

4A_110/2012¹

Judgment of October 9, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Kolly,
Clerk of the Court: Carruzzo

X. _____,
Represented by Mr. Sébastien Besson,
Appellant,

v.

1. International Cycling Union (ICU),
Represented by Mr. Philippe Verbiest
2. Federation Z. _____,
Represented by Mr. Cyril Coomans,
Respondent,

Facts:

A.

A.a

X. _____, born in 1976, is an elite bicycle racer and a specialist in mountain biking.²
He holds a license delivered by Z. _____ Federation (hereafter: Z. _____).

The International Cycling Union (hereafter: ICU) of which Z. _____ is a member, is the Association of National Cycling Federations: with a view to fighting doping in this sport, it adopted some anti-doping regulations (hereafter: ADR).

A.b

¹ Translator's note: Quote as X. _____ *v.* International Cycling Union (ICU) and Federation Z. _____, 4A_110/2012. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

² Translator's note: In English in the original text.

On June 6, 2010, X. _____ underwent a drug test while participating in a competition organized by the ICU. On the 19th of the same month he underwent a similar test off-competition. The analysis of the two samples, confirmed by a counter-analysis, showed the presence of an illicit substance, clomiphene,³ in the bicycle racer's urine.

In July 2010 he was terminated by his team and by another employer heretofore providing him with a global yearly income of some EUR 154'000. He then opened a sport shop.

In a letter of August 25, 2010, Z. _____ informed the ICU that it opened disciplinary proceedings against X. _____ due to these two alleged doping violations.

On October 20, 2010, the ICU enquired from Z. _____ as to the financial penalty foreseen by Art. 326 ADR. According to § 1 (a) of this provision a bicycle racer belonging to a team registered with the ICU, when banned for two years or longer, shall also be subject to a mandatory fine amounting to his net yearly income derived from cycling, *i.e.* 70% of the corresponding gross income, such amount being reduced if justified by the financial situation of the license-holder but by no more than half.

In a decision of November 22, 2010, the Anti-Doping Disciplinary Committee of Z. _____ banned the racer for two years from this date and imposed a fine of EUR 7'500.

B.

B.a

On January 5, 2011, the ICU appealed to the Court of Arbitration for Sport (CAS) and appointed Mr. Olivier Carrard⁴ as arbitrator. In his appeal brief of January 17, 2011, it submitted that X. _____ should be ordered to pay a fine of EUR 104'432.30.

On January 21, 2011, the bicycle racer appointed Professor Ulrich Haas as arbitrator. Z. _____ approved this nomination.

On March 10, 2011, the General Secretary of the CAS advised the Parties that the dispute would be submitted to an arbitration Panel (hereafter: the Panel) composed of Professor Luigi Fumagalli as Chairman and the aforesaid arbitrators Carrard and Haas.

³ Translator's note: A synthetic drug mainly used in female infertility cases.

⁴ Translator's note: Disclosure: the Translator and Mr. Olivier Carrard are Partners in the law firm of ZPG in Geneva.

On the same day Z. _____ filed an answer in which it submitted that the matter was incapable of appeal or alternatively that the appeal should be rejected and the decision under appeal confirmed.

On April 8, 2011, X. _____, represented by Mr. Antonio Rigozzi, sent his answer to the CAS. In addition to the rejection of the appeal he submitted that a new decision should be issued so that the ban would run from July 27, 2010 (instead of November 22, 2010), causing the ban to expire on July 26, 2012. There should be no fine or one amounting to one symbolic franc.

According to a Procedural Order of June 23, 2011, signed by the Parties, the hearing was held on July 13, 2011. At the hearing, counsel for X. _____ asked arbitrator Carrard in substance whether he considered himself capable of being sufficiently open minded to hear the arguments of the Parties and to discuss them with his co-arbitrators without *a priori* as he had already sat twice as arbitrator appointed by the ICU in a Panel dealing with the financial penalty foreseen at Art. 326 ADR (award of October 4, 2010, in CAS case 2010/A/2063, *UCI v. José Antonio Redondo Ramos & Real Federación Española De Ciclismo* [RFEC] [hereafter: the *Redondo* award], and award of February 18, 2011, in CAS case 2010/A/2101, *UCI c. Aurélien Duval & Fédération Française de Cyclisme* [FFC] [hereafter: the *Duval* award]). Satisfied by the affirmative answer given by the Arbitrator appointed by the ICU, Mr. Rigozzi stated that his client had no intention to challenge the Arbitrator's presence within the Panel, adding that he had "no problem with the constitution of the Panel" (French translation of the English stenographic record of the hearing, Appellant's Exhibits 10 and 10*bis*). At the outset of the hearing, the Parties confirmed that they had no objections as to the proceedings followed and indicated that they considered that their right to be heard had been complied with.

On July 19 and 27, 2011, the Parties were invited to submit additional briefs concerning in particular the admissibility of the submissions by X. _____ going beyond the rejection of the appeal and as to whether or not Art. 335 ADR embodies the right to submit a counterclaim. They did so on August, 9 2011.

The time limit to issue the award was extended several times. In a fax of December 2, 2011, counsel for X. _____ expressed surprise about this. Then in an e-mail of December 11, 2011, he invited the ICU to tell him if there were any other pending cases as to the validity of the financial penalties foreseen by the ADR and if in the affirmative, what was the composition of the Panels called upon to address them, in particular the identity of the Arbitrator appointed by the ICU. Two exhibits described as 20111202171333972.pdf and 20111202100857223.pdf were attached (Appellant's Exhibit 14). In the absence of an answer by the ICU X. _____ submitted the same

request to the CAS in a fax of December 16, 2011, to which a copy of the aforesaid e-mail was attached. The ICU answered in a message of the same day that it saw no basis on which it should provide him with information on other CAS cases in which it was involved.

B.b

In a fax of December 20, 2011, the CAS sent the operative part of the award to counsel. In short, the appeal of the ICU was upheld in part and X. _____'s counterclaim was found inadmissible. He was ordered to pay an amount of EUR 28'000 to the Appellant and the disciplinary decision appealed was confirmed in all other respects. The reasons of the award were communicated to the representatives of the Parties as an enclosure to a telecopy of December 23, 2011.

On December 29, 2011, noticing that the aforesaid award referred to two unpublished CAS precedents (award of March 24, 2011, in the CAS cases 2010/A/2203, *Mickael Larpe c. FFC*, and CAS 2010/A/2214, *UCI c. Mickael Larpe & FFC* [hereafter: the *Larpe* award], and award of May 30, 2011, in the case CAS 2010/A/2288, *UCI c. Massimo Giunti & Federazione Ciclistica Italiana [FCI] & Comitato Olimpico Nazionale Italiano [CONI]* [hereafter; the *Giunti* award]), of which he claimed to be unaware, counsel for X. _____ asked the CAS to send him a copy of the awards and furthermore to answer the question asked in his fax of December 16, 2011, (Appellant's Exhibit 19).

In a telecopy of January 10, 2011, the CAS Court Office sent Mr. Rigozzi a copy of the *Larpe* and *Giunti* awards; in other respects the Office said it could not give him the information requested due to the confidential nature of pending proceedings.

On January 19, 2012, the CAS notified the original of the award to counsel for the Parties.

In a fax of February 6, 2012, counsel for X. _____, deploring the total lack of transparency shown by arbitrator Carrard throughout the proceedings, asked the CAS to reconsider its refusal to provide information as to the existence of other pending cases concerning the issue in dispute in which the ICU would also have appointed this arbitrator, as it had done in the *Larpe* and *Giunti* cases. The CAS refused again and confirmed its practice to deny information on pending cases, referring him to the statements he had made at the hearing as to arbitrator Carrard's independence and finally stating that the *Larpe* and *Giunti* awards, issued unanimously, did not address the validity of Art. 326 ADR.

New counsel for X. _____, Mr. Sebastien Besson, attorney in Geneva, states that on February 17, 2012, he was contacted by another bicycle racer who had received an

award in a case in which the ICU had appointed Olivier Carrard as arbitrator (December 29, 2011, award in the CAS case 2011/A/2349, *UCI c. Roy Sentjens & RLVB* [hereafter: the *Sentjens* award]).

C.

On February 20, 2012, X. _____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the CAS award and arbitrator Carrard's disqualification. He argues that the award under appeal was issued by an irregularly composed arbitral tribunal (Art. 190 (2) (a) PILA)⁵ and that it violates his right to be heard (Art. 190 (2) (d) PILA).

The Appellant also made a number of procedural requests based on Art. 55 (2) LTF.⁶ He asks the delegated judge to:

“i) order the CAS and the ICU to provide the following information: (1) number of CAS cases, present or past, in which the ICU appointed Mr. Carrard as arbitrator, indicating the docket number; (2) number of cases in which Mr. Carrard acted as sole arbitrator or chairman of a CAS Panel implicating the ICU, with the docket number; (3) number of awards issued as to Art. 326 ADR, with the docket number and indicating in which ones Mr. Carrard was a member of the Panel;

ii) order the CAS and the ICU to submit any pertinent document allowing verification of the information given pursuant to i);

iii) give the Appellant an appropriate time limit to supplement his arguments after receiving the information and documents referred to under i) and ii).”

In its answer of May 21, 2012, the ICU (hereafter: the Respondent) submits that the procedural requests should be rejected. On the merits it submits that the appeal should be rejected to the extent that the matter is capable of appeal.

The CAS submitted its case file and a “declaration” by Mr. Olivier Carrard dated May 29, 2012, and submitted that the appeal should be rejected in its answer dated May 31, 2012.

Z. _____ sent no answer in the time limit it had been given for this purpose.

⁵ 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.

⁶ Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

The Parties and the CAS confirmed their submissions in a second exchange of pleadings (Appellant's reply of June 19, 2012, rejoinders by the ICU and by the CAS on July 5, 2012).

Reasons:

1.

In the field of international arbitration a civil law appeal is possible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (art. 77 (1) LTF). The seat of the CAS is in Lausanne. At least one of the parties did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The award under appeal is final and therefore may be appealed on the grounds contained at Art. 190 (2) PILA. The grievances raised by the Appellant are in this exhaustive list. As to his submission that the Federal Tribunal should itself disqualify the arbitrator, it is admissible (ATF 136 III 605 at 3.3.4).

The Appellant took part in the proceedings before the CAS and he is particularly affected by the award under appeal, which confirmed a decision banning him for two years and ordering him to pay a fine of EUR 20'800 to the ICU. He therefore has a personal and present legal interest worthy of protection to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives him standing to appeal (Art. 76 (1) LTF).

There is no need to address in this case the disputed issue as to whether or not a civil law appeal is subject to the requirement of a minimum amount in dispute when it concerns an international arbitral award. Assuming this to be the case, the requirement would indeed be met as the ICU submitted in its appeal to the CAS that the EUR 7'500 fine imposed upon the Appellant by the Anti-Doping Disciplinary Committee of Z. _____ should be set at EUR 104'432.30.

The appeal has been made in the legally prescribed format (Art. 42 (1) LTF). It was filed in a timely manner. Pursuant to Art. 100 (1) LTF, the appeal against a decision must be filed with the Federal Tribunal within 30 days after the full decision is notified. According to case law, the fax notification of an international arbitral award by the

CAS does not start the time limit of Art. 100 (1) LTF (judgment 4A_428/2011⁷ of February 13, 2012, at 1.3 and the case quoted). In this case the original award signed by the Chairman of the Panel was sent to the Parties by registered mail on January 19, 2012, and Mr. Rigozzi, then counsel for the Appellant, received it the following day. By filing its brief on February 20, 2012, 30 days after the day following the receipt of the award under appeal (Art. 44 (1) LTF), with February 19, 2012, being a Sunday (see Art. 45 (1) LTF), the Appellant consequently complied with the legal time limit within which he had to seize the Federal Tribunal.

There is accordingly no reason not to address the appeal.

2.

In a first argument based on Art. 190 (2) (a) PILA the Appellant claims that the Panel issuing the award under appeal was irregularly composed.

2.1

2.1.1 Similar to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality (ATF 125 I 389 at 4a; 119 II 271 at 3b and the cases quoted). Failure to comply with this rule leads to irregular composition under Art. 190 (2) (a) PILA (ATF 118 II 359 at 3b). To determine whether an arbitrator gives such guarantees, the constitutional principles developed with regard to state courts must be resorted to (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However the specificities of arbitration and in particular those of international arbitration should be taken into account when reviewing the circumstances of the case at hand (ATF 136 III 605⁸ at 3.2.1 p. 608; 129 III 445 at 3.3.3 p. 454).

2.1.2 The party intending to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This rule of case law, expressly included in Art. R34 of the Code for Sport Arbitration (hereafter: the Code), according to which the challenge must be made within seven days after one becomes aware of the ground for challenge, refers both to the grounds for challenge that the party effectively new and to those it could have known by exercising proper attention (ATF 129 III 445 at 4.2.2.1 p. 465 and references) and choosing to remain ignorant may in certain cases be considered as an abusive maneuver comparable with the postponement of a challenge (aforesaid judgment 4A_506/2007, at 3.1.2). This rule applies the principle of good faith to arbitral proceedings. Pursuant to the principle, the right to invoke an argument based on the irregular composition of the arbitral tribunal expires if the allegedly aggrieved

⁷ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-of/>

⁸ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/>

party does not invoke it immediately, as the party cannot keep the argument in reserve only to raise it in case of unfavorable outcome of the arbitral proceedings (ATF 136 III 605⁹ at 3.2.2; 129 III 445 at 3.1 p. 449 and the cases quoted).

2.2

2.2.1 The Appellant raises the lack of independence and impartiality of arbitrator Carrard. He argues first that the arbitrator did not comply with his duty to disclose a circumstance mentioned in the orange list at Art. 3.1.3 of the IBA Guidelines on Conflicts of Interest in International Arbitration¹⁰ (hereafter the IBA Guidelines), namely that he had been appointed twice or more by one of the parties within the last three years (as to the contents, the scope and the limits of these private regulations, see judgment 4A_506/2007¹¹ of March 20, 2008, at 3.3.2.2 and the legal writers quoted; also see: Matthias LEEMANN, Challenging international arbitration awards in Switzerland on the ground of lack of independence and impartiality of an arbitrator, in Bulletin de l'Association Suisse de l'Arbitrage [ASA] 2011 p. 10 ff, 14, with other references at footnote 15). According to the Appellant, prior to appointing him as arbitrator (on January 5, 2011) the Respondent had already appointed Mr. Olivier Carrard as arbitrator in at least four cases in which it challenged the way the National Federation involved had applied Art. 326 (1) ADR (*Redondo*, February 15, 2010; *Duval*, April 21, 2010; *Larpe*, October 21, 2010; *Giunti*, December 1, 2010). There is also a fifth case in which arbitrator Carrard's appointment took place shortly after he was appointed in the case in dispute (*Sentjens*, February 14, 2011). In addition to the alleged breach of arbitrator Carrard's duty to disclose, the Appellant argues secondly that the fact that he was appointed at least five times by the Respondent in less than a year constitutes in itself a circumstance demonstrating that the arbitrator did not guarantee sufficient independence and impartiality. Thirdly, according to the Appellant, such repeated appointments of the same arbitrator by the same party would be even more detrimental and suspicious because they were made in cases involving the same legal issue.

The Respondent principally objects that the Appellant's right to invoke Art. 190 (2) (a) PILA has expired. In its view, as of the hearing in this case (July 13, 2011) the Appellant was aware of at least three awards issued by a Panel comprising arbitrator Carrard dealing with the issue of the fine. They are the aforesaid *Redondo* and *Duval* awards, to which one should add the March 8, 2011, award in the CAS case 2010/A/2038, *Franco Pellizzotti versus CONI & UCI* and CAS 2011/A/2335, *UCI versus Franco Pellizzotti, FCI*

⁹ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/>

¹⁰ Translator's note: In English in the original text.

¹¹ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/application-of-iba-rules-to-assess-an-international-arbitrators-/>

and CONI (hereafter: the *Pellizotti* award) which was published on the CAS website on June 14, 2011. As to the *Larpe* and the *Giunti* awards they did not deal with the principle of the fine. The *Sentjens* award, however, did so with regard to Art. 1 and 14 ECHR and the principle of proportionality, but it had not yet been issued at the time of the aforesaid hearing. According to the Respondent the Appellant forfeited the right to invoke afterwards the irregular composition of the Panel issuing the award under appeal as a consequence of his awareness of the cases in which the ICU had appointed Mr. Carrard as arbitrator and in view of the statements he made at the hearing and particularly his statement that he had no problem with the constitution of the Panel when he could have challenged the aforesaid arbitrator. Alternatively, the Respondent denies that the three grounds invoked by the Appellant would be sufficient to base a challenge. While conceding that it often appoints Olivier Carrard – a fact the Appellant’s former counsel could not be unaware of – it assures that he never represented it in Court, that he was never “a member or an employee or a representative of the association” (answer nr. 46). It adds that the award under appeal is the only one dealing with the validity of the financial penalty under Swiss law, so that the other awards quoted by the Appellant could not be considered as precedents in this case. Still, according to the Respondent, the Appellant’s only concern was to know whether arbitrator Carrard felt capable to express an objective opinion as to the issue in dispute, his participation in the *Redondo* and *Duval* awards notwithstanding. The arbitrator’s declarations at the hearing reassured the Appellant.

The CAS too takes the view that the challenge to the composition of the Panel is late. It firmly states that his denials notwithstanding, the Appellant was aware of the *Larpe* and *Giunti* awards before receiving the operative part of the award under appeal. It also insists on the fact that at no time during the arbitral proceedings, previous counsel for the Appellant, Mr. Rigozzi – a specialist of sport arbitration and the author of several articles concerning the CAS, in front of which he regularly appears – challenged Mr. Carrard’s presence in the Panel although he could have done it immediately after learning the appointment of the arbitrator by the Respondent, his participation in the *Redondo* and *Duval* cases objectively calling for the application of Art. 3.3 of the IBA Guidelines. In any event, the CAS takes the view that as a consequence of the specificities of sport arbitration, an exception should be made to the formal criterion of the orange list for this kind of arbitration, following the example of what is proposed in explanatory note number 6 for situations such as maritime arbitration, in which the choice of the arbitrators takes place within a very narrow group of specialists. Finally, it points out as additional proof of the arbitrator’s independence that the award under appeal completely departs from the other comparable decisions issued by other Panels including Mr. Carrard.

2.2.2 The principles recalled at 2.1.2 above were applied by the Federal Tribunal in a case where Art. 3.1.3 of the IBA Guidelines could be taken into consideration. It was held that the Appellant was late because he did not challenge the arbitrator at the time his appointment had been confirmed, although he knew that the arbitrator had already been appointed at least twice by his opponent within the last three years (judgment 4A_256/2009¹² of January 11, 2010, at 3.1.2, approved by BERNHARD BERGER, *in* RJB 148/2012 p. 165). There is no reason not to apply these principles in this case provided their requirements are met. This must be determined depending on the Appellant's awareness at the time of the pertinent circumstances in this respect. As the Appellant was assisted by counsel (Mr. Rigozzi), counsel's awareness shall be attributed directly to the client (representation of knowledge; Wissensvertretung; cf. CHRISTINE CHAPPUIS, *in* Commentaire romand, Code des obligations I, 2nd ed. 2012, nr 21 *ad* Art. 32 CO). The change of counsel that the Appellant made for unknown reasons after the reasons of the award under appeal were notified remains without impact in this context.

There is a dispute as to when Mr. Rigozzi became aware of the unpublished *Larpe* (March 24, 2011) and *Giunti* (May 30, 2011) awards and of the fact that they had been issued with Mr. Carrard participating as arbitrator appointed by the Respondent. The Appellant argues that it was on January 10, 2010, when the CAS, following his request of December 29, 2011, sent him the two awards to which the award under appeal, the reasons of which he had been communicated by fax on December 23, 2011, referred. Conversely, the CAS, arguing that the Appellant is denying the obvious, asserts that the e-mails sent by Mr. Rigozzi to counsel for the Respondent on December 11, 2011 – attached to a fax of December 16, 2011, sent to the CAS by counsel for the Appellant – had the two aforesaid awards as an attachment. On the basis of the exhibits in the record, however, it is not possible to consider the latter statement as proved. Indeed the e-mail of December 11, 2011, has no specific reference to the *Larpe* and *Giunti* awards. There is a reference to two attachments but by way of two sequences of numbers which do not allow a connection with these two awards (see B.a last § above). Moreover, if the CAS did attach a copy of the awards to its Exhibit 3, it is striking to notice that this Exhibit (a fax number 0422 of December 16, 2011, sent from Mr. Rigozzi's firm) contains only three pages, corresponding to the aforesaid e-mail and fax. Also, one does not see for which reason former counsel for the Appellant would have immediately requested a copy of these awards upon receipt of the reasons of the award under appeal if he had already been aware of them. Furthermore, it is striking to notice that the Respondent itself – far from confirming receipt of the two awards allegedly attached to the e-mail sent to its counsel on December 11, 2011 – does not dispute the

¹² Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/invalid-waiver-of-the-appeal-to-the-federal-tribunal-through-ref1/>

Claimant's assertions that he became aware of them only after the award under appeal was notified (see for instance at 17, 19 and 60 of the award; nr. 6, 13 and 20 of the rejoinder). To the contrary, the Respondent concedes that the aforesaid award contains two references to the *Giunti* and *Larpe* awards "of which the Appellant was not aware" (answer nr. 67 and refers to them as "awards unknown to the Appellant" (answer nr. 68).

Be this as it may, at the hearing in this case the Appellant was at the very least aware of the *Redondo* and *Duval* awards through Mr. Rigozzi. Moreover he was deemed to know of the *Pellizotti* award since it had been published on the CAS website on June 14, 2011, namely a month earlier. He was doubtlessly aware of it moreover, considering that he alluded to it at the hearing as the Respondent shows (rejoinder nr. 9 and the exhibits quoted). More generally, one hardly sees based on ordinary experience how the Appellant's former counsel – a specialist of sport arbitration and in particular of CAS case law, as well as of the subtleties of this institution – would not have been more broadly aware of the Respondent's inclination to appoint Mr. Carrard as arbitrator. This is confirmed by the following passage, quoted by the Respondent (answer nr 54) of his seminal work (ANTONIO RIGOZZI, *L'arbitrage international en matière de sport*, 2005, p. 494, footnote 2672): "for example that (*sic*) the ICU, whose seat is in Lausanne, almost systematically appoints Mr. Olivier Carrard, an arbitrator domiciled in Geneva..." (emphasis supplied by this Court). Thus, in the most favorable assumption for him, the Appellant was aware of at least two awards – *Redondo* and *Duval* – which had dealt with the issue of the financial penalty foreseen at Art. 326 ADR issued by Panels in which the Respondent had appointed Mr. Carrard as arbitrator. He was therefore in the same situation as the Appellant whose appeal was rejected in the aforesaid case 4A_256/2009.¹³ Consequently, the rules of good faith, of which Art. R34 of the Code is the embodiment, required him, if not to challenge Mr. Carrard within seven days after he became aware of the second award, at the very least to comply with his duty of curiosity (see ATF 136 III 605 at 3.4.2 p. 618) to formally ask this arbitrator at the July 13, 2011, hearing how many times he had been appointed by the ICU to a CAS Panel, whether or not called upon to decide the aforesaid issue of the financial penalty to be imposed to a bicycle racer banned for two years or more and, depending on the answers he would receive, to challenge the arbitrator without further delay. If he had done so and asked the aforesaid arbitrator and/or the Respondent the questions on which the procedural requests submitted to this Court are based, he would have learned that the Respondent had appointed Olivier Carrard as arbitrator in three other cases (*Larp*, *Giunti* and *Sentjens*), perhaps also in a fourth (March 29, 2012, award in CAS case 2010/A/214, *Mikel Astarloza Chaurreau v. RFEC*

¹³ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/invalid-waiver-of-the-appeal-to-the-federal-tribunal-through-ref1/>

and CAS case 2010/A/2142, *UCI v. Mikel Astarloza Chaurreau & RFEC*, Arbitrator Carrard's appointment having taken place on June 10, 2010, according to the Appellant, see reply nr 33; as to the specificities of the constitution of the Panel in these two cases, see, however nr 3 of the CAS rejoinder). Assuming these individuals would have invoked the confidential nature of the information to refuse to give it to the Appellant, then it goes without saying that they could not validly argue today that the grievance based on Art. 190 (2) (a) PILA was forfeited. However, the fact of the matter is that at no time during the hearing of July 13, 2011, did the Appellant ask Mr. Carrard to state whether or not he had been appointed by the Respondent in other CAS cases and, in the affirmative, to state how many and what were the others parties concerned or the issues involved. The Appellant claims that the question he asked at the hearing "could not be clearer"; in his opinion when he asked the arbitrator "if there was anything new after the *Duval* award" he indicated "without any possible ambiguity that he was interested in knowing if there were other cases involving the ICU and arbitrator Carrard" (reply nr 42). He cannot be followed. Indeed, no matter what the Appellant says, the very cryptic wording of the question did not put the arbitrator into a position to give it the meaning alleged by the Appellant. The context in which it was asked, as appears from the stenographic record of the hearing summarized above (see B.a, 6th §) confirms if necessary that the dialog taking place between Mr. Rigozzi and arbitrator Carrard had a much more limited object, as it merely sought to determine whether the Arbitrator was capable of sufficient open mindedness to objectively decide the issue in dispute, *i.e.* that of the validity of Art. 326 ADR in the framework of Art. 163 of the Swiss Code of Obligations (CO), despite the fact that he had been on the Panel issuing the *Duval* award, which also dealt with the aforesaid regulation. It is therefore not surprising that the question put to the Arbitrator remained unanswered in view of its obvious lack of clarity. Yet if the question had really had the meaning the Appellant claims, one may wonder with the Respondent (rejoinder nr 18) and the CAS (rejoinder nr 6) why the Appellant not only failed to insist that Mr. Carrard give a clear and unequivocal answer on the item at issue but moreover stated that he was perfectly satisfied with the arbitrator's explanations and had no problem with the constitution of the Panel. Everything actually leads to the belief that the Appellant was fully aware that the Respondent habitually appointed Olivier Carrard as arbitrator and that he therefore enquired merely as to whether or not the latter was capable of changing his opinion and that the answers he received reassured him. Therefore he cannot justify the fact that he did not investigate any further at the time as to how many times Mr. Carrard had been appointed by the Respondent and claim that the arbitrator disregarded his duty to disclose this spontaneously (disclosure; see BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed. 2010, nr 897 to 900). Moreover, such a duty only exists with regard to the facts for which the arbitrator has reason to believe that they are unknown by the party which could rely on them (ATF 111 Ia 72 at 2c *i.f.*, p. 76). Yet for the reasons indicated above

with regard to the Appellant's former counsel, arbitrator Carrard could consider in good faith that this exception was applicable in this case. Finally, the steps taken by the Appellant's counsel in December 2011 (see B.a, last §, above) – shortly before the award under appeal was issued – with a view to obtaining the same information that he could and should have asked some months earlier, were manifestly late.

This being so, the Appellant has forfeited the right to challenge the regularity of the composition of the Panel that issued the award under appeal by way of a civil law appeal against the award. The merits of his argument need therefore not be examined and his procedural requests made in the appeal need not be addressed (see C., above).

3.

In a second group of arguments the Appellant claims that his right to be heard was violated in several respects.

3.1

The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA has no different contents in principle from what is recognized by constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus, it was held in the field of arbitration that each party has the right to express its views on the essential facts for the judgment, to present its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

3.1.1 In Switzerland, the right to be heard mainly relates to the finding of facts. The right of the parties to be asked for their views on legal issues is recognized only restrictively. As a rule, according to the adage *iura novit curia*, state courts or arbitral tribunals freely assess the legal consequences of the facts and they may also base their decisions on rules of law other than those invoked by the parties. Consequently, unless the arbitration agreement limits the task of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically on the scope to be given to the rules of law. However, the parties must be asked their views when the court or the arbitral tribunal considers basing its decision on a provision or a legal consideration that was not discussed in the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and the references).

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

misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important for the decision to be made. If the award totally overlooks some elements apparently important to decide the matter, it is incumbent upon the arbitrators or the Respondent to justify such omission in their answer to the appeal. They have to demonstrate that, contrary to the Appellant's arguments, the elements omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly rejected by the arbitral tribunal. However the arbitrators are not obliged to discuss all arguments invoked by the parties, so they cannot be held in breach of the right to be heard in contrary proceedings for failing to reject, even implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

Moreover, the Federal Tribunal has held that it is not incumbent upon this Court to decide whether or not the Arbitrators should have upheld the argument they overlooked had they dealt with it. This would indeed disregard the formal nature of the right to be heard and the necessity to annul the decision under appeal in case it is violated, irrespective of the chance of the Appellant to obtain a different result (judgment 4A_46/2011¹⁴ of May 16, 2011, at 4.3.2 *in fine* and the precedents quoted).

3.2

3.2.1 Relying on the aforesaid case law (above 3.1.1) the Appellant argues first, that unbeknownst to him, the Panel resorted to the *Larpe* and *Giunti* awards on the same issue, namely the interpretation and the use of Art. 326 ADR when the latter awards concerned two cases in which the Respondent was a party and had appointed Olivier Carrard as arbitrator. In his view, the Panel should have given him an opportunity to express his position on these legal materials accessible only to the arbitrators and to his opponent in order to ensure equality between the parties. By failing to do so, it had accordingly violated his right to be heard. Hence the formal nature of this right would require the annulment of the award under appeal, whether or not the two precedents in question were pertinent to the resolution of the dispute.

3.2.2 The argument does not withstand scrutiny. The right to be heard is doubtlessly formal in nature, as was recalled above (3.1.2, 2nd § above). Yet for the award under appeal to be annulled on this ground it must have been violated. This requirement is not met in this case.

¹⁴ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg/>

It must be emphasized, first of all, that in the arbitral proceedings the Respondent never invoked the *Larpe* and *Giunti* awards. Therefore it did not benefit from its knowledge of these two precedents to its opponent's detriment and it could not bear responsibility from a possible violation of the Appellant's right to be heard in this respect. Neither did the Respondent include the two arbitral awards in the file of the arbitration and accordingly the Appellant cannot argue that he would not have been given access to some evidence produced by his opponent.

Furthermore, it is not certain that CAS awards could be considered as legal principles within the meaning of the aforesaid federal case law. Indeed, as opposed to the Federal Tribunal – the supreme judicial body of the Confederation, issuing judgments in this capacity that bind the lower Courts – the arbitrators, whose powers are essentially based on the will of the parties, do not issue awards the solutions of which would necessarily bind another arbitral tribunal called upon to decide the same issue, so that at least theoretically, it appears difficult to consider that arbitral case law would be a source of arbitration law (RIGOZZI, *op. cit.*, nr 432, although this writer points out that “legal practice is very different”[*op. cit.*, nr 433 to 435]).

Finally and above all, the Respondent convincingly shows that the Panel did not rely on the *Larpe* and *Giunti* precedents to issue its decision on the issue in dispute (answer 68 to 79). It rightly points out that the arbitrators referred to these awards only to *first*, recall the definition of the net annual income described at Art. 326 (1) (a) ADR (award under appeal nr 145 footnote 22), and *second*, to find that the awards did not address the issue of the proportionality of the fine (award under appeal nr 200 footnote 47); with these two precedents they also quoted the *Redondo*, *Duval* and *Pellizotti* awards, of which the Appellant was aware and in any event the *Larpe* and *Giunti* awards to not deal with the validity of Art. 326 ADR in the light of Art. 163 CO.

In such a context it is manifestly inaccurate to argue that the Panel based its decision on legal considerations alien to the issues raised during the arbitral proceedings and that the Appellant could not anticipate their importance.

3.3

Based on the principles of case law concerning this aspect of the right to be heard (see 3.1.2 above) the Appellant secondly argues that the Panel disregarded its minimum duty to address and deal with the pertinent issues on three counts.

3.3.1 The Appellant argues that the Arbitrators first ignored an entire part of the Appellant's argument as to the admissibility of his counterclaim (appeal 143 to 149; as to the object of these submissions, see B.a 5th § above). They did not have address his argument at the hearing that the interpretation of Art. R55 of the Code, as put forward

by the Respondent, would create unequal treatment and a violation of procedural public policy. Indeed the ICU would have a longer time limit to appeal than the bicycle racer, because it could artificially extend it by asking the hearing body of the National Federation for the full file of the case. This would enable it to decide whether or not to appeal when it knows if the bicycle racer already appeals the first decision, while the latter, if he was deprived from the possibility to submit a counterclaim, would have to file a statement of appeal as a preventive measure and pay the deposit of CHF 1,000. The Panel also failed to address the argument that the new interpretation of Art. R55 of the Code could not be invoked against the Appellant because it appeared for the first time in the unpublished *Duval* award.

The argument is unfounded. The Panel summarizes the Appellant's position as to the admissibility of the counterclaim and refers *expressis verbis* to the argument according to which the inadmissibility of a cross-appeal would create inequality between the parties (award nr 99). It spells out the Appellant's arguments which it did not take into account (award nr 100), which *a contrario* implies that it would take the other arguments into consideration, as summarized in the previous paragraph of the award. Finally it devotes more than three pages to the issue of the "admissibility of Mr. X. _____'s counterclaim" (award nr 119 to 131). It is true that the arbitrators do not appear to have rejected, even implicitly, the argument based on unequal treatment. However they were not obliged to do so according to the aforesaid case law because the argument was devoid of any pertinence. Indeed, not only the Appellant was not deprived from the possibility to challenge the decision of the Belgian Disciplinary Committee following the example of the Respondent, but the Federal Tribunal already rejected the same argument in a recent decision to which reference can be made (judgment 4A_488/2011¹⁵ of June 18, 2012, in the *Pellizotti* case, at 4.4 and 4.5). As to the second argument, the Panel rejected it implicitly because it held – rightly or wrongly – that it could substantiate its reasons by some references to the *Duval* award. Moreover, it justifies the inadmissibility of the bicycle racer's counterclaim by two objective circumstances unconnected with the aforesaid award, namely the repeal of Art. R55 of the 2004 version in the Code in the 2010 version in force since January 1, 2010, as the former gave the possibility to make a counterclaim in the answer to the appeal and furthermore by the repeal of Art. 335 ADR two months before the Appellant's answer, a provision as to which certain Panels, but not the one that issued the award under appeal, held that it gave the Respondent in the appeal the right to file a counterclaim.

¹⁵ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an/>

Be this as it may (and irrespective of the formal nature of the right to be heard) the Appellant no longer has any interest in the submission of the argument. Indeed by seeking through one of his counterclaims that his ban be lifted as of July 26, 2012, the bicycle racer sought to participate in the London Olympic Games (July 2007 – August 12, 2012). Yet it is widely known that the games are over. Accordingly one does not see the interest the Appellant could retain to the annulment of the award simply because this counterclaim was held inadmissible (see *mutatis mutandis* judgment 4A_134/2012¹⁶ of July 16, 2012, at 2). His other counterclaim is also without object, as if the Panel took into consideration his arguments concerning the fine “as a defense in the appeal” (award nr 131) it considered that the financial penalty inflicted upon the bicycle racer in the first instance (EUR 7’500) should not be reduced but rather increased to EUR 20,800.

3.3.2 According to the Appellant the Panel also failed to take into account his arguments as to the specificity of mountain biking when assessing the amount of the financial penalty inflicted upon him. In particular it neglected to take into consideration his detailed explanations seeking to demonstrate the important differences between a professional road bicycle racer and a professional mountain biker.

It is not so. Here too, the arbitrators doubtlessly did not specifically reject the Appellant’s arguments. However, by relying on Art. 326 ADR they clearly rejected, albeit implicitly, the idea that the provision would not apply to a professional mountain bike racer. Moreover, there is nothing in the rule at issue authorizing them to decide differently and to draw any distinctions between the various cycling disciplines to compute the financial penalty when, pursuant to the aforesaid rule, the amount of the fine must be set as a proportion of the bicycle racer’s yearly income. Moreover, one does not see why a professional mountain bike racer should be sanctioned less severely than a bicycle road racer for breaching anti-doping rules.

3.3.3 Finally, the Appellant argues that the Panel failed to take into consideration his argument as to the nullity of Art. 326 ADR in the light of Art. 163 CO because the process by which the financial penalty to be inflicted upon the bicycle racer convicted of doping would be assessed is not determinable.

A contractual penalty is valid if its amount is determined or at least determinable; it is not admissible however if its amount can be unilaterally set by the creditor (ATF 119 II 162 at 2 p. 165; GASPARD COUCHEPIN, *La clause pénale*, 2008, nr 462).

¹⁶ Translator’s note: Full English translation at <http://www.praetor.ch/arbitrage/federal-tribunal-recalls-that-a-litigant-needs-to-have-a-present/>

The Panel recalls that the amount of the fine pursuant to Art. 326 (1) (a) ADR, as interpreted by other CAS Panels, must be computed on the basis of the net yearly income to which the bicycle racer was normally entitled for the entire year (award nr 145). It then points out the various criteria it takes into consideration to determine it while respecting the principle of proportionality. By doing so, the arbitrators admitted, at least implicitly, that the contractual penalty based on this regulation was sufficiently determinable, contrary to what the Appellant argued. One hardly sees indeed how they could have made a precise computation of the fine to be inflicted upon him without considering that the provision was consistent with Swiss law, thus indirectly answering the Appellant's argument.

The argument is unfounded, in any event, to the extent that it is undeniable that the financial penalty foreseen at Art. 326 (1) (a) ADR is at the very least determinable. Thus the Arbitrators could not have failed to address it, albeit implicitly.

4.

The appeal must therefore be rejected. The Appellant shall consequently pay the judicial costs (Art. 66 (1) LTF). He shall also compensate his opponent for the costs of the federal proceedings (Art. 68 (1) and (2) LTF). As to Z. _____, having failed to submit an answer, it has no right to compensation.

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 3'000, shall be borne by the Appellant.

3.

The Appellant shall pay an amount of CHF 3'500 to the ICU for the federal proceedings.

4.

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

Lausanne October 9, 2012.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Carruzzo