4A_488/2011[1]

Judgment of June 18, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Clerk of the Court: Carruzzo.

X._____,
Represented by Mr. Rocco Taminelli,
Appellant,

v.

1. International Cycling Union (ICU),
Represented by Mr. Jean-Pierre Morand,
2. Italian National Olympic Committee (CONI),
3. Italian Cycling Federation (FCI),
Respondents,

Facts:

A.
The International Cycling Union (ICU) is the association of national cycling federations. In order to fight doping in this sport it adopted its Anti-Doping Rules (hereafter: ADR). Moreover it elaborated a program called "Athlete's Biological Passport" (hereafter: the Biological Passport) which constitutes an indirect method of detecting blood doping.

X._____, an Italian professional cyclist, is one of the athletes included in the Biological Passport program.

In December 2009, a group of nine experts appointed by the ICU to review anonymously the blood profiles of the aforesaid athlete unanimously concluded that he had used a prohibited substance or method. After taking note of the cyclist's commentaries a committee of three experts recommended that proceedings should be opened for breach of Anti-Doping Rules as they could not find a satisfactory explanation for the anomalies noticed.

On May 3, 2010 the ICU informed X._____ that according to the ADR it was going to ask the Italian Cycling Federation (FCI) to initiate disciplinary proceedings. Further to that communication the athlete gave up participating in any cycling competition as from May 4, 2010.

[1] Translator's note: Quote as X._____ *v.* ICU, CONI and FCI, 4A_488/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

The disciplinary case was referred to the National Anti-Doping Tribunal (TNA) of the Italian National Olympic Committee (CONI) on July 27, 2007. The ICU intervened formally in the proceedings by filing a brief on September 6, 2010. In a decision of October 21st, 2010 sent to the parties on November 19, 2010, the TNA freed the cyclist of the charge of doping and ordered the ICU to pay the costs, holding that the violation of the Anti-Doping Rules X._____ had been charged with was not established with the required degree of probability.

B.
On December 6, 2010 X._____ appealed this decision to the Court of Arbitration for Sport (CAS). He submitted that ICU and CONI should be ordered to reimburse an amount of € 54'964.70 for the fees of his lawyers, his expert and his travelling expenses.

For its part the ICU submitted its statement of appeal on January 13, 2001. According to the ICU the cyclist should be banned for four years, his results obtained in competitions annulled as from February 29, 2008 and a fine of € 404'999.72 should be imposed.

On February 11, 2011 both Appellants sent a brief with their reasons in support to the CAS. On the 21st and 22nd of the same month both submitted their answers.

On March 2, 2011 X._____ and the UCI took part in the hearing of the CAS and were interrogated as well as their experts. The FCI and CONI did not participate in the hearing.

In an award of March 8, 2011, the reasons of which were communicated to the parties subsequently, the CAS rejected the cyclist's appeal and partially upheld that of the ICU. It annulled the decision of the TNA, found that X._____ had violated Art. 21.2 of the ADR, banned the athlete for two years as from May 3, 2010, disqualified all his results as from May 7, 2009 and ordered the Appellant to pay an amount of €115'000 as fine to the ICU.

C.
On August 19, 2011 X._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the award.

In its answer of October 3, 2011, the ICU (hereafter: the Respondent) submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

By letter of October 21st, 2011 the CAS stated that it would not file an answer. The FCI and the CONI too chose not to express a view as to the appeal because they had not taken actively part in the arbitral proceedings.

In a reply of November 22nd, 2011 and a rejoinder of December 9, 2011, the Appellant and the Respondent confirmed their respective submissions.

Reasons:

1.
According to Art. 54 (1) LTF[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. The CAS issued its award in French. In the briefs submitted to the Federal Tribunal the Parties used Italian (the Appellant) or French (the Respondent). Hence in accordance with the general rule this judgment shall be issued in French.

2.
In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals pursuant to the requirements set at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so or as to the Appellant's submissions, none of these admissibility requirements raises any problem in this case. Accordingly there is no reason not to address the appeal.

3.
The Federal Tribunal issues its decision on the basis of the facts found by the arbitral tribunal (Art. 105 (1) LTF). This Court may neither rectify nor supplement *ex officio* the factual findings of the arbitrators even if the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However, as was already the case under the aegis of the Federal Statute Organizing the Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted) the Federal Tribunal retains the faculty to review the facts on which the award under appeal is based if one of the grievances stated at Art. 190 (2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into account within the framework of the Civil law appeal (see Art. 99 (1) LTF).

4.
The Appellant claimed that the Respondent's appeal was late. The CAS rejected the argument based on Art. 334 ADR (2009 version). To the extent that it is pertinent to decide the case at hand, the latter provision states that the ICU must file its statement of appeal with the CAS within a month of receipt of the full case file from the hearing body of the national federation; it adds that if the appellant does not request the file within fifteen days of receiving the full decision within the meaning of Art. 223 ADR, the time limit in question starts from the reception of the decision. As to the latter provision quoted, it adds that a full copy of the decision, signed at least by the president of the hearing body, must be sent to the license-holder and to ICU by registered mail with acknowledgment of receipt, failing which the time limit to appeal does not start.

4.1
According to the CAS it is not disputed that the Respondent received the decision of the TNA on November 19, 2010 and asked CONI a full copy of the file on December 3, 2010, *i.e.* timely. As the full file, including eight exhibits of which the Respondent was not previously aware, was sent on December

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[2] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[3] Translator's note: The official languages of Switzerland are German, French and Italian.

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

13, 2010, the Respondent complied with the one month time limit at Art. 334 ADR by submitting its statement of appeal on January 13, 2011. According to the CAS there is no reason to waive the application of this provision, no matter what the Appellant says: firstly, the Respondent participated in the first instance proceedings only in part, its first procedural act as a party being the filing of its brief of September 6, 2010; furthermore it is only on December 13, 2010 that the Respondent received all the exhibits in the file, thus becoming able to base its appeal on a complete file in accordance with the *ratio* of Art. 334 ADR; finally the Respondent cannot be blamed for not having been in possession of the full file before that date.

4.2

4.2.1 Relying on Art. 190 (2) (b) PILA the Appellant argues that the CAS wrongly accepted jurisdiction on the Respondent's appeal. To substantiate the grievance he argues that Art. R47 of the Code of Arbitration for Sport (hereafter: the Code) called for the application of Art. 4 (23) of annex H of the Italian Anti-Doping Rules (NSA) in this case, pursuant to which an appeal against a decision of the TNA must be filed within 30 days of receipt of the reasoned decision. As the decision issued on October 21st, 2010 by the TNA was notified by fax to the Parties on November 19, 2010 in accordance with the usual practice of this body, the Respondent should have submitted its statement of appeal within 30 days from this date and it did not do so.

As to Art. 334 ADR the Appellant considers that the provision was not applicable in this case as the Respondent had already become a full party in front of the TNA. Indeed it was the Respondent that asked CONI to open disciplinary proceedings against him on May 3, 2010; it had all the technical documentation used by the Parties; it sent an explanatory note to the *Ufficio di Procura Antidoping* (UPA) on July 5, 2010; it filed two briefs with voluminous documents including various expert reports on September 6 and 10, 2010; it called professor A._____ as an expert in front of the CAS, one of its nine experts specializing in examining biological passports, whom UPA had also called upon in this case; it participated in the hearing in front of the TNA on October 21st, 2010 through the medical doctor in charge of its anti-doping agency, who spoke at the hearing. Under such circumstances, allowing the Respondent to rely on Art. 334 ADR was tantamount to approving an abuse of right by the Respondent and breached the general principle of procedural good faith as well as the rules of the World Anti-Doping Code (WAC), such as Art. 8.1 and 13.2.2 requiring a hearing within a reasonable time. Assuming that the Respondent did not have the full file of the case when it appeared in front of the TNA it should be blamed for its own negligence.

In the same context, the Appellant argues a violation of the rule that the parties should be treated equally as embodied at Art. 190 (2) (d) PILA because he was bound by the time limit at Art. 4 (23) of annex H of the NSA whilst the Respondent could extend its own time limit to appeal at will as it simply had to wait before asking for the full case file in order to profit from additional time.

Finally, according to the Appellant, the CAS would have issued an award inconsistent with procedural public policy (Art. 190 (2) (e) PILA) when declaring capable of appeal an appeal made in violation of the rules of good faith.

4.2.2 In response to these arguments the Respondent points out firstly that it is undisputed that it filed its appeal within the time limit of Art. 334 ADR. Furthermore it explains the various steps in its intervention, pointing out that at the beginning of the disciplinary proceedings it merely answered various requests for information, its first formal act as a party having been the filing of the brief of

September 6, 2010. Hence according to the Respondent, its intervention in the proceedings resulted in particular in the Respondent failing to receive all exhibits, particularly those concerning the preliminary investigation. Therefore there would be no abuse of right in filing an appeal respecting not only the letter but also the spirit of Art. 334 ADR once the full file was received.

As an alternative the Respondent argues that the appeal was filed timely even if one were to disregard Art. 334 ADR, to the extent that the notification of the reasoned decision of the TNA on November 19, 2010 did not start the time limit to appeal because it had been done by fax contrary to the requirements of the aforesaid Art. 277 ADR. Thus, for the Respondent, only the receipt of the full file in the mail on December 13, 2010, including the aforesaid decision, started the time limit to appeal according to the latter provision.

Moreover the Respondent denies breaching procedural good faith in any way and denies the Appellant's right to invoke the alleged incompatibility of the award with procedural public policy simply to substantiate differently the grievance relating to the compliance with the time limit to appeal.

4.3
Seized for lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining jurisdiction or the lack of jurisdiction of the arbitral tribunal (ATF 133 III 139 at 5 p. 141 and the cases quoted). However this Court reviews the factual findings only within the aforesaid limits (see above at 3).

4.3.1 An appeal based on Art. 190 (2) (b) PILA is available when the arbitral tribunal decided claims that it had no jurisdiction to examine, whether because there was no arbitration clause or because it was limited to certain issues which did not include the claims at hand (*extra potestatem*). Indeed an arbitral tribunal has jurisdiction only if, among other conditions, the dispute falls within the anticipations of the arbitration agreement and provided it does not exceed the limits set by the request for arbitration and the terms of reference as the case may be (judgment 4A_210/2008[5] of October 29, 2008 at 3.1and the cases quoted).

It is not self-evident that the Appellant's grievance falls within the framework of the aforesaid provision and case law relating thereto. Deciding whether the lateness of the appeal results in a lack of jurisdiction of the CAS or merely the inadmissibility or the rejection of such an appeal is a delicate issue. According to the Appellant the Federal Tribunal would have decided the issue at 4.2.3.3 of its judgment of December 28, 2008 in case 4A_392/2008[6]. It is not so. In the excerpt of that case quoted, the First Civil Law Court merely held that the CAS had not given an incorrect interpretation of the pertinent statutory provisions when admitting jurisdiction as an ordinary arbitral tribunal as opposed to an appellate body, thus leading the Court to hold that it was not necessary to review the arguments of the Respondent, which claimed in particular that should the CAS have decided as an appellate body, the late filing of the appeal would have no impact on its jurisdiction (case quoted at 4.2.3.3, last § in connection with 3.1, 2nd §).

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[5] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/admissibility-of-appeal-against-interlocutory-decision-procedura/

[6] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/review-by-the-federal-tribunal-of-an-award-upholding-jurisdictio/

Admittedly the argument that an arbitral tribunal disregarded the time limit of the arbitration agreement or a required prerequisite of conciliation or mediation does relate to the exercise of jurisdiction, more specifically to jurisdiction *ratione temporis* and falls accordingly within Art. 190 (2) (b) PILA (judgment 4P.284/1994 of August 17, 1995 at 2 and 4A_18/2007 of June 6, 2007 at 4.2; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, nr 813a; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, nr 532a ff). It must be pointed out however, that this principle of case law mainly aims at usual or typical arbitration, finding its source in a contractual relationship and featuring an arbitration clause the validity of which must be ascertained in time. However it is doubtful that this would also apply to atypical arbitration such as sport arbitration and particularly that it would also include a situation in which the jurisdiction of the arbitral tribunal arises by reference to the statutes of a sport federation providing for arbitration in disciplinary matters. The Federal Tribunal already held in this respect that deciding whether or not a party is entitled to challenge the decision of a body of a sport federation on the basis of its statutory rules and the legal provisions applicable does not concern the jurisdiction of the arbitral tribunal seized of the dispute but rather the issue of the standing to act, namely a procedural issue to be resolved according to the pertinent rules, the application of which the Federal Tribunal does not review when seized of an appeal against an international arbitral award (judgment 4A_428/2011[7] of February 13, 2012 at 4.1.1 and 4A_424/2008[8] of January 22, 2009 at 3.3).

An author has examined the issue further. He points out that transposing to the time limit set at Art. 49 of the Code the general principle that failure to comply with the time limit agreed by the parties results in the arbitral tribunal (here the CAS) losing jurisdiction and consequently moves jurisdiction to the State Courts: in short, applying this principle would require the decisions of sport federations based in Switzerland to be brought in front of Swiss State Courts within the time limit of one month set at Art. 76 CC[9] although the twenty days time limit of Art. R49 would have expired; such a consequence would doubtlessly be contrary to the spirit of international sport arbitration as it would not ensure that athletes be treated in the same manner and according to the same procedures; moreover it would cause unmanageable complications. Hence according to this commentator, the time limit in front of the CAS must be considered as a peremptory time limit, which, if not complied with, does not result in lack of jurisdiction of the CAS but carries the loss of the right to submit the decision under appeal to any jurisdictional review and therefore the rejection of the appeal (Antonio RIGOZZI, The time limit to appeal in front of the Court of Arbitration for Sport: some considerations in light of recent practice, *in* Le temps et le droit, 2008, p. 255 ff; by the same author, L'arbitrage international en matière de sport, 2005, nr 1028 ff). This opinion appears convincing *prima facie*. Moreover if it were sufficient for a party to wait for the time limit at Art. R49 of the Code to expire before seizing Swiss State Courts, that party would be in a position to exclude arbitral jurisdiction simply by doing nothing.

This being said it is not necessary to issue a definitive decision as to whether or not failure to comply with the time limit affects the jurisdiction of the CAS. Indeed, for the reasons hereafter, the grievance based on Art. 190 (2) (b) PILA appears unfounded anyway even if the matter is capable of appeal in this respect.

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[7] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o/

[8] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-no-review-of-the-decision-of-the-/

[9] Translator's note: CC is the French abbreviation for the Swiss Civil Code.

4.3.2 As to Art. 334 ADR the Appellant does not appear to argue that the provision would be inapplicable in this case anyway, even if its requirements were met, because it would have to be superseded by Art. 4 (23) of annex H of the NSA or by Art. 8.1 and 13.2.2 of the WAC. The argument would be doomed anyway. Indeed the CAS found in a way that binds the Federal Tribunal that the parties did not dispute that the ADR were applicable to the proceedings (award at 29) and also that the NSA and Italian law were applicable only in the alternative (award at 32). As to the two provisions of the WAC invoked by the Appellant, they do not deal with the issue of the time limit to appeal but require in particular a hearing within a reasonable time.

Furthermore it is not disputed and it could not be disputed that the statement of appeal was indeed submitted by the Respondent within a month after receipt of the full file communicated by CONI at the Respondent's request, or that the latter asked the file within fifteen days from receipt of the full decision. All the requirements of Art. 334 ADR were accordingly met in this case. Moreover this applies even more if, as the Respondent argues in the alternative, the fax notification of the TNA decision on November 19, 2010 could not start the time limit to appeal anyway because Art. 277 ADR states that only the receipt of a full copy of the decision notified by registered letter with acknowledgment of receipt can do so. The alternate argument must not be examined any further and the same applies to the Appellant's objections as to its admissibility.

The only issue in dispute as to the admissibility of the Respondent's appeal relates to the abuse of right that the Respondent would have committed according to the Appellant. In this respect the CAS held that the ICU could not be found at fault for not having the full file before December 13, 2010. No matter what the Appellant says, such a legal assessment of the behavior in dispute is beyond criticism. Indeed the CAS finds in a way that binds this Court that the Respondent participated in the first instance proceedings only in part as from September 6, 2010, the explanatory note sent to the UPA of CONI on July 5, 2010 being merely in answer to a request for information from this body. It was therefore understandable that the Respondent made use of its right to obtain the full case file including the documents relating to the preliminary investigation in order to be able to decide whether or not an appeal should be made against the decision of the TNA and, in the affirmative, in order to be in a position to submit the reasons in support of its appeal on the basis of all the pertinent elements in the file of this disciplinary matter. Moreover it must be pointed out that between July 27, 2010, when the TNA was seized and its decision on October 21st, 2010, there is less than three months, so that it would be unrealistic to argue that the Respondent procrastinated willingly by failing to demand the full file when the case was still pending in front of the TNA. More generally, one does not see what interest the Respondent would have had to postpone its appeal to the CAS as much as possible if one bears in mind that the cyclist it suspected of a doping violation had been acquitted by the competent sport tribunal of his country. It was rather in the Respondent's interest and indeed it was its duty to act diligently to obtain the Appellant's ban as quickly as possible once its suspicions were proved. Finally the Appellant cannot criticize the Respondent's behavior because he himself obtained a substantial extension of the time limit at Art. 51 (1) of the Code to submit his appeal brief (ten days after the time limit had expired).

4.4

4.4.1 Treating the parties equally requires the proceedings to be organized then conducted in such a way that each party has the same possibilities to present its case. Pursuant to this principle the arbitral tribunal must treat the parties in the same manner at every step of the proceedings (ATF 133 III 139 at 6.1 p. 143 *in medio*). Yet the notion of "proceeding" must be explained. According to case law and legal

writing this means the pre-award phase, namely the proceedings from the constitution of the arbitral tribunal until the proceedings are closed including oral arguments as the case may be, to the exclusion of the deliberation of the arbitral tribunal (judgment 4A_360/2011[10] of January 31st, 2012 at 4.1; BERGER/KELLERHALS, *op. cit.*, nr 1020 ff; also see: JEAN-FRANÇOIS POUDRET, in POUDRET/LALIVE/REYMOND, Le droit de l'arbitrage interne et international en Suisse, 1989, nr 1 *ad* Art. 25 CA, p. 137).

4.4.2 The Appellant's argument that the time limits were different to appeal the TNA decision for him and for the Respondent relates to a phase in the proceedings before the CAS Panel was constituted to address the appeals of the two Parties. Therefore it falls outside the *ratione temporis* scope of the guarantee invoked.

Moreover it is inaccurate to claim, as the Appellant does, that the Respondent could delay the filing of its appeal at will by not demanding the full file of the case. According to Art. 344 ADR it had to request the file within fifteen days from receipt of the full decision, failing which the time limit to appeal would start from receipt of the decision.

4.5
According to constant case law, procedural public policy within the meaning of Art. 190 (2) (e) PILA is an alternative guarantee that can be invoked only when none of the means of recourse at Art. 190 (2) (a) to (d) PILA comes into consideration. Conceived in this manner, the guarantee is a precautionary norm for procedural violations which the legislature would not have had in mind when adopting the other letters of Art. 190 (2) PILA. Its purpose is not at all to enable a party to raise a grievance falling within Art. 190 (2) (a) to (d) PILA which is not admissible for another reason (judgment 4A_14/2012 of May 2, 2012 at 2.3).

The Appellant disregards case law when claiming that the CAS would have issued an award inconsistent with procedural public policy by considering admissible an appeal made in violation of the rules of good faith. Indeed he submitted the same argument without success from the point of view of Art. 190 (2) (b) PILA.

4.6
Accordingly all arguments raise by the Appellant in connection with the admissibility of the Respondent's appeal are groundless.

5.
The Appellant also argues that the CAS would have violated his right to be heard by failing to address a number of arguments he had submitted.

5.1
The right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA does not require reasons in an international arbitral award (ATF 134 III 186 at 6.1 and the references). However it does impose on the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). This duty is breached when inadvertently or due to a

[10] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear/

misunderstanding, the arbitral tribunal fails to take into consideration some submissions, arguments, evidence and offers of evidence submitted by one of the parties and important for the decision at hand. If the award totally disregards some elements apparently important to adjudicate the dispute, it behooves the arbitrators or the respondent to justify this omission in their observations as to the appeal. They have to show that contrary to the Appellant's arguments, the elements omitted were not pertinent to the case at hand or if they were, that they were implicitly rejected by the Arbitral tribunal. However the arbitrators are not under a duty to discuss all arguments raised by the parties so that they cannot be held in breach of the right to be heard in contradictory proceedings for not rejecting, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

5.2
The Appellant recalls that in front of the CAS he based his defense mainly on the fact that many of the samples taken would have resulted in useless laboratory results due to serious analytical and pre-analytical failures. In this respects he spells out the samples in dispute, whether at the 2009 *Giro d'Italia* (May 18 and 31) or at the 2009 *Tour de France* (July 2, 10 and 20), points out their defects and indicates when and where they were raised in the written proceedings and at the hearing of March 2, 2011, which was recorded on a compact audio CD included in the case file.

According to the Appellant the CAS would have failed to address his arguments as to the reliability of the results by wrongly relying on the presumption at Art. 24 DAR – corresponding to Art. 3.2.1 WAC – according to which the laboratories accredited by the World Anti-Doping Agency (WADA) are deemed to have analyzed the samples and complied with the requirements of the security chain according to the international standard of laboratories, the cyclist having to demonstrate a deviation from the standard that could reasonably have caused an abnormal result. The CAS would have overlooked that this presumption is valid only in the presence of such a result but not when, as in the case at hand, none of the results written into the Biological Passport appears abnormal.

5.3
The Appellant's argument is not sufficient to establish a serious violation of the aforesaid principles of case law relating to one of the constitutive elements of the guarantee of the right to be heard embodied at Art. 182 (3) PILA.

It appears that if the CAS allegedly did not take into account certain criticism it heard, it was not due to oversight or a misunderstanding but, even according to the Appellant, as a consequence of the interpretation the CAS made of a specific provision of the DAR, in other words intentionally. Yet the interpretation of a provision in the anti-doping rules of a sport association relates to the way in which the law was applied and consequently escapes review by the Federal Tribunal seized of an appeal against an international arbitral award.

Be this as it may, the issue as to the regularity of the analytical and pre-analytical procedures was extensively discussed at the hearing of March 2, 2011, with the assistance of the party appointed experts and the CAS dealt with it specifically in the award under the caption "the reliability of the results" (nr 54 to 65), by examining the issue at length to reach a finding, among other conclusions, that the samples taken from the Appellant during the 2009 *Giro d'Italia* and the 2009 *Tour de France* were valid (nr 60). The detailed reasons of the CAS as to the validity of the samples and with regard to possible irregularities influencing the results of the analysis relate to the assessment of the evidence and as such escape judicial review by the Federal Tribunal. It is therefore in vain that the Appellant argues against

them and his argument is also clearly of an appellate nature. He tries to challenge the facts on which the arbitral award under review was based under the disguise of an argument that his right to be heard was breached, as though he were arguing in front of a jurisdiction empowered to review the facts freely. Consequently the argument based on the violation of the right to be heard does not appear founded, to the extent that the matter is capable of appeal in this respect.

6.
Finally the Appellant argues that the CAS issued an award inconsistent with public policy within the meaning of Art. 190 (2) (e) PILA.

6.1
An award is inconsistent with public policy when it disregards the essential and broadly recognized values which, according to prevailing Swiss concepts, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3).

Procedural public policy guarantees to the parties the right to an independent judgment as to the legal and factual submissions submitted to the arbitral tribunal in accordance with the applicable procedural law; procedural public policy is breached when some fundamental and generally recognized principles were violated, thus leading to an intolerable contradiction with the feeling of fairness, so that the decision appears incompatible with the values recognized in a state of laws (case quoted at 2.2.1).

An award is contrary to substantive public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles are in particular compliance with contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures and the protection of incapables (case quoted *ibid*).

6.2
The Appellant argues in substance that the Biological Passport from which the CAS reached its conviction as to a violation of anti-doping rules, does not have a sufficient and undisputed scientific basis, is evidence administered exclusively by the Respondent without any guarantee of independence, is vague to the extent that it cannot establish a specific violation and finally causes a reversal of the burden of proof contrary to the principle of *in dubio pro reo*, as it requires the athlete implicated in disciplinary proceedings to demonstrate that the abnormal variations of the biological markers have a physiological origin whilst the anti-doping authority, for its part, does not have to prove a specific violation.

The argument thus summarized is obviously of an appellate nature as most of the factual allegations on which it is based go far beyond the factual findings in the award under appeal and sometimes contradict them in violation of the principles applicable in this respect (see above at 3). This is in particular the case of the arguments at § 143 (a) to (c) of the appeal brief, which rely only on the recording of the hearing of March 2, 2011.

Moreover it is impossible to connect the Appellant's argument to the specific and strictly limited concept of public policy as defined by the Federal Tribunal. It must be recalled that according to well-established case law, the issue of reversing the burden of proof in sport disciplinary proceedings does not concern public policy but relates to the burden of proof and to the assessment of the evidence, issues which, in

private law, cannot be decided on the basis of concepts of criminal law such as the presumption of innocence and the principle *in dubio pro reo* and the guarantees in the European Convention on Human Rights (judgment 4A_612/2009[11] of February 10,2010 at 6.3.2; judgment 5P.83/1999 of March 31st, 1999 at 3d; judgment 4P.217/1992 of March 15, 1993, of 8b non published *in* ATF 119 II 271). Consequently it is in vain that the Appellant seeks to demonstrate at this stage in the proceedings the lack of reliability and the other defects which according to him would affect the indirect method of detecting blood doping by way of the Biological Passport. By doing so he merely questions the appropriateness of the evidence used against him and the way in which the evidence was administered in this case. This does not concern public policy within the meaning of Art. 190 (2) (e) PILA.

The Appellant is aware of this as he proposes that the concept of public policy should be interpreted less strictly than with regard to classic international arbitration when the dispute involves disciplinary sanctions inflicted upon athletes. It is indeed true that the peculiarities of sport arbitration were taken into account by federal case law with regard to certain specific procedural issues, such as the opting out of appeals (ATF 133 III 235 at 4.3.2.2 p. 244). Yet this does not mean that the same should be done with regard to the general ground of appeal derived from the incompatibility of the award with public policy, unless one would want to create an actual *lex sportiva* through case law, which could raise some issues from the point of view of the respective competences of the legislature and the judiciary in the Swiss Confederation. More fundamentally, the Respondent points out with some pertinence in its answer that if the principle of *in dubio pro reo* is beyond discussion in an ordinary criminal or disciplinary proceedings as a consequence of the broad investigative and coercive powers of the state, its strict application to disciplinary proceedings conducted by private bodies that do not have such powers towards the athletes under suspicion of forbidden practices could prevent the system created to fight the scourge of doping in sport from functioning correctly.

This being so the Appellant's last argument does not appear more founded than the others. Consequently the appeal must be rejected.

7.
The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF). He must compensate the Respondent (Art. 68 (1) and (2) LTF) but not the FCI or the CONI as the latter did not submit an answer.

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 6'000 shall be borne by the Appellant.

3.
The Appellant shall pay an amount of CHF 7'000 to the International Cycling Union for the federal judicial proceedings.

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[11] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/

4.
This judgment shall be notified to the Parties and to the Court of Arbitration for Sport.

Lausanne June 18, 2012.

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Carruzzo