



**Arbitration CAS 2013/A/3285 Johan Bruyneel v. United States Anti Doping Agency (USADA), award of 13 May 2014**

Panel: Mr Malcolm Holmes Q.C. (Australia), President; Mr Georg von Segesser (Switzerland); Mr Paul George (USA)

*Cycling*

*Doping*

*Notion of appealable decision*

*CAS jurisdiction*

1. Before a party has a right of appeal there must be an operative decision or award. Whether a procedural order is a decision or an “award” from which an appeal may be brought within the meaning of the USADA Protocol and determined in accordance with the CAS Code is a question which must be decided as a matter of substance and not form. The fact that the procedural order was issued as a “procedural order” and not an “award” is not decisive.
2. If a procedural order is not final and binding in any relevant substantive way and does not dispose of any part of the disputes between the parties, but only constitutes a procedural ruling to continue to hear the case and reserving all questions of substance to be dealt with by the panel in its final award, it is not an “award”, a “final award” or a “partial, interim or non-final award” within the USADA Protocol or the Appeal Rules of the CAS Code. CAS has therefore no jurisdiction to hear an appeal against such procedural order.

**1. PARTIES, FACTS AND PROCEDURE**

- 1.1 Mr Bruyneel (the **Appellant**) is a Belgian national who was, until October 2012, the general manager of the Radioshack Nissan Trek team.
- 1.2 USADA (the **Respondent**) is the national anti-doping agency in the U.S.A.
- 1.3 The parties are currently involved in arbitration proceedings being conducted by an arbitration panel in accordance with the AAA Arbitration Rules (the **AAA Panel**) following the Appellant’s alleged engagement in anti-doping rule violations under the UCI Anti-Doping Rules.
- 1.4 The parties accept that the only right of appeal to the CAS from an award in these arbitration proceedings is under the USADA Protocol and is to be conducted in accordance with the Code of Sports Related Arbitration (the **CAS Code**).

- 1.5 On 12 June 2013 in the course of the arbitration proceedings, the AAA Panel issued Procedural Order No.2.
- 1.6 Procedural Order No. 2 (the **PO**), in its relevant parts, was in the following terms:

*“(a) Jurisdiction:*

*9. After carefully reviewing the submissions and arguments presented by the parties, the Panel tentatively finds that it has jurisdiction to hear the present action brought by USADA against Mr. Bruyneel, C. and M. The Panel plans to give its final decision on jurisdiction in the final Award and Reserves the right to amend its tentative finding or decline jurisdiction at any point in the proceedings. See generally American Arbitration Association (“AAA”) Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes R-7 (which is in accordance with a similar provision in the AAA Commercial Arbitration Rules).*

*10. While the Panel will provide the complete reasoning of its jurisdictional finding in the final Award, the Panel considers it prudent to address the bases for Jurisdiction in this proceeding with respect to each Respondent at this time.*

*“(b) Confidentiality and right to disclose:*

*48. The Panel next considers USADA’s alleged breach of confidentiality obligations owed to the Respondents and the implications of the alleged breach. Mr. Bruyneel and C. both contend that USADA has breached its obligations to keep confidential the facts of this proceeding during its pendency. Specifically, they argue that USADA breached its obligations of confidentiality by publishing extensive statements concerning the Respondents’ alleged anti-doping violations in its reasoned decision against Mr. Lance Armstrong. It is further argued that the alleged breach of confidentiality undermines the rights of the Respondents to a fair trial and that the alleged breach “amounts to a repudiatory breach of any arbitration agreement there may exist” between USADA and the Respondents.*

*[...]*

*60. USADA’s reasoned decision of Mr. Armstrong discusses the alleged anti-doping activities of the Respondents in considerable depth. The Panel observes that USADA even devotes entire subsections to the alleged doping activities of the Respondents, discussing them by name. These allegations notably have in large part been re-alleged in these proceedings.*

*61. The Panel finds the extent of USADA’s disclosures troubling. While the Panel recognizes that the applicable disclosure provisions allow USADA to comment on established anti-doping violations, the Panel also notes that USADA and other ADOs nonetheless have obligations to exercise restraint in making such disclosures when faced with facts that concern the merits of a parallel proceeding that is ongoing. To determine otherwise would undermine the confidentiality obligations in the UCI ADR, the Code, and the Protocol. The Panel additionally observes that USADA redacted some of the names in its reasoned decision and could potentially have redacted the names of the Respondents as well without altering the character or nature of the allegations made and the nature of the anti-doping rule violations established against Lance Armstrong. That it might have been difficult or would have taken away from the nature of the allegations or reasoning related to Mr. Armstrong’s case is of no moment, because a separate confidentiality obligation exists under the UCI ADR, Code, and Protocol as to each person accused in an anti-doping process.*

*Accordingly, the Panel finds that USADA violated the applicable confidentiality provisions of the UCI ADR, the Code, and the Protocol.*

*[...]*

*63. Despite the concerns raised by USADA's disclosures, the Panel does not find that these disclosures undermine the Respondents' right to a fair hearing in this proceeding since the disclosures have no bearing on the neutrality of the Panel. The Panel also finds that, even though the disclosures did violate the confidentiality obligations placed upon USADA by the UCI, WADA, and its own Protocol, USADA's actions do not merit the relief requested by the Respondents. As it ordered in Procedural Order No. 1, however, the Panel reminds the parties "that these proceedings are confidential and the parties are to make no public reference to or about these proceedings other than saying 'no comment'".*

*64. Once again, the Panel reserves the right to amend its finding on this issue and reopen the question at any point in these proceedings.*

*(c) Statute of Limitations:*

*65. The Panel next considers whether the claims brought by USADA against Respondents are subject to a statute of limitations. Because this question may turn on the facts established at a full evidentiary hearing, the Panel determines that it will decide the statute of limitations issue when it reaches the merits of this proceeding.*

*(d) Interlocutory appeal:*

*67. The Panel next considers Respondents' request to permit an interlocutory appeal to the Court of Arbitration for Sport of the decisions made in this procedural order.*

*68. The Panel holds that it is not within its powers to rule on Respondents' request. Such a decision would be beyond the discretion or authority of this Panel; it appears to the Panel fundamental that whether a tribunal is seized with appellate jurisdiction is a question for that tribunal to determine, not for the initial tribunal. The Panel reiterates for the sake of clarity, however, that its findings on jurisdiction, confidentiality, and statute of limitations, are subject to reconsideration at any point in these proceedings. The Panel also recalls that its final jurisdictional decision will be presented in the final Award. The Panel additionally notes that the findings in this procedural order are not a partial or interim award and instead reflect the Panel's recognition of the issues presented in the Pre-Hearing Motions and at the preliminary hearing".*

- 1.7 On 2 August 2013, the Appellant filed a Statement of Appeal with CAS against the PO and on 10 September 2013 filed his Appeal Brief.
- 1.8 On 8 October 2013 the Respondent filed with the CAS an objection to CAS jurisdiction.
- 1.9 Following the parties' agreement, the Appellant was granted a deadline to file a reply to the Respondent's objection to CAS jurisdiction.
- 1.10 The Appellant filed his response to the Respondent's objection to CAS jurisdiction on 28 October 2013 and agreed that a preliminary award on jurisdiction and admissibility be rendered by the Panel.

1.11 On 22 November 2013, the Panel was constituted as follows:

President: Mr. Malcolm Holmes Q.C.

Arbitrators: Dr. Georg von Segesser, and Mr. Paul E. George.

## 2. JURISDICTION

2.1 In its letter to CAS dated 8 October 2013, the Respondent submitted that the CAS did not have jurisdiction to determine the Appeal. In response, the Appellant stated that if there was “any uncertainty as to whether or not the AAA’s decision is appealable” that the CAS determine the issue as a preliminary matter. The Appellant requested the CAS to make a decision on its own jurisdiction as soon as reasonably possible. Accordingly the CAS expedited its consideration of whether the CAS had jurisdiction to admit the Appeal. The arbitration proceedings being conducted by the AAA Panel were fixed for a hearing to commence on Monday 16 December 2013.

2.2 The Respondent raised five grounds of objection to the admissibility of the appeal. The Panel finds it is only necessary to consider the first ground raised by the Respondent, namely; “the USADA Protocol does not authorize a CAS appeal of preliminary procedural measures”. The Respondent noted that there is no applicable provision “authorizing an appeal to CAS of procedural orders in the midst of an ongoing AAA arbitration”. The Respondent submitted that the AAA Panel “was issuing only a preliminary procedural ruling” which “should not be ‘deemed final’ under the USADA Protocol”. It was only a preliminary ruling and not a partial or interim arbitration award subject to appeal.

2.3 The Appellant in response referred to the operation of Articles R-7, R-27, R-31 and R-40(b) of the AAA Supplementary Procedures and submitted these provisions operated to separate out jurisdiction as a preliminary matter “to be determined on an interim basis”. The Procedural Order No 2 was, the Appellant submitted, in substance, a final decision.

2.4 After considering the submissions of the parties, the CAS issued a ruling that the CAS had no jurisdiction to deal with the appeal filed on 2 August 2013 by the Appellant against USADA with respect to Procedural Order No.2 rendered by the Panel on 12 June 2013. The parties were advised of the ruling by CAS on 16 December 2013 and advised that the reasons would be published later. What follows are the reasons for the ruling and award by the CAS.

## 3. REASONS

3.1 The relevant provisions of the USADA Protocol are found in 15(b) which provides:

*“The final award by the AAA/CAS arbitrator(s) may be appealed to the CAS within twenty-one (21) days of issuance of the final reasoned award or when the award is deemed final as set forth below. If the AAA/CAS arbitrators issue a partial, interim or non-final award or an award without reasons such award shall be deemed final for purposes of appeal to CAS on the earlier of (a) issuance of the final reasoned award by the AAA/CAS panel, or (b) thirty (30) days from issuance of the partial, interim or non-final award. The appeal procedure set forth in Article 13.2 of Annex A shall apply to all appeals*

*not just appeals by International-Level Athletes or other Persons. A CAS appeal shall be filed with the CAS Administrator, the CAS hearing will automatically take place in the U.S. and CAS shall conduct a review of the matter on appeal which, among other things, shall include the power to increase, decrease or void the sanctions imposed by the previous AAA/CAS Panel regardless of which party initiated the appeal. The regular CAS Appeal Arbitration Procedures apply. The decision of CAS shall be final and binding on all parties and shall not be subject to further review or appeal”.*

3.2 The relevant provision of the CAS Code relating to Appeals is found in Article R47.

#### **R47 Appeal**

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.*

*An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.*

3.3 As can be seen from an examination of Article R47, the CAS Code adopts a similar requirement to the USADA protocol before a party has a right of appeal. There must be an operative decision or award.

3.4 Article 15(b) of the USADA Protocol requires a “*final award*” or a “*partial, interim or non-final award*”. The CAS Code in Article R47 requires a “*decision*” or an “*award*”. The question then becomes whether the PO is a decision or an “*award*” from which an appeal may be brought within the meaning of the USADA Protocol and determined in accordance with the CAS Code.

3.5 This is a question which must be decided as a matter of substance and not form. The fact that the PO was issued as a “*procedural order*” and not an “*award*” is not decisive. In *Ranko Group v Antarctic Maritime SA*, the UK Commercial Court (Toulson J., 12 June 1998) had to decide (at [16]) whether a letter an arbitrator had written to the parties was an “*award*” “*notwithstanding that the letter was not described in terms as an award*”. In resolving the question, the Court asked itself whether the parties would have understood that the letter was the arbitrator’s final adjudication (i.e., award) on the issue. This approach was adopted in *Michael Wilson & Partners Ltd v Emmott* [2008] EWHC 2684 (Comm) where the Court considered whether a decision which the arbitrator had called a “*procedural order*” was an award. The Court held that this was a matter of substance and not form but that the arbitrator in making the procedural order, had answered procedural questions but had not made an “*award*”. In the present case, the AAA Panel has expressly refrained from making a final decision on the issue and, as a matter of substance, the parties could not reasonably understand it to be an “*award*” by the AAA Panel.

3.6 The PO is not final and binding in any relevant substantive way and it does not operate as a partial or interim award. It does not determine a part of the dispute between the parties. It does not determine an issue on an interim basis. The decision embedded in the PO is merely that the AAA Panel has decided to proceed to a hearing of the claim and has left the question of jurisdiction open for consideration at any time and stated that it will be addressed and determined in its final award.

- 3.7 Insofar as the AAA Panel has indicated that its provisional view (described by the AAA Panel as “*its tentative finding*”) is that it has jurisdiction, the AAA Panel has qualified this by saying it “*reserves the right to amend its tentative finding or decline jurisdiction at any point in the proceedings*”. The AAA Panel added that it will consider whether it has jurisdiction in its final award and “*will provide the complete reasoning of its jurisdictional finding in the final Award*”. In essence, the AAA Panel was saying it will issue new reasons in its final award, which may or may not minor the reasons laid out in the PO.
- 3.8 The AAA Panel adopted the same approach when it expressed its finding on confidentiality. “*Once again, the Panel reserves the right to amend its finding on this issue and reopen the question at any point in these proceedings*”.
- 3.9 The PO does not dispose of any part of the disputes between the parties. Its only effect is a procedural one. It is a procedural ruling to continue to hear the case but reserving all questions of substance to be dealt with by the AAA Panel in its final award. If on the other hand the decision had been to decline jurisdiction, that would have been a decision or an award which affected the substantive rights of the parties, even though it might also be technically a “procedural” order not to proceed. By the AAA Panel reserving all questions for determination in the final award, this PO does not affect the parties’ substantive rights other than in a procedural sense.
- 3.10 The fact that the parties may have understood and proceeded on the basis that there was a bifurcation of these issues and that a final determination would be made by the AAA Panel, does not change the character of the PO as made.
- 3.11 The PO is not appealable as it is not a “*final award*” and is not a “*partial, interim or non-final award*” within the meaning of Article 15 (b) of the USADA Protocol.
- 3.12 An analogous situation arose in the case of *Inforica Inc. v. CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 (CanLII), at [29]. In that case an arbitrator ruled that he had the authority to order security for costs. The Court of Appeal for Ontario held that this was not a ruling as to his “*jurisdiction to conduct the arbitration*” and that the arbitrator’s order for security for costs was not an “*award*”. The Court held that the arbitrator aptly labelled his order as a “*Procedural Order*” and not as an “*award*”. The Court noted that the relevant legislation did not define the term “*award*”, and Sharpe J.A. stated (at [29]) “*the term has been held to connote the judgment or order of an arbitral tribunal that “disposes of part or all of the dispute between the parties”*”. Sharpe JA adopted the view that: “*Only decisions determining the substantive issues should be termed ‘awards’. Matters relating to the conduct of the arbitration are not awards but, rather, are procedural orders and directions*”.
- 3.13 As the PO is no more than a provisional view or tentative finding by the AAA Panel, it is not an “*award*”, a “*final award*” or a “*partial, interim or non-final award*” within the USADA Protocol or the Appeal Rules of the CAS Code. CAS has therefore no jurisdiction to hear this appeal.

## ON THESE GROUNDS

### **The Court of Arbitration for Sport rules:**

1. The Court of Arbitration for Sport has no jurisdiction to deal with the appeal filed on 2 August 2013 by Mr Johan Bruyneel against USADA with respect to Procedural Order No. 2 rendered by the AAA on 12 June 2013.
- (...)
4. All other motions or prayers for relief are dismissed.