



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1551 WADA v/ CONI, FIGC & Nicolò Cherubin

ARBITRAL AWARD

pronounced by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Judge James Robert Reid, West Liss, Great Britain
Arbitrators: Mr. Quentin Byrne-Sutton, Attorney-at-law, Geneva, Switzerland
Mr. Michele A. R. Bernasconi, Attorney-at-law, Zurich, Switzerland

in the arbitration between

World Anti-Doping Agency (WADA), Montreal, Canada
Represented by Dr. François Kaiser, Attorney-at-law, Lausanne, Switzerland

- Appellant or WADA -

and

Comitato Olimpico Nazionale Italiano (CONI), Rome, Italy

- First Respondent or CONI -

Federazione Italiana Giuoco Calcio (FIGC), Rome, Italy
Represented by Mr. Mario Gallavotti and Mr. Stefano La Porta, Attorneys-at-law, Milan, Italy

- Second Respondent or FIGC -

and

Nicolò Cherubin, Vicenza, Italy
Represented by Mr. Carlo Ghirardi, Attorney-at-law, Brescia, Italy

- Third Respondent or Player -

I. FACTS AND PROCEDURE**A. THE PARTIES**

1. The World Anti-Doping Agency ("WADA" or "the Appellant") is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.
2. Comitato Olimpico Nazionale Italiano ("CONI") is the Italian national Olympic committee which, through Giudice di Ultima Instanza in Materia Doping ("GUT"), its Panel of Judges of Final Jurisdiction on Doping Issues, determines appeals on doping matters from decisions of the Corte di Giustizia della Federazione Italiano Giuoco Calcio, the Federal Court of Justice of the Italian Football Federation ("FCJ"). At the time of drafting this Award, the denomination of some of the foregoing Italian bodies had changed, but that is of no relevance for the purposes of the present matter.
3. Federazione Italiana Giuoco Calcio ("FIGC") is the Italian football federation, i.e. the governing body of the game of football in Italy, where it is responsible for all regulatory aspects of the said sport. It is affiliated to the Fédération Internationale de Football Association ("FIFA").
4. Mr Nicolò Cherubin ("the Player") born on 2 December 1986, is a professional football player. At the time of the incident in question he was playing for the football club Reggina Calcio S.p.A. ("Reggina") though he now plays for another club, AS Cittadella Calcio.

B. BACKGROUND

5. On 31 October 2007, at the occasion of a match of the "Serie A", i.e. the top professional Italian football league, between Reggina and Livorno, the Player was one of four players, two from each club, selected to undertake a doping control. The sample taking was to be undertaken by a team of persons comprising the Doping Control Officer ("DCO") Mr. Capuzzo, Mr. Chiaramonte and Mr Giuseppe Luppino, FIGC representatives, and Mr. Miccoli, FIGC's lawyer.
6. According to WADA, the Player was correctly recorded as having arrived at the doping control station at 22:25 p.m. This is a matter of dispute. The Player's case is that he was not notified that he had been selected for testing until just before 22.55 and thereupon reported

for testing and gave the necessary sample. It is undisputed that the time of urine sampling was 22:55 p.m.

7. Following the testing, the testing team made a report. The Player disputes much of what is alleged in the report. The content of the report can be summarised as follows: After being notified of the doping control, the Player and his teammate (Mr. Novakovic) reached the doping control station. Mr. Novakovic was the first to submit to the control, while, upon authorization of the DCO, the Livorno players went to their changing room to have a shower, accompanied by the Federation's representative who never lost sight of them. While Dr. Capuzzo as DCO, Mr. Chiaramonte and Mr. Miccoli, were collecting the teammate's sample, the Player said he wanted to have a shower. But he was not authorized to do so as no one could accompany him as chaperon. In spite of this, the Player left the testing station room and went to the Reggina changing room. The DCO tried to follow him but could not enter Reggina's changing room as this had been closed. The DCO therefore lost sight of the Player for about half an hour. The Player came back to the doping-control station at 10.55 pm. He was then tested. The testing team did not then refuse to test him on the basis that he was in breach of the rules nor did they notify the Player that the test was being treated as an out of competition test. The test turned out negative. Where relevant, the Player's allegations in relation to the above chronology of events will be summarized below.
8. On 13 December 2007 the FIGC representative, Mr. Miccoli, confirmed the above account to the CONI Anti-doping Prosecutor. The Prosecutor investigated the case and on 8 January 2008, referred the Player to the FCJ. In the referring order, the Prosecutor found that articles 2.3 (Refusing or failing without compelling justification to submit to sample collection after notification) and 2.5 (Tampering or attempted tampering with any part of doping control) of the "CONI Norme Sportive Antidoping" (the "CONI Anti-Doping Rules") had not been violated but submitted that the findings of the preliminary investigation showed a "lack of co-operation" by the Player in the completion of the anti-doping procedures. The Prosecutor concluded that the athlete had violated Articles 6.2 and 6.6 of the Operating Instructions of the Anti-Doping Commission.
9. On 29 January 2008, the FCJ dismissed the charges brought against the Player. On 25 February 2008, the Prosecutor filed an appeal to the GUI, stating that the Player should be

sanctioned under Article 4.2 (subsequently re-numbered 5.2) of the Operating Instructions of the Anti-doping Prosecutor's Office. Under that provision, a *“sanction between one and six months ineligibility can be imposed on any licensed athlete who does not provide the required co-operation [...] without advancing acceptable justifications”*.

10. The nature of the appeal before GUI can be seen from the Prosecutor's submission to GUI (i.e. the "Referring Order" or "Provvedimento di deferimento" of 8 January 2008) as recorded in GUI's decision: *“According to the Anti-Doping Prosecutor's Office the decision appealed was wrong as the behaviour shown by the athlete in the case in point could have been sanctioned under a specific sanctionative provision contained in the Sports Anti-Doping Rules, that is under Article 4.2 (current Article 5.2) of the Operating Instructions concerning the activity of the Anti-Doping Prosecutor's Office previously in force. Under such rule “the sanction between one and six months’ ineligibility can be imposed on any licensed athlete who does not provide the required co-operation... without advancing acceptable justifications.”* The Prosecutor's case concluded: *“In conclusion, according to the Anti-Doping Prosecutor's Office the athlete's liability due to “lack of co-operation” in the fulfilment of anti-doping procedures had been established. In light of the remarks above, the Anti-Doping Prosecutor's Office concluded by requesting this Panel to reverse the appealed decision and to declare Mr Cherubin guilty of the disciplinary charge brought against him imposing, as a consequence, the sanction of one month's ineligibility on the footballer barring him from every match, as requested in the referring order.”*
11. The decision of GUI included the following reasoning: *“The appeal filed by the Anti-Doping Prosecutor's Office must be upheld as it is well-founded. This Panel does not share the statements made by the first-instance Federal Hearing Body according to which the athlete must be acquitted of the charge brought against him as there is no explicit sanction to be imposed as specified in the request for conviction made by the Anti-Doping Prosecutor's Office. The behaviour shown by the athlete Nicolo Cherubin in the case in point is punishable under a specific sanctionative provision contained in the Sports Anti-Doping Rules, that is under Article 4.2 of the Operating Instructions concerning the activity of the Anti-Doping Prosecutor's Office in force (current Article 5.2).”*
12. GUI concluded its reasoning as follows: *“Finally this Panel points out that establishing the “malice” of a behaviour shown by an athlete is not an unavoidable condition to establish the athlete's liability. If it had been so, the case in point would have fallen within the situations envisaged by*

Articles 2.3 (Refusing or failing without compelling justification to submit to sample collection after notification) and 2.5 (Tampering or attempted tampering with any part of doping control) of the Sports Anti-Doping Rules. In conclusion this Panel finds that the athlete's liability in terms of "fault", lying in negligence and incautiousness, has been established. This led him to violate the provisions of Articles 6.2 and 6.6 of the Operating Instructions of the Anti-Doping Commission previously in force and the sanction of 1(one) month's ineligibility must be imposed on the athlete. In light of Article 10.8 of the Sports Anti-Doping Rules, this Panel orders that the above-mentioned period of 1 (one) month's ineligibility should start today and end on April 18 2008."

13. Thus, on 20 March 2008, the GUI decided that the Player was guilty of the charge brought against him and imposed a sanction of one month's ineligibility on him in accordance with Article 4.2 of the Operating Instructions of the Anti-Doping Commission. At the pronouncement of the present Award, the Player has already served this period of suspension.

14. On 11 April 2008, the CONI sent to WADA a copy of the GUI decision.

15. On 8 May 2008, CONI sent to WADA an English translation of the decision.

C. THE PROCEDURE IN FRONT OF CAS

16. On 9 May 2009 WADA filed its statement of appeal with CAS against the decision issued on 20 March by GUI.

17. On 9 June 2008 WADA filed its appeal brief requesting the CAS to rule that:

- 1. The Appeal of WADA is admissible*
- 2. The Decision of GUI rendered on March 20, 2008 in the matter of Mr Niccolo Cherubin is set aside.*
- 3. Mr Niccolo Cherubin is sanctioned with a period of ineligibility between one year and two years, starting on the date the CAS award enters into force. Any period of suspension (whether imposed to or voluntarily accepted by Mr Niccolo Cherubin) before the entry into force of the CAS award shall be credited against the total period of suspension to be served.*
- 4. WADA is granted an award for costs."*

18. On 21 July 2008, the FIGC filed its answer with the CAS requesting "CAS to reject the

appeal filed by WADA” and to order that “all costs related to the procedure as well as the legal costs and expenses of FIGC shall be borne by the Appellant”.

19. On his answer to the appeal brief dated 21 July 2008, the Player requested CAS to:

“a) declare the appeal brought by the Office of the CONI Anti Doping Prosecutor against the decision rendered by the Federal Court of the FIGC on the 25 February 2008 to be inadmissible and as a consequence declare inadmissible and dismiss the appeal brought by WADA against the decision rendered by the GUI of the 20 March 2008:

b) in any event declare the appeal brought by WADA against the decision rendered by the GUI of the 20 March 2008 to be inadmissible for the following reasons:

(i) Article 13.2 of the WADA Code states that “a decision that an anti-doping violation was committed [or] a decision that an anti-doping violation was committed ... may be appealed exclusively as provided in Article 13.2”. Hence CAS jurisdiction is limited to hearing appeals from those specific “decisions”. In the present case however no such decision has been made.

(ii) To the extent the prosecution seeks to impose Article 2.3 of the WADA Code, that assertion was waived by the failure of the prosecution to appeal the issue from the Federal of the FIGC to GUI. It is improper and against the rules of this Court to resurrect it here.

(iii) [...] whether justified or not a tardy submission which cannot alter the outcome of the test is not a refusal a failure or an evasion of the sample collection.

(iv) The only finding arising out of the proceedings before the GUI proceeding which resulted in a sanction was the finding of lack of cooperation pursuant to the previously referenced articles 6.2 and 6.6 It is undeniably that at the time of the incident, there was no prescribed sanction for a “lack of cooperation” displayed in the course of an anti-doping control. The sanction applied by GUI was promulgated after the incident with the result that the said decision is a rank ex post facto and impermissible application. If the Player had not already served the penalty, a cross-appeal would have been filed.

(v) In any case, no sanction is warranted against a Player put in the Hobson's choice of either disobeying his employer and risk retribution or facing a WADA sanction for

conduct lacking any freedom of choice.”

20. On 26 November 2008, a hearing was held at the CAS headquarters in Lausanne.
21. At the hearing WADA was represented by the attorneys Mr. Francois Kaiser and Mr. Claude Ramoni. CONI was not represented at the hearing. FIGC was represented by the attorney Mr. Stefano La Porta. The Player was present at the hearing and was assisted by attorneys Mr. Carlo Ghirardi, Mr. Francis Grossi Jr., Mr. Vittorio Rigo, Ms. Silvia Valentini and Mr. Lucien Valloni. Ms Simona Ferrari acted as interpreter. The Panel heard oral argument from the representatives of each of the parties and heard the Player. Oral evidence was given by telephone by Mr. Michele Miccoli, Mr. Renato Capuzzo and Dr. Pasquale Favasulli, the Reggina medical officer. Each of the witnesses was invited by the President of the Panel to tell the truth subject to the consequences provided by the law. Each witness was examined and cross-examined by the parties and questioned by the Panel. After the parties' final arguments, the Panel closed the hearing and announced that its award would be rendered in due course.

D. THE PARTIES' SUBMISSIONS

i) WADA's Submissions

22. By its appeal WADA contends that the sanction imposed on the Player under the national Italian rules is immaterial. Article 4.2 shall apply in addition to the "ordinary rules" and the Player should have been charged and sanctioned under Article 2.3 of the CONI Anti-Doping Rules which provide that "*Refusing or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection*" constitutes an anti-doping rule violation. It submits that "a violation of "refusing or failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete" and that in the circumstances the Player committed an anti-doping rule violation accordingly.
23. In other words, WADA considers that the imposition of a penalty under Article 4.2 does not prevent the application of article 2.3 of the CONI Anti-Doping Rules. This is a mandatory provision of the Code, because the sanction system provided for by the World Anti-Doping Code ("WADC") is a complete set of rules. WADA refers to CAS 2005/A/922, 923, 926, WADA v. UCI, SOA, SCF, Hondo.
24. The fact that the Player had not been charged with a breach of article 2.3 before the tribunal of first

instance (where he was acquitted) or on appeal (where the breach of article 4.2 was found proved and a sanction imposed) does not prevent WADA appealing under the specific right given to it and seeking to have a penalty imposed for a breach of an article which had not previously been asserted.

25. In any event, article 2.3 was the subject of discussion before the lower tribunals and could therefore be the subject of WADA's appeal.
26. WADA had no knowledge of, or right to intervene in, the case until it was informed of the final national decision. WADA is engaged in a worldwide fight against drugs abuse in sport and in order to achieve its ends has to be strict in enforcing the relevant anti-doping rules.
27. It is essential for WADA's fight against doping in sport that it should be able to appeal in cases where a national sporting body has failed to raise the appropriate charges. The WADC has been adopted in Italy too, and such rules include stringent sanctions against those who violate them.
28. Further, according to WADA, the appealed decision was a decision in a doping case and as a result WADA has a right to appeal. WADA referred to CAS 2006/A/1153 WADA v Portuguese Football Federation & Lopes de Almeida.
29. The proper course would have been for GUI to find the Player in breach of article 2.3 and to impose the appropriate sanction, which in the absence of proof of there being no fault or negligence on the part of the Player, or no significant fault or negligence under articles 10.1.1 or 10.5.2 respectively, should be a two-year period of ineligibility, with the one-month period already served to be credited against such 24 months.

ii) FIGC's Submissions

30. On behalf of FIGC it was submitted that the Player was actually tested after the football match and the CONI Anti-doping Prosecutor formed the view that the athlete violated the then current articles 6.2 and 6.6 of the Operating Instructions of the Anti-Doping CONI Commission, but no violation of article 2.3 of Anti-Doping rules had occurred.
31. The comments to article 2.3 of the World Anti-Doping Code show that an Anti-Doping violation is committed only if and when the athlete finally refuses to be tested or avoids being tested. In this case, after not cooperating with the anti-doping officers in a timely manner – because of the events which took place in his team's changing room (and ended in the immediate dismissal of the coach of the team Mr. Ficcadenti) the Player, after 30 minutes,

went through the whole anti-doping testing which proved negative.

32. FIGC supports the appealed GUI decision and believes that the sanction provided for by the then current article 4.2 of the Operating Instructions of the Anti-Doping Prosecutor Office ("*... any registered athlete who - with no cause -fails to co-operate as requested ... may be suspended for 1 to 6 months...*") is specifically set up to punish behaviour (such as that of the Player) which does not constitute an anti-doping offence (and hence cannot be punished with the sanction of a minimum of two year suspension), but simply causes the anti-doping officers delay or practical difficulty in carrying out their duties. A delay of 30 minutes - due to specific instructions that Reggina players received by their coach - was fairly sanctioned by the GUI decision and could not justify a suspension of 2 years.

iii) The Player's Submissions

33. WADA is not entitled to seek the relief it is requesting in its appeal. Whilst nobody doubts the importance of WADA's work, an appeal cannot be used to raise a fresh case.

34. Furthermore, even if WADA was entitled to base its appeal on article 2.3, the Player was blameless because he cannot be said to have refused or failed without compelling justification to submit to sample collection or otherwise to have evaded sample collection and, in any event, the anti-doping officials failed to comply with the terms of the WADA International Standards for Testing in that the Player was never personally notified of the fact he was to be tested and was never notified of his responsibilities in accordance with article 5.4.1e).

E. ISSUES OF FACT

35. As has been stated, there was before the Panel a substantial dispute of fact as to what occurred in relation to the Player at the conclusion of the match of 31 October 2007, opposing the clubs of Reggina and Livorno.

36. In accordance with usual practice, a few minutes before the end of the game (at 22.13) Dr. Favasulli, as official representative of Reggina, was informed by an anti-doping officer of the two names of the Reggina players selected for testing. They were the Player and Nenad Novakovic, the substitute goalkeeper who was on the bench. Shortly after this communication the match ended with Livorno winning 3-0. The Player, according to his account, did not have a good game.

37. In accordance with usual practice, members of the testing team sought to approach the selected players as they left the pitch following the final whistle. There was no satisfactory evidence as to which member of the testing team was responsible for looking after the Player. Neither Mr. Capuzzo (who knew the player by sight) nor Mr. Miccoli claim to have been responsible for keeping the Player in sight until he reached the testing station and neither was able to clearly say who was responsible for the Player.
38. According to the Player's evidence to the Panel he was not approached or made aware that he was required for testing as he left the pitch or before he reached the changing room. He said that he was not very familiar with the anti-doping rules and had only once before been tested, when he was with his previous club.
39. His account to the Panel of events on the relevant evening does not accord with the opening passage of a statement he gave to the prosecutor on 17 December 2007 when he stated "*I admit I went away from the anti-doping room before providing a urine sample but deny that I did so despite having been told that I could not leave.*" He said that this statement was an error, which was corrected by the more detailed account which followed.
40. His evidence to the Panel did partially accord with what he then went on to state to the prosecutor: "*As soon as the match was over, and even prior to having been informed that I had to go to anti-doping, I went into my team's dressing room where a lively discussion was already in progress in the presence of the president, Dott. Foti, the coach Ficcadenti, and the athletic director, Riccardo Bigon. Immediately afterwards, the organization's physician, Dr. Pasquale Favasulli, told me that I had to go to the anti-doping area. However, I preferred to immediately tell the president, who had asked us, what my opinion was on the possibility that the coach might leave. The physician told me I could even have a shower, which I did. It seems to me (but I am not sure) that a federation representative was also there. Whether there was or not, immediately after my shower, I went to the anti-doping room and stayed there until one of the federation representatives went back to the Reggina dressing room with me where I was able to provide the amount of urine required.*" He went on to state that he believed that his lateness in appearing was due to the surrounding situation that was created in the dressing room and the adjacent area, which was the main reason for the delay in the communication to him by Dr. Favasulli.
41. The Player's account was to some extent supported by Dr. Favasulli's evidence to the

Panel. He stated that he managed to inform immediately and quickly Mr. Novakovic (because he had been alongside him on the bench when he received notice of the identity of the players to be tested) of the requirement that he should go to the testing station, but that he did not manage to make contact with the Player as the teams came off the field. By the time he had accompanied Mr. Novakovic to the testing station and had returned to the corridor the Player had already entered the dressing room with all other players and the door had been closed.

42. Dr. Favasulli confirmed that there has been a fairly chaotic situation in the corridor, as the coach had requested in shouting terms all the players of his team to enter into the wardrobe. Dr. Favasulli declared that when he reached the dressing room he was unable to get in because the coach was inside engaged in a heated discussion with the team. He entered the dressing room a few minutes later, when the President of the Club arrived and was able to have the door opened. After some minutes during which the President confronted all the players with the outcome of the match, its consequences for the club and asked each of them to comment on the position of the coach, Dr. Favasulli was able to mention to the Player that he was due for the anti-doping control. Dr. Favasulli could not recall whether he told the Player he could have a shower but he told him that he had been selected for testing and when the discussion with the President was over he accompanied the Player to the testing station.
43. The contemporaneous record of the testing process signed by Mr. Capuzzo, Mr. Miccoli and Mr. Lupino records the Player as having attended at the testing station at 22.25 and as having immediately absented himself until 22.55. The form records that the Player "went of his own initiative to dressing room" without a chaperon. By contrast the two Livorno players were recorded as having presented themselves at 20.21 and then gone with a chaperon (Mr. Luppino) to shower.
44. There is a comment section at the end of the report which is completed in these terms:
"Communication: I wish to point out that after having entered the anti-doping room at 10:25 PM, the soccer player Nicolò Cherubin left of his own initiative without permission from the DCO when everyone was tied up with the [anti-]doping procedures. Cherubin remained locked in the dressing room together with the other team members and the coach. He then came back in at 10:55 PM." Dr. Favasulli is shown as having signed the

report on behalf of both Reggina players.

45. In his statement to the Prosecutor on 13 December 2007 Mr. Miccoli said that while Mr. Capuzzo, he and Mr. Chiaramonte were busy in the specimen collection operations with Novakovic, the Player said that he wanted to go have a shower but *"never did we give him permission, given that none of us could leave in order not to lose sight of him."* He stated that *"Despite this clear refusal, [the Player] left the area and went to the Reggina dressing room."* Mr. Miccoli said that he asked Mr. Chiaramonte to follow the Player but he was unable to do so as the door to the dressing room had been locked and his requests to come in were ignored. Chiaramonte returned to the anti-doping area immediately, reporting what had occurred and that he had therefore lost visual contact with the Player.
46. The Player returned to the anti-doping area of his own initiative at 22.55 and during this half hour, Mr. Luppino, who had returned to the room with the Livorno players, also tried unsuccessfully to enter the Reggina dressing room, stating that an animated discussion was under way between some players and the coach. When the Player returned to the anti-doping area, he was very upset (like all the others on the Reggina team). He said nothing about the reasons for his behaviour, nor did the anti-doping team request further explanations from him. Mr. Miccoli observed that the Player had in fact had a shower. Mr. Miccoli confirmed that the atmosphere in the corridor and in the Reggina dressing room was very tense because the anti-doping team could hear arguing and even yelling. Immediately afterwards the news spread that the coach Mr. Ficcadenti had been released.
47. In his oral evidence to the Panel Mr. Miccoli adhered to his statement to the prosecutor. He stated that "we" refused to allow the Player's request to leave the area because there was no one to chaperon him, but did not state that he personally uttered the words of refusal.
48. Mr. Capuzzo in his evidence to the Panel was not able to enlarge on what Mr. Miccoli had said. He confirmed that the Player had attended the anti-doping station but stated he did not himself refuse the Player's request to go and have a shower. He was at the time concerned with supervising the testing of Mr. Novakovic and therefore did not speak directly to the player.

II. IN LAW

A. JURISDICTION

49. According to art. R47 of the Code of Sports related Arbitration (the "Code"):

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide ... and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body."

50. Under that provision, CAS has jurisdiction in the present matter provided the rules governing CONI and FIGC so provide and if WADA has exhausted the legal remedies available to it.

51. The Panel finds the above conditions of art. R47 of the Code are met.

52. The WADC was incorporated into the CONI Rules and according to arts. 13.2.1 and 13.2.3 thereof, decisions regarding anti-doping violations "*may be appealed exclusively to the Court of Arbitration for Sport*" and WADA is listed among the organizations entitled to appeal.

53. According to art. 13.2 of the CONI Rules, decisions subject to appeal include decisions "that an anti-doping rules violation was committed" and decisions "that no anti-doping rule violation was committed". Therefore, it is irrelevant which of the anti-doping provisions of the CONI Rules the GUI applied for the CAS to have jurisdiction. It is sufficient that the GUI took the appealed decision and that it decided either that an anti-doping violation was committed or that none was committed. In this case, the GUI found that none of the anti-doping violations provided in the "Libro Primo" had been committed but that several anti-doping violations provided in the "Libro Secondo" had been committed, thus the conditions of art. 13.2 are fulfilled.

54. Furthermore, article 2.26 of the GUI Rules stipulates that "*All decisions adopted by the GUI can be appealed from by the interested parties to the CAS, in conformity with its procedure, within 30 days from the communication of the reasoned decision*" and article 3

of the Operating Instructions of GUI provides that its decisions must be notified not only to the parties but also to WADA. That duty of GUI to notify WADA ties in with the purpose of art. 13.2.3 of the CONI Rules implementing the WADC, which is to provide WADA with the right to appeal against final decisions relating to anti-doping violations.

55. For the foregoing reasons, the Panel considers that CAS has jurisdiction.

B. APPLICABLE LAW

56. Article R58 of the CAS Code provides the following:

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

57. In the present matter, both parties have invoked the "Norme Sportive Anti-doping" of CONI (the "CONI Rules"). Consequently, such regulations shall be applied and Swiss law shall be the governing national law.

58. Since the corresponding parts of the CONI Rules are a literal translation of the WADC, which has been incorporated into the CONI Rules, any references hereinafter to provisions of the WADC therefore simultaneously constitute a reference to the corresponding provisions in the CONI Rules, and vice versa.

59. The CONI Rules include, inter alia, a "*Libro Primo*" (an Italian translation of the "WADC") and a "*Libro Secondo*". The *Libro Secondo* encompasses: the "*Istruzioni operative della Commissione Anti-doping – Comitato per Controlli Anti-doping*" (hereinafter the "Procedural Guidelines of the Anti-doping Control Committee", the "*Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio di Procura Antidoping*" (hereinafter the "Operating Instructions of UPA") and the "*Istruzioni operative di Ultima Istanza in materia di doping*" (hereinafter the "Operating Instructions of GUI").

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1551 WADA v/ CONI, FIGC & Cherubin – page 15

C. THE PANEL'S FINDINGS

60. Given the parties' respective submissions and prayers for relief, the two main issues raised are whether the conditions are met to find a violation of article 2.3 and whether in the circumstances of this case it is admissible for WADA to invoke article 2.3 on appeal.
61. In relation to the possible violation of article 2.3, on the basis of the written and oral evidence presented to the Panel, the Panel is comfortably satisfied (to use the terminology of Article 3.1 of the WADC) of the following matters.
62. It has not been established when and in what form the Player was made aware that he was required to attend for doping testing. However, the Panel does not doubt the contemporaneous record showing his presence at the anti-doping station at 22.25 as confirmed by the testimony of Mr. Miccoli and Mr. Capuzzo, so obviously he must have learnt from some source that he was to proceed to the control station.
63. Based on the evidence submitted, the Panel is not satisfied to the required standard that at 22.25 the Player was told or directed not to leave the anti-doping station in a manner which enabled him to understand that he would be in breach of his duties if he did so.
64. Mr. Capuzzo never spoke to the Player and neither Mr. Luppino nor Mr. Chiaramonte gave evidence. Although Mr. Miccoli stated "we" refused permission, he did not state that it was he who spoke to the Player. It is to be noted that in his statement to the prosecutor he says "never did we give permission" rather than "we refused permission", and the expressions used in the initial report form was "He went of his own initiative" and "[the Player] left of his own initiative without permission from the DCO" with no reference to either the Player asking for permission or being refused permission. Although in his statement to the Prosecutor Mr. Miccoli went on to say that "Despite this clear refusal" the Player left the anti-doping station, the Panel finds the evidence given is not sufficient to satisfy it comfortably that the Player was unequivocally refused permission rather than just deciding to do so and not obtaining permission to do so. The Player's actions has to be seen against the background that according to the Report he arrived and left the doping control room within the same minute and that the two Livorno players had been permitted to go to shower, albeit accompanied by Mr. Luppino, and that the three officials left at the

anti-doping station when the Player left were apparently all busy with Mr. Novakovic's sample.

65. At the conclusion of the discussions in the changing room the Player returned to the anti-doping station, at 22.55, and gave the appropriate sample. The sample was tested and the test result was negative. There is no suggestion that the testers treated the sample as anything other than an ordinary in competition sample. Further, the testers did not face the Player with the facts around his behaviour.
66. For the above factual reasons, the Panel considers that in the particular circumstances of this case, and contrary to the factual findings of another CAS Panel in the recent award of 29 January 2009 in the case 2008/A/WADA v CONI, FIGC, Mannini & Possanzini, liability under article 2.3 has not been established because it has not been proven to the Panel's comfortable satisfaction that the Player actually refused or failed in the meaning of article 2.3 to give his sample at 22.25; but rather that he left the station without having been told not to do so in terms he could readily understand as being a formal injunction linked to a possible sanction and in circumstances enabling him to believe that if he immediately returned after taking a shower rather than waiting around while his teammate was being tested that would be sufficient.
67. Given its foregoing conclusion regarding the absence of liability under article 2.3, the Panel needs not discuss the issue of whether or not that provision could in this case be invoked at-all by WADA.
68. For all these reasons, all other prayers for relief are rejected and the Appeal shall be dismissed and the appealed decision confirmed.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1551 WADA v/ CONI, FIGC & Cherubin – page 17

III. COSTS

69. Pursuant to art. R65.1 of the Code, proceedings related to disciplinary cases of an international nature ruled in appeal shall be free, except for the Court Office fee paid by the Appellant and retained by the CAS.
70. There was a request for costs on the part of WADA. Art. R65.3 of the Code provides that the Panel shall decide which party shall bear the costs of the parties, witnesses, experts and interpreters, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
71. The Panel has considered the Code provision in Rule 64.5 and determined that each party ought to bear its own costs since although the Respondents prevailed on the merits the Panel was unable to accept important parts of their contentions on fact and their objection as to jurisdiction was dismissed. Therefore, other than the filing fee paid by the Appellant, there are no costs awarded in this proceeding.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1551 WADA v/ CONI, FIGC & Cherubin – page 18

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. CAS has jurisdiction to entertain the appeal filed on 9 May 2008 by WADA against the Decision of the GUI dated 20 March 2008.
2. The appeal filed on 9 May 2008 by WADA against the Decision of the GUI dated 20 March 2008 is dismissed.
3. The Decision issued on 20 March 2008 by the GUI is upheld and is not to be set aside.
4. This award is pronounced without costs, except for the Court Office fee of CHF 500, paid by the Appellant, which is retained by the CAS.
5. All other prayers for relief are dismissed.

Done in Lausanne, 18 March 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel



Judge James Robert Reid