4A_178/2014[1]

Judgment of June 11, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Hohl (Mrs.)
Federal Judge Kiss (Mrs.)
Clerk of the Court: Leemann

A._____,
Represented by Dr. Lucien W. Valloni,
Appellant

v.

Nationale Anti-Doping Agentur Deutschland,
Represented by Dr. Stephan Netzle and Mrs. Karin Meseck,
Respondent

Facts:

A.
A.a. The German National Anti-Doping Agency (NADA; Respondent) is competent to enforce the World Anti-Doping Agency Codes (WADA-Code) and also the doping control system in Germany.

A._____ (the Appellant), domiciled in U._____ [name of city omitted], is a professional cyclist who participated in national and international cycling competitions at the relevant time on the basis of a license issued by the *Bund Deutscher Radfahrer* (BDR).

A.b.
In June 2007, A._____ tested positive for testosterone. After being informed of the results of the A-sample, he waived his right to a B-sample analysis and admitted to having used a prohibited substance. As

[1] Translator's Note: Quote as A._____ *v.* Nationale Anti-Doping Agentur Deutschland, 4A_178/2014. The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

a consequence, he was dismissed from his then-cycling team. Three months later, he also admitted to having used Erythropoietin (EPO) and blood transfusions. This was ascertained in the course of the anti-doping proceedings in the BDR.

Pursuant to a December 10, 2007, decision of the Federal Sport Tribunal of BDR, A._____ was declared ineligible for a year for doping violations, taking into account his substantial cooperation.

A.c. On February 27, 2011, A._____ participated as a member of an Italian cycling team in the Lugano Grand Prix, an international competition under the auspices of the Union Cycliste Internationale (UCI). The Swiss Anti-Doping-Organization conducted in-competition tests during this competition, a blood and urine sample was taken from A._____, among others.

On March 4, 2011, the A._____ sample was analyzed by a WADA-accredited Swiss Laboratory for Doping Analysis in Lausanne. The presence of human Growth Hormone (hGH) was shown, which is a prohibited substance according to Rule 21 in conjunction with Rule 29 of the Anti-Doping-Regulations of the UCI (UCI-ADR).

On March 15, 2011, the laboratory reported an Adverse Analytical Finding (AAF) to the UCI. The analysis using the "hGH Isoform Differential Immunoassays Test" (hGH-Test) produced the following analytical values: 2.45 for Kit 1 and 2.43 for Kit 2. The Decision Limits (DL), which trigger the communication of an AAF to the Federation by the laboratory, were 1.81 for Kit 1 and 1.68 for Kit 2.

By letter of March 18, 2011, BDR informed UCI and the cyclist of the results of the analysis and provisionally suspended the athlete pursuant to Article 235 UCI-ADR.

Upon request from the athlete, the B-sample was also analyzed by the Laboratory in Lausanne on April 5 and 6, 2011. The two representatives appointed by A._____, Prof. Santo Davide Ferrara and Dr. Alessandro Nalesso, confirmed that the B-sample had been correctly opened and analyzed.

On April 7, 2011, the laboratory reported to the UCI that the B-sample analysis values of 3.16 for Kit 1 and 2.34 for Kit 2 confirmed the presence of a so-called recombinant (*i.e.,* artificially prepared) human Growth Hormone (recGH). The same day, the UCI informed BDR of the results of the test and invited the National Federation to initiate disciplinary proceedings against A._____.

B.
B.a. In a letter of April 28, 2011, NADA informed A._____ of the results of the test, which in its view represented a doping violation.

On June 3, 2011, the Chairman of the UCI Anti-Doping-Commission rejected a request to lift the provisional suspension. An appeal filed with the Court of Arbitration for Sport (CAS) against this decision was rejected in an award of August 24, 2011.

On July 15, 2011, NADA initiated arbitral proceedings before an arbitral tribunal of the German Institution for Arbitration (DIS) against A._____ and submitted that he should be sanctioned for repeated doping violations.

After two hearings, including the interrogation of various experts, the DIS arbitral tribunal rejected the request of NADA in a decision of June 19, 2012. The sole arbitrator held in particular that the calculation of the Decision Limits was not sufficiently documented.

On August 15, 2012, A._____ applied for a new license and signed a new arbitration agreement.

B.b. On July 12, 2012, NADA appealed the decision of the DIS arbitral tribunal of June 19, 2012, to the CAS.

In a decision of August 7, 2012, the Deputy President of the Appeals Arbitration Division decided, among other things, that upon application from the athlete, the procedure would be conducted in English but the parties could submit all documents and evidence in German as well (without translation) and should a hearing take place, counsel could speak German or English.

In a letter of August 29, 2012, A._____ asked NADA to analyze his sample again using the so-called Bio-Marker-Test, which NADA denied.

NADA submitted its appeal brief on September 3, 2012, and essentially submitted that the decision of the DIS arbitral tribunal of June 19, 2012, should be annulled and that A._____ should be declared ineligible for at least eight years and fined for repeated doping violations.

In a decision of September 4, 2012, the Deputy President of the Appeals Arbitration Division rejected the athlete's other procedural submissions.

On September 10, 2012, the International Council of Arbitration for Sport (ICAS) rejected a challenge by A._____ and the composition of the Arbitral Tribunal was confirmed in a decision of September 25, 2012.

On December 7, 2012, A._____ filed his answer to the appeal and challenged the jurisdiction of the Arbitral Tribunal. In his letter of October 30, 2012, he had already challenged the jurisdiction of the CAS because he had terminated the arbitration agreement for cause as he could not afford the costs of the arbitration proceedings.

In a partial award of March 21, 2013, the CAS rejected the jurisdictional objection and found in favor of jurisdiction. In a letter of April 11, 2013, A._____ expressly waived his right to appeal to the Federal Tribunal as to jurisdiction. In a decision of April 16, 2013, the CAS took into consideration the arbitral award

of March 25, 2013, in the case of *Andrus Veerpalu v. International Ski Federation* (CAS 2011/A/2566), concerning the determination of the Decision Limits (DL) for the hGH-Test and ordered another round of written submissions.

On May 6, 2013, NADA submitted its second brief and advised the CAS, among other things, that WADA had initiated a new scientific study (DL Review) under Prof. Hanley (the Hanley Report) in order to recalculate the previous Decision Limits and asked for the results of the study to be admitted as additional evidence.

A hearing took place in Lausanne on August 28-30, 2013. Various party-appointed experts were questioned at the hearing.

In an order of August 30, 2013, the parties were given the opportunity to state their view as to the Hanley Report and also – upon request from A._____ – as to the statements of Dr. Saugy concerning his study "The effect of a period of intensive exercise on the isoform test to detect growth hormone in doping in sports"[2] ("Voss Study") among others.

On September 23, 2013, A._____ filed his submissions as to Dr. Saugy's statements concerning the Voss Study and included, among others, a new expert report by Prof. Hofbauer, who had not been called as a party-appointed expert until then.

On September 23, 2013, NADA stated its position as to Dr. Saugy's statements and the Hanley Report. In a letter of September 26, 2013, it submitted that the expert report of Proff. Hofbauer as to the Voss Study was inadmissible new evidence introduced after the hearing.

On December 2, 2013, A._____ submitted his comments to the Hanley Report with extensive enclosures which included some further expert opinions by Dr. Pitsch, Prof. Scholz and Prof. Hofbauer. The comments submitted in this respect by NADA on December 23, 2013, were declared inadmissible in an order of December 24, 2013.

B.c. In an arbitral award of February 21, 2014, the CAS upheld the appeal of NADA in part, annulled the decision of the DIS arbitral tribunal of June 19, 2012, and declared A._____ ineligible for eight years for repeated doping violations. A fine of EUR 38'500 was imposed upon the athlete and all results he obtained at the Grand Prix of Lugano and between February 27, 2011, and March 18, 2011, were disqualified. Based on its assessment of the evidence and in particular the expert reports, the CAS held that A._____ violated the Anti-Doping Rules by using artificially produced human Growth Hormones (recGH).

[2] Translator's Note: In English in the original text.

C.
In a civil law appeal of March 20, 2014, (supplemented with a submission of May 5, 2014) A._____ asked the Federal Tribunal to annul the CAS award of February 21, 2014, and to send the matter back to the Arbitral Tribunal for a new decision.

No other submissions were requested. The file of the Arbitral Tribunal was requested.

D.
In a decision of March 31, 2014, the Federal Tribunal rejected the Appellant's application for an *ex parte* stay of enforcement.

On June 3, 2014, the Appellant, again, requested a stay of enforcement.

Reasons:

1.
1.1. The judgment on the merits renders the application for a stay of enforcement moot.

1.2. According to Art. 54(1) BGG,[3] the decision of the Federal Tribunal is issued in an official language,[4] as a rule in the language of the decision under appeal. If that is in another language, the Federal Tribunal resorts to the official language the parties used. The award under appeal is in English. As this is not an official language, the judgment of the Federal Tribunal will be issued in the language of the appeal, in accordance with its past practice.

1.3. The case can be decided on the basis of the file. The Appellant's request for a hearing in the Federal Tribunal (see Art. 57 BGG) is inappropriate. The procedural submission in this respect is accordingly rejected.

2.
In the field of international arbitration, a civil law appeal is admissible, pursuant to the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Lausanne in this case. The parties had their domicile or seat outside Switzerland at the relevant time (Art. 176(1) PILA). As the parties explicitly waived the provisions of Chapter 12 PILA, they are applicable (Art. 176(2) PILA).

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[3] Translator's Note: BGG is the German 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.

2.2. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[6] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief; this corresponds to the requirement for reasons in Art. 106(2) BGG as to violations of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[7] at 5, p. 187, with references). Criticism of an appellate nature is not permitted (BGE 134 III 565[8] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its decision on the facts found by the arbitral tribunal (Art. 105(1) BGG). This covers both the findings as to the essential facts that are the basis of the dispute and those concerning the arbitral proceedings, in particular the findings as to the object of the dispute, the submissions of the parties, their allegations of facts, legal arguments, statements in the proceedings and submissions of evidence, the contents of a witness statement, an expert report, or the factual findings based on an inspection (BGE 140 III 16 at 1.3.1, with references).

The Federal Tribunal may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, which rules out the applicability of Art. 97 BGG and of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grounds of appeal within the meaning of Ar. 190(2) PILA are raised against such factual findings, or exceptionally when new evidence is taken into account (BGE 138 III 29[9] at 2.2.1, p. 34; 134 III 565[10] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to correct or supplement the facts on this basis must show, with reference to the record, that the corresponding factual allegations were made in the arbitral proceedings in accordance with applicable procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p 473; each with references).

2.4. The Appellant disregards that the Federal Tribunal is bound by the findings in the award under appeal as to the contents of the case when he precedes his legal argument as to the expert opinion of Prof. Hofbauer with a detailed statement of facts in which he sets forth the proceedings from his point of view and refers to a binder containing numerous documents of the case.

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

Moreover, he disregards in part the legal requirements for sufficient reasons insofar as the limits to submit criticism of an appellate nature as to the award under appeal. Thus, he submits that the Arbitral Tribunal dismissed some applications in the proceedings "concisely" and describes the reasons in the award as "blatant nonsense." In doing so, he provides no grievance contained in Art. 190(2) PILA. In an appeal against an international arbitral award according to Art. 190(2) PILA, only the grounds for appeal listed in that provision may be relied upon and not a violation of the federal constitution directly, of the ECHR, or any other international treaties (see judgment 4A_198/2012[11] of December 14, 2012, at 3.1; 4A_43/2010[12] of July 29, 2010, at 3.6.1; 4A_612/2009[13] of February 10, 2010, at 2.4.1; 4P.64/2001 of June 11, 2001, at 2d/aa, not published in BGE 127 III 429 *ff.*) and the violation of various provisions quoted is therefore basically inadmissible. The fundamental principles resulting from the constitution or the ECHR may indeed be helpful to substantiate the guarantees contained in Art. 190(2) PILA but considering the strict requirements for reasons (Art. 77(3) BGG), it must be shown in the appeal brief in what way one of the grounds for appeal in the provision quoted is met. The Appellant disregarded this requirement by arguing several direct violations of Art. 6(1) and (2) ECHR.

3.
The Appellant submits that the CAS should have declined jurisdiction (Art. 190(2)(b) PILA).

3.1. According to well-established case law, the interlocutory decisions of an arbitral tribunal as to its composition or jurisdiction are subject to an independent appeal (Art. 190(3) PILA) and must also be appealed immediately as otherwise the possible grievances are forfeited and may no longer be invoked in an appeal against the final award (BGE 130 III 66 at 4.3, p. 75; 121 III 495 at 6d, p. 502; 118 II 353 at 2, p. 355).

3.2. The Appellant argues that on October 20, 2012, he terminated the arbitration clause without notice once his submission for legal aid was denied in an order of October 26, 2012; therefore, the CAS no longer had jurisdiction from that point. In doing so, he disregards that the jurisdictional objection should have been raised in an appeal against the CAS partial award of March 21, 2013. As he waived the opportunity to appeal that decision to the Federal Tribunal, his argument as to the alleged lack of jurisdiction is not admissible.

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/failure-ask-reasons-does-not-make-appeal-inadmissible

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/judicial-review-of-international-arbitral-awards-limited-by-art-

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/limited-judicial-review-of-awards-independence-of-cas-reaffirmed

4.
The Appellant sees a violation of the rule of equal treatment (Art. 190(2)(d) PILA) and of public policy (Art. 190(2)(e) PILA) in the denial of his request for legal aid.

He argues that, considering his difficult financial situation, he applied to the CAS for financial support before he submitted his answer to the appeal for his legal representation by Prof. Dr. Rainer Cherkeh and other costs (his own expenses and those of witnesses, experts and translators); his application was rejected. However, he does not mention that the lawyer in question – and additional counsel – still represented him until the end of the arbitration and that he submitted various expert reports. The Appellant describes the reasons of the Arbitral Tribunal in support of the rejection of his submission as "not only untenable but sheer humbug" and merely quotes his own submissions *verbatim*, concluding his arguments with the unsupported claim of a violation of the principle of equal treatment and of public policy simultaneously. In doing so, he disregards the legal requirements that a grievance based on Art. 190(2) PILA should be sufficiently reasoned (Art. 77(3) BGG).

Moreover, the Appellant does not explain to what extent the rule of equal treatment of the parties or public policy would entail a right to legal aid in arbitration as in state court proceedings (Art. 29(3) BV[14]). He does not at all address the fact that in domestic arbitration legal aid is specifically excluded by Art. 380 of the Swiss Code of Civil Procedure (ZPO; SR 272) and does not explain why it should be different in international arbitration (see Christoph Müller, *Kommentar zur Schweizerischen Zivilprozessordnung*, Sutter-Somm and others [editors], 2nd ed., 2013, n. 6 at Art. 380 ZPO; Bernhard Berger and Franz Kellerhals, *International and domestic Arbitration in Switzerland*, 2nd ed., 2010, n. 572, 1043.) Whether and under what conditions an arbitration agreement may be terminated for lack of financial means in consideration of the guarantee of appropriate legal recourses (Art. 29a BV, Art. 6(1) ECHR) (see in this respect Berger and Kellerhals, *op. cit*., n. 572, 1043; Müller, *op. cit*., n. 4 ad Art. 380 ZPO; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage international*, 2nd ed., 2010, n. 280a; Felix Drasser, Oberhammer and Andere [editors], *Kurzkommentar* ZPO, 2nd ed., 2013, n. 3 ad Art. 380 ZPO), needs not be examined thoroughly in the case at hand as the Appellant did in fact claim termination for cause based on his lack of means but waived an appeal against the interlocutory decision by which the CAS held that the termination was invalid and accepted jurisdiction.

5.
The Appellant argues several violations of the right to be heard and the principle of equal treatment of the parties (Art. 190(2)(d) PILA) by the CAS.

5.1. Art. 190(2)(d) PILA allows an appeal only on the basis of the mandatory procedural rules according to Art. 182(3) PILA. In this respect, the arbitral tribunal must guarantee, in particular, the right of the parties to be heard. With the exception of the requirement of reasons, this corresponds to the constitutional right contained at Art. 29(2) BV (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578

[14] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

f.). Case law deduces from that, in particular, the right of the parties to state their views as to all facts important to the decision, to submit their legal arguments, to prove their factual allegations important for the decision with appropriate means submitted timely and in the appropriate format, to participate in hearings and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

The right to be heard is not without limit, even in arbitral proceedings. Thus, the arbitral tribunal is not forbidden from establishing the facts only on the basis of the evidence it considers suitable and relevant (BGE 119 II 386 at 1b, p. 389; 116 II 639 at 4c, p. 644). The arbitral tribunal may waive the administration of evidence when the corresponding submission concerns facts that are not legally relevant, when the evidence is obviously inadequate or when the arbitral tribunal has already reached its opinion on the basis of the evidence already heard and may conclude on the basis of a preliminary assessment of the new evidence that introducing further evidence will not change its conclusion (see BGE 134 I 140 at 5.3; 130 II 425 at 2.1, p. 429; 124 I 208 at 4a). The assessment of evidence in advance by an international arbitration tribunal may be reviewed in an appeal only from the limited point of view of a violation of public policy (judgments 4A_526/2011[15] of January 23, 2012, at 2.1; 4P.23/2006 of March 27, 2006, at 3.1; 4P.114/2003 of July 14, 2003 at 2.2). The right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not contain, according to well-established case law, the right to obtain reasons in an international arbitration (BGE 134 III 186[16] at 6.1, with references). However, there is a minimal duty of the arbitrators to address and handle the issues relevant to the decision. The arbitral tribunal violates this requirements if, due to oversight or a misunderstanding, it leaves unaddressed some legally relevant submissions, arguments, evidence, or offer of evidence of a party (BGE 133 III 235 at 5.2, with references).

5.2. The Appellant disregards these principles when he submits that the Arbitral Tribunal violated his right to submit evidence by refusing his suggested analysis of the samples with the so-called Bio Marker Test. Based on the expert statements of Prof. Thevis, the Arbitral Tribunal held that the Bio Marker Test in question was not more reliable as the hGH Test actually performed but rather that it had a different scope as it could not show a specific administration of human growth hormone within twelve hours before the sample was taken. There is no violation of the right to be heard by the Arbitral Tribunal because it refused an additional analysis of the samples on the basis of anticipated assessment of the test requested by the Appellant. Moreover, the Appellant does not explain why the right to be heard or the principle of equal treatment of the parties in an arbitration would create a right to obtain further analysis according to other methods aside from the test procedure contained in the applicable Anti-Doping Rules. Furthermore, the principles of evidence applicable in private law – even when disciplinary measures of private sport federations are to be assessed – cannot be determined from the point of view of criminal law concepts such as the presumption of innocence or the guarantees resulting from the ECHR as the Federal Tribunal confirmed several times in particular in cases concerning doping violations (judgment 4A_448/2013 of

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-violation-of-the-right-to-heard-denied-the-parties-do-n

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

March 27, 2014, at 3.3; 4A_488/2011[17] of June 18, 2012, at 6.2; 4A_612/2009[18] of February 10, 2010, at 6.3.2; 5P.83/1999 of March 31, 1999, at 3d; 4P.217/1992 of March 15, 1993, at 8b, not published in BGE 119 II 271 *ff.*). Therefore, the Appellant raises no admissible ground of appeal according to Art. 190(2) PILA in his argument that the Arbitral Tribunal violated the presumption of innocence.

5.3. The Appellant argues that the Arbitral Tribunal violated the right to be heard and the principle of equal treatment in connection with the two expert reports of Prof. Hofbauer he submitted as to the Voss Study and the Hanley Report.

5.3.1. First, he wrongly claims that the Arbitral Tribunal allowed the Respondent to submit two new scientific studies at the last minute. According to the award under appeal, the Appellant demanded in his oral argument during the hearing to be allowed to state his position as to the study mentioned by the expert Dr. Saugy in his interrogation. The fact that the study was also given to the Respondent to state its view appears appropriate from the point of view of equal treatment and does not constitute unequal treatment of the Appellant. Moreover, the parties also agreed that both parties would have the opportunity to state their views in respect of the the Voss Study, something which the Appellant does not mention.

5.3.2. As to the contents of the Hanley Report, which became available only at the hearing, the parties could not state their views then and also during the hearing; accordingly, Prof. Hanley was heard as an expert only as to the status of the report and not as to its contents. This also suggested that both parties should be given a time limit to state their views and the Appellant would make his submission only after the Respondent and could state his view as to its comments. This was not unequal treatment of the Appellant. Moreover, the decision under appeal does not show – contrary to the Appellant's claim – that his submission of the expert report of Prof. Hofbauer as to the Hanley Report was not admitted by the Arbitral Tribunal. In fact, Prof. Hofbauer's expert report as to the Voss Study and the Hanley Report are clearly addressed. The Respondent opposed only the admission of the first report (namely, the Voss Study) while raising no objection as to the second expert report (namely, the Hanley Report), which is acknowledged even in the appeal brief. The claim that the Arbitral Tribunal did not admit Prof. Hofbauer's expert report as to the Hanley Report cannot be corroborated any more than the accusation that it did not take the contents of this report into consideration at all. Moreover, the Appellant himself acknowledges that the Arbitral Tribunal specifically confirmed in a letter of December 12, 2013, that the report at issue was received as an enclosure to the Appellant's statement. His claim that "at least at the time of reaching its decision", the Arbitral Tribunal mistakenly assumed that the enclosures to his statement of December 2, 2013, were mere copies of expert reports previously submitted has no support at all. No violation of the right to be heard or of the rule of equal treatment is shown in this respect.

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[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/limited-judicial-review-of-awards-independence-of-cas-reaffirmed

5.3.3. The fact that, after the hearing, the Arbitral Tribunal did not admit any additional expert report beside the Appellant's comments of September 23, 2013, as to the Voss Study, is not in itself a violation of the right to be heard. The parties had agreed, procedurally, that they could state their views in writing within a time limit as to the study mentioned during the hearing; there was no discussion of additional evidentiary proceedings as to the Voss Study, which was not introduced in evidence by a party. When evidence is submitted late from a procedural point of view and accordingly not admitted, this is not – in principle – a violation of the right to be heard.

5.3.4. Contrary to the Appellant's view, there is no violation of the right to be heard either in the claim that the order of December 19, 2013, mentioned in the award under appeal, pursuant to which, Prof. Hofbauer's expert report as to the Voss Study was declared inadmissible, was not notified to the Appellant. There is no right based on the right to be heard to demand that an arbitral tribunal issues a separate order as to the admissibility of each piece of evidence before the final award is issued and give the parties an additional opportunity to state their views in this respect. The Appellant's argument that he became aware of the inadmissibility of the expert report only by reading the final award shows no violation of the right to be heard. Neither does he show a violation of the rule of equal treatment in connection with the alleged failure to notify the aforesaid order. The decision of the Arbitral Tribunal he quotes as to the admissibility of the Hanley Report was based on a different situation as the Respondent's application to have the Hanley Report and Prof. Hanley himself available at the hearing took place at another stage in the proceedings and therefore had to be decided at the hearing itself and not only in the final award, as was the case for an unsolicited document submitted later. No unequal treatment of the parties that could lead to the annulment of the award can be derived from that.

5.3.5. Finally, there is no violation of the right to be heard as to the summary of the Appellant's argument by the Arbitral Tribunal concerning the so-called "stable ratio" ("The Respondent concluded that, with regard to the claimed stable ratio, the Appellant's argumentation 'is wrong' and to the contrary, 'empirically proven'"[19]). While the wording in the award under appeal may not be fully accurate, there is no deriving from it that the Arbitral Tribunal did not take into account the argument that concerning the so-called *stable ratio* the Respondent's allegation by way of the Voss Study would be rebutted, which would prove just the opposite empirically. The opposed views as to how meaningful the study was were well known to the Arbitral Tribunal. An oversight or a misunderstanding due to which the Arbitral Tribunal left an argument of the Appellant's unaddressed is not to be found (BGE 133 III 235 at 5.2, with references).

5.4. The Appellant argues a factual finding of the Arbitral Tribunal in contradiction to the record as to his submission concerning the reliability of the hGH tests, which resulted in his being deprived of the opportunity to prove his point of view as to an issue relevant to the case. Thus, contrary to the finding of the Arbitral Tribunal, he disputed the reliability of the test itself and argued on this basis that the difference

[19] Translator's Note: In English in the original text.

between the results of the A-Sample (2.45 and 2.42) and the B-Sample (3.16 and 2.34) rendered the test invalid.

The Appellant is unable to show with reference to the record that he submitted that the hGH Test would in itself be unfit to show the presence of recGH in the body in the arbitral proceedings. Instead, he challenged the admissibility of the test in dispute to prove a doping violation on one hand, as he submitted that the results would be influenced by individual and external factors (such as intensive training, stress, size, time of taking, age, and ethnicity of the athlete) and the existing statistical values for comparison were insufficient. On the other hand, he questioned the specific result of the test and claimed that the difference between the results measured as to his A- and B- Samples made the test invalid. Yet, the arguments were not overlooked by the Arbitral Tribunal but rather they were mentioned and analyzed in the award under appeal. Thus, in particular, the argument that the difference between the A- and B- Samples was considered yet held unfounded on the basis of statements by the experts.

The argument that the Appellant was prevented from presenting his point of view in the case by an obvious oversight of the Arbitral Tribunal is therefore unfounded.

5.5. The Appellant furthermore argues that a factual finding in the award under appeal as to the expert's statement in connection with his objection as to the different values in the A- and B- Samples was blatantly false. Thus, the Arbitral Tribunal's statement that, according to the experts heard in the hearing, different antibodies were used to analyze the B- Sample which lead to different results, is not only wrong but none of the experts made such a statement. Instead, it would be correct that the antibodies in Kit 1 were obviously the same in the A- and B- Samples, which is why the big difference between the results of the A- and B-Samples in Kit 1 could not be explained.

In this argument the Appellant disregards that according to well-established case law of the Federal Tribunal, a factual finding that is blatantly wrong or contrary to the record is not in itself sufficient to annul an international arbitral award. The right to be heard entails no right to a substantively accurate decision (BGE 127 III 576 at 2b, p. 577 *f.*; 121 III 331 at 3a, p. 333). The Arbitral Tribunal did not disregard, due to oversight or misunderstanding, the argument that the difference between the A- and B- Sample made the test invalid but mentioned it specifically in the award under appeal and rejected it pursuant to expert reports. In doing so, it specifically mentioned the points of view of the experts as to the meaning of the difference between the A- and B- Samples. Insofar as the Appellant argues before the Federal Tribunal that the reasons of the award do not explain the difference measured, he inadmissibly criticizes the assessment of the evidence in the arbitration.

5.6. In his submissions as to the determination of the Difference Limits (DL) as well, the Appellant merely criticizes the contents of the award under appeal and presents his own view to the Federal Tribunal as to the decisive value, yet without showing a violation of the right to be heard. The Arbitral Tribunal held that the Appellant's arguments and the expert reports were unable to show that the determination of the Difference Limits were inaccurate and scientifically inadmissible, leading to higher Difference Limits than

those actually measured. Contrary to what the Appellant seems to assume, the Arbitral Tribunal did not overlook that his party-appointed experts took the view that a higher Difference Limit than the one actually resorted to should be employed. Instead, it took this into account in the award under appeal but considered it unpersuasive and held that the Appellant had been unable to prove his case as to the disputed reliability of the Difference Limits used in the case at hand.

The contention that the Arbitral Tribunal disregarded some of the evidence and thus violated the right to be heard is unfounded.

5.7. The argument that the right to be heard was violated in connection with the Appellant's submission that the entire case file of the DIS Arbitral Tribunal should be requested is equally unfounded. Contrary to what the Appellant appears to assume, the Arbitral Tribunal did not overlook the aforesaid procedural request but mentioned it specifically in several passages of the award under appeal. His argument that the Arbitral Tribunal did not address his submissions disregards that according to well-established case law, the right to be heard does not include the right to reasons of an international arbitral award (BGE 134 III 186[20] at 6.1, with references). That the file was not made part of the record of the arbitration would create a violation of the right to be heard was not argued by the Appellant and neither does it show how he undertook efforts in the arbitral proceedings to remedy a possible procedural deficiency in this respect at the outset of the arbitration (BGE 119 II 386 at 1a, p. 388; judgments 4A_244/2012[21] of January 17, 2013, at 3; 4A_16/2012[22] of May 2, 2012, at 3.3; 4A_617/2010[23] of June 14, 2011, at 3.1).

Insofar as he argues a further violation of the rule of equal treatment (Art. 190(2)(d) PILA) and of public policy (Art. 190(2)(e) PILA), he disregards the legal requirements that arguments be properly substantiated.

6.
The Appeal proves unfounded and is rejected insofar as the matter is capable of appeal. The Appellant's application for legal aid in the federal appeal proceedings must be rejected considering the hopelessness of the appeal (Art. 64 BGG). In view of the outcome of the proceedings, the Appellant must pay the costs (Art. 66(1) BGG). The Respondent stated its position only as to the stay of enforcement and is therefore only entitled to limited costs (Art. 68(1) BGG).

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[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-clause-and-arbitration-clause-contradicting-each-other-must-be-interpreted-according

[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/a-party-considering-itself-harmed-by-a-denial-of-the-right-to-be

[23] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-right-to-the-appointment-of-an-expert-by-the-arbitral-tribun

Therefore the Federal Tribunal Pronounces:

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

2.
The application for legal aid is rejected.

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

4.
The Appellant shall pay to the Respondent an amount of CHF 1'500 for the federal judicial proceedings.

5.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, June 11, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann