Arbitration CAS 2015/A/3892 Roberto Alexander Del Pino v. Union Internationale Motonautique (UIM), award of 2 June 2015

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Jose Juan Pinto (Spain); Prof. Luigi Fumagalli (Italy)

Aquabike
Doping (methylecgonine)
Athlete's failure to establish any departure from proper procedures

An athlete who fails to establish any departure from proper procedures and from proper standards cannot overturn a decision of the Anti-Doping Panel of an International Federation.

I. PARTIES

1. The Appellant is a competitor licensed by the Union Internationale Motonautique ("UIM") in the sport of UIM aquabike class pro roundabout. He appeals a decision of the Anti-Doping Panel of the Respondent ("UIM ADP") dated 25 October 2014 which found him guilty of an anti-doping rule violation ("the Decision").

2. The Respondent is the international governing body of motonautical sport with headquarters in Monaco.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced with the pleadings. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 6 June 2014, the Appellant competed in the WIM World Aquabike Class Pro-Runabout GP1 in Milan ("the Competition").

5. On that day a sample was taken of the Appellant's urine pursuant to anti-doping control organised by UIM. Mrs Roberta Mandelli, an experienced Doping Control Officer, was in charge of the process.

6. The first sample provided by the Appellant was insufficient. Accordingly he provided a second sample later.

7. The two samples were amalgamated into one and then divided into 'A' and 'B' samples for the purpose of testing. Both functions were performed by the Appellant.

8. The Appellant signed the Doping Control Form ("DCF") expressing satisfaction with the process in the usual form.

9. Between the completion of the process at 18.50pm 6 June 2014 until 9 June 2014 12.20pm when the samples were delivered to the couriers DHL they were in the possession of Mrs Mandelli. Mrs Mandelli put the same time in the boxes in the DCF both for her receipt of the samples and for their delivery to DHL. This was clearly, as the UIM ADP found, an obvious error in the way in which she filled in the form and had no sinister connotations.

10. On 10 June 2014 at 8.44am the samples were delivered by DHL to the WADA accredited laboratory in Cologne, Germany.

11. On 17 June 2014, the 'A' sample tested positive for Methylecgonine, a metabolite of cocaine, thus constituting an Adverse Analytical finding ("AAF").

12. On 6 August 2014, the Appellant was informed of the AAF by the UIM Anti-Doping Administrator ("UIM ADA").

13. On 27 August 2014, the UIMADA sent the Appellant the full laboratory package for the 'A' sample.

14. On 11 September 2014, the Appellant requested analysis of the 'B' sample.

15. On 18 September 2014 the Appellant informed UIM that neither he nor his representative would be present at the test of the 'B' sample.

16. On 24 September 2014, the 'B' sample was tested at the Cologne laboratory. Mr Krannick, a legal representative and employee of the German Sports University, acted as an independent witness.

17. The test of the 'B' sample confirmed the AAF.

18. On 25 September 2014, the Appellant was informed of the result of the 'B' sample test.

19. On 16 October 2014, the UIM sent the Appellant the full laboratory package for the 'B' sample.

B. Proceedings before the UIM ADP

20. On 16 October 2014, the UIM ADP summoned the Appellant to a hearing arising out of the AAF to take place on 24 October 2014.

21. On 22 October 2014, the Appellant confirmed his inability to attend the hearing. In a written statement, he offered to make himself available by telephone if required and declared his innocence.

22. At the date of the hearing, the UIM ADP informed the Appellant by telephone of the provisional view that they took of the AAF, but the Appellant chose to make no further submissions.

23. On 25 October 2014, the UIM ADP made the Decision. It disqualified the Appellant from the Competition and from all results obtained at subsequent events. It further imposed a period of two years' ineligibility from UIM events to commence on 25 September 2014 and to end on 25 September 2016 ("the Sanction").

24. On 3 January 2015, the Appellant was notified of the Decision and of the Sanction.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 21 January 2015, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration ("the Code"), the Appellant filed his Statement of Appeal.

26. On 5 February 2015, in accordance with Article R51 of the Code, the Appellant filed his Appeal Brief.

27. On 22 March 2015, in accordance with Article R55 of the Code, the Respondent filed its Answer.

28. On 13 May 2015, a hearing of the Appeal took place at the Lausanne Palace Hotel. The parties were represented by the Counsel referred to in the title to this Award. Mr William Sternheimer, Managing Counsel & Head of Arbitration at CAS, was also present. No objection was made to the composition of the Panel.

29. The Panel heard from Mrs Mandelli by telephone and from Professor Botre, the director of the WADA accredited anti-doping laboratory in Rome, Italy (as an expert witness). The Appellant did not appear for what were described by his Counsel as "personal reasons". At the conclusion of the hearing, Counsel agreed that their right to be heard on behalf of their respective parties had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

30. The Appellant's submissions, in essence, may be summarized as follows:

(1) (a) The chain of custody from collection to delivery to DHL was not established (hence raising doubts as to whether the samples tested were the Appellant's).

(b) In particular, the samples were not properly refrigerated (hence casting doubt on the results of the test).

(2) There was an apparent decrease in the volume of the urine taken at the competition and the volume recorded as received by the laboratory (hence raising the possibility that the sample had been opened and manipulated).

(3) Mr Krannich was not an independent witness for the purposes of the 'B' sample test. Hence the results of the 'B' sample test should be discounted.

31. The Appellant requested the following relief:

(1) That his Appeal should be upheld.

(2) That the Decision should be annulled.

(3) That the Appellant should be reinstated to sports participation with immediate effect.

(4) That the Appellant's results in the following races should be reinstated:

(a) The UIM Aquabike Class Pro-Runabout Event held in Milan, Italy, from 6 to 8 June 2014.

(b) The UIM Aquabike Class Pro-Runabout Continental Championship Event held in Mirandelli, Portugal, from 25 to 27 July 2014.

(c) The UIM Aquabike Class Pro-Runabout held in Ibiza, Spain, from 5 to 17 September 2014.

(d) The UIM Aqua Class Pro-Runabout Championship Event held in Liuzhu, China, from 3 until 4 October 2014.

32. The Respondent's submissions, in essence, may be summarised as follows:

(1) The chain of custody was robust including the safeguarding of the samples in the fridge at Mrs Mandelli's home near Milan from the time of her return there after conclusion of the doping control process through to delivery of the samples to DHL.

(2) Any lack of refrigeration before storage in that refrigerator, and during the course of transport by DHL to the laboratory, would have, if anything, diminished rather than increased the amount of cocaine in the sample.

(3) The volume of urine tested was in accordance with the relevant standard. The Appellant had misunderstood the documentation. There was no basis for an inference of opening of sample or of manipulation.

(4) Mr Krannick was independent within the meaning of the relevant rules.

33. The Respondent requested the following relief, namely a declaration that the Appellant was guilty of a doping offence having tested positive to methylecgonine, a metabolite of cocaine at the UIM World Aquabike Class Pro-Runabout GPI on 6 June 2014 in Milan, and hence:

(1) Sentence (the Appellant) to a two year suspension and ineligibility to participate in any power boating activity and any sport event as of 6 June 2014.

(2) Disqualify the Appellant from all the results achieved at:

(a) UIM World Aquabike Class Pro-Runabout GP12 held in Milan on 6 to 8 June 2014.

(b) Disqualify (the Appellant) from all the results achieved at the UIM World Aquabike Class Pro-Runabout Continental Championship held in Mirabella, Portugal, on 25 to 27 2014.

(c) Disqualify Mr del Pino from all the results achieved at UIM Continental Championship Aquabike Class Pro-Runabout held in Ibiza, Spain, on 5 to 7 September 2014.

(d) Disqualify (the Appellant) from all the results achieved at the UIM Aquabike Pro Class Runabout Championship held in Liuzhu, China, on 3 to 4 October 2014.

(e) Disqualify (the Appellant) from all the results achieved at any other international UIM event in which he participated after 6 June 2014.

V. JURISDICTION

34. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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-related body.

35. The UIM Anti-Doping Rules ("UIM ADR") provide:

8.1.8 Decisions of the UIM doping hearing panel may be appealed to the Court of Arbitration in Sport as provided in Article 13:

13.2.1 Appeals involving international level drivers in cases arising from competition in international events or cases involving international level drivers, the decision may be appealed exclusively to CAS in accordance with the provisions applicable for such court.

36. Jurisdiction is not contested by the Respondents and is confirmed by signature by the parties of the Order of Procedure dated 23 April 2015.

VI. ADMISSIBILITY

37. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

38. As appears from the above, the Appeal was instituted within 21 days of the receipt of the decision appealed against and is therefore admissible.

VII. APPLICABLE LAW

39. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

40. The applicable regulations are the UMI ADR based on the World Anti-Doping Code ("WADC") as in force at the time of the decision. They provide, so far as material, as follows:

ARTICLE 2 ANTI-DOPING VIOLATIONS

The following constitute anti-doping rule violations

2.1. Presence of a prohibited substance or its Metabolites… in a Driver's sample.

(…)

2.1.2 Sufficient proof of an anti-doping rule violation under Article.2.1 is established by any of the following; presence of a prohibited substance or its Metabolites in the Driver's A Sample where the Driver's B sample is analysed and the analysis of the Driver's B Sample confirms the presence of the Prohibited Substance or its metabolites found in the Driver's A Sample.

ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

UIM shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether UIM has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a more balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Driver or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

(…)

3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Driver or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the Driver or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, the UIM shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.3 Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Driver or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then UIM shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List, which is published and revised by WADA as described in article 4.1 of the Code. (It is common ground that Cocaine is on that list).

VIII. MERITS

41. The Panel does not dispute the Appellant's main proposition that presumptively athletes should only be found guilty of anti-doping violations if proper procedures for sample

collection and testing have been followed, although it notes that even if there has been departure from such procedures the governing body can rely on the so-called anti-technicality rule that permits it (if it can) to establish that such departure casts no doubt on the AAF. It is, however, for the athlete to establish such departure in the first place.

42. The Appellant did not appear before the Panel (or even submit a written statement) to deny that he used cocaine prior to or during the competition. Nonetheless the Panel notes that the Decision records that in his written submission on 23 October 2014 he denied the presence of this substance in his sample and the Panel is prepared to proceed on the basis that he does deny any such use or at least (which is the material issue) puts the Respondent to proof of the presence of the relevant metabolite of cocaine in his sample.

43. In the Panel's view, the Appellant has failed to establish any departure from proper procedures so as to give credence to such denial. The Panel will consider each of his submissions set out above separately.

44. As to (1) (a), the chain of custody is established by the oral evidence of Mrs Mandelli itself accepted by the Panel and consistent with information on the chain of custody from the Chain of Custody Form ("COCM") which includes under the rubric *"Details of Location/Transportation/Storage from the fridge until DHL came to pick up the samples"*. Moreover, the Mission Summary signed by Mrs Mandelli on 9 June 2014 under the rubric *"Handling a Sample"* states *"I hereby confirm the sample was securely stored from the point of collection until the point of shipment"* and exhibits the same consistency.

45. As to 1 (b), the same evidence confirms the refrigeration of the samples in Mrs Mandelli's home. Appellant's Counsel sought to suggest that the fact that she had not in the Mission Summary under the same rubric ticked the box *"I hereby confirm the samples were stored as cool as reasonably possible in the circumstances of this mission from the point of collection until the point of shipment"* undermines her evidence. The Panel in fact construes the two boxes as reflecting different scenarios, i.e. that if the samples are "securely stored" this would embrace refrigeration. The Panel considers that even if this were not so, there is no reason to disbelieve Mrs Mandelli's account.

46. The Panel notes, too, the evidence of Professor Botre:

> *"… the effect of not refrigerating the sample, can to the best of my knowledge, cause the degradation with the consequent reduction of their measureable concentrations of cocaine and its two major metabolites…and not their formation from other non-prohibited substances. What can happen is a transient change in the relative concentration ratios between cocaine and its two major metabolites"* (Statement paragraph 7).

47. The Panel accepts Professor Botre's evidence for the following reasons: (1) he was manifestly both expert and truthful, (2) his premise, helpful to the Appellant, was that there were periods when the samples were not refrigerated both when the samples were taken from the testing location to Mrs Mandelli's house and during transport by DHL there being no evidence that any special steps were taken to ensure refrigeration during that latter period. The laboratory

documents confirm that the documents were frozen in the laboratory, (3) the Appellant introduced no expert evidence to contrary effect.

48. As to 2, as to the inference of possible improper opening of the samples or manipulation because of the alleged discrepancy in the laboratory documentation, Professor Botre says:

(a) both the COC form and the DCF are correctly filled out reporting all the relevant information;

(b) the seals were still intact when the 'A' and 'B' bottles were received by the laboratory;

(c) the estimated volume of urine in the 'A' bottle (55 mL) is consistent with the indication reported on the doping control form and referred to the total volume of urine produced (100 mL).

(d) the transfer of samples within the internal laboratory areas was correctly recorded and clearly documented.

Propositions (b), (c) and (d) are germane in this context.

49. As to 2 (b), this is confirmed by the laboratory documentation.

50. As to 2 (c), the DCF itself makes clear that the volume recorded in terms of millilitres is for the 'A' and 'B' samples. The fact that the laboratory put a sticker with 55 mL is explained by Professor Schanzer, who did not appear before the Panel but did give evidence to the UIM ADP where he confirmed that reference on the sticker was to the 'A' sample. The 'B' sample was not reported but, it may reasonably be inferred, consisted of the residue, i.e. 45 mL. Professor Botre cogently explained that it would be unnecessary to record the volume of the 'B' sample unless it were inadequate to carry out a test, in which case the laboratory would decline to test it, at all. (According to his uncontested evidence for cocaine the amount required to test is less than 10 mL)

51. The Panel found this explanation not contradicted by any other evidence, entirely plausible. In short, the manipulation theory is not only speculation but speculation without an even iota of evidence to support it.

52. As to 2 (d), the laboratory documentation confirms that the samples were unopened.

53. The actual analysis as such is not challenged by the Appellant. Once arguments 1 and 2 of the Appellant are rejected, there is no basis for any consequential assertion either that the samples tested were not those of the Appellant or that somehow they degraded because of imperfect custody.

54. As to 3, the international standard for laboratories ("ISL") provides:

5.2.4.3.2.6 *The athlete and/or his/her representative, the representative of the entity responsible for sample collection….shall be authorised to attend the 'B' confirmation.*

If the athlete declines to be present or the athlete's representative does not respond to the invitation or if the athlete or the athlete's representative continuously claim not to be available on the date of the opening despite reasonable attempts by the laboratory to accommodate their dates, the testing authority or laboratory shall proceed regardless and appoint an independent witness to verify that the 'B' sample container shows no signs of tampering and that the identifying numbers match that on the collection documentation. At a minimum the laboratory director or the athlete or his/her representatives or the independent witness shall sign the laboratory documentation attesting to the above.

55. Documentation attesting to the absence and signs of tampering and that the identifying numbers match that on the sample container documentation signed by two representatives of the laboratory director and Mr Krannich. The issue is whether Mr Krannich qualified as an independent witness.

56. As to this the Panel notes the following

(a) There is no definition of "independent" in the ISL.

(b) It must mean presumptively, independent of the parties, that is to say the Appellant and the Respondent who have an interest in the outcome of the 'B' test.

(c) The Panel accepts that a member of the voluntary staff could not be an independent witness since the last sentence differentiates between the roles of each and would be inconsistent with their being the same person.

(d) What is meant by independent must depend upon the functions to be performed by the independent person. The IBA Guidelines of Conflict of Interest in International Arbitration ("IBA Guidelines") deal with arbitrators whose functions are to adjudicate not to observe. Insofar as they assist at all, they remind the Panel that the purpose of requiring both independence and impartiality is to avoid the conflict of interest and Mr Krannich was certainly independent of the UIM who alone – it might be argued - would prefer a finding that the 'B' sample confirmed the 'A' sample (although it is by no means clear that a sports governing body's preference is for an athlete tested to be found to have committed an anti-doping rule violation). Mr Krannich was also manifestly independent of other competitors whose possible interest in such a result is more perceptible.

(e) There is no conflict of interest between the laboratory and the athlete. Both from their different perspectives have a common aim i.e. that the test results are accurate.

(f) The UIM ADP say that Mr Krannich was not a *"fully independent witness"*. The Panel notes that this is an adverb "fully" not found in the relevant ISL rule to qualify the adjective (independent) which *is* found. The conclusion was based on the fact that the laboratory is one department and the legal another department within the same university. Even then the UIM ADP suggests that *"the degree of dependence is very low"*. The Panel goes further and says that no such lack of independence as contemplated in the rule exists at all.

(g) In any event, on 3 September 2014, the Appellant was notified that if he or his representative would not be present, the laboratory would appoint a member of the legal department of the university to observe the sample analysis. The athlete was, therefore, well aware of the consequence of declining the invitation to appear. It matters not at the time that he was made so aware he had not decided whether or not to appear. The knowledge of those consequences persisted until the date of the test of the 'B' sample. The Panel considers that as a matter of general principle he has waived his right to object (compared to the same effect the IBA Guidelines (4) page 9).

57. None of the grounds relied upon by the Appellant have merit and the appeal must, therefore, be dismissed. There is no separate appeal in relation to sanction.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Appellant on 21 January 2015 against the decision of the Anti-Doping Panel of the Respondent dated 25 October 2014 is dismissed.

2. The decision of the Anti-Doping Panel of the Respondent dated 25 October 2014 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.