



Arbitration CAS 2007/A/1373 FINA v/ CBDA & G., award of 9 May 2008

Panel: Mr Martin Schimke (Germany), President; Mrs Carole Barbey (Switzerland); Mr John A. Faylor (USA)

Swimming

Doping

Applicable anti-doping rules

Notion of decision

Lack of CAS jurisdiction due to the non-exhaustion of the internal remedies available to the appellant prior to the appeal

- 1. In the absence of evidence and submissions to the contrary, one can assume that the swimming national federation Rules and its doping control procedures meet the requirements of the International Federation which provide that its Anti-Doping Rules must be complied by all member federation and shall apply to each activity of FINA. Therefore, there is no doubt that the FINA Regulations, in particular, the FINA Doping Control Rules, can be deemed directly applicable to the swimmer, either on the basis of an agreement/license/“swimming passport” or by reason of his/her accreditation for the competition.**
- 2. If a letter does not, in the formal sense, and not on the face of its language have the appearance of a true and genuine “decision” within the meaning of DC Rule 13 and Art. R47 of the Code, the deciding factor to qualify a “decision” is whether the communication contains a ruling or, legally stated, an adjudication of a set of facts or circumstances – or, in the case of a denial of justice, the absence of a ruling where there should have been a ruling – in the communication.**
- 3. The CAS, acting as an appeal instance, has no jurisdiction to adjudicate a dispute, as neither a hearing nor a “decision” has been issued from which an appeal can be lodged with CAS as required under Art. R47 of the Code.**
- 4. The CAS cannot hear an appeal if all internal legal remedies have not been exhausted without effectively depriving the Athlete of his/her right to a first-instance hearing from which she would have the right to appeal.**

The Appellant, The Fédération Internationale de Natation (FINA), is the International Federation governing disciplines related to swimming.

FINA has its seat in Lausanne, Switzerland and has, *inter alia*, the objective of “*promoting the development of Swimming in all possible manifestations throughout the world, and providing a drug free sport*” (see FINA Constitution C.5. 1 and 2).

The First Respondent, The Confederação Brasileira de Desportos Acquáticos (CBDA), is the national body governing swimming activities in Brazil and a member federation of FINA (see listing of Federation Historically Affiliated of FINA in the FINA Handbook).

The Second Respondent, G., is a competition swimmer; she is member of the CBDA.

According to the introduction of the FINA Doping Control Rules:

“The FINA Extraordinary Congress in Barcelona (ESP) on 11 July 2003, decided to accept the World Anti-Doping Code (the “Code”). These Anti-Doping Rules are adopted and implemented in conformance with FINA’s responsibilities under the Code, and are in furtherance of FINA’s continuing efforts to eradicate doping in the aquatic sports. (...)

Fundamental Rationale for the Code and FINA’s Anti-Doping Rules

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as “the spirit of sport”; it is the essence of Sport; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- (...)
- *Respect for rules and laws*
- (...)

DC 1 Definition of Doping

“Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in DC 2.1 through DC 2.8”.

DC 2 Anti-Doping Rule Violations

“The following constitute anti-doping rule violations:

DC 2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Competitor’s bodily Specimen. (...)”

DC 8 Right to a fair Hearing

“DC 8.1 For Doping Controls conducted by FINA or for the consideration of additional sanctions on account of Doping Controls conducted by the IOC, or an organisation described in DC 5.2.5., FINA shall give the Competitor or other Person the opportunity for a hearing before the FINA Doping Panel as provided in Rule C 21 which respects the following principles:

- *a timely hearing;*

- *fair and impartial hearing body;*
- *the right to be represented by counsel at the Person's own expense;*
- *the right to be fairly and timely informed of the asserted anti-doping rule violation;*
- *the right to respond to the asserted anti-doping rule violation and resulting Consequences;*
- *The right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission);*
- *the Person's right to an interpreter at the hearing with the Doping Panel to determine the identity, and responsibility for the cost of the interpreter; and*
- *a timely, written, reasoned decision;*

Hearings held in connection with Competitions may be conducted by an expedited process. (...)

DC 8.2.1 When it appears, following the Results Management process described in Article 7, that an anti-doping rule violation has occurred in connection with a Member Federation's test, the Competitor or other Person involved shall be brought before a disciplinary panel of the Competitor or other Person's Member Federation for a hearing to adjudicate whether a violation of these Anti-Doping Rules occurred and if so what Consequences should be imposed.

DC 8.2.2 Hearings pursuant to this Article 8.2 shall be completed expeditiously and in all cases within three months of the completion of the results management process described in Article 7. Hearings held in connection with Competitions may be conducted by an expedited process. If the completion of the hearing is delayed beyond three months, FINA may elect to bring the case directly before the FINA Doping Panel at the responsibility and at the expense of the Member Federation".

DC 13 Appeals

"DC 13.2 A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that FINA lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or otherwise in violation of DC 7.1.2 may be appealed exclusively as provided in this DC 13.2.

DC 13.2.1 In cases arising from an Event in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court".

In the course of in-competition doping controls while participating in the Brazilian Swimming Championship between 23 May and 28 May 2006, three samples of the Athlete were collected on the following dates:

- On 25 May 2006, samples #965047 and 965054
- On 26 May 2006, sample # 390650

These samples were forwarded to the WADA-accredited laboratory, INRS-Institut Armand-Frappier, in Quebec.

The results obtained on 21 June 2006 by the Laboratory were the following:

- Sample A-965047
“Extremely diluted: 1.001, signs of microbial degradation. Elevated T/E Value”.
- Sample A-390650
“IRMS results consistent with exogenous origin of testosterone. Elevated T/E value. Diluted: 1.005. Signs of microbial degradation”.
- Sample A-965054
“IRMS results: abnormal. T/E value greater than 10. Diluted : 1.005”.

After having been informed of the results of the A-sample analysis, FINA followed up the matter with CBDA.

CBDA, relying on the reports of its Medical Director, Dr Renata Castro, considered that the laboratory findings were not sufficient to support a sanction.

Communications followed between CBDA and FINA with FINA continuing to maintain its position that the laboratory results constituted adverse analytical findings.

On this basis, FINA requested CBDA on 10 May 2007 to complete the result management process, notably by proceeding to the B-sample analysis.

The results of the B samples were the following:

- Sample B-965047
“Extremely diluted : 1.002; IRMS results consistent with exogenous origin of testosterone. Elevated T/E value. Signs of microbial degradation”.
- Sample B-390650
“IRMS results consistent with exogenous origin of testosterone. Elevated T/E value. Dilute: 1.006. Signs of microbial degradation”.
- Sample B-965054
“T/E measured at 28. IRMS results consistent with exogenous origin of testosterone”.

On the basis of the above results, FINA wrote to CBDA on 20 August 2007:

“We note that the laboratory confirmed that the IRMS results are consistent with exogenous origin of testosterone in all the three samples analysed. (...)

Therefore, with the given results of the B-Sample procedure, we consider that the CBDA has now to promptly organise a hearing to consider these adverse analytical findings and to issue a final decision as soon as possible”.

On 21 August 2007, the CBDA repeated its position that an anti-doping violation had not been established because the analysis results could not be relied upon due to bacterial degradation.

The CBDA added:

“Because of all previously stated issues, we keep our position that there are still doubts if a doping offense has really occurred and, to the best of our knowledge, the swimmer G. should be left with benefit of doubt. (...)”

“After all these explanations here reported, the Brazilian Swimming Federation keeps its opinion that it impossible to assure that a doping rule violation has really occurred and, thus, the Brazilian Swimming Confederation cannot punish the athlete (...)”.

On 10 September 2007, FINA filed an appeal before the CAS citing CBDA’S letter dated 21 August 2007 as evidence of its decision.

Both CBDA and G. were named as Respondent in the appeal.

On 8 October 2007, both Respondents filed their answer to the appeal brief.

A hearing was held in Lausanne on 7 March 2008.

LAW

Competence of the CAS

1. The competence of the CAS to act as an appeals body is based on Art. R47 of the Code which provides that:

“A party may appeal from the decision of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement 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 body”.

2. According to this provision, the CAS has the power to adjudicate appeals against a sports organization only if three conditions are met:
 - 2.1. If the statutes or regulations provide an arbitration clause;
 - 2.2. If the sports organization issued an actual decision;
 - 2.3. If all available legal remedies within the adjudicative procedure of the sports organization have been exhausted.

The Arbitration Clause

3. DC Rule 13.2.1 provides:

“In cases arising from an Event in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sports (“CAS”) in accordance with the provisions applicable before such court”.

4. Regardless of this provision which grants jurisdiction to CAS, it is obvious and undisputed that CDBA is the body in Brazil governing aquatic sports and is a member federation of FINA.
5. Art. 7.2 of the FINA Constitution states that:
“The Constitution and rules of a Member must not be in conflict with those of FINA. Where there is a conflict, FINA rules shall prevail”.
6. In addition, the FINA Doping Control Rules provide at the beginning (under the heading “Scope”) and in DC Rule 14.1 that:
“All Member Federations shall comply with these Anti-Doping Rules”.
7. Finally, CDBA pointedly makes reference to the FINA Doping Control Rules in several letters to FINA and to the Athlete. Furthermore, the WADA-accredited laboratory sent its positive results to CDBA with copies also being sent to WADA and FINA as required by the FINA Regulations. Therefore, no doubt can exist that CDBA is, and considers itself to be, subject to the FINA Rules and Regulations.
8. The FINA Doping Control Rules also provide at the beginning (under the heading “Scope”) and in DC Rule 14.1 that:
“These Anti-Doping Rules shall apply to each Participant in the activities of FINA or any of its Member Federations by virtue of the Participant's membership, accreditation, or participation in FINA, its Member Federations, or their Participant's Competitions”.
“The regulations of Member Federations shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to and shall be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the respective Member Federations”.
9. In the absence of evidence and submissions to the contrary, one can assume that the CDBA Rules and its doping control procedures meet the aforementioned requirements. Therefore, the Panel has no doubt that the FINA Regulations, in particular, the FINA Doping Control Rules, can be deemed directly applicable to the second Respondent, G., either on the basis of an agreement/license/“swimming passport” or by reason of her accreditation for the competition. Pursuant to the latter the competitor agrees to be bound by the FINA Rules, or by means of a chain of references to the FINA Rules in by-laws or other regulations commencing with the competitor's swim club. A factual assumption of this nature - based on actual practice and experience and the fact that competitors generally submit to all applicable regulations of the relevant competition (including doping rules) by reason of their participation in competition - has also already been confirmed by CAS precedent (see CAS 2002/A/399 and CAS 2005/A/830).

10. The provisions of the FINA Doping Control Rules dealing with “appeals” include “*decisions made under these Anti-Doping Rules*” (see DC Rule 13.1) which obviously also include those appeals made by national federations in national cases (i.e., of CBDA in the case at hand). DC Rule 13.2 regulates appeals against decisions made by FINA with DC Rule 13.2.1 providing that these appeals are to be made directly to CAS. National doping cases are dealt with in DC Rule 13.2.2 according to which both FINA and WADA have the right to appeal to CAS “*with respect to the decision of the national-level reviewing body*” pursuant to DC Rule 13.2.3. With FINA having lodged this appeal against the decision of CBDA, CAS has jurisdiction to decide on the present dispute, provided the remaining requirements for review have been satisfied.
11. Moreover, CAS’ jurisdiction in the present case is not being disputed by any of the parties.

The Decision

12. Both FINA Doping Control Rules DC Rule 13.2.2, DC Rule 13.2.3 and R 47 of the Code refer to “*decisions*”.
13. The concept of an appealable decision (including an appeal against the failure to make a decision) has been defined in the well-established case law of CAS as follows:

“*The form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal. The form may only be an indication of the intent of the body issuing the communication, which may be taken into consideration. However, the form is not sufficient to find whether there is a decision or not*” (CAS 2005/A/899).

“*A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects*” (CAS 2004/A/659).

“*In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility or a request, without addressing the merits of such request*” (CAS 2005/A/899).

“*An appeal for denial of formal justice is possible when the authority refuses without reason to make a ruling or it delays a ruling beyond a reasonable period*” (CAS 2004/A/659); “*if a body refuses without reason to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision*” (CAS 2005/A/899; see also CAS 2004/A/748).
14. The appeal in the instant case is directed against the CBDA letter of 21 August 2007. This letter does not, in the formal sense, and certainly not on the face of its language have the appearance of a true and genuine “decision” within the meaning of DC Rule 13 and R47 of the Code. It merely contains an “opinion” on the question whether a doping rule violation has really occurred in the case at hand. It is also clear from the extensive discussions among the

parties during the hearing that no one considered the “opinion” to constitute a formal decision.

15. As can be seen from the case rulings cited above, the form of this communication and its “black-letter” terminology do not always provide a sufficient basis to determine whether a decision has or has not been taken. The deciding factor is whether the communication contains a ruling or, legally stated, an adjudication of a set of facts or circumstances – or, in the case of a denial of justice, the absence of a ruling where there should have been a ruling – in the communication (see also CAS 2005/A/899).
16. The Panel takes the position that the CBDA’s letter of 21 August 2007 contains no adjudication which rules on the legal issues posed by the facts and circumstances as they relate to the parties. The letter simply confirms that, because doubts exist on whether “*a doping rule violation has really occurred*”, the CBDA “*cannot punish the athlete*”.
17. Except for the CBDA’s reference to bacterial contamination, it is impossible to determine from the language of the letter, how the author justifies her conclusion that charges of a doping violation must be dropped. There is no confrontation with expert opinion on the reliability of IRMS analysis in the presence of microbial degradation, dilution and elevated T/E values. The letter expresses an opinion, draws a conclusion, but does not weigh the evidence, adjudicate the facts and circumstances of the case at hand and does not pronounce a legal ruling.
18. The Panel is not ignoring the fact that - as stated above - an appeal from the denial of formal justice is possible when the authority concerned refuses, without reason, to make a ruling or it delays a ruling beyond a reasonable period (CAS 2005/A/899). In the case at hand, no ruling has been made. The Athlete has not had “her day in court”.
19. DC Rule 8.2.2 provides:
“Hearings pursuant to this Article 8.2 shall be completed expeditiously and in all cases within three months of the completion of the results management process described in Article 7. Hearings held in connection with Competitions may be conducted by an expedited process. If the completion of the hearing is delayed beyond three months, FINA may elect to bring the case directly before the FINA Doping Panel at the responsibility and at the expense of the Member Federation”.
20. In our case, the CBDA did not refuse to issue a decision. It cannot deny, however, that the whole decisional process, starting from the collection of the samples to the issuance of the B-analysis results, took almost 15 months (21 May 2006 to 21 August 2007). No hearing of the Athlete was held by CBDA during this period or thereafter. No blame can be put on FINA as it continually reminded the CBDA that the case had to move forward.
21. Despite these reminders, however, the Panel takes the view that the CBDA cannot be accused of denying the parties formal justice. It was up to FINA to cite DC Rule 8.2.1 and DC Rule 8.2.2 to CBDA and to point out that (1) it must hold a hearing, regardless of its “opinion” and (2) if the completion of the hearing did not take place within three months from the date of

receiving the B-sample results, it would be compelled to bring the matter before the FINA Doping Panel. In the light of this possibility to usurp the jurisdiction of the Member Federation and to render a “final decision” itself, in addition to the fact that CBDA expressly stated in the challenged letter of 21 August 2007 that “... *we are ready to follow any decision taken on by FINA and/or CAS*”, no denial of formal justice as described in the aforementioned CAS case law is obvious in the present case, in particular not with regard to the sole Appellant, FINA.

Exhaustion of Legal Remedies

22. In the case at hand, the matter was brought directly by FINA before the CAS. No hearing was held before the CBDA or the FINA Doping Panels. Such a hearing should have taken place at the end of the results management process as set forth under DC 7.1 (see DC 7.1.12), unless it would have been waived by the Athlete.
23. Pursuant to DC Rule 8.2.1 (under the heading DC Rule 8 *Right to a fair hearing*), once an anti-doping rule violation has occurred in connection with a member federation’s test, the competitor shall be brought before a disciplinary panel of the competitor Member Federation for a hearing.
24. If such hearing is delayed, then FINA has the opportunity to call the hearing before its own Doping Panel pursuant to DC Rule 8.2.2 (see above). Here, FINA did not call such a hearing and has therefore not exhausted all of its internal remedies. This “mechanism” is also a “legal remedy” in the strict legal sense. To be such, the internal remedy must be readily and effectively available to the aggrieved party and it must grant access to a definite procedure which is the case at hand.
25. In the view of the Panel, FINA’s DC Rule 8.2.1 grants “the Competitor or other Person”, in the event of a Member Federation’s test, the right to a hearing before the Member Federation’s disciplinary panel to adjudicate whether a violation of the Anti-Doping Rules has occurred and what “Consequences” will be imposed. But the FINA Rules also provide that, if the completion of the hearing before the Member Federation is delayed beyond three months, FINA “may elect to bring the case directly before the FINA Doping Panel at the responsibility and at the expense of the Member Federation” (DC Rule 8.2.2).
26. In filing its appeal directly with the CAS, FINA has effectively denied the Athlete her right to have the alleged violation adjudicated on the CBDA level pursuant to DC Rule 8.2.1 in a timely first-instance hearing. Especially in doping proceedings which impose a substantial sanction on the athlete such as a suspension for two years, it is procedurally unacceptable to make a decision on the merits, if the athlete is not give the opportunity for legal review and reconsideration in an appeals instance.

Jurisdiction

27. The Panel takes the position that CAS, acting as an appeal instance, has no jurisdiction at this time to adjudicate this dispute, because neither a hearing nor a “decision” of the CBDA or FINA has been issued from which an appeal can be lodged with CAS as required under R47 of the Code. In any case, FINA as Appellant has not exhausted all legal remedies.
28. Although a strict construction of the term “may elect” in DC 8.2.2 might indicate that FINA has reserved discretion to decide whether or not to bring the case before the FINA Doping Panel, it is the opinion of the Panel that any decision to place the dispute before the CAS without a prior decision of the CBDA or FINA Doping Panels would represent an egregious disregard of the application of DC Rule 8.2.2 and would effectively deprive the Athlete of her right to a first-instance hearing from which she (including CBDA or FINA in the event the Athlete prevails) would have the right to appeal.
29. On the face of the correspondence between CBDA and FINA which has been submitted to the Panel, it would appear that CBDA, for the reasons stated above, had no intention to organize and to hold a hearing in this matter.
30. The Panel issues no ruling as to how the three month period set forth in DC Rule 8.2.2 should be applied to the facts in this case. FINA is therefore free to draw its own conclusions and to act, accordingly. The Panel has noted, however, that CBDA has stated conclusively in its letter of 21 August 2007 that *“it is impossible to assure that a doping rule violation has really occurred and, thus, the Brazilian Swimming Confederation cannot punish the athlete”*.
31. The subsidiary motion of the Appellant must be dismissed as well. There is no legal basis to refer the case back to the previous instance (CBDA). The only alternative decision under Art. R57 of the Code would be to annul the decision. But then, it must be assumed that the Panel is dealing here with a final “decision” within the meaning of Art. R47 of the Code which it clearly is not.

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sports has no jurisdiction to decide the appeal filed by FINA on 10 September 2007 with regards to the letter issued on 21 August 2007.

(...)