

CAS 2014/A/3615 WADA v. Lauris Daiders, Jānis Daiders & FIM

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Chairman : Prof. Dr. Martin Schimke, attorney-at-law in Dusseldorf, Germany
Arbitrator : The Hon. Michael J. Beloff QC, Barrister in London, United Kingdom
Arbitrator: Mr Philippe Sands, QC, Barrister in London, United Kingdom

Ad hoc Clerk: Mr Hervé Le Lay, attorney-at-law in Paris, France

in the arbitration between

WORLD ANTI-DOPING AGENCY (WADA), Montreal, Quebec, Canada
Represented by Messrs Ross Wenzel and Yvan Henzer, Carrard & Associés, Lausanne, Switzerland

-Appellant-

and

LAURIS DAIDERS, Latvia

-First Respondent-

JANIS DAIDERS, Latvia

-Second Respondent-

FÉDÉRATION INTERNATIONALE DE MOTOCYCLISME (FIM), Mies, Switzerland
Represented by Mr Richard Perret, Legal Director

-Third Respondent-

I. THE PARTIES

1. The Appellant, the World Anti-Doping Agency ("WADA"), is the independent international anti-doping agency, constituted as a private law foundation under Swiss Law with its seat in Lausanne, Switzerland, and having its headquarters in Montreal, Canada. Its aim is to promote and coordinate the fight against doping in sport internationally.
2. The First Respondent, the Fédération Internationale de Motocyclisme ("FIM") is the international governing body for Motocycling sports, with its seat in Mies in Switzerland.
3. The Second Respondent, Mr Lauris Daiders, is a sidecar racing athlete.
4. The Third Respondent, Mr Jānis Daiders, is a sidecar racing athlete.

II. FACTUAL BACKGROUND

5. The relevant facts of the case, which were agreed upon by the Appellant and the Third Respondent and which were not contested by the First Respondent and the Second Respondent, are as follows.
6. Mr Lauris Daiders competed in the 2013 FIM Sidecar World Championship as the passenger for pilot Mr Jānis Daiders.
7. Mr Lauris Daiders was selected at random for an anti-doping test after a FIM Motocross Sidecar World Championship race held at Strassebessenbach in Germany on 21 July 2013 to which he participated as passenger of Mr Jānis Daiders. A sample of his urine was subsequently analysed by a WADA accredited laboratory and clenbuterol, a prohibited anabolic agent listed in category S.2 of the WADA Prohibited List which is incorporated within the FIM Anti-doping Code (the "FIM AD Code") by Article 4 of the FIM AD Code, was found in Mr Lauris Daiders's "A" sample urine.
8. This Adverse Analytical finding was notified to Mr Lauris Daiders on 30 August 2013 and he was provisionally suspended from 31 August 2013. Mr Lauris Daiders waived the possibility of filing a request for lifting the provisional suspension. Mr Lauris Daiders did not request that the "B" sample be analysed and did not challenge the findings of the anti-doping test.
9. The case was referred to the FIM International Disciplinary Court (the "CDI").
10. By an email dated 5 November 2013, Mr Lauris Daiders submitted its written statement before the CDI in which he stated: "*I have never had any will, desire, intention knowingly to use*

Clenbuterol. I was indeed unpleasant surprised and shocked about the result of so called “doping control”. The only possibility to find mentioned substance in my body I can explain by using the sports doctor recommended officially ALLOWED sports food additives. The list of sports food that I have used is enclosed.” Mr Lauris Daiders also submitted a list of food additives with descriptions of these products.

11. On 13 November 2013 a hearing was held before the CDI, during which Mr Lauris Daiders was heard. A family friend acting as his interpreter accompanied Mr Lauris Daiders during the hearing, in the course of which Mr Lauris Daiders declared that he had been taking a high dose of a one of the food additives mentioned in the list submitted before the CDI. This was a product named “Weight Loss Formula 1” from a brand named “Herbalife”, taken in the weeks before the race where he was tested positive. He admitted that he had not discussed the product with his sports doctor before using it, but that his doctor had told him that this product was not so good and the dose too high and that he consequently stopped taking this product. He further indicated that he was not sure how Clenbuterol had entered his body and that, except for the Herbalife product, he had only used products prescribed by his doctor.
12. Following the hearing, the CDI gave Mr Lauris Daiders one week to provide the CDI with any further evidence he could adduce in his case as well as an exceptional opportunity to supplement his written submission of 5 November 2013.
13. By email of 19 November 2013, Mr Lauris Daiders made the following additional written submission: *“I have never had any will, desire, intention knowingly to use Clenbuterol. I was indeed unpleasant surprised and shocked about the result of so called “doping control”. I never tried with the intention of improving their physical form. My only explanation for being in my body Clenbuterol is that someone is intentionally added to my meals, or is it gets from food”*. Mr Lauris Daiders provided no further evidence.
14. On 21 February 2014 Mr Jānis Daiders was heard by telephone conference.
15. On 21 March 2014, the FIM International Disciplinary Court (the “CDI”) rendered its decision (the “Decision”).
16. The CDI considered that *“on the balance of probabilities, Mr Daiders has established how the prohibited substance entered his body by asserting that Clenbuterol must have been present in one of the sports food additives he ingested”* (§73 of the Decision), and that *“Mr Daiders' fault or negligence was not significant in the present case”* (§86 of the Decision) within the meaning of Article 10.5.2 of the FIM AD Code and that *“an appropriate sanction to be imposed on Mr Daiders would be a period of ineligibility of 15 (fifteen) months”* (§91 of the Decision).

17. The CDI further concluded, notably in view of Article 036.17.1 of the 2013 FIM Sidecar Motocross World Championship Appendix and its footnote, that in Sidecar Motocross, "*the driver and passenger should undoubtedly therefore be considered a team for the purposes of Article 11.1*" of the FIM AD Code.

18. Consequently, the CDI ruled that:

"I. Mr Lauris Daiders is sanctioned with a period of ineligibility of 15 (fifteen) months commencing on the date of the sending of the notification of the present Decision.

II. The period of the provisional suspension already served since 31 August 2013 until the date of the sending of the notification of the CDI decision shall be credited against this period of Ineligibility.

III. Messrs Lauris Daiders and Jānis Daiders are disqualified from:

i. Grand Prix of Germany, held at Strassbessenbach, on 21 July 2013

ii. Grand Prix of Estonia, held at Kivioli, on 4 August 2013

iii. Grand Prix of Latvia, held at Kegums, on 11 August 2013 and

iv. Grand Prix of Switzerland, held at Roggenburg, on 18 August 2013.

IV. All the results obtained by Messrs Jānis Daiders and Lauris Daiders in the above mentioned rounds of the 2013 FIM Motocross Sidecar World Championship shall be disqualified with all resulting consequences, including forfeiture of any points and prizes.

V. The costs of the case shall be borne by Mr Lauris Daiders for $\frac{3}{4}$ (three quarters) and by Mr Jānis Daiders for $\frac{1}{4}$ (one quarter)."

19. On 24 April 2014 the Decision was notified to the parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

III.1 The Appeal

20. On 28 May 2014, WADA filed a Statement of Appeal at the Court of Arbitration for Sport (the "CAS") against the FIM CDI Decision pursuant to the Code of Sports-related Arbitration 2013 edition (the CAS "Code") and Articles 13.2.1, 13.2.3 and 13.2.6 of the FIM Anti-Doping Code, 2103 (the "FIM AD Code"). WADA submitted the following request for relief:

"WADA respectfully requests CAS to rule that:

- 1- *The Appeal of WADA is admissible.*
 - 2- *The decision rendered by the FIM International Disciplinary Court dated 21 March 2014 in the matter of Mr Lauris Daiders is set aside.*
 - 3- *Mr Lauris Daiders is sanctioned with a period of ineligibility of two years commencing on the date of the CAS Award. Any period of ineligibility, whether imposed on or voluntarily accepted by Mr Lauris Daiders before the entry into force of such award, shall be credited against the total period of ineligibility to be served.*
 - 4- *All competitive results obtained by Mr Lauris Daiders – whether alone or as part of a team within the meaning of art. 11 of the FIM ADR – from and including 21 July 2013 through the commencement of his provisional suspension are disqualified, with all resulting consequences (including forfeiture of any medals, points and prizes).*
 - 5- *WADA is granted an award for costs.”*
21. On 10 June 2010 WADA filed its Appeal Brief and paid the court fee. The relief sought by WADA in the Appeal Brief was identical to that sought by its Statement of Appeal.
22. The submissions of the Appellant, in essence, may be summarized as follows:
- The presence of clenbuterol, a prohibited substance, was identified in Mr Lauris Daiders’s body, and thus the violation of Article 2.1 of the FIM AD Code is established.
 - The standard sanction for a breach of Article 2.1 of the FIM AD Code is a two-year period of ineligibility pursuant to Article 10.2 of the FIM AD Code. In order to benefit from an elimination or reduction of the period of ineligibility under Articles 10.5.1 (in case of no fault or negligence) or 10.5.2 (in case of no significant fault or negligence) of the FIM AD Code, the athlete must first establish the origin of the prohibited substance in his system.
 - Pursuant to Article 3.1 of the FIM AD Code, the athlete bears the burden of proving how the prohibited substance entered his system by meeting the standard of balance of probabilities. It is clear from the CAS case law that the athlete must adduce concrete and persuasive evidence to demonstrate which supplement, medication or other product introduced the prohibited substance into his body.
 - The CDI did not consider whether Mr Lauris Daiders had provided reliable evidence that his explanation or one of them is more likely than not to have occurred. The CDI instead devised a number of theoretical possibilities, weighed them up in terms of relative likelihood and concluded that supplement contamination is the most likely explanation. A

number of theoretical possibilities are dismissed without any particular explanation but the absence of evidence to the contrary. The reasoning of the CDI is flawed as :

- it is not for the hearing panel to identify potential explanations which have not been offered by the parties,
 - deliberate ingestion cannot be dismissed simply on the basis that there is no evidence of it,
 - athletes are required to prove that their explanation is more likely than not to be correct, not that their explanation is more likely than any other competing explanation.
- Mr Lauris Daiders has not come close to establishing to the requisite standard the origin of the clenbuterol in his system, his accounts being vague and unsubstantiated throughout. He has advanced a number of different sources and has failed to provide any concrete element to substantiate any of these theories. He was asked by the CDI to provide explanations and granted additional time to provide evidence of the origin of the clenbuterol, and an opportunity to provide post-hearing submissions. In particular, he did not provide any evidence that the Herbalife product contains clenbuterol or was contaminated with clenbuterol.
 - It is indeed not possible to assess the degree of the athlete's fault in any meaningful manner in the absence of knowledge of how the substance entered his system.
 - Therefore, as the origin of the prohibited substance has not been established, neither Article 10.5.1 nor 10.5.2 can apply to reduce the standard two years sanction.

III.2 The Answer of the Third Respondent and the lack of participation by the First Respondent and the Second Respondent

23. On 10 July 2014, Mr Lauris Daiders filed a Legal Aid Application Form seeking assistance by a *pro bono* counsel on 2 July 2014 which was rejected on 9 July 2014 by the CAS Court Office. Mr Lauris Daiders filed a new request on 15 August 2014 as some information on the first application was incorrect. On 19 August 2014 the CAS Court Office partially granted this request, only if the Panel decided to hold a hearing. Mr Lauris Daiders was therefore offered *pro bono* counsel once the holding of a hearing was decided and the CAS Court Office sent him a list of *pro bono* counsels to assist him at the hearing. Yet, Mr Lauris Daiders never replied and did not utilise this possibility.

24. Numerous extensions and suspensions of the time limits have been agreed upon between WADA and the FIM and/or granted by the CAS Secretariat or the Panel. These have been informed by the lack of knowledge of the English language of Mr Lauris Daiders and Mr Jānis Daiders, as invoked by the FIM, and the difficulties allegedly encountered by the FIM in liaising with them.
25. Mr Lauris Daiders and Mr Jānis Daiders have been duly copied on all the correspondence from CAS, and informed of time limits and the consequences of not meeting them. However, neither submitted any correspondence or made any submissions in the context of these proceedings, apart from Legal Aid Application Form, as updated.
26. On 4 September 2014, the FIM filed its Answer. In its Answer, the FIM submitted the following request for relief:

“The FIM hereby respectfully requests the Panel of the CAS to rule:

- I- The Appeal of WADA is dismissed.*
- II- The Answer of FIM is admissible.*
- III- The Decision of the FIM International Disciplinary Court (CDI) taken on 21 March 2012 (sic) is upheld.*
- IV- The FIM is granted an award for costs.”*

27. The submissions of the FIM may be summarized as follows:
- The FIM does not contest WADA’s statement, in full agreement with the finding of the CDI to that effect that an anti-doping violation by Mr Lauris Daiders of Article 2.1 of the FIM AD Code is established.
 - The main issue on which the parties disagree is the question as to whether Mr Lauris Daiders has established how the prohibited substance entered his system.
 - The balance of probabilities, which is the applicable standard of proof is not very rigorous and of a lower degree of other standards of proof set forth by anti-doping rules (“comfortable satisfaction” and “proof beyond a reasonable doubt”).
 - In order to benefit from Article 10.5 of the FIM AD Code, the only obligation imposed on the athlete is to explain how the substance entered his body, i.e. to make an assertion. The athlete has no obligation to adduce concrete and persuasive evidence other than his statement. Whether this will suffice to convince the panel is another

issue. Under the FIM AD Code, the athlete is not obliged to identify a particular supplement by which the product entered his body. Therefore, Mr Lauris Daiders did not need to adduce any further evidence in addition to his statement.

- WADA had an obligation to collaborate in the investigation and clarification of the facts of the case because of the difficulty for the athlete to prove negative facts.
- Swiss Law should apply complementarily to the FIM AD Code and the WADAC, if necessary, to the dispute given that the FIM is a Swiss association. The assessment of evidence is to be made based on the concept of “free assessment of evidence” under Article 157 of the Swiss Civil Procedure Code, and Article 168 para. 1 of the same code provides that “*questioning and statements of the parties*” is admissible evidence. Therefore, a statement by an athlete is considered evidence and freely assessed by the CDI, it might be considered as concrete and persuasive evidence.
- Because the CDI’s appreciation of evidence is defensible, its decision is not open to criticism or dispute on legal grounds.
- A fifteen month period of ineligibility as imposed by the CDI is an appropriate and proportionate sanction.

III.3 The Panel

28. On 28 May 2014, in its Statement of Appeal, WADA nominated the Hon. Michael Beloff Q.C. as an arbitrator. The Hon. Michael Beloff Q.C. submitted a statement of acceptance and independence and none of the parties subsequently objected to this nomination.
29. On 29 July 2014, the FIM requested that Mr Philippe Sands Q.C. be nominated as Respondent's arbitrator. Neither Mr Lauris Daiders nor Mr Jānis Daiders objected to this nomination within the time limit set forth by the CAS Secretariat. Mr Philippe Sands Q.C. was therefore considered as jointly nominated by the three Respondents. Mr Philippe Sands Q.C. submitted a statement of acceptance and independence and none of the parties subsequently objected to this nomination.
30. On 13 August 2014, Prof. Dr. Martin Schimke was nominated as Chairman of the Panel. Prof. Dr. Martin Schimke submitted a statement of acceptance and independence and none of the parties objected to this nomination.

III.4 The Procedural Order

31. On 1 October 2014 the Appellant signed the Procedural Order and on 7 October 2014, the Third Respondent signed the Procedural Order. Despite repeated requests by the CAS Secretariat, neither the First Respondent nor the Second Respondent signed the Procedural Order.

III.5 The Hearing

32. On 14 November 2014 the hearing in this matter was held at the CAS headquarters in Lausanne, Switzerland.
33. The following persons were present at the hearing:

Appellant:

- Mr Ross Wenzel, Solicitor,
- Mr Yvan Henzer, Avocat.

Third Respondent:

- Mr Richard Perret, FIM Legal Director,
- Ms Ruth Griffiths, FIM Legal Assistant.

34. Despite having been duly informed of the proceedings and repeatedly requested to comment on the date of hearing and on their attendance, neither the First Respondent nor the Second Respondent attended the hearing. Neither was represented at the hearing.
35. At the start of the hearing, the parties present expressed their contentment with the composition of the Panel and, at its conclusion, their satisfaction that they had been accorded due process and that their right to be heard had been fully respected.

IV. DISCUSSION

IV.1 Jurisdiction of the CAS

36. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes of regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said-related body.”

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.”

37. In its statement of appeal, WADA relied on Articles 13.2.1, 13.2.3 and 13.6 of the FIM AD Code which grant a right of appeal to the CAS. The jurisdiction of the CAS was accepted by the Third Respondent and was not contested by the First and Second Respondents. The CAS accordingly has jurisdiction.

IV.2 Applicable Law

38. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

39. The FIM AD Code Introduction provides in the section titled “Scope” that *“These Anti-Doping Rules shall apply to the FIM, each Continental Union (CONU) and National Federation (FMN) of the FIM, and each Participant in the sporting activities of FIM, its CONUs or its FMNs. (...) These Anti-Doping Rules shall apply to all Doping Controls over which the FIM, its CONUs and its FMNs have jurisdiction.”*
40. The doping offense at stake in this dispute occurred during an FIM competition. Therefore, the rules applicable to this dispute are the rules contained in the FIM AD Code and the World Anti-Doping Code (the “WADAC”) in conformity with which it is expressly construed. Article 18.4 of the FIM AD Code provides that *“These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules.”*
41. Article 18.1 of the FIM AD Code provides that *“The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the signatories or governments”*.
42. The FIM held that *“Swiss Law should apply complementarily, if necessary, to the dispute”*. As further explained below, the Panel found that the FIM AD Code and the WADAC provisions are clear and needed no complement on the issues at stake. Therefore, whether Swiss Law should apply complementarily if necessary, is a moot question in this case.

IV.3 Admissibility

43. The Appellant filed the Statement of Appeal within 21 days of receiving the Decision. In addition, none of the parties contested the admissibility of the appeal. It follows that the appeal was filed in due time and is admissible.

IV.4 Merits

44. In this matter, Mr Lauris Daiders does not contest the presence of clenbuterol in his urine sample and the presence of this substance in his body. Neither is it contested that clenbuterol is a prohibited substance listed in category S.2 of the WADA Prohibited List which is incorporated to the FIM AD Code as per Article 4.1. Consequently, as accepted in the Decision, and agreed with by the Appellant and the Third Respondent and not contested by the First and Second Respondent, the anti-doping rule violation by Mr Lauris Daiders as per Article 2.1 of the FIM AD Code (“*The presence of a prohibited Substance or its Metabolites or Markers in a Rider’s Sample*”) is established.
45. The remaining issue is therefore whether Mr Lauris Daiders can benefit from a reduction of the period of ineligibility under Articles 10.5.1 or 10.5.2 of the FIM AD Code and, in the affirmative, whether the reduction decided upon is appropriate.
46. Both Articles 10.5.1 and 10.5.2 of the FIM AD Code provide that in addition to establishing that he bears no fault or negligence or of no significant fault or negligence, “*When a Prohibited Substance or its Markers or Metabolites is detected in a Rider’s Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Rider must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*”

Burden of proof of how the prohibited substance entered Mr Lauris Daiders's system

47. Articles 10.5.1 and 10.5.2 of the FIM AD, as modelled in the WADC, addressed the burden of proof, providing that it is for the athlete charged with a doping offence to establish how a prohibited substance entered his or her body. That is the ordinary and natural meaning of the words set out in these Articles, as confirmed by well-established previous CAS case law (See for example CAS 2010/A/2230 *International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs*, spec. §§ 11.5 and 11.6; CAS 2010/A/2277, *La Barbera v. IWAS*, spec. § 4.26 and CAS 2008/A/1471 & CAS 2008/A/1486, *FINA & WADA v. Tagliaferri*, spec. § 9.5.2, CAS 2011/A/2336, *WADA v. FCL & Villareal*, spec. §95, CAS 2006/A/1025, *Puerta v. ITF*, spec. § 11.2.5)

48. That meaning is supported by the context in which those words appear. The discharge of the athlete's burden is a condition precedent to the person charged being able to obtain the elimination or reduction of the standard sanction for a first offence: he or she must establish an absence of fault or negligence, or of significant fault or negligence. It is a necessary (but not exhaustive) first stage in a two-stage process: unless that burden is discharged, the second stage (establishing the absence of fault or negligence or of significant fault or negligence) will not be satisfied.
49. There is a significant difference in terms of the degree of fault or negligence between a situation in which, on the one hand, the prohibited substance was found in a supplement taken on the recommendation of a trusted and experienced sports doctor or, on the other hand, in a supplement taken without any such recommendation or on the advice of a casual acquaintance who lacked relevant qualifications. It is for the person charged to satisfy the adjudicating authority where, along a spectrum, his own situation falls. This then enables the adjudicatory body to determine whether and to what extent the standard sanction might be modified.
50. This approach is supported by relevant considerations of policy. The person charged needs to be able to know what food, supplement, drink or medicine he has taken or, as the case may be the circumstances in which it could have, without his knowledge, been administered to him. The FIM or WADA will generally not have such knowledge. It is this disparity between the parties in terms of access to relevant information which justifies the imposition of the burden of proof on the person charged rather than on the person charging.
51. Furthermore, given that prohibited substances are generally either themselves performance enhancing or masking agents of other substances which have that propensity, the scheme established provides for the inference that such substances were ingested for one of those two purposes. In the Panel's experience, it is rare for a person charged with a doping offence to admit to deliberate ingestion. For this reason, the weight to be given to an outright denial is diminished by the fact that it is as likely to be the approach taken by a person who is guilty as by one who is not. Imposing the burden of proof upon the person charged thus avoids the need for the person charging to make a positive case of deliberate doping. The person charged must, by establishing the source to the relevant standard or proof, show that the plausible inference cannot be drawn in his case.
52. If, however, the person charging has information that would assist the person charged in discharging that burden, whether particular to his case or derived from relevant research, it has a good faith obligation to disclose it to the person charged (see also in the context of Swiss Law, CAS 2011/A/2384, *WADA and UCI v. Alberto Contador Velasco & RFEC*, spec. §§ 255 *et seq.*, which specifies that whereas difficulties in proving negative facts create a duty of

cooperation of the contesting party that drives from the principle of good faith, it is for the court to draw the consequences of a refusal to cooperate when assessing evidences; in that regard, such difficulties as may exist do not lead to a re-allocation of the risk if a specific fact cannot be established, but rather this risk will remain with the party who bears the burden of proof). If the person charged has provided an explanation for the source of the substance, and which, if unanswered would discharge the burden then it will be for the person charging if willing and able to do so, to seek to rebut the explanation: the evidential burden will have shifted, although the legal burden will remain where it was. The Panel rejects a proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged

53. The Third Respondent has argued that WADA has failed in its "duty of collaboration", referring to the above cited case (CAS 2011/A/2384, *WADA and UCI v. Alberto Contador Velasco & RFEC*). However, the Third Respondent has not explained what information or evidence is in WADA's possession (or is otherwise available to it), that WADA) has failed to provide. To the best of the Panel's knowledge, Mr Lauris Daiders did not request at any point WADA's collaboration or cooperation to the investigation and clarification of the facts of the case. In any event, WADA was not a party to the proceedings before the CDI and the burden of proving how clenbuterol entered his system falls squarely on Mr Lauris Daiders.
54. On the basis of the evidence adduced before the CDI by Mr Lauris Daiders, which was not supplemented in any way before this Panel, the Panel does not find that Mr Lauris Daiders has provided an adequate (or indeed any) explanation for the source of the substance in his system. This failure has significant consequences, as addressed further explained below.

Discharge of burden: Is a mere allegation sufficient to establish how the prohibited substance entered Mr Lauris Daiders's system?

55. As rightly asserted by the Appellant and the Third Respondent, the standard of proof for establishing how the prohibited substance entered the body of the athlete is one of 'balance of probabilities'. Article 3.1 ("Burdens and standards of proof") of the FIM AD Code provides that "*Where these Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the Rider must satisfy a higher burden of proof.*"
56. The person charged cannot discharge that burden merely by showing that he made reasonable efforts to establish the source, but that they were without success. The resolution of the issue which arises at this first stage does not relate to the presence or absence of fault or negligence,

or, if it is present, its degree. Such matters are relevant only to the second stage. The resolution of the issue which arises at the first stage depends upon the answer to a simple question: has the person charged established what the source is? Mere assertion as to what the source is, without any supporting evidence, will be insufficient. Previous CAS panels have expressed the conclusion that merely raising unverified hypotheses or mere speculations as to how the substance entered an athlete's body will not be adequate to meet the threshold as set forth in Article 10.5.1 and 10.5.2 of the WADAC (and its corresponding federation's anti-doping regulations) (see for example CAS 2010/A/2230 *International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs*, spec. § 11.5 ; CAS 2010/A/2268, *I v. FIA*, spec. § 129 ; CAS 2007/A/1413, *WADA v. FIG & Vysotskaya*, spec. §§ 75 and 76 ; CAS 2006/A/1067, *IRB v. Keyter*, spec. § 6.11, CAS 2006/A/1130, *WADA v. Stanic & Swiss Olympic Association*, spec. §§ 51 and 52).

57. In addition, the person charged cannot discharge the requisite burden by positing, for example, three possible different sources that might explain the presence of the substance in his system (e.g. deliberate ingestion, or contamination, or spiking) without seeking to establish that one source is more probable than the others. The person charged must show that one of the three is the probable cause. As expressed by previous CAS Panel, "*for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred*" (CAS 2009/A/1926 & CAS 2009/A/1930, *ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet*, §5.9 ; CAS 2011/A/2384, *WADA and UCI v. Alberto Contador Velasco & RFEC*, §209). The two exercises are different.
58. The Panel emphasises that to permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations often put forth by athletes to explain the presence of a banned substance – can and do occur. That said, it is an easy assertion to make, particularly if unsupported by any evidence. To be effective as a system, more must be required by way of proof, having regard to the athlete's general duty to ensure that no prohibited substance enters his body. If the athlete's statements of denial alone were to be considered sufficient evidence to establish how the prohibited substance entered his body, the condition precedent set forth by Articles 10.5.1 and 10.5.2 of the FIM AD Code and WADAC would be deprived of effectiveness or utility.
59. The Panel recognizes that there may be cases where the person charged, is through no fault of his own, unable to discharge the burden. But the rules, interpreted as the Panel considers they

should be, have not as such been shown to violate human rights norms or basic principles public policy: they are drafted to advance a broader public purpose, namely the commitment to clean competition (CAS 2010/A/2230 *International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs*, spec. §§ 11.9 *et seq.*) (An allegation to contrary effect was only most tentatively advanced by FIM).

60. In this case, Mr Lauris Daiders has submitted as evidence before the CDI his own written and oral statements putting forward a number of possible scenarios of how clenbuterol could have entered his system, as well as a list of food supplements he had been taking. Mr Lauris Daiders did not submit any further evidence during the proceedings before this Panel.
61. In fact, the only evidence provided by Mr Lauris Daiders are his own statements and declarations. In addition, these statements do not come close to explaining how clenbuterol entered Mr Lauris Daiders' system. Mr Lauris Daiders' statements merely identify a number of possible ways in which, in his opinion, clenbuterol might have entered his body. The statements offer no evidence or supported explanation as to how - i.e. by which of those means and under which circumstances – this might have happened. As already highlighted in this award and by other CAS panels in previous cases, in order to be in a position to assess whether there has been no fault or negligence on the part of the athlete, or no significant fault or negligence, having regard to Articles 10.5.1 or 10.5.2 of the FIM AD Code, it is necessary that the source of the prohibited substance in the athlete's system is identified and proven to the requisite standard.
62. It is notable that in the three cases which underpinned the Third Respondent's submissions (CAS 2011/A/2384, *WADA and UCI v. Alberto Contador Velasco & RFEC*; *Décision du Conseil de Discipline Luxembourgeois Contre le Dopage*, Decision of 31 January 2013, *Franck Schleck* CAS 2009/A/1926 & CAS 2009/A/1930, *ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet*) deliberate ingestion was eliminated on the basis of evidence that went well beyond mere denial by the person charged.
63. The Panel notes in particular that Mr Lauris Daiders did not submit any evidence whatsoever in support of any of his hypotheses as to how clenbuterol might have entered his system. Examples of what Mr Lauris Daiders could have submitted in support of one of his theories could have included investigations and enquiries with the manufacturers of the food additives he ingested, along with corroborating evidence as to the concentration of clenbuterol in his tested sample urine and the date and quantity of ingestion of product suspected to have been contaminated.
64. The Panel also notes that despite having been granted a pro-bono counsel by CAS, and despite numerous extensions of time limits, Mr Lauris Daiders chose not to file any submission, let

alone evidence, in these proceedings. He also failed to attend the hearing, despite repeatedly invitations to him to attend. Such an attitude can only serve to reinforce the conclusion that Mr Lauris Daiders has failed to put any real effort into defending this case, and that he has offered no serious argument or evidence to justify a reduction of the period of ineligibility.

65. In that regard, Article 3.2.4 of the FIM AD Code provides that “*The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Rider or other Person who is asserted to have committed an anti-doping rule violation based on the Rider’s or other Person’s refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the tribunal) and to answer questions either from the hearing panel or from the Anti-Doping Organisation asserting the anti-doping rule violation.*”.
66. In view of the above, contrary to the findings of the Decision, the Panel considers that Mr Lauris Daiders has not established how clenbuterol entered his system. Consequently, Mr Lauris Daiders has not met the requirements of Articles 10.5.1 or 10.5.2 of the FIM AD Code, and cannot benefit from a reduction of the standard applicable sanction for a first anti-doping violation.

Sanction

67. As per Article 10.2 of the FIM AD Code, the standard ineligibility sanction is a two-year ineligibility. Consequently, the period of ineligibility of Mr Lauris Daiders shall be of two years, rather than the fifteen months set out in the Decision.
68. As per Article 9 and 10.8 of the FIM AD Code, an athlete shall also be sanctioned with disqualification of the result obtained in the competition in which the violation occurred, as well as all other competitive results obtained from the date the positive sample was collected through to the commencement of any provisional suspension or ineligibility period. All resulting consequences shall have effect, including the forfeiture of any medals, points and prizes during that period.
69. It is undisputed by the parties that, as found by the Decision in view of Article 11.1 of the FIM AD Code and Article 036.17.1 of the 2013 FIM Sidecar Motocross World Championship Appendix, a pair of sidecar driver and passenger constitute a team for the purpose of anti-doping regulations and results. Consequently, the team results of the competition during which the doping offense occurred shall be disqualified (as per Article 11.1 of the FIM AD Code), and the results of the competitions on which they competed together must be disqualified (if the results of one of the pair members are disqualified as per Article 10.8 of the same Code).

70. Article 10.9.3 of the of the FIM AD Code provides that if a provisional suspension is imposed and respected by the athlete, then the athlete shall receive a credit for such period of provisional suspension against any period of ineligibility which may ultimately be imposed.
71. Similarly, any period of ineligibility served by Mr Lauris Daiders before the entry into force of this award, shall be credited against the total period of ineligibility to be served according to this award.

V. COSTS

72. Article R65.2 of the CAS Code provides:

"Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS."

73. Article R65.3 of the CAS Code provides:

"Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties".

74. Having taken into consideration the outcome of the arbitration the Panel is of the view that each party shall bear their own legal and other costs incurred in connection with these arbitration proceedings. In addition, as a contribution towards legal fees and other expenses incurred in connection with these arbitration proceedings, the FIM who led in the defence to the Appeal and have resources not available to Mr Lauris Daiders and Mr Jànis Daiders shall pay to WADA an amount of CHF 3'000 (three thousand Swiss Francs).

ON THESE GROUNDS

The Court of Arbitration for Sports rules that:

1. The Appeal filed by the World Anti-Doping Agency on 28 May 2014 against the Decision of the International Disciplinary Court of the Fédération Internationale de Motocyclisme dated 21 March 2014 is upheld.
2. The decision rendered by the International Disciplinary Court of the Fédération Internationale de Motocyclisme dated 21 March 2014 is set aside.
3. Mr Lauris Daiders is sanctioned with a period of ineligibility of two years commencing on the date of this award. Any period of ineligibility, whether imposed on or voluntarily accepted by Mr Lauris Daiders before the entry into force of this award, shall be credited against the total period of ineligibility to be served.
4. All competitive results obtained by Mr Lauris Daiders – whether alone or as part of a team within the meaning of Article 11 of the Anti-Doping Code of the Fédération Internationale de Motocyclisme – from and including 21 July 2013 through the commencement of his provisional suspension are disqualified, with all resulting consequences including forfeiture of any medals, points and prizes.
5. The present award is pronounced without costs, except for the CAS Court Office fee of CHF 1,000 (one thousand Swiss Francs) already paid by the World Anti-Doping Agency, which is retained by the CAS.
6. The Fédération Internationale de Motocyclisme shall contribute CHF 3'000 (three thousand Swiss Francs) to the World Anti-Doping Agency for its legal fees and other expenses incurred in connection with these arbitration proceedings. The other parties shall bear their own legal costs and expenses incurred in connection with the present proceedings.
7. All other or further requests or motions for relief are dismissed.

Lausanne, 30 January 2015

Operative part of the award notified on 28 November 2014.

THE COURT OF ARBITRATION FOR SPORT



Martin Schimke
President of the Panel