Arbitration CAS 2011/A/2612 Liao Hui v. International Weightlifting Federation (IWF), award of 23 July 2012

Panel: Prof. Ulrich Haas (Germany), President; Mr Jeffrey Benz (USA); Prof. Denis Oswald, (Switzerland)

Weightlifting
Doping (boldenone)
Conditions for the admissibility of a request for declaratory relief
Internal and external chain of custody according to the WADA Technical Document TD2009LCOC
Compatibility of the standard sanction rule of an international federation with the WADC
Legal relationship between an international federation and WADA or the IOC
Principle of hierarchy of norms under Swiss law
Special situation in a particular sport as "aggravating circumstance" according to the WADC

1. **A request for declaratory relief is – in line with the Article 182 PILA - only admissible under two conditions. First, the purpose of the declaratory relief must be aimed at clarifying the (non-)existence of a legal relationship between the parties. Declaratory relief sought in relation to facts or general questions of law are, therefore, not admissible. In addition, the party requesting declaratory relief must show a special legal interest to obtain the respective declaration from the arbitral tribunal.**

2. **According to the WADA Technical Document TD2009LCOC there is an internal and an external chain of custody. The WADA Technical Document TD2009LCOC does not establish any prerequisites or conditions for the latter. The addressees of this document are the WADA-accredited laboratories, which are by their very nature not involved in the sample collection process and, therefore, cannot document the external chain of custody.**

4. **The wording of Art. 10.2 of the IWF Anti-Doping Policy (ADP) and Art. 10.2 of the World Anti-Doping Code (WADC) is different. A standard doping sanction of two (2) years is significantly different than a standard sanction of four (4) years. This is all the more true, since the requirements listed in the WADC are – in principle – not only to be construed as minimum standards but also as maximum standards. The four year standard sanction in the IWF ADP is, thus, a "substantive change", which is not "mitigated" by a deviating standing practice of the IWF.**

5. **The legal relationships between an international federation and WADA or the IOC on the one hand are distinct from the contractual relationship between an athlete and an international federation on the other hand. The latter is solely governed by the federation's regulations (including the documents referred therein) and subsidiarily by Swiss law. Whether or not the international federation is in breach towards third parties**

in respect of the way it enacted its anti-doping policy is, therefore, in principle of no avail for the legal relationship between the athlete and the federation, since the legal effects arising from the different contractual relationships are, in principle confined to the parties of that legal relationship. Hence, the WADC is – even if the relevant international federation is a signatory to the WADC - not a document that by its very nature is directly applicable between said federation and its affiliated athletes.

6. **According to the principle of hierarchy of norms, and subject to well-defined exceptions, rules and resolutions enacted by an association must be in compliance with the highest regulatory framework, i.e. the statutes of the associations. In case of contradiction between lower ranking norms and the statutes it is the latter – subject to well-defined exceptions - that take precedence.**

7. **The comments to Art. 10.6 IWF ADP /WADC do not refer in the context of "aggravated circumstances" to the general circumstances and conditions in a particular sport or within a specific federation as such. The fact that some sports may have a more nuanced doping problem as others is, therefore, of no avail in the context of this provision. According to the rationale of the WADC, differences between various sports cannot command nor justify a different regime on sanctions.**

1. BACKGROUND

1.1 The Parties

1. Mr Liao Hui (hereinafter referred to as "the Appellant" or "the Athlete") is a top-ranked Chinese weightlifter and a member of the Chinese National weightlifting team.

2. The International Weightlifting Federation (hereinafter referred to as "the Respondent" or "IWF") is the IOC-recognized international sports federation with seat in Lausanne, Switzerland, and headquarters in Budapest, Hungary. The IWF was founded in 1905 to promote weightlifting and serve as the international federation for the sport of weightlifting.

1.2 The Relevant Facts

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. In the morning of 2 September 2010 a first anti-doping test was conducted by the World Anti-Doping Agency ("WADA")-accredited Beijing laboratory on the Appellant's sample. The

analysis of this sample reported a negative result.

5. Later on the same day, i.e. still on 2 September 2010, the Appellant was subjected to another out-of-competition control in Beijing by IWF Doping Control Officers (hereinafter referred to as "DCOs").

6. In the context of this second doping test the Appellant and his team manager signed a Doping Control Form showing the sample code assigned to the containers containing the A and B samples of the Appellant's urine. Moreover, the form included the statement that the *"sample collection was conducted in accordance with the relevant procedure and the information on this form is complete and accurate"*.

7. The DCOs responsible for that second sample collection on 2 September 2010, Peter Bartha and Orsolya Nagy, stored the sample in their hotel room mini-bar and transported the samples to Budapest on a commercial passenger plane in their checked luggage, where they arrived on 4 September 2010. Agnes Tiszeker, Managing Director of the Hungarian Anti-Doping Organization (hereinafter referred to as HUNADO) declared in respect to the storage of the samples (hereinafter referred to as the "Tiszeker declaration") – *inter alia* – as follows: *"Agnes Tiszeker (…) declare, that the 2550785 Sample's integrity or identity – whilst in the HUNADO's Custody – has not been compromised during Transport and Storage"*. The DCOs *"transported the samples in Berlinger transportation bags that where sealed by numbered clips. The Berlinger transportation bags were in a suitcase that was locked by a padlock"*. Furthermore, the Tiszeker declaration reads: "*The DCOs transported the Collected Samples to the Special Sample Storage Room at HUNADO. (…) It is a detached room with secure, key-locked door, equipped with Alarm System and Security Cameras to ensure safety"*.

8. On 6 September 2010, the HUNADO ordered that the samples be transported to the WADA-accredited anti-doping laboratory in Cologne (hereinafter referred to as the "Cologne laboratory") by TNT Express Hungary Kft. transport service. According to the Tiszeker declaration, the *"transporter packed up the Samples on the 9th of September 2010 and verified that the Transporter Bag was directly hauled out of the Cooler. He has indicated the exact time of pick up on the Doping Control Chain of Custody Form and signed that the seal and Transport Bag was intact and in perfect condition for the transport"*.

9. On 10 September 2010, the samples arrived at the Cologne laboratory in Germany. The Cologne laboratory reported that the samples bearing the code number assigned to the athlete's samples had been received on 10 September 2010. It further reported that seals and integrity of the samples were intact. The analytical report for the A-sample analysis shows an Adverse Analytical Finding (hereinafter referred to as "AAF") for boldenone and boldenone metabolites. Boldenone is a prohibited substance (anabolic agent, S1) according to the WADA 2010 Prohibited List applicable at the time of the alleged violation.

10. On 30 September 2010, the Appellant was provisionally suspended.

11. On 13 December a B sample analysis took place at the Cologne laboratory. The analysis was attended by the persons listed in the B sample analysis form dated 13 December 2010.

12. The analytical report dated 17 December 2010 confirmed the AAF for the athlete's B sample.

13. In conformity with the IWF Anti-Doping Policy (hereinafter referred to as "IWF ADP"), the athlete requested the laboratory documentation package which was supplied to him. He also requested a hearing before the IWF Doping Hearing Panel (hereinafter referred to as "IWF DHP"). The IWF hearing, as provided in the IWF ADP, was held on 17 and 18 September 2011 in Hong Kong, China.

14. On 3 October 2011 the IWF DHP handed down its decision (hereinafter referred to as "the Decision") that reads – *inter alia* – as follows:

"Pursuant to article 10.2 of the IWF Anti-Doping Policy, the athlete is ruled Ineligible for four (4) years dating from 30 September, 2010 being the date from which the athlete was provisionally suspended".

15. The IWF DHP justified its conclusions – *inter alia* – as follows:

"5.1 …the athlete has failed to establish on the balance of probabilities that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding in this case.

5.2 Consequently, the athlete has failed to rebut the presumption that the WADA accredited Cologne laboratory conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories.

5.3 The Panel is satisfied the comfortable satisfaction of all its members, bearing in mind the seriousness of the allegation which is made, that the IWF has established that the athlete committed an anti-doping rule violation under article 2.1 of the IWF Anti-Doping Policy, in that the presence of Boldenone and Boldenone Metabolites was found in his body sample".

16. The Appellant was notified of the Decision on 7 October 2011.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

17. On 25 October 2011 the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as "the CAS") against the Decision rendered by the IWF DHP and appointed Mr Jeffrey Benz as arbitrator.

18. By letter dated 2 November 2011 the Respondent appointed Mr Denis Oswald as arbitrator.

19. On 6 November 2011 the Appellant filed his Appeal Brief.

20. By communication dated 8 December 2011 the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Mr Ulrich Haas, President of the Panel; Mr Jeffrey Benz and Mr Denis

Oswald, arbitrators.

21. On 16 December the Respondent filed its Answer.

22. By fax-letter dated 19 December 2011 the CAS Court Office informed the parties that, unless the parties agree, or the President of the Panel orders, otherwise, the parties shall not be authorized to supplement or amend their submissions.

23. On 12 January 2012 the CAS advised the parties of the following procedural directions:

"(a) In view of the parties statements to reserve their rights to call additional witness/produce further exhibits in their submissions (…) the parties are invited to inform the CAS Court office within 7 days upon receipt of the present letter whether and if yes what kind of additional evidence they would like to adduce.

(b) The Appellant is invited within a 2-week deadline from receipt of this letter, to submit to the CAS Court office expert witness statements from the following experts:

- Prof. Wu
- Dr. de Boer
- Mr. Paul Scott

[…]

(d) The Panel intends to hold a hearing in this matter…".

24. On 26 January 2012 the Appellant filed the requested witness statements.

25. On 15 February 2012 the Appellant provided the CAS Court Office with a list of all persons supposed to attend the hearing.

26. In a letter dated 17 February 2012, the CAS Court Office informed the parties that the hearing will take place on 2 April 2012 in Lausanne, Switzerland.

27. By letter dated 1 March 2012 the parties were invited to provide the CAS Court Office on or before 15 March 2012 with a joint proposal for a hearing schedule and the list of the main issues which each party wants to raise at the hearing.

28. On the same day, i.e. on 1 March 2012, the Respondent provided a list of all persons attending the hearing on his behalf. Furthermore, the letter stated:

"With reference to the written statements filed by the Appellant on 26 January 2012 (…), the Respondent observes that their content does not only cover issues raised in the Appeal brief but also totally new elements. In that respect, the Respondent refers to para. 5 to 10 of the Answer and requests that any arguments raised in the written statements which were not already specified in the Appeal Brief be declared inadmissible, in accordance with article R51 and R56 of the CAS Code".

29. On 27 March 2012 the Panel advised the parties that:

"the witness Mr Töhötöm Bartha is admitted. The Respondent is asked to submit a witness statement…;

the Respondent shall communicate … the phone number at which Ms Agnes Tszeker can be reached on the day of the hearing in the event that the Appellant wishes to examine her. In the event that Ms Tszeker will not be heard as a witness, her witness statement will not be part of the file;

…".

30. A hearing was held on 2 April 2012. The Panel was assisted at the hearing by Ms Andrea Zimmermann, Counsel to the CAS and Mr Michael Schlumpf as ad hoc-clerc.

31. The hearing was attended:

    i. for the Appellant: by Mr Howard Jacobs, Mr Antonio Rigozzi, and Mr Gong Xiao Yan, attorneys-at-law, Ms Deng Xiao Ling, Interpreter, and by Mr Liao Hui himself;

    ii. for the Respondent: by Mr Ross Wenzel and Mr. Yvan Henzer, attorneys-at-law, and Monika Ungar, IWF Counsel.

32. At the hearing, the following witnesses were heard by the Panel:

    i. for the Appellant: Mr Hao Li;

    ii. for the Respondent: Mr Töhötöm Bartha and Ms Agnes Tiszeker.

33. Moreover the following experts were heard by the Panel: Prof. Moutian Wu, Prof. Douwe de Boer and Prof. Paul Scott (the latter by videoconference) for the Appellant and Prof. Dr. Wilhelm Schänzer and Dr. Martial Saugy for the Respondent.

34. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel and agreed that Mr Töhötöm Bartha will be heard by the Panel.

35. By letter dated 5 April 2012 the Panel requested clarifications from WADA. The letter reads - *inter alia* – as follows:

    "In the ambit of a CAS proceeding, a letter by WADA has been submitted by one of the parties (please see enclosure). This letter refers to "discussions held in Budapest and Istanbul" between WADA and the IWF in respect to Code compliance. Furthermore, the letter states that WADA considers the IWF "anti-doping program to be in line with the World Anti-Doping Code". The Panel would like WADA to advise whether or not WADA did detect differences between IWF anti-doping rules and the World Anti-Doping Code and if so, how – in light of the differences – you concluded that the IWF anti-doping program was in line with the WADC. …".

36. With letter dated the same day the Chairman of the Panel informed the parties on behalf of the Panel as follows:

"Further to the request made at the hearing of 2 April 2012 regarding his eventual participation in the competition to be held on 10 April 2012, the parties are advised that, following an intensive discussion and deliberation, the Panel has decided that the Appellant committed an anti-doping rule violation. Consequently, pursuant to the applicable regulations, a minimum sanction of a two-year period of ineligibility shall be imposed on the Appellant. The parties are further advised that the complete argumentation concerning the issues raised by the parties in the present matter including the question of the precise length of the period of ineligibility will be developed in the AWARD, which will be communicated to the parties in due course. …".

37. In response to the letter of the Panel WADA provided the requested clarifications on 16 April 2012 (hereinafter referred to as the "WADA letter"). The parties were then invited to comment on the WADA letter until 15 May 2012. Furthermore and within the same deadline, the Panel invited the parties to comment on the "BOA Award" (CAS 2011/A/2658) which had just been issued by another CAS Panel.

38. By letter dated 15 May 2012 Appellant and Respondent filed their observations. In its letter (including the exhibits 33 and 34) Appellant has submitted – *inter alia*:

"In light of (I) the above contentions, (II) the IWF's persistence in claiming that 'the IWF ADP (and the four-year ban which is specified in these rules) shall be applied, irrespective of its compliance with the WADA Code', (III) Panel's ruling that of 5 April 2012, Mr. Hui formally requests a declatory award Anti-Doping Rule 10.2 violates the WADA Code and the IWF in non-compliant in addition to reiterating his 'alternative prayers for relief contained in Section V of his Appeal Brief".

39. By letter dated 22 May 2012 Respondent objected to Appellant's letter and stated – *inter alia* – that the *"scope of this appeal procedure is limited by the findings of the challenged decision and by the prayers for relief specified by the Appellant in his Appeal Brief"* and that *"by filing submissions which were not ordered by the Panel, the Appellant deliberately and unacceptably breached art. R.56 of the CAS Code"*. Furthermore, the letter states:

"In consideration of the above, the Respondent herby requests that the CAS Panel:

- rejects the filing of Exhibit 33. … As to Exhibit 34, the Respondent accepts this exhibit be part of the file since the undersigned gave his consent to Mr Rigozzi;

- declares the new prayers for relief … of the submission filed on 15 May 2012 by the Appellant inadmissible …;

- declares inadmissible all submissions specified in the Appellant's letter dated 15 May 2012, inasmuch they are not directly linked with the Panel's order, i.e. section I, para B., section II from p. 15, last paragraph, to the end of this section, and section III".

2.2 The Parties' Respective Requests for Relief and Basic Positions

40. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the parties, even if there is no specific reference to those

submissions in the following summary.

(a) The Appellant

41. In his Appeal Brief dated 6 November 2011 the Appellant requests the CAS to:

> *"(1) declare that the IWF has not established an anti-doping rule violation against the Appellant Mr. Liao Hui;*
>
> *(2) set aside the decision of the IWF Doping Hearing Panel;*
>
> *(3) reinstate any results that were disqualified by the IWF Doping Hearing Panel; and*
>
> *(4) award Appellant a contribution toward his costs in this Appeal.*
>
> *In the alternative, if the Panel finds that an Anti-Doping Rule violation has been established, then Appellant requests that this Panel:*
>
> *(1) declare the Appellant Mr. Liao Hui shall be suspended for a period of two (2) years;*
>
> *(2) set aside the decision of the IWF Doping Hearing Panel; and*
>
> *(3) award Appellant a contribution toward his costs in this Appeal".*

42. In his letter dated 15 May 2012 the Appellant amended his requests and now asks the Panel to issue an award:

> *"I. declaring that the IWF Anti-Doping Rule 10.2 violates the WADA Code;*
>
> *II. declaring that the IWF is non-compliant with the WADA Code;*
>
> *III. declaring that IWF Anti-Doping Rule 10.2 does not constitute a proper "implementation" of the WADA Code within the meaning of Art. 45(3) of the Olympic Charter;*
>
> *IV. declaring that the decision under appeal constitutes a 'violation of the World Anti-Doping Code' within the meaning of Art. 89 of the Olympic Charter;*
>
> *V. setting aside the decision under appeal;*
>
> *VI. declaring that Appellant Mr Liao Hui shall be suspended for a period of two (2) years;*
>
> *VII. awarding the Appellant a contribution toward his costs in this Appeal;*
>
> *VIII. ordering that the Award shall be notified to WADA and the IOC for appropriate and immediate action".*

43. In support of his claim the Appellant contends in his Appeal Brief (and his letter dated 15 July

2012) – *inter alia* – that:

- the admissibility of the appeal is established;

- pursuant the WADA International Standards the burden of proof in an anti-doping case is a multi-step process with shifting burdens. Once the IWF introduces evidence for an anti-doping rule violation the athlete is entitled to rebut this presumption by establishing that a departure from the International Standard occurred. The athlete must demonstrate any departure by a balance of probability (Art. 3.1 IWF ADP). In such case the IWF shall have the burden to establish that such departure did not cause the AAF;

- the chain of custody as of sample collection (i.e. in Beijing) until the time, the samples arrived at the Cologne laboratory is incomplete. According to the Appellant there is no documentation accounting for the location or the condition of the sample between 2 und 9 September 2010 (transport from Beijing to Budapest; storage of sample at HUNADO). The Tiszeker declaration cannot prove otherwise since Ms Tiszeker was not directly involved in any stage of the transportation. In the eyes of the Appellant this is a violation of the WADA Technical Document TD2009LCOC which shifts the burden to IWF to prove that the violation did not cause the AAF;

- the AAF for the A and B samples are not established and the IRMS test results are not reliable, mainly because of lack of reproducibility and failure to properly identify the analytes of interest;

- the sanction imposed by the IWF Doping Hearing Panel violates Art. 10 of the World Anti-Doping Code (hereinafter referred to as the "WADC") since Art. 10.2 IWF ADP constitutes a substantive change from the mandatory parts of the WADC (cf. Art. 23.2.2). Hence, the IWR ADP run contrary to the objective of the WADC to harmonize the regime on sanctions. It follows from this – according to the Appellant – that Art. 10.2 IWF ADP must be invalidated to the extent that it requires a sanction in excess of two years. The Appellant finds support in CAS jurisprudence (CAS 2011/O/2422 and CAS 2011/A/2658);

- Furthermore, the Appellant submits that under Swiss law the sanction imposed is disproportionate, *"in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction"*.

- Since the past conduct of the IWF proves – according to the Appellant – that it will not comply with CAS rulings regarding non-compliance with the WADC, Appellant sees himself entitled to demand that *"the Panel record in its award that the IWF ADP do not constitute a proper implementation of the WADC within the meaning of Article 45 para 3 of the Olympic Charter and that the decision under appeal constitutes a violation of the WADC within the meaning of Artide 59 of the Olympic Charter"*.

(b) The Respondent

44. In its answer dated 16 December 2011 (and its letter dated 15 May 2012), the Respondent submitted to the CAS the following request for relief:

> *"I. The Appeal filed by Mr Liao Hui is dismissed.*
>
> *II. The International Weightlifting Federation is granted an award for costs".*

45. According to the Respondent the Appellant fails to establish that the Cologne laboratory did not conduct the analyses in accordance with the WADA International Standard for Laboratories (hereinafter referred to as "ISL"). Furthermore, the Respondent is of the view that the sanction imposed on Appellant is fair, proportionate and in line with the applicable regulation and principles of law. In support of its requests the Respondent submitted in its answer - *inter alia* - that:

- the Respondent fully relies on the findings of the Decision;
- contrary to the Appellant's submission, the external Chain of Custody (i.e. the record ensuring that the results generated by the laboratory can be unequivocally linked to the Athlete) is well documented. According to the Respondent it is in particular proven that (i) the analysed sample is the one provided by the Appellant, (ii) the Appellant's sample was stored and transported in good condition and (iii) that it is uncontested that the B-sample was still sealed before being analysed in the Cologne laboratory which proves that any manipulation must be excluded;
- if necessary, the Respondent would not object to a DNA analysis in order to establish the origin of the samples;
- the IRMS test results exclude an endogenous origin of the prohibited substance and the IRMS test was performed in compliance with the WADA standards;
- that the IWF ADP are compliant with the WADC. The latter is proven by the fact that IWF was declared compliant with the WADC by the WADA Foundation Board on 20 November 2011;
- Furthermore, the Respondent is of the view that in any case the use of steroids in weightlifting constitutes a serious offence / aggravated anti-doping rule violation that warrants a four-year period of ineligibility (also under Art. 10.6 of the WADC);
- Finally the Respondent submits that the CAS decisions 2011/O/2422 and 2011/A/2658 are of no relevance in the case at hand.

3. LEGAL ANALYSIS

3.1 Jurisdiction

46. Art. R47 of the Code of Sport-related Arbitration (hereinafter referred to as the "CAS 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".

47. In the present case the CAS jurisdiction is based on Art. 13.2.1 of the IWF ADP [*"Appeals Involving International-Level Athletes"*] which provides as follows:

"In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS…".

48. Furthermore, the CAS jurisdiction is undisputed between the parties and has been affirmed by the parties by signing of the order of procedure.

3.2 Timeliness of the Appeal

49. The Statement of Appeal against the Decision was served on 25 October 2011, i.e. within the 21 days after receipt of the Decision (7 October 2011) provided for by Art. R49 of the CAS Code.

50. The Appeal is accordingly admissible.

3.3 Scope of Review

51. The mission of the Panel follows, in principle, from Art. R57 of the CAS Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the CAS Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

52. The scope of the Panel's review is not only confined by Art. R57 of the CAS Code but also by the matter in dispute. The latter is defined – in the first place – by the requests of the parties filed in the respective Statement of Appeal and Answer to the Appeal Brief. According to Art. R56 of the CAS Code the parties are – in principle – not authorized to supplement or amend their requests in the course of the proceedings without the consent of the other party or the authorization of the Panel. Appellant by letter dated 15 May 2012 has filed new prayers of relief (I.-IV) in addition to the ones previously filed. Respondent has objected to these new requests. The Panel carefully assessed the positions and arguments of the parties and decides not to authorize the new requests on file. [In principle a request for declaratory relief is – in line with the law applicable to the procedure (Art. 182 para 2 of the PILA) - only admissible (apart from

general considerations of law) under two conditions. First, the purpose of the declaratory relief must be aimed at clarifying the (non-)existence of a legal relationship between the parties (cf. KuKo-ZPO/OBERHAMMER, 2010, Art. 88 no. 4 et seq.; SUTTER-SOMM, Schweizerisches Zivilprozessrecht, 2nd ed. 2012, no. 558). Declaratory relief sought in relation to facts or general questions of law are, therefore, not admissible. In addition, the party requesting declaratory relief must show a special legal interest to obtain the respective declaration from the arbitral tribunal (cf. KuKo-ZPO/OBERHAMMER, 2010, Art. 88 no. 11 seq.; SUTTER-SOMM, Schweizerisches Zivilprozessrecht, 2nd ed. 2012, no. 558). In the case at hand, the Panel finds that in respect of the new requests filed by Appellant either the first and/or the second prerequisite is not fulfilled. In particular the Panel does not see what the legal interest of the Appellant could be if this Panel would establish whether or not Respondent has fulfilled its contractual obligations vis-à-vis of entities (IOC, WADA) that are not parties to these proceedings.

53. The matter in dispute is further defined by the facts submitted by the parties on which they base their respective requests. In this respect Art. R56 of the CAS Code again provides that the parties are not authorized to supplement or amend their arguments and evidence once the instruction phase of the proceedings is completed, unless the other party or the Panel authorizes it to do so. In the case at hand the Panel (on 17 and 25 April 2012) explicitly requested the parties to comment on the BOA award (2011/A/2657) and the WADA letter. The Panel finds that the submissions filed by the Appellant on 15 May 2012 are in line with the procedural directions issued by the Panel and takes them on file inasmuch as they appear under the heading "I A", "I. B a". and "II". The same accounts for the new exhibit 34 filed by Appellant. Exhibit 33 is only taken note of insofar as it follows from that "Appeal Brief" that up until the latter was filed (3.2.2012) Respondent apparently imposed a four year ban also on athletes that were tested positive for so-called "specified substances". The contents of the "Appeal Brief", as such, however, is not part of the matter in dispute.

3.4 Applicable Law

54. Art. 187 of the Swiss Private International Law Act (hereinafter referred to as "PILA") provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA.

55. In particular, the provisions enable the parties to mandate the arbitrators to resolve the dispute in application of provisions of law that do not originate in any particular national law, such as sports regulations of an international federation (cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, marg. no. 597, 636 et seq.; POUDRET/BESSON, Comparative Law of International Arbitration, 2007, marg. no. 679; RIGOZZI A., L'arbitrage international en matière de sport, 2005, marg. no. 1177 seq.).

56. According to the legal doctrine, the choice of law made by the parties can be tacit (Zürcher Kommentar zum IPRG/HEINI, 2nd ed. 2004, Art 187 marg. no. 11; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2010, marg. no. 1269; KAUFMANN-

KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, marg. no. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI A., L'arbitrage international en matière de sport, 2005, marg. no. 1172; KAUFMANN-KOHLER/STUCKI, International Arbitration in Switzerland, 2004, p. 118 et seq.). In agreeing to arbitrate the present dispute according to the CAS Code the parties have submitted to the conflict-of-law rules contained therein, in particular to Art. R58 of the CAS Code

57. Pursuant to Art. R58 of the CAS Code, the Panel is required to 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".

58. In the light of the above the following rules and regulations shall be applicable to this dispute:

i. the "applicable regulations", i.e. the IWF ADP and all provisions/documents referred to therein, and

ii. Swiss law, since the parties agreed at the hearing that Swiss law shall be applicable subsidiarily.

59. The IWF ADP include – *inter alia* – the following provisions that are of interest in the case at hand:

Article 3.1

"The IWF and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether IWF or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the 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. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the Athlete must satisfy a higher burden of proof".

Article 3.2.1

"WADA-accredited 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 occurred which could reasonably have caused the Adverse Analytical Finding.

If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding, then the IWF or its National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

Article 10.2 (Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods)

"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Four (4) years' Ineligibility".

Article 10.6 (Aggravating Circumstances Which May Increase the Period of Ineligibility)

"If the IWF establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of six years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule. An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the IWF".

3.4 On the Merits

60. In essence two questions are at the hearth of the matter in dispute:

    i. whether the Appellant committed an anti-doping rule violation according to the IWF ADP; and (if yes)

    ii. the period of ineligibility imposed upon the Appellant is in compliance with the applicable law.

3.4.1 Did Appellant commit an Anti Doping Rule violation?

61. It is undisputed between the parties that (i) the Appellant was subject to an out-of-competition test on 2 September 2010; and (ii) the A sample as well as the B sample tested positive for a prohibited substance.

62. However, an anti-doping rule violation is nevertheless not established by the aforementioned circumstances if either (i) the chain of custody is incomplete, i.e. that the results cannot be attributed to the Athlete; or (ii) the sample analysis was performed "incorrectly".

3.4.1.1 The Chain of Custody

63. The Appellant claims that the chain of custody is incomplete. He bases his assertion on the WADA Technical Document TD2009LCOC (*"Laboratory internal Chain of Custody"*, Appellant's

Ex. 14) which reads – *inter alia* – as follows (emphasis added):

"There are two parts involved in the chain of custody for an individual Sample: the external record and the Laboratory Internal Chain of Custody. Both components shall be maintained in the Laboratory as part of its Analytical Testing records. The external record is initiated at the collection site and ensures that the Samples and the results generated by the Laboratory can be unequivocally linked to the Athlete. The Laboratory Internal Chain of Custody records are maintained within the Laboratory to record the Analytical Testing process and the traceability of the Sample during Analytical Testing.

Samples are considered to be under custody when they are:

- in the physical possession of authorized Laboratory staff, or;

- within the view of authorized Laboratory staff, after being in his/her physical possession, or;

- stored in a secured location".

64. It follows from the WADA Technical Document TD2009LCOC that there is an internal and an external chain of custody. However, the WADA Technical Document TD2009LCOC does not establish any prerequisites or conditions for the latter. The addressees of this document are – as is evidenced by the heading of it - the WADA-accredited laboratories. The latter, however, are by their very nature not involved in the sample collection process and, therefore, cannot document the external chain of custody. In addition, the description of the requirements of the external chain of custody in WADA Technical Document TD2009LCOC is but one sentence stating that there should be an external chain of custody without any details of what constitutes the standard for an external chain of custody. The Panel is, therefore, unable to see in what respect the sample collection in this specific case violates the WADA Technical Document TD2009LCOC (or the ISL).

65. Irrespective of the above, the need to comply or provide an external chain of custody is not just a sheer formality, but serves a specific purpose. The purpose of the external chain of custody is in the first instance – as TD2009LCOC explains - that *"the Samples and the results generated by the Laboratory can be unequivocally linked to the Athlete"*. In the case at hand, this link is – in the view of the Panel - established. The Panel basis its conclusion in particular on the following facts and circumstances:

- it is uncontested that the Athlete underwent a doping control;
- it is uncontested that the Athlete witnessed the sealing of the samples;
- the containers in which the samples were kept (Berlinger kit) are specially designed to ensure traceability and to prevent manipulation;
- the containers were put in bags that were sealed by numbered clips;
- the bags were then put in a suitcase which was locked with a padlock and transported to the Beijing airport and personally checked-in by the DCOs Peter Bartha and Orsolya

Nagy for the flight to Budapest;

- the bags arrived in Budapest – together with the DCOs - on 4 September 2010 and were brought to the HUNADO were they were stored until 9 September 2010;

- the bags were then transported to the Cologne laboratory by TNT Express Hungary Kft. transport service where they were delivered on 10 September 2010;

- upon receipt of the bags the Cologne laboratory acknowledged that the seals and integrity of the samples were intact;

- the B-sample testing was witnessed by Dr Jingzhu Wang who confirmed that *"[t]he B-sample with code number 2550785 was correctly closed and sealed with the Berlinger green cap with code number 3640959"*).

66. Furthermore, the Panel notes that in the case at hand there are no indications that the samples were not in good condition at the time of the analysis. No signs of degradation could be observed either in the sample of the Athlete or in any other samples that were transported and analysed together with the Appellant's sample at the Cologne laboratory. Also Appellant's expert Mr Scott stated at the hearing that he did not have any concerns as to the conditions of the samples. In the light of the above, the Panel holds that the results generated by the Cologne Laboratory can be unequivocally linked to the Athlete and that, thus, the external chain of custody is sufficiently established.

3.4.1.2 Adverse Analytical Finding ("AAF")

67. Art. 3.2.1 IWF ADP provides – *inter alia* – that (emphasis added):

"WADA-accredited 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 occurred which could reasonably have caused the Adverse Analytical Finding".

68. According to this provision it is presumed that any sample testing conducted by a WADA-accredited laboratory is performed "correctly" and in compliance with the ISL. However, a rebuttal of this presumption is possible if the athlete establishes that

- a departure from the ISL (including all documents referred thereto) occurred; and that

- this departure could reasonably have caused the AAF.

69. The Appellant alleges that several mistakes were committed in the course of the analysis of Appellant's A sample, in particular that (i) the Cologne laboratory was under a duty to perform an IRMS analysis, (ii) there is no link between the GC/MS part of the analysis and the IRMS portion of the analysis, (iii) the results generated by the Cologne laboratory are not reliable, and (iv) the Appellant was not provided with the full scan spectra.

a. Duty to perform IRMS

70. The Appellant submits that the Cologne laboratory failed to perform a reliable IRMS analysis and that without such analysis an AAF for boldenone cannot be established. IRMS analysis is used to determine the 13C/12C value of a compound and is expressed in delta units per mil (‰). This value will be measured and compared to that of an endogenous reference steroid in the urine sample from another metabolic pathway that is not affected by the external administration of endogenous steroids or their precursors. This serves to define the basal 13C/12C ratio of the person. The results of the IRMS analysis will be reported as consistent with the administration of a steroid when the 13C/12C ratio measured for the metabolite(s) differs significantly, i.e., by 3 delta units or more from that of the urinary reference steroid chosen. Such a value is referred to as the "delta-delta" or "ΔΔ" value.

71. In a first step the Panel will seek to establish whether or not the performance of an IRMS analysis was necessary in the case at hand. The parties agree that the ISL and the WADA Technical Document TD2010IDCR (*"Identification Criteria for Qualitative Assays incorporating Column Chromatography and Mass Spectrometry"*) are applicable. Both documents, however, do not foresee a duty of the laboratory to perform an IRMS analysis to establish the presence of boldenone.

72. The WADA Technical Document TD2009MRLP (*"Minimum Required Performance Levels for Detection of Prohibited Substances"*) provides in a footnote:

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

73. Thus, it follows from this document that "a reliable analytical method" (e.g. IRMS) has to be performed if "a very low concentration of boldenone" is found in an athlete's urine in order to rule out an endogenous origin of boldenone and, thus, a false positive finding. TD2009MRLP, however, was not in force anymore at the time of the analysis of the Athlete's sample. It had been replaced by the WADA Technical Document TD2010MRPL (*"Minimum Required Performance Levels for Detection of Prohibited Substances")* that came into force on 1 September 2010, i.e. before the sample of the Athlete was collected. This (new) document deviates from TD2009MRLP and does not foresee any obligation similar to the footnote included in TD2009MRLP. Thus, from the applicable provisions it is unclear whether the performance of IRMS is still required or not. However, since the problem according to the experts still persists, i.e. that in *"rare individual cases, boldenone of endogenous origin can be constistently found at very low nanograms per millilitre"*, the laboratory must ensure that no false positive findings are reported. Irrespective of the different wording in TD2010MRPL the Panel, therefore, holds that the IRMS analysis had to be performed by the Cologne laboratory. In the case at hand the Cologne laboratory did perform an IRMS analysis and, thus, acted insofar according to best practice.

b. IRMS performed correctly?

74. The question remains, however, whether the required IRMS analysis was performed correctly. In order to answer that question, the Panel must first establish the provisions of reference that had to be observed by the Cologne laboratory when conducting the IRMS analysis. The Panel finds that the WADA Technical Document TD2004 EAAS (*"Reporting and Evaluation Guidance for Testosterone, Epitestosterone, T/E Ratio and other Endogenous Steroids"*) is not directly applicable, since boldenone – in principle – is a steroid of exogenous origin. This is evidenced by the WADA Prohibited List which lists boldenone under "Exogenous Anabotic Androgenic Steroids" and defines the term "exogenous" as follows: "exogenous refers to a substance which is not ordinarily capable of being produced by the body naturally". The WADA Technical Document TD2004 EAAS, however, refers to *endogenous* steroids only, i.e. *"to a substance which is capable of being produced by the body naturally"*. However, TD2004 EAAS may serve as a guidance in order to determine the origin of the steroid at hand, since TD2004 EAAS is designed to solve a comparable problem as the one that is to be resolved here. Thus, in the view of the Panel there are good arguments that parts of this document may be applicable by analogy.

75. The Appellant submits that the Cologne laboratory violated TD2004 EAAS when performing the A sample analysis. Appellant states in his Appeal Brief (p. 16):

"Because IRMS is incapable of identifying substances (rather, it can only determine the isotopic values of a peak), the IRMS test should include two separate testing processes: (1) identification of the analytes of interest by GC/MS; and (2) the corresponding determination of their isotopic values by IRMS. This identification for IRMS with GC/MS was never done in the analysis of sample A. In the initial documentation package, there was no identification for IRMS provided at al. Subsequently, the Cologne Laboratory, through Prof. Schänzer, admitted in page 2 of his Response that 'For boldenone (Bo) analysis of the LC isotope fraction by GC/MS not sufficient material was left from the IRMS analysis to obtain the necessary intensity of the signals for the identification purposes".

76. Appellant bases the requirement for this "two-step-process" in the context of the IRMS analysis on the WADA Technical Document TD2004EAAS which reads on page 2 – *inter alia* – as follows (emphasis added):

"The confirmation <u>of the identity</u> of any steroid reported with abnormal properties must be made (refer to technical document TD2003IDCR)".

77. The Panel is not persuaded that it follows from TD2004EAAS that for the IRMS analysis for boldenone / boldenone metabolites a "two-step-process" must be applied. First of all, the TD2004EAAS is only applicable by analogy in the case at hand. This Technical Document was not designed for the detection of (exogenous) boldenone. Secondly, the Panel notes that boldenone and boldenone metabolites have been identified by GC/MS (screening and confirmation) in application of WADA Technical Document TD2010IDCR (cf. doc pack. p 21 e seq., 55 seq.). Strictly speaking, therefore, an identification procedure had been performed in the case at hand. Appellant acknowledges this, but demands that *"a link between the identification portion of the GC/MS analysis for the 'A' sample (…) and the IRMS portion of the analysis for the 'A' sample (…)"*. be established, since the isotopic values of the peaks in the IRMS analysis could

also result from other sources (e.g. co-elusion or by sheer coincidence). Whether it follows from TD2004EAAS – as submitted by Appellant – that "a link" between the two parts of the analysis is required can be left unanswered, because such link is established to the comfortable satisfaction of the Panel.

78. The Panel notes that the "required link" is established for one of the detected analytes, i.e. for boldenone metabolites. These had been clearly identified in the corresponding LC fraction provided to IRMS analysis. Hence, it can be excluded that these peaks obtained in the IRMS analysis can be attributed to anything else but to the boldenone metabolites identified in the Athlete's sample. Furthermore, Appellant has not demonstrated that the other isotopic values could be attributed to anything else but boldenone. In particular there is no evidence of co-eluding peaks at the retention time for boldenone that could indicate that the isotopic values may be attributed to any other compounds.

c. Lack of reproducibility

79. The Appellant submits that the ISL require that confirmation methods for non-threshold substances be reproducible and that a lack of such reproducibility can constitute an ISL violation (see Appeal Brief, para. 4.4.1.1.1). Respondent contests this and argues that IRMS testing is a qualitative and not a quantitative analysis.

80. The Panel holds that the IRMS analysis is, in principle, a qualitative analysis. According to Nr. 3 of (the analogously applicable) TD2004EAAS *"the results of the IRMS analysis will be reported as consistent with the administration of a steroid when the 13C/12C value measured for the metabolite(s) differs significantly, i.e. 3 delta units or more from that of the urinary reference steroid chosen"*. The latter value is also referred to as the "delta-delta" value. This threshold of 3 delta-delta units takes already into account analytical uncertainties. In the case at hand this threshold is exceeded quite importantly for both the delta-delta values of boldenone and boldenone metabolite (in the A and B sample). This is not disputed by the Appellant. The latter, however, makes reference to the CAS decision *CAS 2009/A/1752 & 1753* according to which – under particular circumstances – a certain degree of reproducibility is required under the ISL also for the qualitative IRMS analysis. The decision reads – *inter alia* – as follows:

> *"5.52 The question which the Panel must ultimately answer under WADC 2003 is whether the Appellants have succeeded in establishing on the "balance of probability" that the Beijing Laboratory departed from the ISLs in its performance of the IRMS analysis. If the Appellants meet this burden, the Respondent is charged with the task of proving to the "comfortable satisfaction" of the Panel that the departure did not cause the Adverse Analytical Finding.*
>
> *5.53 With regard to reproducibility of the Confirmation Procedure, ISL 5.4.4.1 cites under the term "robustness" the requirement that the "method", meaning in the instant case the IRMS method, "shall be determined to produce similar results with respect to minor variations in analytical conditions". The method must further allow for "the reliable repetition of the results at different times and with different operators performing the assay".*

5.54 It was the shared opinion of all the expert witnesses, including the independent expert witness, Prof. Butch, that, at the very least, the difference in delta values measured for androsterone (1.60) in Mr. Tsikhan's A and B sample IRMS tests was irregular, worthy of concern and, in the words of Prof. Schänzer, "should be improved in the future". The Respondent's experts presented the further opinion during their testimony that the variability observed for the 5-ß-androstanediol values was minimal and tended to confirm the exogenous source of the testosterone and could not, in every case, be deemed to be unusual.

5.55 The issue confronting the Panel, however, is to determine whether the variability alleged by the Appellants, which occurred not only in the androsterone value, but also in the other steroid metabolites, some with and some without countervailing biases, constitutes a departure from the reproducibility requirement contained in the ISL.

(…)

5.59 Considering the above factors, -- the speculative nature of the explanations provided for the variability, the lack of relevant guidance in the Technical Documents and the reluctance of the Laboratory to disclose relevant sections of its SOPs --, the Panel concludes that, on the balance of probability, several of the values measured in each of the Athlete's IRMS analysis do indeed fall outside of the Laboratory's acceptable range, whatever that range may be".

81. The facts in this case at hand are not comparable to the case *CAS 2009/A/1752 & 1753*. In that case the Panel found that the variances in the values between the A and the B sample were "considerable", the *"results of the assay move at random and in unexplained directions" and that the values measured were near the "cut-off level"*. Things are different in the case at hand. The delta-delta values measured for the Athlete's A and B sample exceeded the threshold of 3 delta units quite considerably. Furthermore, the values measured for the A and for the B sample are consistent. In addition, the shifts observed from the A to the B sample do not move randomly but consistently in one direction. Finally, it also appears that the variances observed between the A and the B value are within the tolerable limits. In the light of all of the above the Panel sees no violation of the ISL.

d. Full scan spectrum

82. The Appellant puts forward that WADA Technical Document TD2010IDCR requires a full scan spectrum to eliminate the possibility that the alleged positive test was caused by co-eluting peaks.

83. TD2010IDCR reads – *inter alia* – as follows:

"To ensure that the precursor and product ions are not arising from a co-eluting compound in the chromatogram, a full scan spectrum at the retention time of the peak(s) of interest shall be acquired. The purpose of this scan is ***not*** *identification, but rather to document the lack of presence of other substances that could contribute to the precursor-product ion intensity. This may require analysis of an addition aliquot in which the addition of a stable-labeled internal standard is omitted…".*

84. The parties do not agree on the definition of what is to be understood as a "full scan spectrum".

The Appellant puts forward that such scan must be performed with single ions whereas the Respondent submits that only one scan can be performed for all ions.

85. The Panel does not have to decide this question. According to Prof. Schänzer *"[t]he full scan data of the A-sample have been obtained from the first analysis of the A-sample using GC-MS. The second aliquot was used to repeat the sample preparation (which was absolutely identical) to prove that the urine aliquots are identical (confirmation). This was the case"*. This evidence was not contested.

e. Conclusion

86. In light of the foregoing, the Panel holds that no departure from the ISL (including all documents referred thereto) occurred and, thus, the Appellant fails to rebut the presumption according to Art. 3.2.1 of the IWF ADP. It follows from all of the above that the Appellant committed an anti-doping rule violation.

3.4.2 Is the period of ineligibility imposed upon the Appellant in compliance with the applicable law?

87. Once the presence of a prohibited substance (or its metabolites) is established Art. 10.2 IWF ADP provides – in principle - a period of four (4) years of ineligibility.

3.4.2.1 Is Art. 10.2 IWF ADP in line with the WADC?

88. The Appellant submits that Art. 10.2 IWF ADP cannot be applied as such in the case at hand because the provision – *inter alia* – violates the WADC.

89. Art. 10.2 WADC reads as follows:

> *"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:*
>
> *First violation: Two (2) years Ineligibility"*.

90. It is obvious that the wording of Art. 10.2 of the IWF ADP and Art. 10.2 of the WADC is different. A standard doping sanction of two (2) years is something – significantly - different than a standard sanction of four (4) years. Thus, the IWF ADP differs from the WADC on this point. This is all the more true, since the requirements listed in the WADC are – in principle – not only to be construed as minimum standards but also as maximum standards. This follows in particular from Art. 23.2.2 of the WADC which provides that the *"following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change …: … Article 10 (Sanction on Individuals)"*. The four year standard sanction in the IWF ADP instead of the two

years period of ineligibility provided for in the WADC is, thus, a "substantive change" in view of the Panel.

91. This substantive change in relation to the WADC is not "mitigated" by a deviating standing practice of the IWF. In that respect Respondent has submitted that Art. 10.2 IWF ADP is applied literally by Respondent only in those cases, in which the presence of steroid is found in the bodily specimen of an athlete. Whether a standing practice is capable of amending disciplinary rules of the Respondent can be left unanswered here. First of all in order for the Panel to establish a standing practice – contrary to the explicit contents of the rules and regulation of a federation – the threshold must be set fairly high. Irrespective of this, the Panel finds that there is simply no evidence on file that such a standing practice of the IWF indeed exists. On the contrary, the documents on file suggest that – at least until quite recently – the IWF routinely applied its standard sanction of 4 years irrespective of the substance found in the athlete's bodily specimen. By letter dated 14 May 2012 the IWF informed the counsel of Respondent as follows:

"Following the IWF Executive Board meeting that took place on the 9th May 2012 in Antigua, Guatemala during the Pan-American Qualification Competition I wish to inform you of an important decision that was approved by the BB.

…

To amend the IWF ADP to reduce the otherwise applicable sanction for Specified Substances to two years with immediate effect. The above proposal was carried by the BB with majority vote. The BB decision has impact on some on-going CAS cases the IWF is involved in (sic!) therefore I kindly ask you to inform the necessary parties".

92. Informing the "necessary parties" because of an "impact on some on-going CAS cases" would be unnecessary, if the change in the regulation had only mirrored a standing practice of the organs of the IWF that had been in place all along. In view of the above the Panel, therefore, concludes that Art. 10.2 of the IWF ADP clearly deviates from the respective requirements of the WADC.

93. This Panel is not prevented to come to above conclusion because of the WADA letter dated 14 April 2011, which considered IWF's *"anti-doping program to be in line with the World Anti-Doping Code"*. Nor is this Panel bound by the explanations given by WADA in its letter dated 15 May 2012. The original letter to the IWF and also the explanations provided by WADA concerning this letter related to the "Code Monitoring Program" enshrined in Art. 23.4 WADC. The scope of this Code Monitoring Program, however, differs from the tasks that this Panel must perform, i.e. to decide a dispute between two parties. Furthermore, none of the parties have cited a single provision according to which this Panel would be bound by the findings in the context of the Code Monitoring Program.

3.4.2.2 Consequences of the aforementioned findings

94. The question to be answered is, what consequences follow from the above for the legal relationship between Appellant and Respondent.

95. It is undisputed that Respondent has committed itself towards third parties, i.e. entities that are not parties in this procedure to comply with all (mandatory) provisions of the WADC. By becoming a "Signatory" to the WADC the Respondent has contractually engaged itself in relation to WADA to *"adopt and implement anti-doping policies and rules which conform with the Code"*. Respondent has taken over a similar obligation vis-à-vis the International Olympic Committee (hereinafter referred to as "IOC") by becoming a member of the Olympic Movement. Art. 26 of the Olympic Charter (2011) to which Respondent has submitted reads as follows (emphasis added):

"In order to develop and promote the Olympic Movement, the IOC may recognise as IFs international non-governmental organisations administering one or several sports at world level and encompassing organisations administering such sports at national level.

The statutes, practice and activities of the IFs within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the World Anti-Doping Code. Subject to the foregoing, each IF maintains its independence and autonomy in the administration of its sport".

96. Likewise Art. 44 of the Olympic Charter (2011) states:

"The World Anti-Doping Code is mandatory for the whole Olympic Movement".

97. In light of these provisions the Appellant puts forward that – since Art. 10.2 IWF ADP is contrary to Art. 10.2 WADC and, at the same time, the WADC is mandatory for the whole Olympic Movement – the sanction at hand of four years ineligibility is invalid (see Appeal Brief p. 18 seq.). In this regard Appellant also makes reference to the decision in CAS 2011/O/2422 which reasoned that *"the IOC Regulation at issue … was not in compliance with the WADA Code"* and, thus, was *"invalid and unenforceable"*. According to the Appellant the aforementioned award is confirmed by the decision in CAS 2011/A/2658 which states, *"that the imposition of any suspension longer than the two years mandatorily provided for by Article 10.2 of the WADA Code constitutes a violation of the WADA Code"*.

98. The Panel concurs with Respondent that – in principle – the legal relationships between IWF and WADA or the IOC on the one hand are distinct from the contractual relationship between Appellant and Respondent on the other hand. The latter is solely governed by the IWF regulations (including the documents referred therein) and subsidiarily by Swiss law, see *supra*. Whether or not IWF is in breach towards third parties in respect of the way it enacted its anti-doping policy is, therefore, in principle of no avail for the legal relationship between Appellant and Respondent, since the legal effects arising from the different contractual relationships are, in principle confined to the parties of that legal relationship. Hence, the WADC is – even if the relevant international federation is a signatory to the WADC - not a document that by its very nature is directly applicable between said federation and its affiliated athletes. This finding is in line with constant CAS jurisprudence. In CAS 2008/A/1718-1724 (para. 61) the Panel held – *inter alia*:

"The Parties submitted, each of them for different reasons, that the WADC should be applied by the Panel. The Panel refers first to the clear wording of the WADC 2003 and 2009, notably under the first paragraph of

the Introduction chapter where it is mentioned that international federations are "responsible for adopting, implement or enforcing anti-doping rules within their authority (…)". There are numerous CAS cases on the question of the direct applicability of the WADC: see for example CAS 2008/A/ 1627 […] *no. 62, 81 and 82; CAS 2007/A/1445* […] *no. 6.2). The Panel considers that it follows from this wording of the WADC that it does not claim to be directly applicable to athletes. Furthermore, it follows that the associations have autonomy to regulate their internal matters – subject to mandatory provisions of law – at their discretion. By issuing its anti-doping rules the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply unless there was a specific reference in the IAAF Rules".*

99. It follows from the above that the IWF may well be (and almost certainly is) knowingly or unknowingly in breach of its duties in relation to WADA and the IOC. However, the sheer fact that the WADC differs from the IWF ADP has no impact on the – distinct - legal relationship between Appellant and Respondent. The autonomy of Respondent in relation to Appellant is, therefore, not restricted by any contractual engagements entered into by IWF vis-à-vis third parties.

3.4.2.3 Violation of mandatory provisions of Swiss Association Law

100. The autonomy of the IWF to regulate doping matters in relation to its (affiliated) members is, however, limited by principles of Swiss association law that are applicable subsidiarily.

a. The principle of hierarchy of norms

101. In the matter CAS 2011/O/2422 the Panel has held – *inter alia* – that (cf. no. 8.33 seq.):

"By Rule 44 of the OC [Olympic Charter][1], the IOC has incorporated the WADA Code into the IOC's own Statutes. The IOC further provides in Rule 41 of the OC that a competitor must respect and comply with all aspects with the WADA Code. Accordingly, the IOC has by virtue of its own statutes and in particular, Rule 44, accepted the binding nature of the WADA Code. Because the Panel has found that the IOC Regulation [„Osaka Rule"][2] is not in compliance with the WADA Code, and because the WADA Code has been incorporated into the OC, the IOC Regulation is not in compliance with the IOC's Statutes, i.e. the OC, and is therefore invalid and unenforceable".

102. It appears – at least at first sight - that the CAS Panel in the above decision came to its conclusion based on the principle of hierarchy of norms (in this sense apparently also CAS 2011/A/275, no. 7.25). It follows from this principle that – subject to well-defined exceptions – rules and resolutions enacted by an association must be in compliance with the highest regulatory framework, i.e. the statutes of the associations (BK-ZGB/RIEMER, 1990, ST Rn. 320; OSWALD D., Associations, fondations et autres formes de personnes morales au service du sport, 2010, S. 138 et seq.; see also BADDELEY M., L'association sportive face au droit, Les limites de son autonomie, 1994, p. 208; HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrechts, 2009, no. 58). In case of contradiction between lower ranking norms and the statutes it is the latter – subject to well-defined exceptions - that take precedence. In the end,

[1] Added for better understanding.
[2] Added for better understanding.

whether the Panel really based its reasoning on this legal principle (cf. HAAS U., Ex-Doper willkommen?, in Jusletter 2. April 2012, no. 20 et seq.) may be left unanswered here. The facts in this case do differ considerably from those in CAS 2011/O/2422, since the WADC – in the Panel's view – has not been incorporated in the statutes of the IWF.

b. The need for an unambiguous legal basis for disciplinary measures

103. According to Swiss association law a federation may base a disciplinary measure against a (direct or indirect) member only on provisions that provide a clear and unambiguous authority to do so (cf. BSK-ZGB/HEINI/SCHERRER, 4th ed. 2010, Art. 70 no. 22; SCHERRER/LUDWIG, Sportrecht, 2. Aufl. 2010, S. 303; see also BK-ZGB/RIEMER, 1990, Art. 70 no. 210; HEINI/PORTMANN/SEEMANN, Grundriss Vereinsrecht, 2009, no. 265). This principle is also part of general considerations of sports law that have been taken into account by CAS Panels in the past irrespective of the (subsidiarily) applicable law to the merits (cf. CAS 94/129, in REEB M. (ed.) Digest of CAS Awards I 1986 – 1998, p. 187, 194 seq.; 2000/010 in REEB M. (ed.) Digest of CAS Awards II 1998-2000, 2002, p. 658, 663 seq.; 98/218, in REEB M. (ed.) Digest of CAS Awards II 1998-2000, 2002, p. 325, 328 seq.; 2006/A/1041, no. 7.1.1 et seq. ; see also FOSTER, in BLACKSHAW/SIEKMANN/SOEK (ed.) The Court of Arbitration for Sport 1984-2004, 2006, p. 420, 427 ; RIGOZZI A., L' arbitrage international en matière de sport, 2005, no. 1272, 1277). In particular in CAS 94/129 (no. 30, 34) the Panel has stated as follows:

"Any legal regime should seek to enable its subjects to assess the consequences of their actions …".

Furthermore the Panel stated that while *"the fight against doping is arduous, and … may require strict rules, … the rule-makers and the rule-appliers must begin by being strict with themselves".*

104. This Panel sees no reason to depart from this established jurisprudence. Appellant has raised a number of contradictions and a lack of clarity in the rules and regulations of the IWF, in particular (but not only the following)

- the preface of the IWF ADP in which the IWF states, that these *"Anti-Doping Rules are adopted and implemented in conformance with the IWF's responsibility under the* [World Anti-Doping] *Code"* even though the provisions of the IWF ADP and the WADC differ considerably;

- the comment to Art. 10.2 IWF ADP that seems to indicate – contrary to the wording of Art 10.2 IWF ADP - that the standard sanction is two instead of four years:

  "Comment to Article 10.2: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short (e.g., artistic gymnastics) a two year Disqualification has a much more significant effect on the Athlete than in sports where careers are traditionally much longer (e.g., equestrian and shooting); in Individual Sports, the Athlete is better able to maintain competitive skills through solitary practice during Disqualification than in other sports where practice as part of a team is more important. A primary

argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports".

- the comments to Art. 10.4 IWF ADP that equally indicate – contrary to Art. 10.2 IWF ADP – that the standard sanction is two years:

  "Comment to Article 10.4: Specified Substances as now defined in Article 4.2.2 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6".

- the comments to Art. 10.5 IWF ADP (cf. p. 31, 35, 36, 37) that indicate that the standard sanction according to the IWF ADP is in line with the standard period of eligibility under the WADC:

  "This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault".

  "The basic sanction would be two years under Article 10.2. (Aggravating circumstances (Article 10.6) would not be considered because the Athlete promptly admitted the violation. Article 10.4 would not apply because a steroid is not a Specified Substance.)".

  "Based on No Significant Fault alone, the sanction could be reduced up to one half of the two years. Based on Substantial Assistance alone, the sanction could be reduced up to three-quarters of the two years".

  "Under Article 10.5.5, in considering the possible reduction for No Significant Fault and Substantial Assistance together, the most the sanction could be reduced is up to three-quarters of the two years".

  "The basic sanction would be between two and four years (sic!) Ineligibility as provided in Article 10.6".

  "Thus, Article 10.2 would be applicable and the basic period of Ineligibility imposed would be two years".

- Furthermore, Art. 18.5 IWF ADP states that:

  "These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the [World Anti-Doping][3] Code and shall be interpreted in a manner that is consistent with applicable provisions of the [World Anti-Doping][4] Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules".

105. It appears from all of the above that IWF was not particularly diligent when implementing its

[3] Added for better understanding.
[4] Added for better understanding.

anti-doping rules and that in fact the rules – seen in their entirety - are ambiguous and contradictory. Reference is made here – again - to the case *CAS 2009/A/1752 & 1753* where the Panel had to deal with a comparable situation in the rules of the IOC. The facts of the case were as follows:

The IOC had enacted new Anti-Doping Rules for the Olympic Games in Beijing (the so called ADR 2008). These ADR 2008 were based on the current version of the WADC at the time, i.e. the WADC 2003, but for one provision, i.e. the rule on the burden of proof in Art. 3.2.1 ADR 2008. The latter was substantially different from the comparable provision in WADC 2003. The ADR 2008 made references to the WADC 2003 and in particular commanded that the ADR 2008 be interpreted and construed in line with the WADC 2003.

106. The Panel in that case reasoned in relation to the aforementioned problem (i.e. contradiction between various association norms) as follows (no. 4.8 et seq.):

"In its adoption of the IOC ADR 2008, the IOC chose to deviate from the language of Art. 3.2.1 of the WADC 2003. …

[T]he conflict … becomes startlingly visible in other contradictory provisions of the IOC ADR 2008. Art. 16.1 and Art. 16.5 of the IOC ADR 2008 read as follows:

'16.1 These Rules are governed by the Olympic Charter, by the Code and by Swiss law.

16.5 These Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Rules'.

The officially italicized term "Rules" as used in Article 16.1 above is defined in Appendix 1 (Definitions) of the IOC ADR 2008 as 'the International Olympic Committee Anti-Doping Rules applicable to the Olympic Games.' That is clearly the IOC ADR 2008 adopted by the IOC on 07 May 2008 having full force and effect during the XXIX Olympiad. …

The italicized term 'Code' is defined in the Appendix 1 Definitions of the IOC ADR 2008 as 'the World Anti-Doping Code in force at the time of the Olympic Games'. The World Anti-Doping Code in force at the time of the XXIX Olympiad was <u>not</u>, however, the WADC 2009 containing the amended language, but rather the WADC 2003 and, with it, Version 5.0 of ISL 2008. The fact of the conflict is re-confirmed by the interpretation rule contained in Art. 16.5 (… 'shall be interpreted in a manner that is consistent with applicable provisions of the Code') …

Neither the WADC 2003 nor the IOC ADR 2008 provides a clue as to how this conflict in the contradictory wording of the provisions is to be resolved. …

Having said that, this Panel is left with the finding that the two provisions which the Respondent declares to be applicable in a subsidiary relationship must be deemed, to the contrary, to be contradictory with one another. …

It is the Panel's view that contradictions in the applicable rules must be interpreted contra proferentem, i.e., to the detriment of the promulgator of the conflicting or contradictory provision. This view is supported by international judicial practice. Unidroit Principles on International Commercial Contracts 2004 provide in Art. 4.6:

'If contract terms supplied by one party are unclear, an interpretation against that party is preferred'.'

…".

107. This Panel follows the reasoning of the Panel in the case *CAS 2009/A/1752&1753*. The contradiction at stake here is not just one between the "comments" and the provisions in the IWF ADP, but also between the "Preface" and the provisions and among the provisions of the IWF ADP themselves. In particular, it is not possible to interpret Art. 10.2 of the IWF ADP *"in a manner that is consistent"* with Art. 10.2 of the WADC. Hence, the facts and circumstances in the case at hand are absolutely comparable to those in *CAS 2009/A/1752 & 1753*. In light of the fact that the IWF ADP are unilaterally formulated by one of parties and that the parties to the contractual relationship have unequal bargaining power, this Panel finds it appropriate to apply the principle of *"contra proferentem"* in the case at hand with the consequence that the provisions on sanctions contained in the IWF ADP must be "read down" in order to be in line with the WADC.

3.4.2.4 Can the disciplinary measure be justified by any (other) provision in the WADC?

108. It follows from the above that the disciplinary measure imposed by Respondent upon the Appellant cannot be based on Art. 10.2 IWF ADP / WADC, since Art. 10.2 of the IWF ADP – when "read down" in order to be compliant with the Art. 10.2 WADC – only provides for a sanction of two (2) years ineligibility. However, there are provisions also in the WADC that allow for a longer period of ineligibility in case of presence of a prohibited substance in an athlete's bodily specimen. In particular Art. 10.6 WADC provides as follows:

"If the Anti-Doping Organization establishes in an individual case … that aggravating circumstances are present which justify the imposition of a period on ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable shall be increased up to a four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly commit the anti-doping rule violation".

109. The comments to Art. 10.6 of the IWF ADP/WADC give some guidance as to what may constitute aggravated circumstances that justify an increase of the period of ineligibility from two to four years. It appears that those circumstances relate to the individual case and more particular to the conduct, motives and degree of fault of the individual athlete. By its own terms, Art. 10.6 of the IWF ADP/WADC do not apply to the normal, regular case, but only to the "aggravated" case.

a. Special situation in weightlifting does not qualify as aggravated circumstance

110. The comments to Art. 10.6 IWF ADP /WADC do not refer in the context of "aggravated

circumstances" to the general circumstances and conditions in a particular sport or within a specific federation as such. The fact, therefore, that some sports may have a more nuanced doping problem as others is, therefore, contrary to the submissions of the Respondent of no avail in the context of this provision. Any interpretation to the contrary would not only find no basis in Art. 10.6 of the IWF ADP/WADC, but would be against the spirit and intent the WADC which is to harmonize the rules on sanctions throughout all sport. This objective of the rules on sanctions is evidenced – *inter alia* – by the comment to Art. 10.2 of the IWF ADP/WADC, which explicitly states: *"Arguments against requiring harmonization of sanctions are based on differences between sports … A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports"*. This comment makes it clear that – (for good or bad) according to the rationale of the WADC – differences between various sports cannot command nor justify a different regime on sanctions. If this, however, is the underlying idea of the WADC than statistical differences among the various sports as to the use of (certain) prohibited substances cannot by themselves constitute aggravating circumstances in the context of Art. 10.6 of the IWF ADP/WADC. The same is true the other way around. A federation – e.g. – that hardly has any EPO-cases is not allowed – according to the WADC – to give a lesser sanction by arguing that in view of the statistics not the same level of deterrence in relation to the misuse of EPO is needed than in other sports federations. More particularly, in this case, the Panel was presented with insufficient factual evidence to support the contention that steroid based offenses were disproportionately present in cases involved weightlifting athletes versus other sports.

b. Particular circumstances of this case

111. According to Art. 10.6 of the IWF ADP/WADC the onus of proof for the existence of aggravating circumstances rests with the Respondent. In the present case the Panel is not persuaded to the degree of comfortable satisfaction that such aggravated circumstances exist. In the case at hand there is no indication that the Appellant committed the anti-doping rule violation *"as part of a doping plan or scheme, either individually or involving a conspiracy"*. Nor is there an indication that the Appellant used the prohibited substance on multiple occasions. In the case at hand the Appellant was submitted to two doping controls on the same day. The first doping control resulted – unlike the second one - in a negative finding. This is all the more surprising since the second test conducted by IWF was an "announced test", i.e. that the Appellant knew at the time when he submitted to the first doping control that a second one would follow shortly. In addition, the Appellant has submitted to other doping tests on 24 August 2010 and 30 August 2010 all of which were reported negative. It follows from this that there is no evidence on file that Appellant has made *"repetitive use of a prohibited substance"* or that he was undertaking any steps beyond simply having the prohibited substance or its metabolites in his specimen. Furthermore, no evidence has been adduced that the Appellant would *"likely enjoy the performance enhancing effects of the anti-doping rule violation beyond the otherwise applicable period of ineligibility"* (i.e. the two-years-sanction). Finally, the Panel notes that there is no evidence on file that the Appellant *"engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation"*.

112. To sum up, the Panel sees no possibility to justify the period of ineligibility imposed upon the Appellant with any other provision of the IWF ADP / WADC. The Panel, therefore, finds that the maximum period of ineligibility that can be imposed upon the Appellant on the basis of the facts adduced before it is two (2) years.

3.5 Conclusion

113. In light of the foregoing, the Panel holds that

- the Appellant committed an anti-doping rule violation (presence of boldenone / boldenone metabolites in his bodily specimen);

- the period of ineligibility to be imposed upon the Appellant is to be reduced from four (4) to two (2) years and

- all other prayers for relief are rejected or dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Liao Hui on 25 October 2011 is upheld insofar as the Appellant requests the Panel to set aside the decision rendered by the IWF Doping Hearing Panel and to declare that he shall be suspended for a period of two (2) years.

2. The period of ineligibility imposed by the IWF Doping Hearing Panel on Mr Liao Hui is reduced from four (4) years ineligibility to two (2) years ineligibility.

3. (…)

4. (…)

5. All other or further prayers of relief are dismissed.