

**CAS 2009/A/1870      World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA)**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President:            Prof. Luigi **Fumagalli**, Attorney-at-Law, Milan, Italy

Arbitrators:        Mr Ulrich **Haas**, Professor, Zurich, Switzerland  
                              Mr Michele **Bernasconi**, Attorney-at-Law, Zurich, Switzerland

between

**World Anti-Doping Agency (WADA)**

Represented by Mr François Kaiser, Attorney-at-Law, Lausanne, Switzerland

as Appellant

and

**Jessica Hardy**

Represented by Mr Howard L. Jacobs, Attorney-at-Law, Westlake Village, CA, United States, and Mr Antonio Rigozzi, Attorney-at-Law, Geneva, Switzerland

as First Respondent

**United States Anti-Doping Agency (USADA)**

Represented by Mr William Bock III, General Counsel, Colorado Springs, CO, United States

as Second Respondent

\* \* \* \* \*

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## 1. BACKGROUND

### 1.1 The Parties

1. The World Anti-Doping Agency (hereinafter referred to as “WADA” or the “Appellant”) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.
2. Ms Jessica Hardy (hereinafter referred to as “Hardy” or the “First Respondent”) is a swimmer of international level, born on 12 March 1987, and has been a member of the U.S. national swim team since 2005.
3. The United States Anti-Doping Agency (hereinafter also referred to as “USADA” or the “Second Respondent”; Hardy and USADA are hereinafter jointly referred to as the “Respondents”) is the independent anti-doping agency for Olympic-related sport in the United States. USADA has full authority to execute a comprehensive anti-doping program in the United States, encompassing testing, adjudication, education, and research, and to develop programs, policies, and procedures in each of those areas. USADA has its seat in Colorado Springs, Colorado, United States.

### 1.2 The Dispute between the Parties

4. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings.
5. In early July 2008 Hardy competed at the 2008 U.S. Olympic Team Trials in Omaha, Nebraska, USA (hereinafter referred to as the “Trials”) in order to qualify for the Beijing 2008 Olympic Games. Based on her results achieved at the Trials, Hardy qualified for the Beijing 2008 Olympic Games in four events (50m freestyle, 100m breaststroke, 4x100m freestyle relay, 4x100m medley relay).
6. While competing at the Trials, on 1, 4 and 6 July 2008, Hardy underwent some doping controls. The sample collected on 4 July 2008 was reported positive for Clenbuterol, a prohibited substance under the applicable anti-doping rules (hereinafter referred to as the “Adverse Analytical Finding”). The Adverse Analytical Finding was confirmed by the B-sample analysis. The samples collected on 1 and 6 July were initially reported as negative: further analyses of the samples indicated, however, “*suspect Clenbuterol transitions*”.
7. Hardy was notified of the Adverse Analytical Finding on 21 July 2008, while she was attending a USA Swimming Pre-Olympic Camp and was scheduled to leave for the Olympic Games on 25 July 2008. Instead, she remained at home and decided to withdraw from the US Olympic team.
8. On the basis of the Adverse Analytical Finding, USADA determined that an anti-doping rule violation had been committed. As a result, and pursuant to the Supplementary Procedures for Arbitration of Olympic Sport Doping Disputes (hereinafter referred to as the “Supplementary Procedures”) of the American Arbitration Association (hereinafter

referred to as the “AAA”), a panel of arbitrators (hereinafter referred to as the “AAA Panel”) was appointed to hear Hardy’s case in accordance with Article 10 of the USADA Protocol for Olympic Movement Testing then in force (hereinafter referred to as the “2004 USADA Protocol”).

9. On 1 August 2008 the AAA Panel issued an arbitral award (hereinafter referred to as the “AAA Award on Liability”) finding that Hardy had violated Article 2.1 (presence of a prohibited substance) and Article 2.2 (use of a prohibited substance) of the Doping Control Rules (hereinafter referred to as the “DC” or the “FINA DC”) of the Federation International de Natation (hereinafter referred to as “FINA”).
10. Further proceedings were then conducted, in order to determine whether exceptional circumstances existed under FINA DC 10.5 that might reduce or eliminate the presumptive period of ineligibility applicable to Hardy pursuant to FINA DC 10.2. On 4 May 2009, therefore, the AAA Panel issued an interim arbitral award (hereinafter referred to as the “AAA Interim Award”) holding as follows:
  - “8.2 Pending the provisions of paragraphs 8.4-8.6 hereof, Jessica Hardy shall be ineligible to compete for a one year period commencing on August 1, 2008 and concluding on July 31, 2009, under the provisions of the FINA DC Rules. The Panel shall retain jurisdiction over this proceeding until the earlier of the IOC’s timely appeal to the Court of Arbitration for Sport, the IOC’s grant of a waiver of the application of Rule 45, or the Panel’s determination regarding the procedures set forth in paragraphs 8.4 and 8.5 hereof.*
  - 8.3 This decision shall be served upon the IOC by the American Arbitration Association, via email and by overnight courier.*
  - 8.4 If the IOC has not appealed this decision to the Court of Arbitration for Sport within twenty one days from its receipt by the IOC, as allowed under FINA DC 13.2.3, then this Panel retains jurisdiction over the matter as follows:*
    - (a) If Respondent has applied to the IOC for a waiver of Rule 45 and it has been denied by the IOC or the IOC has not responded within three months from the date of her application.*
    - (b) Respondent shall report to this Panel her progress on the application for a waiver to the IOC. Respondent shall provide this Panel through the American Arbitration Association with a copy of all communications with respect to Respondent’s anti-doping violation, including any proceedings before the Court of Arbitration for Sport.*
  - 8.5 If Respondent has not applied to the IOC for a waiver of Rule 45 on or before July 31, 2009 then this decision shall become final.*
  - 8.6 If the IOC appeals this decision to the Court of Arbitration for Sport within twenty one days from its receipt by the IOC, this Award shall become final upon initiation of the appeal by the Court of Arbitration for Sport.*
  - 8.7 The parties shall bear their own costs and attorneys’ fees.*
  - 8.8 Except as set forth above, this Award is in full settlement of all claims submitted to this arbitration. All claims not expressly granted herein are hereby denied”.*
11. In the AAA Interim Award, the AAA Panel indicated that it had to determine the following issues:

- “(a) *Has Respondent [Hardy] met her burden under DC 10.5.2 of proving by a balance of probability how the Prohibited Substance entered her system in order to have the period of Ineligibility reduced? As part of this burden, is it necessary for Respondent [Hardy] to prove that there was a sufficient quantity of the Prohibited Substance in her system to cause the concentration of the Prohibited Substance in her sample # 1517756?*
- (b) *Has Respondent [Hardy] established under DC 10.5.2 that her negligence, when viewed in the totality of the circumstances, was not Significant in relation to the anti-doping rule violation? Respondent [Hardy] does not argue that she bore no Fault or Negligence, so the issue is one of the degree of her negligence.*
- (c) *If the Panel finds that Respondent [Hardy] has met her burden of proof under DC 10.5.2, then the Panel is to determine the reduction in the period of Ineligibility.*
- (d) *The effect, if any, of Olympic Charter Rule 45 on the period of Ineligibility”.*
12. In light of the evidence submitted, the AAA Panel found that Hardy had met “*her burden by a balance of probability in showing the presence of clenbuterol in the AdvoCare Arginine Extreme supplements she was taking prior to her doping control of July 4, 2008*” and that she had “*no further burden of proof with respect to whether the quantity of clenbuterol shown to be in her contaminated supplements produced the concentration levels of clenbuterol in her Sample #1517756*”.
13. The AAA Panel, then, considered the degree of Hardy’s negligence to determine, in light of the relevant precedents and for the purposes of the applicable provisions of the FINA DC and of the 2004 World Anti-Doping Code (hereinafter referred to as the “2004 WADC”), whether it “*was Significant, which would negate any possibility of a reduction in the period of Ineligibility, or simply ordinary negligence, which would allow the consideration of a reduction*”, as follows:
- “7.22 *When considering all of the steps taken by Respondent prior to taking the contaminated supplements, the Panel notes the following:*
- (a) *Respondent had personal conversations with AdvoCare about the supplements’ purity prior to taking them.*
- (b) *The AdvoCare web site assured that its products were “formulated with quality ingredients”. The association to known steroid enhanced activities such as bodybuilding promoted “natural” bodybuilding rather than ‘steroidal’ bodybuilding.*
- (c) *Respondent was told by AdvoCare that its products were tested by an independent company for purity and its web site confirmed that, though only with respect to one of its products.*
- (d) *Respondent obtained the supplements directly from AdvoCare with whom she had a contractual relationship, not from an unknown source.*
- (e) *The supplements Respondent took were not labelled as ‘steroidal’ or otherwise labelled in a manner which might have raised suspicions.*
- (f) *Respondent took the same supplements for a least eight months prior to her positive doping control result.*
- (g) *Respondent obtained an indemnity from AdvoCare with respect to its products.*
- (h) *Respondent consulted with various swimming personnel, including the team*

*nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products.*

- 7.23 *The Panel must look to the totality of the circumstances in evaluating whether Respondent's case is indeed "truly exceptional". None of the CAS cases reviewed by the Panel includes the combination of circumstances listed above. In totality, they do add up to "truly exceptional" circumstances.*
- 7.24 *While the Panel declines to find that there was any intention by Respondent to cheat or that she was seeking to enhance her performance inappropriately or in violation of the rules, there is no doubt that Respondent acted with "fault or negligence" in committing an anti-doping violation under the FINA DC Rules. She took a nutritional supplement which was the cause of her positive doping control result. She took supplements in spite of being aware of the warnings of USADA and despite her hesitation about taking supplements due to the risk of contamination. She does not argue that she was not negligent. The issue is whether her conduct is below the level of Significant Negligence defined in the FINA DC rules. Looking to the Comments in the Code [WADC], the two criteria mentioned there as "illustrations which could result in a reduced sanction based on No Significant Fault or Negligence" are found in this case. Those criteria are: the source of her supplements had no connection to Prohibited Substances and the label of the contaminated supplement did not list the Prohibited Substance".*
- 7.25 *... Because of the totality of the factors listed above, the Panel finds that Respondent's negligence did not rise to the level of being Significant and thus her period of Ineligibility may be reduced from two years".*
14. The AAA Panel then concluded that, *"based on the totality of the circumstances in this case"*, Hardy's ineligibility period could be reduced to the maximum possible extent under the applicable rules, and that an ineligibility period of one year was fair and reasonable.
15. The AAA Panel, however, examined whether such conclusion could be affected by some regulations adopted by the International Olympic Committee (hereinafter referred to as the "IOC") on 27 June 2008 under Rules 19 and 45 of the Olympic Charter, which, if applied to Hardy, would have caused her to be denied the opportunity to attempt to qualify for, and to compete at, the 2012 Olympic Games.
16. Indeed, under such regulations (referred to in the AAA Interim Award as "Rule 45" and hereinafter also as the "Olympic Rule" or the "IOC Rule")
- "1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.*
  - 2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all international Federations, to all National Olympic Committees and to all Organising Committees for the Olympic Games".*
17. The AAA Panel remarked that *"the overall effect of the one year period of Ineligibility*

*on Respondent, taking into account the impact of Rule 45, is far in excess of what should be expected when applying the principles of fundamental justice and fairness in the circumstances of this case. The effect of this penalty imposed upon Respondent is first a one year period of Ineligibility (including missing the 2008 Olympic Games for which she qualified) and second, because of Rule 45, no eligibility to compete in the next Olympic Games. This penalty is indeed, in the view of the Panel, evidently grossly disproportionate, under the principles of proportionality. In addition, this penalty is inconsistent with the provision of the FINA DC and the Code [WADC]”.*

18. As a result, the Panel deemed to be “*just and equitable to fashion a remedy that allows Respondent the opportunity to apply to the IOC for a waiver of the applicability of Rule 45 in her case*” and to retain “*jurisdiction over this case until such time as: a. the IOC has appealed this decision to CAS and the appeal has been initiated under the CAS rules; or b. Respondent has applied to the IOC for a waiver of Rule 45 on or before July 31, 2009 (the date of expiration of Respondent’s one year period of Ineligibility); and the application for a waiver of Rule 45 has been denied by the IOC or the IOC has not responded*”. At the same time, the Panel decided, “*in the event the IOC either does not respond to Respondent’s application or denies the application*”, to “*review the circumstances as reported by Respondent and reserves the right to reduce the period of Ineligibility imposed upon Respondent to six months*”.
  
19. On 19 May 2009, FINA filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as “CAS”), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”), to challenge the AAA Interim Award. The appeal proceedings so started were registered by the CAS Court Office as CAS 2009/A/1852, *FINA v/ Jessica Hardy & USADA*. An appeal to the CAS against the AAA Interim Award was also filed by WADA on 22 May 2009. This second appeal was registered as CAS 2009/A/1853, *WADA v/ Jessica Hardy & USADA*.
  
20. In a letter dated 20 May 2009 Hardy indicated to the AAA Panel the following:
 

*“As requested by the Panel, Respondent Jessica Hardy has made initial contact with the IOC regarding the issue of the waiver of application of IOC Rule 45. In that connection, the undersigned scheduled a meeting with Howard Stupp in Lausanne on May 12, 2009; unfortunately, Mr. Stupp was required to cancel that meeting at the last minute. Respondent intends to continue to pursue this matter directly with the IOC.*

*Respondent has given great consideration to how she wishes to proceed in this matter. In that regard, Respondent believes that the best course of action would be to have this Panel confirm the sanction length at one year, commencing on August 1, 2008; and to allow Respondent Jessica Hardy to pursue the waiver issue directly with the IOC. In the event that the IOC refuses to grant the waiver, or fails to respond to the waiver issue, Jessica Hardy believes that her best course is a direct action against the IOC, before the Court of Arbitration of Sport and/or the Swiss Federal Tribunal, limited to the issues of (1) whether the IOC rule violates Swiss law in general, and (2) whether the IOC rule violates Swiss law as applied to the specific facts of this case.*

*For these reasons, Respondent Jessica Hardy respectfully requests that this Panel issue its Final Award, confirming the sanction length of one year commencing on August 1, 2008”.*

21. In accordance with Hardy's request, on 30 May 2009 the AAA Panel issued a final arbitral award (hereinafter referred to as the "AAA Final Award") ruling as follows:
- "(a) The Panel's Interim Arbitral Award, issued May 4, 2009 is hereby rendered final, is incorporated into this Final Arbitral Award by this reference, and is to be read and interpreted in conformity and consistently with this Final Arbitral Award.*
  - (b) The Panel confirms that, for the reasons stated in its Interim Arbitral Award, Jessica Hardy shall be ineligible to compete for a one year period commencing on August 1, 2008 and concluding on July 31, 2009, under the provisions of the FINA DC Rules.*
  - (c) The Panel shall no longer retain jurisdiction over this proceeding and all other conditional aspects of the Interim Arbitral Award shall be rendered void.*
  - (d) This Final Arbitral Award shall be served upon the International Olympic Committee by the American Arbitration Association.*
  - (e) The parties shall bear their own costs and attorney's fees.*
  - (f) Except as set forth above, this Award is in full and final settlement of all claims submitted to this arbitration. All claims not expressly granted herein are hereby denied".*

## **2. THE ARBITRAL PROCEEDINGS**

### **2.1 The CAS Proceedings**

22. On 11 June 2009, WADA filed a statement of appeal with the CAS, pursuant to the CAS Code, to challenge the AAA Final Award, starting these arbitration proceedings (CAS 2009/A/1870). The statement of appeal named Hardy and USADA as respondents and had attached 6 exhibits.
23. On 16 June 2009 FINA informed the CAS that it wished to withdraw its appeal, registered as CAS 2009/A/1852, *FINA v/ Jessica Hardy & USADA*, against the AAA Interim Award. As a result, on 24 June 2009 the CAS President issued an order terminating the arbitration procedure CAS 2009/A/1852, *FINA v/ Jessica Hardy & USADA* and removing it from the CAS roll.
24. In a letter dated 23 June 2009, WADA informed the CAS Court Office that it could "*consider withdrawing its first appeal*", registered as CAS 2009/A/1853, *WADA v/ Jessica Hardy & USADA*, filed against the AAA Interim Award, "*provided that*:"
- the Respondents confirm that they do not contest the admissibility of the second appeal filed by WADA in the procedure CAS 2009/A/1870, WADA vs/ Jessica Hardy & USADA. In particular, the Respondents should confirm that they do not challenge the timely filing of the second appeal and that CAS has jurisdiction in such an appeal;*
  - the Respondents do not ask for an award for costs in the procedure CAS 2009/A/1853, WADA vs/ Jessica Hardy & USADA, and*
  - the Respondents accept that the exhibits filed by WADA in the case CAS 2009/A/1853, WADA vs/ Jessica Hardy & USADA are incorporated by reference in the procedure CAS 2009/A/1870, WADA vs/ Jessica Hardy & USADA".*



25. In a letter dated 26 June 2009, Hardy expressed her agreement with the conditions suggested by WADA in its communication of 23 June 2009. USADA, on its side, did not raise any objection to the termination of CAS 2009/A/1853, *WADA v/ Jessica Hardy & USADA* pursuant to the conditions specified by WADA and agreed by Hardy. As a result, on 30 July 2009 the CAS President issued an order terminating the arbitration procedure CAS 2009/A/1853, *WADA v/ Jessica Hardy & USADA* and removing it from the CAS roll.
26. In a letter dated 1 July 2009, Hardy informed the CAS Court Office that USADA had decided not to take any further role in connection with the arbitration.
27. On 6 July 2009, the Appellant filed, together with 4 exhibits, its appeal brief. In such submission, the Appellant confirmed its requests for relief.
28. In a letter dated 7 July 2009, USADA confirmed to the CAS Court Office that it “*will not be submitting a brief in this matter*”.
29. On 22 July 2009 Hardy informed the CAS Court Office that she had requested that the IOC grant her a waiver from the application of the IOC Rule, and a declaration that her suspension pursuant to the AAA Final Award would not serve as an automatic disqualification from the 2012 Olympic Games. As a result, Hardy asked for a brief extension to submit her answer brief “*(1) in order to allow the IOC sufficient time to respond to Respondent Jessica Hardy’s formal request for a waiver from application of the IOC Rule; (2) as a matter of efficiency, to avoid Respondent Jessica Hardy having to draft lengthy and legally complex submissions on the validity of the IOC Rule while there is still a possibility that the issue becomes moot; (3) to provide sufficient time to Respondent Jessica Hardy to determine whether the application of the IOC Rule will be an issue in this CAS appeal; and (4) as a matter of efficiency, to provide sufficient time to Respondent Jessica Hardy to determine whether it is necessary to make a formal request, pursuant to Article R41.2 of the CAS Code, that the IOC be joined as a party in this arbitration proceeding*”.
30. In a letter dated 28 July 2009, Hardy advised the CAS Court Office that she had received an answer from the IOC “*declining to respond to the merits of the request for a waiver from application of the amendment to Rule 45 of the Olympic Charter*” and informing the CAS Court Office that “*it therefore appears that it will be necessary for Respondent Jessica Hardy to request ... that the IOC be joined as a party pursuant to Art. 41.2 of the CAS Code*”.
31. By communication dated 30 July 2009, 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: Prof. Luigi Fumagalli, President of the Panel and Prof. Ulrich Haas and Mr Michele Bernasconi as co-arbitrators appointed by the parties.
32. In a letter to the CAS Court Office dated 13 August 2009, the United States Olympic Committee (hereinafter referred to as the “USOC”), making reference to Hardy’s request that the IOC “*be enjoined in the CAS proceeding ... concerning the validity and applicability of IOC’s regulation to Rule 45 of the Olympic Charter*”, wrote in support of “*the effort to have the Court of Arbitration for Sport rule on the matter at this time*”: more specifically, the USOC expressed its view that “*it is in the best interest of sport generally that the issues raised by Ms. Hardy be addressed promptly and fully by an*

*appropriate adjudicatory body after having heard from all relevant parties, including the IOC”, since “a ruling on the matter ... will allow all NOCs and athletes appropriate time to plan for the Games with full knowledge of the applicable rules and implications”.*

33. On 14 August 2009, Hardy filed her “*Answer Brief and Request for Joinder of International Olympic Committee*” in the arbitration. Hardy’s brief had attached 43 exhibits.
34. On 18 August 2009 the CAS Court Office transmitted to the parties and the IOC the “*Answer Brief and Request for Joinder of International Olympic Committee*” filed by Hardy, inviting the parties and the IOC to state their position in relation to Hardy’s request.
35. In a letter dated 28 August 2009 USADA, while confirming that it did “*not intend to brief the issues in this case or take an active role in this matter*”, indicated that it recognized “*the efficiency that would be achieved by having the IOC join in this matter and providing for a final resolution of Jessica Hardy’s potential eligibility to compete for a position on the United States Olympic Team in 2012*”, and that it supported “*a prompt, final resolution of this matter on all issues for the good of clean athletes and the integrity of competition*”.
36. In a letter of 2 September 2009 the IOC informed the CAS Court Office that “*the International Olympic Committee does not accept to participate in the ... arbitration. The subject of this dispute is res inter alios and concerns the length of a suspension inflicted by USADA to Ms Jessica Hardy for an anti-doping rule violation. Rule 59 of the Olympic Charter does not apply to such dispute*”.
37. By letter dated 18 September 2009 the CAS Court Office advised the parties that, “*having deliberated on the matter, the Panel has decided not to accept the request filed by the First Respondent for the joinder of the International Olympic Committee, as the conditions stipulated in Article R41.4 of the Code of Sports-related Arbitration are not satisfied. The reasons for the Panel’s decision shall be contained in the final award*”.
38. On 22 September 2009, Hardy requested the Panel to reconsider its decision regarding the joinder of the IOC as a party, submitting that Rule 59 of the Olympic Charter provides the applicable arbitration agreement for such purposes and that the merits of the case necessarily involve “*the consideration of the IOC Rule to Jessica Hardy, and the validity of the IOC Rule in general*”. In the alternative, the First Respondent submitted that the Panel will be required to address “*the following issues in its consideration of this case: (1) whether the application of the IOC Rule to Jessica Hardy would result in a disproportionate penalty that violates Swiss law; (2) whether the IOC Rule as applied to Jessica Hardy constitutes a penalty rule or an entry rule; (3) whether the application of the IOC Rule to Jessica Hardy would be incompatible with the legal principle ne bis in idem (prohibition of double penalty for the same offense); (4) whether the application of the IOC Rule to athletes who were already serving or have served a period of ineligibility according to FINA DC 10.5 violates any athletes’ rights according to any applicable laws*”. As a result, Hardy invited the Panel to request that the IOC submit its position on these issues in writing.

39. In a letter dated 14 October 2009, the Panel, after consultation with the parties, invited the IOC to file *“the written statement that the IOC might deem necessary or appropriate in order to express its position on the issues mentioned in the letter of the First Respondent dated 22 September 2009”*. In addition, the Panel granted the IOC the possibility to reconsider its position and join the pending CAS proceedings.

40. In a letter of 2 November 2009, the President of the Panel addressed the CAS Secretary General with respect to the pending arbitration as follows:

*“As you know, in such arbitration much of the discussion between the parties concerns some provisions recently adopted by the IOC regarding the participation in the Olympic Games (the “Olympic Eligibility Rule”): in substance, the Appellant submits that the Olympic Eligibility Rule has no relevance for the determination of the sanction (for an anti-doping rule violation) to be imposed (in the Appellant’s view) on the Respondent, while the Respondent maintains, inter alia, that the Olympic Eligibility Rule has to be taken into account for the same purposes.*

*The question of the nature and legality under Swiss law of the Olympic Eligibility Rule has been examined in a recent advisory opinion rendered by the CAS upon application of the IOC (the “Opinion”). The IOC requested that the Opinion so rendered had to remain confidential pursuant to Article R-62 of the CAS Code. I have been informed, however, that the IOC has now released the CAS from the confidentiality obligation, and consented to the publication of the Opinion.*

*In light of the foregoing, I would be grateful if you could send the parties copy of the Opinion and draw the parties’ attention to the fact that I was one of the members of the Panel that rendered it.*

*The fact that I concurred in the adoption of the Opinion is not, in my view, a circumstance affecting my independence in the pending proceedings, also taking into account their peculiarities. Indeed, the Opinion was rendered in general terms and was not focused on the case that is being now arbitrated. However, I would like to inform the parties of such circumstance, so that they have the opportunity to express their position on it”.*

41. On the same date, the CAS Court Office forwarded to the parties the letter of the President of the Panel together with copy of the advisory opinion rendered on 11 June 2009 upon application of the IOC (TAS 2009/C/1824, CIO) (hereinafter referred to as the “Advisory Opinion”) and asked the parties to express their position on the circumstances outlined in the President’s letter.

42. In a letter dated 6 November 2009 the IOC confirmed its decision not to join the pending arbitration proceedings and to refrain from any further request or step.

43. On 9 November 2009 Hardy took note of the President of the Panel’s letter of 2 November 2009 and confirmed that *“Hardy currently has no reason to doubt Mr. Fumagalli’s impartiality and assumes that he maintains the ability to adapt his position to the facts of the present case ..., in particular after having considered her arguments ...”*. At the same time, Hardy requested to be provided with an opportunity to file a written submission in order to address the arguments discussed in the Advisory Opinion.

44. On the same date, also WADA indicated that it had “*no objection to Prof. Fumagalli chairing the Panel in this arbitration*”.
45. On 16 November 2009 the Panel granted the parties a deadline to file a written submission with respect to the Advisory Opinion.
46. In a letter dated 6 January 2010, Hardy informed the Panel that Mr John Ruger, USOC Athlete Ombudsman, had expressed his desire to attend the hearing of the case as an observer, and that Hardy had no objection to this request. USADA, in a letter of 7 January 2010, also confirmed that it had no objection to Mr Ruger’s request.
47. On 15 January 2010, following the Panel’s letter of 16 November 2009, granting the parties the opportunity to file written submissions with respect to the Advisory Opinion:
  - i. Hardy filed a “*Supplementary Submission*”; and
  - ii. WADA filed a “*Complementary Brief*”.
48. In a letter dated 26 January 2010 Hardy objected to WADA’s “*Complementary Brief*”, submitting that it had not addressed the Advisory Opinion but constituted an inadmissible reply to Hardy’s preceding submissions, and requested that WADA’s “*Complementary Brief*”, together with the accompanying evidence, be declared inadmissible and stricken from the record.
49. On 2 February 2010, the CAS Court Office informed the parties that the Panel had decided to accept WADA’s “*Complementary Brief*” only “*with respect to its portions (together with the relevant exhibits) concerning issues also discussed in the Advisory Opinion: the consistency of the IOC Rule with general principles (Section IVb), and its nature (Section V), and that the Panel shall disregard all other portions (together with the relevant exhibits)*”. In any case, the Panel indicated that “*all the parties will have the possibility to fully state their case and comment on any issue relating to the dispute during the hearing, in accordance with the rules of the CAS Code*”.
50. On 19 February 2010, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the “*Order of Procedure*”), which was accepted and countersigned by the parties.
51. A hearing was held in New York on 12 March 2010 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 9 December 2009. The Panel was assisted at the hearing by Ms Louise Reilly, Counsel to the CAS. The hearing was attended by:
  - i. for the Appellant: by Mr François Kaiser, counsel, and Mr Oliver Niggli, WADA’s Chief Financial Officer and Legal Director;
  - ii. for the First Respondent: by Mr Howard L. Jacobs and Mr Antonio Rigozzi, counsel, by Ms Amanda Hardy, Ms Denise Robinson, Mr William Robinson and by the First Respondent in person.

Nobody attended for the Second Respondent. At the same time, the Panel authorized Mr John Ruger, USOC Athlete Ombudsman, to attend the hearing as an observer.

52. At the hearing, Hardy made some declarations, concerning *inter alia* her background, her testing history as well as the circumstances of her decisions to take the supplements produced by Advocare. Mr Bill Robinson and Ms Denise Robinson, indicated as witnesses by the First Respondent, were not requested to render any declarations and attended as observers.
53. The parties, then, filed, with the Panel's consent, some additional documents and made cogent submissions in support of their respective case. In its presentation, WADA amended its request for relief (see § 59 below). Hardy insisted that her requests be accepted.
54. At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.
55. In a letter dated 21 March 2010 Hardy, then, referred to her submission that "*the only way for the Panel to provide for legal certainty is to issue a 6-month period of ineligibility*", and informed the Panel that she "*will not claim damages from the AAA, WADA, USADA, USA Swimming, FINA or any other anti-doping organization or sports federation for the 6 months ineligibility period she would have served without cause*".

## **2.2 The Position of the Parties**

56. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, 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 Position of the Appellant***

57. In its statement of appeal, the Appellant requested the CAS "*to rule*" as follows:
  1. *The Appeal of WADA is admissible.*
  2. *The decision of the AAA arbitral Panel dated May 30, 2009, in the matter of Ms Jessica Hardy is set aside.*
  3. *Ms Jessica Hardy is sanctioned with a period of suspension of two years, starting on the date on which the CAS award enters into force. Any period of suspension (whether imposed to or voluntarily accepted by Ms Jessica Hardy) before the entry into force of the CAS award shall be credited against the total period of suspension to be served.*
  4. *WADA is granted an award for costs*".
58. The relief so sought was confirmed in the appeal brief dated 4 July 2009 as follows:
  1. *The Appeal of WADA is admissible.*
  2. *The decision of the AAA arbitral award dated May 30, 2009, in the matter of Ms Jessica Hardy is set aside.*
  3. *Ms Jessica Hardy is sanctioned with a period of suspension of two years, starting on the date on which the CAS award enters into force. Any period of suspension (whether imposed to or voluntarily accepted by Ms Jessica Hardy) before the*

*entry into force of the CAS award shall be credited against the total period of suspension to be served.*

4. *All competitive results obtained by Ms Jessica Hardy from July 1<sup>st</sup>, 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
  5. *WADA is granted an award for costs”.*
59. At the hearing, however, WADA slightly modified the relief sought, and waived its request that the competitive results obtained by Hardy after the end of the period of suspension already served (one year) and before the commencement of the second year of ineligibility sought should be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes. In other words, WADA specified at the hearing that it was seeking a second year of suspension of Hardy, to start on the date of the CAS award, but no disqualification of the results obtained by Hardy between the first and the second year of suspension.
  60. The Appellant criticizes the AAA Final Award, which it asks the Panel to set aside: in the Appellant’s opinion, the AAA Final Award has to be replaced by an award issued by CAS finding Hardy responsible for an anti-doping rule violation and imposing the “ordinary” sanction provided for such violation.
  61. In its submissions in this arbitration, the Appellant preliminarily underlines that the violation of FIDA DC 2.1 (presence of a prohibited substance or its metabolites in a competitor sample) is established: the Adverse Analytical Finding indicated the presence of a prohibited substance in a sample of Hardy and the occurrence of an anti-doping rule violation is not challenged. As a result, the ordinary sanction provided for such an infringement should apply.
  62. The Appellant, then, submits that the conditions for the elimination or reduction, pursuant to FINA DC 10.5.1 and 10.5.2, of the standard period of ineligibility are not met, even though “*WADA accepts in the present procedure that Ms Jessica Hardy tested positive for clenbuterol because of the contaminated food supplements she allegedly ingested*”.
  63. With respect to the elimination of the sanction, the Appellant notes that Hardy “*admits having been negligent in taking supplements ... . Therefore, she correctly accepts that she cannot benefit from an elimination of the sanction for no fault or negligence*” under FINA DC 10.5.1.
  64. With respect to the reduction of the sanction for “*no significant fault or negligence*”, the Appellant underlines that “*a reduction of the otherwise applicable period of ineligibility is meant to occur only in cases where the circumstances are truly exceptional, i.e. when an athlete can show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relationship to the doping offence*”. The Appellant in such respect submits that:
    - “*instead of being rightly suspicious with food supplements, Ms Jessica Hardy chose to trust blindly a sponsor that commercializes nutritional supplements described as enhancing muscle growth; she even signed an endorsement*

*agreement with such corporation” (AdvoCare), agreeing “to promote food supplements ... . However, Ms Hardy was aware of the explicit warnings of WADA and of other anti-doping organizations against the potential dangers of food supplements”;*

- *“as an experienced top-level athlete and being fully aware of the danger of food supplements, Ms Jessica Hardy should have been particularly vigilant”;*
- *“Ms Hardy failed to conduct further investigations”, in addition to making a direct inquiry from the supplement manufacturer, “while she could realize, by a simple check on the internet, that the description of the food supplements offered to her was alarming”;*
- *“despite clear signs of danger, Ms Hardy did not have the supplements tested, nor did she make serious inquiries from a doctor or any other reliable specialist”;*
- *“by signing the Endorsement Agreement” and the indemnity clause therein contained, “Ms Hardy has accepted that her behavior could be risky and the parties ... expressly provided for the consequences thereof ... . she took into account a certain margin of risk”.*

65. The Appellant therefore concludes that *“Hardy has not established exceptional circumstances whereby she would bear no significant fault or negligence. The ordinary two-year suspension is therefore applicable”.*

66. With respect to the First Respondent’s submission in this arbitration that the IOC Rule is to be taken into account in the determination of the measure of the sanction, the Appellant maintained (letter of 9 November 2009) that *“the issues raised by Respondent Jessica Hardy with respect to Rule 45 of the Olympic Charter and the IOC Executive Board’s decision on eligibility to the Olympic Games have nothing to do with this arbitration, which scope is only to determine which sanction should be imposed upon Ms Hardy in applying the FINA Doping Control Rules and the provisions of the World Anti-Doping Code”.* At the same time, while discussing the Advisory Opinion (in the *“Complementary Brief”* of 15 January 2010), WADA outlined that in its opinion *“the principle of proportionality does not justify to disregard the applicable provisions of FINA DC or to impose a sanction below the minimum of one year if the Panel were to find that Ms Hardy should benefit of a reduction of the sanction for no significant fault or negligence”;* in addition, *“the IOC Rule is a provision governing eligibility to a specific sport event (the Olympic Games), organized by the event organizer (the IOC), which is free to determine the conditions of participation to such event in accordance with its own rules”.*

## ***b. The Position of the Respondents***

### ***b.1 The Position of Hardy***

67. The answer dated 14 August 2009 filed by the First Respondent (§ 33 above) contained the following *“Conclusions and Prayers for Relief”:*

***“AS A PRELIMINARY MATTER***

***1. Join the IOC in the present arbitration proceedings pursuant to Article R41.2 and R41.4 of the CAS Code.***

*ON RESPONDENT'S PRIMARY CASE:*

2. *Declare that the IOC Rule is not applicable to Jessica Hardy.*
3. *Confirm the AAA/CAS Arbitral Tribunal's final award of 1<sup>st</sup> June 2009 deciding that, based on the totality of the circumstances of this case, Respondent's Jessica Hardy's Ineligibility Period shall be reduced to the maximum extent of one year starting on 1<sup>st</sup> August 2008.*

*ON RESPONDENT'S SUBSIDIARY CASE:*

4. *Annul the AAA/CAS Arbitral Tribunal's final award of 1<sup>st</sup> June 2009 and decide that, based on the totality of the circumstances of this case including the application of the IOC Rule, Respondent's Jessica Hardy's Ineligibility Period shall be reduced to six months.*

*IN ANY EVENT:*

5. *Condemn WADA and/or the IOC to pay a substantial contribution towards Respondent's Jessica Hardy's legal fees and other expenses incurred in connection with the proceedings".*

68. Hardy, in other words, asks this Panel to dismiss the appeal brought by WADA. The First Respondent, then, as her primary case, requests this Panel to confirm the sanction imposed by the AAA Panel, finding, at the same time, that the application of the IOC Rule to Hardy "*would result in a penalty that is grossly disproportionate and therefore violative of Swiss law, let alone of fundamental principles of sports law*". In the alternative, the First Respondent requests that the sanction imposed by the AAA Panel be reduced to six months, "*to prevent a grossly disproportionate penalty in light of the additional discipline that will be imposed*" by the IOC Rule. In any case, in order to have the issue of the impact of the IOC Rule on her suspension finally settled also towards the IOC, and with the participation of the IOC, in this CAS arbitration, Hardy requested that the IOC be joined in the proceedings under the applicable rules of the CAS Code.
69. With respect to the joinder of the IOC, Hardy submits that the dispute with the IOC, concerning the IOC Rule and the automatic bar from competing in the 2012 Olympic Games it involves, is a dispute "*in connection with the Olympic Games*", and therefore falls within the scope of Rule 59 of the Olympic Charter. As a result, according to the First Respondent, CAS has jurisdiction to hear it. In addition, the First Respondent submits that the dispute between Hardy and the IOC and the dispute between Hardy and WADA involve "*the same operative facts*", and that in order to verify whether the penalty imposed on Hardy is proportionate to her fault, it is necessary to consider the "*overall effect*" of the sanction, including the effect deriving from the IOC Rule. According to Hardy, therefore, the conditions set in the CAS Code for the third party joinder are satisfied.
70. At the same time, the First Respondent underlines that her appeal against the application of the IOC Rule is admissible and submits that the issue of her eligibility for the 2012 Olympic Games is not premature, because the IOC Rule already prevents her, under the USA Swimming and USOC rules, even from attempting to qualify for the 2012 Olympic Games.
71. With respect to the merits of the dispute, the First Respondent submits that the open issues, to be settled in this arbitration, are "*(i) whether Jessica Hardy bears significant*



*fault or negligence for the offense ... and (ii) what is the appropriate length of the suspension to be imposed*". In this latter respect, Hardy submits that the appropriate length of the sanction varies *"depending on whether this Panel agrees with Jessica Hardy's submission that the IOC Rule is inapplicable to her ... or not ..."*.

72. With regard to the first issue, the First Respondent emphasizes that the evidence on file shows that she was diligent in her decision to use supplements and her choice of supplements, that she took the reasonable steps necessary for a finding of no significant fault or negligence and that she is entitled to the maximum possible reduction under FINA DC 10.5.2. More specifically, in the First Respondent's opinion,
- i. Hardy was diligent, inter alia because
    - *"she took supplements from only one company for less than a year prior to the ... Trials"*;
    - she *"undertook a thorough analysis and review before deciding to take supplements in the first place, and before deciding that Advocare supplements were safe"*;
    - *"she inquired and was told that none of those athletes"* who used Advocare supplements *"had ever tested positive for performance enhancing substances"*;
    - *"she and her agent made direct inquiries with Advocare about the safety and purity of its supplements"* and *"received direct assurances, both from Advocare and its representatives, that Advocare supplements were pure"*;
    - *"her review of Advocare's website was consistent with the representations that had been offered directly to her"*: actually, *"through her research, ... [she] noted that Advocare supplements do not appear to be marketed to bodybuilders"*;
    - Advocare, in the endorsement contract, *"agreed to an indemnity provision, which ... Hardy took to be a further guarantee of the purity and safety of the Advocare products"*;
    - she *"made further inquiries from USA Swimming and the United States Olympic Committee. Their responses provided further assurances to her regarding her choice of Advocare as a safe supplement company"*;
    - she *"limited her supplements to only those provided by Advocare"* and *"received the supplements directly from Advocare"*;
  - ii. exceptional circumstances exist from which it follows that Hardy did act with no significant fault or negligence:
    - when taking into account the CAS precedents, i.e. *"when looking at the actual facts of these cases, and the diligence exercised by the respective athletes, it is evident that ... Hardy exercised the highest degree of diligence"*;
    - *"Hardy did not blindly trust Advocare"*, but conducted thorough inquiries;
    - *"the mere fact that the athlete could have done more research is an insufficient basis to find significant fault"*;

- *“the argument ... that ... Hardy was significantly negligent for contacting the manufacturer and receiving specific assurances ... is completely inconsistent with the position taken by WADA”* in other cases, where *“WADA argued that”* the athlete *“was significantly negligent for not contacting the manufacturer and for not receiving assurances from the manufacturer”*;
  - WADA’s position that Hardy could have the supplements tested prior to consuming her is untenable, because (i) Hardy tested positive several times while taking the supplements, and (ii) it cannot be applied to a case of contamination;
  - an *“athlete is required to take reasonable steps to protect him- or herself, not to take every conceivable step, whether practicable or not”*;
- iii. Hardy is entitled to the maximum possible reduction in the sanction, because the finding of the AAA Panel was not evidently and grossly disproportionate. On the contrary, the AAA Panel’s conclusion was correct as it took into account the degree of Hardy’s negligence.
73. With regard to the second issue, the First Respondent submits that *“the one-year ... suspension ... is in and of itself a proportionate sanction”* if the IOC Rule is not applicable. And the First Respondent alleges that *“the IOC Rule cannot be applied to her because (A) it violates the WADC and (B) it is illegal under Swiss law”*. More specifically, in the First Respondent’s opinion,
- i. the IOC Rule violates the WADC, because
- it constitutes a substantive change to Article 10 of the WADC and to the effect of such provision, while the IOC undertook, as a signatory to the WADC, to implement such provision without changes;
  - the effect of the IOC Rule is to be qualified as a a sanction according to Rule 23.2.1 of the Olympic Charter;
  - it implies a suspension for more than two years, i.e. for a period exceeding the maximum sanction allowed under the WADC;
- and the only way to effectively prevent such violation of the WADC from taking place would be to declare the IOC Rule inapplicable to Hardy, since there are no consequences that could realistically be imposed on the IOC by WADA for the non-compliance with the WADC;
- ii. the IOC Rule is illegal under Swiss law, because
- it is a disciplinary measure in its nature, irrespective of how it is characterized in the applicable regulations: CAS precedents have indicated that rules which prohibit participation in a competition on the ground of the athlete’s past behaviour cannot be qualified as an entry rules *stricto sensu*, since they sanction the athlete’s behaviour. As such
  - the IOC rule is incompatible with the principle of proportionality, since
    - √ it constitutes a sanction imposed in addition to what (a two year suspension for a first offence) is considered to be *“the highest threshold admissible”*;

- √ it exceeds what is reasonably required to search its goal: the IOC Rule is not tailored to combat doping, as this aim is pursued by the WADC, or to protect the integrity and reputation of the Olympic Games, as it is not possible to see how an athlete's participation could jeopardize only the edition of the Olympic Games following the period of ineligibility served and not the subsequent editions;
- √ it is based on an arbitrary distinction, since the six-month timeframe is not connected in any way to the degree of fault of the athlete;
- it constitutes a restriction to her personality rights within the meaning of Article 28 of the Swiss Civil Code, which is illicit, since it is not justified by the athlete's consent or by an overriding private or public interest;
- it is arbitrary as it contravenes the principles of due process and equal treatment, since
  - √ in its effect it provides for an additional punishment, "*inflicted upon only those top-notch athletes who are able to qualify for the Olympics*";
  - √ it creates a "*fundamentally unequal situation*" since it would exclude from the Olympic Games the athletes found to be non-significantly negligent exactly like the athletes who cheated or were found significantly negligent;
  - √ it is tied exclusively to the calendar of the competitions;
  - √ it is meant to apply automatically, without providing the athletes with an opportunity to be heard;
- it constitutes an illicit double jeopardy, since an athlete would be sanctioned more than once for the same offence;
- it can amount to a violation of public policy: the principles of proportionality and double jeopardy are "*core principles ... relevant to the judicial review of arbitral awards*"; their disregard could lead to the setting aside of the award enforcing the application of the IOC Rule.

74. The First Respondent, indeed, submits that this Panel, should it conclude that the application of the IOC Rule to Hardy is admissible under Swiss law, "*should adapt the length of the suspension in order to take into account the application of the IOC Rule*" on the basis of the principle of proportionality, irrespective of the finding with respect to the exceptional circumstances under FINA DC 10.5.2. In this connection, the First Respondent submits that:

- i. a CAS panel (as recognized in some CAS precedents) has the discretion to ignore the mandatory minimum sanction set forth in the WADC (and the FINA DC);
- ii. the application of the IOC Rule to Hardy, upon a finding of exceptional circumstances under WADC (and FINA DC) 10.5.2, would result in a disproportionate penalty, since Hardy has already missed one Olympic Games, and "*faces a suspension that would not only keep her out of her sport for one year ..., but which would preclude her from even trying to make the 2012 Olympic team*". As a result, the application of the IOC Rule would result "*in a disproportionate penalty, even if there is a reduction in penalty*"; and the only

way to avoid it would be to impose a sanction not exceeding six months;

- iii. the application of the IOC Rule to Hardy would result in a disproportionate penalty even absent a finding of exceptional circumstances under WADC (and FINA DC) 10.5.2, because the Panel should “*still decide if the penalty is proportionate when considering the overall effect of the sanction*”, including the effect of the IOC Rule. Also in this case the only way to avoid the disproportionate consequences of the application to Hardy of the IOC Rule would be to impose a sanction not exceeding six months.

75. Finally, the First Respondent discussed the Advisory Opinion, that had considered the IOC Rule, and concluded as follows:

- “• *The IOC Advisory Opinion is not binding on the present Panel.*
- *The IOC Advisory Opinion is not accurate inasmuch as it finds that the IOC Rule is not disciplinary in nature and concludes that it constitutes a rule of eligibility for registration and participation in the Olympic Games – a condition of eligibility for registration and participation that only the IOC can set, by decision of its Executive Board acting as a delegation*” (IOC Advisory Opinion, § 7.1.7).
- *By contrast, the IOC Advisory Opinion is accurate inasmuch as it considers that the IOC Rule can only apply to athletes who were aware of its consequences when they committed the anti-doping rule violation*”.

#### b.2 The Position of USADA

76. In a letter dated 7 July 2009, the Second Respondent informed the CAS that USADA would not be submitting an answer to the appeal filed by WADA.

77. USADA, however, in a letter dated 28 August 2009, while confirming its position, wrote in support of Hardy’s application that the IOC be joined in the arbitration, “*for a final resolution of Jessica Hardy’s potential eligibility to compete for a position on the United States Olympic Team in 2012*”.

### **3. LEGAL ANALYSIS**

#### **3.1 Jurisdiction**

78. CAS has jurisdiction to decide the present dispute between the parties.

79. The jurisdiction of CAS, in fact, is not disputed by the parties and has been confirmed by the signing of the Order of Procedure. In addition, it is contemplated, pursuant to Article R47 of the CAS Code, by

- i. FINA DC 13,
- ii. Article 15(b) of the USADA Protocol for Olympic and Paralympic Movement Testing in force, since 1 January 2009, at the time the AAA Final Award was issued (hereinafter referred to as the “2009 USADA Protocol”),
- iii. Article R-45 of the Supplementary Procedures, Annex D to the 2009 USADA Protocol, and

- iv. Article 13 of the 2009 World Anti-Doping Code, Annex A to the 2009 USADA Protocol, in force, since 1 January 2009, at the time the AAA Final Award was issued (hereinafter referred to as the “2009 WADC”).
80. More specifically, the provisions which are relevant to that effect in these proceedings are the following:
- i. FINA DC 13 “*Appeals*”:
- “DC 13.1 Decisions made under these Anti-Doping Rules may be appealed as set forth below in DC 13.2 through 13.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review provided in these Anti-Doping Rules must be exhausted.*
- DC 13.2 A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed [...] may be appealed exclusively as provided in this DC 13.2.*
- DC 13.2.1 In cases arising from an Event in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court. [...]*
- DC 13.2.3 In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Competitor or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) FINA and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games; and (e) WADA. [...].*
- DC 13.5 The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to a decision subject to appeal:*
- *Within a deadline of ten (10) days from receipt of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied.*
  - *If such request is raised within the above deadline, then a new appeal deadline will run for the concerned party from the day the copy of the file is received.*
- DC 13.6 In the event an appeal is filed before the CAS by a party, all other parties that may be effected by a decision in connection with the concerned case, shall have the right to join in the appeal proceedings”.*
- ii. Article 15(b) of the 2009 USADA Protocol:
- “The final award by the AAA/CAS arbitrator(s) may be appealed to the CAS within twenty-one (21) days of issuance of the final reasoned award or when the award is deemed final as set forth below. If the AAA/CAS arbitrators issue a partial, interim or non-final award or an award without reasons such award shall*

*be deemed final for purposes of appeal to CAS on the earlier of (a) issuance of the final reasoned award by the AAA/CAS panel, or (b) thirty (30) days from issuance of the partial, interim or non-final award. The appeal procedure set forth in Article 13.2 of Annex A shall apply to all appeals not just appeals by International-Level Athletes or other Persons. A CAS appeal shall be filed with the CAS Administrator, the CAS hearing will automatically take place in the U.S. and CAS shall conduct a review of the matter on appeal which, among other things, shall include the power to increase, decrease or void the sanctions imposed by the previous AAA/ CAS Panel regardless of which party initiated the appeal. The regular CAS Appeal Arbitration Procedures apply. The decision of CAS shall be final and binding on all parties and shall not be subject to further review or appeal”.*

- iii. Article R-45 [“*Appeal Rights*”] of the Supplementary Procedures, Annex D to the 2009 USADA Protocol:

*“The arbitration award may be appealed to CAS as provided in Annex A of the USADA Protocol, which incorporates the mandatory Articles on Appeals from the World Anti- Doping Code. Notice of appeal shall be filed with the Administrator within the time period provided in the CAS appellate rules. Appeals to CAS filed under these rules shall be heard in the United States. The decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law”.*

### **3.2 Appeal proceedings**

81. As these proceedings involve an appeal against a decision regarding an international level athlete in a disciplinary matter brought by WADA on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the CAS Code.

### **3.3 Timeliness of the Appeal**

82. The statement of appeal was filed within the deadline set in FINA DC 13.15 and in Article 15(b) of the 2009 USADA Protocol. Accordingly, the appeal was filed within the prescribed deadlines.

### **3.4 Scope of the Panel’s review**

83. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, 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.

### 3.5 Applicable law

84. The law applicable in the present arbitration is to be identified by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (hereinafter referred to as the “PIL”), the arbitration bodies appointed on the basis of the CAS Code being international arbitral tribunals having their seat in Switzerland within the meaning of Article 176 of the PIL (Article R28 of the CAS Code). In fact, the seat of this arbitration is in Lausanne, Switzerland, even though the hearing took place in New York, USA, in accordance with Article R-45 of the Supplementary Procedures.
85. Pursuant to Article 187.1 of the PIL,  
*“The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected”*.
86. Article 187.1 of the PIL constitutes the conflict-of-law system applicable to arbitral tribunals, which have their seat in Switzerland, and recognizes the traditional principle of the freedom of the parties to choose the law that the arbitral tribunal has to apply to the merits of the dispute.
87. The freedom of the choice of law in favour of the parties, based on Article 187.1 of the PIL, is confirmed by Article R58 of the CAS Code.
88. Pursuant to Article 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. In the latter case, the Panel shall give reasons for its decision”*.
89. In the present case, the question is which are the applicable “regulations” and whether any “rules of law” were chosen by the parties for the purposes of Article R58 of the CAS Code.
90. The Panel remarks that the awards issued by the AAA Panel, including the AAA Final Award challenged in these proceedings, applied the anti-doping regulations adopted by FINA (the FINA DC) to determine whether an anti-doping rule violation has been committed and to set the sanction to be imposed on Hardy.
91. The Panel therefore concludes that this dispute has to be determined on the basis of the FINA regulations, with Swiss law applying subsidiarily. FINA, in fact, is an association under Swiss law, and has its seat in Lausanne, Switzerland: the regulations adopted by FINA, therefore, have to be interpreted on the basis of Swiss law. The application of principles of Swiss law, in addition, has been confirmed by the parties in the course of this arbitration.
92. The provisions set in the FINA DC which appear to be relevant in this arbitration are the following:

i. DC 9 [*“Automatic Disqualification of Individual Results”*]:

*An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Event with all resulting consequences, including forfeiture of any medals, points and prizes*

ii. DC 10 [*“Sanctions on Individuals”*]:

*DC 10.1 An anti-doping rule violation occurring during or in connection with a Competition may lead to Disqualification of all of the Competitor's individual results obtained in that Competition with all consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.*

*DC 10.1.1 If the Competitor establishes that he or she bears No Fault or Negligence for the violation, the Competitor's individual results in the other Events shall not be Disqualified unless the Competitor's results in Events other than the Event in which the anti-doping rule violation occurred were likely to have been affected by the Competitor's anti-doping rule violation.*

*DC 10.2 Except for the specified substances identified in DC 10.3, the period of Ineligibility imposed for a violation of DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers), DC 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and DC 2.6 (Possession of Prohibited Substances and Methods) shall be:*

*First violation: Two (2) years' Ineligibility.*

*Second violation: Lifetime Ineligibility.*

*However, the Competitor or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in DC 10.5. [...]*

*DC 10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.*

*DC 10.5.1 If the Competitor establishes in an individual case involving an anti-doping rule violation under DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under DC 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under DC 10.2, 10.3 and 10.6.*

*DC 10.5.2 This DC 10.5.2 applies only to anti-doping rule violations involving DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under DC 2.2, failing to submit to Sample collection under DC 2.3, or administration of a Prohibited Substance or Prohibited Method under DC 2.8. If a*



*Competitor establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

93. The above provisions are applied as rules in force at the time the alleged anti-doping rule violation was committed, under the principle “*tempus regit actum*”. New regulations, in fact, do not apply retroactively to facts that occurred prior to their entry into force, but only for the future (CAS 2000/A/274, *S. v/ FINA*, award dated 19 October 2000, *Digest of CAS Awards II (1998-2000)*, p. 389 at 405). This Panel, however, has the power, according to the “*lex mitior*” principle, to apply those rules subsequently entered into force which are more favourable to the athlete (advisory opinion CAS 94/128 rendered on 5 January 1995, *UCI and CONI*, *Digest of CAS Awards (1986-1998)*, p. 477 at 491; award of 23 April 2001, TAS 2001/A/318, *V. c. Fédération Cycliste Suisse*, in Reeb (ed.), *Digest of CAS Awards (2001-2003)*, III, The Hague, 2004, p. 173). The Panel, however, remarks that no submissions have been filed by the parties referring to the application in this case of the *lex mitior* principle: the rules entered into force after the alleged anti-doping rule violation was committed (the Adverse Analytical Finding refers to a sample collected on 4 July 2008), in fact, do not appear to be more favourable to Hardy than the rules in force on 4 July 2008, which, therefore, this Panel exclusively applies.
94. In addition to the above, the Panel notes that the AAA Interim Award also made reference to, and Hardy discussed in this CAS arbitration, some provisions adopted by the IOC, which have to be interpreted on the basis of Swiss law, the IOC being a legal entity having its seat in Switzerland.
95. More exactly, discussion has arisen with respect to the regulations adopted by the IOC Executive Board on 27 June 2008 (already referred to as the “IOC Rule”: § 16 above) under Rules 19 and 45 of the Olympic Charter.
96. The IOC provisions referred to in this arbitration are the following:
- i. Rule 1 [“*Composition and General Organisation of the Olympic Movement*”]
    1. *Under the supreme authority of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values.*
    2. *The three main constituents of the Olympic Movement are the International Olympic Committee (“IOC”), the International Sports Federations (“IFs”) and the National Olympic Committees (“NOCs”). Any person or*

*organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.*

3. *In addition to its three main constituents, the Olympic Movement also encompasses the Organising Committees of the Olympic Games (“OCOGs”), the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement’s action, as well as the judges, referees, coaches and the other sports officials and technicians. It also includes other organisations and institutions as recognised by the IOC.*

ii. Rule 2 [“Mission and Role of the IOC”]

*The mission of the IOC is to promote Olympism throughout the world and to lead the Olympic Movement. The IOC’s role is:*

1. *to encourage and support the promotion of ethics in sport as well as education of youth through sport and to dedicate its efforts to ensuring that, in sport, the spirit of fair play prevails and violence is banned; [...]*
3. *to ensure the regular celebration of the Olympic Games; [...]*
8. *to lead the fight against doping in sport;*
9. *to encourage and support measures protecting the health of athletes; [...]*

iii. Rule 3 [“Recognition by the IOC”]

1. *The condition for belonging to the Olympic Movement is recognition by the IOC.*
2. *The IOC may recognise as NOCs national sports organisations, the activities of which are linked to its mission and role. The IOC may also recognise associations of NOCs formed at continental or world level. All NOCs and associations of NOCs shall have, where possible, the status of legal persons. They must comply with the Olympic Charter. Their statutes are subject to the approval of the IOC. [...]*

iv. Rule 19 [“The IOC Executive Board”]

3. *Powers, responsibilities and duties:*

*The IOC Executive Board assumes the general overall responsibility for the administration of the IOC and the management of its affairs. In particular, it performs the following duties: [...]*

- 3.10 *it takes all decisions, and issues regulations of the IOC, which are legally binding, in the form it deems most appropriate, such as, for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the proper implementation of the Olympic Charter and the organisation of the Olympic Games; [...]*

v. Rule 23 [“Measures and Sanctions”]

*In the case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the measures or sanctions which may*

*be taken by the Session, the IOC Executive Board or the disciplinary commission referred to under 2.4 below are: [...]*

2. *In the context of the Olympic Games, in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC, including but not limited to the IOC Code of Ethics, or of any applicable public law or regulation, or in case of any form of misbehaviour:*

2.1 *with regard to individual competitors and teams:*

*temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the relevant infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC (Executive Board); [...]*

vi. Rule 28 [*“Mission and Role of the NOCs”*]

2. *The NOCs’ role is:*

2.2 *to ensure the observance of the Olympic Charter in their countries; [...]*

7. *NOCs have the right to:*

7.2 *send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter; [...]*

vii. Rule 41 [*“Eligibility Code”*]

*To be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, coach, trainer or other team official must be entered by his NOC. The above-noted persons must notably:*

- *respect the spirit of fair play and non violence, and behave accordingly; and*
- *respect and comply in all aspects with the World Anti-Doping Code.*

viii. Rule 45 [*“Invitations and Entries”*]

2. *Only NOCs recognised by the IOC may enter competitors in the Olympic Games. Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.*

ix. 59 [*“Disputes – Arbitration”*]

*Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.*

### 3.6 The Dispute

#### a. The joinder of the IOC

97. A preliminary, procedural question disputed by the parties concerns the position of the IOC in these arbitration proceedings. On one side, in fact, the First Respondent requested that the IOC be joined, or given the opportunity to intervene, in the arbitration, where the impact of the IOC Rule on Hardy has been raised; on the other side, the Appellant indicated that the dispute concerns only the FINA rules and therefore there is no need to involve the IOC in the arbitration. At the same time, the IOC did not accept to be joined or to intervene in the dispute.
98. On this issue, a decision was adopted by the Panel and communicated to the parties by the CAS Court Office on 18 September 2009, denying the First Respondent's request (§ 37 above).
99. The provisions of the CAS Code that are relevant on the point (being applicable also to the appeals arbitration proceedings pursuant to its Article R54) are the following:
- i. Article R41.2 [*“Joinder”*]:
 

*“If a Respondent intends to cause a third party to participate in the arbitration, it shall mention it in its answer, together with the reasons therefore, and file an additional copy of its answer. The Court Office shall communicate this copy to the person whose participation is requested and set such person a time limit to state its position on its participation and to submit a response pursuant to Article R39. It shall also set a time limit for the Claimant to express its position on the participation of the third party”.*
  - ii. Article R41.3 [*“Intervention”*]:
 

*“If a third party intends to participate as a party in the arbitration, it shall file with the CAS an application to this effect, together with the reasons therefore within the time limit set for the Respondent's answer to the request for arbitration. To the extent applicable, such application shall have the same contents as a request for arbitration. The Court Office shall communicate a copy of this application to the parties and set a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39”.*
  - iii. Article R41.4 [*“Joint Provisions on Joinder and Intervention”*]:
 

*“A third party may only participate in the arbitration if it is bound by the arbitration agreement or if itself and the other parties agree in writing. [...]”.*
100. According to the abovementioned provisions, therefore, in the CAS system a third entity can participate as a party to the arbitration proceedings already pending among other subjects in two situations, joinder (Article R41.2 of the CAS Code) or intervention (Article R41.3 of the CAS Code), but subject to a common condition (Article R41.4 of the CAS Code): that it agrees in writing to such participation or that it is bound by the same arbitration agreement binding the original parties to the dispute.
101. The Panel finds that the condition set by Article R41.4 of the CAS Code is not satisfied. The Panel remarks in fact that the IOC has not agreed to participate in the present

arbitration, notwithstanding the opportunity to intervene granted by the Panel. At the same time, the Panel finds that the IOC is not bound by the same arbitration agreement binding the original parties to the dispute.

102. The dispute between the parties, in fact, concerns an award rendered by the AAA Panel (the AAA Final Award, incorporating the AAA Interim Award): the current proceedings have the nature, under the CAS Code, of appeal arbitration proceedings. The jurisdiction of this Panel to adjudicate on such dispute, hearing an appeal against the AAA Final Award, therefore, derives from the rules of the “*sport-related body*”, or from the specific agreement, providing for an appeal to the CAS (Article 27 of the CAS Code) following the issuance of an award by the AAA Panel: more exactly, it derives from FINA DC 13, from Article 15(b) of the 2009 USADA Protocol and from Article R-45 of the Supplementary Procedures (§ 80 above).
103. The rules so described do not bind the IOC to participate in this CAS arbitration. Actually, the IOC was not a party to the dispute relating to the anti-doping rule violation committed by Hardy; it did not participate in the proceedings leading to the AAA Final Award, and is therefore not bound by it. As a result, under the CAS Code, it cannot be compelled, failing its consent, to participate in an arbitration hearing an appeal against the AAA Final Award, limited to the scope of such award. In other words, the IOC, if it does not voluntarily submit to the jurisdiction of CAS, cannot be bound by the award to be rendered by this Panel on the appeal against a decision formed without its participation and not binding it.
104. The Panel, indeed, has noted that under FINA DC 13.2.3 the IOC is given the right to appeal to CAS any decision rendered under the FINA DC “*where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games*”. Such provision grants a right of appeal to a subject that was not a party to the proceedings leading to the decision appealed against: WADA itself, Appellant in these proceedings, was not a party to the dispute heard by the AAA Panel, but could initiate the present arbitration on the basis of a rule granting it the right to appeal. Such provision, however, even if granting a right, does not create an obligation for the IOC to participate in the CAS proceedings: this obligation can rest only upon the IOC’s consent or a rule binding it – and the FINA DC do not bind the IOC.
105. The First Respondent invoked, in order to establish this Panel’s jurisdiction with respect to the IOC, Rule 59 of the Olympic Charter, i.e. a rule binding the IOC. The Panel, however, contrary to Hardy’s indication, does not find such rule to provide for a proper basis for the joinder of the IOC in this arbitration, which is based on a different arbitration agreement. The Panel does not express any opinion with respect to the possibility for Hardy to invoke Rule 59 of the Olympic Charter in order to start an arbitration proceeding against the IOC for a dispute concerning the IOC Rule. It is however the Panel’s opinion that such provision cannot be invoked in this arbitration to extend to the IOC the jurisdiction of this Panel, contrary to the CAS Code provision indicating that joinder is possible, failing the third party’s agreement, only if the third party is bound by the same arbitration agreement binding the original parties to the dispute.
106. Failing a proper jurisdictional basis for the joinder of the IOC, no relevance can be given to the indication that the dispute between Hardy and the IOC involves the same facts as the dispute between Hardy and WADA (as submitted by Hardy: § 69 above) or

that a need exists for a prompt resolution *vis-à-vis* the IOC of the issue concerning Hardy's eligibility to compete for a position in the 2012 US Olympic team (as alleged by USOC and USADA: §§ 32 and 35 above): those elements, which could have been considered by the IOC while deciding whether to intervene or accept the joinder in this arbitration, do not *per se* extend the jurisdiction of this Panel to the IOC.

107. In light of the foregoing the Panel confirms that the IOC cannot be joined as a party in these arbitration proceedings.

**b. The merits of the dispute between the parties**

108. The AAA Final Award is challenged in this arbitration under several perspectives: both parties, in fact, dispute the measure of the sanction imposed on Hardy. On one side, the Appellant submits that the AAA Panel wrongly held Hardy to be entitled to a reduction in the sanction under FINA DC 10.5.2 and therefore requests that a second year of suspension be imposed on Hardy. On the other side, the first Respondent argues that the sanction imposed on her, taking into account the IOC Rule, is excessive, and therefore requests that the Panel either declares that the IOC Rule is inapplicable or reduces the sanction to six months.

109. In light of the parties' submissions and petitions, the questions that the Panel has to examine are the following:

- i. can Hardy be found to bear "*No Significant Fault or Negligence*" for the anti-doping rule violation she committed?
- ii. what is the appropriate length of the suspension to be imposed on her?
- iii. is Hardy entitled to a finding of this Panel as to the impact of the IOC Rule on the measure of the sanction to be imposed on her? Can the sanction be determined taking into account the IOC Rule?

110. The Panel shall consider each of said questions separately.

**i. Can Hardy be found to bear "*No Significant Fault or Negligence*" for the anti-doping rule violation she committed?**

111. The AAA Panel found that Hardy, responsible for an anti-doping rule violation, was entitled to the benefits under FINA DC 10.5.2. First, the AAA Panel held that Hardy had established that the prohibited substance had entered into her system as a result of her use of the AdvoCare supplements she was taking. Then, the AAA Panel found the degree of Hardy's negligence to be non significant, considering the totality of the circumstances of the case, defined to be "*truly exceptional*". As a result, the AAA Panel concluded that the otherwise applicable period of ineligibility could be reduced.

112. WADA disputes such conclusion. While accepting that Hardy had tested positive because of the contaminated food supplements she had ingested, WADA, in fact, submits that the circumstances of Hardy's case are not truly exceptional and that Hardy's negligence must be considered to be significant. In support of this allegation WADA underlines that, even though Hardy was aware of the explicit warnings against the potential dangers of food supplements, and, as an experienced top-level athlete, she should have been particularly vigilant, she had chosen to trust blindly a sponsor that commercializes nutritional supplements described as enhancing muscle growth, even

signing an Endorsement Agreement; that she had failed to conduct further investigations with a doctor or any other reliable specialist, in addition to making direct inquiries with the supplement manufacturer; that she could have realized, by a simple search on the Internet, that the description of the food supplements offered to her was alarming; that she did not have the supplements tested; that the indemnity clause contained in the Endorsement Agreement indicates that Hardy had accepted that her behaviour could be risky.

113. FINA DC 10.5.2 sets two conditions for the reduction of the ineligibility period to be applied on an athlete following the finding of the violation of FINA DC 2.1 (presence of a prohibited substance):
  - i. the athlete must establish how the Prohibited Substance entered his or her system;
  - ii. the athlete must establish that he or she bears No Significant Fault or Negligence.
114. The Panel notes that the first condition is satisfied. The issue is indeed not even disputed by the parties in this arbitration: the AAA Panel held that Hardy had established that the prohibited substance had entered into her system as a result of her use of the AdvoCare supplements; and WADA accepts that Hardy tested positive because of the contaminated food supplements she had ingested.
115. The dispute between the parties concerns, actually, the satisfaction of the second condition, denied by WADA and affirmed by the First Respondent, who endorses the conclusions of the AAA Panel.
116. The issue whether an athlete's negligence is "significant" has been much discussed in the CAS jurisprudence (e.g., in the cases CAS 2005/A/847, *Knauss v/ FIS*, award of 20 July 2005, hereinafter referred to as the "Knauss Award"; CAS 2008/A/1489, *Despres v/ CCES & CAS 2008/A/1510, WADA v/ Despres, CCES and Bobsleigh Canada Skeleton*, award of 30 September 2008, hereinafter referred to as the "Despres Award"; CAS 2006/A/1025, *Puerta v/ ITF*, award of 12 June 2006; CAS 2005/A/830, *Squizzato v/ FINA*; CAS 2005/A/951, *Cañas v/ ATP Tour, Inc.*; CAS 2004/A/690, *Hipperdinger v/ ATP Tour, Inc.*; CAS OG 04/003, *Edwards v/ IAAF*) which offers guidance to this Panel.
117. Two principles are usually underlined with respect to the possibility to find an athlete's negligence to be "non significant": a period of ineligibility can be reduced based on no significant fault or negligence only in cases where the circumstances are truly exceptional and not in the vast majority of cases; for instance, a reduced sanction based on "no significant fault or negligence" can be applied where the athlete establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements (*cf.* Despres Award, at § 7.4, quoting from the official commentary of the WADC).
118. As a result, a point can be established: the fact that an adverse analytical finding is the result of the use of a contaminated nutritional supplement does not imply *per se* that the athlete's negligence was "significant"; the requirements for the reduction of the sanction under FINA DC 10.5.2 can be met also in such circumstances. It is in fact clear to this Panel that an athlete can avoid the risks associated with nutritional supplements by simply not taking them; but the use of a nutritional supplement "*purchased from a*

*source with no connection to prohibited substances, where the athlete exercised care in not taking other nutritional supplements*” and the circumstances are “*truly exceptional*”, can give rise to “ordinary” fault or negligence and do not raise to the level of “significant” fault or negligence.

119. The Panel agrees with the AAA Panel that the circumstances of Hardy’s case are “*truly exceptional*”: Hardy had personal conversations with AdvoCare about the supplements’ purity prior to taking them; Hardy had been told by AdvoCare that its products were tested by an independent company for purity and its website confirmed that, though only with respect to one of its products; the AdvoCare website assured that its products were “*formulated with quality ingredients*”; Hardy had obtained the supplements directly from AdvoCare, not from an unknown source; the supplements Hardy took were not labelled in a manner which might have raised suspicions; Hardy took the same supplements for at least eight months prior to her positive doping control result; Hardy had obtained an indemnity from AdvoCare with respect to its products; Hardy had consulted with various swimming personnel, including the team nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products. In other words, Hardy appears to have purchased the supplements which caused the Adverse Analytical Finding from a source unrelated to prohibited substances, and exercised care in not taking other nutritional supplements.
120. The Panel recognizes that Hardy could have taken other conceivable steps. WADA, indeed, indicated in its submissions other actions that Hardy could have taken: for instance, she could have conducted further investigations with a doctor or another reliable specialist; she could have the supplements tested. Those circumstances actually show that Hardy was indeed negligent, also considering that the risks associated with food supplements are well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabelled products were detected and considered in the CAS jurisprudence. The Panel however finds that Hardy has shown good faith efforts “*to leave no reasonable stone unturned*” (Despres Award, § 7.8) before ingesting the AdvoCare products: she made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements.
121. Contrary to the finding of good faith it is not possible, in the Panel’s opinion, to invoke the fact that Hardy obtained from AdvoCare an indemnity in the Endorsement Agreement. The Panel finds this clause not to be an indication that Hardy felt the use of the supplements she was endorsing to be risky: it rather constitutes a sign of a reassurance by AdvoCare that its products were safe and that the information and reassurance given by AdvoCare to her were true and reliable.
122. In light of the foregoing, the Panel holds that Hardy can be found to bear “No Significant Fault or Negligence” under FINA DC 10.5.2 for the anti-doping rule violation she committed.

**ii. *What is the appropriate length of the suspension to be imposed on Hardy?***

123. Pursuant to FINA DC 10.5.2, if an athlete is found to bear “No Significant Fault or Negligence” for the anti-doping rule violation committed, then “*the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise*



*applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years”.*

124. The Panel finds that, for the determination of the length of the sanction, the degree of negligence is relevant: in deciding the period of ineligibility in a range between one and two years, the Panel has to review the level of the athlete’s fault or negligence (Knauss Award, at § 7.3.). In this respect, the AAA Panel, exercising its discretion, decided to reduce the sanction to the maximum possible extent and to declare Hardy ineligible to compete for one year, i.e. for one-half of the two-year period of ineligibility otherwise applicable in accordance with FINA DC 10.2.
125. In general terms, this Panel subscribes to the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, *FC Zürich v/ Olympique Club de Khourigba*, §§ 66, 124; CAS 2004/A/690, *Hipperdinger v/ ATP Tour, Inc.*, § 86; CAS 2005/A/830, *Squizzato v/ FINA*, § 10.26; CAS 2005/C/976 & 986, *FIFA & WADA*, § 143; 2006/A/1175, *Daniute v/ IDSF*, § 90; CAS 2007/A/1217, *Feyenoord v/ UEFA*, § 12.4).
126. Whether this principle applies also to the review of awards rendered by AAA panels under the USADA rules can however be left open: AAA panels are admittedly not disciplinary bodies of a sporting federation. The Panel, in fact, in this specific case, and taking in mind the totality of its circumstances, holds the sanction imposed by the AAA Panel to be proportionate to the level of Hardy’s negligence.
127. Indeed, the Panel finds that, however not in a significant measure, Hardy was negligent: her Adverse Analytical Finding occurred years after that the risks connected to the use of nutritional supplements had first become known to athletes. Much information has been given and stringent warnings have been issued in this respect. As a result, this Panel finds that the level of diligence due by an athlete rose over the years; and the athlete’s behaviour should be considered with care, when assessing the measure of the reduction of the sanction he or she should receive. Further, it follows from this that CAS precedents (as any other kind of precedents) have to be reviewed carefully to determine whether or not the standard of care established at that time is still valid today.
128. Notwithstanding the above, the Panel finds that imposing now on Hardy the period of ineligibility requested by WADA would mean on the one hand to apply a sanction too harsh and on the other hand to apply a sanction which does not find a sufficient basis in the rules. WADA itself, recognized the peculiarities of the case. This follows from its requests. To begin with WADA’s request that “*Ms Jessica Hardy is sanctioned with a period of suspension of two years, starting on the date on which the CAS award enters into force. Any period of suspension (whether imposed to or voluntarily accepted by Ms Jessica Hardy) before the entry into force of the CAS award shall be credited against the total period of suspension to be served*”. This request, however, is not in line with the applicable rules. According to FINA DC 10.9, in fact, the period of ineligibility starts no later than the hearing date. The hearing date in the sense of FINA DC 10.9 is not the one held by this Panel on 12 March 2010, but the one of the AAA Panel. Any period of ineligibility must, therefore, start at the latest on 1 August 2008. However, WADA is not requesting a two-year period of ineligibility as of 1 August 2008 either. At the hearing, WADA waived its request that the competitive results obtained by

Hardy after the end of the period of suspension already served (one year) and before the commencement of the second year of ineligibility sought should be disqualified. In other words, WADA specified at the hearing that it was seeking a second year of suspension of Hardy, to start on the date of the CAS award, but – as a matter of fairness – no consequences for Hardy between the first and the second year of suspension. Basically this amounts to splitting a two-year period of suspension (foreseen – in principle – by the applicable rules) into two separate one-year periods of ineligibility. As acknowledged by WADA during the hearing, an additional period of ineligibility, starting from the date of this award, would constitute a sort of a (separate) second sanction. The applicable rules, however, do not provide for this.

129. Since this Panel is bound by the Appellant's requests, the requests of the Appellant are not supported by the applicable rules and, in addition, the consequences following from the Appellant's requests appear to be particularly harsh and disproportionate, the Panel concludes that the period of the ineligibility of one year imposed by the AAA Panel is proper under FINA DC 10.5.2 for the anti-doping rule violation committed by Hardy.

**iii. *Is Hardy entitled to a declaratory finding of this Panel as to the impact of the IOC Rule on the measure of the sanction to be imposed on her? Can the sanction be determined taking into account the IOC Rule?***

130. Hardy, however, requests in this arbitration that the Panel takes into account, for the determination of the sanction, also the impact of the IOC Rule: the cumulative application of the IOC Rule and of the one year sanction imposed by the AAA Panel would result, in the First Respondent's opinion, in a penalty "*grossly disproportionate*", in violation of Swiss law and of "*fundamental principles of sports law*". As a result, this Panel is requested either (a) to declare that the IOC Rule is not applicable to Hardy, or (b) to reduce to six months the ineligibility period to be imposed on Hardy, so as to avoid the application of the IOC Rule.

a. Is Hardy entitled to a declaratory finding of this Panel as to the impact of the IOC Rule on the measure of the sanction to be imposed on her?

131. The First Respondent seeks in this arbitration a declaratory judgment holding that the IOC Rule is not applicable to her. In support of such request, Hardy submits several reasons.

132. The Panel notes that Swiss law subjects to stringent conditions the possibility for a Claimant to obtain from a Swiss court a declaratory judgment. Such conditions are also relevant in these arbitration proceedings, since Swiss law applies subsidiarily and Swiss law also defines the powers of adjudication of arbitration bodies having their seat in Switzerland. According to the predominant view the prerequisites for a declaratory judgment are – in principle – threefold. According thereto the party seeking declaratory relief must show a legal interest to do so. The latter presupposes that the declaratory judgement is necessary to resolve a legal uncertainty that threatens the Claimant (TF 17.8.2004 – 4C 147/2004). According to constant Swiss jurisprudence a legal interest is missing if a declaratory judgement is insufficient or falls short of protecting the Claimant's interests (ATF 116 II 196; 96 II 131). The latter is the case – *inter alia* – if a party must file a further claim or request in order to obtain the judicial relief sought or if there are better or easier ways to pursue and protect the Claimant's legal interests (ATF 123 III 429; 99 II 174). Furthermore, according to the predominant view, the legal

uncertainty must relate to the existence or non existence of a claim or a defined legal relationship between the parties to the dispute (ATF 80 II 366). No declaratory relief may be sought e.g. to solve abstract legal questions or to determine factual circumstances. Finally, there must be a certain urgency to resolve the uncertainty in order to protect the respective party's right, i.e. there must be an immediate interest for solving the uncertainty now (*Vogel/Spühler*, Grundriss des Zivilprozessrechts, 8. Aufl. 2006, no 23 et seq.).

133. The Panel finds that aforementioned conditions are not satisfied in the case at hand. In fact, the Panel finds that Hardy lacks legal interest to request a declaratory relief. Even if one assumes that there is – in relation to the IOC rule – a certain degree of uncertainty as to the lawfulness of the provision, a declaratory judgement would not protect Hardy's interests since neither the IOC nor the USOC would be bound by the arbitral award. The uncertainty regarding the applicability of the IOC in relation to Hardy can only be solved in proceedings initiated against these entities. Furthermore, the Panel holds that the uncertainty as to the lawfulness of the IOC rule is rather an abstract legal question than an actual matter concerning the legal relationship between the parties to the present dispute. Finally, the Panel holds that it is not convinced that there is – at this point in time – an immediate necessity to resolve and clarify the legal uncertainty in order to protect Hardy's interests.
  134. As a result of the foregoing, the Panel finds that Hardy is not entitled to a declaratory finding in these proceedings as to the impact of the IOC Rule on the measure of the sanction to be imposed on her.
  135. Such conclusion, the Panel notes, does not mean that the IOC Rule is applicable to Hardy: the Panel expresses no view on the point. Subject to the satisfaction of all conditions imposed by Swiss law for the raising of a claim, Hardy remains fully entitled to claim (in a procedure initiated against the IOC or USOC) that the IOC Rule is not applicable to her.
- b. Can the sanction be determined taking into account the IOC Rule?
136. The First Respondent also seeks in this arbitration, as an alternative to a declaratory judgment, an award reducing the ineligibility period to six months. A sanction in such a measure would in fact allow the First Respondent to avoid in any event the application of the IOC Rule, which declares ineligible to "*participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games*" only those persons who have "*sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations*" (emphasis added).
  137. The Panel finds that such request cannot be granted. The Panel, in fact, finds itself to be bound by FINA DC 10.5.2, which sets a minimum sanction to be imposed on an athlete whose negligence is found to be non significant. As a result, the Panel is not allowed by FINA DC 10.5.2 to apply an ineligibility period of six months.
  138. The Panel, in addition, does not find that the requirements of the fundamental principles of proportionality under Swiss law allow (or even compel to) a deviation from the applicable anti-doping rule. In this respect, in fact, the following is to be underlined:

- it is recognized that the measure of the sanctions contemplated by the WADC (and consequently of the FINA DC) is consistent with the principle of proportionality (*cf.* Advisory Opinion of 21 April 2006, CAS 2005/C/976 & 986, *FIFA & WADA*, at § 139);
- the Panel cannot in this arbitration take into account for the “proportionality test”, in addition to the FINA DC, the effects of a rule (the IOC Rule) whose legality is challenged by the very party (the First Respondent) that requested it: should the First Respondent be right in holding that the IOC Rule is inapplicable to her, then any weight given to the IOC Rule in the framework of the “proportionality test” would be misplaced. Indeed, the evaluation of the IOC Rule in the assessment of the proportionality of the overall consequences of Hardy’s anti-doping rule violation to Hardy’s fault implies a finding as to the nature and legality of the IOC Rule, while this Panel has already underlined that it expresses no view in respect of these issues;
- the First Respondent invokes a proportionality test which takes into account the IOC Rule in order to have a sanction of six months imposed, since only this sanction would allow her to compete at the 2012 Olympic Games: considering the degree of her negligence, in other words, the Panel should impose a sanction of six months (and allow her to be entered for the 2012 Olympic Games) only because a larger sanction would disqualify from the next Olympic Games. The Panel notes, however, that the IOC Rule, imposing an ineligibility to compete at the Olympic Games, is supposed to be *de facto* relevant only for those A-level athletes having an actual chance to be entered for competition at the Olympic Games, while it plays no tangible role for all the athletes not having expectations with respect to the Olympic Games. If the First Respondent’s line of reasoning is followed, therefore, the consequences of the IOC Rule would play a material role in the “proportionality test” only for the A-level athletes. The above means that, assuming the same degree of negligence (*arguendo*: the same level of negligence as Hardy’s), A-level athletes would be entitled to a lower sanction (much lower: the half of it) than all other athletes. Such result is clearly untenable: proportionality is to be measured only against the kind of conduct (or level of negligence), and not the importance or the level of the athlete;
- this Panel agrees with the holding of another CAS Panel, where it stressed that “*the WADC [and therefore the FINA DC] contains some degree of flexibility to enable a Panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account*” (award of 12 June 2006, CAS 2006/A/1025, *Puerta v/ ITF*, § 11.7.8);
- the Panel cannot be asked on the basis of the principle of proportionality to disregard the provisions of the FINA DC and entirely rewrite the applicable rules in order to seek equal treatment, curing the abovementioned unfair result, and to apply in every case (irrespective of the importance of the athlete) a sanction lower than the one contemplated in the rules because of the existence of the (challenged) IOC Rule – *in abstracto* applicable to every athlete; or to consider in an arithmetical way, in setting the measure of the sanction, the circumstance that the athlete, because of the ineligibility served, has already missed the opportunity to

compete at the Olympic Games. Such exercise is clearly beyond the scope of the powers of this Panel – and can be conducted only by WADA, the International Federations and the IOC, in evaluating the impact on the sanctioning system of the IOC Rule, which is raising so much controversy.

139. In light of the foregoing, the Panel finds that the measure of the sanction cannot be determined taking into account the IOC Rule. In particular, the Panel finds that its approach does not prevent Hardy from getting judicial relief and does, therefore, not amount to a denial of access to justice. The sanction of the ineligibility for one year is proportionate to the kind of misconduct and level of negligence found with the First Respondent. The prior body, i.e. the AAA Panel, therefore, was correct in imposing it on Hardy.

### **3.8 Conclusion**

140. The Panel holds that the appeal brought by WADA is to be dismissed, and the AAA Final Award is to be confirmed. Furthermore, the Panel holds that all other prayers for relief are dismissed.

## **4. COSTS**

141. Pursuant to Article R65.1 of the CAS Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee to be paid by the appellant and retained by the CAS.
142. Article R65.3 of the CAS Code provides that the Panel shall decide which party shall bear the costs of the parties, witnesses, experts and interpreters, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
143. As this is a disciplinary case of an international nature, which was brought to CAS by WADA further to an award issued by the AAA Panel with respect to an international level athlete, the proceedings will be free, except for the minimum Court Office fee, already paid by the Appellant, which is retained by the CAS.
144. With regard to the parties' costs, having taken into account the outcome of the arbitration, the conduct and the financial resources of the parties, the Panel finds it to be appropriate and fair that each party bears the expenses it has incurred in connection with these arbitration proceedings.

## **ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency against the AAA Final Award issued on 30 May 2009 is dismissed.
2. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by the World Anti-Doping Agency, which is retained by the CAS.
3. Each party bears the legal and other costs incurred in connection with these arbitration proceedings.
4. All other prayers for relief are dismissed.

Lausanne, 21 May 2010

## **THE COURT OF ARBITRATION FOR SPORT**

**Luigi Fumagalli**

President of the Panel

**Ulrich Haas**

Arbitrator

**Michele Bernasconi**

Arbitrator