4A_612/2009[1]

Judgment of February 10, 2010
First Civil Law Court

Composition
Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: LEEMANN.

Parties
Claudia PECHSTEIN,
represented by Dr Lucien W. VALLONI and Dr Thilo PACHMANN,
Appellant,

v.

International Skating Union,
represented by Mr Jean-Cédric MICHEL,
Respondent,

Deutsche Eisschnelllauf Gemeinschaft e.V.,
represented by Mr Marius BREUCKER,
party to the proceedings.

Subject

Translator's note: Quote as Claudia Pechstein *v.* International Skating Union, 4A_612/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

International Arbitral Tribunal; illegal composition, right to be heard, non-discrimination precept, public policy,

Appeal of the arbitral award by the Court of Arbitration for Sport (CAS) of November 25, 2009.

Facts:

A.

A.a Claudia Pechstein, Diensdorf/Germany, (Appellant) is a 37-year old German speed skater. Her main events are the 3,000 metres and the 5,000 metres. The Appellant has been a member of the world's speed skating elite since 1988 when she represented the GDR in the Junior World Championships. In her long career she has competed at five Olympic Games (from 1992 to 2006). In addition to numerous Olympic medals she has won various world and European championships and national competitions. She is therefore one of the most successful winter sports athletes of all time.

The International Skating Union (Respondent) is an association under Swiss law with its seat in Lausanne. It is recognised as the international federation governing the sports of figure skating and speed skating.

The Deutsche Eisschnelllauf Gemeinschaft e.V. (hereafter "DESG"), Munich/Germany, to which the Appellant is affiliated, is a member of the Respondent.

A.b The Respondent underwent numerous anti-doping controls between February 4, 2000 and April 30, 2009 which did not give any indications of prohibited substances. During the same period the Respondent collected more than ninety blood samples from the Appellant as part of its blood profiling programme. In particular, between October 20, 2007 and April 30, 2009 twenty-seven blood samples were collected from the athlete, the last twelve of which were collected between January and April 2009.

The blood parameters which are collected and recorded in the framework of the Respondent's blood profiling programme include *inter alia* haemoglobin, hematocrit and the

percentage of immature red blood cells (reticulocytes). As a blood parameter the reticulocyte count allows real-time assessment of the production of red blood cells in the human organism.

Whilst the Respondent considers a reticulocyte count of between 0.4 % and 2.4 % normal, the results of the blood screening results of the Appellant showed reticulocyte counts which were well above 2.4 % and which then sharply decreased.

On February 7/8, 2009 the World Speed Skating Championships organised by the Respondent took place in Hamar (Norway). Blood samples were taken from all athletes on the morning before the Championships commenced, i.e. on February 6, 2009. The reticulocyte count of the Appellant was 3.49 %.

As a consequence of this result, the Respondent took two further blood samples from the Appellant, one in the morning and one in the afternoon of February 7, 2009. The reticulocyte counts were 3.54 % and 3.38 % respectively. The Appellant and the DESG were informed by the medical adviser of the Respondent, Prof. A ._____, that the reticulocyte counts were "abnormal". Although the haemoglobin and hematocrit values did not require it to do so, the DESG subsequently declared that the Appellant would not compete in the following day's races.

On February 18, 2009 a further blood sample was taken from the athlete outside of the Championships. This showed a reticulocyte count of 1.37 %.

B.

B.a After reviewing the blood profile, the Respondent filed a complaint with its disciplinary commission against the Appellant. It accused the Appellant of having used a prohibited substance or a prohibited method (i.e. a type of blood doping), which constitutes an anti-doping offence pursuant to Article 2.2 of its Anti-Doping Regulations (ADR), which came into force on January 1, 2009 in line with the new version of the World Anti-Doping Code of the World-Anti-Doping-Agency (WADA).

After a hearing held in Bern on June 29/30, 2009 the Respondent's disciplinary commission ruled in its decision of July 1, 2009 that the Appellant was guilty of a doping offence pursuant to Article 2.2 of the ADR in the form of blood doping, disqualified the results obtained at the World Championships on February 7, 2009 and imposed a two-year ban commencing February 9, 2009 on the Appellant.

B.b On July 21, 2009 the Appellant and the DESG appealed the decision of the disciplinary commission of July 1, 2009 to the Court of Arbitration for Sport (CAS).

On August 17, 2009 the CAS announced the composition of the Arbitral Tribunal for this legal dispute. No objections were raised by any of the parties at that time or during the course of the proceedings.

By submission of August 3, 2009 the Appellant submitted its grounds for appeal to the CAS. On September 16, 2009 the Appellant requested to be allowed to submit a written reply to the Respondent's answer to the notice of appeal. The Respondent objected to another exchange of written submissions. By letter of September 23, 2009 the CAS informed the parties that it would not authorise another exchange of written submissions under application of Article R56 of the CAS Code. However, it did exceptionally grant the athlete the opportunity "to present any new evidence deriving from medical investigations performed on her, with comments thereto"[2] by eight days before the hearing at the latest and to appoint an expert for the hearing who could comment on the functioning of the measuring machine Advia 120.

On September 29, 2009 the CAS issued an "Order of Procedure"[3]. This was signed by all parties before the hearing. The hearing was set for October 22/23, 2009.

On October 14, 2009 the Appellant submitted to the CAS a brief with various exhibits. On October 17, 2009 the Respondent protested that significant parts of the submission did not concern new evidence deriving from medical investigations as provided for by the order of the Arbitral Tribunal of September 23, 2009; in light of the extent of the new documents it

[2] Translator's note: In English in the original German text.
[3] Translator's note: In English in the original German text.

claimed that it would be impossible to discuss them with its experts and to comment thereon in writing before the hearing.

In a letter of October 19, 2009 the CAS held that many parts of the Appellant's submission did not comply with the instructions issued by the Arbitral Tribunal on September 23, 2009 and Article R56 of the CAS Code. In particular it found that most of the documents submitted did not constitute new evidence deriving from medical investigations performed on the Appellant and that its submissions were not restricted to comments on these medical investigations but, in actual fact, constituted a rejoinder. The Arbitral Tribunal thus ordered that the submissions of the athlete of October 14, 2009 not be placed in the file, with the exception of Exhibits 37, 38, 39, 42, 44 and 53. Furthermore, the Arbitral Tribunal admitted all experts appointed by the Appellant to the hearing with the exception of Dr B._____ who had not been listed in the appeal brief.

On October 21, 2009 the DESG submitted a further brief and a new expert report to the Arbitral Tribunal. In an order of the same day, the CAS confirmed its decision not to admit the written and oral expert opinions of Dr B._____ since these were not concerned with new evidence deriving from medical investigations performed on the Appellant and the athlete had not requested an extension of the time limit for submission of the expert opinion of Dr B._____ before expiry of the time limit for the grounds for appeal on August 3, 2009. Under application of Article R57 of the CAS Code, it also rejected the Appellant's application to allow other interested persons to attend the hearing. DESG's submission of October 21, 2009 was finally not placed in the file since it did not comply with the order of the Arbitral Tribunal of October 19, 2009.

At the hearing, which took place on October 22 and 23, 2009 in Lausanne, a total of twelve experts named by the Parties were heard. All Parties were given the opportunity to put questions to the experts. They were subsequently given the opportunity to present their case, submit their arguments and to answer the questions of the Arbitral Tribunal.

At the hearing the Arbitral Tribunal decided to place the draft of WADA's "Athlete Biological Passport Operating Guidelines"[4] of October 2009 in the file and granted the Parties a short period for submitting of written comments.

After the Parties' final submissions and the Appellant's closing statement the Arbitral Tribunal closed the hearing.

On October 27, 2009 the Parties submitted their comments on the draft of the WADA Guidelines mentioned.

By way of fax of November 23 and 24, 2009 the Appellant submitted an urgent application to the Arbitral Tribunal to reopen the proceedings in order to be able to cross-examine Prof. C._____, who had not attended the hearing on October 22 and 23, 2009. The application was substantiated by the fact that one of the legal representatives of the Appellant had heard that Prof. C._____ had apparently revised his original opinion owing to evidence she had submitted on October 14, 2009 and that the Respondent had not summoned him to the hearing for this reason.

The CAS rejected the Appellant's and the DESG's application to reopen the proceedings and the appeals in an arbitral award of November 25, 2009 and confirmed that the two-year ban on the athlete would continue to apply with the slight difference that the ban would be effective from the earlier time of February 8, 2009.

C.
In a Civil law appeal of December 7, 2009, which was supplemented by a submission of January 11, 2010 within the time limit, the Appellant submits that the Federal Tribunal should annull the arbitral award of the CAS of November 25, 2009 and refer the matter back to the Arbitral Tribunal for a new decision.

It also makes the following procedural applications:

[4] Translator's note: In English in the original German text.

"A. The CAS be ordered to disclose to what extent its Secretary General or third parties influenced the judgment under appeal. In particular, how the judgment under appeal was amended after the application of the Appellant to reopen the proceedings and how these amendments came about should be disclosed.

B. The Appellant be granted the opportunity to comment on any submissions and answers to the appeal brief by the Respondent and on any position taken by the Arbitral Tribunal. Should the Federal Tribunal not of its own accord grant the Appellant a right to comment by setting a time limit, the Appellant reserves the right to comment on the respective submission by the Respondent within 15 days.

C. The complete files of the Arbitral Tribunal be transmitted.

D. A public hearing be held.

E. Respondent 1 be ordered to release the complete results of the anti-doping tests carried out on December 10-12, 2009 on the occasion of the World Cup competition in Salt Lake City and the records of the measuring machines used.

Furthermore, she seeks a stay of the various *ex parte* or interim measures to be ordered.

The files of the arbitration proceedings have been transmitted. Owing to the urgency asserted by the Appellant with respect to the Olympic Games, the Arbitral Tribunal was not requested to take position. In a letter of December 16, 2009 the Federal Tribunal took notice of DESG's renunciation of an active role in the proceedings.

D.

In an order of December 7, 2009 the Federal Tribunal ordered that the Appellant could participate in the 3,000 metre speed skating World Cup race in Salt Lake City on December 11-13, 2009. In an supplemantary order of December 10, 2009 it allow the Appellant to also participate in training providing it was in preparation for the 3,000 metre World Cup race.

In an order of December 11, 2009 the Federal Tribunal rejected the Appellant's application to obtain an ex parte order that she also be allowed to participate in the training and the competition in the 1,500 metre event if she was not one of the first eight skaters in the 3,000 metre race.
On December 22, 2009 the Federal Tribunal rejected the application for further *ex parte* measures. A further procedural application with respect to the interim relief requested by the Appellant was rejected in an order of December 30, 2009.

In an order of January 26, 2010 the Federal Tribunal rejected the application to have the award stayed and the applications of December 17, 2009 and January 11, 2010 to obtain *ex parte* interim relief.

Reasons:

1.
According to Art. 54 (1) BGG[5], the Federal Tribunal issues its decision in one of the official languages, as a rule that of the decision under appeal. Should the decision have been issued in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As English is not a (Swiss) official language and the parties used different languages in front of the Federal Tribunal, the decision will be issued in the language of the appeal brief, according to practice.

2.
In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190-192 PILA[6] (Art. 77 (1) BGG).

2.1 The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant time the Appellant had neither her domicile nor her habitual residence in Switzerland. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

[5] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173 110.

[6] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

2.2 Only the grievances limitatively listed in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal only examines the grievances raised and reasoned in the appeal brief; this corresponds to the requirement for reasons in Art. 106 (2) BGG with regard to violations of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). As to the grievances based on Art. 190 (2) (e) PILA, the incompatibility of the arbitral award under review with public policy must be shown specifically (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not admissible (BGE 119 II 380 at 3b p. 382).

2.3 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 105 (2) and of Art. 97 BGG). Yet the Federal Tribunal may review the factual findings of the award under appeal when admissible grievances within the meaning of Art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). In order to claim an exception from the Federal Tribunal being bound to the factual findings of the lower court and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the documents that the corresponding factual allegations were already made in conformity with procedural rules in the proceedings in front of the lower court (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

2.4 The appeal brief fails to recognise these principles in parts.

2.4.1 It seeks an extended judicial review by the Federal Tribunal and, in doing so, overlooks the fact that the restricted scope of review according to Art. 77 (1) BGG as read with Art. 190 (2) PILA applies to all international arbitration proceedings, thus also to the field of sport. An extension of the judicial review of the Federal Tribunal, as requested by the Appellant under claim of due process, is not justifiable.

Since in an appeal against an international arbitral award, according to Art. 190 (2) PILA, only the grounds for appeal set out in this provision may be invoked, but not directly a violation of the Federal Constitution, the ECHR[7] or other treaties (see judgments 4P.105/2006 of August 4, 2006 at 7.3; 4P.64/2001 of June 11, 2001 at 2d/aa, not published, in BGE 127 III 429 ff.), the various grievances of violations of corresponding provisions are not capable of appeal in principle. The principles resulting from the Federal Constitution or the ECHR can be applied, where appropriate, in support of the guarantees given by Art. 190 (2) PILA; however, in light of the strict requirements for reasons (Art. 77 (3) BGG), it must be shown in the brief itself.

2.4.2 The Appellant's legal assertions are preceded by her own thorough presentation of the facts, in which she describes the course of events and the proceedings from her point of view. At various points as in her further grounds for appeal, she deviates from the factual findings of the CAS[8] or widens them without asserting any substantiated exceptions to the binding character of the factual findings. To that extent, her submissions must remain unheeded.

The various new facts and offers of evidence (Art. 99 (1) BGG) must also remain unheeded. The Appellant argues, for example, by submitting new expert reports, that it has in the meantime come to light that the Appellant does actually suffer from a blood abnormality, *i.e.* a spherocytosis. Furthermore, she claims, with reference to numerous documents compiled after the award under appeal was issued, that the anti-doping experts the world over agree that the blood counts of the Appellant cannot be explained by any known doping method. Moreover, she submits to the Federal Tribunal various documents which refer to the award under appeal and challenge the conclusions drawn by the Arbitral Tribunal in various lights, for example, a letter from Prof. D._____ of December 6, 2009 and Prof, Dr E._____ of January 7, 2010 and two e-mails from Dr C._____ of January 6 and 7, 2010.

2.4.3 The results of the anti-doping tests which were carried out on December 10-12, 2009 at the World Cup competition in Salt Lake City mentioned by the Appellant and the records of the measuring machines used are new facts which must remain unheeded in the appeal (Art.

[7] Translator's note: European Convention on Human Rights.
[8] Translator's note: Although the literal translation of "Vorinstanz" is "lower court", "CAS" has been used for clarity here.

99 (1) BGG). The procedural application to produce these documents must be rejected simply for this reason.

3.
Based on Art. 190 (2) (a) PILA, the Appellant argues that the Arbitral Tribunal was not independent and impartial.

3.1
To start with, the Appellant challenges the independence of the CAS itself.

3.1.1 She argues are that in this case the interests of the Respondent are only of secondary importance, the primary interests are those of the International Olympic Committee (IOC) and the international sporting associations in general, which consider the economic value of the Olympic Games and their sporting events to be at risk as a result of doping issues. She argues that the sponsors and the public in general are interested in fair sporting events, which is why this image must be preserved whatever the cost. She claims that the IOC and the international sporting associations need to prove that they are fully committed to fighting doping without restrictions and are dedicated to healthy sport.

For this reason she argues that it was of extreme importance to the IOC and the international sporting associations at the beginning of the proceedings that indirect proof, which was to be introduced by way of the WADA blood passport and which was in the final stages of its development at that time, works, especially since this detection procedure is significantly cheaper than the urine tests directly proving use of prohibited substances. In the Appellant's view therefore, it was inevitable that she would be found guilty come what may; she claims that there is nothing better than making an example of a well-known athlete. For instance, she claims that Jacques Rogge, the IOC President, declared before the proceedings that the Pechstein case was a "litmus test to see if the long-term profile of the international scientific community is confirmed". After the award was issued the Vice President of the IOC was practically euphoric about the award under appeal and declared "the decision of the CAS shows that sports law is opening up more possibilities in the fight against doping in athletes than state law was ever able to".

3.1.2 If an arbitral tribunal proves deficient with respect to independence or impartiality, this is a case of illegal composition within the meaning of Art. 190 (2) (a) PILA. According to the principle of good faith, such an objection in arbitration proceedings must be made immediately, otherwise the right to invoke the ground for appeal is forfeited (BGE 129 III 445 at 3.1 p. 449 with references).

The Appellant herself appealed to the CAS and signed the Procedural Order of September 29, 2009 without raising objections with respect to independence or impartiality. Under these circumstances it is not compatible with the principle of good faith to raise the issue of impartiality of the Arbitral Tribunal applied for the first time before the Federal Tribunal in the framework of an appeal. The grievance of lack of independence of the arbitral tribunal asserted by the Appellant is therefore not capable of appeal.

3.1.3 Moreover, the CAS must be regarded as a proper arbitral tribunal contrary to the Appellant's view. According to the case law of the Federal Tribunal, the CAS is furthermore sufficiently independent from the IOC, which is why its decisions, even in matters which concern the IOC's interests, can be regarded as judgments comparable with those of a state court (BGE 129 III 445 at the end 3 p. 448 ff. with references).

Irrespective of the fact that the Appellant's factual allegations are not based on the factual findings of the decision under appeal (see Art. 105 (1) BGG), her submissions of a general nature do not give rise to reasonable doubts as to the independence of the CAS. The grievance of lack of independence of the CAS would thus be unsubstantiated anyway.

3.2 The Appellant then makes the complaint that the president of the Arbitral Tribunal, F._____, was partial. He allegedly informed one of her current legal representatives in October 2007 that he takes a "hard line on doping issues" when the latter wished to appoint him as arbitrator in other proceedings for an athlete whom he represents. The Appellant claims that F._____'s appointment by G._____, a former member of the National Olympic Committee and president of an international sporting association and member of the IOC Sport and Law Commission, thus meant that the decision had in fact already been made.

The grievance is unfounded. The accusation directed at the president of the Arbitral Tribunal to the effect that he would have stated in another context that he takes a "hard line" on doping issues, is too vague and general to give rise to reasonable doubt about the independence of F._____, especially since there is no direct relationship to these proceedings (see BGE 133 I 89 at 33 p. 92; 105 Ia 157 at 6a p. 163).

The Appellant's grievances that the president of the Arbitral Tribunal was partial or that the IOC influenced the composition in an illegal manner fall short of the mark.

3.3 The Appellant's further grievance that the IOC and the international sporting associations could have influenced the decision making process via the CAS Secretary General in that the latter may have subsequently "amended" the decision under appeal, is speculative and is not based on actual facts. For example, the Appellant herself states that she does not know whether the Secretary General made use of the possibility to "amend" the decision or not.

Moreover, she does not formulate a grievance based on Art. 190 (2) (a) PILA when she submits that Article R59 of the CAS Code provides for the decision to be communicated to the CAS Secretary General before signature and that he may make "merely formal amendments" and "also steer the attention of the arbitral tribunal towards fundamental points". Contrary to the view expressed in the appeal brief, these proceedings do not give rise to any doubts concerning the fact that the decision lies solely with the arbitral tribunal. Undue influence on the arbitral tribunal which would challenge its independence does not result from the foregoing.

The grievance of lack of independence or illegal composition of the arbitral tribunal (Art. 190 (2) (a) PILA) is unfounded and the procedural applications made in this connection must be rejected.

4.
The Appellant further claims a violation of the right to a public hearing.

4.1 In this respect she incorrectly invokes Art. 6 (1) ECHR, Art. 30 (3) Federal Constitution and Art. 14 (1) ICCPR[9] since these are not applicable to voluntary arbitration proceedings according to the correct understanding of the case law of the Federal Tribunal (see judgments 4P.105/2006 of August 4, 2006 at 7.3; 4P.64/2001 of June 11, 2001 at 2d/aa, not published BGE 127 III 429 ff.). It is not possible to derive a right to a public hearing in the framework of the arbitration proceedings from the provisions mentioned.

The CAS did not disregard a right of the Appellant to a public hearing by rejecting the Appellant's application to allow her manager H._____ to attend the hearing as Article R57 CAS Code only provides for a public hearing if the parties consent. The Appellant does not show to what extent the right to be heard (Art. 190 (2) (d) PILA) and public policy (Art. 190 (2) (e) PILA) should allow a public hearing in international arbitration proceedings, which are not public as a rule.

Be this as it may, in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process.

4.2 Unlike the proceedings before the CAS, which freely assesses factual and legal issues, the judicial review in an appeal of the arbitral award before the Federal Tribunal is significantly restricted. In this appeal the award lends itself to a decision on the basis of the record; ordering a public hearing (Art. 57 BGG), as requested by the Appellant, is not advisable.

A mandatory public hearing before the Federal Tribunal, as is exceptionally required by the ECHR – in the case of claims according to Art. 120 (1) (c) BGG or where the Federal Tribunal intends to adjudicate the matter itself (see Art. 107 (2) BGG) based on its own factual findings (Art. 55 BGG) – (see HEIMGARTNER/WIPRÄCHTIGER, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, N. 9 ff. on Art. 57 BGG; JEAN-MAURICE FRÉSARD, in: Commentaire de la LTF, 2009, N. 8 f. on Art. 57 BGG), is not an option in appeal proceedings against arbitral awards pursuant to Art. 77 BGG.

[9] Translator's note: ICCPR is the abbreviation for the International Covenant on Civil and Political Rights; in German the *Internationale Pakt über bürgerliche und politische Rechte* referred to in Switzerland as the UNO-Pakt II.

The application for a hearing before the Federal Tribunal must be rejected.

5.
The Appellant claims a violation of the right to be heard by the CAS in several ways (Art. 190 (2) (d) PILA).

5.1
5.1.1 The Appellant submits that the Respondent only disclosed the complete results of the blood tests of February 6 and 7, 2009 on July 28, 2009 - after the decision by the Disciplinary Commission and shortly before expiry of the time limit which expired on August 3, 2009 for substantiation of the appeal to the CAS. She claims that this disclosure was necessary because it had become clear as a result of statements by the experts that the reticulocytes as sole value did not constitute suitable evidence of blood doping. The Appellant claims that she had thus been advised to obtain as many additional blood values as possible in order to make a reliable scientific statement.

5.1.2 The submissions mentioned are not sufficient to constitute a grievance of the right to be heard. The Appellant neither explains, making reference to the record, that she had made a complaint about the late disclosure in the arbitration proceedings nor is it clear from her submission what she is accusing the CAS of from a procedural point of view.

To the extent that she states in the remainder of the grounds for appeal that she was not given sufficient time to prepare, the grievance of a violation of the right to be heard comes to nothing. As the CAS held in its Procedural Order of October 21, 2009, the Appellant, after she declared on July 21, 2009 that she would be appealing, did not request an extension of the time limit for the grounds for appeal as would have been possible according to Article R32 CAS Code. For this reason alone there can be no claim of a violation of the right to be heard (Art. 190 (2) (d) PILA).

5.2 For the same reason, the Appellant's submission that the analyses of the complete blood tests, which had to be carried out by experts, could only be carried out after expiry of the time limit for the grounds for appeal to the CAS (August 3, 2009) owing to the holiday period, is unfounded.

Moreover, in arbitration proceedings, as in civil proceedings, the parties cannot submit new allegations and evidence at any time and without restriction. This does not constitute a violation of the right to be heard but is in line with generally recognised procedural principles. The Arbitral Tribunal thus held in its letter of September 23, 2009 that it would not allow a further exchange of written submissions pursuant to Article R56 CAS Code. However, it exceptionally granted the Appellant the opportunity to present any new evidence deriving from medical investigations performed on her, with comments thereto within eight days before the hearing at the latest. The majority of the Appellant's submission of October 14, 2009, with which she submitted various new expert opinions, was rejected by the Arbitral Tribunal by letter of October 19, 2009 since the majority of the documents submitted did not constitute new evidence deriving from medical investigations performed on the Appellant and thus conflicted with the order of the Arbitral Tribunal of September 23, 2009.
Based on this, the Appellant does not show a violation of the right to be heard when she merely submits that it is clear from the expert opinions of Prof. B._____ and Dr I._____ that it is very unlikely that she used prohibited substances and her blood values could be explained by a blood abnormality, and when she claims without further substantiation that the expert report was wrongly rejected by the Arbitral Tribunal. In her allegation that the expert report submitted was based on new facts of which she was not previously aware, she does not illustrate to what extent she submitted the expert report in conformity with the procedural rules. In particular she does not explain, making reference to the record, to what extent the rejected expert report concerned "new evidence deriving from medical investigations performed on her". In doing so she disregards the requirements for reasons for a sufficient grievance relating to the right to be heard.

The same applies to the grievance that the CAS wrongly disregarded the expert report by Prof. K._____ submitted by the DESG. This is, incidentally, irrelevant anyway especially since she does not assert a violation of her own right to be heard in this submission but instead complains that the procedural rights of the DESG, which has not filed an appeal against the award, were not respected.

5.3 The Appellant's submission that, as a result of the order by the CAS of October 19, 2009, she was cheated of the possibility of replying to the new factual pleading of the Respondent is

not further substantiated. The Appellant does not specifically illustrate either which of her comments were allegedly disregarded by the Arbitral Tribunal which apparently made it impossible for it to recognise the significance of the expert report submitted.

Moreover, on October 22/23, 2009 a hearing took place in Lausanne in which the Appellant was able to comment in detail. In the order by the Arbitral Tribunal of October 19, 2009 the Appellant had additionally been informed that it would have an opportunity during the hearing to comment in detail on the question of the medical evidence.

The accusation made in the appeal brief that she did not have sufficient time and opportunity to prepare is not justified from this point of view either. Moreover, the fact that, according to Article R56 of the CAS Code, only one set of written submissions is exchanged before the hearing takes place according to Article R57, at which the parties can comment orally, does not constitute a violation of the right to be heard, contrary to the view expressed in the brief. The Appellant does not show, by referring to the files, whether the Arbitral Tribunal refused at the hearing to let her comment in certain respects or to comment on the submissions of the Respondent. Instead she merely submits that she was not given an opportunity to comment in writing. This therefore does not justify a violation of the principle of equal treatment of the parties or of the right to be heard (Art. 190 (2) (d) PILA), just as little as the allegation that the Respondent only submitted the details of the blood tests and calibration of the analysis machines before the CAS. A violation of the right to be heard cannot be justified either by the fact that a witness presented by the opposing party did not appear before the CAS.

Finally the Appellant does not sufficiently illustrate the extent to which the right to be heard empowers a party to cross-examine an expert owing to an alleged change of opinion after the final submissions by the Parties and the Appellant's closing statement within a month of closure of the main hearing. Moreover, in the arbitration proceedings it was not the Appellant but the Respondent, which was relying on Dr C._____. The fact that Dr C._____ was not summoned by the Respondent for the hearing does not violate the Appellant's right to be heard, contrary to her view. If under these circumstances the Arbitral Tribunal did not base its award on the written comments of Dr C._____ it is not clear to what extent the refusal of the application to reopen the proceedings, which was based on a change of opinion

by Dr C._____ vis-à-vis his written statement, would show an inadmissible assessment of the evidence in advance within the meaning of violation of the right to be heard or procedural public policy.

6.
The Appellant makes various claims with respect to a violation of public policy (Art. 190 (2) (e) PILA).

6.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy (BGE 121 III 331 at 3a p. 333). The material adjudication of a dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the fundamental, widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. The award under appeal may be annulled only if it contradicts public policy in its result and not merely in its reasons (BGE 132 III 389 at 2.2 p. 392 ff.; 128 III 191 at 6b p. 198; 120 II 155 at 6a p.166 f.).

6.2 The Appellant disregards with respect to a significant proportion of her submissions both the concept of public policy and the strict requirements for reasons applicable to such grievances (see BGE 117 II 604 at 3 p. 606). In large parts her comments are limited to criticism of an appellate nature which is not admissible in the framework of the appeal proceedings (BGE 119 II 380 at 3b p. 382).

6.2.1 Thus, referring to two expert reports from Dr C._____ of May 19, 2009 and August 28, 2009 and to the decision by the Respondent's Disciplinary Commission of July 1, 2009, she claims at first that the Arbitral Tribunal "concealed contrary to the record" the influence of the expert opinion of Dr C._____ in that it "owing to the change of opinion of Dr C._____ deleted his name from the judgment at the last minute". Irrespective of the fact that these submissions are speculative and are not supported by the exhibits, the Appellant argues that the CAS of disregarded the duty of substantiation decided in contradiction to the

record, but she neither illustrates a violation of public policy nor other grounds for appeal provided for by Art. 190 (2) PILA (see BGE 134 III 186 at 6.1 p. 187; 127 III 576 at 2b S. 577 f.; with references).

6.2.2 The same applies to the Appellant's submission that there is an "irresolvable internal inconsistency in the reasons". It is true that the Federal Tribunal in some older decisions held a judgement containing contradictions to violate public policy and explained that the purpose of Art. 190 (2) (e) PILA is also to guarantee a certain minimum quality of Swiss international arbitration awards (judgments 4P.198/1998 of February 17, 1999 at 4a; 4P.99/2000 of November 10, 2000 E. 3b/aa; see also judgment 4P.115/1994 of December 30, 1994 at 2b). In the more recent case law of the Federal Tribunal, for example in the last landmark decision on public policy (BGE 132 III 389 at 2.2.1 p. 392), the internal inconsistency of a decision is no longer mentioned in connection with public policy. In a further published decision the Federal Tribunal decided that a contradiction in the award cannot be appealed as a violation of public policy (BGE 128 III 191 at 6b p. 198) which is hardly compatible with the unpublished decisions mentioned (in this direction also Bernard Dutoit, Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987, 4th ed. 2005, N. 8 on Art. 190 IPRG p. 678). With a view to the quality of international arbitral awards, it is not appropriate to treat a contradictory decision differently from those which are based on unsustainable factual findings or an arbitrary application of the law, which are not covered by Art. 190 (2) (e) PILA either. A contradiction in the grounds of a decision thus does not constitute a violation of public policy (judgment 4A_464/2009 of February 15, 2010 at 5.1).

6.2.3 The Appellant does not identify a violation of public policy either where it accuses the Respondent of unexpectedly not having summoned Dr C._____ to the hearing before the CAS because it knew that he had changed his personal opinion. Irrespective of the fact that her submissions are not based on the factual findings in the award under appeal (Art. 105 (1) BGG) it is not the task of the Federal Tribunal to review the fraud charge against the opposing party within the meaning of Art. 151 SPC[10] in the framework of the appeal proceedings.

[10] Translator's note: SPC is the abbreviation for the Swiss Penal Code.

6.3

6.3.1 According to established case law of the Federal Tribunal, a finding that is obviously wrong or contrary to the record does not suffice to annul an international arbitral award. The right to be heard contains no right to a materially accurate decision (BGE 127 III 576 at 2b p 577 f.). Moreover, the violation of the procedural rules agreed by the parties or that of arbitration rules is not a violation of procedural public policy (BGE 117 II 346 at 1a p. 347). Public policy according to Art. 190 (2) (e) PILA does not concur with that of arbitrariness but is, in fact, narrower (BGE 132 III 389 at 2.2.2 p. 393 with references). The grievance that the Arbitral Tribunal based the award under appeal on arbitrary factual findings or application of the law is thus not sufficient under Art. 190 (2) (e) PILA (BGE 117 II 604 at 3 p. 606).

6.3.2 On this basis, the Appellant is attempting in vain, by referring to the WADA Code, the Respondent's anti-doping rules and civil procedural and medical arguments, to challenge the outcome of the evidentiary proceedings. The view of the Arbitral Tribunal that the Respondent must prove a doping offence "to the comfortable satisfaction of the hearing panel"[11] does not violate public policy but refers to the allocation of the burden of proof and the standard of evidence which, in the area of application of private law - even where disciplinary measures of private sporting organisations are under review – cannot be determined from the perspective of criminal law concepts such as the presumption of innocence or the principles of "*in dubio pro reo*" or on the basis of the guarantees which result from the ECHR. Even with respect to her defence that the standard of evidence on which the decision was based leads to disregard of the principle of proportionality, the Appellant does not point out a violation of public policy. Instead with her submissions regarding the standard of evidence and the alleged reversal of the burden of proof, she is actually making criticisms of an appellate nature which are not admissible in appeal proceedings.

6.3.3 A result of the evidentiary proceedings for the taking of evidence and the hearing of numerous experts, the Arbitral Tribunal held that the Appellant's abnormal blood values of February 6 and 7, 2009 and the sharp decrease in the reticulocyte count recorded on February 18, 2009 cannot be explained by an innate or acquired abnormality but were the result of blood manipulation.

[11] Translator's note: in English in the original text.

In her further grounds for appeal the Appellant argues at length that the Arbitral Tribunal comments of having made its decision contrary to the unanimous opinion of the experts and the blood values could neither be explained by the doping method considered by the CAS or any other known method. To the extent that account must be taken of the submissions at all, in light of the numerous items of new evidence submitted (see Art. 99 (1) BGG), they merely challenge the result of the taking of evidence by the Arbitral Tribunal and are limited to criticism of an appellate nature of the award. In this respect, the matter is not capable of appeal.

The same applies to the arguments that the testing methods used were scientifically insufficient, to the extent that these do not repeat various grievances already rejected. The Appellant also sweepingly invokes *inter alia* the economic freedom granted by Art. 94 Federal Constitution, the right to work according to Art. 6 f. ICESCR[12], her personality rights, the right to a fair trial and the WADA "Athlete Biological Passport Operating Guidelines" which only came into force on December 1, 2009 as also stated in her presentation of the facts. She shows no grievance pursuant to Art. 190 (2) PILA but, rather criticises again in an inadmissible manner the assessment of the evidence by the CAS. Contrary to the Appellant's view, the fact that her test results were collected in accordance with the guidelines applicable at that time and not under those which only came into force after the decision – although only shortly thereafter –is neither a violation of public policy nor of the principle of equal treatment. Furthermore, there can be no claim of a violation of the principle of equal treatment (Art. 190 (2) (d) PILA) where the arbitral tribunal considered the WADA Guidelines not applicable before they came into force but nevertheless mentioned them in two places whether for the purpose of comparison or in order to address a corresponding argument by the Appellant.

Her comments under the headings "Violation of public policy by disregarding the safety mechanisms in the case of indirect evidence" and "The proceedings brought by Respondent 1 regarding the production of the biological blood passport breaches the principle of legality

[12] Translator's note: ICESCR is the abbreviation for the International Covenant on Economic, Social and Cultural Rights; in German the *Internationale Pakt über wirtschaftliche, soziale und kulturelle Rechte* referred to in Switzerland as the UNO-Pakt I.

and proportionality" do not address the reasons of the award, let alone a sufficiently reasoned grievance according to Art. 190 (2) PILA. They must thus remain unheeded.

The Appellant does not assert a violation of public policy either where she describes the data management of the Respondent and the test results as deficient, sheds doubt on the reliability of the database or claims that the Guidelines of the Respondent were disregarded with respect to the blood test. Other grievances are only asserted in a generalised manner to the extent that they have not already been rejected and do not meet the statutory requirements for reasons (see Art. 77 (3) BGG).

The grievances that the principle of proportionality and the "*lex mitior*" rule are violated are also unfounded and do not establish a violation of public policy.

6.4 In connection with the expert report of Prof. D._____, the Appellant wrongly claims a violation of public policy and of the right to be heard.

To substantiate her claim she initially submits that the presentation of the facts by the CAS, according to which Prof. D._____ came to the definitive conclusion that the Appellant and her family members do not suffer from hereditary spherocytosis, is incorrect and contrary to the record. She then argues that the Arbitral Tribunal referred to the medical report, contrary to the record, as the "final report", whilst page 3 of the report refers to a "provisional assessment". The Appellant claims that the medical report is also incorrectly portrayed in various respects and that incorrect conclusions are drawn from it.

The Appellant does not show to what extent a judicial inadvertence made it impossible for her to bring forward and prove her point of view with regard to an issue that was relevant in the case (BGE 133 III 235 at 5.2; 127 III 576 at 2b-f p. 577ff.). Although she does claim that the Arbitral Tribunal did not appraise the further expert reports L._____ and M._____, she does not explain to what extent this was a result of the alleged inadvertence. She rather bases her arguments in other respects on the fact that the Arbitral Tribunal wrongly rejected her submission of October 14, 2009 on procedural grounds, which was submitted with the expert reports mentioned, and thus ignored her comments. The expert report to which reference is made in the appeal brief with the subsequent

investigations by Prof. M._____ of October 10, 2009 and Prof. L._____ of October 7, 2009 was accepted in the record as Exhibit 37 and 39; furthermore, on request by the Appellant, Prof. M._____ attended the hearing.

A violation of the right to be heard by a contradiction with the record is not demonstrated. The Appellant restricts herself to commenting on the extent to which the alleged inadvertence led to an incorrect appraisal of the evidence. However, as in the case of arbitrary appraisal of evidence, this does not constitute a violation of the right to be heard (BGE 127 III 576 at 2f p. 580; see also Art. 77 (2) BGG, which excludes application of Art. 105 (2) and Art. 97 BGG).

The further grievance that the Arbitral Tribunal violated its duty of substantiation misses the mark, especially since no right to substantiation can be derived from the case law of the Federal Tribunal as to Art. 190 (2) (d) PILA (BGE 128 III 234 at 4b p. 343; 116 II 373 at 7b p. 374 f.).

6.5 The foregoing also applies to the corresponding grievance under the heading "Violation of public policy by applying in the award the opinion of a veterinarian to a matter of human medicine". By doing so, the Appellant criticises the findings of fact of the CAS on the basis of the fact that Prof. N._____, who attended the hearing, is only trained as a vet, and sets out her own view of the facts. Irrespective of the fact that she does not state that she already asserted such objections in the proceedings before the CAS, her submissions are of an appellate nature and cannot be used to illustrate a violation of the right to be heard nor of formal public policy.

Her grievance that the principle of human dignity protected by Art. 7 Federal Constitution was violated because her blood values were given to a veterinarian for evaluation also goes astray. There can be no claim of medical treatment, contrary to what the Appellant appears to be asserting. The fact that the principle of human dignity would prohibit a university based scientist, who is *inter alia* a qualified veterinarian, from acting as an expert in the framework of doping proceedings is not demonstrated.

6.6 No sufficiently grounded grievances according to Art. 190 (2) PILA are shown by the further grounds for appeal under the headings "Production of the personal blood profile of the Appellant by the CAS in violation of public policy", "Use of measurements proven incorrect in violation of public policy" and "Violation of public policy as a result of incorrectly-determined thresholds". To the extent the Appellant deals with the reasons for the award under appeal at all and does not repeat submissions which have already been rejected, she makes criticisms of an appellate nature of the award and presents her own views of the facts, particularly with respect to the definitive measuring methods and appraisal of the blood values. In doing so she refers to numerous findings by the CAS as arbitrary, contradictory, incorrect or contrary to the file, but does not demonstrate to what extent it was impossible for her as a result to put forward and prove her point of view in the proceedings (BGE 133 III 235 at 5.2 p 248 f.; 127 III 576 at 2b-f p. 577 ff.). She merely claims sweepingly at various points a violation of the principle of the right to be heard or of public policy without meeting the statutory requirements for reasons (see Art. 77 (3) BGG).

7.
The appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings, the Appellant must pay the costs and compensate the other party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected, to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 5,000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent compensation of CHF 3,000 for the Federal judicial proceedings.

4.

This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, February 10, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge (Mrs):	The Clerk:
KLETT	LEEMANN