4A_576/2012[1]

Judgment of February 28, 2013

First Civil Law Court

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

X._____,
Represented by Mr. Antonio Rigozzi
Appellant,

v.

International Weightlifting Federation,
Represented by Mr Yvan Henzer,
Respondent,

Facts:

A.
A.a
X._____ is a [name of country omitted] high level weightlifter and the member of the [name of country omitted] national weightlifting team.

The International Weightlifting Federation (hereafter: IWF according to its English acronym), which is headquartered in Lausanne with offices in Budapest (Hungary) is a non profit corporation under Swiss law, recognized by the International Olympic Committee (IOC), the members of which are the national weightlifting federations.

A.b
In the morning of September 2, 2010 the [name of place omitted] laboratory, accredited by the World Anti-Doping Agency (WADA) submitted X._____ to a first anti-doping test, which proved negative.

During the same day the [name of country omitted] weightlifter was subjected to a second doping test off competition organized by the IWF. The Cologne (Germany) laboratory also accredited by WADA, which analyzed the weightlifter's samples of urine established the presence of Boldenone[2] and of Boldenone metabolites. Boldenone is an anabolic steroid mentioned in the list of forbidden substances established by WADA.

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[1] Translator's note: Quote as X._____ *v.* Federation Internationale d'Haltérophilie, 4A_576/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

[2] Translator's Note : Boldenone is an anabolic steroid

On October 3, 2011 the Anti-Doping Commission of IWF banned X._____ for four years from September 30, 2010, when he was provisionally suspended.

B.
On October 25, 2011 X._____ filed an appeal in the Court of Arbitration for Sport (CAS).

After hearing the case the three arbitrators Panel chaired by Professor Ulrich Haas, partially upheld the appeal on July 23, 2012, and reduced the ineligibility period imposed upon the Appellant from four to two years. In short the award held that the violation of anti-doping rules the [name of country omitted] weightlifter was charged with was proved despite the athlete's denials, which he based on the modalities of the transfer of the samples from [name of place omitted] to Cologne and on the method of analysis applied by the German laboratory. However, in his view, the anti-doping rules adopted by the IWF must be interpreted "*contra proferentem*" due to their lack of clarity in order to be consistent with those of WADA, which provides for a two years ban for a first doping violation in the absence of any aggravating or mitigating circumstances.

C.
On September 28, 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.
In its answer of November 16, 2012, the IWF (hereafter: the Respondent) submitted that the appeal should be rejected. The CAS did the same in its answer of November 30, 2012, to which were attached the comments formulated by the chairman of the Panel in its name on the 29th of the same month.
The parties maintained their respective submissions in a second exchange of briefs (Appellant's reply and third brief of December 20, 2012 and January 15, 2013, Respondent's rejoinder and fourth brief on January 14 and 17, 2013).

Reasons:

1.
According to Art. 54 (1) LTF,[3] the Federal Tribunal issues its decision in an official language,[4] as a rule in the language of the decision under appeal. The CAS issued its award in English. In the briefs submitted to the Federal Tribunal the parties used French, with the exception of the Panel, whose chairman submitted observations in German. Hence according to the general rule, this judgment will 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 of Art. 190 to 192 PILA[5] (Art. 77 (1) LTF). The seat of the CAS is in Lausanne. At least one of the parties – in this case the Appellant – did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

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

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

[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.

The award under appeal is final and may consequently be appealed on all grounds stated at Art. 190 (2) PILA. The Appellant invokes no other grievances. In accordance with Art. 77 (2) *in fine* LTF he seeks the annulment of the decision.

The Appellant participated in the CAS proceedings and is particularly affected by the award under appeal as the latter imposes upon him an illegibility period of two years although this was cut in half by the appeal body. Thus he has a personal and present 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). Admittedly, the timeliness of his interest could be doubted as the sanction expired on September 30, 2012, merely two days after the appeal was filed. In comparable situations the Federal Tribunal has declared the appeal moot (see judgment 4A_134/2012[6] July 16, 2012 at 2, concerning domestic arbitration; judgment 4A_636/2011[7] of June 18, 2012 at 2.3. However this case is different from the other two and particularly from the last one quoted, to the extent that the Appellant credibly shows without being contradicted by the Respondent that he has a present interest in the annulment of the award under appeal. His interest is the risk for the Appellant, who intends to pursue his sporting career, to be punished more severely as a repeat offender if the award enters into force and becomes *res judicata* should he commit another violation in future.

There is no need to review here the disputed issue as to whether or not the Civil law appeal is subject to the requirement of a minimal amount in dispute when it concerns an international arbitral award. Assuming so, the requirement would indeed be met in this case. [Name of person omitted], the Appellant, was prevented from participating in the Olympic Games in London (July 27 – August 12, 2012) as a consequence of his ban. Yet participating in a competition of such importance is doubtlessly a financial issue for an athlete at this level, which goes far beyond the CHF 30'000.-- threshold set at Art. 74 (1) (b) LTF for a civil law appeal to be admissible.

The appeal was filed in the legally prescribed format (Art. 42 (1) LTF). It was filed in a timely manner, namely within thirty days after the full award was notified (Art. 100 (1) LTF; judgment 4A_110/2012[8] of October 9, 2012 at 1).

Hence there is no reason not to address the appeal. In doing so this Court will not follow the sequence of grievances proposed by the Appellant. Indeed it appears more logical to start with a review of the arguments concerning the collection of the samples before addressing, if necessary, the arguments as to the modalities and the results of the analyses of the samples. Indeed admitting one of the arguments concerning the circumstances of the transfer of the samples from [name of place omitted] to Cologne would necessary resolve in the award under appeal being annulled, whether or not the subsequent analysis of the samples in the laboratory was flawed.

3.

3.1

Invoking Art. 190 (2) (e) PILA the Appellant argues that the Panel issued an award contrary to public policy by depriving him from his right to carry on his profession for two years on the basis of the analysis of samples the traceability of which was not certain between the time of their collection and that of arrival to the laboratory. In his view, even though no anti-doping rule was breached, a state of laws

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[6] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/federal-tribunal-recalls-that-a-litigant-needs-to-have-a-present

[7] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/motion-to-set-aside-dismissed-because-of-the-lack-of-a-present-a

[8] Translator's note: Full English translation at: http://www.swissarbitrationdecisions.com/grounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them

cannot dispense with a custody chain insuring the traceability of the sample, in other words making sure that the sample analyzed is indeed the one given by the athlete suspected of doping.

3.2
An award is incompatible with public policy when it disregards the essential and broadly recognized values which, according to prevailing concepts in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3).

3.2.1
The chain of custody seeks to insure that an individual sample can be traced. It contains two elements: the external chain of custody, which allows tracing the course of the sample between the place it was collected and the laboratory in order to establish unequivocally the origin of the sample analyzed, namely to attribute the sample to the athlete who gave it and to him alone; the internal chain of custody, which allows reconstituting the analytical testing process and insures the traceability of the sample throughout this process (see WADA technical document TD2009LCOC reproduced at Nr 63 of the award under appeal).
Only the external chain of custody is the object of the argument in this case. The Appellant wishes to turn it into an issue of principle which according to him should be resolved by applying the so-called maxim of the elephant (see Lord Justice Stuart-Smith, in Cadogan Estates Ltd v. Morris EWCA Civ 1671 (November 4, 1998 §17: "*it is difficult to describe, but you know it when you see it*[9]"). Whatever the weight of this argument, its soundness is not certain as the issue concerns evidence *lato sensu* in sport disciplinary law, the link of which to the specific notion of public policy is not obvious (see judgment 4A_488/2011[10] of June 18, 2012 at 6.2). Be this at it may, the following considerations render the issue moot.

3.2.2
In substance the Panel describes as follows the modalities of collection of the Appellant's urine samples and their course until they reached the German laboratory (award Nr 6 to 9).
On September 2, 2010, the Appellant was subjected to a second off competition test carried out in [name of the city omitted] by two IWF anti-doping control officers named in the award. In this occasion he and his team manager signed a form stating the code number given to the containers containing the A and B samples of his urine and certifying that they were collected regularly. Back to their hotel, the officers stored the samples in the minibar of their room before transporting them in their checked in luggage on a commercial flight that landed in Budapest on September 4, 2010. The samples were then stored in a secure storage belonging to the Hungarian anti-doping agency, then they were transported on September 9, 2010 by a specialized firm to the Cologne laboratory, where they arrived the following day. According to the statement of the director of this agency, the integrity and the identity of the samples were not compromised during their transportation and storage. For its part, the German laboratory stated that the seals on the containers containing the sample were intact.
In its legal analysis of the case the Panel emphasized that the external chain of custody is not a mere formality but pursues a specific goal, which is to ensure that "*the Samples and the results generated by the laboratory can be unequivocally linked to the Athlete*[11]" (excerpt from the foresaid technical document which WADA translates as follows: [French translation omitted]. The Panel finds the link

[9] Translator's note: In English in the original text
[10] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an
[11] Translator's note: In English in the original text

established in this case. The Arbitrators enumerated as follows the circumstances enabling them to draw this conclusion (award Nr 65):

- The Appellant was subjected to an anti-doping test;
- The Appellant acknowledges that the samples were sealed;
- The containers containing the samples (Berlinger kit) were specially designed to ensure traceability and prevent manipulations;
- The containers were placed into satchels sealed by numbered clips;
- The satchels were then placed into a locked suitcase which was transported to the airport of [name of city omitted] and personally checked in by the IWF anti-doping officers for the flight to Budapest;
- The satchels arrived in Budapest – with the officers - on September 4, 2012 and were brought to the Hungarian anti-doping agency where they were stored until September 9, 2010;
- The satchels were then brought to the Cologne Laboratory by the courier company Z._____, which received them on September 10, 2010;
- Upon receiving the satchels, the Cologne laboratory found that the seals and the samples were intact;
- Dr A. who had been present during the analysis of sample B, confirmed that the sample, coded as Nr 1, was correctly closed and sealed with the green safety cap bearing code Nr 2.

The Panel emphasizes moreover that there is no indication in this case from which one could infer that the quality of the samples was not good at the time they were analyzed; indeed no degradation could be shown, whether in the Appellant's samples or in those of other athletes which had been transported and analyzed in the Cologne Laboratory together with the Appellant's samples. It also points out that the latter's expert, a Mr B._____, stated at the hearing that he did not have the least concern as to the conditions in which the samples were. Thus, for the Panel, the results generated by the Cologne laboratory can be unequivocally linked to the Appellant, so that the external chain of custody has been sufficiently established.

It appears from the foregoing that, for the Panel, the external chain of custody was complied with in this case. This conclusion derives from an assessment of the evidence and, as such, is outside the scope of review by the Federal Tribunal. Although he disputes it, the Appellant challenges this assessment and does so by way of arguments manifestly of an appellate nature, when he invokes various circumstances from which he infers that the external chain of custody would not have been established in this case (alleged lack of identification of the hotel in which the IWF anti-doping officers stayed, of the room they were in, of the flight they took to return to Budapest and of the luggage containing the samples which was put in the cargo hold of the plane, etc.). Moreover he gives no explanation which could make plausible a mistaken manipulation of the samples or a wrongful intervention by a third party who would have been able to contaminate his samples or substitute them with others with the same identification number without traces.

Hence his argument that the Panel would have issued an award inconsistent with public policy in this respect is unfounded.

4.

In another group of arguments the Appellant claims that two of the arguments he invoked in the CAS in connection with the manner in which the analysis of his samples was conducted by the Cologne laboratory caused a violation of his right to be heard in contradictory proceedings.

4.1

The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA, does not differ in principle from that which is consecrated in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at1b; 117 II 346 at 1a p. 347). Thus it was admitted with regard to arbitration that each party had the right to express its views on the facts essential for the judgment, to submit 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).

The right to be heard also imposes upon the arbitrators a minimal duty to review and address the pertinent issues. This duty is violated when inadvertently or due to a misunderstanding, the Arbitral tribunal does not take into consideration some allegations, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued (ATF 133 III 235 at 5.2)

4.2

4.2.1

In order to understand the Appellant's argument as to the alleged violation of his right to be heard, the reasons contained in the passage of the award under appeal devoted to the analysis of the samples must be summarized (Nr 67 to 85):

Firstly the Panel recalls the key principle of the Respondent's regulations, taken from the World Anti-Doping Code, according to which a laboratory accredited by WADA is presumed to have carried out the analysis of the samples in accordance with the International Standard for Laboratories, so that it behooves the athlete to reverse the presumption by showing that the standard was not fully complied with, which could reasonably have caused the abnormal analysis result. Reviewing then the various points of criticism made by the Appellant as to the modalities of the analysis of the A sample, it wonders firstly whether the German laboratory should have carried out an analysis by Isotop Ratio Mass Spectometry[12] (IRMS) in addition to the Gas Chromatography coupled with the Mass Spectrometry (GC/MS). It answers the question in the affirmative because in a remark in a footnote of a WADA technical document it is stated that in some very rare individual cases, Boldenone may be found endogenously in urine at some very low constant levels of some nanograms per liter, so that when a very low level of Boldenone is found by the laboratory, a reliable method of analysis such as IRMS must be applied to demonstrate that the substance is of exogenous origin, thus ruling out the possibility of a false positive (the athlete was not doped up despite the abnormal analysis result). The Panel found that the Cologne laboratory did carry out an IRMS analysis of the A sample, then verified if it did so correctly. The Appellant had invoked the necessity to proceed with the two steps analysis on the basis of the WADA technical document TD2004EAAS: EGC/MS to identify the forbidden substance and an IRMS, which does not allow for the identification of a substance, to demonstrate the exogenous character of the substance identified; according to him the A sample had not been subjected to such a double analysis, in violation of the aforesaid technical norm, so that the required link between the two parts of the analysis have not been established. The Panel reaches the opposite conclusion while leaving open the question as to whether or not the necessity of such a link may be deducted from WADA technical document TD2004EAAS, which it states is doubtful. In its view the required link is established for one of the substances detected, namely the Boldenone metabolites; hence it is excluded that the peaks obtained during the IRMS analysis could be attributed to any other substances than these metabolites identified in the sample given by the Appellant. Thirdly the Panel rejects his argument as to an alleged violation of the ISL by the Cologne laboratory. Finally it addresses the alleged duty to conduct a full

[12] Translator's note: In English in the original text

scan spectrum, which the Appellant deducts from WADA technical document TD2010IDCR in order to exclude the possibility that the positive result of the test would have been caused by some coelution peaks, i.e. peaks overlapping, or by mere coincidence. It points out in this respect that the Parties do not agree as to what a full scan spectrum should mean, the Appellant claiming that the scan must be made for each individual ion while the Respondent states that one scan for all ions is sufficient. The Panel considers that the issue needs not be decided. It explains this by quoting a passage from an uncontested written statement by Professor C._____, the director of the Cologne laboratory and the Respondent's expert. According to the Appellant's French translation of this statement in English a "*full scan data of the A-sample has been obtained from the first analysis of the A-sample using GC/MS. The second aliquot was used to repeat the sample preparation (which was absolutely identical) to prove that the urine aliquots are identical (confirmation). This was the case*[13]".
The Panel concludes that the analytical testing of the sample was carried out in conformity with the ISL, the presumption of conformity established by the Respondent's regulations having not been reversed. Hence, for the Panel, the Appellant committed an anti-doping violation.

4.2.2
In a first part of the argument under review, the Appellant claims that the Panel found the "required link" mentioned above (see at 4.2.1) in violation of his right to be heard in contradictory proceedings. According to him the Arbitrators would have admitted the existence of the link on the basis of a document which they had undertaken towards the Parties they would not take into consideration and which they had even excluded from the file. The long argument in the appeal brief (Nr 46 to 64) and in the reply (Nr 9 to 22), essentially of an appellate nature, is not sufficient to demonstrate the validity of the argument. The Appellant concedes that the Panel seems to have drawn its conclusion that the link was established for the Boldenone metabolite (award Nr 78) from a passage of Professor C._____'s written statement of November 24, 2011 filed as exhibit 103 by the Respondent in the appeal proceedings (appeal Nr 54). It is true that in the passage quoted the director of the Cologne laboratory and expert for the Respondent admitted the existence of the link in dispute (p.4): "*[a]dditionaly it was possible to identify Boldenone metabolite (BM1) in the corresponding LC fraction of the A-sample*[14]". Whether on the basis of this piece of evidence only – i.e. in the absence of the document on which the expert had based his opinion – the Panel could draw the same conclusion is an issue concerning the assessment of the evidence, which is consequently outside the scope of review by the Federal Tribunal.

No matter what the Appellant says the excerpts from the minutes of the April 2, 2012 CAS hearing he quotes (appeal Nr 57 to 62; Appellant's exhibit 4 *bis*) do not show at all that the Panel would have given the Parties the specific assurance that it would not take into account expert C's written statement. Indeed such assurance encompassed only the documents not included in the CAS file, which was not the case of that statement since the Respondent had attached it to its answer to the appeal as exhibit 103. Moreover in the passage quoted at Nr 61 of the appeal brief, the chairman of the Panel indeed told the Parties that it would base its award only on the documents in its possession, to the exclusion of any additional documents, but he added the following precision: "[*a]nd of course, the expert witness statements*[15]". Yet the statement at issue was doubtlessly in the latter category, i.e. among the evidence that the Panel reserved to consider in support of its award.

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[13] Translator's note: Original english text in the CAS award at Nr 85
[14] Translator's note: In English in the original text
[15] Translator's note: In English in the original text

Furthermore the explanations given in the CAS answer show that the Panel considered at the hearing that the production of new documents so late in the proceedings could not be accepted. It must be recalled that the right to adduce evidence, which constitutes one of the elements of the right to be heard, is not violated when evidence was not requested in a timely manner (judgment 4A_150/2012[16] of the July 12, 2012 at 4.1 and the cases quoted). Therefore the Appellant cannot argue today that his right to be heard was violated if he did not request early enough the production of the documents concerning Professor C._____'s written statement. He has even less of a right to do so that according to his own statement Professor C._____ had acknowledged in his statement that he had not transmitted these documents to the CAS (reply p.5 foot note 3).

Finally, the arguments put forward by the Appellant at p. 4 and 6 of his reply (Nr 13 to 22) are too enigmatically formulated for this Court to take them into consideration.

This being so, the Appellant is wrong to argue a violation of his right to be heard in this respect.

4.2.3
The Appellant submits the second part of the same argument under the following caption: "[v]iolation of the right to be heard resulting from the Arbitral tribunal using previous CAS awards not discussed in the proceedings (Art. 190 (2) (d)" (p16). Yet it must be noted that the rest of the argument does not address this issue at all and one seeks in vain any reference to such awards.

In reality the Appellant raises here the issue of the full scan spectrum (see above at 4.2.1). According to him the Panel would not at all have addressed the issue he had raised, namely the type of scan that should have been carried out: one scan for each ion (Appellant's thesis) or one scan for all ions (Respondent's thesis). It would have wrongly relied on the fact that Professor C._____'s statement, quoted at Nr 85 of the award had not been challenged although that statement did not deal with the issue at hand. Indeed carrying out a full scan by GC/MS is precisely what the Appellant considers problematic from the point of view of the requirements of WADA technical document TD2010IDCT (appeal Nr 71 to 78).

The alleged formal denial of justice invoked by the Appellant does not exist. The Panel set forth the issue raised by the latter (award Nr 82 to 84), then it stated the reason – Professor C._____'s uncontested written statement as to the full scan data quoted at Nr 85 of the award – which in its view dispensed it from deciding the issue. Assuming that the Appellant is not seeking a review of the application of the law on the merits under the disguise of the right to be heard, which case law forbids in this respect (judgment 4P.202/2003 of the November 24, 2003 at 2.2 and references), he would still have to demonstrate with some precision – this being an eminently technical problem – why the Panel would not have been authorized on this basis to dispense with examining the issue in dispute. Merely claiming that the execution of a full scan by GC/MS is problematic in the light of the requirements of some WADA technical document (appeal Nr 76) and the remark at footnote 11 on p. 17 of the appeal as to the context in which the foresaid statement was issued, appear manifestly insufficient in this respect.

4.3
This being so, the argument as to a violation of the right to be heard appears unfounded on both counts.

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[16] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

5.
Finally the Appellant claims that the Panel breached procedural public policy.

5.1
Procedural public policy within the meaning of Art.190 (2) (e) PILA guarantees to the parties the right to an independent judgment as to the submissions and the facts submitted to the Arbitral tribunal in conformity with applicable procedural rules; procedural public policy is violated when some fundamental and generally recognized principles were violated, thus leading to intolerable contradiction with the sense of justice, so that the decision appears incompatible with the values acknowledged in a state of laws (ATF 132 III 389 at 2.2.1). Moreover procedural public policy is only a subsidiary guarantee and therefore constitutes a precautionary norm for procedural violations which the legislator would not have had in mind when adopting the other letters of Art. 190 (2) PILA (ATF 138 III 270[17] at 2.3).

5.2
According to the Appellant the Panel would have violated procedural public policy by relying "on mere allegations contained in the expert report while excluding from the file some documents which according to the expert were supposed to prove such allegations" (appeal Nr 80). To the extent that the meaning of the argument can be understood despite its ambiguous formulation, it is obvious that it merely presents from a different point of view the argument derived from the violation of the right to be heard, which has been rejected by this Court. By raising it again as a violation of procedural public policy, the Appellant disregards the subsidiary nature of the guarantee. One may even wonder if the argument is not mere inadmissible criticism of the assessment of the evidence by the Panel. As to the necessity to provide the very strict anti-doping regime to which athletes are subject with some minimal procedural guarantees, which the Appellant invokes in this context, it cannot be doubted. However, in this case, the Appellant has not been able to establish that he would not have benefited from such guarantees. He is therefore wrong to claim a violation of procedural public policy.

6.
The Appellant does not succeed and must pay the judicial costs (Art. 66 (1) LTF) and compensate the Respondent (Art 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 4'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 5'000 for the federal judicial proceedings.

4.

[17] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

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

Lausanne February 28, 2013.

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

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