# Chapter 8
# Doping: Request of Review/Revision

**Philippe Schweizer**

## Contents



## 8.1 CAS 2008/A/1557, Federazione Italiana Giuoco Calcio (FIGC), Daniele Mannini, Davide Possanzini and Comitato Olimpico Nazionale Italiano (CONI) v. World Anti-Doping Agency (WADA)

The Mannini/Possanzini Award concerns two players whose conduct in undergoing the applicable anti-doping urine tests was open to question: they passed the test, but there was a half-hour delay. The CAS had originally ordered that the players be banned from

Dr. Philippe Schweizer—Attorney at Law, KGG Associés.

P. Schweizer (✉)
Neuchâtel, Switzerland
e-mail: philschweizer@bluewin.ch

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participating in official matches for 350 days. The FIGC filed a 'Request for Arbitration' with the CAS submitting three 'new' witnesses. The CAS eventually set aside its original decision. The author describes the revision of arbitration in Switzerland and the CAS arbitration rules. He analyses whether the admissibility of the revision was justified, and concludes that the Swiss Supreme Court would never have admitted a request for revision based on new evidence such as that which was submitted to the Panel.

## 8.2 The Facts

The dispute arose from certain irregularities in connection with an anti-doping test carried out after the game between Brescia and A.C. Chievo Verona on 1 December 2007. Two of Brescia's players, Messrs Daniele Mannini and Davide Possanzini (the players), did not fully comply with their "urinary duties" pursuant to the applicable anti-doping regulations (implementing the WADA Code in Italian football), including the *Istruzioni Operative della Commissione Antidoping* and the *Procedimento disciplinare e Istruzioni operative relative all'attività dell'Ufficio di Procura Anti-doping* (*Instructions*). More precisely, they did comply, but with a delay of half an hour, which was considered excessive and led to a request for a sanction for non-cooperation. The FIGC's Court of First Instance acquitted the players, considering that there was no sanction provided for under the *Instructions* for their behaviour. But upon appeal by the *Ufficio di Procura Antidoping*, Italian judge of final jurisdiction in doping matters (*Giudice di Ultima Istanza*) suspended the players for a period of 15 days.

The World Anti-Doping Agency (WADA) brought an appeal against this decision before the CAS. Based on Article 2.3 of the WADA Code, WADA claimed that the players' behaviour constituted an undue refusal to submit to a sample collection and requested the CAS to impose a suspension of 2 years.

On 29 January 2009, the CAS Panel rendered an award, ruling as follows: a) the decision issued on 20 March 2008 by the Italian judge of final jurisdiction on doping issues was set aside; b) the players were suspended for a period of 350 days. In accordance with Article 57 of the CAS Code, the Panel had reviewed both the facts of the case and the applicable law and determined that the players had committed an anti-doping rule violation as they had failed to immediately report to the anti-doping station without an authorisation or a compelling justification, and they had not remained under the direct control of the anti-doping officer during the period between the end of the match and the anti-doping test.

On 12 February 2009, FIGC filed with the CAS a "Request for Arbitration", submitting that new evidence (three witnesses, among others) was made available, which would prove that the players were not guilty of any rule violation. The CAS was asked to set aside the award rendered on 29 January 2009, to confirm the decision issued on 20 March 2008, and to rule that no anti-doping violation was committed by the players. This is where the going got rough.

The Secretary General of the CAS transmitted that request to the other parties on 16 February 2009, with the following statement: "It is understood that such

'request for arbitration' is to be considered as a request for review of the arbitral award rendered by the CAS on January 29, 2009 based on new facts and/or new evidence (*recours en révision*). Although the Code of Sports-related Arbitration does not provide for a possibility to reopen an arbitration procedure when an award has been rendered, the CAS can accept to reopen an arbitration procedure which is terminated if all parties involved in the arbitration agree to do so. Basically, such general agreement would then be considered as a new arbitration agreement which would enable the CAS to reopen the procedure. In case of disagreement between the parties, any request for review could be addressed to the Swiss Federal Tribunal which would then initiate a specific procedure in accordance with Swiss law".

On 18 February 2009, WADA's counsel wrote to the CAS as follows: "WADA has no objection that the same Panel who rendered the Award (…) examines, on the basis of the conduct of the proceeding (including the tapes of the hearings), whether there is any ground to reopen the case. If the Panel determines that such a ground exists, WADA will abide to such decision".

On 25 February 2009, the Secretary General of the CAS acknowledged receipt of the various letters sent to him by counsel to the parties involved in the case and stated: "Considering that all parties have agreed that the arbitration procedure be reopened, this matter will now be submitted to the Panel for consideration".

WADA's counsel then submitted that WADA did not agree at all that the case be reopened and that "it (would) be up to the Panel to decide whether the request filed by FIGC based on allegedly new evidence permits or not to reopen the case". Furthermore, the reopening of an arbitral procedure closed by a CAS award should occur only in exceptional circumstances, and a party should not be allowed to request the reopening of a case in order to file evidence which such party renounced to file in the previous procedure. In WADA's opinion that condition was clearly not met in the present case.

## 8.3 The Award

The following findings of the Panel are relevant for our purposes:

1. Neither the Swiss Private International Law Act (PILA) nor the CAS Code provide for the revision of international arbitral awards, but 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 revision of international awards.
2. In the present case, there was no agreement by WADA to a new arbitration, as requested by the FIGC, but the parties agreed nevertheless that the Panel should have jurisdiction to determine whether there was any ground for a revision of the first award, applying by analogy and for guidance those rules which govern

a "révision" of court decisions, including Article 123 § 2a of the Swiss "*Loi sur le Tribunal fédéral*". According to that provision, the applicant must establish that, through no fault of his own, he was prevented from or otherwise unable to adduce the relevant facts or evidence in the course of the proceedings. This means that the applicant must prove that he acted diligently and did everything to elucidate the facts deemed relevant to his case.

3. In this respect, the three "new" witnesses mentioned by the FIGC were not admissible, in the Panel's opinion. The applicant and the players did not show why they should have been unable to call these witnesses to testify in the previous proceedings before the Panel.
4. As regards the award rendered by the CAS in another case (the so called *Cherubin* Award, where the CAS was quite soft with a player who did not strictly comply with the anti-doping-control proceedings), the Panel stated that this award was published approximately two months after the first award in the present case was rendered, and that new jurisprudence cannot, in principle, be a ground for the revision of an award.
5. Examining the admissibility of that part of the evidence adduced by the FIGC and the players to show that there was a lack of understanding and some confusion about the regulatory requirement of immediately proceeding to the doping-control after the game while being continuously chaperoned, the Panel found that the three conditions of admissibility were met: (a) the practise invoked, which allegedly prevailed in Italian football between 2005 and 2008 pre-existed the rendering of the first award; (b) the additional evidence was relevant enough to possibly have an impact on the outcome of the case; (c) considering the evidence relating to the due diligence criterium, the Panel found that the players themselves were unaware of various discussions surrounding the nature of the doping-control procedures and were unable to realise 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.
6. For the reasons mentioned above, the Panel found that the conditions for admitting a revision of the case were met with respect to the additional evidence adduced about the practise and beliefs which allegedly prevailed in Italian football between 2005 and 2008 as to the nature and conditions of the post-match doping controls that regularly took place.
7. Considering the new evidence, including the testimony of a witness who had already been considered inadmissible[1] (!), the Panel found that in this case the players could not 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 the relevant date.
8. On these grounds, the Panel retracted its first award and confirmed the decision issued on 20 March 2008, by the *Giudice di Ultima Istanza*.

[1] Cf. supra, 8.2.3).

## 8.4 Short Analysis

### *8.4.1 The Revision of Arbitral Awards in Switzerland*

In view of the foreign seat, respectively, domiciles of the parties concerned, this was an international arbitration and, since the CAS is seated in Lausanne, Switzerland, the proceedings were governed by Chap. 12 of the PILA.[2] The PILA contains no express provision on the revision of arbitral awards. However, the Swiss Supreme Court has held that the Swiss legislator could not reasonably be assumed to have wanted to exclude such a remedy altogether; thus, the Court has found the revision of arbitral awards to be admissible *praeter legem.*[3]

To do so, the Supreme Court had to be creative, notably with respect to issues such as the designation of the court of competent jurisdiction to hear such requests, as well as the admissible grounds for revision and the applicable time limits. As far as jurisdiction is concerned, the Supreme Court has found that it is competent to hear requests for revision in all cases (including with respect to partial awards[4]). As for time limits and the admissible grounds for revision, the Court has chosen to apply, by analogy, the *Loi fédérale d'organisation judiciaire*, i.e. the statute governing proceedings before the Swiss Supreme Court at the time when the question was first raised, in 1982. That said, this procedural framework will only apply where the parties have not agreed, whether directly or by reference, upon a specific procedure for revision, for instance by providing that the arbitral tribunal itself may revise its own awards. The new statute governing proceedings before the Swiss Supreme Court, the *Loi sur le Tribunal fédéral* (LTF), in force since 1st January 2007, has not modified the previous system in any significant way. As seen above,[5] the remedy of revision is available when the applicant has discovered relevant facts or found conclusive evidence which he/she could not have invoked in the previous proceedings, excluding, however, any facts or evidence which have come into existence after the rendering of the award. The time limit for filing a request with the Supreme Court is 90 days from discovery of the ground(s) for revision.[6]

### *8.4.2 The CAS Arbitration Rules*

As was rightly observed by the Panel in the present case, the CAS Code does not provide for the possibility of revision proceedings *stricto sensu*, i.e. where a request is filed unilaterally by a party that considers it has reasons to request the

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[2] Article 176 PILA.

[3] DTF 118 II 199, 204; see also 129 III pp. 727, 728.

[4] Federal Tribunal, 1st November 1996, *P. v A.*, in RSDIE 1997, p. 279, with note PhS.

[5] Cf. supra, 8.2(2).

[6] Article 124 al. 1 lit. D LTF.

reopening of the proceedings which had been closed by a final award, without the agreement of the other party. That said, the CAS Code does not exclude an agreement between the parties providing for the reopening of the proceedings after the award has been rendered.

### 8.4.3 The Theoretical Admissibility of the CAS System

At first blush, the permissive approach of CAS in interpreting the CAS Code in favour of allowing revision by agreement is in accordance with the principle of party autonomy, although such a procedure (resulting in a party-agreed reopening of the proceedings) may elicit some reservations with respect to the *res judicata* character of arbitral awards (which is the same as that of court judgments). Indeed, in Switzerland, *res judicata* has to be raised *ex officio* by courts, since it deprives the parties of a legal interest in bringing anew before the judge a matter which has already been adjudicated. On the other hand, since it is undisputed that a party may validly forgo the execution of an enforceable decision it has obtained in its favour, one cannot see why the parties could not resubmit a matter to an arbitral tribunal if they agree that the tribunal was not apprised of all the relevant elements at the time when it rendered its award.

### 8.4.4 In Case, was There a Unanimous Agreement on the Reopening of the Proceedings?

In the case under discussion, the Panel found, as we have seen, that WADA had not unconditionally consented to the reopening of the proceedings, but rather that it had agreed that the Panel was competent to determine whether the conditions for such a reopening were met. In this respect, the Secretary General's letter of 25 February 2009[7] is instructive. It makes it clear from the start that the parties' agreement may extend to the recognition of the CAS's competence to deal with a request for a reopening of the proceedings *where a ground for revision has been validly invoked*, without, however, entering into any detail. The Secretary General's letter notes that absent an agreement between the parties, such a request should be dealt with within the normal procedural framework, meaning that it should be brought before the Swiss Supreme Court (which in turn implies that the conditions set forth in the Swiss law, i.e. the LTF, are to apply in such cases). Indeed, upon receipt of the Secretary General's letter of 16 February 2009, WADA had seized the opportunity to plead that no valid ground for revision had been established.

[7] Supra 8.1.

### 8.4.5 The Panel's Reasoning on the Parties' Agreement to the Reopening of the Proceedings

Starting from the premise that WADA had only accepted the competence of CAS to decide on its own competence, the Panel chose to limit the scope of its examination to the question whether the case submitted to it was one that would call for revision in accordance with Article 123 (2)(a) of the LTF, which it found to be applicable by analogy. One can only say that, in so doing, the CAS has certainly not opted for the easiest solution—*ad augusta per angusta*—all the more so in view of the final outcome, i.e. the retracting of its first award. To arrive at *that* result,[8] the Panel could have said that by giving it the full power and authority to decide whether to reopen the proceedings, the parties, including WADA, had in reality authorized it to render a decision based on considerations of fairness or equity, on the basis of a "new" request for arbitration providing it with a full power of review (as submitted by the FIGC—whose counsel were clearly aware that a proper application of the requirement of Article 123 LTF would have very little chance to succeed…). The Panel preferred, instead, to give a restrictive interpretation of WADA's first letter (i.e. before WADA changed its arguments), by finding that WADA had only agreed for it to determine whether it was competent to decide that a valid ground for revision had been put forward, what's more, by analogy. This was obviously done to avoid creating a precedent in the system which could result in many more cases where the parties would attempt to reopen the proceedings. However, one should not lose sight of the fact that such a reopening would require the unanimous agreement of the parties, a condition which will make it a relatively rare occurrence, although it can happen that all the parties are unhappy with an award, whether because they find it too lenient or too strict, meaning that one cannot altogether exclude the potential for such a procedural "vicious circle", running counter the principles of *res judicata* and legal certainty. Thus, since the Panel had chosen not to redirect the applicant to the Swiss Supreme Court, it was left with the option of treating the new request for arbitration as a request for revision, which it admitted and which led it to retract its previous award. Although little detail has transpired as to the new evidence offered by the applicant, the summary made in the award leaves one slightly perplexed. The Panel, finding that the three newly offered witnesses could just as well have testified in the prior proceedings, held that their testimonies should be disregarded. Then, referring to the confusing manner in which the anti-doping legislation had been enacted in Italy between 2005 and 2008 and to the players' assumed understanding of that legislation at the relevant time, it retracted its previous award, rendered relying on the circumstantiated evidence submitted to it, which

[8] Rejecting the applicant's request would have been easy, on various grounds which will not be developed here, including the principle of *res judicata*, the silence of the CAS Code, the applicability of the *Loi sur le Tribunal fédéral*, or the absence of any ground for revision, as the case may be.

evidence was again comprehensively administered and completed before the second award. As a result, the Panel ended up dividing by more than 23(!) the length of the suspension it had originally imposed on the players. One may wonder whether, in so doing, the Panel has not set an even *more* dangerous precedent than the one it was trying to avoid. Furthermore, for those who are familiar with the Swiss Supreme Court's case law relating to the revision of arbitral awards—even if, in this case, the CAS emphasized that it would only rely on it "by analogy and for guidance"—it is absolutely clear that the Supreme Court would never have admitted a request for revision based on such new evidence as that submitted to the Panel, at least as it was summarized in the award discussed here.