CAS 2008/A/1513 Mr Emil Hoch v/FIS & IOC

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr. Ulrich Haas, Professor in Zurich, Switzerland
Arbitrators:	Mr. Hans Nater, Attorney-at-Law in Zurich, Switzerland
	Mr. Michele Bernasconi, Attorney-at-Law in Zurich, Switzerland
Ad hoc clerk:	Mr. Philippe Frésard, Attorney-at-Law in Berne, Switzerland

in the arbitration between

Mr EMIL HOCH, Triesen, Liechtenstein
represented by Mr. Markus Wille, Attorney-at-Law in Triesen, Liechtenstein

-Appellant-

and

FÉDÉRATION INTERNATIONALE DE SKI (FIS), Oberhofen, Switzerland
represented by Mr. Jean-Pierre Morand, Attorney-at-Law in Geneva, Switzerland

-First Respondent-

and

INTERNATIONAL OLYMPIC COMMITTEE (IOC), Lausanne, Switzerland
represented by Messrs Jan Paulsson, Mark Mangan and Tom Moham, Attorneys-at-Law in Paris, France

-Second Respondent-

* * *

1. THE PARTIES

1.1 EMIL HOCH (hereinafter also referred to as the "**Appellant**"), who was born on 15 June 1964, is an Austrian citizen and was the trainer (coach) of the Austrian cross-country ski team at the Winter Olympic Games in Turin, Italy, in 2006 (the "**Torino 2006 Olympic Games**"). He held a trainer licence from the Austrian Ski Federation (hereafter "**ÖSV**"), which in turn is a member of the First Respondent. Today the Appellant is the coach of the cross-country national team of Liechtenstein.

1.2 The INTERNATIONAL SKI FEDERATION (hereinafter referred to as the "**First Respondent**" or "**FIS**") is the international sports federation governing the sport of skiing worldwide. FIS is an association incorporated and existing under the laws of Switzerland. It has its seat in Oberhofen, Switzerland.

1.3 The INTERNATIONAL OLYMPIC COMMITTEE (hereinafter referred to as the "**Second Respondent**" or "**IOC**") is the supreme authority of the Olympic Movement and was the organiser of the Torino 2006 Olympic Games. The IOC is an association incorporated and existing under the laws of Switzerland. It has its seat in Lausanne, Switzerland.

1.4 The Appellant and the Respondents will hereafter be collectively referred to as "**the Parties**".

2 THE RELEVANT FACTS

2.1 During the Torino 2006 Olympic Games (February 2006) the Appellant shared a room with Mr Markus Gandler, the Austrian team director, in a private house on Via Banchetta in Pragelato. The house was located a short distance from the chalet in which the athletes of the Austrian cross-country ski team were housed (Messrs Martin Tauber, Roland Diethart, Jürgen Pinter, Johannes Eder). These athletes were under the care of and trained by the Appellant.

2.2 On the night of 18 February 2006 the Italian police executed a search warrant in the accommodation of the Austrian cross-country ski team and support staff in Pragelato. In the course of the search the police seized various items, both in the chalet, in which the athletes were housed, and in the building in which, among others, also the Appellant lived during the Torino 2006 Olympic Games.

2.3 The Italian police documented the search in a written record. According to said record (in translation) a bag belonging to the Appellant and containing the following items was seized in the room occupied by the Appellant and Mr Markus Gandler:

> *"a. three containers for renal infusion equipment (evidence 'B'),*
> *b. one phial for infusion brand name KOCHSALZ 'BRAUN 0.9%' (evidence 'C')*
> *c. one needle with tubes and testing device intravenous drip (evidence 'D')*
> *d. one phial for infusion brand name KOCHSALZ 'BRAUN 0.9%' (evidence 'E')*
> *e. one phial for infusion brand name KOCHSALZ 'BRAUN 0.9%' containing liquid (evidence 'F')*
> *f. one plastic container with red top labelled 'Hemcure' (evidence 'G')*

g. one apparently empty phial for infusion brand name KOCHSALZ 'BRAUN 0.9%' (evidence 'H')
h. two glass phials containing liquid brand name 'Hatriumchlorod' 0.9% with cannulas and needles with blood (evidence 'I')
l. one plastic container with probable traces of blood (evidence 'L')
m. two corks for needles with case (evidence 'M')
n. one butterfly needle with probable traces of blood (evidence 'N')
o. five handkerchiefs with probable traces of blood (evidence 'O')
p. one plastic packet with a white substance (evidence 'P')
q. twelve pieces of plastic with red substance and plastic tops (evidence 'Q')
r. one glass container (evidence 'q')
s. one glass container with plastic top and metal bands (evidence 'R')
t. one glass container containing liquid (evidence "S")."

2.4 In addition, according to the record, the Italian police seized the following further items from a dustbin at the entrance to the apartment, which was adjacent to the bedroom occupied by the Appellant and Mr Markus Gandler:

"*a. three containers for intravenous drip containing liquid (evidence 'T')*
b. five sterile needles (evidence 'U')
c. seven silver-coloured packets labelled 'Serafol Abo' (evicende 'V')
d. ten sterile intravenous drip cannulas (evidence 'Z')
e. three small corks with needles (evidence 'AA')
f. five 10 ml syringes with no needles (evidence 'AB')
g. one plastic syringe (evidence 'AC')
h. one yellow bag containing two pieces of paper handkerchiefs probably stained with blood, one needle cork and two plastic containers for syringe needles (evidence 'AD')."

2.5 The search record bears the following note:

"*Si da atto che presente verbale è stato tradotto in forma integrale mediante lettura dal Brigadiere CC PECMLANER Helmut in forza alla Regione CC Trentino Alto Adice conoscitore della lingua Tedesca con mansioni di interprete ... f.l.c.s. ALLE ORE 00.20 DEL 19.02.06.*"

In translation:

"*It is hereby attested that this record was translated in its entirety by being read aloud by Brigadiere CC PECMLANER Helmut, the member of the Caribinieri of the Trentino-South Tyrol region with a good command of the German language, acting as an interpreter. ... Drawn up, read, confirmed, signed on 19.2.2006 at 00.20 am.*"

2.6 The Appellant admits having collected the medical items found in his bag from the athletes at their home in order to dispose of them.

2.7 Immediately after the police had conducted the search the Appellant left Turin before daybreak to drive home to Austria.

2.8 As a result of the above-mentioned events various proceedings were initiated – amongst others – by the IOC and the FIS:

2.8.1 The IOC instituted proceedings against the athletes of the Austrian cross-country ski team (Messrs Tauber, Diethart, Pinter, Eder). All of them were declared by the IOC to be permanently ineligible for all future Olympic Games. The athletes filed an appeal

against this disciplinary sanction with the CAS. By decision dated 4 January 2008 the CAS dismissed the appeals by Messrs Eder, Tauber and Pinter (CAS 2007/A/1286, 1288, 1289). By decision dated 4 January 2008 the CAS partially upheld the appeal filed by Mr Diethart and reduced the period of his ineligibility (CAS 2007/A/1290).

2.8.2 FIS also instituted doping proceedings against the above-mentioned four athletes by reason of the events at the Torino 2006 Olympic Games. By decision of 22 November 2007 the FIS Doping Panel (hereinafter referred to as "**FDP**") convicted all but one of the athletes, namely Mr Pinter. While the FDP's decisions in the cases concerning Messrs Eder and Tauber have become final and unappealable, the other two proceedings are pending before the CAS. However, FIS also instituted proceedings against the Austrian team's athlete support personnel, in particular against Mr Markus Gandler, Prof. Peter Baumgartl, the medical doctor responsible for the Austrian Nordic team, and the Appellant. While the first two persons were acquitted because of a lack of evidence, the proceedings before the FDP against the Appellant were concluded on 28 February 2008 with a conviction as follows:

"... the Panel rules that:

1. *regarding the violation of Article 2.6.2 the Respondent, Emil Hoch is declared ineligible from participating directly or indirectly in any capacity in any FIS sanctioned events for a period of two years;*
2. *regarding the violation of Art. 2.8 the Respondent, Emil Hoch is declared ineligible from participating directly or indirectly in any capacity in any FIS sanctioned event for life;*
3. *(...)"*

3. THE PROCEEDINGS

3.1 On 18 March 2008 the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "**CAS**") against the decision issued on 28 February 2008 by the FDP. In his Statement of Appeal the Appellant requested a stay of execution of the FIS decision in accordance with Art. 13.1 of the FIS Anti-Doping Rules (hereinafter referred to as "**FIS ADR**").

3.2 On 9 April 2008 the Appellant filed his Appeal Brief with the CAS.

3.3 On 23 April 2008 the CAS Court Office set the First Respondent a deadline of 19 May 2008 to file its Answer to the Appeal.

3.4 On 25 April 2008 the Deputy President of the CAS Appeals Arbitration Division dismissed the Appellant's request for a stay of execution.

3.5 On 29 April 2008 the IOC filed a Statement of Intervention in accordance with Art. R41.3 of the Code of Sports-related Arbitration (hereinafter referred to as the "**Code**").

3.6 On 5 May 2008 the CAS Court Office informed the Appellant and the FIS of the constitution of the Panel.

3.7 After granting the Parties the right to be heard on the IOC's intervention the Panel issued a decision dated 27 June 2008 by which the IOC was allowed to participate as Co-Respondent (i.e. Second Respondent), together with the FIS in the arbitration procedure CAS 2008/A/1513 initiated by the Appellant.

3.8 By letter dated 25 July 2008 the IOC filed its Answer with the CAS.

3.9 On 30 July 2008 the CAS Court Office issued an Order of Procedure on behalf of the Panel which was signed by all the Parties.

3.10 By letter dated 8 August 2008 the First Respondent informed the IOC that it would not file further observations in reply to the Answer submitted by the IOC.

3.11 By letter dated 21 August 2008 the Appellant informed the CAS Court Office that it would not file a Reply to the submissions of the IOC.

3.12 By letters dated 15 September 2008 the Appellant and the Second Respondent, and by letter dated 16 September the First Respondent, waived their right to a hearing. Furthermore, the Parties instructed the Panel to take its decision on the basis of the parties' entire written submissions.

3.13 By letter dated 23 September 2008 the Panel submitted a list of questions to the Appellant and to the First Respondent to answer which they did by letters dated 29 and 26 September 2008 respectively. All Parties were given the opportunity to respond to the answers submitted by the Appellant and by the First Respondent. Furthermore the Parties expressly stated that their right to be heard had been observed throughout the proceedings by the Panel.

4. THE PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

4.1 The Appellant

4.1.1 In his Appeal Brief dated 9 April 2008 the Appellant requests the CAS – *inter alia* – to:

a) change the challenged decision to the effect that the Appellant is cleared of the charges of having committed an anti-doping rule violation under Arts. 2.6.2 and 2.8 of the FIS ADR.

b) in the alternative the Appellant requests the CAS to quash the decision being appealed against and to find that the Appellant did not violate Arts. 2.6.2 and 2.8 of the FIS ADR.

c) in the second alternative the Appellant requests the CAS to quash the decision being appealed against and to refer the matter back to the FDP.

4.1.2 In support of his claim, the Appellant contends – *inter alia* – that the decision by the FDP is based on a number of serious procedural defects (in particular violations of procedural guarantees applicable to criminal proceedings according to the European Convention on Human Rights [hereinafter referred to as the "**ECHR**"]).

4.1.3 Furthermore, the Appellant claims that the FDP has wrongly based its decision on the medical items found in and outside the room because the Appellant only collected, and had in his possession, the items designated as evidence "B" to "S" in the seizure record. He claims he knows nothing about the origin of the other items that were in the dustbin at the entrance. Furthermore, he contends that he had no control over the content of the dustbin.

4.1.4 According to the Appellant there can be no anti-doping rule violation based on the items seized in his room.

4.1.5 The Appellant contends that he was not in possession of a "prohibited method" (Art. 2.6 of the FIS ADR) because

aa) the medical items found in the room were primarily intended for permitted, not prohibited, purposes.

- The athletes were provided with the medical items needed for drip infusions so that the team doctors could appropriately administer the athletes with a drip infusion quickly in the event of a medical emergency.

- The disposable syringes were used in connection with haemoglobin measurements. The latter were done in order to prevent a protective ban on athletes. One of the athletes had – according to the Appellant – a naturally increased level of haemoglobin. Since the Torino 2006 Olympic Games took place at a height of approximately 2,000 m there was – according to the Appellant – a worry that a protective ban may be imposed on said athlete because his levels were too high. Therefore his haemoglobin values had to be monitored. The disposable syringes were used to break the athlete's skin in order to collect blood for the haemoglobin test.

- In addition the Appellant claims that the disposable syringes were also used for administering vitamin preparations and homeopathic preparations.

- The butterfly needles were – according to the Appellant – intended to facilitate the taking of blood for the haemoglobin measurements.

bb) The Appellant further contends that it cannot suffice for Art. 2.6 of the FIS ADR that the medical items could potentially be used for prohibited purposes. This is all the more so in that the Appellant had collected the items not from one, but from various athletes. Consequently, the medical items could not all be viewed as a whole in the present case because the possibility of them having been used in combination had to be ruled out.

cc) Furthermore, the Appellant is of the view that he was not in "possession" because he had collected the medical items from the athletes upon instruction by those responsible within the ÖSV. He, therefore, had no idea what medical items were concerned and so consequently the intention required for "possession" was absent from the outset.

4.1.6 According to the Appellant, no anti-doping rule violation under Art. 2.8 of the FIS ADR had been proven either. In particular, collecting the medical items from the athletes did not constitute any "covering up" or "a type of complicity" involving an anti-doping rule violation by an athlete because

aa) the subjective elements of the offence were not fulfilled. The Appellant was not medically trained and did not even look to see what it was he had collected from the athletes. He had also assumed that the medical items had been used by the team doctors in compliance with the FIS ADR. Moreover, he thought the medical items were medical waste, which he was supposed to collect from the athletes and dispose of properly upon instruction by those responsible at the ÖSV.

bb) Contrary to the findings in the FDP's decision, he did not make any statements that he knew that the athletes administered infusions themselves and had therefore acted unlawfully. Also contrary to the findings by the FDP, he never claimed that he collected the "medical waste" in order to hide it (from the authorities).

cc) According to the Appellant there was also no case of assisting any offence by an athlete because the items seized in the apartment could not be attributed to any of the Austrian athletes. It was therefore still completely unclear who he is supposed to have helped or which third-party act he is supposed to have hidden.

4.1.7 The Appellant is also of the view that he has not committed any anti-doping rule violation in the form of "possession of a prohibited substance" under Art. 2.6 of the FIS ADR because

aa) contrary to the findings by the FDP (margin no. 46) neither blood bags nor the substance albumin were seized by the Italian police in the room he occupied in Pragelato. This could be seen from the seizure record, which does not list any such items. Nothing else could be concluded from the expert opinions that had been obtained in the Italian proceedings. For, the findings made therein could not be clearly attributed to the items seized from the Appellant.

bb) Furthermore, the findings in the expert opinions were questionable because they were contradictory. In particular, there were contradictory expert opinions concerning the question of whether traces of albumin could be found on the piece of evidence designated as "evidence R".

cc) In all other respects also – according to the Appellant – the findings of fact made by the FDP were based on mistakes. Thus, in margin no. 46 of the decision it is claimed that the "equipment to determine the blood group (Serafol Abo) was seized from him". However, according to the seizure record this was not correct;

for said item was the piece of evidence designated "V" and was not seized from the Appellant's room, but rather from the dustbin outside the room.

4.1.8 The Appellant also gives an explanation for his – allegedly rushed – departure from Pragelato after the police raid. This was due to the overall circumstances. As a layman in legal matters, who did not know the situation under Italian law, he - not being a specialist on the subject of doping - preferred to leave Italy due to the Italian authorities' forceful method of operation. However, this could not be considered to be an admission of guilt.

4.1.9 Finally, the Appellant is also basing his Appeal on the argument that the ban for life imposed by the FDP is disproportionate. No skiing association, which is a member of the FIS, would employ a coach, who may not look after its athletes in official FIS events. A lifelong ban from participating in any capacity in any FIS sanctioned event was therefore tantamount to a lifelong prohibition from practising a trade or profession. However, in view of the fact that the Appellant was economically dependent on practising his profession as a cross-country ski trainer, and that he had up to now not been guilty of anything, the lifelong ban was disproportionate.

4.2 The First Respondent

4.2.1 In its Answer dated 19 May 2008 the First Respondent requests the CAS – *inter alia* – *"to fully reject the appeal and to confirm the FDP's decision, and notably the sanction of ineligibility for life"*.

4.2.2 In support of its motion, the First Respondent contends – *inter alia* – that:

4.2.2.1 The procedural principles derived from the ECHR cannot be applied to the internal proceedings of an association. Furthermore, the First Respondent affirms that the procedural rights of the Appellant had been respected and that – in any event – procedural defects would be cured in the light of the Panel's mission according to Art. R57 of the Code to conduct a full review of the case in fact and in law.

4.2.2.2 According to the First Respondent, the FDP had based its decision first and foremost on the seized medical items, which were found in the Appellant's bag in his room. However, the FDP was permitted to also take the medical items that were found in the dustbin at the entrance to the apartment into account when making its decision because

aa) some of them were identical to the items found in the Appellant's bag.

bb) Furthermore, there was obviously a connection between the two places of discovery, for the items found in the Appellant's bag were mainly medical items that had been used and the items seized from the dustbin were mainly unused medical items. This suggested that the dustbin at the entrance was used as a place for storing the extra supplies of doping substances and methods for the athletes and that the Appellant dealt with the proper disposal of the used medical items.

cc) Furthermore, the First Respondent points out that the dustbin at the entrance was within the Appellant's sphere of control and influence.

4.2.2.3 According to the First Respondent, the FDP was also correct to find that the elements of the offence under Art. 2.6 FIS ADR had been fulfilled because

aa) the Appellant was in possession of the medical items seized,
- for the term "possession" had to be interpreted widely. Accordingly, "constructive possession" was sufficient. Notably, this was understood to mean a situation when the person concerned does not have exclusive control over the premises, in which the "Prohibited Substance" and "Prohibited Method" are found, but knows about their presence and intends to exercise control over them.
- The Appellant was therefore not only in possession of the medical items in his bag, but also of those in the dustbin at the entrance.

bb) According to the First Respondent, the nature of the individually seized items could easily be determined on the basis of the photos made by the Italian police. For, the record individualizes the items in two ways, firstly by means of a consecutive letter at the beginning of the description of the item ("a" to "t" and "a" to "h" respectively) as well as by the capital letters at the end "evidence A" to "evidence AC"). Since the individual items are pictured in the photographs with the respective capital letter allocated to them in the record (and a reference number), there is no doubt about their allocation.

cc) According to the First Respondent, the medical items seized in the apartment were clearly intended for infusions and transfusions. However, this is a "Prohibited Method" for the purposes of the FIS ADR.
- This particularly applied to the "plastic container" listed in the seizure record under "l" and "evidence L", which is pictured in the photograph with the reference number 11, for, said bag is a bag for taking blood. However, under no circumstances was there any permitted use for such an item in the hands of an athlete.
- The other medical items were also not used by the athletes for permitted purposes. At least the Appellant has not submitted another plausible explanation. According to the First Respondent, the Appellant particularly had no reason to believe that the medical items had been used for a permitted medical emergency treatment because, firstly, no such emergency situation occurred and, secondly, the Appellant, as the athletes' trainer, was very well informed about their state of health.

dd) According to the First Respondent, the medical items seized in the room furthermore prove that the Appellant was in possession of prohibited substances, for albumin is such a prohibited substance. According to the First Respondent, Prof. Melioli's expert opinion detected the substance in the "container" listed under "s" or "evidence R" in the seizure record.

4.2.2.4 According to the First Respondent, the FDP was furthermore correct to find that the elements of the offence under Art. 2.8 FIS ADR had been fulfilled, for:

aa) The Appellant had, according to his own account, collected the medical items from the athletes.

bb) This had also been done in order to support and cover up the prohibited activities of the athletes. As the athletes' trainer, the Appellant had been at the centre of events and had therefore played a central and decisive role in connection with the doping violations.

4.2.2.5 Finally, the First Respondent is also asserting that the ban imposed by the FDP is proportional because there were special reasons in the Appellant's person, which made the offence appear particularly punishable, namely:

aa) The Appellant had, by his conduct, enabled and supported organized and systematic doping.

bb) Also this was not the first violation of this kind by members of the ÖSV at the Olympic Games.

cc) The Appellant's position and the fact that serious health risks are associated with such doping practices, are further aggravating circumstances that have to be taken into account.

dd) The aspect of deterrence must also be taken into account when determining the measure of the sanction. A clear signal to the outside world is needed that such practices will not be tolerated under any circumstances.

ee) According to the First Respondent another reason for aggravating the punishment was the Appellant's entire conduct during the proceedings. Instead of "coming clean" he denied everything and at no point in the proceedings did he cooperate or contribute to solving the case.

4.3 The Second Respondent

4.3.1 In its Answer dated 25 July 2008 the Second Respondent requests the CAS – *inter alia* – "*that the decision of the FDP regarding Mr Hoch be upheld*".

4.3.2 In support of its motion, the Second Respondent contends – *inter alia* – that:

4.3.2.1 The Appellant's case has to be evaluated in a broader picture, in particular taking into account the doping convictions of and charges against the (Austrian) cross-country skiers Messrs Eder, Pinter, Tauber and Diethart as well as the (Austrian) biathletes Messrs Perner and Rottmann. All of these athletes were found by the IOC to have possessed materials for carrying out blood transfusions and artificially manipulating blood haemoglobin values and to have collaborated with fellow athletes in violation of

the applicable anti-doping rules. According to the Second Respondent Mr Hoch was a key member of the doping conspiracy involving these athletes, since

aa) the cross-country skiers were trained by the Appellant;

bb) the Appellant collected the medical waste which formed the basis of the athletes' convictions ;

cc) the Appellant is, in this case, relying on the evidence of the four cross-country skiers, which other CAS Panels found not to be credible;

dd) the results of the investigation by the Italian police prove that the Appellant was of pivotal importance in the doping scheme;

ee) the results of the investigation launched by the Appellant's former employer, the ÖSV and the findings of the FDP and the statements made by the Austrian cross-country skiers in the other proceedings before the CAS point in the same direction.

4.3.2.2 The Second Respondent further contends that the explanations given by the Appellant that he possessed the medical items for non-doping purposes are not credible because

aa) the athletes, from whom the Appellant collected the medical items, were proven to be engaged in doping practices;

bb) the medical items found with the Appellant and the athletes are particularly suited to be used for doping purposes;

cc) the athletes can gain substantial benefits when engaging in blood manipulations;

dd) effective blood doping practices require the monitoring and reduction of haemoglobin values which explains why a haemoglobin meter was found with the athletes;

ee) the altitude of the athletes' residence in Pragelato could not cause any fluctuation in the athletes haemoglobin values and, thus, did not require any monitoring of the blood values and

ff) because there has been a "blood doping history" with the Austrian team dating back to the Salt Lake City 2002 Olympic Games (CAS 2002/A/389, 390, 391, 392 & 393).

4.3.2.3 In view of the above facts, the Second Respondent is of the view that the Appellant has fulfilled the elements of the offence under Art. 2.6.2 of the FIS ADR (possession of a prohibited substance/method) because

aa) the term "possession" has to be construed in a broad sense according to which "constructive possession" suffices, i.e. it is sufficient if a person knows about the presence of a prohibited item and intends to exercise control over it;

bb) according to this definition the Appellant did not only have possession of the medical items in his room, but also of the items in the dustbin at the entrance as well as possession of the items discovered in the physical possession of the athletes under his charge;

cc) the items thus attributed to the Appellant fulfil the elements of the offence of possession of a prohibited method within the meaning of Art. M1(a) and Art. M2(b) of the WADA 2006 Prohibited List;

dd) the Appellant in addition fulfils all elements of the offence of possession of a prohibited substance because the expert opinion by Professor Melioli stated that "one glass container with plastic top and metal bands" reported by the police as having been found in Mr Hoch's bag contained the prohibited substance, human albumin.

4.3.2.4 Furthermore, the Second Respondent is of the view that the Appellant also committed an anti-doping rule violation under Art. 2.8 of the FIS ADR because

aa) he took part in a collaborative blood doping network;

bb) the language of Art 2.8 of the FIS ADR is particularly broad;

cc) the Appellant confirmed that he collected the "medical waste" from the athletes several times and

dd) the athletes Messrs Eder, Pinter and Tauber all confirmed in the proceedings conducted on their behalf that the Appellant knew and was actively involved in their use of a haemoglobin meter and infusion equipment.

ee) Furthermore, according to the Second Respondent the complicity of the Appellant is evidenced by the fact that he decided to flee right after the Italian police raid.

4.3.2.5 Finally, the Second Respondent submits that the decision by the FDP is valid because

aa) the *de novo* hearing before the CAS cures any possible deficiencies in the FDP procedure;

bb) the materials found in the possession of Mr. Hoch and the athletes cannot be justified;

cc) the medical opinions presented to the Panel supported the decision taken by the FDP; and

dd) the life-time ban issued by the FDP is proportionate to the violations committed.

5. CAS JURISDICTION

5.1 Whether, and the extent to which, the Panel is competent to decide the present dispute is governed by Art. R47 of the Code. The provision stipulates three pre-requisites (cf. CAS 2004/A/748 Roc Viatcheslav Ekimov v/ IOC, USOC & Tyler Hamilton, no. 83), namely:

- there must be a "decision" of a federation, association or another sports-related body,
- "the (internal) legal remedies available" must have been exhausted prior to appealing to the CAS and
- the parties must have submitted to the competence of the CAS.

5.2 The Appellant was convicted by the FDP based on Arts. 2.6.2 and 2.8 FIS ADR. The FDP is an organ of the FIS with the consequence that there is a "decision" in the sense of Art. R47 of the Code. According to Art. 13 FIS ADR a decision made by the FIS (i.e. the FIS Doping Panel) based on violations of the FIS ADR may be appealed exclusively to the CAS. There are no other internal appeals available against the decision, so the second pre-requisite of Art. R47 of the Code is also met. The fact that the parties have submitted to the jurisdiction of CAS follows from the applicable regulations, in particular Art. 13 FIS ADR, from the fact that all parties signed the order of procedure and from the fact that neither party has raised any objection as to the jurisdiction of the CAS. Accordingly, the jurisdiction is established.

6. TIME LIMIT FOR APPEAL

6.1 It remained uncontested and is not at issue in the present proceedings that the Appellant's Appeal was filed in time.

6.2 According to Art. R49 of the Code the time limit for filing an appeal with CAS is 21 days unless the regulations of the sports federation or association concerned provides another time limit. In the present case, the decision of the FDP bears the date of 28 February 2008 so the Statement of Appeal filed with the CAS on 18 March 2008 was in due time.

7. APPLICABLE LAW

7.1 Art. R58 of the Code provides that 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 issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

7.2 In the present case the applicable regulations are the FIS ADR. The FDP based its decision on said rules, which are designed to implement the World Anti-Doping Code (hereinafter referred to as the "WADC"). All of the Parties also referred to the FIS ADR in their written pleadings. Also, at no point did the Appellant claim that he was not bound by said regulation. Moreover, Art. 14 FIS ADR stipulates that each national Ski

Association shall specifically provide that all Athletes, Athlete Support Personnel and Other Persons under the jurisdiction of the National Ski Association shall be bound by the FIS ADR.

8. AS TO THE MERITS

8.1 The Appellant's appeal must be upheld if the decision by the FDP is unlawful. In the present case the Appellant is asserting both procedural (see (a) below) as well as substantive irregularities in the decision by the FDP (see (b) and (c) below).

a) Did the FDP comply with the procedural rules?

8.2 The Appellant considers the FDP's decision to be unlawful from a procedural aspect because it - allegedly - has a number of serious procedural defects. The Appellant is particularly claiming that the decision violates procedural fundamental rights enshrined in Art. 6(1) ECHR. These rights particularly include the right to a reasoned decision and the right to due process.

8.2.1 Whether and to what extent sports associations are bound by the ECHR in the context of their disciplinary jurisdiction is not clear. The Panel has serious doubts as to the applicability of the ECHR in said cases in view of Art. 1 ECHR. According to this provision only state authority, not private third parties, are bound to observe the rights under the Convention. Nevertheless, there are more and more authorities in legal literature advocating that the ECHR also applies directly to sports associations (cf Taylor/Lewis (Ed) Sport: Law and Practice, 2nd ed. 2008, pp. 516 et seq.). However, in the present case, this question can be left unanswered because not every breach of a procedural fundamental right constitutes a breach of Art. 6(1) ECHR. Thus, the decision by the European Court of Human Rights of 25 October 1995 in Bryan v. United Kingdom (Application no. 44/1994/491/573) reads as follows under marg. no. 40:

> *"As was explained in the Court's Albert and Le Compte v. Belgium judgment (10 February 1983, Series A no. 58, p. 16 para 29), even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 para 1 in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para 1'."*

8.2.2 Under Art. R57 of the Code, CAS - in appeals arbitration proceedings - has full power to review the facts and the law of the case and therefore has full jurisdiction. In other words, the Panel hears the case *de novo*, without being limited by the submissions and evidence that was available to the FDP. Furthermore, the procedural principles of the arbitration tribunal's independence and impartiality and of "fair proceedings" are guaranteed to a similar extent as before the state courts. It follows from the decision of the European Court of Human Rights of 25 October 1995 (see supra marg. no. 8.2.1) that in such case the (alleged) breach of procedural principles in the proceedings before the FDP can no longer be complained about in the present arbitration proceedings. This approach is also in line with this arbitration court's consistent case law. Accordingly, procedural deficiencies by the tribunals of an association are generally cured in CAS proceedings (cf. for example CAS 2007/A/1286, 1288 and 1289, Johannes Eder / Martin

Tauber / Jürgen Pinter v/ International Olympic Committee, pp. 16 and 17). This opinion is also in conformity with existing case law in Switzerland (cf. Judgment of the Swiss Federal Court dated 11 June 2001, A. v/ UEFA).

8.2.3 The Appellant has taken the opportunity to bring this Appeal before the CAS and has expressly confirmed that he was given the right to be heard and to be treated equally in these CAS proceedings. In light of this, the Panel finds that its *de novo* hearing of this case has cured any lack of due process in the FDP's decision and that it is therefore not necessary to consider whether or not the FDP did in fact afford due process to the Appellant.

b) The subject matter of the review

8.3. The Appellant was convicted by the FDP on the basis of Art. 2.6.2 and Art. 2.8 FIS ADR. The relationship between these two provisions is defined in Art. 10.6 FIS ADR ("Rules for certain Potential Multiple Violations"). Art. 10.6.1 FIS ADR provides:

> *"For purposes of imposing sanctions under Article 10.2, 10.3 and 10.4, a second anti-doping rule violation may be considered for purposes of imposing sanctions only if the FIS ... can establish that the Athlete or Other Person committed the second anti-doping rule violation after the Athlete or Other Person received notice, or after FIS ... made a reasonable attempt to give notice, of the first anti-doping rule violation; if the FIS cannot establish this, the violations shall be based on the violation that carries the more severe sanction."*

8.3.1 In the present case the two infractions, with which the Appellant is charged are - indisputably - to be considered as one single anti-doping rule violation, not as two separate anti-doping rule violations. Therefore, the main criterion is the provision of the FIS ADR, which carries the more severe sanction.

8.3.2 For violations of Art. 2.8 FIS ADR, the period of ineligibility to be imposed is a minimum of four years up to lifetime ineligibility (cf. Art. 10.4.2 FIS ADR). For violations of Art. 2.6.2 FIS ADR, the period of ineligibility to be imposed is two years (cf. Art. 10.2 FIS ADR). Art. 2.8 FIS ADR therefore obviously carries the more severe sanction. If, in the present case, there is a violation of Art. 2.8 FIS ADR, there is no need to review Art. 2.6.2 FIS ADR because that provision then no longer has any independent significance any more. In that case, the Appellant and the Respondents would not have any independent legitimate interest in a finding of whether there has been a violation or not of Art. 2.6.2 FIS ADR in addition to a violation of Art. 2.8 FIS ADR. Therefore, the focus of the Panel's attention in the following review is on the question whether there has been a violation of Art. 2.8 FIS ADR.

c) The pre-requisites for a violation of Art. 2.8 FIS ADR

8.4 Art. 2.8 FIS ADR provides that:

> *"The following constitute anti-doping rule violations:*
> *(...)*
> *Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation."*

8.4.1 The provision covers numerous acts, which are intended to assist another or a third party's anti-doping rule violation. The assistance can constitute assistance provided in the preliminary stages before an offence is committed. However, it also covers acts, which are supposed to prevent an anti-doping rule violation from being discovered after it has been committed. The rule does not expressly stipulate how substantial the assistance has to be in order to fulfil the elements of Art. 2.8 FIS ADR. However, the standard is probably low because according to the wording even just "any type of complicity" is sufficient. In any event, though, an act of assistance for the purposes of Art. 2.8 FIS ADR requires that the person concerned is aware of the anti-doping rule violation committed by another party because otherwise there is no intent to assist a third-party act in the first place.

8.4.2 The starting point is that, in the present case, there has undoubtedly been a "third-party" anti-doping rule violation, namely by the athletes Eder, Tauber, Pinter and Diethart. This has been established by cases CAS 2007/A/1286, 1288, 1289 and CAS 2007/A/1290. Having examined the decisions and also in the light of the Appellant's submissions, the present Panel has no reason to call into question the findings made in said cases. Therefore, in the present case, the only question that needs to be answered is whether the Appellant - knowingly - supported said anti-doping rule violations by the athletes.

d) Objective assistance

8.5 On the basis of the evidence submitted by the Respondents, the Panel considers that it has been established that the Appellant - objectively - assisted the anti-doping rule violations by the athletes. In cases 2007/A/1286, 1288, 1289 and CAS 2007/A/1290 the athletes were found guilty of having been involved in blood doping and blood manipulation. Mr. Hoch himself admitted that he collected the used medical items, which the police seized from the bag in his room, from the athletes. It is easy to determine the nature of the pieces of evidence seized with the aid of the seizure record and the photographs. By means of the corresponding letters a photograph of each item can be definitively matched against the corresponding item listed in the seizure record.

8.6 Said medical items are, in the Panel's opinion - and as follows from the plausible and logical statements made by Prof. Don H. Catlin in his expert opinion - items which are typically used for manipulating blood and for blood doping. Merely disposing of the medical items for the benefit of the athletes therefore already exceeds the threshold for - objective - assistance within the meaning of Art. 2.8 FIS ADR.

e) Subjective components

8.7 On the basis of the evidence submitted by the Respondents, the Panel is also satisfied that the Appellant acted with the knowledge and intent required for Art. 2.8 FIS ADR.

8.7.1 In the present case the Panel concludes that the Appellant knew of the anti-doping rule violation from a number of pieces of circumstantial evidence. The Appellant had a special, close relationship with the athletes both in terms of physical proximity and in terms of subject matter. He lived in the direct vicinity of the athletes and was their coach. He went in and out of the athletes' accommodation and was therefore - due to his

function - involved in all of the athletes' sports decisions. The fact that the Appellant disposed of the athletes' medical items shows that the Appellant - by reason of his closeness to the athletes - was involved in not only their sports decisions but also in their doping practices. Therefore, the Panel is satisfied that the Appellant rendered this assistance "for" the athletes. Although the Appellant claims that, as far as this is concerned, he acted upon the instruction of higher officials within the association, not for the athletes, the Panel considers this to be an irrelevant defensive lie because the Appellant was not in a position to name the persons above him in the hierarchy, who are supposed to have given him these instructions.

8.7.2 The fact that the used medical items were collected in order to assist the athletes in their doping practices also follows from the fact that, in this specific case, the medical items served no purpose other than doping practices. This is shown by the fact that some of the medical items found in the Appellant's bag could, from the outset, not be used for purposes that are permitted in sport. This is so with, for example, the blood bag seized from the Appellant's bag and which is designated in the seizure record as evidence "L" and "l". However, even as regards those items which could - at least in theory - possibly have a "dual use", i.e. could also be used for permitted purposes, the Appellant was unable to give any plausible explanation. The Appellant submitted that, particularly the used syringes found in the bag, were needed in connection with haemoglobin measurements with the haemoglobin meter. Said measurements would have had the purpose of preventing a protective ban on athletes because of the altitude at which the Torino 2006 Olympic Games took place. However, in the Panel's opinion, this is an irrelevant defensive lie because, according to the convincing and plausible statements by Prof. Don H. Catlin in his expert opinion, the altitude, at which the athletes lived and in which the competitions took place, did not have a significant influence on the haemoglobin concentration in the athletes' blood. However, this suggests that both the haemoglobin meter as well as the syringes were used on the athletes for prohibited, not for permitted, purposes.

8.7.3 The Appellant's submissions that the medical items were intended to make on-site drip infusions possible in the event of an emergency is, in the Panel's opinion, also an irrelevant defensive lie. For, in the present case, it is undisputed that at least the medical items seized from the Appellant's bag, had in fact been used. However, in that case the medical items cannot have been intended for a hypothetical emergency, as it is undisputed that there was no medical emergency in the Austrian cross-country ski team. Consequently, the medical items must obviously have been used for other purposes, i.e. for purposes that are prohibited in sport.

8.7.4 Also the other miscellaneous circumstances confirm the Panel's opinion that the Appellant helped the athletes with their anti-doping rule violation knowingly and intentionally. Thus, the Appellant did not collect any and all kinds of rubbish from the athletes, rather only the "suspicious" rubbish, i.e. he disposed of that rubbish which could incriminate the athletes. The explanation that precisely medical items - because of their nature - had to be disposed of "carefully" and thereby by the Appellant does not appear to be very plausible. Firstly, the Appellant did not explain how he intended to dispose of it allegedly "carefully". The fact that the medical items were kept in a bag belonging to the Appellant in his room at least suggests the suspicion that the professional disposal of medical (special) rubbish was not in the forefront of the

Appellant's mind when he acted. Rather, he was supposed to ensure that this rubbish would not be found on the athletes so as not to give rise to any suspicion of doping that might incriminate them.

8.7.5 The Appellant's rushed departure to return home following the search is, in the Panel's opinion, also an indication that the Appellant saw himself as part of the doping network, not as an innocent recipient of recommendations. Finally, another fact to support the view that the Appellant was more at the centre of the doping events in Pragelato than on the fringes thereof is the fact that a large number of other medical items were found in the vicinity of his room, namely in the dustbin; apart from the fact that they were mainly unused, said items largely corresponded to the ones which the Appellant had collected from the athletes.

8.7.6 To summarize, on the basis of the many pieces of circumstantial evidence and pieces of evidence submitted by the Respondents, the Panel is satisfied for the purposes of Art. 3 FIS ADR that the Appellant fulfilled the elements of the offence under Art. 2.8 FIS ADR.

d) Length of the sanction

8.8 The FDP suspended the Appellant for life.

8.8.1 For violations of Art. 2.8 FIS ADR, the period of ineligibility imposed shall be a minimum of four years up to lifetime ineligibility (cf. Art. 10.4.2 FIS ADR). Indeed violations of Art. 2.8 FIS ADR are considered particularly serious under the WADC.

8.8.2 CAS's jurisprudence makes it clear that a sanction imposed on an athlete or on athlete support personnel must respect the principle of proportionality. This is particularly so where - like in the present case - the applicable rules regarding the extent of the sanction allow ample scope. In that case the sanction imposed must be in line with the seriousness of the offence. In the present case the FDP fully exhausted the range of sanctions and imposed the highest possible sanction.

8.8.3 It seems to the Panel, as a matter of principle, that - in view of the specific circumstances of a case - a lifetime ban could be considered both justifiable and proportionate in doping cases even if the ban is imposed for a first violation. However, in the Panel's opinion this is only justified where the seriousness of the offence is most extraordinary. For instance, the FIS ADR consider a case to be particularly serious if the anti-doping rule violation under Art. 2.8 was committed on a minor.

8.8.4 In the present case the Panel is of the opinion that the offence committed by the Appellant is a serious offence. The Appellant provided substantial help for multiple third-party anti-doping rule violations. He was thus involved in, so to speak, a larger doping conspiracy and thereby demonstrated a high degree of criminal energy. This is all the more so in that the doping practices in this specific case are particularly dangerous for the athletes concerned. However, the Panel is not satisfied that the offence has reached a level of seriousness that would justify imposing the highest possible sanction, i.e. preventing the Appellant from participating directly or indirectly in any FIS sanctioned event for the rest of his life. A sanction of that kind may be appropriate

if the Appellant was the principal or the leader of the doping conspiracy surrounding the Austrian cross-country ski team. However, the Panel thinks there are substantial doubts about this. In view of the doping history of the Austrian cross-country team (see the events at the Salt Lake City 2002 Olympic Games) one cannot exclude that other people, including higher-ranking officials, pulled the strings in this doping conspiracy. The Panel cannot shake off the feeling that the Appellant no doubt had a decisive leadership responsibility in this doping scandal, but not the sole or supreme leadership responsibility. However, if it has not been established that the Appellant was the head of the doping conspiracy, the Panel does not consider it appropriate to penalise the Appellant as the head, thereby diverting attention from the responsibility of others. In the light of all of these considerations the Panel considers only a limited period of ineligibility to be proportional.

8.8.5 Taking into account the fact that the Appellant is born in 1964 and that he will retire in 21 years, the Panel considers a sanction of approximately 2/3, namely 15 (fifteen) years justified. In the light of the foregoing and in accordance with Art. R57 of the Code, the period of ineligibility of the Appellant to participate directly or indirectly in any capacity in any FIS sanctioned events shall be reduced to a period of 15 years starting on 18 September 2007 (date of the first hearing of the FDP, in accordance with Art. 10.8 FIS ADR) and the decision of the FDP shall be modified accordingly.

8.8.6 This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the Parties to the Panel. Accordingly, all other prayers for relief are rejected.

9. COSTS

9.1 Pursuant to Art. R65.1 of the Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee of CHF 500.00.

9.2 Art. R65.3 of the Code provides that the Panel shall decide which Party shall bear, or in what proportion the Parties shall share, the costs, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the Parties.

9.3 In the present case, the IOC renounced its right to claim costs and no hearings before the CAS have taken place. Having given due consideration to the circumstances of the present case, the Panel takes the view that each party shall bear its own costs.

* * *

ON THESE GROUNDS

The Court of Arbitration for Sport pronounces:

1. The Appeal filed by Mr. Emil Hoch against the decision rendered on 28 February 2008 by the FIS Doping Panel is partially upheld;

2. The decision rendered on 28 February 2008 by the FIS Doping Panel is set aside as far as the period of ineligibility is concerned;

3. Mr. Emil Hoch shall be ineligible to participate directly or indirectly in any capacity in any FIS sanctioned events up to 18 September 2022;

4. This award is rendered without costs, except for the Court Office fee of CHF 500.00 (five hundred Swiss Francs) paid by the Appellant, which is retained by the CAS;

5. Each Party shall bear its own costs;

6. All other claims are dismissed.

Lausanne, 26 January 2009

THE COURT OF ARBITRATION FOR SPORT

Ulrich Haas
President of the Panel

Hans Nater,
Arbitrator

Michele Bernasconi,
Arbitrator

Philippe Frésard
Ad hoc clerk