Arbitration CAS 2006/A/1041 Stefan Ivanov Vassiliev v. Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) & Bulgarian Bobsleigh and Toboggan Federation (BBTF), award of 28 July 2006 (operative part of 30 June 2006)

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Bobsleigh
Doping (methenolone enanthate)
Lack of jurisdiction of the FIBT
Burden of proof
No fault or negligence or no significant fault or negligence in the application for a retroactive TUE

1. **According to the FIBT's Rules, in cases in which a doping test is instigated by FIBT (or WADA), the athlete's national federation concerned is responsible for the results management, the conduct of the hearing process and for any "consequences" to the athlete's detriment resulting from a decision. The FIBT Rules do not provide for any competence on the part of the FIBT in this regard. In particular the FIBT Rules do not contain any basis to "re-examine" a case or to decide on an "appeal" against a doping ban. The fact that a proper case management by the national federation cannot be expected because of a conflict of interest is not sufficient to justify the FIBT's ability to override its own rules.**

2. **Under the FIBT rules, the burden of proving the absence of (significant) fault or negligence to the court lies with the athlete. As regards the standard of proof, the "balance of probability" must be considered. The clear evidence that the prohibited substance was administered to the athlete after a surgical intervention which was beyond the athlete's control and sphere of influence is a sufficient reason to admit that the athlete proved that he/she is without fault in connection with the prohibited substance entering his/her body.**

3. **Under the FIBT Rules, an athlete's obligations are not limited to the only period prior to the taking or using of a prohibited substance but also apply in the period thereafter. The examination of fault is therefore in relation to a condition, not only to the point in time when a substance was taken. The FIBT Rules provide that an athlete can apply for a Therapeutic Use Exemption (TUE) *ex post facto* under certain circumstances, such as the treatment of an acute medical condition. The athlete acts at least negligently if he/she does not apply for such a TUE although he/she could have discovered without great difficulty the details of his/her treatment before the sample was taken. In such a case, there is no scope for the application of the "no fault or negligence" rule, but only for the "no significant fault or negligence" rule; therefore, the period of ineligibility cannot be totally eliminated but only be reduced.**

Stefan Ivanov Vassilev ("the Appellant" or "the Athlete") was born on 8 September 1968 and is an international level athlete. He is a duly listed member of the national team of the Bulgarian Bobsleigh and Toboggan Federation ("the BBTF" or "the Second Respondent"). On 22 November 2004 he provided a urine sample as part of the out-of-competition testing program of the World Anti-Doping Agency ("WADA"). On 9 December 2004 the WADA accredited laboratory at the Deutsche Sporthochschule in Cologne ("the Cologne Laboratory") reported an adverse analytical finding for the substance methenolone enanthate in the A sample. Methenolone enanthate is a banned substance under the rules of the Fédération Internationale de Bobsleigh et de Tobogganing ("the FIBT" or "the First Respondent") and of the BBTF.

The FIBT informed the BBTF of the adverse finding by letter dated 16 December 2004 and instructed it to conduct its results management programme in accordance with Art. 7 of the FIBT Anti-doping rules 2004 ("the FIBT Rules").

By letter dated 7 January 2005 the Vice-President of the BBTF commented on the adverse analytical finding and ruled out "the possibility of a deliberate rule violation" by the Athlete. In its letter the BBTF additionally requested that the analysis of the B sample be conducted in another laboratory.

By letter dated 12 January 2005 the First Respondent denied the BBTF's request that the B sample be analysed in a different laboratory. The B sample was then analysed on 15 February 2005 in the Cologne Laboratory. Said analysis confirmed the result of the analysis of the A sample.

By letter dated 7 March 2005 directed at the BBTF and the Athlete, but addressed only the BBTF, the Secretary General of the FIBT informed the parties of the Cologne Laboratory's analytical finding of the B sample. The letter also included the following passage: "Therefore under the rules of FIBT and WADA, the athlete is subject to a 2 year ban beginning from 9th December 2004. We note as well that the athlete subject to the sanction is President of the Bulgarian Bobsleigh and Toboggan Federation and as such cannot participate in any FIBT events or procedures for the period of the ban. The FIBT requests that the Bulgarian Bobsleigh and Toboggan Federation give a clear indication of how it will proceed under the current circumstances and how the governance of the Federation will be conducted".

By letter dated 15 June 2005 the BBTF informed the FIBT that the presidency of the BBTF had in the meantime been assumed by the Vice-President Alexander Simeonov. In addition the BBTF requested that the two-year ban imposed on the Athlete be cancelled. The BBTF substantiated the request with the argument that the adverse analytical finding was the result of emergency surgery undergone by the Athlete during a visit to his parents in September 2004.

After requesting additional documentation the case was (re-)examined by a special committee of the FIBT. By email of 15 November 2005 the Secretary General of the FIBT then informed the President of the BBTF of the result of the "re-examination" of the doping case as follows:

> *"Having also re-examined the medical documentation produced in the past, the above mentioned Committee concluded its evaluation by stating that the 2-year ban imposed on the athlete Stefan Vassilev must be re-confirmed for the following reasons:*

- the Commission noted no valid medical indication for giving the banned substances Methenolone enanthate to the athlete;

- the athlete failed to present – as he should have done – the request for a Therapeutic Use Exemption to the FIBT medical Commission for the therapeutic use of a prohibited substance on the WADA List of Prohibited Substances and Prohibited Methods".

By letter dated 30 December 2005 the BBTF informed the FIBT that it had reduced the period of ineligibility from two years to one year expiring on 9 December 2005. The Second Respondent justified its decision with, inter alia, the argument that firstly the positive finding was a consequence of medical emergency treatment and secondly that the Appellant "provided substantial assistance to discover the proper person involved in the anti-doping violation found by FIBT". This decision of BBTF was communicated to the Appellant by letter dated 3 January 2006.

By letter dated 3 January 2006 the First Respondent informed the Second Respondent that a national federation was not entitled to reduce a sanction imposed on the Athlete by the international federation and that, hence, the two-year ban imposed on 7 March 2005 remained in force. In addition the letter contains the following notice: *"Your Federation and/or athlete had, and still have, the possibility of appealing to the IOC Court of Arbitration in order to request the reduction of the punishment"*. By letter dated 4 January 2006 the Second Respondent forwarded the FIBT's letter dated 3 January 2006 to the Appellant.

By letter dated 12 January 2006 the Appellant requested from the First and the Second Respondent a copy of the file on which the respective decisions for the ban were based. On 2 February 2006 the BBTF sent a copy of the file to the Appellant.

On 8 February 2006 the Appellant filed an appeal with the CAS ad hoc Division in Turin. After being advised by the President of the CAS ad hoc Division in Turin that this was not the proper forum to file the appeal the Appellant turned to the CAS Court Office in Lausanne by letter dated 14 February 2006. The appeal filed with the CAS Court Office in Lausanne is an appeal against the decision of FIBT imposing a two-year period of ineligibility on the Athlete and an appeal against the decision of the BBTF imposing a one-year sanction on the Athlete.

By letter to the CAS dated 1 March 2006 the First Respondent claimed that the Appellant's appeal was manifestly too late according to Art. R49 of the Code of Sports-related Arbitration (hereinafter referred to as "the Code"). In his order dated 24 March 2006 the President of the CAS Appeals Arbitration Division ruled that the appeal filed by the Appellant with CAS on 22 February 2006 was admissible.

A hearing was held in Lausanne on 28 June 2006. At the conclusion of the hearing, the parties, after making submissions in support of their respective requests for relief, raised no objections regarding their right to be heard and to be treated equally in the arbitration proceedings.

LAW

Jurisdiction

1. The Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes can arise out of the statutes and regulations of a federation containing an arbitration clause, out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu* the jurisdiction of CAS is based on Art. 13.2 of the FIBT Rules. The provision provides that, *"a decision that an anti-doping rule violation was committed may be appealed – in case involving an international-level athlete – exclusively to the CAS"*.

2. Moreover, at least the Appellant and the First Respondent have signed the Order of Procedure dated 22 June 2006. Furthermore, in their abundant correspondence with the CAS, neither the Appellant nor the First Respondent have at any time challenged the general jurisdiction of the CAS. Finally, the Appellant and the First Respondent confirmed the jurisdiction of the CAS at the hearing.

The panel's task

3. The Panel's task follows from Art. R57 of the Code. According to said Article the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code allows the Panel to issue a new decision which replaces the challenged decision or to annul the decision and refer the case back to the previous instance.

4. The fact that the Second Respondent has not commented on the matter and also did not appear at the hearing, although it was properly summoned to it, does not alter the Panel's task, which ensues from Arts. R55(3) and 57(3) of the Code.

Admissibility

5. The appeal filed by the Appellant by letter dated 14 February 2006 is admissible. This has been determined by the Order of the President of the CAS Appeals Arbitration Division dated 24 March 2006.

Applicable law

6. According to Art. R58 of the Code, the Panel is required to 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".

7. *In casu* the "applicable regulations" in the sense of Art. R58 of the Code are the rules and regulations of the First Respondent, in particular the FIBT Rules.

The merits

8. The examination of the merits centers on two questions, namely the legality of the sanction of 2-years' ineligibility imposed by the First Respondent and the legality of the one-year ban imposed by the Second Respondent. It is not disputed between the parties that the prohibited substance methenolone enanthate was found in the bodily specimens of the Appellant and that the Appellant's sample of 22 November 2004 was taken and analysed lawfully and properly.

A. The first respondent's decision

9. By letter dated 7 March 2005 the First Respondent imposed a 2-year ban on the Appellant because of an anti-doping violation and – following a "re-examination of the case" – confirmed said ban in writing by letter of 3 January 2006. The appeal against said ban (imposed and confirmed) by the First Respondent is completely well-founded

10. *In casu* the First Respondent took action against the Appellant although it did not have any competence to do so according to its rules and regulations. According to the FIBT Rules, in cases in which – as in the present – case the doping test was instigated by the FIBT (or by the WADA pursuant to an agreement with the FIBT), the national federation of the athlete concerned is responsible for the results management (see Art. 7.1), conduction the hearing process (see Art. 8 .2) and finally also for the decision about any 'consequences' (see Art. 8.6) to the athlete's detriment. Nor do the FIBT Rules provide for any "second instance" competence on the part of the First Respondent. In particular the FIBT Rules do not contain any basis for the authority to "re-examine" the case or to decide on an "appeal" against the doping ban, of which the First Respondent availed itself.

11. This usurping of authority by the First Respondent is in the present case also not justified as an exception because of special circumstances of the specific case. Although the First Respondent pointed out in the hearing that the Appellant was only an athlete but at the time also President of the BBTF and that therefore proper case management by the BBTF could not be expected because of a conflict of interest, this reason is not sufficient justification for overriding one's own rules. Firstly, this is merely a claim made by the First Respondent without any further substantiation. Secondly, there was no reason – even if one were to agree with the First Respondent's argument – to override the rules governing competence laid down in the FIBT Rules; for under its own rules and regulations the First Respondent had various instruments available in order to counter any delay or obstruction of the proceedings by the BBTF. At no

time therefore did an emergency situation exist for the First Respondent provoking the breach of the rules. Art. 8.2 of the FIBT Rules provides:

"Hearings … shall be completed expeditiously and in all cases within three months of the completion of the Results Management process … If the completion of the hearing is delayed beyond three months, if my elect, if the Athlete is an International Level Athlete, to bring the case directly to a single arbitrator form the Court of Arbitration for Sport. …".

At no time did the First Respondent make any such application. Under the First Respondent's rules and regulations it would also have been possible for the First Respondent to impose a provisional suspension on the Appellant pursuant to Art. 7.4 of the FIBT Rules. This was not done either. To sum up, therefore there was at no time any reason for the First Respondent to act in breach of the rules.

12. Not only the usurping of authority as such, but also the manner in which the First Respondent exercised its supposed competence is highly unlawful. Thus, for instance, the ban was imposed on the Appellant without the First Respondent having conducted a hearing. However, the FIBT Rules state (see Art. 8.2) that a hearing is mandatory. The principle of fair hearing has therefore benne substantially breached. This irregularity is not cured by the fact that a committee of the FIBT conducted a "re-examination of the case" – which is not even provided for by the FIBT Rules; for firstly the Appellant did not participate in said "re-examination" and secondly this does not even begin to fulfill the requirements to be met by a "hearing process" stipulated in Art. 8.2 of the FIBT Rules. Furthermore, the FIBT Rules provide that the athlete has a right to a *"timely, written and reasoned decision"* (Art. 8.2). This too is missing in the present case; for the First Respondent did not give a decision which can be termed "reasoned" in either its letter of 7 March 2005 nor in its letter of 3 January 2006 speaks of the FIBT Medical Committee having decided the appeal, in his email of 15 November 2005 the Secretary General speaks of a "Positive Doping Cases Committee", which re-examined the case. Let it at this point also be mentioned by-the-by that the Secretary General's reference in his letter of 3 January 2006 to the *"IOC Court of Arbitration"* is ambiguous; for the CAS is not a "sub-group" or "department" of the IOC (see REEB, in REEB (ed.), Digest of CAS Award 1986-1998, Bern 1998, p. XXVI et *seq.*).

13. To sum up therefore it can be stated that in the specific case there is absolutely no basis in the rules and regulations for the way in which the First Respondent proceeded and that therefore the First Respondent's decision to ban the Appellant for two years is unlawful and therefore void. Because the rules and regulations also do not contain any basis for legitimation the Panel cannot in the present case make any decision of its own in this regard in lieu of the FIBT pursuant to Art. R57 of the Code.

B. The Second Respondent's Decision

14. By letter of 30 December 2005 the Second Respondent imposed a one-year ban on the Appellant. The appeal against this is partially founded

15. Under the FIBT Rules the BBTF is responsible for imposing a bon of ineligibility on the Appellant (see above). The first prerequisite for this is that the FIBT Rules presence of a prohibited substance or its metabolites in an athlete's bodily specimen constitutes an anti-doping rule violation. In the present case it is not disputed that the Appellant committee an anti-doping violation; firstly the analysis in the Cologne Laboratory revealed the presence of a prohibited substance and secondly an anti-doping violation does not require any subjective element on the part of the athlete such as *"intent, fault or negligence"* (see Art. 2.1.1 of the FIBT Rules).

16. In compliance with the World Anti-doping Code ("WADC") the FIBT Rules stipulate a period of two years' ineligibility (Art. 10.2) for a first anti-doping rule violation within the meaning of Art. 2.1. However, in the present case, there may be a reason for reducing the two year ban pursuant to Art. 10.5.1 or Art. 10.5.2 of the FIBT Rules. A prerequisite for this would be that there is "no fault or negligence". The burden of presenting this to the court and the burden of proving these exceptional circumstances lies with the Appellant (see Art. 10.5 of the FIBT Rules). In addition Art. 3.1 of the FIBT Rules provides that, as regards the standard of proof, the *"balance of probabilities"* must be considered.

17. In the present case the Panel, having taken evidence, proceeds on the assumption that the Appellant did undergo an emergency operation because of a hernia inguinalis dextra incarcerata on 6 September 2004 in the "Multiprofile Hospital for Active Treatment" in Ruse (Bulgaria). This is supported by the Appellant's detailed and plausible submissions in the hearing on the sequence of events concerning the facts of the case as well as the documents submitted by the Appellant, namely the "discharge summary" and the hospital's "operative report". According thereto the Appellant was admitted to the hospital's accident and emergency ward with severe pains in his abdomen on 6 September 2004 and was immediately operated on after a brief examination.

18. Furthermore, in the Panel's opinion, the result of the taking of evidence is that the Appellant was treated postoperatively in hospital with the drug "Primabulone depot" in order to encourage and accelerate the healing process. According to the concurring statements of the court-appointed expert, Mr Saugy, and the party-appointed expert witness, Mr Gintchev, the drug has the effect of increasing the synthesis of blood and muscle cells. The drug's primary area of application is in cases of anaemia or loss of blood in order to recover muscle mass. Whether and to what extent the drug is also used in (medical) practice beyond these cases, for instance in connection with (preventative) postoperative care, cannot be answered across the board. According to the detailed and plausible statements by the court-appointed expert, Mr Saugy, a different cultural approach can be observed, particularly between Eastern and Western Europe. While the drug is applied only very reticently for preventative purposes in Western Europe, such application is much more widespread in Eastern Europe. The party-appointed expert witness, Mr Gintchev, also confirmed this impression. According to him, although it was not standard practice to use the drug in Bulgaria after surgical interventions for the general purpose of encouraging the healing process and of avoiding complications, such application

was not unusual. In the light of these statements, but also in view of the hospital's "discharge summary" of 19 September 2004, in which it is noted that the drug "Primabulone depot" was administered to the Appellant postoperatively, the better reasons support the argument that in the present case the Appellant was given the drug for medical reasons and not for non-sporting doping purposes.

19. Based on the evidence taken, the Panel further proceeds on the assumption that the Appellant's adverse analytical finding is due to having taken the drug "Primabulane depot" (once). According to the "Merck Index", the common encyclopaedia of chemicals, drugs and biologicals (12th edition 1996), the drug's pharmacological name is "methenolone enanthate" and therefore precisely the substance, which was found in the Appellant's urine sample according to the laboratory report. If the drug is not taken orally but - as in the present case - is injected - the drug, even if administered only once, has a long-term effect. Whether and how long the substance can be detected in a patient's body depends on the individual case and depends on a number of different parameters, in particular also on how high the injected dose was - which is not known in the present case. According to a statement made by Mr Saugy, which the Panel has no cause to doubt, one can expect that even with a "normal", single dose the substance's metabolites will be discharged in the patient's urine over a lengthy period of time. According to the expert, Mr Saugy, detection of the substance in the Appellant's bodily fluids for a period of approximately two months is perfectly "possible and not to be ruled out". In the present case, about two months elapsed between the Appellant's operation on 6 September 2004 or his discharge from hospital on 19 September 2004 and the doping control on 22 December 2004. There is therefore a high probability to support the argument that there is a direct connection between the Appellant's medical treatment in hospital and the adverse analytical finding.

20. In the Panel's opinion there is "no fault or negligence" on the part of the Appellant for the prohibited substance having been in his body. The Panel is satisfied that the Appellant was admitted to the hospital's accident and emergency ward with acute pain, was examined by various doctors and was immediately operated on under anaesthetic. The Appellant had no influence on either "whether" or "how" the surgical intervention would be undertaken. The same applies to the postoperative administration of the drug "Primabulone depot". According to the "discharge summary" this drug was administered to the Appellant by means of an injection once, directly after the surgical intervention. All these events therefore took place beyond the Appellant's control and sphere of influence. Of course the Appellant could - theoretically - have pointed out when he was admitted to emergency that he is an athlete and was therefore subject to sports-specific restrictions in terms of medical treatment. However, it cannot seriously be assumed that the obligation on the part of the athlete to point this out - which exists in usual circumstances - was breached intentionally or negligently in the present case, where the athlete was admitted to a hospital with extremely severe pain and a life-threatening condition.

21. However, under the FIBT Rules, an athlete's obligations are not limited to only the period prior to the taking or using of a prohibited substance, rather they also apply in the period thereafter.

Firstly, this follows from 10.5 of the FIBT Rules, for these rules are based on whether the athlete is at fault with regard to the presence of a prohibited substance in his bodily specimen. The examination of fault is therefore in relation to a condition, not only to the point in time when a substance was taken. Secondly, this also follows from the reference in Art. 4.3.2 of the FIBT Rules to the "International Standard for Therapeutic Use Exemptions" ("ISTUE"). According to the ISTUE an athlete must, as a matter of principle, apply for a Therapeutic Use Exemption ("TUE") prior to taking or using a prohibited substance. Pursuant to Art. 4.7 of the ISTUE the TUE can, as an exception, be applied for *ex post facto "in cases where an emergency treatment or treatment of an acute medical condition was necessary"*, i.e. where the exemption was not applied for in advance. The question therefore arises whether *in casu* the Appellant intentionally or negligently did not apply for the exemption. This can only be assumed if the Appellant knew or ought to have known that a prohibited substance was administered in the course of medical treatment. According to the Appellant's submissions in the hearing, he did not acquire positive knowledge of the treatment with the drug "Primabulone depot" until after the event, i.e. after the analysis report became known. However, the Appellant could probably have found this out before the sample was taken. According to the Appellant in the hearing, whilst he was in hospital he had the opportunity to speak with the doctors responsible on several occasions. He could therefore have found out without any great difficulty whether or not he had been administered a prohibited substance. However, according to the Appellant, while he was in hospital he deliberately did not inform the doctors treating him that he was an international-level athlete, because he feared that he would have to pay a higher amount for his stay in hospital and for the operation. Of course this reason cannot excuse the fact that the Appellant did not make any enquiries of his own. This applies all the more in view of the fact that the Appellant could have also found out the details of his treatment in another way, for according to his own statements, he could *"without any great difficulty"* have inspected his hospital file and could therefore have discovered the details of his treatment. The latter would also have stood to reason given the nature and severity of the intervention. It is therefore not surprising that the Appellant in his closing submissions in the hearing himself expressly and of his own accord admitted that to this extent there was fault or negligence on his part. However, this means that in the present case there is no scope for the application of Art. 10.5.1 of the FIBT Rules, which provides for an elimination of the period of ineligibility in the event of "no fault or negligence".

22. What is questionable is what the legal consequences of this fault - which at most can be classified as "no significant fault or negligence" - are. The FIBT Rules are quite strict in this regard. Pursuant to Art. 10.5.2 of the FIBT Rules if there is "no significant fault or negligence" on the part of the athlete with regard to the anti-doping rule violation and he additionally proves how the prohibited substance entered into his system, there is merely the possibility of reducing the period of ineligibility to one year. Even the lowest limit of this range of penalties (one year ineligibility) appears to be harsh in view of the circumstances of the present case. However, in this regard the Sole Arbitrator's hands are tied. The express wording of the provisions could, at most, be deviated from if the FIBT regulation were arbitrary or incompatible with the applicable state law. However, in the light of the advisory opinion in the case CAS 2005/C/976 & 986, which concerned the legality of a provision of the WADC with exactly the same wording, one

will not be able to argue this. The result of this is therefore that the decision of the BBTF of 30 December 2005 to ban the Appellant for a period of one year is insofar lawful.

23. In its decision to ban the Appellant for one year the BBTF assumed that the period began on 9 December 2004. In view of the particular facts of the present case this does not seem "fair" to the Panel within the meaning of Art. 10.8 of the FIBT Rules. According to this - where required by fairness - the period of ineligibility can be brought forward to the date of the sample collection. The Panel is making use of this possibility in view of the various defects in the irregularities in the present case. To be noted in this regard are particularly the excessive duration of the proceedings, the inadequate communication between the BBTF and the Appellant, the fact that the BBTF did not enter any appearance in the present proceedings and thereby made the Appellant's legal action more difficult and the scant reasons for its decision in the letter to the Appellant of 3 January 2006.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Stefan Ivanov Vassilev on 22 February 2006 against the decision of the FIBT and BBTF is partially upheld.

2. The decision of the FIBT dated 3 January 2006 is annulled.

3. The decision of the BBTF dated 30 December 2005 is partially reinstated.

4. Mr Stefan Ivanov Vassilev is guilty of anti-doping rule violation committed on 22 November 2004, further to an out-of-competition testing in Winterberg, Germany. Mr Stefan Ivanov Vassilev shall be declared ineligible for one year. The period of ineligibility shall start retroactively on the day of testing, namely on 22 November 2004.

5. (…).

6. (…).

7. All other claims are rejected.