

CAS 2008/A/1557

AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Dr Dirk-Reiner **Martens**, Attorney-at-Law, Munich, Germany
Arbitrators: Dr Quentin **Byrne-Sutton**, Attorney-at-Law, Geneva, Switzerland
Mr Ercus **Stewart SC**, Barrister, Dublin, Ireland
Ad hoc Clerk: Mr Andreas **Zagklis**, Attorney-at-Law, Athens, Greece.

in the arbitration between

Federazione Italiana Giuoco Calcio (FIGC)

Represented by Mr Mario Gallavotti, Attorney-at-Law, Rome, Italy and Mr Antonio Rigozzi, Attorney-at-Law, Geneva, Switzerland

Daniele Mannini

Represented by Messrs Fabio Lattanzi and Paolo Rodella, Attorneys-at-Law, Rome, Italy and Mr Gianpaolo Monteneri, Zurich, Switzerland

Davide Possanzini

Represented by Mr Carlo Antonio Ghirardi, Attorney-at-Law, Brescia, Italy

Comitato Olimpico Nazionale Italiano (CONI)

and

World Anti-Doping Agency (WADA)

Represented by Messrs François Kaiser and Claude Ramoni, Attorneys-at-Law, Lausanne, Switzerland

1. Introduction

- 1.1 Federazione Italiana Giuoco Calcio ("FIGC") is the Italian football federation which groups Italian football clubs.
- 1.2 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.
- 1.3 Comitato Olimpico Nazionale Italiano ("CONI") is the Italian National Olympic Committee which represents all national sport associations in Italy, including FIGC.
- 1.4 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.
- 1.5 Pursuant to a decision of CONI's Judges of Final Jurisdiction (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.
- 1.6 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 and received by WADA on 21 April 2008. 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").
- 1.7 On 29 January 2009 the Panel rendered its award ("First Award"). The holding of the First 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.*"

1.8 Following notification of the First Award, on 12 February 2009 the FIGC filed with CAS a "Request for Arbitration" ("the Request") asking *"for a new arbitration on this matter"*. FIGC – and with it 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"*. The FIGC and the Players also requested CAS to order, as a preliminary measure, a stay of execution of the First Award in order to allow the Players to continue playing.

1.9 On 18 March 2009 the Panel issued its Order on the issue of preliminary measures ("the Order"), ruling that

"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."

1.10 Therefore, the Panel shall now decide on the Request, after having heard the positions and evidence presented by the Parties.

2. Facts and Proceedings before CAS

2.1 As a preliminary matter, the Panel refers to the facts as established in the proceedings which led to the First Award. Their evaluation under the scope of evidence presented after the issuance of the First Award, to the extent necessary, will be dealt with when discussing the merits of the Request.

2.2 On the occasion of a regular season game of Serie B of FIGC on 1 December 2007 between Brescia and A.C. Chievo Verona ("the Game") the Players were drawn to undergo a doping control.

2.3 In keeping with the practice in Italy for doping controls during football games, the official notification of the Players' selection for Sample collection was made to the Players' team representative in the technical area.

2.4 In this case the team representative who received the notification in the technical area on behalf of the Players was the Brescia team doctor Diego Giuliani ("Dr. Giuliani"), who had the responsibility of informing the Players thereof at the end of the game.

2.5 Thus, at the end of the Game at approximately 17.45 hrs the Players were advised by Dr. Giuliani that they had to report immediately to the doping-control station. This occurred as the Players left the pitch and were on the steps leading to the corridor where the dressing room was situated.

- 2.6 The foregoing notification was confirmed in the Players' written submissions in the following terms:
- *“At the conclusion of the match, as the Player was coming off the pitch, he was advised by the team doctor, Dott. Diego Giuliani, that he had been selected to submit to an anti-doping control and that he should report to the anti-doping station”* (written submission of Davide Possanzini of 21 July 2008);
 - *“Mr Mannini, at the end of the home match, lost by the club, was informed by the deputy assistant of Brescia, Mr. Diego Giuliani, that he was selected, jointly with Davide Possanzini, to undergo to the anti-doping control; ... the two players duly proceeded towards the anti-doping room...”* (written submission of Daniele Mannini of 21 July 2008).
- 2.7 Mr Possanzini had already described this sequence of events during his examination by the Doping Prosecution Office on 19 December 2007, when he declared: *“...at the end of the game, as soon as I left the field, I was informed by Brescia team’s doctor, Dr. Diego Giuliani, that I had been selected for the doping control and that I had to go to the doping testing room immediately”*.
- 2.8 The FIGC Anti-Doping Representatives, Mr Vincenzo De Vita and Mr Riccardo Miadoro were waiting with Dr. Giuliani and then followed the Players into the corridor in order to keep them in sight. In that respect, Mr Possanzini declared at the hearing on 23 October 2008 that he remembered seeing on the steps an official whose function he recognized because of the person’s badge. In the official report signed on 1 December 2007 by the two foregoing representatives, it is stated that: *“At 5:45 PM, the Brescia official representative was duly notified, in his own technical area, that the players selected for the anti-doping operations were Messrs. Mannini and Possanzini. The two players were followed in their locker room by the anti-doping officials ...”*. Both Players’ declarations in front of the Doping Prosecution Office on 19 December 2007 confirm in substance that they were in sight of the Anti-Doping representatives when reaching the dressing room, since both of them declare having seen an inspector being invited into the dressing room.
- 2.9 As the Players were walking towards the doping control station they were intercepted by the team coach and the President of Brescia and were instructed to immediately proceed to the Brescia dressing room instead of the doping control station because an important team meeting had been scheduled in view of Brescia's third consecutive defeat. The Players did as they were told and entered the dressing room for a meeting which lasted somewhere between 10 and 25 minutes.
- 2.10 Mr De Vita was invited to join the Players in the dressing room, but when he tried to enter he found the door blocked from the inside so that he had to wait outside until after the meeting. During that time the Players were not under visual control of doping control officials.

- 2.11 At the end of the team meeting, approximately 35 minutes after the end of the Game, the Players proceeded to the doping control station and gave blood and urine samples. The analysis of the samples did not reveal the presence of any prohibited substance.
- 2.12 The Players' case was initially examined by the Ufficio di Procura Antidoping ("UPA"), which concluded that the Players had no intention to avoid the doping control and that thus the Players' behaviour would not fall under Article 2.3 of the WADA Code. However, according to the UPA, the Players were guilty of non-cooperation with the anti-doping officials and were thus subject to sanctions according to Articles 6.2 and 6.6 of the "Istruzioni Operative della Commissione Antidoping" (hereinafter the "IOCA") and Article 4.2 of the "Procedimento disciplinare e Istruzioni operative relative all'attività dell' Ufficio di Procura Antidoping" of CONI (hereinafter the "PIUPA"; jointly with the IOCA referred to as the "Istruzioni").
- 2.13 On 29 January 2008, the Court of First Instance of the FIGC acquitted the Players considering that there was no sanction provided for in the Istruzioni for the Players' behaviour. In particular, the Court found that the wording of Article 4.2 of the PIUPA did not provide a basis for sanctioning a violation of Articles 6.2 and 6.6 of the IOCA.
- 2.14 On 20 March 2008, upon appeal by the UPA, the GUI set aside the first-instance ruling and imposed a sanction of 15 days of ineligibility on the Players for a violation of several anti-doping rules contained in the Istruzioni. More specifically, it found that Articles 6.2 and 6.6 of the IOCA and Article 4.2 of the PIUPA had been violated. The GUI decision does not provide express reasons for not applying Article 2.3 of the WADA Code (hereinafter "Article 2.3"), but in its discussion refers to the Players' brief filed with GUI on 12 March 2008 in which they argue that "...*lacking facts that could constitute violations as per Article 2 of WADC, that is aimed at evading sample collection, the conditions to initiate disciplinary proceedings were not met*" and request in the alternative "... *subordinately this Panel to apply article 10.5.2 of WADC, imposing fifteen days' ineligibility on the athletes barring them from every match*".
- 2.15 On 16 May 2008 WADA filed with 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.
- 2.16 A hearing took place in Lausanne on 23 October 2008.
- 2.17 On 29 January 2009 the Panel rendered the First Award.
- 2.18 On 12 February 2009 the FIGC filed the Request.
- 2.19 On 17 February 2009 the Players agreed to the Request filed by FIGC.
- 2.20 On 18 February 2009 WADA informed CAS that it had no objection that the same Panel who rendered the Award in CAS 2008/A/1557 examines whether there is any

ground to re-open the case and furthermore noted that if the Panel would establish that such grounds existed, WADA would abide by such decision.

- 2.21 On 18 March 2009 the Panel issued its Order on the issue of preliminary measures.
- 2.22 The Panel held a hearing on 3 April 2009 at the CAS Court Office in Lausanne to deal with the Request. The following persons gave evidence before the Panel:
- Daniele Mannini;
 - Davide Possanzini;
 - Dr Matteo Frameglia, anti-doping officer;
 - Prof Giuseppe Capua, President of the FIGC Anti-Doping Commission;
 - Prof Piero Volpi, Italian Football Players Union's Representative to the FIGC Anti-Doping Commission;
 - Luigi Corioni, President of Brescia.
- 2.23 At the end of the hearing, the parties, after making submissions in support of their respective requests for relief, confirmed that they had no objections to raise regarding their right to be heard and that they have been treated equally and fairly in the arbitration proceedings.
- 2.24 By letter dated 14 April 2009 the Players filed a petition challenging Dr. Quentin Byrne-Sutton as arbitrator. Following written submissions by all parties and the arbitrators concerned, on 27 May 2009 the Board of the International Council of Arbitration for Sport issued its "Decision on a petition for challenge of an arbitrator", ruling as follows:

"The petition for challenge against Mr Quentin Byrne-Sutton as arbitrator, filed by the Players Mannini and Possanzini, and supported by the FIGC, is rejected."

3. The Parties' submissions

3.1 The positions of the parties are summarised as follows:

3.2 FIGC, Mannini, Possanzini

3.2.1 FIGC and the Players submit that by virtue of FIGC's Request, the Players' submissions dated 5 March 2009 and WADA's letter dated 18 February 2009 the parties have concluded a new arbitration agreement which authorizes the Panel to "re-open" the

proceedings and decide the case on the basis of new evidence; thus, there is no need to apply by analogy Article 123 of the “Loi sur le Tribunal Fédéral” (the “Article 123”)¹ for these proceedings.

3.2.2 In the event the Panel were to decide to apply Article 123, the standard of diligence mentioned in the Order for preliminary measures (see paragraph 4.1 of the Order) was set too high and not in accordance with the jurisprudence of the Swiss Federal Tribunal (“the SFT”). In cases where the evidence was really compelling, the SFT did not apply the test of diligence with a view to delivering a fair result. The FIGC and the Players have now brought forward evidence that was unknown to them before the rendering of the First Award and/or could not be proven at that time.

3.2.3 FIGC and the Players further submit that there is a series of new facts and/or new evidence on the basis of which the Panel should now reach a different conclusion, i.e. that the Players did not commit an anti-doping rule violation:

- Dr Matteo Frameglia, one of the anti-doping officers involved in the relevant doping control procedure, informed the FIGC on 6 February 2009 that the tests “*were carried out without any violation of the rules by the players*” and that their delay in attending the test “*was clearly tolerated*” by the anti-doping officers.
- Dr Riccardo Miadoro, also one of the anti-doping officers involved in the relevant doping control procedure, contacted the FIGC shortly after the publication of the First Award and stated that the suspension of the Players must have been caused by a misunderstanding of the facts of the case, since a) the anti-doping officers expressed “*certain tolerance ... about test timing*”, b) the Players during the team meeting “*were visible in sight [sic] and were not doing any illegal anti-doping practices*”.
- Mr Corioni, President of Brescia, made a public statement on 2 February 2009 saying that the door of the Brescia locker room was open to allow players and staff, as well as other people on duty to enter. He had not testified in the previous proceedings because he was under suspension by the league at the time of the doping test and was thus not supposed to be in the locker room. He did not want to openly admit that he had acted in violation of the suspension order.

¹ “Art. 123 Autres motifs

1. La révision peut être demandée lorsqu’une procédure pénale établit que l’arrêt a été influencé au préjudice du requérant par un crime ou un délit, même si aucune condamnation n’est intervenue. Si l’action pénale n’est pas possible, la preuve peut être administrée d’une autre manière.

2. La révision peut en outre être demandée:

a) dans les affaires civiles et les affaires de droit public, si le requérant découvre après coup des faits pertinents ou des moyens de preuve concluants qu’il n’avait pas pu invoquer dans la procédure précédente, à l’exclusion des faits ou moyens de preuve postérieurs à l’arrêt;

b) dans les affaires pénales, si les conditions fixées à l’art. 229, ch. 1 et 2, de la loi fédérale du 15 juin 1934 sur la procédure pénale¹ sont remplies”

- The WADA Code is not directly applicable in Italian football. Article 2.3 of the Norme Sportive Anti-doping which incorporates Article 2.3 of the WADA Code into the Italian football legal framework merely refers to “justification” (“giustificato motivo”) and not to “...compelling justification”.
- Dr Frameglia and Prof Capua informed the FIGC for the first time after the First Award that in December 2007 it was a commonly held belief in Italian football that anti-doping tests after the match were considered advance notice tests, which did not require any kind of direct control over the athletes by the anti-doping officers between the notification and the test. Also, the Players’ delay is in compliance with the timeframe of 30 minutes provided for in Article 6.2 of the IOCA with respect to advance notice doping tests.
- The guidelines regarding doping-test procedures coming from the FIGC Anti-Doping Commission, which is a body fully independent from the FIGC management, and shared by clubs and players created a “*convincement among all the interested parties that appears not to be in line with the WADA [Code]*”, i.e. that chaperoning was not obligatory at all times.
- The award rendered by CAS on 18 March 2009 in the matter 2008/A/1551 WADA v/ CONI, FIGC, Nicolò Cherubin (“the Cherubin Award”) provides an interpretation of the applicable rules which, if adopted in the present case, would lead to a different result on the merits.

3.3 WADA

- 3.3.1 WADA submits that it had no objection that the same Panel who rendered the First Award examines, on the basis of the previous proceedings (including the tapes of the hearings), whether there is any ground to re-open the case. However, WADA contends that it did not agree to a new arbitration or to the case being re-opened and that it will be up to the Panel to decide whether the Request based on allegedly new evidence permits or not to re-open the case. If the Panel finds that the case should be re-opened, the Panel should then re-open a procedure on the merits.
- 3.3.2 WADA argues that the re-opening of a case already closed by a CAS award should occur only in exceptional circumstances. In any case, a party to a CAS proceeding should not be allowed to re-open a case in order to file evidence, which such party “renounced to file” in the previous proceedings. In particular, it would be contrary to the principle of good faith for a party to “renounce to file” evidence in proceedings and wait for the outcome of such proceedings before filing allegedly “new” evidence and requesting a reconsideration of the case, if the award is adverse to such party.
- 3.3.3 WADA further submits that Mr Frameglia was one of the FIGC representatives present in Brescia at the time of the doping test in question on December 1, 2007. He signed the report executed on the day of the match where it is stated that (i) the players Mannini and Possanzini were not authorized to leave the doping control station and (ii) that they failed to appear after having been repeatedly summoned. Furthermore, Mr Fra-

meglia was not in charge of notifying or chaperoning the players Mannini and Possanzini but rather the players from the other team. His statement that tests performed at the end of matches were not considered as "no advance notice" tests contradicts the clear text of the report signed by the DCOs and the FIGC representatives at the end of the football match held on December 1, 2007.

- 3.3.4 According to WADA, the statement of Mr Capua, an "indirect" witness, is contradicted by evidence filed in the previous proceedings and statements of witnesses or parties who were present on the day of the match and who have been examined at the hearing. Therefore Mr Capua's statement does not constitute new evidence, which could be admissible to reconsider the case.

4. Jurisdiction and Conditions of Revision

- 4.1 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).
- 4.2 The PILA and the Code of Sports-related Arbitration (the "CAS Code") do not provide for a review of international arbitral awards. However, it is undisputed² that 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 "révision" of court decisions applied *mutatis mutandis* to a review of "international" arbitral awards.
- 4.3 In its letter dated 18 February 2009 addressed to CAS, WADA stated that it "*has no objection that the same Panel who rendered the award in CAS 2008/A/1557 examines, on the basis of the conduct of the proceeding (including the tapes of the hearing), whether there is any ground to re-open the case. If the Panel determines that such a ground exists, WADA will abide to such decision*". FIGC and the players interpret the above reaction by WADA to the Request as an acceptance to re-open the proceedings which enables the Panel to reconsider the First Award in light of new evidence before it. WADA on the other hand submits that it merely agreed that the CAS, and not the SFT, examine the Request under the criteria laid down in Article 123.
- 4.4 On the basis of the correspondence exchanged between the Parties and CAS, the Panel finds there was no agreement by WADA to a new arbitration, as initially requested by the FIGC, but that, at a minimum, the Parties agreed that this Panel should have jurisdiction to determine whether there is any ground for a revision of the First Award. The Panel finds therefore that it is competent to examine whether the conditions for a revision are met and, if so, to revise the First Award. In doing so the Panel shall apply by

² Cf. ATF 118 II 199.

analogy and for guidance those rules which govern a “revision” of court decisions, including Article 123³ and related case law of the SFT⁴, without being bound by them in a formal sense.

4.5 In keeping with the rules governing the revision of court decisions, when deciding on the revision of the First Award, the Panel will apply a dual test:

4.5.1 First, the Panel shall determine whether the revision is admissible (“*rescindent*”), in light of the following conditions (*infra* §5):

- i) Did the alleged new facts/new evidence exist at the time of the First Award (“*faits nouveaux anciens*”),
- ii) 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?
- iii) Are the alleged new facts/new evidence “relevant” and “conclusive” in the sense that they could likely lead to a modification of the First Award on the merits?

4.5.2 Second, if the three above requirements are met, the Panel will have to decide whether the application of the new facts/new evidence should lead to a modification of the First Award (“*rescisoire*”) (*infra* §6).

5. Admissibility of the Revision (“*rescindent*”)

5.1 As mentioned above, the FIGC and the Players have the burden of proving that they were not negligent in omitting to present these facts in the previous proceedings⁵. The Panel considers that the test of diligence is fundamental and must be applied strictly because without it the doctrine of “*res judicata*” and basic principles of due process

³ Loi sur le Tribunal Fédéral, art. 123 para. 2a.

⁴ 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.]

⁵ The applicant must establish that, through no fault of its own, it was prevented from or otherwise unable to adduce the relevant facts or evidence in the course of the arbitral proceedings. This means that the applicant must show that it acted diligently in the arbitral proceedings and that it did everything it could to elucidate the facts that it deemed relevant to its case. (E. Geisinger/V. Frossard, Challenge and Revision of the Award, in Kaufmann Kohler / Stucki (ed.), International Arbitration in Switzerland – a Handbook for Practitioners, Kluwer, 2004, p.163).

would be undermined. A revision cannot be a means for parties to make up for past mistakes and any negligence in their management of their burden of proof.

- 5.2 The Panel points out that much of the evidence adduced by the FIGC and the Players after the First Award was established through witnesses. In this respect, article 44.2 of the CAS Code *inter alia* reads:

“ [...] The parties call to be heard by the Panel such witnesses and experts which they have specified in their written submissions. The parties are responsible for the availability and costs of the witnesses and experts called to be heard. [...]”

- 5.3 Thus, when applying the test of diligence, it needs to be borne in mind that each party had the procedural burden of calling its own witnesses and experts, and that in the proceedings leading to the First Award the Panel did not impose any restrictions in that regard. On the contrary, making use of its authority under Article 44.2 of the CAS Code, the Panel exceptionally authorized the hearing of witnesses via teleconference (Messrs Giorgio Cavenaghi and Vincenzo De Vita for the Appellant; Mr Serse Cosmi for the Respondent).

- 5.4 Bearing in mind this procedural framework, the Panel finds that the evidence provided by Dr Frameglia and Mr Corioni with respect to the Player's delay in submitting to doping control is inadmissible for the following reasons:

- The FIGC and the Players could have called as a witness in the previous proceedings the President of Brescia Mr Corioni who was, together with the coach Mr Cosmi, the person who required the Players to join the team meeting right after the Game. Mr Corioni clarified that he was not supposed to be present in the locker room due to serving a disciplinary ban imposed on him by the league and that a new sanction would have been imposed on him had he testified earlier before this Panel. The Panel finds that this explains why FIGC and the Players chose not to have Mr Corioni testify earlier before CAS and not why they were unable to call him as a witness.
- Dr Frameglia was one of the three FIGC anti-doping officers at the Game and he co-signed the report which gave rise to this case. From an objective point of view, FIGC and the Players were expected to have considered Dr Frameglia as a possible witness when preparing their answer to WADA's appeal, where WADA had listed the other two FIGC anti-doping officers (Messrs De Vita and Miadoro) as witnesses.

- 5.5 As regards Mr Miadoro, the Panel wishes to underline that, although he did not participate in the hearing of 3 April 2009, he had been called by WADA as a witness in the previous proceedings. During the hearing of 23 October 2008 WADA withdrew its motion to hear Mr Miadoro as a witness without any objections raised by the (then) Respondents (see para. 26 of the First Award) who are therefore not allowed to bring forward Mr Miadoro's *ex-post* statement that the First Award was based on a "misunderstanding of the facts".

- 5.6 Furthermore, the Panel finds that since WADA's appeal was based on Article 2.3 in the proceedings before the First Award, the FIGC and the Players could have invoked the alleged discrepancy between the English version of Article 2.3 and the Italian translation in the Norme Sportive Anti-Doping, i.e. between the words "compelling justification" and "justification". Instead, when addressing the issue of "compelling justification" in their submissions and oral pleadings, they did so without contending that the wording of the Italian rule might imply a different standard. Consequently, FIGC's new submission in that respect is inadmissible.
- 5.7 The Panel also notes that the Cherubin Award was published approximately two months after the First Award and therefore does not meet the first criterion for the revision of the First Award. The Panel accepts that an arbitral award may provide guidance with regards to the applicable law, which is usually a matter of proof in international arbitration; however, the Panel is of the opinion that new jurisprudence cannot, in principle, be a reason for the revision of an arbitral award. The Panel finds that the Cherubin Award is in any event not relevant to the present case, since it refers to an incident where the player in question went to the doping control station directly after the end of the game and then left without being told not to do so in terms he could readily understand as being a formal injunction linked to a possible sanction. Conversely, the focus of the present proceedings is the 35-minute delay between notification and arrival at the doping control station, during which the Players remained unattended by the chaperones.
- 5.8 The Panel shall now examine the admissibility of that part of the evidence produced to invoke that there was a lack of understanding and some confusion about the regulatory requirement of immediately proceeding to the doping control station after the Game while being continuously chaperoned.
- 5.9 With respect to that aspect of the additional evidence adduced by the FIGC and the Players, the Panel finds that the three conditions of admissibility are met.
- 5.10 Given that the FIGC and the Players are invoking a practice which allegedly prevailed in Italian football during a period between approximately 2005 and 2008, the alleged facts pre-existed the rendering of the First Award and must be admitted with respect to that condition.
- 5.11 The condition that the additional evidence is relevant enough to possibly have an impact on the outcome of the case is also met, since whether the doping-control procedures the Panel deemed applicable when rendering its First Award – in particular the duty of the Players to proceed immediately to the control station and to remain in visual contact with the chaperones – were properly applied and understood in Italian football in December 2007 at the time of the test is relevant in establishing an anti-doping rule violation.
- 5.12 In connection with the requirement of due diligence, the FIGC contends that the publication of the First Award triggered numerous reactions and, after internal discussions, the FIGC management discovered that the FIGC Anti-doping Commission, an

allegedly autonomous body, had been interpreting the in-competition testing procedures as “advance notice” tests which did not require chaperoning of the players. Further investigations revealed that professional football players in Italy were not aware of their relevant obligations and that anti-doping officers were generally tolerant with delays and chaperoning. However, the FIGC also acknowledged at the hearing that between 2005 and 2008 it had engaged in lengthy discussions with CONI regarding the issue of visual control of players before providing a sample.

- 5.13 The Panel heard extensive evidence on this issue which left it unclear whether the FIGC management was aware of the guidelines provided by its Anti-Doping Commission in meetings with chaperones and representatives of the players’ union. On balance, the Panel is unconvinced that the FIGC was entirely ignorant of the problem and could not have raised the issue at the outset of the proceedings.
- 5.14 That said, based on the testimony and statements heard during the hearing on 3 April 2009, the Panel finds that the Players themselves were unaware of such discussions surrounding the nature of the doping-control procedures, and that prior to the First Award the Players were no doubt incapable of realizing how important it was for them to explain in detail what their perception was of the nature of the doping-control they were subject to after the games and of the duties that stemmed therefrom at the time of test in December 2007.
- 5.15 Because the gap in understanding between what was legally required of the Players in terms of duties and what they allegedly believed to be their rights and obligations in undergoing the doping control after the game only became apparent to them upon receipt of the First Award, the Panel finds that the Players cannot be deemed negligent for having failed to adduce fuller evidence on this point during the proceedings that preceded the First Award.
- 5.16 For the above reasons, the Panel considers that the three conditions for admitting a revision of the case (“rescindent”) are met with respect to the additional evidence adduced about the practice and beliefs which allegedly prevailed in Italian football during a period between approximately 2005 and 2008 as to the nature and conditions of the post-match doping controls that regularly took place.

6. Revised Decision (“*rescisoire*”)

- 6.1 In determining whether or not to render a different award on the basis of the evidence and allegations admitted, the Panel shall apply the same regulations as relied on in the First Award and will examine the consequence of applying those regulations to the broader set of facts and evidence now on record.
- 6.2 Before examining the most relevant aspects of the additional evidence, the Panel recalls the following passages from the First Award, which will help to put the reasoning in this award into context:

“50. [T]he main issues the Panel has to address are [...] whether or not a violation of Article 2.3 occurred and, if so, with what consequences.

51. The Panel does not disagree with GUI's opinion that the Players acted in violation of the doping-test procedures defined in Articles 6.2 and 6.6 of the Procedural Guidelines of the Anti-doping Control Committee. However, for the reasons examined below, the Panel finds that such behaviour of the Players also amounted to the violation of a substantive anti-doping rule, i.e. of Article 2.3, and that by ignoring this fact GUI misapplied the rules. In addition, and as shall be discussed in the next section of this award, the Panel considers GUI to have applied the wrong sanction.

[...]

53. [...] It has also been established that the Players were fully conscious of the fact that they had to report to the doping control without delay and deliberately (even though perhaps reluctantly) decided to attend a team meeting to which they were called by their coach and President.

[...]

58. It has been established that the Players reported to the doping-control station with a delay of at least 25 minutes, so the question is whether this can be characterized as either a failure or a refusal to submit the sample, despite the fact that the Players did eventually present themselves to the control and delivered the samples.

[...]

59. In that relation it is relevant that according to Article 6.2 of the Istruzioni the athlete "must appear as soon as possible in the anti-doping test station and in any case by the deadline specified in the notification" and "must be in constant sight of and directly observed by the personnel" and that according to WADA's International Standard for Testing [Section 5.4.1(e)] it is the athlete's responsibility to "remain within sight of the DCO/Chaperone until the completion of the Sample Collection procedure".

60. The foregoing provisions confirm that under the meaning of Article 2.3 any behaviour whereby an athlete expressly refuses, or de facto fails to report to the control station without delay and remains without chaperone during such delay, must be deemed a refusal or a failure to submit a sample, unless there is "a compelling justification".

61. In other words, the refusal or failure is constituted by any delay in providing the sample after having been notified to do so, where the delay is not authorized by the control personnel and during which the athlete is not chaperoned, irrespective of whether the athlete submits a sample at some subsequent point in time.

[...]

73. While WADA has the burden of proving a failure or refusal to submit a sample, the burden of proving a possible "compelling justification" is on the Players.

[...]

76. [T]he Panel finds that more probably than not the Players found themselves in the dilemma of either risking an argument with the coach and /or the President if they refused to attend the meeting – since it appears credible that they had been quite forcibly summoned to and requested to stay in the meeting – or complying with those instructions and arriving late at the doping-control station.

77. However, the Panel does not consider this dilemma to be a "compelling justification" to fail to submit to a sample without delay, notably because even if they had acted against the instructions of their coach and President, from a legal perspective they would not have risked any repercussions with respect to their employment relationship, as they would have been conforming with binding rules (binding also on the coach and the President) forming a mandatory part of their engagement as professional players.

78. In that connection, there is no evidence that the Players made any serious efforts to convince their principals of the need to first go to the doping-control station and that they were in effect "sequestered" in the dressing room in the sense of being physically prevented from leaving.

79. Thus, to remain in conformity with their anti-doping duty to submit a sample – which they were well aware of, due to having undergone other In-Competition tests in the past – the Players should have resolved the dilemma by either going directly to the control station before entering the dressing room or by insisting with the coach and or President that they must first go to the control station or by insisting that a chaperone be admitted to the dressing room."

6.3 In relation to the reasoning in the First Award and given the additional evidence, the question is now whether the Players did or did not know precisely what their duties were with respect to the applicable doping-control procedure, and, if not, whether they are responsible for the lack of knowledge.

6.4 During the hearing of 3 April 2009 Prof Capua, President of the FIGC Anti-Doping Commission and Prof Volpi, Italian Football Players Union's Representative to the FIGC Anti-Doping Commission testified on the issue of chaperoning and delays in in-competition doping controls.

6.5 Prof Capua

6.5.1 According to Prof. Capua's evidence, as from 1 July 2005, when the new anti-doping regulations entered into force, the FIGC Anti-Doping Commission has been responsible, mainly in collaboration with CONI and with the assistance of its own chaperones, for coordinating and providing support for the conduct of the tests effected by the Italian anti-doping agency ("CONI-NADO"). The Commission also continues to provide training and consulting services to players and clubs, as well as to the chaperones themselves, in particular by taking care of the implementation of the anti-doping regulations and operative instructions for the conduct of the tests.

6.5.2 After having been informed of the First Award, Prof Capua felt forced to inform the FIGC's Legal Office of the interpretation which at the time of the doping control and until the end of 2007 was still generally recognized within the Italian football move-

ment, and was in fact known to CONI-NADO: in-competition tests were considered as advance notice tests, since these controls were routinely effected on the occasion of all the Serie A and Serie B matches. Only the out-of-competition tests, which were implemented starting 2004-2005 – being more infrequent and for this reason considered to be extraordinary – were actually considered controls without notice and required chaperoning.

6.5.3 Prof Capua was aware of discussions and certain clashes between FIGC and CONI-NADO on this issue, which were allegedly only resolved at the beginning of 2008, in particular following various sessions held throughout the year 2007, for the training and certification of chaperones, and after several meetings with players' and clubs' representatives.

6.5.4 Prof Capua declared that the FIGC Anti-Doping Commission, in its regular meetings with chaperones, during which operative instructions for their activities are provided, always indicated that it was preferable to ensure that the test was completed by recommending to its officials to "*favour the smooth conduct of the anti-doping tests by interpreting in a reasonable manner the possible tensions which players may be experiencing after a match*". Further, the FIGC Anti-Doping Commission would provide guidelines to the Player's Union and the latter would inform the players accordingly.

6.6 Prof Volpi

6.6.1 Prof Volpi confirmed that there was a disagreement between the FIGC and CONI on the issue of visual control of players between the time of notification and the arrival at the doping control station in in-competition tests. According to Prof Volpi, the interpretation which at that time was still prevailing within the FIGC Anti-Doping Commission and the Italian football movement was that in-competition anti-doping tests were considered essentially as ordinary tests with advance notice, for which visual contact between the anti-doping officials and the players selected for testing was not required between notification and arrival at the doping control station. The practice changed as of the beginning of 2008 but in general the players' level of awareness and education on such issues was still very low until the First Award.

6.6.2 Prof Volpi also testified that the education of players with respect to regulations and related rights and duties was carried out by the Players' Union mainly through annual meetings with the captains of the teams during the general assembly. However, aside from a video on doping procedures distributed to the teams some 3-5 years ago, there had been no special education with regard to doping-control procedures until after the First Award was published.

6.7 Dr Frameglia

6.7.1 Dr Frameglia's testimony was mainly focused on evidence which have already been considered inadmissible (see para. 5.4 above), since it related to the doping control of 1 December 2007. However, Dr Frameglia confirmed during the hearing that, although since 2005 he was aware of the rule of chaperoning the players selected for in-

competition doping control, *"one thing is theory – [another] thing is practic[e]"*. From his experience, Dr Frameglia believed that the vast majority of football players in Italy were under the impression that this was an advance-notice test where reasonable delays with no visual contact by the chaperones could occur without it having any dramatic consequences.

6.8 The Players

- 6.8.1 The Players declared in substance that they had received no formal instruction or material information about the nature of the doping-control tests they were subject to after the football matches, i.e. on the topic of whether such tests were deemed to constitute ordinary tests or out-of-competition tests, or concerning precisely what their duties were in terms of proceeding to the control station and interacting with chaperones.
- 6.9 Despite the declarations and testimony summarized above, the Panel is not convinced that the whole of what FIGC coined "the Italian football family" falsely believed the post-match doping-controls were deemed to be advance-notice tests, since, among others, the DCO's written reports tend to demonstrate the contrary.
- 6.10 However, the Panel is now convinced that on 1 December 2007, when the Players were asked to proceed to the doping-control station upon leaving the football pitch, neither of them had a clear understanding of whether this corresponded to an in-competition or to an out-of-competition doping control or of what their duties were in terms of proceeding to the station and staying in visual contact with the chaperone.
- 6.11 The Panel's finding raises the question whether the Players can be deemed responsible for their lack of knowledge and understanding of the applicable anti-doping procedures.
- 6.12 In that relation, it goes without saying that professional athletes are bound by a taxing duty to properly inform themselves regarding anti-doping regulations and procedures as well as to educate themselves with respect to any aspects they fail to understand; otherwise the purpose and application of anti-doping rules would be undermined. The fact that professional athletes are expected to behave in a responsible manner is indeed one of the cornerstones of the fight against doping and has been continuously upheld by CAS.
- 6.13 At the same time, one of the corollaries of the diligence required of professional athletes and of the severity of the sanctions attached to anti-doping violations is that athletes must be given a fair opportunity to fully inform and educate themselves, with the benefit of user-friendly tools and materials, regarding the regulations and procedures. This implies that when regulations and procedures emanate from anti-doping organizations and are enforced via a pyramid of international and national sports federations, associations and anti-doping bodies, it must be ensured at each level that the rules are effectively implemented and that efficient processes are put in place to inform and educate the athletes. Indeed, because the regulatory framework is complex and partly private and contractual in nature, any other approach would be unfair.

- 6.14 The importance of athletes having access to relevant information is implicit for example in numerous CAS awards dealing with the issue of contaminated nutritional supplements, in which the existence of readily available information is deemed an important factor in determining whether an athlete is at fault and to what degree:

“As a general remark, the Panel observes that the sporting world has, for quite some time even before the 2000 Sydney Games, been well aware of the risks in connection with using so called nutritional supplements, i.e. the risk that they may be contaminated or, in fact, “spiked” with anabolic steroids without this being declared on the labels of the containers. There have been several cases of positive tests for nandrolone which have been attributed to nutritional supplements and which have been widely publicised in the sports press. This fact was the likely motive for the IOC press releases in October 1999 and February 2000 [...] which gave an unequivocal warning about the use of imported and unlicensed supplements and their possible mislabeling.” (emphasis added by the Panel)

[CAS 20001/A/317, CAS Digest II, pp.170-171; see also CAS OG 02/001, CAS Digest III, p.579, and more recently CAS 2005/A/847, Knauss v/ FIS, paras. 7.3.2-7.3.3]

- 6.15 Furthermore, sports regulations must be clear, and the practices of the authorities that enforce them must be consistent and predictable, as underlined in the following fashion by the CAS:

“The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-apppliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders”

[CAS 94/129, USA Shooting & Q./International Shooting Union (UIT), award of 23 May 1995, CAS Digest I, pp.197-198; see also CAS 2006/A/1164 Luca Scassa and MV Augusta Motor Spa v/ FIM and TAS 2004/A/762, White Endurance Team c./ Fédération Motocycliste Suisse]

- 6.16 Given the legal principles recalled above, the Panel considers that in this case the Players cannot be deemed responsible for their lack of knowledge and understanding of the nature of the anti-doping test and corresponding duties to which they were subject on 1 December 2007.
- 6.17 Article 2.3 of WADC and the corresponding CONI rule are generic in nature, in the sense that they simply define the anti-doping violation consisting of a failure to submit to sample collection. They do not define the different types of doping controls that exist for sample collection or the related procedural requirements for the testing. Those details are found in underlying anti-doping rules.
- 6.18 In this case, the definition of the nature of the doping-control test involved, of the corresponding procedural requirements and of the DCO's, the chaperone's and the Italian football players' respective duties derives from a combination of various sections

(“Libros”) of the Norme Sportive Anti-Doping of CONI and of the WADA International Standard for Testing, in a manner which is not easy to comprehend even for a lawyer.

- 6.19 Thus, even if they do not quite represent “*a thicket of mutually qualifying or even contradictory rules*”, the applicable doping-control procedure and the exact scope of the athletes’ duties could certainly not be readily understood by the Players without them being informed and educated as to the rules by the FICG and/or by the Players’ Union. Otherwise, the Players would not “see the wood for the trees”.
- 6.20 In relation to the foregoing, the Panel finds that the declarations and testimony heard on 3 April 2009 establish beyond reasonable doubt that on the date of the doping-control in December 2007 (i) the two Players had received no manner of education or materials and did not have ready access to any source of information that would have allowed them to understand in a synthetic manner the essential and imperative elements of the anti-doping controls they were subject to and what exact duties they must abide by, (ii) the practices among chaperones/DCOs were not entirely uniform with regard to important conditions such as the immediacy with which players must report to the control station and the strictness of requiring uninterrupted visual contact, (iii) from around July 2005, when the new rules of CONI entered into force, until the beginning of 2008, the anti-doping authorities were not properly and consistently enforcing the new rules and the requirements laid down in Article 6.2 of the IOCA and Section 5.4.1(e) of WADA’s International Standard for Testing, and (iv) although a certain level of collaboration from the selected players was expected, this was far from being seen and enforced as a duty the violation of which would incur a sanction of two years ineligibility. As a result and with doping controls conducted as often as every Sunday, many football players participating in Serie A and Serie B were *bona fide* convinced that immediate reporting to the doping control station and uninterrupted visual control by the chaperones were not – in the words of Mr Mannini – “essential”.
- 6.21 For the foregoing reasons, the Panel finds that through no fault or negligence of their own the Players themselves had no more than an “impressionistic” view of what their exact duties were in terms of reporting immediately to the control station and remaining in uninterrupted visual control of the chaperones, and were far from believing that no exceptions were possible or from understanding the gravity of the sanction which would ensue in case of a breach.
- 6.22 As a result and contrary to its finding in its First Award, the Panel now finds that when the Players stopped off in the changing room for somewhere between 10 and 25 minutes before proceeding to the control station they were not conscious of the fact and could not know that despite the circumstances (losing the game and being summoned by the coach and President) this delay and loss of visual control would according to the rules be deemed a failure or a refusal to submit to the doping control.
- 6.23 Therefore, the Panel concludes that the Players cannot be deemed to have refused or failed to submit to sample collection under Article 2.3.

6.24 In reaching this conclusion the Panel does not question the validity of Article 2.3 or its strict conditions of application as determined in the First Award but only decides, for factual reasons based on the additional evidence admitted on record, that in the particular circumstances of this case Mr Mannini and Mr Possanzini cannot be deemed to have violated Article 2.3 and thereby committed a doping offense. Accordingly, the Panel considers it must retract its First Award, with the consequence that the sanction provided therein is no longer applicable and instead the decision issued on 20 March 2008 by the Judges of Final Jurisdiction on Doping Issues of CONI is confirmed.

7. Costs

7.1 (...)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Request for Arbitration filed by the Federazione Italiana Giuoco Calcio on 12 February 2009 is upheld to the extent it requested a revision of the Award rendered by the Panel on 29 January 2009.
2. The Panel's Award of 29 January 2009 is retracted.
3. 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 dismissed.
4. The decision issued on 20 March 2008 by the Judges of Final Jurisdiction on Doping Issues of CONI is confirmed.
5. All other motions or prayers for relief are dismissed.
6. (...)

Lausanne, 27 July 2009

THE COURT OF ARBITRATION FOR SPORT

Dr Dirk-Reiner Martens
President of the Panel

Dr Quentin Byrne-Sutton
Arbitrator

Mr Ercus Stewart
Arbitrator

Mr Andreas Zagklis
Ad hoc Clerk