

Maltese Doping Cases

by Claude Ramoni*

Background facts

At the end of 2007 and the beginning of 2008, three Maltese football players, Mattocks, Martin and Grech tested positive for prohibited substances.

Following a test performed on 26 December 2007, the player Mattocks tested positive for 19-norandrosterone. He explained that the source of this prohibited substance was a contaminated food supplement. The Malta Football Association (MFA) accepted his explanation and suspended him for a period of four months.

Several days later, on 2 January 2008, two other Maltese football players tested positive for prohibited substances, as a consequence of excessiveness on the occasion of New Year's Eve:

- Grech tested positive for cocaine. He did not challenge the adverse analytical findings reported by the laboratory and explained to the MFA that cocaine was purportedly put in one of his drinks by one of his friends on New Year's Eve. The MFA Control and Disciplinary Board did not believe this explanation and imposed a one-year suspension period on Grech. Grech appealed this decision with the MFA Appeals Board, which reduced the sanction down to nine months.
- Martin tested positive for both cocaine and amphetamines. He admitted having taken both substances during a New Year's Eve Party and was suspended by MFA for a period of one year.

Both WADA and FIFA appealed all three decisions rendered by MFA. It seemed quite obvious to FIFA and WADA that the sanctions imposed by the MFA were not in line with the provisions of the then applicable FIFA Disciplinary Code (the 2007 FDC) or of the World Anti-Doping Code (WADC). According to the WADC or the 2007 FDC, a reduction of the ordinary two-year suspension period sanctioning the presence of a prohibited substance in a player's bodily sample may occur in exceptional circumstances only, where the player is able to demonstrate that his fault is not significant. The minimum period of suspension, except if the player is able to demonstrate that he bears no fault at all, is one year. FIFA and WADA therefore were of the opinion that all three sanctions imposed by MFA were too lenient. Furthermore, the sanctions of four months imposed on Mattocks, as well as the sanction of nine months imposed on Grech were not compliant with the set of sanctions provided for by the 2007 FDC and the WADC for the substances detected in the players' samples.

Admissibility of the appeal

The 2002 edition of the MFA statutes (which were then applicable) contained a clause providing that:

"in so far as the affiliation to FIFA is concerned, the Association recognizes the Court of Arbitration in Lausanne, Switzerland (CAS) as the supreme jurisdictional authority to which the Association, its Members and members thereof, its registered players and its licensed coaches, licensed referees and licensed players' agents may have recourse to in football matters as provided in the FIFA Statutes and regulations".

The CAS panel observed that the players were validly bound by the MFA Statutes. It therefore came to the conclusion that article 61 of the 2007 FIFA Statutes providing, *inter alia*, for WADA and FIFA's right of appeal to the CAS in doping matters was validly incorporated by reference in the MFA Statutes. It therefore held that the CAS had jurisdiction.

This conclusion by the CAS panel is fully in line with a long standing jurisprudence by the CAS, confirmed by the Swiss Federal Tribunal, admitting the validity of an arbitration clause by reference¹.

Applicable Rules on the merit - FIFA or MFA regulations?

The key issue in all three cases was the one of the applicable regulations on the merits.

On the one hand, the MFA Statutes in force at that time provided that MFA was bound to "observe the rules, bye-laws, regulations, directives and decisions of the Federation International de Football Association (FIFA)". According to the 2007 FDC, which was adopted in compliance with the WADC, the duration of the period of ineligibility sanctioning the presence of a prohibited substance in a player's sample was *two years*.

On the other hand, MFA had adopted a "Doping Charter", which provided that the use of a prohibited substance by a player would result in the player being sanctioned with a *twelve-month* period of suspension (for a first doping offence). This suspension period could be scaled down or extended in particular circumstances.

In the present case, WADA and FIFA submitted that the Maltese players had to be sanctioned in accordance with the 2007 FDC and applied that the CAS impose a two-year suspension period on all three players. The MFA, as well as Martin, submitted that the only applicable rules were the Maltese rules, in particular the MFA Doping Charter.

Was the FIFA Disciplinary Code directly applicable?

In the proceedings, FIFA submitted that all FIFA anti-doping regulations in force at that time, namely the FIFA Doping Control Regulations and the 2007 FDC, which entered into force on 1 September 2007, were directly applicable to Maltese players, to the exclusion of MFA Doping Charter. FIFA in particular relied on article 60 par. 2 of the 2007 FIFA Statutes, which provided that "CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

The panel held that, as a matter of principle, national football federations were issuing their own national regulations and, then, retained their own regulatory competences, notably with regard to national competitions. FIFA regulations were applicable to international games only. However, the panel also held that FIFA was also entitled to issue regulations, which could be directly applicable at national level. When adopting regulations, FIFA can therefore decide whether such regulations shall be directly applicable to the whole football family, as a consequence of the affiliation of a national federation and its members to FIFA or, whether they need to be implemented by each FIFA member in order to then apply them at national level.

In order to answer this question, the panel made a thorough literal analysis of the then applicable FIFA anti-doping regulations. Article 2 of the 2007 FDC provided that the 2007 FDC applied to "every match and competition organized by FIFA", as well as, "beyond this scope [...] if the statutory objectives of FIFA are breached, especially with regard to [...] doping". This provision could mean that the 2007 FDC would directly apply in order to sanction any doping offence committed by a football player, even in the course of a control organised by a national federation.

However, the panel did not follow this interpretation based on article 152 of the 2007 FDC, which provided for the obligation of the national federation to adapt their own provisions to comply with the code and to incorporate anti-doping regulations into their own regulations. Furthermore, FIFA circular number 1059 provided the national federations with a deadline to adapt their anti-doping regulations.

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1 See e.g. CAS 2007/A/1370 & 1376 FIFA,

WADA v/ CBF, STJD & Dodo; Swiss Federal Court, Judgement of 9 January 2009 4A_460/2008, published in ASA Bulletin Vol. 27, p. 540.

The panel therefore held that the 2007 FDC was clearly excluding its direct applicability at national level. It concluded that FIFA could therefore not claim that the 2007 FDC was applicable directly at national level, but that FIFA had to take disciplinary measures against national federations in order to ensure that they adopt national anti-doping regulations in line with the 2007 FDC and the WADC.

On the occasion of the entry into force of the revised WADC on 1 January 2009, FIFA amended its anti-doping regulations and replaced the provisions relating to doping in both the FDC and the FIFA Doping Control Regulations by the "FIFA Anti-Doping Regulations". According to article 1 par. 1 of these regulations,

"These regulations shall apply to FIFA, its member associations and the confederations and to players, clubs, player support personnel, match officials, officials and other persons who participate in activities, matches or competitions organised by FIFA or its associations by virtue of their agreement, membership, affiliation, authorisation, accreditation or participation." Paragraph 2 of the same article further specifies that: *"These regulations shall apply to all doping controls over which FIFA and, respectively, its associations have jurisdiction."*

Therefore, the new FIFA Anti-Doping Regulations which entered into force on 1 May 2009 clearly state that they apply at both international and national levels. The ruling by the CAS panel in the Maltese cases with regard to the scope of application of FIFA anti-doping rules would therefore no longer be valid under the new regulations.

Nevertheless, according to the 2009 edition of the FDC, which is currently in force, the wording of article 2 FDC has not been amended compared to the 2007 edition. Furthermore, the 2009 FDC also includes a provision similar to article 152 of the 2007 FDC providing for the obligation of member federations to adopt regulations incorporating mandatory provisions of the FDC and sanctioning members' federations failing to comply with such obligation with a fine and, possibly, further sanctions (art. 145 of the 2009 FDC). Therefore, for all other offences, which are defined by the FDC and which have to be implemented by the national federations (such as, for example, infringements of the Laws of the Game, misconduct, offensive or discriminatory behaviour, threats, coercion, corruption, match fixing, etc.), the ruling by the CAS panel in the Maltese cases that the FDC is not directly applicable at national level, shall still be valid.

Did article 60 par. 2 of the FIFA Statutes compel the panel to apply FIFA regulations?

Article 60 par. 2 of the 2007 FIFA Statutes provided that *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. The appellants interpreted this provision as meaning that all parties, when agreeing to the arbitration clause contained in the MFA Statutes, by reference to the FIFA Statutes, also agreed that CAS had to primarily apply FIFA regulations. This reasoning was followed by the CAS in the Dodo case², as well as in numerous other cases³.

However, the panel in the Maltese cases did not follow this approach. It held that the MFA regulations showed a lack of intention to extend the scope of application of the FIFA and the UEFA regulations per reference. Therefore, the CAS competence could not be interpreted as an admission of the applicability of the FIFA Regulations to national cases by virtue of article 60 par. 2 of the 2007 FIFA Statutes.

The conclusion of the panel in the Maltese awards with regard to the rules applicable to the merits of the case and the scope of article 60 par. 2 of the 2007 FIFA Statutes does not seem to be in line with a longstanding CAS jurisprudence. Does it mean that article 60 par. 2 of the 2007 FIFA Statutes is not *per se* sufficient in order to create a valid agreement between the parties as to the applicable rules in the meaning of article R58 of the Code of Sports-related Arbitration? We

do not believe that the Maltese awards have to be interpreted this way. In our opinion, the ruling made by the panel as to the applicable rules should not be applied broadly, but only in very specific cases (for example in doping matters) where the CAS has jurisdiction to rule on matters involving national players, who are bound to comply with national rules, in purely internal matters. In such cases, one could understand that the panel does not feel comfortable in imposing the application of FIFA rules and Swiss law to national-level players in the absence of any decision rendered by FIFA and in the frame of a dispute, which does not have any international dimension. This is particularly true in doping matters where CAS arbitration is not agreed upon by the parties, but provided for by anti-doping rules⁴.

Was the FIFA Disciplinary Code applicable by reference?

In the Maltese cases, WADA adopted a slightly different approach than FIFA in order to support that FIFA regulations were applicable to the players. WADA supported that the 2007 FDC was applicable as being part of the national anti-doping regulations by reference and that such rules prevailed in case of conflict. MFA Statutes stated that MFA had the obligation to comply with FIFA rules, by-laws, regulations, directives and decisions. The purpose of such provision was to implement, for the MFA, the obligation of FIFA members, provided under article 13 of the 2007 FIFA Statutes, to fully comply with the Statutes, regulations, directives and decisions of FIFA bodies at any time. As a consequence of such, WADA submitted that FIFA regulations were applicable by reference and that, in case of conflict between FIFA rules and MFA rules, FIFA rules shall prevail, in order for MFA to comply with its own statutes.

In several awards, rendered prior to the Maltese awards, the CAS ruled that FIFA anti-doping regulations were applicable at national level in doping matters, ruling that the FIFA regulations had been validly implemented in national regulations.

- In an award rendered on 21 December 2007⁵, the panel noticed that there was a contradiction between the rules of the Football Association of Wales (FAW), which stated that the sanction for a first infringement of doping control regulations was, at least, a six-month suspension and a fine, and the FDC, which provided for the ordinary two-year suspension for a first doping offence. In this case, as the rules of the FAW expressly stated that, in case of a conflict between the FIFA rules and the FAW rules, FIFA rules prevail, the panel held that the FIFA rules, in particular the FDC, were applicable.
- In two awards rendered in August 2008 in connection with two Qatari players⁶, the panel observed that the Qatari regulations did not contain detailed provisions governing anti-doping. The regulations of the Qatar Football Association only provided that it was *"prohibited to use illegal drugs for activation according to FIFA regulations..."* and that players found guilty of doping offences were subject to several sanctions, amongst other a suspension period, whose duration was however not specified. The Qatari regulations also contained several references to FIFA rules and regulations. The panel held in both cases that FIFA anti-doping rules were applicable, inasmuch as the Qatar Football Association had not adopted national anti-doping rules. Nothing in the regulations of the Qatar Football Association prevented the direct application of FIFA statutes, regulations and directives in such cases.
- In an award rendered on 11 September 2008 with regard to a Brazilian football player⁷, the panel held that the FIFA rules, in particular the FDC, were primarily applicable, the rules of the Confederação Brasileira de Futebol (CBF) being applicable subsidiarily. The panel relied on Brazilian law, which imposed on Brazilian sport federations and athletes the adherence to international sport rules. In this Brazilian case, the panel further referred to article 65 of the CBF statutes, which provided that the prevention, fight, repression and control of doping in Brazilian football had to be done complying also with international rules.

In the Maltese cases, the CAS panel came to another conclusion. It held that the MFA statutes and the MFA anti-doping rules did not

² CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBF, STJD & Dodo, §104

³ See CAS 2008/A/1519 & 1520, Shakhtar Donetsk v/ Matuzalem, Real Zaragoza & FIEA; CAS 2007/A/1298, 1299 & 1300 Heart of Midlothian v/ Webster & Wigan Athletic FC; CAS 2009/O/1808 Kenya Football Federation v/ FIFA

⁴ See in this respect Judgement of the Swiss Federal Tribunal of 22 March 2007, ATF 133 III 235.

⁵ CAS 2007/A/1364 WADA v/FAW & James

⁶ CAS 2007/A/1445 WADA v/QFA & Mohadanni ; CAS 2007/A/1446 WADA v/QFA & Alanezi

provide that FIFA rules and regulations were applicable by reference and/or should prevail in case of conflict between the 2007 FDC and the MFA Doping Charter. On the contrary, the panel held that the MFA Doping Charter should be applied “*independently and without any reference to the FDC anti-doping regulations which [were] therefore not applicable in the present case[s]*”.⁷ The panel also took into consideration the fact that the players were national level football players.

Comment

The Maltese cases are amongst numerous cases, where a CAS panel had to deal with national regulations, which were contradicting international regulations. The panel came to the conclusion that the MFA national regulations were solely applicable on the merits by ruling (i) that the 2007 FDC was not directly applicable at national level without proper implementation by the national federations and (ii) that the MFA anti-doping rules did not leave room for the application of the 2007 FDC.

In case of conflicts between several sets of rules, the situation is clear if the national rules explicitly provide that, in such a case, international regulations prevail. In several cases, CAS panels relied on such provision to rule that the regulations of the international federation were applicable and prevailed over national rules⁸.

In the absence of such a provision, it is difficult to draw a final conclusion from the CAS jurisprudence. For example, in the Maltese cases, the CAS held that the MFA Doping Charter prevailed. In the Brazilian case of Dodo, the CAS panel came to the opposite conclusion, despite the fact that the rules applicable in this case (i.e. CBF rules, FIFA rules and Brazilian law) were similar or even identical to the rules applicable in the Maltese cases⁹. In another precedent about a Portuguese player, the panel held that the rules of the Portuguese Football Federation and Portuguese law were applicable (and not FIFA rules)¹⁰. In the Qatari cases, the panel held that the absence of specific national provisions and the references to FIFA regulations provided for in national regulations resulted in the “direct” applicability of FIFA anti-doping rules to Qatari players¹¹. On the contrary, in a Pakistani cricket case, the panel held that a general reference to the WADA Code in the Pakistani rules was not a valid arbitration clause by reference allowing WADA to appeal decisions rendered in doping matters with CAS¹².

One should not forget that the ruling by CAS is influenced by the conduct of the parties during the proceeding and the argumentation they put forward. Most of the time, national football federations are reluctant to challenge the applicability of the FDC or to claim that national regulations shall prevail, as this would constitute a breach of their obligations toward FIFA¹³. In the Maltese cases, the MFA strongly submitted that FIFA anti-doping regulations were not applicable. On the contrary, in the Brazilian or the Qatari cases, the Brazilian Football Federation or the Qatari Football Federation did

not fully exclude the application of FIFA rules in their submissions before CAS.

CAS panels face an uncomfortable situation when several contradicting sets of rules may be applied (national rules v international rules incorporated by reference; anti-doping rules adopted by an anti-doping organisation v international standard issued by WADA and incorporated by reference¹⁴). Most of the time, CAS panels start from a literal interpretation of the rules in order to come to a conclusion.

In our opinion, in order to solve such issues, CAS panels should refer to the general principles that govern the interpretation of disciplinary rules. It is undisputed that in order to impose a sanction on an athlete convicted of a doping offence, the offence and its consequences (sanction) have to be provided for in a rule which has to be accessible and predictable (principle of legality). In other words, the players must have access to anti-doping rules and be able - if need be with appropriate advice - to foresee the consequences, which a given action may entail¹⁵.

Another principle, which is often applied in order to interpret sport regulations, is the principle that any provision with unclear wording has to be interpreted against the author of the wording (*contra proferentem*). As the CAS stated in an award rendered in 2008: “*this means that in principle, if no other reasons require a different treatment, any ambiguous, or otherwise unclear, provision of the statutes has to be interpreted against the association that has drafted the statutes, and not against the members*”¹⁶. This would mean that any ambiguity due to contradictions between national and international rules should in no way be interpreted against the addressees of the rules, namely the players.

Nevertheless, in order to interpret anti-doping rules, one should not forget that the WADC has now been implemented worldwide in all sports and constitutes a standardised uniform set of rules providing clear definitions of doping offences, as well as the disciplinary consequences thereof. The WADC is furthermore an appendix to the International Convention against Doping in Sport, adopted under the patronage of UNESCO and now in force in 137 countries throughout the world. In good faith, nowadays, no player or athlete may support that he/she is unaware of anti-doping rules adopted in compliance with the WADC, or at least of the main principles of the WADC. We remind however that neither the UNESCO Convention nor the WADC are of direct application and that, therefore, contradictory regulations should not be automatically overruled by the WADC or the UNESCO Convention.

Based on the foregoing, it is interesting to note that the panel in the Maltese cases has adopted a relatively strict “legalist” approach, by deciding that Maltese national rules prevailed over the 2007 FDC adopted in conformity with the WADC. As a result, the awards rendered in the Maltese cases did not hesitate to adopt the interpretation of the rules, which was more favourable to the players, even though the panel did not refer to the principle “*contra proferentem*”.

Sanctions

The panel, applying the MFA Doping Charter, examined whether the periods of suspension imposed on each of the players by the MFA were admissible in view of Section 6 MFA Doping Charter, which provided for a one year sanction for a first doping offence, which may be scaled down or extended in certain circumstances. The panel did not agree with WADA’s submissions that the MFA Doping Charter should be interpreted in compliance with the 2007 FDC, which would mean that the suspension period should be extended up to two years unless the nature of the substance, or particular circumstances, justify a less severe sanction. The panel held that the objective of the MFA Doping Charter was clearly to impose a one-year sanction for doping offences, to be scaled up or down in specific circumstances and that the provisions of the 2007 FDC providing for a two-year sanction were not a circumstance justifying a departure from the clear wording of the MFA Doping Charter.

The panel then ruled as follows with regard to the sanctions imposed on the three Maltese players:

- Mattocks, sanctioned by the MFA to a suspension period of four months for use of a contaminated supplement.

7 CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBE, STJD & Dodo

8 See e.g. CAS 2007/A/1364 WADA v/FAW & James where the rules of the Wales Football Federation stated that in case of conflict between FIFIA and FAW rules, FIFA Rules shall prevail; CAS 2008/A/1558 & 1578 WADA & FEI v/ SANEF & Gertenbach, where the constitution of the South African Equestrian Federation stated that in case of conflict between national rules and rules issued by the International Equestrian Federation (FEI), the FEI rules will apply.

9 CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBE, STJD & Dodo

10 CAS 2006/A/1153 WADA v/ Assis & FPF

11 CAS 2007/A/1445 WADA v/QFA & Mohadanni ; CAS 2007/A/1446 WADA v/QFA & Alanezi

12 CAS 2006/A/1190 WADA v/Pakistan

Cricket Board & Assif & Akhtar

13 See for example the statement by the Mexican federation in the Carmona case: CAS 2006/A/ 1149 & CAS 2007/A/1211 WADA v/ FMF & Carmona, §66

14 See e.g. CAS 2008/A/1607 Varis v/ IBU

15 See Kaufmann-Kohler, Malinverni, Rigozzi, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, 26 February 2003, available on the WADA website, §§76-77 & 86; CAS 2001/A/330 R v. FISA, published in Digest of CAS Awards III, pp. 197 *et seq.*, esp. p. 203.

16 See CAS 2008/A/1622, 1623, 1624 FC Schalke, SV Werder Bremen & FC Barcelona v/ FIFA, §§50-51, published in Court of Arbitration for Sport, CAS Awards Olympic Games 2008, 2009, pp. 219 *et seq.*

The panel held that the risk related to contaminated supplements was well-known and that Mattocks did not demonstrate that he had made any inquiry as to the content of the nutritional supplements he was taking nor that he exercised any caution when using such products. On the contrary, the panel relied on the well established CAS jurisprudence on contaminated supplement, which constantly refused to consider as an exceptional circumstance justifying a reduced sanction the contamination of supplements, unless the athlete demonstrate that he exercised a specific caution to enquire whether the supplement was “reliable”¹⁷.

Therefore, the panel ruled that no specific circumstance justified a reduction of the ordinary one-year suspension period provided for under Section 6 of the MFA Doping Charter and increased up to one year the sanction imposed on Mattocks;

- Grech, sanctioned by the MFA Appeals Board to a suspension period of nine months, further to an appeal by the player against the twelve-month ban imposed by the MFA Control and Disciplinary Board.

The panel held that it did not believe the player’s explanation that the origin of the cocaine found in his bodily specimen was due to a spiked drink. On the contrary, the panel ruled that taking cocaine on the occasion of a New Year’s Eve party could not be considered as an exceptional circumstance justifying to depart from the ordinary sanction of one year suspension provided for under the MFA Doping Charter. The panel therefore increased the sanction imposed to Grech up to twelve months.

- Finally, regarding Martin, who was sanctioned by the MFA to a one-year period of ineligibility for use of cocaine and amphetamine on the occasion of a New Year’s Eve party, the CAS panel confirmed this sanction, which was the ordinary sanction provided for under the MFA Doping Charter.

Conclusion

The ruling by the CAS panel in the Maltese cases that national rules shall prevail over FIFA regulations seems justified in view of the word-

ing of both the MFA rules and regulations, as well as of the 2007 FDC. This award confirms the necessity that all federations worldwide adopt rules compliant with the International Federation regulations and the WADC, in particular in order to ensure that all athletes worldwide are submitted to the same treatment in case of an anti-doping rule violation, albeit their nationality, domicile or origin.

The systematic of the FIFA rules in force at that time, which provided for FIFA and WADA’s right of appeal to the CAS in the FIFA Statutes, when the provisions applicable on the merit of the case were contained in the FDC and the FIFA Doping Control Regulations results however in a somehow contradictory result, with regard to the Maltese case.

The appeals by WADA and FIFA were held admissible. The purpose of such appeals is mainly to ensure that decisions rendered by anti-doping organisations, such as a national football federation, comply with FIFA regulations governing doping and/or the WADC. However, in the case at stake, the panel ruled that the FDC was not applicable, and chose to apply rules, which were not compliant with the WADC.

In application of the MFA Doping Charter, the panel increased the sanctions pronounced in two out of the three cases.

Therefore, the effect of the appeals lodged by FIFA and WADA in the cases of the Maltese players was to allow the CAS to review decisions rendered in application of national Maltese rules, which do not provide for a right of appeal by FIFA or WADA... The panel partially upheld two out of the three appeals, imposing however, sanctions which are not in line with the FDC or the WADC. This (practical) result does not seem in line with the purpose of the appeal by FIFA and WADA in doping matters as provided for under the FIFA Statutes.

The International Sports Law Journal

¹⁷ See e.g. CAS 2005/A/847 Knauss v/ FIS ; CAS 2008/A/1510 WADA v/ Despres &

CCES ; CAS 2008/A/1597 Akritidis & al. v/ IWF



From left to right: Robert Siekmann and Dr Emanuel Macedo de Medeiros meeting at EPFL headquarters in Nyon, Switzerland, 17 June 2010, within the framework of the stakeholders’ consultation for the purpose of the EP-commissioned Study on “The Lisbon Treaty and EU Sports Policy”.