

INTERNATIONAL SKATING UNION

DECISION

of

The ISU Disciplinary Commission

Panel: - Dr. Béatrice Pfister (Chair)
- Mr. Fred Benjamin
- Dr. Allan Boehm

In the matter of

International Skating Union, Chemin de Primerose 2, 1007 Lausanne

represented by the ISU Legal Advisors, Mr. Gerhardt Bubnik and
Mr. James L. Hawkins

- Complainant -

against

Claudia Pechstein

represented by Mr. Simon Bergmann, attorney at law, Scherz
Bergmann Rechtsanwälte, Kurfürstendamm 53,
D-10707 Berlin, Germany

- Alleged Offender -

and

Deutsche Eisschnelllauf-Gemeinschaft e.V., Menzingerstrasse 68, D - 80992
München, Germany, represented by Dr. Marius Breucker, attorney at law, Wüterich
Breucker Rechtsanwälte, Charlottenstrasse 22 - 24, D-70182 Stuttgart, Germany,

- Interested ISU Member -

Concerning alleged violation of rule 2.2 of the ISU Anti-Doping Rules

I. History of the Procedure

1. On March 5, 2009, the ISU filed a complaint with the ISU Disciplinary Commission (DC) accusing the Alleged Offender of blood doping, together with exhibits and with the following motion:
 - “a) to find the Alleged Offender guilty of an anti-doping violation under article 2.2 of the ISU Rules;
 - b) to impose on the Alleged Offender a sanction in accordance 10.2 of the ISU Rules which is a two year Ineligibility, alternatively
 - c) to consider whether an increased sanction should not imposed under article 10.6. for the presence of aggravating circumstances, namely because:
 - (i) the Prohibited Method was used on multiple occasions, and/or
 - (ii) the violation was part of a doping plan or scheme,
 - d) to disqualify the results of the Alleged Offender obtained in the 500m and 3000m race at the World Allround Speed Skating Championships on February 7, 2009, with forfeiture of all prizes and points.”
2. By order of March 9, 2009, the DC invited the Alleged Offender and the Interested ISU Member to file their Statements of Reply within 21 days.

Further the Alleged Offender was invited to inform the DC within the same time limit whether she requests an oral hearing according to Art. 8 of the ISU Anti-Doping Rules (ISU ADR) and letters E.3 and E.4 of the ISU Anti-Doping Procedures (ISU ADP). Within the set time limit the Alleged Offender and the Interested ISU Member requested an extension of the time limit for filing their Statements of Rply, which extension was granted. Together with her request for time-extension the Alleged Offender requested an oral hearing.
3. Upon receipt of the Statements of Reply of the Alleged Offender on April 30, 2009, and of the Interested ISU Member on April 29, 2009, the Chair, on May 6, 2009, ordered a second exchange of writs.
4. The Complainant filed its Response to the Statements of Reply within the set time limit on May 27, 2009 and amended para 6.1. of the Complaint, now alleging that the Alleged Offender used a prohibited substance and/or a prohibited method.
5. The Alleged Offender and the Interested ISU Member filed their comments to the Claimant's Response within due time on June 18, 2009.
6. By order of June 4, 2009, the parties were summoned to appear at the oral hearing. By the same order Prof. Dr. Max Gassmann was appointed as the neutral expert by and for the DC.

7. The oral hearing with the questioning of Mr Dijkema as representative of the ISU, Ms Pechstein and Prof. Dr. Max Gassmann as neutral expert took place on June 29 and 30 in Berne, Switzerland. The testimony of the following witnesses and expert witnesses were heard:

Witness:

- Dr. med. Jane Moran
- Prof. Dr. med. Harm Kuipers
- Dr. med. Gerald Lutz
- Mr Helge Jasch
- Prof. Dr. med. Giuseppe d'Onfrio
- Dr. med. Pierre-Eduard Sottas
- Prof. Dr. med. Wolfgang Jelkmann
- Prof. Dr. med. Max Gassmann

II. Procedural Matters

8. According to Article 8.1.1 of the ISU ARD the DC has jurisdiction in anti-doping cases arising out of ISU Testing or Testing at International Events. The present case arises out of a series of ISU Out-of-Competition Testings and Testings at International Events. Therefore DC has jurisdiction to hear and decide this case.
9. The present case is governed by the ISU ADR, the ISU ADP and the DC Rules of Procedure.
10. According to Article 8 para 1 of the DC Rules of Procedure, complaints to the DC must be filed within 30 days of the occurrence of the alleged offense or within 30 days of learning about the alleged offense, except in cases for which the ISU ADP and/or ISU ADR specifically provide for different time limits. Article 16 of the ISU ADR provides for such different time limits by establishing that no action for a violation of an ISU Anti-Doping Rule may be commenced later than 8 years from the date the violation occurred. While the long term blood profile of the Alleged Offender on which the Complainant bases its charge of an anti-doping violation includes results from tests which were taken more than 8 years before the filing of the Complaint the Anti-Doping Rule violation alleged by the Complainant itself clearly lies within the 8 year limit of the statute of limitations. Thus, the Complaint was filed within the time limit of Article 16 of the ISU ADR.

Furthermore even if the 30 day time limit of Article 8 para 1 of the ISU DC Rules of Procedure were applicable in the present case, this time limit would have been observed: If a complaint according to Article 2.2 of the ISU ADR is based on conclusions drawn from long term blood profiles gained from long term test series said time limit is to be considered respected if the filing of the complaint occurs no later than 30 days after the Complainant gained knowledge of

the results of the last tests from which it draws its conclusions as to the occurrence of an Anti-Doping violation. In the present case these were the tests of February 6 and 7, 2009 and thus the filing of the Complaint on March 5, 2009, took place within 30 days thereafter.

11. In their Comments to Complainant's Response, the Alleged Offender and the Interested ISU Member contested the validity of Complainant's amendment of the Complaint with respect to "the use of a prohibited substance". The Complainant has not modified its final motion. In the Statement of Complaint the ISU requested the DC to find the Alleged Offender guilty of an Anti-Doping violation under Article 2.2 of the ISU ADR which article encompasses the use of a prohibited substance as well as the use of a prohibited method. The amendment of para 6.1 of the Complaint which explicitly mentions the use of a prohibited substance is not a substantive modification of the Complaint. According to M1. of the 2009 WADA Prohibited List, the prohibited method of blood doping alleged by the Complainant automatically includes the use of Erythropoiesis-stimulating agents which are prohibited substances under S2 of the 2009 WADA Prohibited List. Thus, from the Statement of Complaint the Alleged Offender knows exactly what she is accused of; therefore the amendment made by Complainant to para 6.1 of its Statement of Complaint in no way curtailed the Alleged Offender's right to a fair trial and her right to defend herself. Further, even if the contested amendment had introduced a new claim, the Alleged Offender's right to be heard would still have been observed through the second exchange of writs which allowed her the opportunity to defend herself against the alleged new allegation of Complainant. Therefore, the objections against the amendment are rejected.
12. In its Statement of Reply and in its Rejoinder, the Interested ISU Member objects to the Statement of Complaint and moves to dismiss the case in written proceedings claiming that the Statement of Complaint was insufficient under Article 9.3 of the DC Rules of Procedure due to the lack of documentation and evidence.

According to Article 9.3 of the DC Rules of Procedure, the Complaint shall contain the facts giving rise to the Complaint, together with all documents, exhibits and designation of other evidence which the Complainant believes the DC should consider. The Statement of Complaint of March 5, 2009, clearly stated the facts which gave rise to the Complaint. It contained documents, exhibits and the designation of other evidence in support of the complaint, thereby fulfilling the requirements for a valid complaint. The question of whether the facts stated in the Complaint and the evidence offered for proving them are sufficient to sustain the motion of the Complaint is not of a procedural nature but is part of the decision on the merits. The supplementation of the statement of facts and the means of evidence in the course of the second exchange of writs is in accordance with Article 11 para 1 of the DC Rules of Procedure and also follows from the right to be heard. All parties have the right to respond to new allegations from the opposing parties. For all these reasons the request of the Interested ISU Member to dismiss the Complaint on procedural grounds is rejected.

13. At the outset of the oral hearing the ISU contested the standing of the Deutsche Eisschnellauf-Gemeinschaft e.V. as a party and, with reference to Article 8.1.5 of the ISU ADR, requested to admit it only as an observer. However, according to Article 12.2 of the ISU ADR the ISU Member Federation with which a skater who has violated the ISU ADR is affiliated has to reimburse the ISU for all costs related thereto. Therefore the Interested ISU Member has a proper interest and can claim standing as a party. Additionally the Deutsche Eisschnellauf-Gemeinschaft e.V. has standing under Article 5 Para 1 of the ISU DC Rules of Procedures. It has sufficiently demonstrated that the decision in this case may have a significant financial and reputational impact not only for the Alleged Offender but also for the Deutsche Eisschnellauf-Gemeinschaft e.V.

III. Facts

14. The Alleged Offender is a 37 year old world class speed skater who, among other merits, has earned 7 olympic medals, 5 of which are gold, since she first participated in Olympic Winter Games in 1992.
15. On the day before the 2009 ISU World Allround Speed Skating Championships in Hamar, on February 6, 2009, blood samples were taken from all skaters as part of the ISU blood testing program.

The results for the Alleged Offender gave rise to a suspicion of blood doping, because it showed an abnormal reticulocytes value of 3.5 %, which is 1.1 % point above the upper normal limit applied by the ISU

16. The next day, on February 7, 2009, a post race sample was taken from the Alleged Offender after the 300 meter race; the results again showed high values of percent reticulocytes (3.46 % and 3.34 %). Consequently, an out of competition blood test was taken from the Alleged Offender on February 18, 2009. From the values of these tests, combined with the results of many earlier tests taken from the Alleged Offender from the year 2000 on, the Complainant came to the conclusion that blood doping had taken place shortly before the 2009 ISU World Allround Speed Skating Championships in Hamar.
17. The Alleged Offender and the Interested ISU Member challenge the results of the tests taken from the Alleged Offender on several grounds:
18. First, the Alleged Offender and the Interested ISU Member contest that the long term blood profiles of the Alleged Offender as presented by Complainant can serve as a valid basis for the finding of the use of a prohibited method because the respective blood samples had not been analyzed and reported by WADA accredited laboratories in conformity with the International Standard for Testing (IST) and the International Standard for Laboratories (ISL). It is therefore claimed by the Alleged Offender and the Interested ISU Member that Claimant had breached its own rules as well as the ones of WADA.

19. Complainant, on the other hand, is of the view that in the absence of a WADA blood screening program, the ISU Procedures for Blood Testing (Communication Nr. 1520) is the only binding document for blood screening.

The DC does not share this opinion. According to the introduction to the ISU ADR all Anti-Doping-matters shall be regulated by the ISU ADR and ADP adopted by the ISU Council. The ISU blood profiling program clearly is an Anti-Doping matter; therefore the ISU ADR and ADP apply.

20. Article 6 para 1 of the ISU ADR hold that for the purpose of the analysis of doping control samples, the ISU shall use only WADA accredited laboratories or **other method approved by WADA** (highlighting by the Panel).

For the purpose of its blood testing program, the ISU has chosen not to have the samples analyzed by laboratory analysis but by measuring machines (ISU Communication Nr. 1520, Point 3.1), i.e. by an "other method" in the sense of Article 6 para 1 ISU ADR. This method is approved by WADA. This follows from Appendix 1 of the WADA Guidelines for Blood Samples Collection of June 2008 which explicitly provide for on-site-screening and establish that in this case the screening shall be conducted only by qualified experts using equipment approved by the Anti-Doping-Organisation (i.e. in our case: approved by the ISU).

While Complainant uses laboratories to operate the automated blood measuring machine, this does not change the fact that the automated measuring remains an "other method" which is in lieu of using WADA accredited laboratories.

In other words: Even if the ISU uses laboratories for operating the "other method" for blood sample analysis, it is neither bound by its own rules nor by the ones of WADA to use WADA accredited laboratories for this purpose, other than in case of the use of laboratories for actual laboratory analysis.

21. The Interested ISU Member refers to Article 5.3 ISU ADR which says that testing shall be in substantial conformity with the International Standard for Testing in force at the time of testing and the ISU Anti-Doping Rules and Procedures. The word "Testing" is defined in Appendix 1 of the ISU ADR as certain parts of the Doping Control Process. Blood screening does not form part of Anti-Doping Testing (see notes 1 and 2 of Appendix 1 of the WADA Guidelines for Blood Sample Collection) but may be used for Anti-Doping Purposes in accordance with Article 2.2 of the Code. From this it follows that Article 5.3 ISU ADR is not applicable to the present case. Rather, 5.3.1 applies which says that blood samples may be used to detect prohibited substances or prohibited methods for screening procedure purposes or for longitudinal hematological profiling (the passport) in accordance with the current ISU Blood Testing Communication.
22. The Interested ISU Member also refers to point 8 para 1 of the WADA Guidelines for Blood Sample Collection which states that the Guidelines expand upon the International Standard for Testing and claims that based on this wording the

Guidelines cannot replace the International Standard for Testing but amend it only. However, the respective paragraph explicitly refers to Doping Control Purposes in accordance with Article 2.1 of the WADA Code, i.e. the presence of a prohibited substance. The present case is not about the presence of a prohibited substance.

The note following point 1 para 1 of the WADA Guidelines states that longitudinal haematological profiling may be used for Anti-Doping-Purposes in accordance with Article 2.2 of the Code (i.e. use of a prohibited method or a prohibited substance) and that mandatory technical documents to supplement both the IST and ISL would soon be made available to Anti-Doping Organizations who wish to employ the indirect detection methodology. Further the note says that with the exception of those mandatory areas which are part of the World Anti-Doping Program, the processes outlined in the Guidelines are not mandatory, but are aimed at assisting Anti-Doping Organizations in the development of systems and protocols for blood sample collection, it explicitly states that the method of sample collection may vary from the recommendations contained in the Guidelines provided that minimum standards apply to ensure that the integrity of the samples is maintained. From this it follows that until the issuance of mandatory technical documents by WADA the ISU is free to establish its own rules for blood testing as long as the mandatory areas of the World Anti-Doping Program are respected and the integrity of the samples maintained.

The DC cannot see any mandatory areas of the World Anti-Doping-Program which would have been violated by Claimant. It has further been satisfied on bases of the testimonies given by Dr. Moran, Prof. Kuipers and the neutral expert, Prof. Gassmann, that the ISU Procedures for Blood Testing respect the minimum standards for ensuring that the integrity of the samples is maintained.

Dr. Moran, as a witness, described in detail the blood screening procedure. This included, but was not limited to the following steps: the blood sample collection which is done in the presence of the ISU Medical Advisor and at least one phlebotomist, i.e. a qualified technician to take blood; the athletes who have to identify themselves by passport, which is registered in the computer; the athletes selecting a strip of three identical bar code labels which is automatically scanned into the system with the athlete's name; the athletes choosing a vacuum pre-sealed tube which is filled to the maximum capacity of 3 ml.; one of the bar codes of the skater's strip being fixed on the tube, another one signed by the athlete at the sign-out desk; the blood tube being secured by the Medical Advisor and placed in the refrigerator; at the end of collecting all samples the securing them in a transport container by the ISU Medical Advisor; one of the phlebotomists transporting it to the laboratory together with the chain of custody form, another copy of the form being placed in the container, when the container; arrives at the laboratory the number on the seal being checked against the number of the chain of custody form; the signing of the samples over to the person in charge of the laboratory, the chain of custody form being checked again and then the tube being put into the Advia machine. After the testimony of Dr. Moran, the

Panel is satisfied with the security of the collection and transporting practice. This was again confirmed by the testimony of Dr. Kuipers, especially regarding to the testing provided in Hamar.

23. According to the applicable rules Complainant does not have to use WADA accredited laboratories for blood screening. The reasons for this can be explained as follows:

The duty for using only WADA accredited laboratories for the purpose of laboratory analysis intends to guarantee reliable testing results by assuring that the analysis is done by laboratories which avail themselves of the necessary know how, expertise and safeguards.

In the case of automated blood measuring machines, no such specific laboratory expertise is required since, as Complainant has credibly explained, the only human action within the analyzing process is a laboratory technician who puts the secured sample tubes from closed and sealed containers into the machine. Everything else is fully automated and electronically processed. Rather than specific laboratory requirements, here it is the proper calibration of the analyzing machine and the laboratory technicians knowing how to run the respective machines which are needed to assure correct results. In other words: the Calibration Protocol for the method of automated blood counts has the same function as the ISL within the framework of actual laboratory analysis.

In this respect the Panel has been satisfied that on one hand the sports calibration protocol for the Advia 120 machine as used by Complainant for its blood screening program, if adhered to, provides for correct results. This was confirmed by the expert opinion of Prof. Gassmann. The Panel is also satisfied that the ISU Medical Commission is carefully selecting suitable laboratories which have and use the Advia 120. These facilities are located within the tolerated distance from the place of the blood sample collection, they have the availability and capability and they prepare the machine for ISU needs according to the Calibration Protocol.

Based on the credible testimonies of Dr. Moran and Prof. Dr. Kuipers the Panel is further convinced that in all blood screening tests conducted of the Alleged Offender, the Sport Calibration Protocol for Advia 120 and the ISU Procedures for Blood Testing have been adhered to, which adherence was supervised by Members of the ISU Medical Commission.

24. All this does create not a statutory, but a factual presumption that the blood screening tests of the Alleged Offender produced correct results. This presumption has not been rebutted. The Alleged Offender claimed that on February 7, 2009, she had to remind Prof. Kuipers in his function as ISU Medical Advisor to affix the bar codes to her two blood sample tubes. However, the only thing that matters is that the codes were affixed prior to the blood tubes leaving the testing station. This was done. Neither did the Alleged Offender or the Interested ISU

Member claim any other deviations from the ISU Procedures for Blood Testing nor does the Panel not see any other circumstances which would give rise to any reasonable suspicion that the blood tests of the Alleged Offender produced incorrect results.

Another question is whether these results were correctly reported on the excel table presented by Complainant as exhibit 2 to the Statement of Complaint (see point 29, p. 10 below).

25. The Alleged Offender claims that the ISU Procedures for Blood Testing have no effect with respect to her; she claims the provision would have had to be agreed between the parties. She further states that the "declaration for competitors and officials entering ISU events" signed by her merely stipulates the inclusion of ISU Communications no. 1447 and 1448 of their updates, but not Communication no. 1520.

The signing of point VI of the declaration for competitors and officials entering ISU events is of solely a declaratory nature and does not affect the validity of the ISU ADR for all skaters. Rather, these rules are binding whenever enacted in accordance with the ISU Constitution, through the obligation of ISU Members according to Article 6 para 3 b V and Article 7 para 1 of the ISU Constitution to specifically provide in their own rules that all persons under their jurisdiction shall be bound by the ISU Statutes, including amendments thereto. The fact that ISU Communication no.1520 is not explicitly mentioned on the declaration form does not change anything regarding the effect of the ISU Procedures for Blood Testing on the individual skaters. In fact, with respect to screening procedure purposes or for longitudinal hematological profiling, Article 5.3.1 of the ISU ASD explicitly refers to the current ISU Blood Testing Communication which is thereby embodied in the ISU Statutes which are binding upon the ISU Members as well as their Members.

26. The Alleged Offender and the Interested ISU Member claim that the Excel table with the blood screening results of the Alleged Offender presented as Exhibit 2 to the Statement of Complaint does not represent true and accurate values.
27. First, they claim that the Advia 120 device yields higher reticulocyte values than other measuring machines. In his expert opinion Prof. Gassmann confirmed that there are certain variations between different measuring devices but called them minor, neglectable and not material. The Panel has no reasons to doubt the accuracy of the Advia 120 machine - which, among other things, was used for the 2000 Sydney Olympic Summer games - was accurate for the present purposes.
28. The Alleged Offender and the Interested ISU Member also contest the reliability of the transfer of the data from the measuring machine to the Excel sheet. The Panel does not find this claim justified. In his testimony Prof. Kuipers gave a precise description of the data transfer process and demonstrated it by computer projection. He showed that the test results produced by the Advia 120 are trans-

mitted electronically and write protected and are directly stored to the ISU data base. This data base is only accessible to the ISU Medical Advisors who cannot change any data but can only retrieve them.

29. The Alleged Offender and the Interested ISU Member claim certain material defects of the Excel sheet and thereby contest the accuracy of the information stated therein:

- They point out that there are a few blank spaces on the Excel sheet. Prof. Kuipers credibly explained the reason for these blank spaces by the fact that some Advia machines only send a data sheet and not a data file with sometimes not all values having been tested.
- Regarding the values from Hamar, the slight differences between the Excel table and the Statement of Complaint are due to the fact, as Prof. Kuipers explained that the computer data contains the mean value of all four test runs which were conducted in Hamar while the figures in the Statement of Complaint reflect the values from the first two runs only.
- Prof. Kuipers informs that the reason why not all values were given with the same amount of decimals is a software issue; while the computer uses 2 decimals for retycs values, the printout sometimes contains one only.
- Another allegation of defect in the Excel sheet is the fact that there is one impossible value of absolute retycs of 0.08. This was later explained by the expert Dr. Sottas who said that concerning the Advia and Sysmex machines not all countries use the same units and that the units can differ by a factor of 1000, mostly in the US and in Japan. Prof. Kuipers confirmed and said that the value of 0.08 (which was obtained from the blood screening text in Salt Lake City) has to be multiplied by 1000.
- Slight difference in the values from the Olympic winter games in Salt Lake City of 0.1 %: Prof. Kuipers explains that this was an IOC event. He does not know the reason for the small difference, but said that the values probably are from different runs of the same sample.
- The reason for the fact that the Alleged Offender has results from a test of March 5, 2000, but no such results are in the data base, are not known. Prof. Kuipers pointed out that this was the second event ever that the ISU had done blood testing.

All in all comprehensible explanations have been given by the ISU for the alleged defects on the Excel sheet. Based on these explanations the Panel is convinced that the existing differences pointed out by the Alleged Offender and the Interested ISU Member do not impact the accuracy of the results presented on the Excel table.

IV. Law

30. According to Article 2.2. of the ISU ADR the use or attended use of a skater of a prohibited substance or a prohibited method is an Anti-Doping violation. Under M.1 of the 2009 WADA prohibited list, blood doping, i.e. the enhancement of oxygen transfer is a prohibited method and the use of EPO or any other erythropoiesis stimulating substance is a prohibited substance under S2.1 of the prohibited list.
31. Art. 3 of the ISU ADR, incorporating a mandatory provision of the WADA Code, describes the standard of proof as follows: "Whether the ISU or its Member has established an Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."

The standard of proof "comfortable satisfaction" is foreign to Swiss law.

With reference to article 4 of the DC Rules of Procedure Complainant is of the opinion, that the DC has to apply the standard of proof as established by Art. 3 of the ISU ADR and claims that Swiss law, Swiss precedents and literature as to the burden of proof are irrelevant to the present case and inadmissible.

The DC does not share this view:

The ISU is an association governed by articles 60 ss of the Swiss Civil Code (CC). Neither WADA nor the ISU for their respective purposes can amend or supersede mandatory Swiss law.

The Panel is of the opinion that as an independent ISU judicial body the DC has the duty to render decisions which respect, to the best of its knowledge, all applicable legal provisions. While the ISU rules are to be given preference whenever they fit into the framework of Swiss mandatory law, recourse to Swiss civil law is necessary in the sense of art. 4 para 1 of the DC Rules of Procedure in case of a possible conflict between the rules of the ISU on one hand and mandatory Swiss law on the other.

Therefore in the present case the question has to be examined, whether the standard of proof of "comfortable satisfaction of the hearing panel" is compatible with Swiss law.

Art. 8 of the Swiss Civil Code reads as follows: "In the absence of a special provision to the contrary, the burden of proving an alleged fact rests on the party who bases his / her claim on that fact. Art. 8 CC belongs to the mandatory statutory provisions of Swiss law.

Art. 3.1 of the ISU ADR is in line with Art. 8 CC insofar as it says that the ISU and its members shall have the burden of establishing the occurrence of an Anti-Doping Rule violation. Yet, according to standing adjudication of the Swiss Federal Court and prevailing doctrine, Art. 8 CC does not only allocate the burden of proof but also establishes a certain general standard of proof, which requires that the tribunal be convinced of the truth of an alleged fact, based on objective points of view. There does not need to exist absolute certainty but possible remaining doubts must appear insignificant (see BGE 128 III 271 ss).

However, there are exceptions to this general standard of proof, i.e. cases in which prepondering probability is sufficient proof of a fact. Such exceptions can either be established by statute or have been developed by precedents and legal writings. The reason for such exceptions is that the realization of substantive law must not fail due to difficulties of proof which typically arise with respect to certain facts or situations. This is the case, e.g. with respect to the occurrence of an event insured against (see BGE 5 C.79/2000) or to the question of whether an adequate or hypothetical causal connection exists (BGE 127 III 271, with references to precedents and literature).

The present case involves facts which are typically difficult to prove: direct proof of the use of the prohibited method and/or the prohibited substance in question will, absent lucky circumstances, hardly ever be possible to prove directly. This is, among other things, due to the fact that erythropoiesis-stimulating agents can be detected in blood samples only for about 3 to 4 days whereas the enhancing effect of bodily performance lasts much longer. On the other hand indirect proof through long term blood profiles faces the difficulty of proving a causal link between certain blood values and the administration of certain substances. From this it follows that establishing a standard of proof below the general standard required by Art. 8 CC is not in contradiction with said provision, provided that the level of "prepondering probability" is maintained. For this standard the Swiss Federal Court recently held that the possibility that a fact could turn out not to be true does not exclude "prepondering probability" but it must neither play a significant role for the fact in question nor be considered likely (see BGE 130 III 325 E.3.3) or: under the standard of proof of prepondering probability a fact is to be considered proved if from an objective point of view there are important reasons indicating that the alleged facts are true, such that other possibilities do not reasonably have to be taken into consideration (BGE 132 III 721). The Panel is of the opinion that Art. 3.1 ISU ADR is compatible with this standard required by Art. 8 CC. in that it requires the Panel to bear in mind the seriousness of the allegation when answering the question of whether it is comfortably satisfied that an Anti-Doping rule violation has occurred.

32. There can be no doubt that the allegation of the Anti Doping rule violation in the present case is very serious. Therefore the Panel can consider itself comfortably satisfied that the alleged violation has occurred only if it is convinced that possible causes other than the use of a prohibited method / substance are not reasonably possible to be the reason for the blood values of the Alleged Offender. There-

fore, in the present case, the standard of proof established by Art. 3.1 ISU ADR is compatible with the mandatory requirements of Art. 8 CC.

33. While Claimant pretends that the Alleged Offender has a highly abnormal blood profile which can be reasonably explained only by deliberate blood manipulation, the Alleged Offender and the Interested ISU Member allege that there are multiple other possible causes, namely:
- congenital blood disease
 - physical stress
 - influenza like flu or other infection
 - medication such as nasal sprays, Vitamin B 12, Vitamin C, acid, zinc, iron
 - bleeding
 - cold temperatures
 - stress
 - minor hemolyses
 - psychological stress
 - foot strain or sprain
 - high altitude training.

The neutral expert, Prof. Gassmann, considers these factors as possible causes, but calls them highly unlikely to explain the tremendous increase of reticulocytes values in the Alleged Offender's blood. From the expert opinion of Prof. Gassmann and several statements of the other expert witnesses during the oral hearing the Panel concludes that there is only one possible alternative cause for the high values of the Alleged Offender's blood other than blood doping: a congenital blood disorder.

34. In his testimony Dr. Sottas stated that in the approximately 10'000 blood profiles of athletes he has examined in his professional career he only found eight persons with a blood disease, only one of them having had a blood profile similar to the one of the Alleged Offender.
35. Even though this makes it appear highly unlikely that the blood values of the Alleged Offender were caused by a congenital blood disease, the Panel cannot rule out this possibility altogether, especially because, according to several expert witnesses, such a blood disease can remain undetected for many years.
36. Because the only possibility to prove a congenital blood disease is by way of an examination of the individual, for which the ISU has no authority, Complainant in its Statement of Reply correctly stated that it is for the Alleged Offender to prove any congenital blood disease by undergoing medical examination. In light of this the Panel was surprised to learn from the Reply of the Alleged Offender of June 18, 2009, page 20 and from the testimony of Dr. Lutz at the oral hearing that until one week before the hearing there was no attempt by the Alleged Offender to medically determine whether she carries a blood disease.

37. In view of the serious nature of the charges against the Alleged Offender, at the end of the taking of evidence in the oral hearing the Panel gave her the opportunity to furnish medical proof of the existence of a congenital blood disease within a reasonable time. At the same time she was informed that if she should decline this she would have to bear any possible negative consequences. Additionally the ISU through its Legal Advisor, Mr Bubnik, stated that conditioned upon the Alleged Offender seeking a medical examination there would be no restrictions of training and competing during the ongoing procedure provided it would be brought to a conclusion in reasonable time. After a private consultation between the Alleged Offender, the Interested ISU Member and the support personnel the Alleged Offender announced to the Panel that she did not accept the offer of time but instead requested a decision to be made on the evidence as it exists at the end of the hearing.
38. Given that the Alleged Offender refused to furnish to the Panel the only evidence possible to prove the only reasonably possible alternative cause for her blood profile other than blood doping, thereby depriving the Complainant of the only possibility to eliminate this alternative cause, the Panel considers that it cannot take this possible alternative cause into consideration.
39. On basis of all evidence presented in the case the Panel is convinced of a prepondering probability that the Alleged Offender has applied the prohibited method of blood doping.
40. According to Article 10 Para 2 of the ISU ADR a first violation of Article 2.2 is sanctioned by a two years ineligibility. In the present case there is no reason to modify this period as provided by Articles 10.4, 10.5 and 10.6.

Due to the fact that the Alleged Offender agreed to not to compete on February 7, 2009, the period of ineligibility in accordance with Article 10.9 shall begin on that day.

41. Article 9 of the ISU ADR states "A violation of these Anti-Doping rules in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes".

V. Costs

42. According to Article 12 of the ISU ARD "Members shall be obliged to reimburse the ISU for all costs (including but not limited to laboratory fees, hearing expenses and travel) related to a violation of these ISU Anti-Doping Rules committed by a Skater or other persons affiliated with that Member".

The amount which the Interested ISU Member has to reimburse to the ISU remains to be determined upon receipt of the proofs of costs from the ISU.

43. Under Article 15 Para 1 of the DC Rules of Procedure each party involved in the proceedings shall bear their own costs of proceedings and expenses.

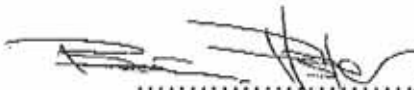
Based on the above consideration, the Panel issues the following

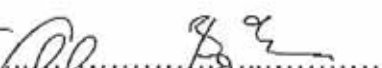
DECISION

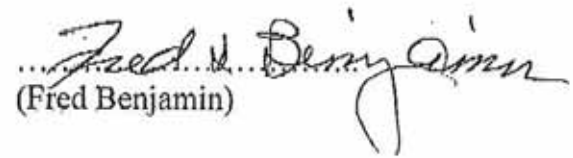
1. Claudia Pechstein is declared responsible for an Anti-Doping violation under Article 2.2 of the ISU ADR by using the prohibited method of blood doping.
2. The results obtained by Claudia Pechstein in the 500 m and 3'000 m races at the World Allround Speed Skating Championships on February 7, 2009, are disqualified and her points, prizes and medals forfeited.
3. A two years ineligibility, beginning on February 9, 2009, is imposed on Claudia Pechstein.
4. The Deutsche Eisschnelllauf-Gemeinschaft e.V. shall pay to the ISU the costs to be determined.
5. Each Party bears its own costs of proceedings an expenses.

This decision is sent to the Parties by e-mail and to the Alleged Offender and the Interested ISU Member also by registered mail against return receipt.

Berne, July 1, 2009


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(Dr. Béatrice Pfister)


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(Dr. Allan Boehm)


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(Fred Benjamin)

The present decision is subject to appeal to CAS within 21 days upon receipt of the present decision, in accordance with Article 13.2.1 and 13.6 of the ISU ADR.