

4A\_382/2018<sup>1</sup>

Judgment of January 15, 2019

First Civil Law Court

Federal Judge Kiss (presiding)

Federal Judge Hohl,

Federal Judge Niquille.

Clerk: Carruzzo (Mr.)

International Olympic Committee, represented by Jean-Pierre Morand, and Antonio Rigozzi,  
Appellant,

v.

X\_\_\_\_\_, represented by Philippe Bärtsch and Christopher Boog,  
Respondent.

Facts:

A.

A.a. The International Olympic Committee (IOC) is an international non-governmental and non-profit organization, established as an association under Swiss law with its headquarters in Lausanne. The Olympic Charter gives it the mission to lead the Olympic Movement, with the Summer Olympic Games (OG), also known as Olympiad Games, and the Winter Olympics, as its peak.

From 7 to 23 February 2014, the Russian city of Sochi hosted the Winter Olympics (hereinafter: the Sochi Games). The athletes from the organizing country won 33 medals, which allowed Russia to finish first in the medal table, despite having only reached eleventh place at the previous Winter Olympics in Vancouver (Canada) in 2010.

X\_\_\_\_\_ is a Russian cross-country skier who participated in the Sochi Games. He won the medal [type omitted] in [category omitted] free individual and the medal [type omitted] in the [category omitted] relay with the Russian team.

On February 13, 21, and 23, 2014, the Russian skier was subjected to three anti-doping tests, all of which were revealed to be negative, just like the controls carried out on other Russian athletes involved in the arbitration procedure, which will be discussed later.

A.b. On December 3, 2014, a German TV channel broadcast a documentary concerning the alleged existence of a secret, extensive, and institutional doping program within the Russian Athletics Federation, after which the World Anti-Doping Agency (WADA) appointed a three-member independent

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<sup>1</sup> Translator's Note: Quote as International Olympic Committee v. X\_\_\_\_\_, 4A\_382/2018. The decision was issued in French. The original text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch)

commission to investigate this allegation. In its report of November 9, 2015, the Independent Commission confirmed that widespread cheating had been organized by members of the entourage of athletes, officials, and athletes themselves in order to increase the chances of success of individual athletes and teams of the organizing country through the use of substances and methods that fell within the anti-doping regulations.

In 2015, Dr. A\_\_\_\_\_, former director of the Moscow Anti-Doping Laboratory and the person in charge in Sochi during the Winter Olympics, left Russia and made a series of statements that were widely published and that revealed the existence of a sophisticated doping plan before, during, and after the Sochi Olympics. Also, on May 19, 2016, WADA instructed Professor Richard H. McLaren to conduct an independent inquiry into Dr. A\_\_\_\_\_’s allegations. In his first report, dated July 16th 2016, Prof. McLaren came to the conclusion that the Moscow Laboratory was operating, for the protection of doped Russian athletes, as part of a highly reliable, state-driven system, which the report called the “Disappearing Positive Methodology”<sup>2</sup>; that the Sochi Laboratory had used a unique system of exchange of samples, by which clean urine was provided by Russian athletes to a urine bank, where samples of clean urine were stored in advance and could then be exchanged, on the day of the control, with the samples containing banned substances in order to allow doped Russian athletes to participate in the 2014 Winter Olympics; and finally, that the manipulation of the results of anti-doping tests and the exchange of samples had been directed, controlled, and supervised by the Ministry of Sport with the active participation of Federal Secret Service (FSB), Russian National Team Sport Readiness Center (CSP), and the two above-mentioned laboratories. The second report of Prof. McLaren, dated December 9, 2016, contained detailed explanations on the implementation of an unprecedented doping program at the Sochi Games. According to its author, there had been a meticulously orchestrated conspiracy, with the complicity of the officials within the Ministry of Sport, the CSP, the staff of the Moscow-based Sochi Laboratory, the Russian Anti-Doping Agency (RUSADA), the Olympic organization, the athletes, and the FSB.

Between the publication of the two reports from Prof. McLaren, the IOC appointed an Investigatory Commission headed by Samuel Schmid, former President of the Swiss Confederation, with the aim of establishing facts that may justify the opening of a disciplinary procedure. On December 2, 2017, that Commission issued a report confirming, in essence, the existence and magnitude of Russian doping and emphasizing the unprecedented nature of the cheating that had been brought to light.

A.c. In December 2016, the IOC instituted a Disciplinary Commission of three members, chaired by Prof. Denis Oswald (hereinafter: the Disciplinary Commission), which was charged with investigating potential anti-doping rule violations committed by Russian individual athletes at the Sochi Games. Said Commission formally opened disciplinary investigations against a first group of 28 Russian athletes, whom it criticized for knowingly and actively engaging in a sophisticated doping and cover-up scheme, orchestrated by the state, during the Sochi Olympics. One of the targeted persons was X\_\_\_\_\_, who was informed by the IOC, on December 22, 2016, of the initiation of a disciplinary procedure against him. On the same day, the International Ski Federation (FIS) suspended the Russian athlete on a provisional basis. In appeal by the person concerned, the Court of Arbitration for Sport (CAS), ruling

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<sup>2</sup> Translator’s Note: In English in the original text.

on August 31, 2017, said that the provisional suspension of the person concerned should be terminated, if necessary, on October 31 of that year, at the latest.

On November 1, 2017, after hearing the case, the Disciplinary Commission pronounced the its decision. Finding X\_\_\_\_\_ guilty of violating the IOC Anti-Doping Rules at the Sochi Olympics, it invalidated the results obtained by him at those Games, ordered the withdrawal of two medals he had won on that occasion, disqualified the Russian relay team in [name of category omitted], required the restitution of all the rewards received by its members, invited the FIS to modify the results of the competitions in which X\_\_\_\_\_ had taken part, and declared the Russian skier ineligible for accreditation in any capacity from any future edition of the Games of the Olympiad and the Winter Olympic Games after the Sochi Games.

The full decision was issued on November 27, 2017. The grounds of the decision are summarized in the CAS Award (paras. 52-68). As a preliminary point, the Disciplinary Commission found that, contrary to other sports organizations, it would not apply the system of collective sanctions against all Russian athletes who participated in the Sochi Olympics, but would examine each case individually, included the one of X\_\_\_\_\_, in order to sanction only the athletes for whom there was enough evidence of an individual implication in the violation of the anti-doping rules. However, the Disciplinary Commission would reserve the right, once it established the existence of a generalized fraud scheme, to consider this in its appreciation of the evidence against each individual athlete. It further explained why the cases related to the Russian athletes were extraordinary, highlighting in particular that it was not a 'typical' violation of the anti-doping rules, consisting of the use of a prohibited substance, but instead was the use of a process aimed at covering up the existence of a case of doping; therefore it would be impossible to use certain types of direct or objective evidence. It also compared its work to assembling a puzzle; finding the pieces and being able to satisfy itself that the resulting image it put together from the available evidence corresponded to reality. As to the concrete elements of proof, the Disciplinary Commission inferred, first, that the explanations given from the two reports of Prof. McLaren were sufficiently reliable to be taken into consideration in the framework of the investigation against X\_\_\_\_\_, and that the same applied to the majority of evidence provided and the two forensic analyses of the file, and that this was equally the case for the written witness testimony of Dr. A\_\_\_\_\_. At the end of this analysis, it came to the conclusion, from the evidence available, "that it was more than comfortably satisfied that"<sup>3</sup> a sample swapping program had indeed been put in place and carried out at the Sochi Games. For the Disciplinary Commission, it was inconceivable that the Russian athletes had not been involved in this program, which, like a fine Swiss watch, could not have functioned in the absence of one of its many cogs. In its opinion, X\_\_\_\_\_ was no exception to the rule for various reasons. Therefore, he was to be found guilty of violating Articles 2.2, 2.5, and 2.8 of the World Anti-Doping Code (WADC), 2009 version, and to impose the aforementioned sanctions.

B.

B.a. X\_\_\_\_\_, like the other sanctioned Russian athletes, appealed against the decision of the Disciplinary Commission (CAS 2017/A/5379).

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<sup>3</sup> Translator's Note: In English in the original text.

A specific procedure consisting of a limited joinder of causes was agreed upon by all parties. Thus, the Russian skier and the other appellants filed a joint appeal brief, on December 27, 2017, on issues common to all the athletes, to which an individual appeal brief that each athlete addressed to the CAS about their specific situation was added. On January 17, 2018, the IOC filed its responses to the joint appeal and to the various individual appeal briefs. Two Panels of three Arbitrators each were appointed to decide on all of the appeals, with the understanding that both would participate in the evidentiary hearings on the common questions, but each of them would then deal separately with cases relating to the individual athletes that would be presented to them according to the respective sport.

B.b. By a reasoned Award of April 23, 2018, following the issuance of the operative part of February 1, 2018, the CAS admitted the appeal of X\_\_\_\_\_, annulled the decision rendered on November 1, 2017 by the Disciplinary Commission against the Russian skier and restored the individual results obtained by him on the occasion of the Sochi Olympics 2014 with all the consequences both for himself and for the relay team in [name of category omitted]. The reasons for this Award, which covers no less than 154 pages, will be summarized below to the extent necessary to deal with the grievances invoked by the Appellant.

B.b.a. The Panel began by recounting the facts it considered relevant, distinguishing between those that related to all of the appellants (Award, paras. 4-26) and those that related more specifically to the situation of X\_\_\_\_\_ (Award, paras. 27-32). It then summarized the procedure for the Russian athlete, as it was conducted before the Disciplinary Commission (Award, paras. 33-68) and before the CAS Panel (Award, paras. 69-86). Subsequently, it set out in detail the arguments put forward by X\_\_\_\_\_ and by the IOC in order to support the former in his appeal (Award, paras. 87-156) and the latter its response (Award, paras. 157-236); it did so in both cases by repeating the distinction mentioned above. The hearing, which was held from January 22 to January 27, 2018, in Geneva, takes up a large part of the Award, which, still based on the same distinction, deals with the Opening Statements of the parties, the evidence (witness statements, expert reports, witness statements of the skier, etc.), the Closing Statements, and the Final Pleadings (Award, paras. 237-672).

B.b.b. The following chapters of the Award deal with questions of admissibility (paras. 673-687). The Panel found it had jurisdiction, derived from Article R47 of the Code of Sports-Related Arbitration (hereinafter: the Code) in conjunction with Article 11.2.1 of the Anti-Doping Regulations established by the IOC for the Sochi Games (hereinafter: the Rules), the appellant's *locus standi*, pursuant to Article 11.2.2 of the Rules, and the admissibility *ratione temporis* of the appeal under Article R49 of the Code in connection with Article 11.5 of the Rules. Regarding the applicable law, it relied on Article 1.2 of the Rules, by reference to Article R58 of the Code, which led to the application of the WADA Code (2009 version) to decide whether the appellant had or had not committed an anti-doping rule violation.

B.b.c. Once these preliminary questions were answered, the Panel started to examine the merits of the appeal (Award, paras. 688-865). In its opinion, the relevant provisions in this respect were Articles 2.2, 2.5, 2.8 and 3.1 of the WADA Code and, additionally, the 2014 WADA Prohibited List. From the latter provision it deduced that the burden of proof lies with the IOC and, when it comes to the standard of proof, it should be higher than on the balance of probabilities, but less than proof beyond a reasonable doubt, and that it is for the IOC to establish, to the comfortable satisfaction of the hearing authority, that

the Russian athlete had committed the specific violations of the anti-doping rules of which he was accused, clarifying that the more serious the allegations, the higher the degree of proof required for the Panel to be “comfortably satisfied” would be. The latter therefore fixed the principles that would govern its search for the truth: *first*, the IOC had the burden to establish the existence of the relevant anti-doping rule violation, to the comfortable satisfaction of the Panel; *second*, the hearing authority would consider all the decisive circumstances of the case, while the absence of direct proof would not necessarily mean proof of innocence, but could also imply that a grave, reprehensible act was effectively disguised; furthermore, as the IOC did not constitute a national or international office responsible to apply the law and its investigatory powers were limited compared to those of a state or international organ, the Panel should consider these facts while assessing the evidence provided, to the extent that it would be possible to admit that the IOC established, to its satisfaction, the existence of an anti-doping rule violation notwithstanding the impossibility to reach a similar conclusion on the sole basis of a direct proof; however, and at the same time, considering the seriousness of accusations against the appellant, the IOC should provide a particularly cogent proof as to the deliberate participation of the athlete in the alleged violation; it would not be sufficient to simply establish the existence of a general doping scheme to the comfortable satisfaction of the Panel; it should also be necessary to sufficiently prove, in each individual case, that the athlete concerned had deliberately adopted a concrete behavior that constituted a specific and identifiable violation of an anti-doping rule; *third*, in order to verify whether the IOC had provided the proof to the required standard, the Panel would take into consideration any admissible and reliable means of proof provided by the IOC; supposing that the evidence provided had the same weight, it would then apply the rules on the burden of proof.

B.b.d. After examining the issue of proof, the Panel indicated the method that it would use for the examination of the disputed issues (Award, paras. 722-728). It emphasized, first, that Article R57 of the Code allows it to review the facts and the law with full power of review (*de novo*), and that it would be able to take into account the evidence presented to it, without limiting itself to the evidence that existed on the date of the decision of the Disciplinary Commission. It therefore insisted that its findings were based on a different and broader basis than the findings on which the outcome of the Disciplinary Commission was based. The Panel noted, secondly, that insofar as the appellant’s dispute was concerned, it would not have to draw definitive conclusions as to the general existence, purpose, nature and extent of a doping or cover-up scheme used at the Sochi Olympics as such, but rather only to the extent necessary for the consideration of the specific issues related to the Russian athlete. Third, it explained that it was not possible for it to conclude that the existence of a general doping and cover-up scheme would imply obligatorily and *ipso facto* the commission by the appellant of the alleged anti-doping rule violations by the IOC. It would rather need to ensure that the Russian athlete was responsible for each of these violations, in other words that the totality of the evidence at its disposal would allow it to conclude, to its comfortable satisfaction, that the athlete personally committed specific acts or omissions that form the elements of each of the disputed anti-doping rule violations.

B.b.e. The Panel then examines, in detail, the various anti-doping rule violations invoked by the IOC against the appellant (Award, paras. 729-865). At the end of this analysis, based on all available evidence, it concludes that the IOC did not bring sufficient evidence, as it was incumbent on it, of a violation of one or other of these rules by the appellant (Award, paras. 866). It concludes with these clarifications, which are reproduced here in the original language of the Award:

867. In reaching these conclusions, the Panel wishes to underscore what it has not decided in this appeal. The Panel has *not* made a ruling on whether or not Sochi Games existed and how it worked even though it was in place and worked. Moreover, the Panel did not consider it possible to conclude that the existence of a general doping and cover-up scheme, even if established, would inexorably lead to a conclusion Athlete committed the ADRVs alleged by the IOC.

868. What the Panel, in the appeal of an individual athlete against the finding of various ADRVs, *did decide* is simply this: for all the reasons outlined in this award, the evidence presented before the Panel does not justify the conclusion to the comfortable satisfaction of the Panel that the Athlete, through acts or omissions, individually committed any of the alleged ADRVs.<sup>4</sup>

C.

On June 27, 2018, the IOC (hereinafter: the Appellant) lodged a civil law appeal to the Federal Tribunal for the violation of its right to be heard in adversarial proceedings (Article 190(2)(d) PILA), with a view to obtaining the annulment of the Award.

The Federal Tribunal did not require the filing of an answer to the appeal. On the other hand, it did require the production of the case file by the CAS.

Reasons:

1.

According to Article 54(1) LTF,<sup>5</sup> the Federal Tribunal issues its judgment in an official language, as a rule, in the language of the award under appeal. When the award was issued in another language (here, English), the Federal Tribunal uses the official language chosen by the parties. Before the CAS, they used English, while in its appeal the Appellant employed French, pursuant to Article 42(1) LTF in conjunction with Article 70(1) Cst<sup>6</sup> (ATF 142 III 521<sup>7</sup> at 1). In accordance with its practice, the Federal Tribunal will therefore issue its judgment in French.

2.

An appeal in civil matters is admissible against awards relating to international arbitration under the conditions laid down in Art. 190-192 PILA<sup>8</sup> (Article 77(1) LTF). Whether as to the object of the appeal, the legal standing, the time limit to appeal, the submissions made by the Appellant or the grounds for appeal invoked, none of these admissibility conditions raises a problem in the present case. The appeal is therefore admissible.

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<sup>4</sup> Translator's Note: In English in the original text.

<sup>5</sup> Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110

<sup>6</sup> Translator's Note: Cst is the French abbreviation for the Swiss Federal Constitution.

<sup>7</sup> Translator's Note: The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

<sup>8</sup> Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.

3. In a single plea, the Appellant, denouncing a violation of his right to be heard, alleges that the CAS, on the one hand, failed to fulfill its minimum duty to consider and deal with the relevant issues and, on the other hand, based its Award on unforeseeable grounds.

3.1.

3.1.1. The right to be heard, as guaranteed by Articles 182(3) and 190(2)(d) PILA, does not require an international arbitral award to be reasoned. However, the case law has inferred a minimum duty of the arbitral tribunal to consider and deal with the relevant issues. This duty is violated when, inadvertently or by misunderstanding, the arbitral tribunal does not consider the allegations, arguments, evidence and offers of evidence presented by one of the parties that are important for the award to be rendered. In its appeal against the award, it is incumbent upon the so-called aggrieved party to demonstrate which oversight of the arbitrators prevented it from being heard on an important issue. It is up to this party to establish, on the one hand, that the arbitral tribunal did not examine some factual, legal or evidentiary elements that it had consistently put forward in support of its conclusions and, secondly, that those elements were likely to affect the outcome of the dispute (ATF 142 III 360<sup>9</sup> at 4.1.1 and 4.1.3).

3.1.2. In Switzerland, the right to be heard relates mainly to the findings of fact. The right of the parties to be questioned on legal issues is only limited recognized. Generally, according to the adage *jura novit curia*, state or arbitral courts freely assess the legal significance of the facts and they may also rule on the basis of rules of law other than those invoked by the parties. Accordingly, provided that the arbitration agreement does not restrict the mission of the arbitral tribunal to solely the legal grounds raised by the parties, the latter do not need to be heard specifically on the scope of the rules of law. Exceptionally, it is appropriate to challenge them where the judge or arbitral tribunal is considering basing its decision on a standard or a legal consideration that was not invoked during the procedure and the relevance of which could not have been foreseen by the parties (ATF 130 III 35 at 5 and references). Moreover, knowing what is unpredictable is a question of appreciation. The Federal Tribunal is therefore restrictive in the application of this rule for this reason and because it is appropriate to have regard to the peculiarities of this type of procedure by avoiding that the argument of surprise is used to obtain a material review of the award by the appeal authority (Judgment 4A\_716/2016<sup>10</sup> of January 26, 2017 at 3.1). The Federal Tribunal also recalled this conclusion, a few years ago, by refusing to extend that case-law to the establishment of the facts (Judgment 4A\_538/2012<sup>11</sup> of January 17, 2013 at 5.1, confirmed by the judgments 4A\_214/2013 of August 5, 2013 at 4.3.1 and 4A\_305/2013 of October 2, 2013 at 4).

Moreover, the Federal Tribunal has only rarely admitted the argument of “surprise” (ATF 130 III 35 at 6.2, Judgment 4A\_400/2008<sup>12</sup> of February 9, 2009 at 3.2). In the vast majority of cases, it has rejected

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<sup>9</sup> Translator's Note: The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties>

<sup>10</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/atf-4a-716-2016>

<sup>11</sup> Translator's Note: The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue>

<sup>12</sup> Translator's Note: The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/annulment-of-an-award-by-the-federal-tribunal-because-of-the-use>

said argument (judgments 4A\_716/2016 of January 26, 2017 at 3.2, 4A\_136/2016<sup>13</sup> of November 3, 2016 at 5.2, 4A\_322/2015<sup>14</sup> of June 27, 2016 at 4.4, 4A\_324/2014<sup>15</sup> of October 16, 2014 at 4.3; 4A\_544/2013 of May 26, 2014 at 3.2.2, 4A\_305/2013<sup>16</sup> of October 2, 2013 at 4, 4A\_214/2013<sup>17</sup> of August 5, 2013 at 4.3.1, 4A\_407/2012<sup>18</sup> of February 20, 2013 at 5.3; 4A\_538/2012<sup>19</sup>, *supra*, at 5.1; 4A\_46/2011<sup>20</sup> of May 16, 2011 at 5.1.3, 4A\_254/2010<sup>21</sup> of August 3, 2010 at 3.3, 4A\_240/2009<sup>22</sup> of December 16, 2009 at 3 and 4P.105/2006 of August 4, 2006 at 7.2, last paragraph). It is however true that the long-standing restraint of the Federal Tribunal towards this argument had practically no deterrent effect on the persons filing appeals in international arbitration (Judgment 4A\_525/2017 of August 9, 2018 at 3.1 *in fine*).

### 3.2.

3.2.1. The Appellant alleges that the Award violated its right to be heard due to the fact that it failed to examine its principal argument, formulated as follows (Award, para. 200, Appeal, para. 45):

[T]he IOC [...] invites the Panel to first, come to a conclusion on the existence of a doping and cover-up scheme, and, secondly, draw conclusions with respect to the general involvement of the athletes.

In connection with this, appellant emphasizes that the case in question does not result from a traditional violation of the anti-doping rules, characterized by the presence of a prohibited substance in the athlete's sample but, rather, by the implementation of an institutionalized doping program, within the framework of a conspiracy initiated by the State which organized the Sochi Olympics for the benefit of athletes with this nationality, in order to cover-up any trace of doping in athletes who however used substances prohibited by WADA. It undoubtedly concedes that the Russian appellants, before the Panel, had argued that it was necessary to demonstrate their individual guilt. However, in its opinion, these same appellants allegedly had not disputed the relevance of the existence of the Russian doping program, even though the debate focused on the question of proof of the execution of such a program. A similar opinion was shared by the Panel, but the latter, even though it admitted that it had more evidence that the Disciplinary Commission, considered that it was not its task to decide on the existence

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<sup>13</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/atf-4a-136-2016>

<sup>14</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected>

<sup>15</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/double-jeopardy-sport-sanctions-may-be-part-public-policy>

<sup>16</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/normative-interpretation-excluded-factual-findings>

<sup>17</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/irreconcilable-contradiction-domestic-award-leads-annulment>

<sup>18</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/objections-arbitral-proceedings-must-be-raised-clearly-and-forcefully>

<sup>19</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue>

<sup>20</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg>

<sup>21</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/claim-of-violation-of-due-process-denied-no-unforeseen-legal-arg>

<sup>22</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/reference-to-swiss-law-includes-the-vienna-conventional-on-contr>

of the Russian doping program as such, but only to determine if any individual athlete was involved. Accordingly, it had not taken into account various elements of proof such as the excessively high salt content or the presence of mixed DNA in urine samples of some of the Russian appellants, simply because the Appellant had failed to establish that the samples of X\_\_\_\_\_ were affected by such anomalies. In so doing, the Panel, having assessed the evidence of the respondent's involvement in organized cheating, purely and simply ignored the Appellant's main argument, according to which the Panel should have considered the very nature of an institutional system of doping whose purpose was precisely to cover up the doped athletes.

Still according to the Appellant, the manner in which the Panel proceeded would also fall under the notion of 'surprise', as the respondent himself did not contest the relevance of a Russian doping program but instead tried to demonstrate that the existence of such program was not established. The effect of surprise of the Appellant was even more striking in retrospect as the Panel clarified, particularly in para. 867 of its Award, that there was significant evidence of the existence of the Russian doping program, whose existence it refused to affirm.

The Appellant also tries to obtain a re-examination of the way in which the Panel assessed the relevant evidence but insists on complaining that the evidence of the existence of a Russian doping program was ignored. In sum, it alleges that the Panel handled the present case as if it had a "classic" doping case before it, while instead, it got what it calls the biggest doping scandal of all times, showing an unprecedented level of sophistication, particularly when it comes to the cover-up of evidence. According to the Appellant, the Panel deprived the right to be heard of any substance by refusing to deal with the question of the existence of a Russian doping scheme and prohibiting itself from drawing the necessary conclusions as to the proof of the involvement of individual athletes in the illicit scheme.

Finally, the Appellant refers to a subsidiary argument according to which the Panel clarified, on the violation of the anti-doping rule on the use of a prohibited substance, that, even if the presence of a Russian doping scheme were established, it would still not be convinced of the involvement of the appellant in the violation of said rule. Referring to the Judgment 4A\_730/2012<sup>23</sup> of April 29, 2013 at 3.3.2, the Appellant qualifies such subsidiary argument as a "standard clause" that is unfit to exclude a violation of the right to be heard.

3.2.2. It is obvious, by reading the argumentation that has just been recounted in a slightly summarized way – argumentation which is also unclear and essentially appellatory in nature – that the Appellant in reality tries, under the guise of a violation of its right to be heard, to question how the Panel assessed the evidence in the arbitration file and to make the Federal Tribunal return the case to the Panel so that the latter can confirm the existence of a Russian doping scheme in order to reach the conclusion that the respondent was involved in such a scheme. It goes without saying that such an attempt is doomed to fail.

It appears from the rest, in view of the findings formulated in paras. 867-868 of the Award, as they have been reproduced *in extenso* under Section B.b.e of this judgment, that the Appellant makes in its appeal

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<sup>23</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/modification-operative-part-award-admitted-if-appellant's-favor>

an extremely brief summary of the nuanced considerations that the Panel showed what, in its eyes, was the way to understand the relationship between the institutionalized doping scheme seemingly put in place for the Sochi Games and the possible individual guilt of Russian athletes who had been sanctioned in first instance for being involved in this scheme. It should not be forgotten in this regard that the Disciplinary Commission – which, it is worth noting, was set up by the Appellant – had taken care to specify that it would not apply a system of collective sanctions against all Russian athletes who participated in the Sochi Games, but rather would examine each case individually, in order to punish only those athletes whose personal involvement could be established as in violation of the applicable anti-doping rules. The Panel held a similar reasoning with regard to the exclusion of collective sanctions. However, it then deviated somewhat from the reasoning held by the Disciplinary Commission in the sense that, contrary to the latter, it did not find that it was necessary to establish from the existence, supposedly proven, of a generalized doping and cover-up scheme that such individual athlete had committed the alleged anti-doping rule violation. However, knowing whether individual responsibility can be inferred from the finding of the existence of an illicit scheme, operated on a large scale, is a point of law which is beyond the Federal Tribunal's control when it rules on an appeal in international arbitration. This means that the Appellant cannot complain to the Tribunal of the choice made by the Panel between the two alternatives, by refusing to infer the respondent's guilt from the mere existence – even if proven – of a doping scheme within the context of a competition in which the athlete had participated under the colors of the organizing country.

That being said, it is in no way demonstrated and does not appear to be that the Panel violated, by inadvertence or misunderstanding, the Appellant's right to have its allegations, arguments, evidence and offers of evidence relevant to the Award heard in accordance with the applicable rules of procedure.

For the rest, the Appellant fails to bring good arguments as to the effect of surprise. We can hardly imagine an organization of this importance, which was part of a procedure that hit the headlines, and two sports-arbitration specialists, can still be surprised in any way in a litigation whose considerable stakes could not be disregarded. Finally, the alternative reasoning held by the Panel has nothing to do with what the Federal Tribunal has characterized as the “stereotypical formula” in Judgment 4A\_730/2012, quoted by the Appellant, where the Panel simply stated that it took into account all the facts, legal arguments and evidence submitted by the parties, but would only refer to arguments and evidence necessary to explain its reasoning.

In such circumstances, the appeal can but only be dismissed.

4.

The Appellant, who loses, will have to pay the costs of the federal proceedings (Article 66(1) LTF). The respondent is not entitled to costs.

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The legal costs, fixed at CHF 5'000 shall be borne by the Appellant.

3.

There is no award of costs.

4.

This judgment is communicated to the representatives of the parties and to the Court of Arbitration for Sport.

Lausanne, January 15, 2019.

On behalf of the First Civil Law Court of the Swiss Federal Tribunal:

The President:

The Clerk

Kiss

Carruzzo