. The Panel deems, therefore, that the Appellants are estopped from asking for a more severe penalty than the one issued in the first instance and already accepted by them. Further to that, the Appellants also could not provide the Panel with precedents of *reformatio in peius* within KNSB. In the letter of the Second Appellant to the CAS dated 10 June 2011 only examples from other sport federations in the Netherlands were adduced.

72. The Panel, thus, prefers to stay with the sanction as imposed by the KNSB Disciplinary Committee which can be based on article 38.1 of the Doping Regulations read together with article 18.3 of the Doping Regulations (see para. 9.20 above).

73. Article 38.1 of the Doping Regulations reads as follows:

"The ineligibility period imposed for a violation of article 3 … shall be two years in the case of a first violation …".

74. The article refers to conditions for reduction and elimination of the period of ineligibility in case of specified substances under condition of cooperation of the athlete (article 39), in case of no fault or negligence (article 40), of no significant level of fault or negligence (article 41) and admission before a violation is suspected (article 42). The facts of the case, as well as the arguments of the Respondent do not allow the Panel to consider any of these articles.

75. Thus, it is article 18.3 of the Doping Regulations which allows the Panel to consider the age and the lack of experience as factors in order to determine a milder sanction than asked for by article 38.1 of the Doping Regulations.

The Court of Arbitration for Sport rules:

1. The appeals filed by the Stichting Anti-Doping Autoriteit Nederland (NADO) on 15 December 2010 and by the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) on 16 December 2010 against the decision of the KNSB's Appeals Committee dated 26 November 2010 are upheld.

2. The decision of the KNSB's Appeals Committee of 26 November 2010 is set aside.

3. W. is guilty of an anti-doping rule violation committed on 31 January 2009.

4. The decision of the KNSB Disciplinary Committee of 12 March 2010 is reinstated.

5. (…).

6. (…).

7. All other or further claims are dismissed.