Arbitration CAS 2007/A/1286 Johannes Eder v. International Olympic Committee (IOC) & CAS 2007/A/1288 Martin Tauber v. International Olympic Committee (IOC) & CAS 2007/A/1289 Jürgen Pinter v. International Olympic Committee (IOC), award of 4 January 2008

Panel: Mr David Rivkin (USA), President; Mr Peter Leaver (United Kingdom); Mr Dirk-Reiner Martens (Germany)

Cross-country skiing
Doping (intravenous infusion)
Use and possession of a Prohibited Method
Due process
Prohibition of a second trial
Standard of proof
Legitimate acute medical treatment
Concept of "possession"
Concept of "acceptable justification"
Complicity

1. **Article R57 of the CAS Code gives a Panel full power to review the facts and the law of the case. As a result, the Panel hears the case *de novo*, without being limited by the submissions and evidence that was available to the previous instance. Accordingly, even if there had been a lack of due process in the proceedings before the previous instance, any such deficiencies are cured by the CAS in its hearing of the full appeal.**

2. **Article 4 of Protocol 7 of the ECHR is restricted in its application to criminal proceedings brought by the same State. Accordingly, it is inapplicable to arbitration proceedings.**

3. **There is very little practical difference between the *"balance of probability"* and *"beyond a reasonable doubt"* standards of proof, particularly when read with the phrase *"bearing in mind the seriousness of the allegation which is made"*. Pursuant to this interpretation and the preceding CAS jurisprudence, the Respondent is required to prove its allegations with evidence that is sufficient to comfortably satisfy the Panel in light of the seriousness and consequences of the allegations made against the Appellant.**

4. **The administration of saline infusions in order to ensure that haemoglobin levels are within the range provided by the applicable regulations is not *"legitimate acute medical treatment"*.**

5. **The concept of *"possession"* within the meaning of Article 2.6.1 of the IOC Anti-Doping Regulations must be considered in light of surrounding circumstances. Possession of a Prohibited Method is proved where it can be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a Prohibited Method. It is not necessary to establish the intent to use the Prohibited Method in addition to establishing actual or constructive possession.**

6. ***"Other acceptable justification"* is intended to cover situations in which emergency medical treatment is required, so that there is no opportunity to apply for a TUE. In the absence of a physical examination by a medical practitioner, the self-treatment of diarrhoea is not an *"acceptable justification"*. Likewise, in the absence of a FIS dispensation and if no protective ban has previously been issued, naturally high haemoglobin levels do not constitute an *"acceptable justification"*.**

7. **According to Swiss law, there are two types of conduct that may amount to *"joint causation"* or being an *"accessory"* to a tortious act: (1) active, physical assistance, or (2) psychological assistance. Such conduct is the first element of joint causation of damage. The second element under the Swiss Code requires that the assistance rendered by the accessory contributes to the damage caused.**

8. **In light of the plain language of the second part of Article 2.8 of the IOC Anti-Doping Regulations, an athlete will not only violate Article 2.8 if he or she is found to have assisted, encouraged, aided, abetted, covered up or engaged in *"any other type of complicity"* specifically in relation to the ADR violation(s) of another athlete ("horizontal complicity"); he or she will also violate Article 2.8 through *"vertical complicity"*, by which an athlete engages in an ADR violation that is facilitated by a coach or support staff, in circumstances where that coach or support staff also similarly facilitated the ADR violations of other athletes.**

The parties

The Appellants, Johannes Eder ("Eder"), Jürgen Pinter ("Pinter") and Martin Tauber ("Tauber") (collectively, "the Appellants"), were each selected by the Austrian National Olympic Committee to compete as cross-country skiers for the Austrian national team at the Winter Olympic Games in Torino, Italy in 2006 (the "Torino Olympic Games").

The Respondent, the International Olympic Committee (IOC), is the Supreme Authority of the Olympic Movement and was the organiser of the Torino Olympic Games.

The Respondent and the Appellants will hereafter be collectively referred to as "the Parties".

The proceedings

On 25 April 2007 the IOC Executive Board (the "Board"), having considered the recommendations of the IOC Disciplinary Committee that Eder was in violation of Articles 2.2, 2.6.1, 2.6.3 and 2.8 of the IOC Anti-Doping Rules applicable to the XX Olympic Winter Games in Torino in 2006 ("IOC ADR"), decided to accept those recommendations. Eder was ordered to be permanently ineligible for all future Olympic Games in any capacity.

On 25 April 2007 the Board, having considered the recommendations of the IOC Disciplinary Committee that Tauber was in violation of Articles 2.6.1, 2.6.3 and 2.8 of the IOC ADR, decided to accept those recommendations. Tauber was ordered to be permanently ineligible for all future Olympic Games in any capacity.

On 25 April 2007 the Board, having considered the recommendations of the IOC Disciplinary Committee that Pinter was in violation of Articles 2.6.1, 2.6.3 and 2.8 of the IOC ADR, decided to accept those recommendations. Pinter was ordered to be permanently ineligible for all future Olympic Games in any capacity.

On 15 May 2007 Pinter and Tauber each filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the respective decisions of the Board of 25 April 2007. Pinter and Tauber each filed his Appeal Brief on 8 June 2007.

On 16 May 2007 Eder filed his Statement of Appeal with the CAS against the decision of the Board of 25 April 2007. Eder filed his Appeal Brief on 8 June 2007.

The Parties mutually agreed to consolidate each of the Appellants' individual proceedings against the Respondent.

By letter dated 24 July 2007, the CAS Court Office informed the Parties, on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Panel to hear the consolidated Appeals had been constituted.

On 6 August 2007, the Respondent filed its Answer in respect of each of the Appellants' Appeal Briefs.

On 13 September 2007, Eder filed his Reply to the Respondent's Answer.

On 20 September 2007, Tauber and Pinter filed a Joint Reply to the Respondent's Answer.

On 15 October 2007, the Respondent filed its Rejoinder.

On 1 and 2 November 2007, the Panel held a hearing at the CAS offices in Lausanne, Switzerland.

Undisputed facts

The following are facts that were either: (a) admitted by the Appellants in their respective Appeal Briefs; (b) admitted by the Appellants during the course of their testimony; or (c) not contested by the Parties.

Walter Mayer ("Mayer") was the trainer and manager for the Austrian national cross-country ski team at the 2002 Winter Olympic Games in Salt Lake City (the "Salt Lake City Games").

In light of the discovery of various items of equipment in Mayer's chalet in Salt Lake City following the 2002 Salt Lake City Olympic Games, the Board sanctioned Mayer on 26 May 2002 for his role in performing UV blood transfusions on two Austrian cross-country skiers at the Salt Lake City Games. The Board declared Mayer to be ineligible to participate in future Olympic Games up to and including the 2010 Olympic Games. This decision was upheld by a CAS arbitration panel on 20 March 2003.

Despite the imposition of this sanction and in apparently wanton disregard of it, during the 2006 Torino Olympic Games, Mayer was accommodated in Pragelato, in close vicinity to the premises occupied by the Appellants. According to his own testimony before the Austrian Ski Federation (ASF), Mayer had been the cross-country skiing coach for the ASF since February 2004.

In advance of the Torino Olympic Games, the Fédération Internationale de Ski (FIS) announced that it would be imposing five-day protective bans in cases where athletes' haemoglobin levels were tested at higher than 17g/dl.

During the Torino Olympic Games, the Appellants shared a private house at Via del Plan no 5 in Pragelato, Italy. Eder and Pinter shared a ground floor room, and Tauber had his own room on the first floor. Roland Diethart ("Diethart"), another member of the Austrian cross-country ski team, occupied a separate room on the first floor.

Emil Hoch ("Hoch"), the coach of the Austrian cross-country ski team for the Torino Olympic Games, shared a room in premises at 1 Banchetta in Pragelato with Markus Gandler ("Gandler"), who was the Austrian team director.

Tauber brought with him to Pragelato a device for measuring haemoglobin levels ("haemoglobinmeter"). The Appellants each had open access to Tauber's room, and each used Tauber's haemoglobinmeter in Torino.

During the Torino Olympic Games, and as a result of the announcement of a FIS control, Eder self-administered a saline infusion in the presence of Hoch in order to reduce his haemoglobin values. Eder did not admit this fact in his Appeal Brief or in his prior CAS proceeding (*see* below). This infusion was administered before 18 February 2006.

Hoch collected the used infusion kit from Eder in order to dispose of it.

Eder admitted in his testimony that Mayer had first advised him that a self-administration of saline would be effective in reducing his haemoglobin values. Mayer also discussed Eder's haemoglobin values with Hoch.

Hoch was present on each occasion on which Eder measured his haemoglobin values.

Eder self-infused saline for a second time during the Torino Olympic Games at approximately 8:05pm on 18 February 2006. This was at the time of the Police raid (*see* below), and Eder was seen by Police Officers to throw the equipment that he was using under the bed in his room.

Hoch had occasionally spoken with Tauber about his haemoglobin values.

On 18 February 2006 at 8:05pm, the Italian Police entered the Appellants' premises at 5 Via Del Plan, Pragelato. At that time, the Police seized the following items from each of the Appellants and from Diethart:

1) Tauber:

   One haemoglobinmeter;

   Two jars, each respectively containing 18 and 11 medical devices for haemoglobin testing;

   An open pack with used single-use needles, containing traces of blood;

   Ten unopened boxes of single-use needles,

   Two unopened packs of needles for infusion ("butterfly needles"); and

   One unopened infusion device pack.

2) Pinter:

   Four used single-use syringes with traces of blood; and

Five unopened boxes of single-use 20ml and 10ml syringes.

3) Eder:

One intravenous drip with needle containing a small quantity of transparent liquid.

4) Diethart:

One saline solution Braun 0.9% containing a transparent liquid, with instructions;

Four jars with 50 devices for haemoglobin testing;

13 unopened packs of syringes;

Five unopened infusion device packs;

One pack of butterfly needles;

One sterile packed microperfuser;

One unopened single-use needle pack; and

One box labelled "Anabol Loges", containing approximately 15 black pills.

The Italian Police found the intravenous drip with needle containing small quantity of transparent liquid under Eder's bed. In his report to the Torino Public Prosecutor's Court, Professor Melioli identified the transparent liquid to be physiological saline.

On 18 February 2006 at 10:50pm, the Italian Police entered the shared accommodations of Hoch and Gandler. At this time, the Police found the following items in the room shared by Hoch and Gandler:

Three containers for renal infusion equipment;

One phial for infusions – brand-name KOCHSALZ "BRAUN 0.9%";

Needle with tubes and intravenous drip device;

One phial for infusions – brand-name KOCHSALZ "BRAUN 0.9%";

One phial for infusions – brand-name KOCHSALZ "BRAUN 0.9%" containing liquid;

One plastic container with red top labelled "HEMOCURE";

One phial for infusions – brand-name KOCHSALZ "BRAUN 0.9%" apparently empty;

Two glass phials containing liquid – brand-named "Hatriumchlorod" 0-.9% with cannulas and needles with blood;

One plastic container probably containing traces of blood;

Two corks for needles with case and four empty cases and four needles with case;

One butterfly needle with probable traces of blood;

Five handkerchiefs with probable traces of blood;

One plastic packet with a white substance;

Twelve pieces of plastic with a red substance and one plastic top;

One glass container;

One glass container with plastic top and metal bands;

One glass container with liquid.

The Italian Police also found the following items in the rubbish bin at the entrance to the apartment of Hoch and Gandler:

Three containers for intravenous drip containing liquid;

Five sterile needles;

Seven silver-coloured packets labelled "SERAFLO ABO";

Ten sterile intravenous drip cannulas;

Three small corks with needle;

Five 10ml syringes with no needles;

One plastic syringe;

One yellow plastic bag containing two pieces of paper handkerchiefs, probably stained with blood, one needle cork and two plastic containers for syringe needles.

The Austrian Olympic Committee (AOC) has declared each of the Appellants to be ineligible for all future Olympic Games. In addition, Mayer, Hoch, Gandler and Dr Peter Baumgartl ("Baumgartl") were all banned for life from all future Olympic Games.

On 12 May 2006, the ASF held that Eder had violated Rule 2.6.3 of the Code of Conduct of the ASF and imposed a 1-year suspension.

Eder appealed the ASF decision to the CAS. A CAS Panel upheld the decision of the ASF by its award dated 13 November 2006 (CAS 2006/A/1102 & 1146).

Analysis of the haemoglobinmeter by Professor Melioli revealed that haemoglobin values were measured 59 times between 10 and 19 February 2006. Professor Melioli's analysis showed that the instrument had recorded a minimum value of 15.7 g/dl and a maximum value of 17.9g/dl.

Other than the Austrian cross-country ski team's physician, Dr Baumgartl, there were other doctors accommodated with other teams in Pragelato.

By letter dated 5 February 2007, the FIS rejected Eder's request for a permanent dispensation for naturally elevated haemoglobin levels.

None of the Appellants has ever been subject to a protective ban for an elevated haemoglobin level by FIS.

Relevant Anti-Doping Rules

Article 2.2 of the IOC ADR provides that the "*Use or Attempted Use of a Prohibited Substance or Method*" constitutes an anti-doping rule violation.

Additionally, Article 2.2.1 of the IOC ADR provides that:

The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

Article 2.6.1 of the IOC ADR provides:

The following constitute anti-doping violations:

…Possession by an athlete at any time or place of any Prohibited Substance or Prohibited Method, referred to in Article 2.6.3 below, unless the athlete establishes that the Possession is pursuant to a TUE [Therapeutic Use Exemption] granted in accordance with Article 4.3 (Therapeutic Use) or other acceptable justification.

Relevantly, "Possession" of a Prohibited Substance or Method is defined in Appendix 1 of the IOC ADR as:

The actual, physical possession, or the constructive possession which shall be found only if the Person has exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists; provided, however, that if the Person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the Person knew about the presence of the Prohibited Substance/Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous possession.

Article 2.6.3 of the IOC ADR provides:

In relation to possession, the following categories of substances and methods are prohibited (- for the full list of the prohibited substances and methods, see the List of Prohibited Substances and Prohibited Methods).
…Categories of Prohibited Methods:

…- M1. Enhancement of Oxygen Transfer
- M2. Chemical and Physical Manipulation.

Article M1(a) of the WADA 2006 Prohibited List is as follows:

Blood doping, including the use of autologous, homologous and heterologous blood or red blood cell product of any origin.

Article M2(b) of the WADA 2006 Prohibited List is as follows:

Intravenous infusions are prohibited, except as a legitimate acute medical treatment.

Article 2.8 of the IOC ADR provides that the following constitutes an anti-doping rule violation:

Administration or attempted administration of a Prohibited Substance or Prohibited Method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

Article 3.1 of the IOC ADR provides that:

The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing body 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. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

Article 7.1.5 of the IOC ADR provides that:

In all procedures relating to any anti-doping rule violations arising upon the occasion of the Olympic Games, the right of any Person to be heard pursuant to Byelaw to Rule 23.3 of the Olympic Charter will be exercised solely before the Disciplinary Commission. The right to be heard includes the right to be acquainted with the charges and the right to appear personally in front of the Disciplinary Commission or to submit a defence in writing, at the option of the Person exercising his right to be heard.

Article 7.1.7 of the IOC ADR provides that:

In all cases of anti-doping violations arising upon the occasion of the Olympic Games for which the IOC Executive Board has retained its powers (see Article 7.1.4 above), the Disciplinary Commission will provide to the IOC Executive Board a report on the procedure conducted under the authority of the Disciplinary Commission, including a proposal to the IOC Executive Board as to the measure and/or sanction to be decided upon by the IOC Executive Board. In such case, the proposal of the Disciplinary Commission shall not be binding upon the IOC Executive Board, whose decision shall constitute the decision by the IOC.

Article 10.5.1 of the World Anti-Doping Code ("WADA Code") provides that:

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of a Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

Article 10.5.2 of the WADA Code provides that:

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers). Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3 or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced.

"No Fault or Negligence" is defined in Appendix 1 of the WADA Code as:

The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

"No Significant Fault or Negligence" is defined in Appendix 1 of the WADA Code as:

The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

LAW

Jurisdiction

1. The jurisdiction of the CAS, which is not disputed by any of the Parties, derives from Article 12.2 of the IOC ADR, which provides an exclusive right of appeal to the CAS in respect of decisions made under the IOC ADR.

2. Article 12.2 of the IOC ADR provides:

   A decision that an anti-doping rule violation was committed, a decision imposing Consequences of an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the IOC lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension may be appealed exclusively as provided in this Article 12.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.

3. Article 12.2.1 of the IOC ADR continues:

   In all cases arising from the Olympic Games, the decision may be appealed exclusively to the Court of Arbitration for Sport in accordance with the provisions applicable before such court.

4. Accordingly, the CAS has jurisdiction to hear the Appeals in these consolidated proceedings. Each party further accepted CAS's jurisdiction by signing the Order of Procedure.

Applicable Law

5. As above, Article 12.2.1 of the IOC ADR provides that appeal proceedings in *"all cases arising from the Olympic Games"* are to be heard by the CAS *"in accordance with the provisions applicable before such court"*.

6. According to Article R58 of the Code of Sports-Related Arbitration, the Panel is required to 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".

7. Eder nominated Austrian law at paragraph 8 of his Appeal Brief, but also acknowledged that Swiss law would be applicable as the law of the Respondent's domicile.

8. The Respondent submits that by signing an Entry Form for the Torino Olympic Games, which required an agreement to abide by the IOC ADR, Eder is bound by the governing law of the IOC ADR. Pursuant to Article 15.1 of the IOC ADR, those rules are governed by Swiss law. Swiss law is therefore applicable to these proceedings.

9. The Panel agrees with the Respondent's submission in this respect. The applicable law in these proceedings is Swiss law.

Panel's Analysis

Was due process afforded to the Appellants by the Board?

10. The Appellants each challenge the respective decision of the Board on the basis that there was a lack of due process: specifically, that the Board failed to give grounds for its decision, that it did not provide the Appellants with a right of audience, that it delegated its hearing function to the IOC Disciplinary Commission (in violation of the ECHR) and that its decision was based on insufficient evidence. In the submission of the Appellants, the Board's decisions in respect of each of the Appellants should therefore be set aside.

11. As was noted by Tauber and Pinter, and also noted by the Panel in CAS 2006/A/1175, the Panel is given full power by Article R57 of the CAS Code to review the facts and the law in this case. As a result, the Panel hears the case *de novo*, without being limited by the submissions and evidence that was available to the Board. Accordingly, even if there had been a lack of due process in the proceedings before the Board, any such deficiencies are cured by the CAS in its hearing of this full appeal (CAS 2006/A/1175; CAS 94/129, *CAS Digest I,* p. 187 at 203).

12. The Appellants have taken the opportunity to bring this appeal before the CAS and have expressly confirmed that they were given the right to be heard and to be treated equally in these CAS proceedings. In light of this, the Panel finds that its de novo hearing of this case has cured any lack of due process in the Board's decision and that it is therefore not necessary to consider whether or not the Board had in fact afforded due process to the Appellants.

13. The Panel also notes that the Appellants were each given the opportunity to appear before the IOC Disciplinary Commission, but declined to do so. It is clear that the Appellants also had the opportunity to question the IOC Disciplinary Committee in respect of the evidence that it had reviewed in support of its Recommendations. However, the Appellants chose to submit a written response to that Committee, and did not avail themselves of this opportunity. Such a choice by the Appellants cannot be viewed as a failure by the Respondent to provide the Appellants with a right of audience.

Does the Board's decision violate the ECHR prohibition on second trial?

14. Eder submits that the Board's decision violates the prohibition in Article 4 of Protocol 7 of the ECHR of a second trial, on the basis that the ASF has already ruled on the issues in its decision of 12 May 2007. Article 4 of Protocol 7 ("Article 4") reads as follows:

> *1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
>
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case.*

15. It is clear from the text of Article 4 that it is restricted in its application to criminal proceedings brought by the same State. Accordingly, the Panel finds that Article 4 of the ECHR is inapplicable to these proceedings. In any event, the Panel notes that Eder has been sanctioned by the Board for two additional violations, under Article 2.6.1 and Article 2.8 of the IOC ADR that were not the subject of the earlier ASF ruling. Moreover, the Board's decision involves a ban on participation in future Olympic Games, which the ASF did not have the authority to impose.

16. Further, the Board's decision in respect of Eder's breach of Article 2.2 was based on additional evidence which put into question some of the circumstances against which the ASF decision had been made. In particular, the Panel notes that it is now questionable as to whether or not Eder did in fact suffer from diarrhoea on the evening of 18 February 2006, which required him to self-administer a saline solution. Eder did not admit in the prior proceeding that he had self-infused saline earlier in the Olympics.

17. Therefore, even if Article 4 of the ECHR did apply to these proceedings, the Panel finds that the Board's decision does not violate that provision. For these reasons, among others, the Panel also disagrees with Eder's submission that the Respondent's decision contravenes the principle of legal certainty.

Standard of proof

18. In Eder's submission, the applicable standard of proof is that an accused person is innocent until guilt is proven "beyond doubt". Article 3.1 of the IOC ADR sets out the standard of proof that is required in order to make out a violation of the IOC ADR. Specifically, the violation must be proven to the *"comfortable satisfaction of the hearing body, bearing in mind the seriousness of the*

allegation which is made". This is explicitly interpreted in Article 3.1 to mean *"greater than a mere balance of probability but less than proof beyond a reasonable doubt"*.

19. In addition, the Panel notes with approval the following excerpt from the CAS decision in CAS 2000/A/317 (at para. 26):

"…the legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law. This is particularly true for the principles of in dubio pro reo *and nulla poena sine culpa"*.

20. In light of the foregoing, the Panel agrees with the Respondent's submission that the relevant standard of proof is set out in Article 3.1 of the IOC ADR and, that in any event, principles of criminal law are inapplicable to the issues in this case.

21. Tauber and Pinter submit that the seriousness of the allegations require the Panel to interpret the standard of proof laid down in Article 3.1 in such a way as to require the Respondent to prove the violations *"beyond a reasonable doubt"*. The cases CAS 2005/A/884 and CAS 2004/O/645 are given by Tauber and Pinter in support of this submission.

22. It can be seen from these cases and from that of CAS 2004/O/649, which affirmed the Panel's decision in CAS 2004/O/645, that the weight of CAS jurisprudence on this particular issue confirms that there is very little practical difference between the *"balance of probability"* and *"beyond a reasonable doubt"* standards of proof, particularly when read with the phrase from Article 3.1, *"bearing in mind the seriousness of the allegation which is made"*. The Panel agrees with the opinion expressed by the Panel in the following excerpt from the CAS 2004/O/649 case (drawn from paragraph 36 of its 4 March 2005 interim decision):

"Built into the balance of probability standard is a generous degree of flexibility that relates to the seriousness of the allegations to be determined. In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or "comfort", required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. Nor is there necessarily a great gulf between proof in civil and criminal matters. In matters of proof the law looks for probability, not certainty. In some criminal cases, liberty may be involved; in some it may not. In some civil cases – as here – the issues may involve questions of character and reputation and the ability to pursue one's chosen career that can approach, if not transcend in importance even questions of personal liberty. The gravity of the allegations and the related probability or improbability of their occurrence become in effect part and parcel of the circumstances which must be weighed in deciding whether, on balance, they are true".

23. Pursuant to the above interpretation and the preceding CAS jurisprudence, it is the Panel's view that the Respondent is required to prove its allegations with evidence that is sufficient to comfortably satisfy this Panel in light of the seriousness and consequences of the allegations made against the Appellants.

General observations

24. The Panel made a number of observations during the course of the hearing which merit discussion at the outset of its analysis on the Appellants' liability with respect to the alleged violations. Those observations were concerned with the frequency of the coincidences upon which the Appellants relied in support of their respective cases. Other than the haemoglobinmeter, the Appellants have each claimed to have no knowledge of the items possessed by his fellow Appellants or of the items found with their trainer, Hoch. This Panel has been asked by the Appellants to view as mere coincidence the fact that the Appellants, living together in cramped accommodations, each arrived at the Torino Olympic Games with different parts of a complete kit for the manipulation of haemoglobin levels. Tauber arrived in Pragelato with his haemoglobinmeter and an infusion kit; Pinter arrived with syringes and tubing; and Eder arrived with an infusion kit and saline solution. Although not subject to these proceedings, the Panel is also aware that Roland Diethart also arrived in Pragelato with further items of potential use for infusions and transfusions, including infusion kits, saline solution, butterfly needles, syringes and microcuvettes for haemoglobin testing, and that Hoch and Gandler had additional equipment for blood doping, including equipment to test blood types.

25. The Appellants were unable to explain satisfactorily why the Austrian cross-country team chose to stay in Pragelato, rather than in the Athlete's Village in Sestriere, where they would have been subject to bag searches and a controlled environment that would have made infusions or transfusions virtually impossible. Tauber claims that this decision was taken so that the team were able to reside at a lower altitude that would have less effect on the haemoglobin levels. However, Tauber was unable to produce any evidence that training for a short period and competition at the altitude of Sestriere, at approximately 2000m above sea level, had, or would have, any measurable effect on his (or any athlete's) haemoglobin levels. In this respect, the Panel notes that Walter Mayer is credited with having chosen the accommodations in Pragelato for the Austrian cross-country team and that he was also accommodated in separate accommodations in Pragelato during the Torino Olympic Games. This is a further coincidence that the Panel is asked to accept.

26. Also, the Appellants have each provided a different medical justification for the items that were found in their physical possession on 18 February 2006. These explanations again require the Panel to accept that the Appellants each coincidentally had a medical justification that would explain the collective presence of the equipment needed to perform intravenous infusions and transfusions.

27. In his Appeal Brief, Eder initially claimed that he had the infusion kit solely to prevent dehydration arising from diarrhoea. During oral questioning, however, Eder admitted that he had brought the infusion kit and saline with him from Austria because he was concerned that his alleged naturally high haemoglobin levels would result in a protective ban and also that he

would not find adequate medical care at the Torino Olympic Games. The Panel does not accept that a medical professional would not have been available to Eder at the Torino Olympic Games. Although the Panel accepts that there had been a fairly energetic campaign to crack down on inflated haemoglobin levels at the Torino Olympic Games and that Eder might therefore have feared a protective ban, the Panel notes that Eder has never been the subject of a protective ban. The Panel is also of the view that, if Eder had indeed only been concerned about receiving a protective ban, his actions in hiding the infusion kit under his bed were inconsistent with that justification.

28. Ultimately, while the Panel had the impression that Eder was relatively candid in his oral evidence, the Panel is concerned about the inconsistencies between Eder's Appeal Brief and his oral evidence and remains sceptical of his suggested justifications for possessing the infusion kit. The Panel also notes that Eder's admission that he self-administered an infusion at an earlier stage of the Torino Olympic Games casts serious doubt on whether or not Eder actually did suffer from diarrhoea, as he has asserted, or at a minimum, it reduces the likelihood that this was the dominant motive for his administering a saline infusion.

29. Tauber contends that he has a relatively high haemoglobin concentration and that he therefore purchased the haemoglobinmeter himself in early 2006 in order to regularly check his haemoglobin levels. He also submitted that he was curious and wanted to monitor the changes in his haemoglobin, particularly in relation to changes in altitude.

30. He told the Panel that he travelled home to Seefeld after his first competition, which took place on 13 February 2006, so that his haemoglobin level could resume its normal level because Seefeld lies at a lower altitude to Pragelato. The Panel has particular difficulty with this explanation. The Panel was presented with evidence showing that only one test (consisting of two measurements) was taken during Tauber's trip to his home in Seefeld, between 13 and 15 February 2006. Both Tauber and his brother, Markus Tauber, also gave evidence that this single test result was that of Markus Tauber. If Tauber was indeed interested to see the effects of altitude on his haemoglobin levels, his failure to test his haemoglobin levels even once during the trip to Seefeld is inconsistent with that explanation for his purchase and possession of the haemoglobinmeter. It also makes incomprehensible his decision to carry the haemoglobinmeter with him during his brief time home rather than leave it in Pragelato.

31. Tauber claims that he had the infusion kit in case he required treatment by way of an infusion and was attended by a doctor who did not carry such equipment. Tauber explained that this had in fact happened to him at the World Championships in Obertsdorf in 2005. In this regard, Tauber admits that on that occasion the doctor had been able to procure the necessary equipment from a local pharmacy. The Panel is of the view that had a similar situation arisen in Torino, not only would the attending doctor be highly likely to carry infusion equipment but, in the event that he did not, he would also have been able to procure this item locally, as had

been the case in Obertsdorf. The haemoglobinmeter and infusion kit are a very suspicious combination of items to be in the possession of an elite athlete at the Olympic Games, and the Panel does not accept Tauber's explanation.

32. Pinter submits that his possession of syringes and tubing (some used with traces of blood inside) can be explained by his use of Thiogamma, which he claims to have injected intravenously in order to combat muscle cramps. The Panel is concerned by a number of inconsistencies in this explanation. Firstly, in his statement before the ASF on 10 March 2006, Pinter explained that the Thiogamma was used for the improved consumption of carbohydrates, not for muscle cramps.

33. Secondly, although Pinter has submitted a statement from Dr Lechner, dated 11 October 2007, in which he claims that Thiogamma was administered to Pinter during the 2002/2003 World Cup season in order to treat "unclear nerve pain", he was unable to produce any evidence of his use of Thiogamma between 2002/3 and the Torino Olympic Games, such as a prescription or a contemporaneous medical report.

34. Thirdly, Pinter explained the blood in the syringe tubing on the basis that his method of injecting the Thiogamma involves pulling back blood up to the barrel of the syringe, in order to check that the vein has been breached and then inserting the Thiogamma. Some traces of blood can therefore remain in the tubing as a result of this process. The Panel heard evidence from Professor Catlin which cast doubt on the likelihood of blood traces being left in the tubing after an injection of Thiogamma and which concluded that the most likely explanation was that blood was the actual substance that had been injected. Also, when asked whether it was *"possible or probable that residual blood will be visible in the tube"* after an injection of Thiogamma, Pinter's medical expert, Professor Gastl, opined only that it was *"possible"*, rather than *"probable"*. The Panel also notes that Pinter's evidence was that each Thiogamma ampoule contained 20ml, in comparison to his 10ml syringes and that he therefore used the infusion tube and butterfly needle to ensure that he could reload the syringe with the rest of the Thiogamma ampoule without having to inject himself twice. In this scenario, the Panel notes that Pinter would not have needed to pull back blood for the second injection of Thiogamma (as he would already have known that he had breached the vein) and that the Thiogamma solution would therefore have flushed through the tubing twice. The Panel finds that it is highly unlikely that traces of the original pulled-back blood would be visible after two such flushings of the Thiogamma solution.

35. Fourthly, Pinter gave evidence that he had never recorded Thiogamma on any of his doping control forms, nor had he informed any of the team physicians about his use of the substance. If Pinter were taking Thiogamma, this would have been a risky and unlikely omission. As all athletes are expected to know, the purpose of listing any medication or substance being taken is to protect the athlete in the event that this medication or substance erroneously produces a

false positive in a doping control test. In the Panel's view, the fact that Pinter did not list Thiogamma or even inform team officials about it reinforces the likelihood that he was not actually taking this medication at the time.

36. Fifthly, the letter to the Respondent from Pinter's original defence counsel, Dr Platzgummer, in connection with the Disciplinary Committee hearing, made no reference to Pinter's use of Thiogamma. If such use were genuinely the case, the Panel finds it difficult to understand why that this defence was not put to the Respondent in the first place.

37. Finally, other than a supporting statement by Eder that he saw the Italian Police seize and then return the Thiogamma ampoules to Pinter, there is no evidence that Pinter actually had such ampoules in his possession. The Panel finds it unusual that the Italian Police would not have recorded the Thiogamma in its report had such a substance indeed been found. Ultimately, this justification was entirely inconsistent with the evidence and was found not to be credible by the Panel. In passing, the Panel notes that, in the Police Report of its raid on the house occupied by Wolfgang Perner, the Police recorded the presence of Thiogamma. That raid took place at 9.30pm on 18 February 2006, that is, about 90 minutes after the raid on the Appellants' house.

38. The Panel's scepticism of the justification put forward by each of the Appellants is compounded by the fact that Mayer and other members of the Austrian cross-country ski team support staff, notably Hoch, fled from Italy after the Italian Police raid. This indicates to the Panel that the activities within the Austrian cross-country ski team had been motivated by more than is suggested by the Appellants' innocent explanations. In stating the basis of its scepticism, the Panel is not to be understood to be indicating that any of the Appellants is *"guilty by association"* with Mayer or Hoch, but simply that the association of those two with the Austrian ski team was yet another factor to be weighed in the balance.

39. Ultimately, the Panel found the combination of coincidences highly unlikely in the circumstances of this case and was also disturbed by the level of inconsistency that was evident both within the Appellants' own pleadings and also against the evidence before the Panel. As a result, while the Panel found that Eder's oral evidence had been mostly credible, the inconsistencies noted above were particularly damaging to the credibility of Tauber and Pinter. It is against these observations that the Panel's analysis has proceeded.

Use of a Prohibited Method

40. Pursuant to Article 2.2, the *"use or attempted use of a Prohibited Substance or Prohibited Method"* is an anti-doping violation. *Intravenous infusions, except as a legitimate acute medical treatment* are declared a Prohibited Method under Article M2(b).

41. During oral evidence, Eder admitted to having self-infused a saline solution on two occasions during the Torino Olympic Games – once at the time of the Italian Police raid on 18 February 2006 ("the second infusion") and another a few days earlier ("the first infusion"). Article 3.2 of the IOC ADR explicitly provides that violations may be established *"by any reliable means, including admissions"*. Accordingly, the Panel finds that Eder has performed two intravenous infusions.

42. Eder submits that a breach of Article 2.2 requires that the athlete intends to achieve increased performance by the application of the Prohibited Method. The Panel notes that Article 2.2.1 explicitly states that the success or failure of the Prohibited Method is immaterial and that the mere use or attempted use of that Prohibited Method is sufficient in order to constitute a violation of Article 2.2. Further, to impose upon the IOC the burden of proving that an athlete had a subjective intent to enhance his or her performance would be counter-productive to the fight against doping. Therefore, the Panel rejects Eder's submissions on this point.

43. The next question to be considered before finding that there has been a violation of Article 2.2 is whether or not Eder's infusions constituted *"legitimate acute medical treatment"*. Eder has admitted that his reason for performing the first infusion (prior to a FIS control announcement) was to reduce his haemoglobin concentration. Although Eder did concede that the second infusion (at the time of the Italian Police raid) was partly motivated by concern over his haemoglobin levels, he maintains that he administered the infusion primarily in order to combat severe dehydration as a result of the diarrhoea.

44. Eder gave evidence that he spoke by telephone with both the team doctor, Dr Baumgartl, and when he was not available in time, his own personal physician, Dr Lechner, about his diarrhoea. Eder asserts that both doctors had indicated to him that an infusion of saline would be an appropriate therapy in the circumstances and that Dr Lechner had advised him to perform the infusion himself. The Respondent has questioned whether or not Eder did in fact suffer from diarrhoea and submitted that Eder's attempts to hide the infusion kit under his bed were illustrative of his appreciation that the infusion was a doping violation.

45. In light of Eder's admission that he had, at least in part, been concerned about high haemoglobin levels and the risk that he would be subject to a FIS protective ban, it is unnecessary for the Panel to make a finding on whether or not Eder did in fact have diarrhoea. The administration by Eder of two saline infusions in order to ensure that his haemoglobin levels were within the FIS range was not *"legitimate acute medical treatment"*. The Panel therefore finds that Eder has committed a violation of Article 2.2.

Possession of a Prohibited Method

46. In order to establish a violation of Article 2.6.1, the Respondent has the onus of proving the following elements, to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegations: (1) the Appellants had actual, physical possession of a Prohibited Method; or (2) the Appellants had constructive possession of a Prohibited Method, which means either: (a) the Appellants had exclusive control over the premises in which a Prohibited Method exists; or (b) the Appellants knew about the presence of a Prohibited Method and intended to exercise control over it.

47. It is undisputed that the Appellants each had certain medical equipment in his actual physical possession. Eder had an intravenous saline drip with needle; Tauber had a haemoglobinmeter, microcuvettes for haemoglobin value testing, a significant quantity of single use and butterfly needles and an infusion pack; and Pinter had four used single-use syringes with tubing, showing traces of blood and a further five boxes of single-use syringes.

48. Tauber and Pinter refute the Respondent's assertions that the Appellants each constructively possessed those items in the possession of his fellow Appellants and of Roland Diethart, Emil Hoch and Markus Gandler. These assertions are made on the basis of the Appellants' close living quarters in Pragelato and the coordination of the Appellants' activities among themselves and with Hoch.

49. Given the nature of the living arrangements of the Appellants during the Torino Olympic Games and the evidence from Tauber that his fellow Appellants freely used the haemoglobinmeter in his bedroom, the Panel is also of the view that it is highly unlikely that the Appellants were not aware of the equipment that was in the physical possession of each of them. It is therefore the view of the Panel that each of the Appellants constructively possessed those items found in the physical possession of his fellow Appellants, of Diethart and of Hoch; that is, each of them knew about those items and intended to exercise control over or use them if and when they wished to do so.

50. However, the Panel agrees that *"possession of a Prohibited Method"* is a difficult concept, which requires some interpretive guidance. Tauber and Pinter argue that the term *"possession of a Prohibited Method"* is unclear and that it must be interpreted as requiring an athlete to possess *all* of the materials necessary in order to perform that Prohibited Method. In the case of intravenous infusions, this would require a butterfly needle, infusion tube and a liquid for infusion, at a minimum. In the case of blood doping, this would additionally require the possession of blood to be transfused.

51. It should firstly be said that the concept of "possession" within the meaning of Article 2.6.1 must be considered in light of surrounding circumstances. In this regard, the Panel cannot

ignore the fact that each of the Appellants was in possession of a different part of medical equipment, which, taken together, make possible the practice of intravenous infusions, and potentially also of blood transfusions. It is also a relevant circumstance that Walter Mayer and other support staff of the Austrian cross-country ski team were sanctioned for blood doping after the Salt Lake City Olympics. The Appellants acknowledged that they were aware of this, and they should also have been aware that the anti-doping integrity of the Austrian cross-country ski team would be under intense scrutiny in the wake of this scandal. Additionally, the admission by Hoch that he disposed of the team's used medical equipment in Pragelato is also relevant to the surrounding circumstances against which each Appellant's possession charge must be viewed.

52. On the one hand, the Panel is of the view that it would not be sufficient to justify a charge under Article 2.6.1 if an athlete were merely in possession of, for example, one single syringe – even though such an item would be viewed suspiciously in the absence of a reasonable explanation or a recognised therapeutic use exemption ("TUE"). At the other extreme, the Panel considers Tauber's and Pinter's interpretation of "possession" to be unworkable and counter-productive to the fight against doping. The Panel is of the view that Possession of a Prohibited Method is proved where it can be shown to the comfortable satisfaction of the Panel that, in all the circumstances, an athlete was in possession, either physical or constructive, of items which would enable that athlete to engage in a Prohibited Method. Accordingly, the Panel finds that the Appellants were indeed each in possession of a Prohibited Method: namely, "intravenous infusions" as specified in Article M(2)(b) of the WADA 2006 Prohibited List. The Panel rejects the argument that in addition to establishing actual or constructive possession it is also necessary to establish the intent to use the Prohibited Method. First, this anti-doping violation is proved simply by possession. Secondly, the necessity of proving intent would render Article 2.6 nugatory. In addition, the Panel believes that it is likely that the Appellants were also in possession of an additional Prohibited Method: namely, "blood doping" as specified in Article M(1)(a) of the WADA 2006 Prohibited List. Although it is not necessary for the Panel to make a definitive finding on this point, the Panel notes that the only element of "blood doping" that was not found within the Appellants' physical or constructive possession was blood or blood bags containing their own blood. As noted above, bags containing blood of Austrian biathletes were found in Hoch's quarters, along with blood-typing equipment. Moreover, traces of blood were found in Pinter's syringes, which can only be properly explained by the injection of blood using those vessels.

53. The next question to be determined is whether or not any of the Appellants fall within either of the two exceptions outlined in Article 2.6.1: that he possessed the Prohibited Method pursuant to a *"TUE granted in accordance with Article 4.3"* or that he had some *"other acceptable justification"* for the possession. As outlined above, each of the Appellants claims a different medical excuse for possessing the above items. It is significant that the term, *"other acceptable justification"* is used directly after *"TUE granted in accordance with Article 4.3"*. The Respondent

submits that *"other acceptable justification"* should therefore be interpreted as requiring the intervention or advice of a medical doctor. The Panel is of the view that any items related to a Prohibited Method that are prescribed on the advice of a medical doctor should be the subject of a TUE and that *"other acceptable justification"* is intended to cover situations in which emergency medical treatment is required, so that there is no opportunity to apply for a TUE.

54. None of the Appellants applied for a TUE in relation to the medical equipment that was found in their possession.

55. In the case of Eder, the Panel does not find it necessary to address the question of whether or not diarrhoea represented an acceptable justification in light of his admission that the second saline infusion was performed, at least in part, in order to reduce his haemoglobin levels. However, for the sake of clarity, the Panel is not convinced that Eder in fact suffered from diarrhoea on the evening of 18 February 2006 and also finds that in the absence of a physical examination by a medical practitioner, the self-treatment of diarrhoea is not an "acceptable justification".

56. In addition, both Tauber and Eder claim that they were in possession of a haemoglobinmeter and infusion kit, respectively, because they feared that their high haemoglobin levels put them at risk of a protective ban from competition during the Torino Olympic Games. The Panel's view is that such naturally high levels should be the subject of a FIS dispensation and that, in the absence of this and in light of the fact that none of the Appellants had previously received a protective ban, the Panel does not agree that this constitutes an *"acceptable justification"*.

57. The Appellants each contend that it was necessary to carry his respective medical equipment because there had been insufficient medical personnel that were dedicated to the Austrian team. The Panel does not find this explanation credible. Even if it were the case that the Austrian team's own doctor, Dr Baumgartl, could not attend to the Appellants, there were many other doctors accommodated with other teams in Pragelato and Serestriere. At the very least, medical care was available from the nearby clinic in the village if required. The Panel also agrees with the comments from Professor Catlin that there were many doctors available to athletes competing at the Olympic Games.

58. As discussed in further detail above, the Panel is also unconvinced by the submissions of Tauber and Pinter as to their justifications for possession of a Prohibited Method.

59. The Panel accordingly finds that none of the Appellants had an *"acceptable justification"* for the possession of a Prohibited Method and that they are in violation of Article 2.6.1.

60. While the Panel is comfortably satisfied that it is sufficient to show that each of the Appellants has violated Article 2.8 by his active or psychological assistance in his fellow Appellants'

possession violations, it should be noted that the evidence in this case strongly indicates that the Appellants were not only in possession of a Prohibited Method (intravenous infusion) but had also been engaging in that Prohibited Method during the Torino Olympic Games.

61. Further, although it is not necessary to make a definitive finding, the Panel is also of the view that there is a strong likelihood that the Appellants were in possession of an additional Prohibited Method (blood doping) and had also been engaging in that Prohibited Method during the Torino Olympic Games. The Panel finds the following facts particularly relevant in this regard:

- the saline infusions administered by Eder;
- the traces of blood found both in the syringes and tubing of Pinter and also amongst the items found with Hoch;
- the significant usage of Tauber's haemoglobinmeter;
- the involvement of Walter Mayer in the training of the Appellants and his accommodation in close vicinity to the Appellants in Pragelato;
- the statement by Eder before the ASF Disciplinary Board on 15 June 2007 that Mayer had spoken with Hoch about Eder's haemoglobin values;
- the statement by the Appellants' chalet cleaner in Pragelato, Ms Milazzi-Reitner in her 20 February 2006 statement to the Italian Police that she had been instructed not to let the doping control officers into the Appellants' accommodations in the event of a doping control; and
- the blood-testing device found with Hoch and Gandler, which suggests that blood from multiple sources had either been collected or stored.

Complicity in ADR violations

62. Article 2.8 makes the *"assisting, encouraging, aiding, abetting, or covering up or any other type of complicity"* involving an actual or attempted violation of the IOC ADR to be a violation in itself. The full text of Article 2.8 is reproduced below:

Administration or attempted administration of a Prohibited Substance or Prohibited Method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

63. The Panel is required to construe the phrase *"assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation"*. However, this construction is not difficult, as the words are commonly used English words with well-established meanings.

64. The language of Article 2.8 is broad in order to capture any form of complicity. The sentence is written in the disjunctive in order to make clear that any such action may be sufficient to show complicity. Indeed, it is important to note that there is a comma after the phrase *"administration or attempted administration of a Prohibited Substance or Prohibited Method to any athlete"*. Following this phrase and a comma, there are no further references to "athlete". In the Panel's view, therefore, the proper interpretation of Article 2.8 is that the first part, *"administration or attempted administration of a Prohibited Substance or Prohibited Method to any athlete"* is limited to actions with respect to athletes. However, the latter part, *"assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation"*, is intended to be very broad and to cover any ADR violation by any person bound by the ADR, including a coach or a support staff member, and is not limited to the ADR violations of fellow athletes.

65. In the context of the ADR, the first part of Article 2.8 may be fulfilled in the physical sense where, for example, an athlete physically assists a fellow athlete or support staff member by providing equipment to him or her that is necessary for the administration of that Prohibited Method. That physical assistance would also almost inevitably be a violation of the second part of Article 2.8.

66. In the absence of proof of physical assistance, a violation of Article 2.8 can also be established by what might be termed "psychological assistance". Psychological assistance would be any assistance that was not physical assistance, such as, for example, any action that had the effect of encouraging the violation.

67. This plain reading of the article is supported by Swiss Law, which governs the IOC ADR. The concepts of assistance, encouragement, aiding, abetment, covering up and complicity are embedded in the Swiss Code of Obligations ("Swiss Code"), in particular in Article 50(1), which relates to tortious conduct (these concepts of course also exist in the context of Swiss criminal law, but the Panel reiterates that principles of criminal law are not applicable to sports law matters).

68. The concepts outlined in Article 2.8 are most akin to the principle of *"joint causation of damage"* or to the role of *"accessory"* as in Article 50(1) of the Swiss Code, which provides:

"Haben mehrere den Schaden gemeinsam verschuldet, sei es als Anstifter, Urheber oder Gehilfen, so haften sie dem Geschaedigten solidarisch" (Official German version).

"Lorsque plusieurs ont causé ensemble un dommage, ils sont tenus solidairement de le réparer, sans qu'il y ait lieu de distinguer entre l'instigateur, l'auteur principal et le complice" (Official French version).

In English, the above translates to:

Where several persons have jointly caused a damage, whether as instigators, principals or accessories, they shall be jointly and severally liable to the damaged party.

69. According to Swiss law, there are two types of conduct that may amount to "joint causation" or being an "accessory" to a tortious act: (1) active, physical assistance, as is suggested by "assisting", "aiding", "abetting" and "covering up" in Article 2.8; or (2) psychological assistance,[1] as is suggested by "encouraging" in Article 2.8. Such conduct is the first element of joint causation of damage. The second element under the Swiss Code requires that the assistance rendered by the accessory contributes to the damage caused.

70. One athlete's own involvement in the practice or possession of items necessary for the practice of a Prohibited Method can have the effect of making other athletes more comfortable about their own use of a Prohibited Method. Under Swiss law, there are many cases that illustrate liability as an "accessory" for this type of psychological assistance. A good example is the case of *Maillard v. Guye and Gutknecht*[2]. In that case, three children (A, B and C) had been engaged in a game of bows and arrows. During the game, A shot C in the eye. In assessing the civil liability of A and B, the Swiss Federal Tribunal found that both A and B had caused the injury to C because of their joint participation in the game. Although B did not shoot the arrow that actually hit C, he mentally supported and encouraged the dangerous game through his active participation in that game and therefore was found to be jointly and severally liable with A for the damage caused.

71. The Panel must therefore consider whether or not each of the Appellants assisted, encouraged, aided, abetted or covered up the possession violations of his fellow Appellants in such a way as to contribute to causing his fellow Appellants' possession violations. The IOC has proven to the Panel's comfortable satisfaction that each Appellant met these standards. The facts outlined above demonstrate a broad pattern of cooperation and common activity, with the other athletes and with the coaches, in the possession of the Prohibited Method of blood doping.

72. Tauber's provision of the haemoglobinmeter was key in the administration of the Prohibited Method. Without that equipment, it is highly unlikely that the Appellants could have engaged in this activity. Tauber admits that he freely offered it to them for their use. Tauber also gave evidence that his fellow Appellants knew that he kept the haemoglobinmeter in his bedroom. Additionally, the Panel heard evidence about the cramped nature of the Appellants' accommodations and finds it highly unlikely that Tauber could have been unaware of the use of his haemoglobinmeter by his fellow Appellants or of the related equipment possessed by his fellow Appellants. For these reasons, the Panel finds that Tauber assisted his fellow Appellants in their own possession violations and has violated Article 2.8.

---

1 Heinz REY, Ausservertragliches Haftpflichtrecht, 3rd ed., Zurich 2003, n. 1428; OFTINGER/STARK, Schweizerisches Haftpflichtrecht, Vol. II/1, 4th ed., Zurich 1987, § 16 para. 319.

2 ATF 104 II 184 E. 2

73. Both Eder and Pinter have violated Article 2.8 by engaging in the possession of a Prohibited Method and through this conduct encouraging and providing mental support to his fellow Appellants in their possession of a Prohibited Method. The possession by each athlete of various equipment necessary to engage in blood doping and the pattern of cooperation in, for example, using the haemoglobinmeter show that each athlete did not engage in this activity alone, but rather did so as part of a common scheme to engage in the Prohibited Method. Even if, as Eder suggested, the coach Hoch may have been the instigator of potential blood doping practices within the Austrian cross-country team at the Torino Olympic Games, the Panel believes that these practices would not have been possible had each Appellant himself not engaged in the Prohibited Method or at least possessed the items that enabled him to do so. This involvement had the effect of making routine the practice within the team, so that the Appellants were far more comfortable with, and less likely to reject, the practice. This effect is likely to be particularly compelling in a small, close-knit team such as that of the Austrian cross-country skiers.

74. Moreover, the Appellants have denied any knowledge of the activities of their fellow Appellants or other athletes or of the items possessed by them (other than the haemoglobinmeter). The Panel does not consider these denials to be credible and rejects them. The evidence, particularly of the cramped nature of the accommodations and of the volume of materials found with Appellants and with Hoch, as well as the regular interaction with Hoch and other coaches, indicates to the Panel that the Appellants were aware of the items that all of them collectively possessed. Tauber and Pinter argue that none of the Appellants' DNA was found on the items possessed by Hoch and that those items therefore cannot be attributed to them. However, as described above in paragraph 34, blood residue remained in the syringe found in Pinter's possession. The Panel also notes that the report of Professors Stafano and Verdian concluded that their DNA analysis was largely inconclusive due to the lack of sizeable organic samples to test. On these bases, the Panel finds that all of the Appellants have violated Article 2.8 through their participation in these activities and the resulting encouragement of the possession violations of their fellow Appellants.

75. Tauber and Pinter submit that an athlete will only violate Article 2.8 if he or she is found to have assisted, encouraged, aided, abetted, covered up or engaged in *"any other type of complicity"* specifically in relation to the ADR violation(s) of another *athlete*. According to Tauber and Pinter, an athlete could only violate Article 2.8 if the athlete specifically conspired with other athletes engaged in an ADR violation. If only such *"horizontal complicity"* could violate Article 2.8, the mere participation of an athlete in, for example, a blood doping network would not represent a violation of Article 2.8 if that athlete was unaware that other athletes were also involved in the network. This interpretation would conflict with the plain reading of the ADR and the principle under Swiss law that assistance contributing to the violations of other athletes, even if negligently provided, will trigger joint liability. In any event, in this case, given the close

proximity of the athletes living together and their common activities, the Panel is comfortably satisfied that the athletes knew what each other was doing.

76. Moreover, in light of the plain language of the second part of Article 2.8, which does not refer to athletes only, an athlete can violate Article 2.8 also through *"vertical complicity"*, by which an athlete engages in an ADR violation that is facilitated by a coach or support staff, in circumstances where that coach or support staff also similarly facilitated the ADR violations of other athletes. In such a situation, an athlete may not positively know which other athletes are also engaging in ADR violations, but by his or her common utilisation of the coach or support staff for improper means, an athlete is complicit in the ADR violations of those other athletes and also of the coach or support staff. In this context, the Panel observes that although *"complicity"* is likely to involve some degree of knowledge on the part of the person alleged to be complicit, it is not necessary that that person knew all of the people involved or all of the Prohibited Methods being used or possessed. The evidence of the regular participation of Hoch and other coaches in the athletes' activities would also show such vertical complicity.

Was There "No Fault or Negligence" or "No Significant Fault or Negligence"?

77. Tauber and Pinter contend that because each did not believe that the items in his possession could constitute Possession of a Prohibited Method, there was *"no significant fault or negligence"* within the meaning of Article 10.5.1 of the WADA Code, and that the period of ineligibility should therefore be reduced by half, as provided in Article 10.5.2 of the WADA Code.

78. *"No Significant Fault or Negligence"* is defined in Appendix 1 of the WADA Code as:

The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

79. *"No Fault or Negligence"* is defined in Appendix 1 of the WADA Code as:

The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

80. The standards for *"No Fault or Negligence"* and *"No Significant Fault or Negligence"* have been the subject of considerable CAS jurisprudence and need not be repeated here. Without attempting to restate these standards, it is clear that these exceptions are intended to protect an athlete who innocently ingests a Prohibited Substance. The circumstances of this case clearly do not fall within this intended meaning.

81. In fact, as shown above, the fault shown by all of the Appellants in possessing the materials, and likely also by engaging in a Prohibited Method, is substantial. The Appellants cannot qualify for a reduction in sanction.

Are the sanctions proportionate?

82. The ADR offences committed by the Appellants in this case are extremely serious. The fact that the Appellants engaged in these offences after the Salt Lake City affair exacerbates the seriousness of their ADR offences and illustrates that the Appellants have failed to learn from the mistakes of members of the former Austrian cross-country ski team. In these circumstances, the Appellants have shown a complete disregard for the principles of the Olympic Games and for the IOC ADR that protects the interests of all athletes at the Olympic Games.

83. The Appellants have asked the Panel to believe that each had a legitimate explanation for engaging in the relevant Prohibited conduct. As has already been identified, the Panel has found these explanations to be thoroughly inconsistent and therefore not credible, and has rejected them.

84. Further, the Appellants cannot pretend that they were merely innocent bystanders in this pattern of conduct within the Austrian cross-country ski team. They must also take responsibility for their active complicity in the ADR offences committed by them and by their fellow team members.

85. Elite athletes are constantly subject to intense pressure to succeed in their chosen disciplines. Such pressure is exerted by a number of sources, including the media, the public and the athlete's own teammates and coaches. However, even in the face of such pressure, athletes must bear the responsibility of their choices and must understand that their actions have a direct effect on their fellow athletes.

86. Although the imposition of a 10-year ban, for example, would effectively eliminate the Appellants' ability to compete as an athlete in an Olympic Games again, it would still be limited enough to allow the Appellants to return to the Olympic Games as coaches or support staff in the future. Each of these athletes were active or willing participants in a broader scheme to commit doping offences. Moreover, Appellants have shown an apparent lack of understanding of the wrongfulness of their conduct, as shown by their continued denials of such conduct. In view of these serious improprieties and collective behaviour, as compared to some prior CAS cases involving wrongful individual conduct, the Appellants should not be afforded the possibility of participating in future Olympic Games in any capacity.

87. For these reasons, it is entirely appropriate and proportionate that the Appellants be banned from all future participation in the Olympic Games.

Pinter's Counterclaim

88. In light of the above findings, the Panel is of the view that there are no grounds in support of the counterclaim made by Pinter.

The Court of Arbitration for Sport rules that:

1. The appeals filed by Johannes Eder, Martin Tauber and Jürgen Pinter against the decisions rendered on 25 April 2007 by the IOC Executive Board are dismissed.

2. The decisions of the IOC Executive Board of 25 April 2007 declaring each of the Appellants to be ineligible permanently for all future Olympic Games in any capacity are affirmed.

3. The counterclaim filed by Jürgen Pinter is denied.

(…)