



**Arbitration CAS 2009/A/2011 Stephan Schumacher v. International Olympic Committee (IOC), award on costs of 6 May 2010**

Panel: Prof. Luigi Fumagalli (Italy), President; Prof. Ulrich Haas (Germany); Mr Quentin Byrne-Sutton (Switzerland)

*Cycling*

*Doping*

*Allocation of the costs incurred by the parties in case of withdrawal of the appeal*

**In deciding which party bears the parties' costs and the measure of the contribution, a CAS panel has to take into account the outcome of the arbitration, the conduct of the parties and the financial resources of the parties. A withdrawal of the appeal, which therefore renders the decision appealed against unchallenged, is a situation which *de facto* corresponds to a dismissal of the appeal aiming at setting aside the decision; as to the conduct of the parties, a better-timed withdrawal can avoid an unnecessary preparation and counsel's costs by the respondent. Last, the panel controls if the financial resources of the respondent clearly outweigh those of the appellant.**

Mr Stephan Schumacher ("Schumacher" or the "Appellant") is an international level cyclist of German nationality, born on 21 July 1981.

The International Olympic Committee (IOC or the "Respondent") is the supreme authority of the Olympic Movement, with the primary responsibility to supervise the organization of the Summer and Winter Olympic Games.

The Appellant participated in the Games of the XXIX Olympiad, held in Beijing in 2008 ("Beijing OG") as a member of the German team. More exactly, on 13 August 2008, Schumacher competed in the Men's Individual Time Trial cycling event, ranking thirteenth.

Before the competition, on 4 August 2008, Schumacher had however to undergo a doping control, providing blood samples.

The results of the tests performed during the Beijing OG on the A-sample provided by Schumacher were reported to be negative.

The IOC however decided in January 2009 to perform further tests on the samples provided by Schumacher. Following such tests, on 28 April 2009 an adverse analytical finding was reported with respect to the A-sample.

On the basis of such adverse analytical finding, disciplinary proceedings were opened against Schumacher pursuant to Article 7.2 of the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 (the “Beijing Rules”).

On 17 June 2009 the B-sample was reported to be positive.

After an exchange of documents and the presentation of written submissions, a hearing was held on 27 July 2009 before the disciplinary commission set up by the IOC President (the “Disciplinary Commission”).

On 17 November 2009 the Disciplinary Commission, holding “*unanimously*” that Schumacher had “*committed an anti-doping rule violation pursuant to Article 2.1 of the [Beijing] Rules*”, adopted the following decision (the “Decision”):

- I. *The Athlete Stefan Schumacher, Germany, Cycling, is disqualified from the Men’s individual Time Trial event of the Beijing 2008 Olympic Games, where he had placed 13<sup>th</sup>;*
- II. *The Union Cyclist Internationale is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*
- III. *This decision shall enter into force immediately”.*

On 7 December 2009, Schumacher filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the “CAS Code”), against the IOC to challenge the Decision, starting these arbitration proceedings. The statement of appeal, drafted in German, had attached 4 exhibits, including a translation in English.

In his statement of appeal, Schumacher requested, *inter alia*, “*the transmittal of all files of the proceedings maintained at the IOC*” and “*that the proceedings be conducted in the German language*”, and specified the following request for relief:

1. *The IOC’s decision dated 17 November 2009 is to be set aside;*
2. *The athlete Stefan Schumacher is to be declared not guilty of a doping offence during the Olympic Games in Beijing;*
3. *The costs of the proceedings incurred by Stefan Schumacher in connection with the IOC’s disciplinary proceedings are to be borne by the IOC”.*

In a letter dated 15 December 2009 the IOC indicated that it did not agree that the proceedings be conducted in the German language. As a result of the IOC’s objection, therefore, the CAS Court Office, on 16 December 2009, took note that the statement of appeal had been filed also in an English translation and indicated that English would be the language of the arbitration, in accordance with Article R29 of the CAS Code.

On 15 January 2010, the Appellant filed his appeal brief, with one exhibit. In such submission, the Appellant set out the reasons for his challenge to the Decision and confirmed its requests for relief.

On 19 February 2010, the IOC filed its answer brief. IOC's brief had attached 27 exhibits.

In its answer, the IOC sought, in addition to some evidentiary measures, the following relief:

- “1. *The appeal of Mr Stefan Schumacher be dismissed.*
2. *The Appellant Mr Stefan Schumacher be ordered to paid the Respondent's cost and expenses arising out of this arbitration in an amount to be determined by the CAS Panel”.*

In a letter dated 2 March 2010 the Appellant requested to be given the opportunity to comment on the “*new facts and documents*” put forward by the IOC in its answer.

On 4 March 2010 the IOC stated that it did “*not challenge the Appellant's request to file a complementary brief, inasmuch the IOC is also granted the right to file its own observations and provide new evidence*”.

By communication dated 4 March 2010, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted.

In a letter of 17 March 2010 the CAS Court Office informed the parties that the Panel had reviewed the file and had decided to authorize a further exchange of written submissions.

On 29 March 2010 Schumacher informed the CAS that he wished to withdraw his appeal against the Decision. As an explanation of his decision, Schumacher made reference to other CAS proceedings (CAS 2009/A/1820) involving him and indicated the following:

*“The decision made by the CAS concerning the events of the Tour de France (CAS 2009/A/1820) has been accepted by all parties. Stefan Schumacher waived the review of this decision by the Federal Supreme Court of Switzerland. The suspension imposed on Stefan Schumacher by this decision runs from 28 August 2008 until 27 August 2010. As the adverse analytical findings of Mr Stefan Schumacher's samples collected during the Tour de France 2008 were announced after the Olympic Games 2008, a utilisable positive analytical result of a sample collected during the Olympic Games 2008 would not constitute a new case of its own. The suspension already imposed by the CAS would therefore also be applicable in case of adverse analytical findings during the Olympic Games 2008.*

*This inevitably means that even in case of confirmation of the IOC's decision in the present proceedings, a longer suspension cannot be imposed on Stefan Schumacher in the end. Consequently and in any case Stefan Schumacher is entitled to exercise his profession as a professional cyclist again from 28 August 2010 on.*

*Stefan Schumacher would like to look to the future and prepare himself in peace for the time after the 27 August 2010”.*

In a letter to the Panel dated 30 March 2010 the IOC took note of the withdrawal of the appeal. The Respondent however indicated that it maintained its request that the Appellant be ordered to pay the Respondent's costs and expenses arising out of the arbitration, and asked the Panel to issue a decision in that respect.

On 7 April 2010 the CAS Court Office, making reference to the correspondence exchanged by the parties, advised them of the following:

*“... a 7-day deadline upon receipt of the present letter is fixed for the Appellant to submit to the CAS Court office his position on the Respondent’s claim for reimbursement of costs, or for the parties to inform the Panel whether they have reached an agreement on the costs issue. Failing an agreement between the parties within such deadline, the Panel shall issue an award on the allocation of the costs incurred by the parties in connection with the arbitration proceedings.*

*... the Panel may request the President of the Appeals Arbitration Division to apply article R65.4 of the Code of Sports-related Arbitration (Code)”.*

On 13 April 2010 the Appellant expressed his view that *“the outcome of the proceedings was well open in the light of the pleadings exchanged by the parties”*, and therefore suggested that *“each party should bear their own costs and the costs of the arbitration proceedings occurred up to now should be shared equally”*.

On 14 April 2010 the IOC informed the Panel that it did not agree with the Appellant’s suggestion and therefore insisted in its request to the Panel that Schumacher be ordered to contribute to the Respondent’s costs. In this respect, the IOC indicated that it *“had to respond to the numerous submissions of the Appellant and seek advices from international experts since the Athlete challenged very technical findings of the decision”*.

## LAW

1. As a preliminary matter, the Panel points out that it has jurisdiction to hear the present dispute between the parties. The jurisdiction of CAS is not disputed by the parties and is provided by Article R47 of the CAS Code in combination with Article 12.2 of the Beijing Rules.
2. Furthermore, the only issue in dispute between the parties which remains to be decided by this Panel concerns the allocation of the costs incurred by the parties in these arbitration proceedings.
3. Indeed, by letter dated 29 March 2010 the Appellant withdrew his challenge against the Decision and such withdrawal was accepted by the Respondent. As a result, no relief is still being sought by Schumacher against the Decision; the Panel therefore confines itself to acknowledging the withdrawal of the appeal.
4. The IOC, however, requests to be allocated in any case a contribution towards the costs it has incurred because of Schumacher’s appeal to the CAS. The Appellant, on the other hand, indicates that it would be fair that each party bears its own expenses.
5. In that relation, the Panel notes first of all that these proceedings involve an appeal against a decision regarding an international level athlete in a disciplinary matter brought on the basis of rules providing for an appeal to the CAS. Accordingly, they have to be considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the CAS Code.

6. The rules on the costs of the arbitration proceedings concerning disciplinary cases of an international nature ruled in appeal are contained in Article R65 of the CAS Code as follows (in the version of the CAS Code in force at the time these proceedings were initiated):
  - i. pursuant to Article R65.1 of the CAS Code, disciplinary cases of an international nature ruled in appeal are free of charge, since the fees and costs of the arbitrators are borne by the CAS, except:
    - for the Court Office fee of CHF 500 to be paid by the appellant and retained “*in any event*” by the CAS (Article 65.2 of the CAS Code); and
    - “*if all circumstances so warrant*”, when the President of the Appeals Arbitration Division decides to apply Article R64.4 and R64.5, 1st sentence, to an appeals arbitration, either ex officio or upon request of the President of the Panel (Article R65.4 of the CAS Code): in this case, a deviation from the “free of charge” rule is allowed and the payment of the costs of the arbitration (including the arbitrators’ fees) can be imposed on the parties;
  - ii. pursuant to Article R65.3 of the CAS Code, the Panel decides which party bears the costs of the parties, witnesses, experts and interpreters, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
7. In light of the above, the Panel underlines that, as this is a disciplinary case of an international nature ruled in appeal, the proceedings are free: indeed, the parties incurred no expense with respect to the costs of the arbitration, i.e. with respect to the CAS services or the arbitrators’ fees, except for the minimum Court Office fee, already paid by the Appellant, which is retained by the CAS. No decision in this respect is therefore to be taken by the Panel.
8. The Panel does not find that the circumstances of the case warrant a request to the President of the Appeals Arbitration Division to apply Article R64.4 and R64.5 of the CAS Code: the appeal was filed *bona fide*, at a time the Appellant had an interest to challenge the Decision, and indicated the reasons supporting it.
9. With regard to the parties’ costs, in deciding which party bears them and the measure of the contribution, this Panel has to take into account the elements indicated in Article R65.3 of the CAS Code, as follows:
  - i. *the outcome of the arbitration*: the Appellant has withdrawn his appeal against the Decision, which therefore remains unchallenged – i.e., in a situation which *de facto* corresponds to a dismissal of the appeal aiming at setting aside the Decision;
  - ii. *the conduct of the parties*: the Panel notes that the appeal’s withdrawal was justified by Schumacher on the basis of the award rendered in the arbitration proceedings CAS 2009/A/1820. The Panel, however, notes that the award in CAS 2009/A/1820 was issued on 22 January 2010, and the appeal was withdrawn on 29 March 2010. In the meantime, the IOC filed (on 19 February 2010) its appeal brief. A better-timed withdrawal could have avoided an unnecessary preparation by the IOC of the answer brief, and the counsel’s costs relating thereto;

- iii. *the financial resources of the parties*: Stefan Schumacher is an individual, competing at the international level in the sport of cycling; the IOC is the supreme authority of the Olympic Movement, and supervises the organization of the Olympic Games. The financial resources of the IOC therefore clearly outweigh those of the Appellant.
10. In light of the foregoing, the Panel finds it to be fair that the Appellant pays a contribution, determined in the amount of CHF [...] to the Respondent, towards the expenses incurred by it in connection with these arbitration proceedings.

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

1. The withdrawal of the appeal filed by Mr Stephan Schumacher against the decision issued on 17 November 2009 by the Disciplinary Committee of the International Olympic Committee is acknowledged.
2. The procedure *CAS 2010/A/2011 Schumacher v/IOC* is terminated and deleted from the CAS roll.
3. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by Mr Stephan Schumacher, which is retained by the CAS.
4. Mr Stephan Schumacher is ordered to pay CHF [...] to the International Olympic Committee as a contribution towards the legal and other costs incurred in connection with these arbitration proceedings.
5. All other prayers for relief are dismissed.