CAS 2007/A/1385 Henry Rebienot Antchouet v/ Hellenic Football Federation (HFF)

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Luigi **Fumagalli**, Attorney-at-Law, Milan, Italy

Arbitrators: Mr Rui **Botica Santos**, Attorney-at-law, Lisbon, Portugal

Mr Pedro **Tomás Marqués**, Attorney-at-Law, Barcelona, Spain

in the arbitration between

HENRY REBIENOT ANTCHOUET
represented by Mr Duarte Felipe Vieira and Mr Paulo Estima, Attorneys-at-law, Porto, Portugal

– as Appellant –

and

HELLENIC FOOTBALL FEDERATION (HFF)

– as Respondent –

1. BACKGROUND

1.1 The Parties

1. Henry Rebienot Antchouet (hereinafter referred to as the "Player" or the "Appellant") is a professional football player of Gabonese nationality, born on 2 August 1979.

2. The Hellenic Football Federation (hereinafter referred to as the "HFF" or the "Respondent") is the national football association for Greece. It is affiliated to the Fédération Internationale de Football Association (hereinafter referred to as "FIFA"), the governing body of international football.

1.2 The Dispute between the Parties and the Decision of the HFF

3. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings.

4. On 5 May 2007 the Player took part for the Greek football club Larisa FC (hereinafter referred to as "Larisa" or the "Club") in the final match for the Greek Cup against Panathinaikos FC. At the end of such match the Player underwent a doping control.

5. On 18 May 2007 the Hellenic national antidoping organization (hereinafter referred to as the "Eskan") informed the HFF that the "A" sample collected from the Player had tested positive for cocaine, a banned substance under the applicable antidoping regulations.

6. In a letter dated 22 May 2007, the Eskan informed the HFF that the Player had been notified on 18 May 2007 of the adverse analytical finding, but that the Player, acting through his proxy, had informed the Eskan that he did not wish the "B" sample to be further analyzed.

7. Disciplinary proceedings were therefore started against the Club and the Player. As a result, on 31 May 2007, a hearing took place before the First Instance Disciplinary Committee of the Hellenic Football Federation (hereinafter referred to as the "Disciplinary Committee"). Such hearing was attended by an attorney representing the Club. Nobody appeared for the Player.

8. On 13 June 2007 the Disciplinary Committee issued a decision (hereinafter referred to as the "Decision") holding as follows:

   "*Acquits LARISA FC. ...*

   imposes on player ANTCHOUET REBIENOT HENRI ARNAUD a ban of two (2) years from all official and friendly matches and ...

   orders the suspension of his professional Player Identity Card for an equal period (two years)".

9. In its Decision, the Disciplinary Committee underlined that "*pursuant to the Doping Regulations of the Football Games Regulations, Chapter IV par. 16 Art. 1 and 5, a player is prohibited to use or take any substance that may produce an artificial change to his physical playing ability (doping) as well as to use a physical or nerve stimulation medium*", and therefore that, "*if as a result of the test arises the use of prohibited substances by an amateur or professional,* [the player] *is punished by a ban of two (2) years from all official and friendly matches and at the same time an equal period of suspension of his amateur or professional Player Identity Card*". In addition if it "*is proven that the club was aware of his actions, the same organs impose a fine to the club that the player belongs to, which amount to at least 3.000,00 € for the clubs playing in the A National Division*".

10. The Disciplinary Committee, then, considered the facts of the case and held that "*the results of sample A, wherein the prohibited substance cocaine was detected, is deemed final*". Consequently, the Disciplinary Committee concluded follows:

    "*Whereas ...* [it] *was proven that the second defendant* [the Player] *used the prohibited stimulating substance cocaine, which was detected in his sample provided for doping tests ... . Therefore, the second defendant* [the Player] *must be punished by the aforementioned penalties, as foreseen in the Doping Regulations under Chapter IV par. 16 Art. 5 (Appendix A of the Football Games Regulations), namely by a ban of two (2) years from all official and friendly matches and, at the same time, an equal period of suspension of his professional Player Identity Card*".

11. At the same time, the Disciplinary Committee remarked that Larisa had "*denied any knowledge pertaining its athlete ... taking the aforementioned substance, whereas there were no exhibits to prove the opposite*", and therefore found that the Club "*should be exonerated because no evidence of its guilt has arisen*".

12. The Decision was notified to the Player, according to his unchallenged submission, on 11 September 2007.

2. THE ARBITRAL PROCEEDINGS

2.1 The Appeal

13. On 19 September 2007, the Player filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the "Code"), to challenge the Decision, naming the HFF as respondent, and specifying the following requests for relief:

    "*1) To set aside the decision of the H.F.F.*

2) To consider that the specific substance was not intended to enhance sporting performance, and therefore to impose the application of article 65.° par. 1, b) of FIFA Disciplinary Code; and if such is not the case,

3) To consider that the player bears no fault or negligence, and therefore to impose the application of article 65.° par. 3 of FIFA Disciplinary Code; and if such is not the case,

4) To consider that the player bears no significant fault or negligence, and therefore to impose the application of article 65.° par. 2 of FIFA Disciplinary Code;

5) To impose a suspended sanction, in accordance with article 33.° of FIFA Disciplinary Code;

6) In any case, if a suspension is to be imposed, the suspension should not be longer than 6 months".

14. On 1 October 2007, the Appellant filed his appeal brief, with the supporting documents, confirming, in substance, the requests for relief submitted in the statement of appeal.

15. In support of his challenge to the Decision the Appellant emphasises that, in his opinion, "*this case is full of rather weird situations and formal irregularities that have been committed in the decision making process, which ended in a two year suspension*". The Player submits that such "*formal irregularities*" constitute "*serious violations of his right to a fair hearing*" under the European Convention on Human Rights and the FIFA rules, and had led the Disciplinary Committee "*to apply such an unfair, disproportional and heavy sanction*" because he was "*not given the opportunity to properly defend himself, to prove that he had not committed the act intentionally*".

16. In other words, the Appellant criticizes the Decision in respect both of the procedure, concerning the performance of the antidoping test and the hearing before the Disciplinary Committee, and the merits, regarding the finding of an antidoping rule infringement.

17. Under the first point of view, concerning the "*formal irregularities*", the Appellant maintains that Mr Konstantos Konstantinos, Vice-President of the Club (hereinafter referred to as "Mr Konstantinos"), who had declared to the Eskan that the Player did not want the "B" sample analysis, had no power to act on his behalf, while the Player's specific request of analysis of the "B" sample, sent on 25 May 2007, had been disregarded. In addition, the Appellant submits that he had been notified of the adverse finding following the "A" sample analysis only in the Greek language, i.e. in a language he did not understand, and that he was not notified of the date of the hearing before the Disciplinary Committee.

18. Under the second point of view, concerning the finding of an antidoping rule infringement, the Appellant stresses that he "*never consciously or voluntarily consumed any kind of substances to improve performance*", also because he "*had no reason to consume any doping substance in order to improve his performance ..., which would have no practical effects ...*". In this respect, the Player submits "*that the substance has probably entered into ...* [his] *system possibly through some drink that he has consumed*", and most probably in a night club, where, on 29 April 2007, the girlfriend of a compatriot offered him a taste of her cocktail drink, where "*he could never imagine that the girl ... had dropped something into the drink*".

19. In light of such circumstances, the Appellant submits that some rules of the FIFA Disciplinary Code, as based on the WADA antidoping code, should be applied, which provide for the imposition of no sanction "*if the athlete bears no fault or negligence*", for the reduction of the sanction to its half "*if an athlete violates the regulations concerning doping without bearing any serious fault or negligence*", or for the application of a mild sanction "*if the specific substance was not intended to enhance sporting performance*". In addition, the Appellant requests that the sanction be suspended and underlines that "*the 2 year sanction ... is unfair and absolutely disproportional, consisting the strictest possible punishment, and it would mean a life sentence, or "death" sentence of his career and the sustenance of his life*", while in other cases the Disciplinary Committee, as well as the disciplinary committees of different Greek federations, had inflicted more lenient sanctions.

20. In summary, the requests for relief submitted are, in the Appellant's opinion, justified "*considering:*

- *his exemplary playing career;*
- *that is his first offence;*
- *the negative doping controls that he has been submitted to in all clubs and national team in his career;*
- *no significant fault or negligence;*
- *substance not voluntarily consumed and therefore not used in order to enhance sportive performance;*
- *honest regret, availability to do a public apology and to collaborate in anti-doping initiatives*".

2.2 The Answer of the Respondent

21. On 23 October 2007 the HFF filed its answer pursuant to Article R55 of the Code, as follows:

"*... the Hellenic Football Federation ... reaffirms its positions, which are based on the decisions taken by national legal bodies according to the Laws.*

In consequence we consider that for our part there is no dispute to discuss and

remain firmly as for our position. i.e. to respect the resolutions taken by the competent legal bodies, so there is no need to nominate any arbitrator".

22. In other words, the Respondent requested, in substance, that that the Decision be confirmed and that the appeal filed by the Player be dismissed.

2.3 The CAS Proceedings

23. In a letter dated 10 January 2008, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel to hear the appeal brought by the Player had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Rui Botica Santos and Mr Pedro Tomás Marqués, arbitrators.

24. On 26 March 2008 the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"). Such Order of Procedure indicated amongst other that CAS had jurisdiction to rule on the appeal filed by the Player and that the applicable law would be determined in accordance with Article R58 of the Code.

25. A hearing was held in Lausanne on 28 March 2008 on the basis of the notice given to the parties in a letter of the CAS Court Office dated 1 February 2008. At the hearing no representative for the Respondent was present. The Panel, however, decided to proceed with the hearing pursuant to Article R57, last paragraph of the Code, which so provides:

    "*If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing*".

26. At the hearing, the Appellant filed, with the permission of the Panel pursuant to Article R44.1, second paragraph of the Code, (i) a letter dated 13 July 2007 sent by the Player's attorney's to the club Deportivo Alavés, and (ii) the reply letter of Deportivo Alavés dated 16 July 2007. At the conclusion of the hearing, the Appellant, after making cogent submissions in support of his case, confirmed that he had no objections in respect of his right to be heard and to be treated equally in the arbitration proceedings.

3. LEGAL ANALYSIS

3.1 Jurisdiction

27. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS is not disputed by HFF and was based *in casu* by the Appellant on Article R47 of the Code and on Article 35(4) of the HFF regulations, which, in the English translation provided by the Appellant, reads as follows

"*The appeal to the CAS is only allowed, when all levels of jurisdiction in all the Greek Football (Courts) are completed, according to the terms and conditions of the HFF and UEFA statutes*".

3.2 Admissibility

28. The Player's statement of appeal was filed within the deadline set down in Article R47 of the Code. It complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

3.3 Applicable Law

29. According to Article R58 of the Code, the Panel is required to 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*".

30. In this case, as the dispute was heard, and the Decision issued, by a disciplinary body of the HFF, Greek rules and regulations should have to be applied primarily, with Greek law applying subsidiarily.

31. The Panel, however, notes that the Appellant made in his briefs in these arbitration proceedings no reference to any Greek rules or regulations, applicable within the HFF system, or to Greek law. Indeed, the Appellant is basing his submissions on provisions of the European Convention on Human Rights (hereinafter referred to as the "ECHR"), of the World Anti-Doping Code (hereinafter referred to as the "WADA Code"), as well as of the FIFA Disciplinary Code (hereinafter referred to as the "FDC"), as in force at the time the facts occurred for which the Decision was issued.

32. More exactly, the rules invoked by the Appellant in these proceedings are the following:

    <u>Article 6 [*Right to a fair trial*] of the ECHR</u>:

    1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in

special circumstances where publicity would prejudice the interests of justice.

2 *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3 *Everyone charged with a criminal offence has the following minimum rights:*

- a *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- b *to have adequate time and facilities for the preparation of his defence;*
- c *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- d *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- e *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Article 8 [*Right to a fair trial*] of the WADA Code:

Each Anti-Doping Organization with responsibility for results management shall provide a hearing process for any Person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping violation was committed and, if so, the appropriate Consequences. The hearing process shall respect 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 be fairly and timely informed of 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 hearing body to determine the identity, and responsibility for the cost, of the interpreter; and*
- *a timely, written, reasoned decision;*

Hearings held in connection with Events may be conducted by an expedited process as permitted by the rules of the relevant Anti-Doping Organization and the hearing body.

Article 10.5.1 [*No Fault or Negligence*] of the WADA Code:

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

Article 10.5.2 [*No Significant Fault or Negligence*] of the WADA Code:

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.8. failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

Article 33 [*Partial suspension of implementation of sanctions*] of the FDC:

1. *The body that pronounces a match suspension (cf. art. 19), a ban on access to dressing rooms and/or the substitutes' bench (cf. art. 20), a ban on taking part in any football-related activity (cf. art. 22), the obligation to play a match without spectators (cf. art. 24), the obligation to play a match on neutral ground (cf. art. 25) or a ban on playing in a certain stadium (cf. art. 26) may examine whether it is possible to suspend the implementation of the sanction partially.*
2. *Partial suspension is permissible only if the duration of sanction does not exceed six matches or six months and if the relevant circumstances allow it, in particular the previous record of the person sanctioned.*
3. *The body decides which part of the sanction may be suspended. In any case, half of the sanction is definite.*

4. *By suspending implementation of the sanction, the body subjects the person sanctioned to a probationary period of anything from six months to two years.*
5. *If the person benefiting from a suspended sanction commits another infringement during the probationary period, the suspension is automatically revoked and the sanction applied; it is added to the sanction pronounced for the new infringement.*
6. *Special provisions may apply in certain circumstances. In the case of doping offences, this article is not applicable.*

Article 65.1(b) of the FDC:

If any specified substances contained in the list of prohibited substances and methods (cf. appendix A of the Doping Control regulations for FIFA Competitions and Out of Competition) are detected, for which proof can be produced that the specific substances were not intended to enhance sporting performance, at least a caution shall be given for the first offence and a two-year suspension in the case of repetition. A third offence shall incur a lifelong ban.

Article 65.2 of the FDC:

If the suspect can prove in each individual case that he bears no significant fault or negligence, the sanction may be reduced, but only by up to half of the sanction applicable under par. 1; a lifelong ban may not be reduced to less than eight years.

Article 65.3 of the FDC:

If the suspect can prove in an individual case that he bears no fault or negligence, the sanction otherwise applicable under the terms of par. 1 becomes irrelevant.

Article 106 [*Burden of proof*] of the FDC:

1. *The burden of proof regarding disciplinary infringements rests on FIFA.*
2. *In the case of a doping offence, it is incumbent upon the suspect to produce the proof necessary to reduce or cancel a sanction. For sanctions to be reduced, the suspect must also prove how the prohibited substance entered his body.*

33. For the purposes of the above mentioned provisions of the WADA Code the following definitions, as set in Appendix 1 of the same, are relevant:

No Fault or Negligence*: The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known, or suspected even with the exercise of the utmost caution, that he or she had Used or been administered the*

Prohibited Substance or Prohibited Method.

No Significant Fault or Negligence*: The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.*

3.4 Scope of Panel's Review

34. Pursuant to Article R57 of the Code,

"*The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. [...]*".

3.5 The Merits of the Dispute

35. As mentioned, the Appellant is challenging in these arbitration proceedings the Decision, by maintaining that it was issued in violation of some procedural requirements, and that it wrongly found the existence of an antidoping rule violation.

36. In the first perspective, the Appellant maintains that in the performance of the antidoping test and the hearing before the Disciplinary Committee his basic right to be heard had been violated, since

i. the "B" sample was not analysed, notwithstanding his request dated 25 May 2007;

ii. all communications concerning the antidoping infringement and the disciplinary proceedings were drafted and sent him in Greek, i.e. in a language the Player did not understand;

iii. he had not been properly notified of the date of the hearing before the Disciplinary Committee.

37. In respect of such challenges, the Panel notes that, according to Article R57 of the Code, it has full power to review the facts and the law. The Panel consequently hears the case *de novo* and is not limited to considerations of the submissions before the Disciplinary Committee: the Panel can consider all new argument produced before it. This implies that, even if a violation of the principle of due process, or of the Player's right to be heard, occurred in prior proceedings, it may be cured, at least to the extent such violation did not finally impaired the Appellant's rights, by a full appeal to the CAS (CAS 94/129, *USA Shooting & Q. v/ UIT*, *CAS Digest* I, p. 187 at 203; CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest* II, p. 255 at 257; CAS 2000/A/274, *S. v/ Fédération Internationale de Natation*, *CAS Digest* II, p. 398 at 400; CAS 2000/A/281, *H. v/ Fédération Internationale de Motocyclisme*,

CAS Digest II, p. 410 at 415; CAS 2000/A/317, *A. v/ Fédération Internationale des Luttes Associés*, in *CAS Digest* III, p. 159 at 162; CAS 2002/A/378, *S. v/ Union Cycliste Internationale & Federazione Ciclistica Italiana*, in *CAS Digest* III, p. 311 at 315). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "*fade to the periphery*" (CAS 98/211, *B. v/ Fédération Internationale de Natation*, *CAS Digest* II, p. 255 at 264, citing Swiss doctrine and case law).

38. As a result, the Panel could find it unnecessary to verify whether the Appellant's right to be heard before the Disciplinary Committee was affected by the fact that all communications regarding the disciplinary proceedings were in the Greek language or by the fact that the notification of the date of the hearing was sent to the Club and not to the Player in person, to his address in Portugal. The Appellant has had and has used the opportunity to bring the case before the CAS, where all of the Appellant's fundamental rights have been duly respected. At the end of the hearing, indeed, the Appellant expressly confirmed that he had no objections in respect of his right to be heard and to be treated equally in the CAS arbitration proceedings. Accordingly, subject to the evaluations below (para. 40 ff.), even if any of the Appellant's rights had been infringed upon by the Disciplinary Committee, the *de novo* proceedings before the CAS would be deemed to have cured any such infringements.

39. For the sake of clarity, however, the Panel underlines that in any case it does not agree with the Appellant's submissions as to the alleged "*formal irregularities*" concerning the language of the communications and the notification of the hearing and notes that, except for the generic reference to some general provisions, the Appellant has made no reference to, and indicated no violation of, any procedural rule applicable before the Disciplinary Committee.

40. A single issue, however, remains open. It concerns the failure of the Eskan to analyze the "B" sample provided by the Player. Such failure, if found to constitute an infringement of the applicable rules, would not be cured *per se* by an appeal to the CAS, as it would affect the very determination, from a factual and legal point of view, that an antidoping rule violation has been committed by the Player. The failure of the national antidoping organization to perform a duly requested analysis of the "B" sample would be treated as a non confirmation of the adverse analytical finding based on the "A" sample.

41. The Disciplinary Committee stated, in the Decision, that the "B" sample was not analysed because the Player, through his "*proxy*", had informed the Eskan that he did not wish that analysis to be performed. The Player challenges the Decision on this point, by maintaining that Mr Konstantinos, who had acted as his purported "*proxy*", did not have the power to represent him. In other words, according to the Appellant, the Player's right to have the "B" sample analysed was not validly waived by Mr Konstantinos. Indeed, the Player submits, he directly exercised such right in a letter sent to Eskan on 25 May 2007, but his request was not considered, and the "B" sample was not analysed.

42. In respect of the above, the Panel notes that it is undisputed that the Player received on 18 May 2007 the communication that the "A" sample had tested positive. The point is not only indicated in the Decision, but also confirmed in the letter to Eskan of 25 May 2007, whereby the Player made reference to "*your letter of 18 May 2007*", "*informing me that I tested positive in a Doping Control*".

43. The above confirms that the Player also understood the content of such communication of 18 May 2007. In addition, the very submissions of the Player before this Panel show that, when he received the notification of the positive result, he was aware of the possibility to request the analysis of the "B" sample (para. 6 of the appeal brief: "*Mr. Konstantos Konstantinos and the player did talk about the situation, and Mr. Konstantos Konstantinos tried to persuade the player that a second analysis request wouldn't be necessary or useful*").

44. In this context the Panel finds it strange that the Player, who knew that he had the possibility to request the analysis of the "B" sample, decided to leave Greece, on the same 18 May 2007, without taking any action, or at least making sure that an action would be taken in respect of the serious antidoping rule violation notified him. It appears to the Panel that indeed the Player had agreed with the Club not to take any step, and that only a few days later he decided to take a different course of action.

45. In addition, the Panel notes that the Appellant has not indicated any rule applicable before the Eskan or the Disciplinary Committee under which the right to have the "B" sample analysed had to be exercised, or waived, personally, or allowing for a subsequent request to overrule a preceding waiver. In addition, the Player has not indicated any reason why Mr Konstantinos would have notified the Eskan that the Player did not wish the analysis to be performed without the Player's consent. The Panel cannot easily accept, on the basis of the simple declarations of the Player, that a senior officer of the Club could act without the Player's consent and to the detriment of the Player's rights.

46. In light of the above, the Panel is not convinced that Mr Konstantinos acted improperly, sending a letter to the Eskan without previously securing the Player's consent in its respect. In any case, the Appellant failed to substantiate his claim, from both a factual and legal point of view, that the communication of Mr Konstantinos, even assuming it was sent without the Player's consent, did not allow the Disciplinary Committee to draw the conclusions it drew in the Decision.

47. As a result, the Panel finds that the Decision, to the extent it held that the Player had waived his right to have the "B" sample analysed, has to be confirmed.

48. The Player, actually, is challenging the Decision also with respect to its merits, i.e. with respect to the finding of an antidoping rule violation and to the application of the appropriate sanction.

49. Also in this respect, the Panel preliminarily notes that the Player is not invoking the violation of any specific rule of Greek law or Greek regulation applicable before the Disciplinary Committee, allowing the conclusions he is submitting. The Disciplinary Committee applied indeed some specific provisions in force in the Greek system: more exactly it made reference in the Decision to Chapter IV par. 16 Articles 1 and 5 of the Doping Regulations (Appendix A of the Football Games Regulations). The Player does not criticize the application of those rules. He alleges that the application of some FIFA rules should lead to the cancellation, reduction and/or suspension of the sanction imposed, but does not explain why those rules should be applied instead of the rules actually considered by the Disciplinary Committee and whether – and in which measure – they differ from the Greek rules. Indeed, the Panel notes that the rules of the FDC invoked by the Appellant apply only to matches and competitions organized by FIFA (Article 2 of the FDC): as such, they do not appear to be applicable to the Greek Cup, competition in which the Appellant tested positive.

50. As a result, the appeal should be dismissed even only for this reason, since the Appellant has failed to substantiate from a legal point of view his challenge to the merits of the Decision.

51. In any case, the Panel finds that the Appeal has to be dismissed and the Appellant's requests for relief denied even if the rules invoked by the Player were applied to the facts of the case.

52. In this respect the Panel confirms (see § 37) that, by using its full power to review the facts and the law, it can consider all the elements of the dispute, and review the exercise of the power of evaluation vested in the Disciplinary Committee, so as to determine whether an antidoping rule violation has been committed by the Player and, in the event an infringement is found, whether the proper sanction was applied.

53. The Player, in order to have the sanction cancelled or reduced, is challenging the Decision under three different perspectives, i.e.:

    i. that he bears No Fault or Negligence, within the meaning and for the purposes of Article 65.3 of the FDC and Article 10.5.1 of the WADA Code; or alternatively

    ii. that he bears No Significant Fault or Negligence, within the meaning and for the purposes of Article 65.2 of the FDC and Article 10.5.2 of the WADA Code; or alternatively

iii. that the infringement concerns a "specified substance", within the meaning and for the purposes of Article 65.1(b) of the FDC.

54. The Panel agrees with the Appellant that the FIFA provisions he invokes correspond to the WADA Code rules indicated by the Appellant himself. As a result, the Panel submits that such FIFA rules should be interpreted as having the same meaning as the provisions of the WADA Code. More specifically, the meaning of the expressions "*no fault or negligence*" or "*no significant fault or negligence*" are to be considered as having the same meaning in both systems.

55. As a preliminary issue, this Panel has to find which burden and standard of proof has to be applied on doping related issues. It has to be noted that the burden of proof is initially on the party asserting that an antidoping rule violation has occurred (i.e. FIFA or one of its Member Associations) (Chapter III Article 1 of the FIFA Doping Control Regulations, hereinafter referred to as the "DCR"; Article 106.1 of the FDC). As to the standard of proof, the same party shall establish that the violation has occurred "*to the comfortable satisfaction of the hearing body*" (Article 3.1 of the WADA Code). This standard of proof is greater than "*a mere balance of probability*" but less than "*proof beyond reasonable doubt*". Once FIFA or its Member Association has discharged the above burdens, the player accused of the antidoping rule violation is subject to "strict liability". This means that the presence in the athlete's body or bodily specimen of a prohibited substance, regardless of the athlete's intent, knowledge, fault or negligence, is sufficient to establish an antidoping rule violation and thus the athlete's presumptive guilt. The FIFA regulations allow the player to rebut the presumption of guilt by proving absence of fault or negligence or, alternatively, absence of significant fault or negligence (Article 106.2 of the FDC). When the burden of proof is upon the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a "*balance of probability*". The balance of probability standard – set forth also by the WADA Code (Article 3.1) and by the CAS jurisprudence – means that the athlete alleged to have committed a doping violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence.

56. According to the Decision, the analysis of the "A" sample (deemed to be final) showed evidence of cocaine. Cocaine is a stimulant included in the list of prohibited substances. The Panel, therefore, adopts the conclusions of the Disciplinary Committee that the Player's doping offence has occurred. More exactly, in accordance with the standard of proof set forth by the DCR and the WADA Code, the Panel concludes that the Player's violation of Chapter III Article 1 DCR (Presence of a prohibited substance in a player's bodily sample) is proven to its comfortable satisfaction, bearing in mind the seriousness of the allegation.

57. The sanction for a first violation of Chapter III Article 1 DCR is a two-year suspension. For the sanction to be eliminated or reduced, a finding of a circumstance having that effect must be made within the FDC and the related

definitions. Under Articles 65.2 and 65.3 of the FDC, it was up to the Appellant to discharge his burden of proving that he bore No Fault or Negligence or, at least, that he bore No *Significant* Fault or Negligence.

58. It is in this regard the definitions of "No Fault or Negligence" and "No Significant Fault or Negligence" must be applied (see *supra*, § 33). Accordingly, to establish such circumstances the Appellant must prove: *(a)* how the prohibited substance came to be present in his body (Article 106.2 of the FDC), and *(b)* that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substance. The proof of (a) and (b) would establish No Fault or Negligence. No Significant Fault or Negligence requires a Panel, in addition to taking into account the factors relevant to a finding of No Fault or Negligence, to consider the totality of the circumstances and, having done so, to conclude that the athlete's fault or negligence was not significant in relationship to the antidoping rule violation. The Appellant is required to establish that the fault or negligence was not significant on the "balance of probability" (see *supra*, § 55).

59. In the proceedings in front of this CAS Panel, the Player relied as a possible explanation as to how the cocaine entered into his body on its ingestion through a "spiked drink" that was offered him by the girlfriend of a compatriot in a night club.

60. The Panel is not willing to accept such explanation. No evidence of the alleged night out or of the actual existence of the drink supposedly offered by the girlfriend of a compatriot of the Player was submitted. There is no corroborating evidence in the record that he was even in the night club on the night in question other than his own statement. Moreover, even if the Panel were to accept that the Player did go to a night club and did drink something offered by the girlfriend of a compatriot (*quod non*), the Panel must in any event underscore that cocaine contamination through a "spiked drink" is only a speculative guess or explanation uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required (see *supra*, § 55) that it is factually or scientifically probable that the prohibited substance came to be present in the Player's body in the way alleged by the Appellant. Mere speculation of a fact is not proof that such fact did actually occur.

61. The Appellant has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Appellant did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Appellant's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of cocaine through a "spiked drink" is more probable than its non-occurrence.

62. Finally, even if the Appellant's explanation of how cocaine had come into his body were supported by plausible evidence (*quod non*), it seems to the Panel that the Player's behaviour was significantly negligent under the alleged circumstances. Under the definitions included in the WADA Code, an athlete bears "No Fault or Negligence" when he establishes that "*[...] he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance [...]*", and he bears "No Significant Fault or Negligence" when he establishes that "*[...]that his fault or negligence, when viewed in the totality of the circumstance and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an anti-doping rule violation*".

63. Even assuming that the Appellant told the truth about the night of 29 April 2007, it is evident from the records that the Player failed to exercise *any* caution (let alone the *utmost* caution), thereby failing both the "No Fault or Negligence" test and the "No Significant Fault or Negligence" test. A CAS Panel cannot accept the submission that not imagining that the girl offering a drink had dropped something into it, is a circumstance excusing an athlete from his/her fault or negligence. If it were to do so, this Panel would create a loophole enabling athletes who have been found guilty of a doping offence to get an unwarranted reduction of the sanction provided for by the applicable antidoping regulations.

64. With regard to the measure of the sanction, therefore, as the sanction cannot be reduced, since the Player did not establish that he bore No Fault or Negligence or No Significant Fault or Negligence, the Panel finds that the Decision has to be confirmed. All the elements adduced by the Appellant (e.g., his exemplary career, his regret) are not relevant for a mitigation of the sanction, which the applicable rules do not allow.

65. The Appellant, actually, is requesting a reduction of the sanction also under a different perspective. He in fact alleges that the infringement concerns a "specified substance", within the meaning and for the purposes of Article 65.1(b) of the FDC, which allows for the application of a mild sanction if "*proof can be produced that the specific substances were not intended to enhance sporting performance*" of the player in question.

66. In this respect, the Panel finds it to be unnecessary to verify whether the Player, by ingesting cocaine, "*intended to enhance sporting performance*" and whether evidence to establish this fact was offered. The Panel, in fact, notes that cocaine is not one of the "*specified substances contained in the list of prohibited substances and methods (cf. appendix A of the Doping Control regulations for FIFA Competitions and Out of Competition)*" (see also award of 29 April 2008, TAS 2007/A/1411, *Flachi c. UPA-CONI*, § 49-50).. As a result, no reduction of the sanction is possible pursuant to Article 65.1(b) of the FDC.

67. Finally, the Appellant requests that the sanction be "*suspended ... in accordance with article 33.° of FIFA Disciplinary Code*".

68. In the Panel's view also this request has to be dismissed. Indeed, Article 33.6 of the FDC expressly states that the provisions therein contained, allowing for a partial suspension of the implementation of sanctions, is not applicable "*in the case of doping offences*". As a result, no suspension can be granted for the implementation of the sanction imposed on the Player as a result of the finding of an antidoping rule infringement for which he is responsible.

3.6 Conclusion

69. In the light of the foregoing, the Panel holds that the appeal is to be dismissed and the Decision confirmed.

4. COSTS

70. ...

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Henry Rebienot Antchouet against the decision issued on 13 June 2007 by the First Instance Disciplinary Committee of the Hellenic Football Federation is dismissed.

2. The decision adopted by the First Instance Disciplinary Committee of the Hellenic Football Federation on 13 June 2007 is confirmed.

3. All other prayers for relief are dismissed.

4. ...

5. ....

Lausanne, 3 June 2008

THE COURT OF ARBITRATION FOR SPORT

Luigi **Fumagalli**
President of the Panel

Rui **Botica Santos** Pedro **Tomás Marqués**