



Arbitration CAS 2008/A/1564 World Anti-doping Agency (WADA) v. International Ice Hockey Federation (IIHF) & Florian Busch, award of 23 June 2009

Panel: Prof. Michael Geistlinger (Austria), President; Mr. Hans Nater (Switzerland); Mr. Martin Schimke (Germany)

Ice hockey

Doping (refusal to submit to a sample collection)

Interpretation of the rules of an IF in conformity with the WADC

Interpretation of unclear or contradictory arbitration agreements according to the principle of confidence

Basic requirements for a valid arbitration clause or arbitration agreement

1. International Federations (IFs) that have signed the World Anti-doping Code (WADC) are required, *inter alia*, to adopt and implement anti-doping policies and rules which conform with the WADC and to require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the WADC; in this respect, International Federations have to adjust their legal order in accordance with the above commitments towards WADA. Where no such adjustments have taken place, the rules of an International Federation must be interpreted in such a manner that their application finds the Federation in conformity with the WADC.
2. Pursuant to Swiss law, arbitration agreements which contain provisions with regard to the essential elements of an arbitration agreement which are unclear or contradictory (so called “pathological clauses”) are to be interpreted in an objective manner which provides for neutrality with regard to the results of the interpretation. If a party argues having understood a clause in a different manner, the principle of confidence is to be applied. This means that the respective will of the parties is to be established as it could be and must have been understood *bona fide* by the respective addressee of a declaration.
3. The players sign to abide and observe the IF’s Statutes, By-laws and Regulations, and, in particular, decisions by the IF including disciplinary measures in general. They subject themselves to exclusive jurisdiction of IF appeal procedures and, after their exhaustion, to the jurisdiction of the CAS.
4. For an arbitration clause or arbitration agreement to be valid, it has to make clear the parties’ consent to arbitration, to define the scope and limit of that consent, to cover precisely the subject matter the parties intend be submitted to arbitration and to provide for the designated dispute resolution method and for exclusivity. Moreover, by reference to the Code of Sports-related Arbitration, the recommended elements of an international arbitration clause are fulfilled: this is the place of arbitration, the method of selection and number of arbitrators and the language of the arbitration.

The World Anti-Doping Agency (WADA) is a Swiss private law Foundation, seated in Lausanne, Switzerland and has its headquarters in Montreal, Canada. Pursuant to art. 4.1 of its Statutes, as of 11 April 2005, WADA shall promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition. According to art. 4.4 of these Statutes, WADA shall *“encourage, support, coordinate and, when necessary, undertake in full cooperation with the public and private bodies concerned, in particular the IOC, IFs and NOCs, the organization of unannounced out-of-competition testing”*.

The International Ice Hockey Federation (IIHF) is the worldwide governing body for ice hockey and like all international Olympic federations a signatory of the World Anti-Doping Code (WADC). It has its seat in Zurich, Switzerland.

Mr Florian Busch is an international-level German ice-hockey player and participated as a member of the German national ice-hockey team in several international competitions, such as the Ice Hockey World Championships in 2003, 2004, 2006, 2007 and 2008 and the Olympic Games in Torino in 2006.

According to WADA, on March 6, 2008, at 12:30 pm, K., a doping control officer, appeared at Mr Florian Busch’s domicile in order to perform an out-of-competition sample collection.

According to WADA on this occasion, Mr Busch refused to submit to sample collection. He declared that he felt disturbed by too frequent doping tests and criticized the way athletes are selected to be submitted to out-of-competition testing. The doping control officer warned Mr Busch that refusing a test could lead to severe disciplinary sanctions. He also suggested that the sample collection could occur at a place other than the athlete’s apartment. The athlete refused this proposal and confirmed his refusal to be tested. Even though the doping control officer repeated several times to Mr Busch that his refusal could lead to severe disciplinary sanctions, Mr Busch confirmed his refusal and did not allow the doping control officer to enter his apartment. The doping control officer left Mr Busch’s domicile at 12:50 pm, asking him to confirm his position in writing.

After the doping control officer had left, at about 12:54 pm, Mr Busch called the German National Anti-Doping Agency (NADA) and informed it of the event. At 2:16 pm, Mr Busch once more called NADA and declared that he had changed his position and wished to go ahead with the sample collection. NADA informed Mr Busch that a repetition of the doping test was not possible because of the infringement of the principle of unannounced testing. Thereafter, he took the initiative that on March 6, 2008 at about 5:00 pm a doping test arranged by the German Ice-Hockey Federation (DEB) and performed by K. took place. The sample was analysed at the IDAS Dresden and did not show any prohibited substances or prohibited methods.

On March 7, 2008 NADA informed and sent all relevant documentation to DEB, the institution in charge of results management against Mr Busch. On March 19, 2008 DEB informed NADA that it intended to sanction Mr Busch with a public warning. DEB was advised by NADA that refusing a sample collection constitutes an infringement of art. 2.3 NADA Code which complies with art. 2.3 WADC and has to be sanctioned according to arts. 11.5.1 and 11.3.1 NADC which correspond to arts. 10.4.1 and 10.2 WADC.

On April 9, 2008 DEB explained to NADA that the sanctions provided for by the NADC/WADC are excessive, that their application would infringe the athlete's basic rights and the principles of the rule of law, because a refusal of a doping test cannot be held as equal to having been found doped. As to this issue, the NADC contains a lacuna. The fact that Mr Busch underwent a doping test in a time very close to his refusal must be considered that he withdrew from his refusal. Additionally, it has to be counted in his favour that the results of this doping test, which took place in such a close timeframe, were negative. Thus, a public warning must be seen as adequate sanction under these circumstances. Also, it should not be possible to manipulate sample collection within five hours, although NADA objected to such opinion.

On April 15, 2008 NADA heard from the media that Mr Busch was sanctioned by the Missed Test Policy Panel of DEB with a public warning, with EUR 5.000 fine and a duty of 56 hours of community service. NADA also learnt from the media that IIHF supported the decision of DEB and would allow Mr Busch to play at the Ice Hockey World Championships in Canada, May 2 – 11, 2008.

By email dated April 17, 2008 – on the other hand – the IIHF received the decision of the DEB from the DEB. The DEB sanctioned Mr Busch as follows:

- a) official public warning having the consequence of a minimum 3-month ban in case of another violation*
- b) Fine of EUR 5.000,00 to a non-profit organization*
- c) 56h of community work as youth coach (7 month, 2h weekly) in the age groups starting beginners to bantam*
- d) Absorption of all proceedings and control costs”.*

The decision of the DEB Missed Test Policy Committee communicated to IIHF by the General Secretary/Sports Director of the DEB contained the following reasons:

“The decision was(s) particularly based on the following time frame.

On March 3, 2008, Florian Busch denied the doping test at 12.30 pm, but at 12:45 pm Mr. Busch was already in contact with the NADA. In this conversation he independently organized an orderly doping control sample, which was taken on March, 6, 2008 at around 5:00 pm. The doping control officer was the same person at the initial control attempt at 12.30 pm:

The control sample was tested by the “Institute of Doping Analysis and Sports Biochemistry” in Dresden and showed a negative test result.

There was no indication of a tampered sample and/or the consumption of doping concealing substances. Therefore the designated equalization of positive control samples is actually disproved.

The NADA-Code also states the following: A positive A-sample can be disproved by a negative B-sample. Based on the current case, the negative test result of the taken and analysed sample has to be appreciated accordingly.

The actual circumstances show, that Florian Busch due to the panic reaction, initially denied the doping control, but then came to senses.

The decision taking committee regards this case as inadequate and improper, that the obviously not doped athlete should face the same sanctions as a positive tested athlete”.

On April 21, 2008, NADA – not having received the decision of the DEB – informed WADA of this case in order for it to take action.

WADA, by letter dated May 6, 2008, based on art. 3.1 of the IIHF 2004 Disciplinary Regulations, requested the Directorate of the 2008 IIHF Mens’ World Championships to order that Mr Busch was provisionally suspended as from May 6, 2008, and WADA requested IIHF to render its decision on the provisional suspension within 48 hours upon receipt of WADA’s request, ie on or before May 8, 2008. Furthermore, WADA requested the IIHF Disciplinary Committee to initiate a disciplinary proceeding against Mr Busch and to sanction him with two years ineligibility for his violation of art. 6.3 (a) of the IIHF 2004 Disciplinary Regulations, starting as from the beginning of the provisional suspension of Mr Busch.

Section 3 of the IIHF 2004 Disciplinary Regulations, as far as relevant for the request of WADA, reads as follows:

“3.1 The Disciplinary Committee shall act upon request by an IIHF body (Statute 21), the respective IIHF Doping Control Committee, by WADA, or by a member national association. The Disciplinary Committee must receive notification of the request within 30 days of the alleged incident having taken place. A disciplinary proceeding can also be initiated at the discretion of the Disciplinary Committee without request by other parties at any time within the limitation period (Article 3.7 below). The decision is taken by the Chairman of the Disciplinary Committee.

3.2 The request for disciplinary proceedings must be submitted in writing to the Secretary of the Disciplinary Committee. The Secretary must inform the incriminated party and its national association that such a request has been received or, if applicable, proceedings have been initiated by the Disciplinary Committee. The parties concerned must be informed of the alleged violation or offence and provided with all relevant documents or correspondence”.

In this request for disciplinary proceedings WADA counted the 30-day deadline from the “incident” in art. 3.1 of the IIHF 2004 Disciplinary Regulations as starting from when “WADA was informed of the decision taken in the matter of Mr. Florian Busch by NADA on April 21, 2008”.

IIHF, by email dated May 7, 2008 answered WADA’s request saying that IIHF “has determined that it is not in a position to act on your request for reasons noted in the attached document”.

The document attached by IIHF to its answer is called “Florian Busch Update” and reads as follows:

“Upon further review, German forward Florian Busch will remain eligible to compete at the 2008 IIHF World Championship for the following reasons:

- *There is a National Anti-Doping Code in place in Germany. Within this code, there is a requirement for each sport to set up an internal disciplinary committee, independent and arm’s length from the sport.*
- *The German Ice Hockey Association (DEB) has set up such a committee which accepted and acted upon the Florian Busch case, making a decision on April 15, 2008 which was accepted completely and acted upon by the player.*
- *There is an appeal process set out in the German Anti-Doping Code for all decisions made by these sport-specific internal disciplinary committees. Until all such appeal routes are exhausted, this matter remains a concern within Germany and the various sport and anti-doping agencies there.*
- *As of May 7, 2008, no agency or sport body within Germany has appealed the decision of the German Ice Hockey Disciplinary Body. Until all such appeals of the German National Anti-Doping Code have been pursued and completed, the IIHF is not in a position to interfere in decisions with its Member national Associations.*
- *The player Florian Busch thus remains eligible to compete in the 2008 IIHF World Championship in Canada”.*

In the same email, sent by the President of IIHF on May 7, 2008, IIHF expressed its concern *“with the apparent inaccurate and incomplete information provided to”* WADA *“by the German National Anti-Doping Agency (NADA) which forms the basis of”* WADA’s *“request to the IIHF”*.

On May 7, 2008, WADA wrote a letter to IIHF stating that it assumed that the IIHF letter dated May 7, 2008 was considered as a *“decision”* in the understanding of the IIHF Disciplinary Regulations which can be appealed to CAS by WADA on the basis of art. 3.9 of the IIHF Disciplinary Regulations within 21 days from its notification.

In the same letter WADA informed the IIHF President that it had submitted a list of questions to the NADA on April 29, 2008, in order to determine whether WADA has a right to appeal to CAS against the DEB decision on the basis of the NADA Anti-Doping Code. On May 4, 2008, NADA informed WADA that DEB was ready to answer the list of questions after the IIHF World Championships. WADA asked the IIHF President to transmit the list of questions to DEB in order that they may provide WADA with an answer by May 8, 2008, 10 am Canadian Eastern time. The following questions were attached to this letter to the IIHF President:

“List of questions to DEB in the frame of the Florian Busch case

1. *According to the NADA Code (Art. 13.2.1 and 13.2.2), WADA has a right of appeal against final decisions rendered by German national sport federations if the athlete has passed an arbitration agreement with the national federation or with the NADA.*
 - a. *Does such an agreement exist?*
 - b. *If, yes please provide WADA with a copy of this agreement (Player’s license, etc).*
2. *If no such agreement exists, is there in DEB rules any right of appeal for WADA? If yes, please provide us with a copy of the applicable rules.*

3. *If the answers to questions 1. and 2. indicate that WADA has a right of appeal, please provide us with a copy of the procedural rules (deadline, etc)”.*

WADA, in its letter to the IIHF President, assuming that he was in direct contact with the DEB representatives, indicated that in case DEB

“establishes, by means of applicable rules and reliable documents, that 1) WADA has a right of appeal under their rules or 2) WADA has a right of appeal under the NADA rules, WADA will then appeal the DEB decision to CAS”. On the other hand WADA emphasized that, should “DEB be unable to establish this, or should DEB not provide WADA with an appropriate answer within this set deadline, WADA reserves its right to appeal the IIHF decision to CAS on the basis of IIHF Disciplinary rules as explained above”. WADA reminded the IIHF President “that as an Olympic international federation and a signatory to the World Anti-Doping Code, IIHF shall require, as a condition of membership, that the rules of its national associations are in compliance with the World Anti-Doping Code and IIHF rules.

On that point, we stress that a refusal is to be sanctioned by a 2-year ban in accordance with both IIHF Disciplinary regulations (art. 6.4 a and b) and the World Anti-Doping Code (article 10.4.1). This 2-year ban may be reduced to a minimum 1 year ban in case of no significant fault or negligence, or even eliminated in case of no fault or negligence. However, in the present case, the fault of the athlete has already been established by DEB. However, the sanction pronounced is not compliant. The DEB decision is therefore not in line with your rules and as stipulated in IIHF Statutes (Duties of all members), IIHF may, at any time, overrule any decision of any member national association which is inconsistent with IIHF rules”.

By letter dated May 8, 2008, DEB referring to IIHF President’s letter of May 7, 2008, and WADA’s email informed of the following:

“1.) As of 17.12.2007/12.01.2008 German NADA and the German Ice Hockey Federation (DEB e.V.) have signed an agreement on the organisation and execution of doping controls. By signing this agreement, DEB e.V. has recognized the NADA Code as binding for our field of responsibility.

According to Art. 10, lit. 10.1 of the NADA Code, DEB e.V. has then established a disciplinary panel that is in charge of sanctioning (see also Art. 10.7 NADA Code).

This panel had instituted written proceedings against Florian Busch and, finally, taken a decision on 15.04.2008 in compliance with Art. 10.3 of the NADA Code.

2.) The rights to appeal and the jurisdiction are covered by Art. 13 of the NADA Code.

As per Art. 13.1 of the NADA Code, decisions can only be appealed under the provisions of this Art. 13, in connection with the valid code of procedure.

The National Court of Arbitration for Sports (nationales Sportschiedsgericht) is in charge of any appeals. It will be replaced by the “ad-hoc-Schiedsgericht des Deutschen Sportbundes (ad-hoc-Court of Arbitration of the German Sports Confederation – DSB) until the National Court of Arbitration was established. The rules of arbitration of the respective court of arbitration are applicable.

The kick-off event for establishing the National Court of Arbitration for Sports was held on 28.04.2008. Until today, only three (3) out of a total of 55 national Sports Federations (33 olympic and 22 non-olympic federations) have signed an agreement with the German Institute for Arbitration in Sports (DIS), which is the governing body of the National Court of Arbitration for Sports.

As far as the “ad-hoc Court of Arbitration of the German Sports Confederation” is concerned, please refer to the Statutes of DOSB.

The following persons/parties are entitled to appeal according to Art. 13.2.2 of the NADA Code:

- a. the athlete or any person who can conclusively prove to be violated in his/ her own rights by the adjudication (in our opinion, NADA is entitled to appeal)*
- b. the other party involved in the proceedings (in our opinion, DEB e.V.)*
- c. the respective International Federation (in our opinion, the IIHF)*
- d. WADA*

3.) According to Art. 13.2, last paragraph, the decisions of the National Court of Arbitration for Sports and the “ad-hoc Court of Arbitration of the German Sports Confederation” can be appealed to CAS after having fully exhausted all national remedies.

4.) This means, NADA and WADA can appeal to the National Court of Arbitration for Sports or the “ad-hoc Court of Arbitration of the German Sports Confederation”, independent of the existence of an athlete’s agreement.

5.) The Statutes and By-laws of DEB e.V. do not cover any rights of WADA. This is, in our opinion, not necessary as these WADA rights are covered within the NADA Code, which both, the DEB e.V. and the athletes comply with.

(...)”.

On May 9, 2008, WADA appealed the DEB decision of April 15, 2008 to the ad-hoc Court of Arbitration of the German Olympic Sports Confederation and requested the court to set aside the DEB decision and sanction Mr Busch instead with a two-year period of ineligibility because of refusal and order him to bear the costs of the proceeding and of taking a sample. The appeal was based on art 13 NADA Code read together with the letter of DEB to WADA dated May 8, 2008. With regard to the anti-doping rule violation and the sanction, the appeal referred to arts 2.3 and 11.5.1 read together with art 11.3.1 NADA Code.

IIHF did not answer the letter of WADA dated May 8, 2008.

The ad-hoc Court of Arbitration of the German Olympic Sports Confederation rendered its decision on December 3, 2008 and found that Mr Busch intentionally refused to submit to sample collection, which would justify the imposition of a two-year period of ineligibility pursuant to the WADC and the German NADA Code. DEB, however, had failed to implement the NADA Code and it could not be assumed that the NADA Code had been recognized by Mr Busch. Thus, no legal basis was given in order to sanction Mr Busch as requested by WADA. Therefore, the appeal filed by WADA was dismissed.

On May 27, 2008, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) “in order to safeguard its right in this matter, in particular in the event that the appeal filed by WADA before the German Court of Arbitration for Sport would not be admissible”. WADA challenged the Appealed Decision of IIHF, submitting the following requests for relief:

- “1. The Appeal of WADA is admissible.*
- 2. The Decision of the IIHF rendered on May 7, 2008 in the matter of Mr. Florian Busch is set aside.*
- 3. Mr. Florian Busch is sanctioned with a two-year period of ineligibility starting on the date on which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Florian Busch) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
- 4. WADA is granted an award for costs”.*

Pursuant to articles R32, R37 and R44.3 of the Code of Sports-related Arbitration (the “CAS Code”), WADA requested that this appeal procedure be stayed until the National German Court of Arbitration for Sports renders its final decision on the appeal filed by WADA and pending before the National German Court of Arbitration for Sports. WADA held that the German Court decision was to be rendered on the same context of facts as the IIHF decision appealed before the CAS and that it was *“in the interest of the fight against doping that decisions rendered on similar facts by different bodies shall be consistent”*.

On May 30, 2008, Counsel to the CAS requested IIHF to inform the CAS Court Office whether IIHF agrees to suspend the CAS proceedings until the German National Court of Arbitration for Sport has rendered its decision. By letter dated June 6, 2008, President and Secretary General of IIHF answered as follows:

“As the President of the IIHF noted in the IIHF E-Mail the IIHF – due to lack of competence – was and is not in a position to impose at this stage any sanction against Respondent 2. The IIHF, therefore, contends that CAS is not competent to hear a claim filed by Appellant against the IIHF at this stage, but that rather Appellant and/or the German Anti Doping Agency should pursue this case in Germany in accordance with the applicable rules.

The IIHF has no reason to prevent Appellant and/or the German Anti Doping Agency from filing an appeal with the German National Court of Arbitration for Sports and is not interested to being involved, in parallel, in CAS proceedings that are based on the same subject matter. In IIHF’s view it would rather be more effective to wait and see what the outcome of the proceedings with the German National Court of Arbitration for Sports will be. In the IIHF’s view it may well be that once that decision will be known, Appellant may withdraw the present claim.

For these reasons and without prejudice to any right of defence, in particular the right to raise the defence of lack of jurisdiction, and subject to the next sentence, the IIHF herewith agrees to have the present proceedings stayed until the German National Court of Arbitration for Sports has rendered a final and enforceable decision (i.e. until possible appeals filed against the decision have become final and enforceable). The IIHF expects that due to the stay of the present proceedings, Respondents do not have to appoint any arbitrator at this stage and that until continuation of the proceedings no court fees or other fees will have to be advanced.

(...)”.

By letter dated June 9, 2008, Counsel to the CAS informed the parties that the proceeding was stayed until the German National Court of Arbitration for Sports has rendered its decision.

On December 18, 2008, Counsel to the CAS informed the parties that WADA had filed a new appeal at the CAS against the German National Court of Arbitration's decision in the matter of Mr Busch dated December 3, 2008. She asked the parties for their agreement to consolidate the two procedures and have them decided by the same panel of arbitrators.

By letter dated January 13, 2009, IIHF informed the CAS that *"IIHF does not agree to consolidate the two procedures since we believe that the elements of dispute in the two cases are distinctly different"*.

As a consequence of this IIHF letter the procedures CAS 2008/A/1564 WADA v./IIHF & Busch and CAS 2008/A/1738 WADA v. Deutscher Eishockey-Bund e.V., later joined by Mr Busch, were to be treated as separate cases. WADA was set a deadline of ten days to file its Appeal Brief by letter of Counsel to CAS, dated January 21, 2009.

By letter dated January 20, 2009, WADA proposed to the CAS and the other parties in both procedures to have the same panel be appointed. IIHF agreed by letter dated January 27, 2009. DEB and Mr Busch did not react within the set deadline and a second deadline of two days, thereafter. The CAS having informed the parties so by letter, dated January 29, 2009, considered the non-reaction as DEB's and Mr Busch's tacit agreement to the decision of both cases by the same panel.

When composing the CAS Panel, Counsel to the CAS by letter dated February 4, 2009 drew the attention of the parties to the remarks made by the arbitrator nominated by DEB and Mr Busch, Dr Martin Schimke in the "Acceptance and Statement of Independence" form. There Dr. Schimke stated: *"I have been appointed Co-Arbitrator in a current CAS-case pending by WADA. I regularly provide legal advice to the German Professional Ice Hockey League (DEL), most recently in connection with the cooperation agreement between DEL and the "Deutsche Eishockey Bund e.V." (DEB). This involved warnings to the DEB due to alleged non- and improper performance of obligations laid down in the said cooperation agreement. In this regard, it cannot be excluded that DEL would retain me to also act externally (officially) towards the DEB in the future"*. There was no challenge of the independence of Dr Schimke by the parties within the set deadline of seven days after the ground of challenge has become known.

On February 2, 2009, WADA filed its Appeal Brief, containing a statement of the facts and legal arguments accompanied by supporting documents, and repeated its prayers for relief from its Statement of Appeal.

On February 12, 2009, IIHF informed the CAS that it had decided not to participate in the procedure. IIHF repeats its arguments that *"it was not in a position to impose any sanctions on Mr Busch due to lack of competences in the IIHF Statutes & Bylaws and IIHF Disciplinary Regulations.*

The relevant provisions which enable the IIHF to review decisions taken by its Member federations or any other competent body within the territory of its Member federations have now been introduced to the IIHF Statutes & Bylaws. This Statutes & Bylaws revision was implemented at the IIHF General Congress in Montreal, Canada at the end of May 2008. As a consequence, the IIHF will, in future, be entitled to review decisions such as the one taken by the German Ice Hockey Federation in the Busch Case.

Given the fact that the IIHF was not competent to review the decision taken by the German Ice Hockey Federation in the Busch Case, the IIHF neither wishes to be involved nor to take a position in this matter.

Obviously the IIHF will remain at the CAS Panel's disposal for any further queries. The IIHF furthermore confirms with this letter that it will accept the CAS Panel's award without having participated in the proceedings. The costs of this CAS proceedings shall not be borne by the IIHF".

On March 9, 2009, the Second Respondent filed an Answer with the following request for relief:

"The Second Respondent hereby respectfully requests the CAS to rule that:

- 1. The Appeal of WADA is dismissed.*
- 2. The decision of IIHF rendered on 7 May 2008 in the matter of Mr. Florian Busch is upheld.*
- 3. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne by WADA.*
- 4. WADA is ordered to pay the Respondents' legal and other costs incurred in connection with this arbitration".*

Upon request of the Second Respondent he was authorised by the CAS to submit the complete case file before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation to the CAS. The complete case file was submitted to the CAS on April 20, 2009.

Apart from the documents already included in the parties' submissions, the file consists of a complete version of the NADA-Code, of an extended arbitration request (appeal) dated May 28, 2008, including 15 attachments, of a further extended arbitration request (appeal) dated May 30, 2008 including attachments that are already part of the CAS file, and of three further letters of the Second Respondent dated June 9, 2008, June 12, 2008 and June 20, 2008, all of them concerning the constitution of the arbitration court. A further exchange of letters before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation (July 3, 2008, July 9, 2008, July 11, 2008, July 14, 2008, July 15, 2008) related to the joint nomination of one arbitrator by DEB and Mr Busch. A letter dated July 15, 2008, of Mr Sturm, the attorney of Mr Busch, made clear that Mr Busch considered the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation not to be competent to deal with his case and did not subject to this proceeding. This letter is followed by a last letter relating to the composition of the court (July 16, 2008). A letter dated September 16, 2008 of the president of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation contains the Constitution Order of the court as well as the Procedural Order N° 1. Both orders were agreed to by WADA by letter dated September 25, 2008, which extended its appeal by letter dated September 30, 2008. By this letter WADA *inter alia* withdrew its request to sanction the athlete due to the fact that Mr Busch had declared through his attorney that he feels not to be subject to sanctions of DEB and is not ready to accept the jurisdiction of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. Attached to this letter are to be found: The agreement between NADA and DEB concerning the organisation and performance of doping controls dated December 12, 2007 and January 01, 2008; a decision of the Disciplinary Committee of the German Athletics Federation in another case of refusal, where the respective athlete was sanctioned by two-year period of ineligibility; and one further such case of sanction for refusal in Germany by reference to the national NADA anti-doping report 2007. Party letters dated September 29, 2008, October 2, 2008 and October 9, 2008 referred to the acceptance of the Constitution Order and the execution of Procedural Order N° 1. Procedural Order N° 2 dated

November 6, 2008 set the date for the hearing and ruled on evidence and hearing procedure. On October 20, 2008, DEB submitted its answer to the appeal requesting the dismissal of the appeal and containing two attachments with regard to a cooperation agreement between DEL and DEB dated December 23, 2005. By letter dated November 11, 2008, DEB informed the court that Mr Busch continued to refuse to sign a DEB-athletes agreement concerning the fight against the misuse of drugs, the text of which is attached to this letter. Party letters dated November 22, 2008 and November 27, 2008 related to the appearance and statements of witnesses for the hearing. It follows from the last letter that Mr Busch and Mrs R. have been advised by the attorney of Mr Busch not to appear as witnesses before the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation. The last document of this file is the award of the Ad-hoc Court of Arbitration of the German Olympic Sports Confederation dated December 3, 2008. DEB requested the CAS Panel to include the whole file in the CAS file which decision was deferred by the Panel to the hearing in order to have the opinion of the other parties heard before.

A hearing was held on April 22, 2009 at the CAS premises in Lausanne.

The Panel informed the parties that it will rule on its jurisdiction together with the merits. Thus, the request of the Second Respondent, raised in its Response dated March 9, 2009, to decide by Preliminary Order that the CAS has no jurisdiction to hear the appeal filed by WADA was dismissed since the Panel found that the question of its jurisdiction was untimely linked to the merits of the case. No party objected to include the complete file of the case before the Ad-hoc Court of Arbitration of the German Sports Confederation.

LAW

CAS Jurisdiction

1. The Panel wishes to emphasize that as a signatory to the WADC, IIHF is bound by art 23.2.1 WADC 2009 and was bound by art 20.3 WADC 2003 on March 6, 2008, when the incident at stake occurred. Art 20.3 WADC 2003 required from IIHF as an International Federation to adopt and implement anti-doping policies and rules which conform with the WADC; to require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the WADC; to require all athletes and athletes' support personnel within its jurisdiction to recognize and be bound by anti-doping rules in conformance with the WADC; to require athletes who are not regularly members of the IIHF or one of its member National Federations to be available for Sample collection and provide accurate and up-to-date whereabouts information if required by the conditions for eligibility established by the IIHF or, if applicable, the Major Event Organization; to monitor the anti-doping programs of National Federations; to take appropriate action to discourage non-compliance with the WADC; to authorize and facilitate the International Observer program at

international events; and to withhold some or all funding of its member National Federations that are not in compliance with the WADC.

2. The Panel is willing to assume that IIHF signed the WADC in good faith and adjusted its legal order in accordance with the above commitments towards WADA. Where no amendments of provisions took place, after IIHF had signed the WADC 2003, the Panel departs from the understanding that the IIHF rules in force at the relevant time must be interpreted in such a manner that their application finds IIHF in conformity with the WADC.
3. This stated, the Panel wishes to point at the broad objectives IIHF pursues according to sections 2 and 3 of the 2003 – 2008 IIHF Statutes and Bylaws, in force at the relevant time. Section 2 reads as follows:

“2. Recognition by the IOC

The IIHF is recognized by the International Olympic Committee (IOC) as the only governing body for international ice hockey”.

4. Section 3 provides for the following IIHF objectives:

“The objectives of the IIHF are

- *to govern, develop and promote ice and in-line hockey throughout the world*
- *to develop and control international ice and in-line hockey*
- *to promote friendly relations among the member national associations*
- *to operate in an organized manner for the good order of the sport.*

The IIHF will take all necessary measures to attain the following:

- *to conduct the affairs according to its Statutes, Bylaws and Regulations*
- *to arrange sponsorships, media coverage, license rights, advertising and merchandising in connection with all IIHF competitions*
- *to establish and maintain clear jurisdiction over ice and in-line hockey internationally*
- *to establish uniform international regulations and official playing rules*
- *to support the development of young players*
- *to support the development of coaches and game officials*
- *to organise all events of the IIHF*
- *to control international transfer of players*
- *to establish contacts with other sports federations and groups”.*

5. According to Section 22 read together with Section 26 of the 2003 to 2008 Statutes and Bylaws these objectives and statutory measures were adopted by IIHF Congresses, where all full member national associations in good standing had one or two votes. The member national associations thus have authorized IIHF to enact measures going well beyond a mere responsibility for IIHF Championships. Only two from nine measures enumerated above for IIHF to undertake are in clear connection with IIHF competitions/events. All other measures

and all four objectives listed in section 3 of the 2003 – 2008 IIHF Statutes and Bylaws cover issues of general relevance for the sports of ice and in-line hockey.

6. The IIHF Statutes and Bylaws establish a direct link between themselves, the final and binding authority of the IIHF, and the players of their member national associations. Based on IIHF Bylaw 606 para. 1 a player cannot enter himself for an IIHF Championship or IIHF event, but be entered as a member of a team by his/her member national association.
7. DEB is a member of IIHF. According to section 11 of the IIHF 2003 – 2008 Statutes and Bylaws, “*IIHF member national associations are obliged to abide by the Statutes, Bylaws, Regulations and decisions of the IIHF and to undertake not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute arising and to submit any such dispute to the jurisdiction of the IIHF as specified in the IIHF Statutes, Bylaws and Regulations*”.
8. One of the key issues attached to the membership in IIHF is the delimitation of jurisdictions and mutual recognition of member national associations as provided for by section 10 of the IIHF 2003 – 2008 Statutes and Bylaws. This provision reads as follows:
“The member national associations of the IIHF shall recognize each other as being solely empowered to control ice and/or in-line hockey in their respective countries; therefore, they undertake that neither they nor any of their members will in any way have relations with non-associated bodies or one of their members, except as may be permitted by Statutes and Bylaws or with special permission of the IIHF President for limited time periods”.
9. By having granted to DEB the status of full membership (section 11 Class of Membership lit. a), IIHF has found that DEB is “*an ice hockey association that operates independently of any other organisation, controls solely ice hockey and has taken part in an IIHF ice hockey championship*”. On the one hand, full membership entitles the member national associations to participate in all activities and affairs of the IIHF, on the other hand, membership in the IIHF “*includes acceptance by such member national associations, their constituent bodies, clubs, players, members, officials and any person or body whatsoever or howsoever associated of the final and binding authority of the IIHF*”.
10. Mr Busch, thus, seen from the perspective of IIHF Statutes and Bylaws, is a player entered by DEB for an IIHF Championship or IIHF event and is as such bound by the IIHF Statutes and Bylaws, as well as Regulations and to acceptance of the final and binding authority of the IIHF.
11. As a consequence, IIHF, at the occasion of an IIHF Championship or IIHF event, requests a player to sign a Player Entry Form. By signing such form, the player confirms *inter alia* the following:
“I, the undersigned, declare, on my honour that
a) I am under the jurisdiction of the National Association I represent.
(...)

l) I agree to abide by and observe the IIHF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution”.

12. The wording of lit. l of the form makes clear that the temporal and material scope of the IIHF Player Entry Form is not limited to the respective event itself, in the same way as the sphere of activity and authority of IIHF goes well beyond IIHF events and covers obligations towards WADA under the WADC, such as out-of-competition and out-of-season controls, which by matter of definition cannot and must not take place during IIHF events. It is the objective explicatory value the text of the declaration has, seen from the perspective of an uninterested party. The Panel, thereby, considers the fact that due to the seat of IIHF in Switzerland and the applicability of Swiss law arbitration clauses or arbitration agreements must meet the requirements of art 178 of Switzerland’s Federal Code on Private International Law of December 18, 1987. Arbitration agreements which contain provisions with regard to the essential elements of an arbitration agreement which are unclear or contradictory (so called “*pathological clauses*”) are to be interpreted in an objective manner which provides for neutrality with regard to the results of the interpretation (see eg WENGER/MÜLLER, Commentary to art 178 Code on Private International Law, 1545 at numbers 52 f with further references). If a party, like in the case at hand, argues having understood a clause in a different manner, the principle of confidence is to be applied. This means that the respective will of the parties is to be established as it could be and must have been understood *bona fide* by the respective addressee of a declaration (see WENGER/MÜLLER, 1546 at number 55 with further references). From such perspective, the players sign to abide and observe the IIHF Statutes, By-laws and Regulations, and, in particular, decisions by the IIHF including disciplinary measures in general. They subject themselves to exclusive jurisdiction of IIHF appeal procedures and, after their exhaustion, to the jurisdiction of the CAS not only for the resolution of any dispute arising in connection with the IIHF Championship and Statutes, By-laws and Regulations, but also with regard to disputes not necessarily in any connection with the IIHF Championship and related aspects of the IIHF Statutes, By-laws and Regulations. This follows from the use of the pair “*and/or*” in the text of lit. l and from the general wording of the first phrase of lit l. Neither the IIHF Player Entry Form nor the IIHF Regulations the Player Entry Form is referring to contain any element that could be construed as to exclude the jurisdiction of the CAS.

13. Mr Busch signed the IIHF Player Entry Forms on December 13, 2003, on December 20, 2004, on April, 22, 2006, on April 26, 2007 and on May 1, 2008. The fact that Mr Busch has signed such player entry forms nearly every year since 2003 does not mean that the validity of the Player Entry Form is limited to one year. The Panel finds, moreover, that IIHF, for administrative reasons, is also asking players, who had already previously signed such player entry form, at each IIHF Championship or IIHF event, to repeat such signature in order to guarantee that all players participating at a current IIHF Championship or IIHF event have

signed an IIFH player entry form. Since IIFH can never know whether a player having been entered for an IIFH Championship or IIFH event will also be entered for the next IIFH Championship or IIFH event, or due to an injury or weakness in performance in a given year will be entered only at the next following or at a later IIFH Championship or IIFH event, IIFH can fulfill its out-of-competition and out-of-season-control commitments towards WADA only by considering athletes having once been entered by a member national association for an IIFH Championship or IIFH event as falling under IIFH jurisdiction – in parallel to the jurisdiction of the respective member national association – as long as they remain active players eligible for a future entry by their member national association to such future IIFH Championship or IIFH event.

14. The IIFH Player Entry Form, in the view of the Panel, fulfils the basic requirement for a valid arbitration clause or arbitration agreement. They *“make clear the parties’ consent to arbitration, and ... define the scope and limit of that consent”*. *“They cover precisely the subject matter the parties intend be submitted to arbitration”*. They provide for the designated dispute resolution method and for exclusivity. Also the recommended elements of an international arbitration clause are fulfilled by reference to CAS Code such as the place of arbitration, the method of selection and number of arbitrators and the language of the arbitration (see eg FRIEDLAND P. D., *Arbitration Clauses for International Contracts*, Bern 2004, 40 f.; 46 f.; similarly BERGER K. P.; *International Economic Arbitration*, Deventer, Boston, 1993, 121 – 132; CARBONNEAU Th. E., *The Law and Practice of Arbitration*, Huntington, New York, 2004, 24 f; RUBINO-SAMMARTANO M., *International Arbitration Law and Practice*, The Hague et al. 2001, 219 – 224; BINDER P., *International Commercial Arbitration and Conciliation*, in: UNCITRAL Model Law Jurisdictions, London 2005, 59 – 71 numbers 2-001 – 2-035; FISCHER/HAYDOCK, *Drafting an Enforceable Arbitration Agreement*, in: CAMPBELL D. (ed.), *The Arbitration Process*, The Hague et al. 2002, 29 – 67 (48 – 56). They suffer neither of inconsistency, uncertainty nor of inoperability (see eg REDFERN/HUNTER/BLACKABY/PARTASIDES, *Law and Practice of International Commercial Arbitration*, London 2004, 165 – 168, numbers 3.67 – 3.72).

15. These general observations on the sphere of activity and obligations of IIFH and relevance of IIFH rules for players having been made, the Panel refers to art R47 of the Code which stipulates three prerequisites for CAS jurisdiction (cf CAS 2004/A/748, n° 83; CAS 2008/A/1471 & CAS 2008/A/1486, n° 5.1):
 - 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;
 - the parties must have submitted to the competence of the CAS.

16. In the present case WADA on May 6, 2008 approached the IIFH, and in particular the IIFH Disciplinary Committee based on art 3.1 of the IIFH 2004 Disciplinary Regulations, in force at the relevant time, with, *inter alia*, the request to initiate a disciplinary proceeding against Mr Busch and to sanction him with a two year period of ineligibility for his violation of art 6.3 (a) of the IIFH 2004 Disciplinary Regulations. Mr Busch, falling under IIFH jurisdiction in

parallel to DEB jurisdiction, was alleged to have refused an out-of-competition doping control on March 6, 2008. Since the test was ordered by NADA and not by WADA or IIHF, DEB was the primary authority for results management. By its decision of its Anti-Doping Committee dated April 15, 2008 DEB did not sanction Mr. Busch with any period of ineligibility. The Panel, having reviewed art 3.1 of the IIHF 2004 Disciplinary Regulations holds, therefore, that WADA had the right to request the initiation of a disciplinary proceedings.

17. WADA had to submit such request within 30 days of the alleged incident. The “incident” is the DEB decision dated April, 15, 2008, which WADA considered not to be in compliance with its Rules. DEB failed to provide NADA with this decision. WADA had access to the DEB decision only upon its receipt from IIHF on April 24, 2008. The 30 days deadline of art 3.1 of the IIHF 2004 Disciplinary Regulations has to be counted, therefore, from April 24, 2008, since it cannot be assumed that art 3.1 of the IIHF 2004 Disciplinary Regulations expects from WADA or any other body or organisation entitled to such request for initiation of disciplinary proceedings to act based on rumours or media reports. This view is supported by the word “alleged”, used in art. 3.1. of the IIHF 2004 Disciplinary Regulations. In addition, the Panel has to interpret the provision in question in *“keeping with the perceived intention of the rule maker, and not in a way that frustrates it”*. (see eg. CAS 2001/A/354 & CAS 2001/A/355, at para. 68, with further references). Thus, the Panel considers the request of WADA of May 6, 2008 as having been submitted timely.

18. According to art 1.1 of the IIHF 2004 Disciplinary Regulations it is the responsibility of the IIHF Disciplinary Committee to *“sanction member national associations, clubs, officials, coaches, and players if they infringe the Statutes, Bylaws, Regulations or Official Playing rules of the IIHF (...)”*. WADA argued a violation of such regulation by a player. Thus, the responsibility of the IIHF Disciplinary Committee was given. IIHF answered the request by letter of IIHF dated May 7, 2008, whereby the IIHF President informed WADA that *“the International Ice Hockey Federation has determined that it is not in a position to act on your request for reasons noted in the attached document”*.

19. It is not clear from this letter whether the IIHF President has involved the IIHF Disciplinary Committee and who inside IIHF *“determined”* the IIHF position communicated to WADA. Section 37 IIHF 2003 – 2008 Statutes and Bylaws provides for the following duties and responsibilities of the IIHF President:
 - “The President of the IIHF or his substitute has the following duties and responsibilities:*
 1. (...)
 2. *He represents the interests of the IIHF in all external matters.*
 3. *He is responsible for ensuring that all decisions are taken in accordance with the Statutes, Bylaws and Regulations as well as for the execution of decisions by Congress and by Council.*
 4. (...)
 5. *He has the right to sign on behalf of the IIHF in all matters that have been approved by Council; (...).”*

20. Previous CAS decisions (CAS 2004/A/659; CAS 2005/A/899; CAS 2004/A/748) have elaborated the characteristic features for a letter or other communication to be a decision. They have been summarized in the latter decision at paras 89 and 90 as follows:

“The Panel agrees with the definition of “decision”, and of the characteristic features of a “decision” stated by those CAS Panels:

«In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties» (CAS 2005/A/899, at paragraph 61);

«A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects» (CAS 2004/A/569, at paragraph 36).

The Panel also agrees with the CAS Panel in Galatsaray (q.v. at paragraph 63) that:

«the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal»”.

21. The letter of the IIHF President was a unilateral act sent to a determined recipient and was intended to reject the request of WADA and to declare the eligibility of Mr Busch. The letter fulfilled all above cited requirements. In addition, considering the strong position the IIHF President has as shown in para. 66 above, WADA had to accept the IIHF President's letter as the IIHF Disciplinary Committee's decision according to art. 3.1 of the IIHF 2004 Disciplinary Regulations. WADA had no possibility to bypass the IIHF President or to achieve any other decision from IIHF. Therefore, it was a final decision. Thus, the Panel finds that the criterion of a “decision of a federation” as required by art R47 of the Code has been met.

22. Sections 47 – 49 of the IIHF 2003 - 2008 Statutes and Bylaws rule on the arbitration as follows:

“47. Subject Matter of the Arbitration

Any dispute concerning the interpretation or application of the Statutes, Bylaws, Regulations and official playing rules or decisions of IIHF bodies or the decisions of any duly authorized representative of the IIHF and the appeal and all review processes within the IIHF having been fully exercised must be settled by arbitration through the Court of Arbitration for Sport (CAS) – except of those specified in statute 21 C. This also applies to disputes between and among the member national associations or between them and the IIHF bodies, if no amicable agreement has been reached.

48. Court of Arbitration for Sport (CAS)

Any dispute to be settled by arbitration must be submitted exclusively by way of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-Related Arbitration. The time limit for appeal is twenty-one days after receipt of the decision concerning the appeal.

49. Binding Authority of CAS

All parties that are subject to the arbitration accept that the Court of Arbitration for Sport (CAS) is the Court of Final Appeal and the decisions of CAS shall be binding to all parties involved”.

23. Art 3.9 IIHF 2004 Disciplinary Regulations specifies for doping matters that decisions of the Disciplinary Committee in doping cases “*may be appealed only to the Court of Arbitration for Sport (CAS). The time limit for appeal is 21 days after receipt of the reasons of the decision. (...)*”.
24. Given the result of the Panel’s deliberations holding that the IIHF’s letter of May 7, 2008 was to be considered a decision by the IIHF Disciplinary Committee, based on art 3.9 IIHF 2004 Disciplinary Regulations read together with sections 47 – 49 IIHF 2003 – 2008 Statutes and Bylaws, the Panel declares to have jurisdiction to decide the present case. CAS jurisdiction is found, based on these articles, being given with regard to both Respondents, IIHF as well as Mr Busch, who is found by the Panel being bound to these provisions and to the CAS jurisdiction by having signed IIHF player entry forms, in particular on April 26, 2007 and confirmed on May 1, 2008. Mr Busch was under IIHF jurisdiction – in parallel to DEB jurisdiction – at the relevant time.
25. There were no further internal remedies available to WADA under IIHF rules. In particular, WADA was not required by the IIHF 2004 Disciplinary Regulations and IIHF 2003 – 2008 Statutes and Bylaws to file an appeal against the decision rendered by DEB to the Ad-hoc Court of Arbitration of the German Sports Confederation or initiate any other eventual internal remedy within DEB or German NADA. The attachment to the decision of IIHF, dated May 7, 2008 and entitled “Florian Busch Update” is considered by the Panel as containing an error in law. The reference to the fact that there might be a National Anti-Doping Code in place in Germany and that DEB might have set up a disciplinary committee, the decision of which might be accessible to an appeal process as set out in the German Anti-Doping Code, is not relevant in the case of an “*alleged incident*” according to art. 3.1 IIHF 2004 Disciplinary Regulations. Such “*alleged incident*” falls within the jurisdiction of IIHF and there is no legal ground to transfer it to the jurisdiction of DEB. Once a decision on the level of a member national association is to be considered an “*alleged incident*” in the understanding of art. 3.1 IIHF 2004 Disciplinary Regulations, remedies eventually available in such member national association need not to be used by WADA before submitting its request based on art. 3.1.
26. Thus, the Panel holds that CAS has jurisdiction to decide the appeal of WADA and that the appeal was admissible, having been submitted timely.

Applicable law

27. Art. R58 of the Code provides the following:

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

28. Given the findings of the Panel in para. 1-14 above, the Panel rules that the IIHF 2003 – 2008 Statutes and Bylaws, in particular the provisions with regard to the fight against doping (Bylaws 1400 and 609 on Doping Controls) and the IIHF 2004 Disciplinary Regulations are the applicable regulations. Based on the IIHF Player Entry Form these are *“the applicable regulations and rules chosen by the parties”*.
29. The same Statutes, Bylaws and Regulations bind also the DEB based on section 11 of the IIHF 2003 – 2008 IIHF Statutes and Bylaws which reads, *“IIHF member national associations are obliged to abide by the Statutes, Bylaws, Regulations and decisions of the IIHF and to undertake not to involve any third party whatsoever outside of the IIHF in the resolution of any dispute arising and to submit any such dispute to the jurisdiction of the IIHF as specified in the IIHF Statutes, Bylaws and Regulations”*.
30. Indeed, through § 1.3 read together with § 1.5.1 lit. 1 of its 2006 Statutes, which were in force at the relevant date (see para. 1 above), DEB implemented those IIHF obligations. DEB affirmed *“to be a member of the IIHF, which Statutes, Bylaws and Regulations (§ 1.5.1 lit 1) are recognized as obligatory by DEB and its members. DEB declares that the rules enumerated in § 1.5.1 lit 1 are part of the DEB Statutes”*. § 1.5.1 lit. 1 DEB 2006 Statutes enumerates as such rules the *“Statutes, Bylaws, Regulations and the Official Rule Book of IIHF”*.
31. At the hearing, the Panel asked DEB to submit the rules which served as legal basis to the DEB decision dated April 15, 2008. This request was repeated by the letter of the Counsel to the CAS dated April 29, 2009. The Panel asked the DEB to follow the request *“at its earliest convenience”*, but DEB failed to do so in due time. Thus, the Panel holds that there are no applicable DEB rules, but that DEB based on section 11 of the IIHF 2003 – 2008 Statutes and Bylaws and §1.3 read together with § 1.5.1. lit. 1 of the DEB 2006 Statutes has to apply the IIHF rules mentioned above in para. 28.

The merits

32. The Panel refers to art. R57 para. 1 of the Code which reads as follows:
“R57 Scope of Panel’s Review, Hearing
The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply”.
33. It is established jurisprudence of the CAS that under art. R57 of the Code, the Panel’s scope of review is fundamentally unrestricted. In CAS 2008/A/1700 and CAS 2008/A/1710, n° 66, the CAS held as follows: *“It has full power to review the facts and the law and may even request ex officio the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of the disciplinary body being challenged was lawful or not, but also to issue an independent decision based on the regulations of the interested federation (CAS 2004/A/607; CAS 2004/A/633; CAS*

2005/A/1001; CAS 2006/A/1153). The CAS Code contemplates a full hearing *de novo* of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The “full power” granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced a proceedings before a national or international disciplinary tribunal. The CAS must, therefore, be accorded the unrestricted right to examine not only the procedural aspects of the *Appealed Decision*, but also, and above all, to review and evaluate all facts and legal issues involved in the dispute”.

34. This unlimited scope of review is especially justified and fundamental in the case at hand as the IIHF did not impose any sanction on Mr Busch and did not participate in the proceeding before the CAS. The CAS Panel feels also not to be restricted by WADA’s initial request as held by the Second Respondent. WADA, by letter dated May 6, 2008 has not only “requested IIHF to provisionally suspend Mr Busch and to initiate disciplinary proceedings against him”, but also “to sanction this athlete with a two years period of ineligibility for his violation of article 6.3(a) of IIHF Disciplinary Regulations (...)”.

35. Bylaw 1407 of the IIHF 2003 – 2008 Statutes and Bylaws provides for the following:

“Sanctions with Doping

If a player has tested positive for a doping offence or has refused to submit to doping control tests or if any player or other person has attempted to manipulate or is deemed to have manipulated the results of a test, sanctions as specified in the IIHF Disciplinary Regulations will apply”.

36. Art. 6.4 (a) of the IIHF 2004 Disciplinary Regulations reads as follows:

“In case of refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in the IIHF Medical Regulations, or otherwise evading sample collection (Code Article 2.3)”
(...)

- First violation: Two year’s ineligibility

(...)”.

37. Art. 6.4 (c) of the IIHF 2004 Disciplinary Regulations provides that the “*period of ineligibility may be reduced based on the circumstances as provided in Code (WADC) 10.5.2 and 10.5.3*”.

A. *Was there a refusal to submit to sample collection?*

38. According to the submissions and statements of the parties and to the witness statements at the hearing, there is no doubt that Mr Busch refused to submit to sample collection on March 6, 2008, at 12:30, when being visited at his home by the doping control officer K. acting on behalf of PWC company lim., a private anti-doping testing agency contracted by NADA. The party and witness statements revealed that Mr Busch was annoyed at having been tested a couple of times in the recent past and, in particular, by the fact that the test was to take place at his apartment at a time when he had just met Mrs R., his partner, under unpleasant conditions, after a unsatisfactory training session in the morning and right before leaving for

lunch. The witness statements and party submissions contradicted each other as to what exactly the doping control officer had explained to Mr Busch, when Mr Busch refused to submit to the sample collection. It can be taken as established, however, that K. informed Mr Busch that a refusal would have serious consequences.

39. The hearing did also not reveal who, Mr Busch or the doping control officer, made the proposal as to an alternative to have the test done in the ice hockey stadium and not in Mr Busch's apartment and who refused such proposal. The test should have been an unannounced out-of-competition test and was ordered by NADA. It was the third test of Mr Busch in the year 2008. Mr Busch and the doping control officer knew each other from previous tests. All previous tests took place smoothly. The test of Mr Busch was the second in a row of athletes the doping control officer had to visit on this day. The doping control officer had received orders from his superior in PWC with regard to whom to test in a given time window. He was, however, allowed to set up the times and places to test these athletes on his own. He consulted their whereabouts information on ADAMS and prepared a logical travel plan for the day.
40. All testimonies and statements at the hearing agree that the failed effort of sample collection ended at the latest at about 12:50 after the doping control officer had received from Mr Busch the reasons for his refusal in writing. Whether somebody in PWC/NADA was called by Mr Busch in order to have the sanctions for refusal explained in more detail in the presence of the doping control officer or immediately after he had left, remained controversial.
41. The parties' submissions and testimonies at the hearing did not indicate the need to discuss any significant deviation from applicable testing standards by K., considering, in particular, that the two persons knew each other already from previous tests shortly before and given the fact that Mr Busch explained to the Panel at the hearing, knowing and handling ADAMS very well and being aware of his rights, but also of the sanctions in case of whereabouts violations. Only with regard to sanctions under general anti-doping rules, Mr Busch declared not having felt sufficiently informed.
42. At 12:54 Mr Busch called S., at that time press speaker of NADA, in order to know which sanctions might follow his behaviour. It took some time until he received the answer. At 1 pm Mr Busch called the Technical Director of DEB, P., and informed him what had happened. P. called NADA in order to have the doping control officer return to Mr Busch's apartment to do the testing. NADA informed DEB that such return and new test would not be an unannounced test anymore, and could not be ordered by NADA. P. then called PWC directly and organised that a new test will take place by K. by order of DEB on the same day at about 5 pm. K. received this order at about 4 pm by phone, drove to his office and found there the fax of his superior ordering this test and mentioning the fax time 3:15 pm. This test took place at 5:14 pm, the analysis of the sample did not reveal any prohibited substance. At the hearing, Mrs R. testified for Mr Busch that he was in his apartment together with her all the time between 12:50 and 5:14 pm. They did not eat anything and Mr Busch was permanently on the phone. He might have drunk some mineral water, but did not take any other substance.

43. DEB and Mr Busch offered in their submissions in writing and at the hearing two alternatives how to evaluate this chain of events from a legal perspective:
 - a) As withdrawal from an effort to refuse to sample collection;
 - b) As process of sample collection which started at 12:30 and was completed on 5:14 pm.
44. The Panel finds that none of the two evaluations is convincing. NADA had ordered an unannounced out-of-competition test, which was to take place at 12:30. Mr Busch had been requested to give a urine sample. If Mr Busch had been unable to urinate at that time and only hours later, which can sometimes occur in practice, the second alternative would have been established. Mr Busch, however, did not have any such problem, he simply stated not to be willing to undergo a test. Thus, the Panel holds that alternative b) is to be excluded.
45. The Panel, however, also finds that alternative a) was not given. There were two separate orders of tests, even if the same anti-doping testing agency and the same doping control officer was performing the two tests. The order for the first test came from NADA. The order for the second test came from DEB. DEB ordered the second test after it had been informed by NADA that NADA cannot order such test anymore, because the test would have lost its character as unannounced out-of-competition test. Thus, the Panel holds that the chains of events must be evaluated as two separate tests done by the same doping control officer. The first test was refused.
46. The Panel holds that the arguments of Mr Busch and DEB at the hearing that the result of the second test was negative and that the time since 12:30 until 5:14 pm was too short in order to mask the intake of a prohibited substance or to hinder that such substance taken before could be revealed, are of no legal relevance for the issue of refusal to sample collection.
47. Summarizing the Panel states that Mr Busch has violated Bylaw 1407 of the IIHF 2003 – 2008 Statutes and Bylaws and art 6.4 (a) of the IIHF 2004 Disciplinary Regulations.

B. *What is the appropriate sanction?*

48. The Panel, thus, must apply art. 6.4 (a) of the IIHF 2004 Disciplinary Regulations, which provides for a two-year period of ineligibility for refusal to sample collection.
49. According to art. 6.4 (c) of the IIHF 2004 Disciplinary Regulations this period of ineligibility can be reduced “*based on the circumstances as provided in Code 10.5.2 and 10.5.3*”.
50. The Panel holds that art. 10.5.3 of the 2003 WADC (Athlete’s Substantial Assistance in Discovering or Establishing Anti-Doping Rules Violations by Athlete Support Personnel and Others) referred to by art. 6.4 (c) of the IIHF 2004 Disciplinary Regulations is not applicable in the case at hand. The Panel finds, however, also that art. 10.5.2 of the 2003 WADC (No significant fault or negligence) is to be doubted whether to be applicable in the case of Mr Busch, since the exception of art. 10.5.2 of the 2003 WADC by strict textual analysis covers

only the issue of “*failing to submit to sample collection*” (art. 2.3 of the 2003 WADC), but not the issue of refusal, which by its very nature is an intentional behaviour and was established as such by this Panel, but also by the Ad-Hoc Court of Arbitration of the German Olympic Sports Confederation in its award dated December 3, 2008 and by the DEB Anti-Doping Committee in its decision dated April 15, 2008.

51. Even if the Panel is willing to follow WADA and to admit the “*no significant fault or negligence*” exception also to be discussed and applied in the case of refusal, Mr Busch does not offer sufficient indications that the circumstances in his case were truly exceptional, meaning that he could show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relationship to the anti-doping rule violation. Mr Busch was annoyed that he had had to undergo so many tests in recent times and by the fact that he felt disturbed in his privacy, he had had a hard training session immediately before the test, he was disturbed with his female partner in an unpleasant situation, he was hungry, he was not aware of all the legal consequences of his behaviour, but all these circumstances in their totality do not amount for being able to be considered “truly exceptional”. Later efforts of Mr Busch, once he had called the DEB Technical Director, to have the test repeated cannot be taken into consideration by the Panel for his degree of fault at the moment when he refused to sample collection. Thus, the Panel holds that Mr Busch could not establish exceptional circumstances whereby he would bear no significant fault or negligence. Art. 6.4 (c) of the IIHF 2004 Disciplinary Regulations, thus, cannot be applied in the case at hand.

52. The Second Respondent did not substantiate his arguments with regard to violation of proportionality and standards of rules of law by the applicable provisions equalizing a refusal to submit to sample collection to an established finding of doping to such extent that the Panel in its ruling feels not well based on established CAS jurisprudence having applied such sanction for such anti-doping rule violation (cf. eg CAS 2008/A/1470).

C. *How shall the sanction be calculated?*

53. Art. 6.8 of the IIHF 2004 Disciplinary Regulations provides as follows:

“The period of ineligibility shall start on the date of the hearing by the Doping Control Committee or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed. Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of doping control not attributable to the athlete, the Disciplinary Committee may start the period of ineligibility at an earlier date commencing as early as the date of the sample collection”.

54. In the case at hand no hearing by the IIHF Doping Control Committee has taken place. The delays in the results management process have been caused by IIHF and DEB and are not attributable to the athlete. Thus, the Panel feels free to apply the last sentence of the above provision and allow the period of ineligibility start at an earlier date than the hearing before the Panel which took place on April 22, 2009 and which was to replace the hearing by the

IIHF Disciplinary Committee/IIHF Doping Control Committee as provided for by art. 3.8 of the IIHF 2004 Disciplinary Regulations. This provision reads as follows:

“3.8 Recourse to the Disciplinary Committee

If the Doping Control Committee asserts that an anti-doping rule was violated the case shall be referred to the IIHF Disciplinary Committee. The Deciding Panel of the Disciplinary Committee shall conduct a hearing process to determine whether an anti-doping rule violation was committed and, if so, shall impose appropriate sanctions. The Deciding Panel must act in compliance with the IIHF Doping Control Regulations, the provisions of the IIHF Disciplinary Regulations and of the World Anti-Doping Code (Code)”.

55. At the hearing, Mr Busch and DEB explained that Mr Busch has served the following sanctions imposed by the DEB:

- payment of EUR 5,000;
- 56 hours of community work done in the framework of education programs for young athletes in ice-hockey until March 31, 2009.

56. Further to that, DEB did not enter Mr Busch for any international events since the IIHF 2008 World Championship in Canada. In particular, Mr Busch was not entered for the IIHF 2009 World Championship in Switzerland.

57. On the other hand, Mr Busch continued to play as a professional in the supreme German ice-hockey league (DEL) all the time since March 6, 2008.

58. Art. 6.9 of the IIHF 2004 Disciplinary Regulations provides for the status during ineligibility as follows:

“The status during ineligibility complies with the provisions of Article 10.9 of the Code. (...)”.

59. Art. 10.9 of the 2003 WADC reads as follows:

“Status During Ineligibility

No Person who has been declared ineligible may, during the period of ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory or Signatory’s member organization. In addition, for any anti-doping rule violation not involving specified substances described in Article 10.3 some or all sport-related financial support or other sport-related benefits received by such Person will be withheld by Signatories, Signatories’ member organizations and governments. A Person subject to a period of Ineligibility longer than four years may, after completing four years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event”.

60. At the hearing, the Panel was informed by DEB that DEB has no legal influence on DEL, which is run by a separate company. DEB and DEL are concluding cooperation agreements, but DEB, so far, was not in a position to enforce IIHF anti-doping rules for DEL. The Panel

holds such argument as no sufficient explanation for lack of implementation of commitments toward the WADC in the German sport of ice-hockey. Even if DEL according to the German legal construction is not covered by an “IIHF’s member organization”, the understanding of art. 10.9 of the 2003 WADC is that a player declared ineligible because of having committed an anti-doping rule violation shall be banned from playing the sport of ice-hockey and in-line hockey in total. Mr Busch shall neither be allowed to play internationally nor nationally in an ice-hockey or in-line hockey competition, but shall also not be allowed to participate in any other capacity or activity at such competition. The Panel finds that it is up to IIHF, eventually also to other signatories of the WADC from Germany, to ensure such status during the imposed period of ineligibility.

61. Given this legal background, the Panel finds that Mr Busch has not served any period of ineligibility in the understanding of art. 10.9 of the 2003 WADC so far. The Panel finds, however, that Mr Busch has served two sanctions of different kind (fine and community work) and was *de facto* sanctioned for one year ineligibility from international competitions. The Panel, taking into consideration the preparatory and evaluating hours needed in addition to the 56 hours community work, served by Mr Busch, holds justified to equalize fine and community work served altogether to one month of ineligibility in the understanding of art. 10.9 of the 2003 WADC. The *de facto* sanction of one year for international ineligibility, given the loss of market value, income and reputation attached thereto is held equal by the Panel to one further month. Thus, the Panel holds that two months from altogether two years of ineligibility have already been served.
62. As a consequence, the Panel rules that the period of ineligibility of Mr Busch starts on April 22, 2009. The period of ineligibility of Mr Busch, which shall embrace all international and national competitions in ice-hockey and in-line hockey, will end at midnight on February 21, 2011 in order to take into account the 2-month period of ineligibility already served and which is credited against the total period of ineligibility of two years.

Binding Force for IIHF and DEB as member of IIHF

63. The Panel notes with satisfaction that IIHF, not having participated in this proceeding, nevertheless, has declared to accept the CAS award by its letter dated February 12, 2009. The Panel also took note of the amendments to the IIHF Statutes and Bylaws at the IIHF General Congress in Montreal at the end of May 2008 which certainly will assist in having more clarity in future, but which did not change the applicable law already in force with relevance for cases like the present case before they came into force.
64. The Panel also wishes to underline that WADA, by agreeing on a “*final settlement*” in that other case dealt with by the Ad Hoc Court of Arbitration of the German Olympic Sport Confederation, did in no way waive to pursue its rights in the proceedings before the CAS in this matter. The decision of the German Ad Hoc Court does not have a *res indicata* effect regarding the case at hand.

The Court of Arbitration for Sport rules:

1. The appeal of WADA against the decision of IIHF, dated May 7, 2008 is declared admissible and upheld.
2. The decision of IIHF rendered on May 7, 2008 in the matter of Mr Florian Busch is set aside.
3. Mr Florian Busch is sanctioned with a two-year period of ineligibility starting on April 22, 2009, two months of which are considered as having already been served and shall be credited against the total period of ineligibility to be served.
4. (...)
5. (...)
6. All other motions or prayers for relief are dismissed.