



Arbitration CAS 2008/A/1557 Federazione Italiana Giuoco Calcio (FIGC), Daniele Mannini, Davide Possanzini & Comitato Olimpico Nazionale Italiano (CONI) v. World Anti-Doping Agency (WADA), order of 18 March 2009

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Quentin Byrne-Sutton (Switzerland); Mr Ercus Stewart (Ireland)

Football

Request to stay the execution of a CAS award

Revision of a CAS award upon the parties' agreement

Irreparable harm

Balance of interests

Likelihood of success

1. The Swiss Private International Law Act (PILA) and the CAS Code do not provide for a review of international arbitral awards. However, if the parties agree to submit a request for revision to an arbitral tribunal directly, the latter is competent to undertake such revision under the rules which govern a revision of court decisions applied *mutatis mutandis* to a review of “international” arbitral awards. That includes the competence for the arbitral tribunal to pronounce itself on a request for stay tied to the revision it has been asked to examine.
2. Professional footballers missing games suffer irreparable harm. It is not necessary to determine the number of games the players will miss, whether the games missed will be important games or even whether and to what extent the players will lose compensation as a result of missing games.
3. In the event that a CAS panel enters a stay of execution of a CAS award and later determines that the award cannot be changed, the players suspended as a result of the CAS award will have been able to play for a period of time during which they should have been ineligible. However, in such case the period of suspension which the players avoided as a result of the stay can be added to the suspension ordered in the award, with the result that the overall period of suspension ordered in the award will have been respected. On the other hand, if no stay is ordered by the CAS panel and the latter ultimately decides to set aside the award, the players will have missed games which they cannot recuperate. Therefore the interests of the players in a stay outweigh those of the opposite party in enforcing the rules.
4. When deciding on the revision of an award, the CAS panel applies a dual test: first, the panel determines whether the revision is admissible and, second, whether the application of the new facts/evidence should lead to a modification of the initial award. As to the admissibility of the revision, the panel has to check whether the new

facts/evidence existed at the time of the initial award, whether the claimants are able to prove that they were unable to produce the alleged new facts/new evidence in the previous proceedings and whether the new facts are “relevant” and “conclusive” in the sense that they could likely lead to a modification of the initial award on the merits. If the answer to those questions depend in part on the evidence to be produced by the claimants, it would be speculative to make an assessment of the chances of success before examining all the evidence.

Federazione Italiana Giuoco Calcio (“FIGC”) is the Italian Professional Football Association which groups Italian football clubs.

Daniele Mannini and Davide Possanzini are professional football players (“Players”) who were registered with Brescia Calcio S.p.A. (“Brescia”) at the point in time relevant in these proceedings.

Comitato Olimpico Nazionale Italiano (“CONI”) is the Italian National Olympic Committee which represents all national sport associations including FIGC.

The World Anti-Doping Agency (“WADA”) is a foundation formed by the Olympic Movement and Public Authorities whose aim is to promote and coordinate the fight against doping in sport.

Pursuant to a decision of CONI’s Giudice di Ultima Istanza (“GUI”) dated 20 March 2008, the Players were suspended for 15 days from participation in all competitions or activities authorized or organized by FIGC because of a delay in providing blood and urine samples on the occasion of a doping control on 1 December 2007.

On 16 May 2008 WADA filed with the Court of Arbitration for Sport (“CAS”) an appeal against the decision issued on 20 March 2008 by GUI. According to WADA, the Players had “unduly refused to submit to urine sample collection on December 1, 2007” and should be sanctioned according to Article 2.3 of the World Anti-Doping Code (“WADA Code”).

A hearing took place in Lausanne on 23 October 2008.

On 29 January 2009 the CAS announced its award (“Award”). The holding of the Award reads as follows:

- “1. *The Appeal filed by the World Anti-Doping Agency on 16 May 2008 against the decision issued on 20 March 2008 by the Judges of Final Jurisdiction on Doping Issues of CONI is partially upheld.*
2. *The decision issued on 20 March 2008 by the Judges of Final Jurisdiction on Doping Issues of CONI is set aside.*
3. *A suspension of one year is imposed on Mr Daniele Mannini and Mr Davide Possanzini commencing on the date of this decision, less the period of fifteen days already served.*
4. *All other motions or prayers for relief are dismissed.*

5. *This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by the World Anti-Doping Agency, which is retained by the CAS.*
6. *Each party shall bear its own costs”.*

By facsimile dated 12 February 2009 the FIGC filed with CAS a “Request for Arbitration” asking “for a new arbitration on this matter”. FIGC – and with it the players Mannini and Possanzini (hereinafter the “Players”) – contends that new facts and/or new evidence “were made available” and that “if this new evidence had been known to the Panel who delivered the Award, their decision would have been different”. More particularly, FIGC argues inter alia that the Players’ delay in attending the test was clearly tolerated by the FIGC officers and that as a result of the Anti-Doping officers’ and the Player’s interpretation of post-game doping tests as “advance notice tests”

“...normally neither the athletes selected for doping test nor the anti-doping officers paid much attention to the timing and conduct between the end of the match, the test notification and the test itself”.

In the words of the attorney for the player Mannini in his 12 March 2009 submissions there was “a long-standing, constant and uniform practice” to consider post-game doping tests

“advance notice tests which did not require any direct control of the athletes by the anti-doping officers between the notification and the test”.

According to the FIGC and the Players, the above facts and further corroborating facts became known to them only after the Award was issued on 29 January 2009.

On the foregoing basis, the FIGC and the Players request CAS to set aside the Award and to rule that no Anti-Doping Rule violation was committed (FIGC Request for Arbitration dated 12 February 2009).

The FIGC and the Players also request CAS to order, as a preliminary measure, a stay of execution of the Award in order to allow the Players to continue their professional career. According to the FIGC and the Players,

- the fact that the Players will be unable to play any matches would cause them a harm which is not capable of being undone if the Panel should eventually set aside the Award, and which is thus potentially “irreparable”,
- in view of the new facts/new evidence their Request for Arbitration will more likely than not succeed on the merits, and
- the Players’ interests clearly outweigh those of WADA. They argue that in the event the Award is confirmed the time of suspension not served during a stay of the execution can be added at the end of the suspension ordered in the Award. Conversely, should the Award be set aside, the time/games missed after the effective dated of the Award until the date of a new award cannot be recuperated.

In its replies of 5 and 12 March 2009 WADA submitted in substance that it is not accepting a new arbitration to be triggered, but is willing to allow the same Panel to decide whether there are any new allegations and evidence allowing to reopen the case for revision on the merits. WADA concluded,

among others, “[...] that none of the additional documents or allegations filed or made by FIGC or the players can permit to reconsider the case” and that “Inasmuch, as none of the evidence produced by FIGC should lead to a reconsideration of the case, WADA supports that the request for provisional measures should be dismissed”.

LAW

CAS Competence for the Motion to Stay the Execution of the Award

1. Since the seat of this arbitration is in Switzerland and since the FIGC, the Players and CONI are all neither domiciled nor habitually resident in Switzerland, the Swiss Private International Law Act (“PILA”) applies to this arbitration (Article 176 para 1 PILA).
2. The PILA and the CAS Code of Sports-related Arbitration (the “CAS Code”) do not provide for a review of international arbitral awards. However, it is undisputed¹ that if the parties agree to submit a request for revision to an arbitral tribunal directly, it is competent to undertake such revision under the rules which govern a “révision” of court decisions applied mutatis mutandis to a review of “international” arbitral awards. That includes the competence for the arbitral tribunal to pronounce itself on a request for stay tied to the revision it has been asked to examine.
3. The Panel finds that the Parties to this arbitration have agreed in substance that it has jurisdiction to examine whether there are any new facts and allegations which would allow it to reconsider the case, i.e. to determine whether there is any ground for a revision of the Award, and to pronounce itself on the corresponding request for provisional measures (see also CAS 2000/A/270 & CAS 1999/A/235; cf. RIGOZZI A., *L’arbitrage international en matière de sport*, Basle 2005, paras. 1398-1399, p. 706 f.).
4. As a result, the Panel shall hereby rule on the request for a stay of the execution of the Award.

Stay of Execution

5. According to established CAS case law three issues have to be considered when deciding on a request to stay the execution of a decision (CAS 2004/A/578; CAS 2000/A/274, published in the Digest of CAS awards II, p. 757; CAS 98/200 pp. 38-41; CAS 2003/A/523, paragraph 7.4; CAS 2004/A/780; CAS 2005/A/916, order of 23 August 2005):
 - whether the measure is useful to protect the requesting party from irreparable harm,
 - whether the interests of the requesting party outweigh those of the opposite party, and

¹ Cf. ATF 118 II 199.

- the likelihood of success on the merits.
6. These three conditions will be dealt with in turn:
 7. Since the effective date of the Award the Players have missed several games of the teams to which they are contractually bound, and they will miss a number of further games if the execution of the Award is not stayed.
 8. The Panel finds that missing games is harmful for professional footballers (CAS 2004/A/691 and CAS 2007/A/1672). In the circumstances of this case, the Panel does not have to determine the number of games the Players will miss, whether the games missed will be important games or even whether and to what extent the Players will lose compensation as a result of missing games. Therefore, the Panel deems the first condition for a provisional stay to be met.
 9. The second test consists of determining whether the interest of the Players in having the execution of the Award stayed outweighs those of WADA in enforcing the provisions of the Anti-Doping Rule regulations.
 10. In the event that the Panel enters a stay of execution of the Award and later determines that the Award cannot be changed, the Players will have been able to play for a period of time during which they should have been ineligible. However, in such case the period of suspension which the Players avoided as a result of the stay can be added to the suspension ordered in the Award, with the result that the overall period of suspension ordered in the Award will have been respected.
 11. On the other hand, if no stay is ordered by this Panel and the Panel ultimately decides to set aside the Award, the Players will have missed games which they cannot recuperate (CAS 2003/O/482, CAS/2004/A/780, CAS 2006A/1141 and CAS 2008/A/1453).
 12. For the above reasons, the Panel finds that the interests of the Players in a stay outweigh those of WADA in enforcing the rules.
 13. The Panel is thus left with determining the chances of success on the merits in order to decide whether a stay of the execution of the Award can be entered.
 14. When deciding on the revision of the Award under the requirements laid down by the law² and the precedents of the Swiss federal tribunal³, the Panel will have to apply a dual test:
 - First, it shall have to determine whether the revision is admissible, in light of the following conditions:
 - Did the alleged new facts/new evidence exist at the time of the Award (*“faits nouveaux anciens”*)?,

² Loi sur le Tribunal Fédéral, art. 123 para. 2a.

³ Cf. ATF 11.05 1999 [Bull. ASA 2000.p. 326, RSDIE 1999, p. 608, Yearbook 2001, p. 299]; ATF 09.07.1997 [Bull. ASA 1997 p. 506, RSDIE 1998 p. 588]; ATF 02.07.1997 [Bull. ASA 1997, p. 494, RSDIE 1998, p. 580].

- Are the Claimants able to prove that they were unable to produce the alleged new facts/new evidence in the previous proceedings without any negligence on their part?
 - Are the alleged new facts/new evidence “relevant” and “conclusive” in the sense that they could likely lead to a modification of the award on the merits?
 - Second, if the three above requirements are met, the Panel will have to decide whether the application of the new facts/new evidence in question in fact lead it to modifying the original Award.
15. In the circumstances of this case, the answer to the questions raised in 14 first indent above depends in part on the evidence to be produced by the Claimants in the course of the proceedings. Even though the Panel does have doubts with respect to the admissibility of certain elements, it would be speculative for it to make an assessment of the chances of success before examining all the evidence. For this reason the Panel should put more weight on the other two tests (“irreparable harm” and “balance of interest”) which, as indicated above, clearly speak in favour of a stay.
16. It stems from the above that this order to stay cannot be interpreted as an indication of how the Panel will decide on the admissibility of the revision, or as any indication of its view on the chances of success on the merits. The Panel simply wishes to minimize the harm inflicted on the Players in the event that the proceedings ultimately led to an Award in the Players’ favour, bearing in mind that the parties agreed that the Panel could examine the admissibility of a revision on the merits.

The Court of Arbitration for Sport, ruling in camera, pronounces:

1. The application by Federazione Italiana Giuoco Calcio, Daniele Mannini and Davide Possanzini for a stay of the execution of the award issued on 29 January 2009 by the Court of Arbitration for Sport is upheld.
2. The costs deriving from the present order will be determined at the end of the revision proceedings.