

**Arbitration CAS 2005/A/830 S. v. FINA, award of 15 July 2005**

Panel: Mr Martin Schimke (Germany), President; Mr Denis Oswald (Switzerland); Mr Massimo Coccia (Italy)

Swimming

Doping (clostebol)

Strict liability

Duty of diligence

Proportionality of the sanction

1. Under the FINA Doping Policy, an offence has been committed when it has been established that a prohibited substance was present in the athlete's body. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance. The burden of proof lies within FINA and its Member Federation to establish that an anti-doping rule violation has occurred.
2. An athlete fails to abide by his/her duty of diligence if, with a simple check, he/she could have realised that the medical product he/she was using contained a prohibited substance, the latter being indicated on the product itself both on the packaging and on the notice of use. Furthermore, it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor or, at the very least, a physiotherapist. However, if it appears that the athlete had no intention whatsoever to gain advantage towards the other competitors, his/her negligence in forgetting to check the content of the medical product can be considered as mild in comparison with an athlete that is using a doping product in order to gain such advantage. Accordingly, although it cannot be considered that the athlete bears *no fault or negligence* in such a case, it can be held that he/she bears *no significant fault or negligence*, which opens the door to a reduced sanction.
3. Substantial elements of the doctrine of proportionality have been implemented in the body of rules and regulations of many national and international sport federations by adopting the World Anti-Doping Code, which provides a mechanism for reducing or eliminating sanctions *i.a.* in cases of "*no fault or negligence*" or "*no significant fault or negligence*" on the part of the suspected athlete. However, the mere adoption of the WADA Code by a respective Federation does not force the conclusion that there is no other possibility for greater or lesser reduction of a sanction.
4. A mere "uncomfortable feeling" alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction of the sanction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the

WADA Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised.

During its Extraordinary Congress in Barcelona on July 11, 2003, the Fédération Internationale de Natation Amateur (FINA) decided to accept the World Anti-Doping Code and to implement it in its Doping Control Rules (“DC”).

On August 21 and 22, 2004, the Italian swimmer S. (“the Appellant”) participated in the European Open Water Swimming Cup Competition in Waren/Müritz, Germany.

On August 22, 2004, after having competed in the women’s event, she had to undergo a doping control. A doping sample was collected from her in the doping control station.

The samples were sent by courier on August 25 to the laboratory “*Institut für Dopinganalytik und Sportbiochemie*” (IDAS, “the laboratory”) in Kreischa, Germany.

On September 20, 2004, the laboratory reported to FINA that the A sample showed the presence of “*the major urinary metabolite of clostebol at low concentration. According to the 2004 Prohibited List of the World Anti-Doping Code, clostebol belongs to the class S4.1.a (anabolic agent, anabolic androgenic steroids)*”.

On September 30, the Italian Federation suspended the Appellant from any sporting activities with immediate effect.

On December 9, 2004, a hearing was held before the FINA Doping Panel and was attended by the Appellant, the President of her Club, Mr. Gianni Gross and her lawyer.

On the same day, the FINA Doping Panel issued a decision that found S. to have committed an anti-doping rule violation under FINA Rules DC 2.1 and DC 10.5.2 and imposed on the swimmer a period of ineligibility of one (1) year, commencing on the date of the decision.

The decision was received by the Appellant on January 19, 2005.

A statement of appeal was filed before the CAS on February 7, 2005.

The Appellant does not contest the result of the analysis carried out by the laboratory, she admits the use of a cream “Trofodermin” which she applied to her foot to fight against skin affection between her fifth and fourth toes. The cream was chosen and purchased by her mother who was not aware that it could contain a doping agent. Moreover, the cream did not enhance the athlete’s capacity and nor it favoured her performance. On this basis, she claims that she did not commit any fault nor she had been negligent and therefore does not deserve a sanction that makes her ineligible

from any competitions for one year. For these motives, the Appellant requests the Panel to acquit her from the charge, or in any event, to reduce the sanction within the limits of the suspension already inflicted by the Italian Swimming Federation on September 30, 2004.

The Respondent considers that its Doping Panel has made a correct application of the Anti-doping Rules and its decision is not only correct but the most favourable one it could have issued. It stresses that according to the Anti-doping rules, any athlete taking part in competitions has the duty to prevent any prohibited substance to enter his or her body. As in the Appellant case, the athlete did not establish that she was not negligent in using a product without checking its composition; the sanction could not be less than half of the ordinary sanction of two years of ineligibility. For these motives, FINA requests the Panel to reject the appeal and confirm the sanction imposed by the FINA on the Appellant.

A hearing was held in Lausanne on June 1, 2005.

LAW

Competence of the CAS

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

“A party may appeal from the decision of a disciplinary tribunal of similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body”.

and on the articles DC 13.1 – 13.2.1.

2. Moreover, the competence of the CAS is explicitly recognised by the parties in their briefs and in the Order of procedure they have signed.

Admissibility

3. The Appeal is admissible for the following reasons:
4. The decision of the FINA Panel (December 9, 2004) imposing a sanction on the Appellant was received on January 19, 2005.
5. The Appellant’s appeal was filed on February 7, 2005.

6. In this connection there are two provisions in the FINA Rules regarding time-limits for an appeal. Whereas DC 13.5 provides for that “*the deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision ...*” (see also “Appeal Instruction” of the contested decision), C 12.8.3 in connection with C 12.8.2 of the FINA Constitution stipulates that an appeal against a decision by the FINA Doping Panel shall be referred to the CAS “*not later than one month after the sanction has been received by the Member or individual sanctioned*”.
7. In this case it is irrelevant which is the controlling provision. The Appellant has met all mentioned deadlines.

Applicable law

8. Art. R58 of the Code provides:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled”.
9. Such provision was expressly mentioned in the Order of Procedure signed by both parties.
10. The “*applicable regulations*” in this case are the FINA Rules, in particular the DC Rules referred to in 2 above.
11. The parties have not expressly or by implication agreed a choice of law applicable to these proceedings before the CAS. Since the domicile of FINA is in Lausanne, Switzerland (Article C2 of the FINA Rules) the Panel shall apply Swiss law on a complementary basis.
12. The applicable procedure in this case is the appeal procedure provided for by art. R47 *et seq.* of the Code. Pursuant to art. R57 of the Code:
“The Panel shall have full power to review the facts and the law”.

Examination of the contested decision

A. FINA’s competence to be seized of the case

13. The scope of the Doping Control Rules of FINA is the following:
“These Anti-Doping Rules shall apply to each Participant in the activities of FINA of any of its Member Federations by virtue of the Participant’s membership, accreditation, or participation in FINA, its Member Federations, or their Competitions” (see section “Scope” of the FINA DC Rules).

14. The question remains through which legal instrument the Appellant is bound by the FINA Rules. In particular the following questions arise:
- Is there a chain of references to the FINA Rules in the by-laws (starting from the Appellant's swimming club over the by-laws of the Italian Swimming Federation to the FINA Statutes)?
 - Is there an agreement/licence/"swimming passport" through which the Appellant has accepted that she is subject to the FINA Rules?
15. Article DC 14.1 (and also section "Scope" of the DC Rules) provide that the regulations of Member Federations shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to Competitors. In the absence of counter evidence the Panel assumes that the Italian Swimming Federation-Rules comply with the requirements of: DC 14.1. In addition, it derives from the Appellant's submissions and statements that she always felt subject to the FINA Rules.
16. Therefore, the Panel has no doubt that the FINA Doping Control Rules can be deemed directly applicable to the Appellant.

B. FINA Doping Panel's competence to impose a sanction

17. FINA Doping Panel's competence to impose a sanction on a competitor derives from articles C 12.5 and C 21.5 of the FINA Constitution.

C. The legal presumption under the Anti-Doping Policy

18. On December 9, 2004, the FINA Doping Panel found the Appellant to have committed an anti-doping rule violation of FINA Rules DC 2.1 and DC 10.5.2 and therefore imposed on her a period of ineligibility of one year commencing on the date of its decision (*i.e.* December 9, 2004).
19. According to Article DC 2, the following constitute anti-doping rule violations:

"DC 2.1

The presence of a Prohibited Substance or its Metabolites or Markers in a Competitor's bodily Specimen.

DC 2.1.1

It is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body. Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Competitor's part be demonstrated in order to establish an anti-doping violation under DC 2.1"

20. Under the FINA Doping Policy, an offence has therefore been committed when it has been established that a prohibited substance was present in the athlete's body. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance.
21. The burden of proof to FINA lies in DC 3.1 that provides the following:
- “FINA and its Member Federation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or its Member Federation has established an anti-doping violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Competitor 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”.*
- “DC 3.2 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:*
- DC 3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedure in accordance with the International Standard for laboratory analysis (...)”*
22. In the case at hand, the question to be answered is whether FINA has met its burden of proof or, whether the conditions provided for at DC 2.1 and DC 3.2 are met.
23. As such the findings of the IDAS are sufficient to consider that the Appellant violated an anti-doping rule:
- For the reasons set out in paras 13 to 16 above the FINA Doping Control Rules were applicable to the Appellant.
 - According to article DC 3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis.
 - According to articles DC 2.1 and DC 3.1 and the Laboratory reports, the Appellant committed a doping offence as the metabolite of clostebol was detected at low concentration in the sample she delivered on August 21, 2004.
 - The Appellant did not contest that the sampling procedure and laboratory analysis were correctly performed.
24. FINA has thus met its burden to prove that in proper test proceedings a prohibited substance was found in the athlete's urine.

Sanction

25. The offence is now established. The question, which remains to be answered, is whether the length of the suspension of one year is correct.

26. According to article DC 10.2 the period of ineligibility imposed for a violation of DC 2.1 shall be of two years.
27. The FINA Rules provide for either elimination or reduction of the period of ineligibility based on exceptional circumstances:
 - According to article DC 10.5.1, if the competitor establishes that he or she bears no fault or negligence for the violation, the period of ineligibility shall be eliminated.
 - According to article DC 10.5.2, if the competitor establishes 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.
28. FINA Doping Panel considered that article DC 10.5.1 (no fault or negligence) was not applicable to the Appellant for the following reasons:
 - According to article DC 2.1.1, the athlete is responsible for the detected presence of a prohibited substance in her bodily specimen.
 - The athlete, despite her age of seventeen years old is aware of doping in sport.
 - She applied Trofodermin without the advice of a doctor.
29. But it ruled that article DC 10.5.2 (no significant fault or negligence) was relevant to the Appellant case:
 - As she is not very much experienced in international competitions, that she relied on her mother's advice, that the quantity of clostebol detected was very low and that the application of the Trofodermin had no enhancing effect, the sanction had been reduced of one half.
30. According to the FINA Anti-Doping rules, the sanctions available are either two years (no exceptional circumstances), one year to two years (no significant fault or negligence), or no sanction at all (no fault or negligence).
31. The first question which has to be clarified is whether no fault or negligence has been established by the Appellant.
32. In accordance with the definition set forth in the FINA Doping-Rules such is the case when *"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"* (see also CAS 2003/A/484). In addition, the athlete must establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated (article DC 10.5.1).
33. On the one hand, at the time of the competition in Germany, the Appellant appeared to be not properly instructed about the list of prohibited substance and she was not aware that a mere local cream could contain doping agents. On the other hand, the rule contained in the

FINA Doping Control Rule is clear: It is each Competitor's duty to ensure that no Prohibited substance enters his or her body.

34. In the case at hand, the Appellant certainly established how the prohibited substance entered her system; however she failed to abide by her duty of diligence. With a simple check, she could have realised that the cream was containing a doping agent, as clostebol is indicated on the product itself both on the packaging and on the notice of use. At least she could have asked her doctor, coach or any other competent person to double-check the contents of the cream bought by her mother.
35. Also the age of the Appellant (at that time 17) does not absolve her from responsibility because the Appellant had been competing for 10 years at that time, and in swimming is not uncommon to have 17-year old athletes compete at the highest level (see also CAS 2003/A/447 "... *age does not fall within the category of 'Exceptional Circumstances'*").
36. Furthermore, the Panel is of the view that it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor or, at the very least, a physiotherapist.
37. On this basis, the Panel considers that the Appellant is responsible for what happened. One cannot not reasonably think that she does not bear *no Fault or Negligence* in the sense of article DC 10.5.1. Therefore, the elimination of Period of Ineligibility is not possible.
38. As the Appellant appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage. Accordingly, the Appellant appears to bear *no Significant Fault or Negligence*, in the sense provided for by article DC 10.5.2.
39. Therefore, the applicable sanction in this case is a reduced period of ineligibility but no less than one-half of the minimum period. As the minimum period of ineligibility is of two years, the sanction shall be a suspension of one year at least.
40. The question to be answered is to whether this rule is consistent with the principle of proportionality.
41. The Panel believes that DC 10.5 does not violate general and fundamental principles of law like the doctrine of proportionality. In this connection the panel refers to an expert legal opinion from Prof. Kaufmann-Kohler, which confirmed that the WADA-Code mechanisms are not contrary to human rights legislation (see CAS 2004/A/690 notes 86 and 88, citing Kaufmann-Kohler and with reference to a decision of the Swiss Federal Supreme Court).
42. However, the question remains: is a CAS Panel bound in any single case to reduce a suspension only by "one-half" according to DC 10.5.2, when a finding of "no significant fault

or negligence” is at hand? In other words does DC 10.5.2 bind the CAS *per se* from reducing this fixed sanction, regardless of the circumstances of the individual case?

43. Before resolving this issue, the Panel deems it opportune to examine its case law and the principles guiding the CAS in relation to the application of a sanction.

44. In many cases, the CAS Panels had been confronted with Anti-doping rules which do not grant the authority to take into consideration circumstances that would lead to a reduction of the sanction. However, the CAS, in many cases, reduced the sanction despite the applicable rules provide for a strict period of ineligibility (CAS 1996/56; CAS 2002/A/396; CAS 2000/A/270). The criteria for the application of such measure are laid *i.a.* in the case CAS 1999/A/246. The main principle is the following:

“The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringements. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions”.

45. Besides those rules, also Swiss law provides for the principle of proportionality (see AUER/MALINVERNI/HOTTELIER, Droit constitutionnel suisse, T. II, Berne 2000, p. 109 and also p. 112 and the jurisprudence quoted ATF 116 Ia 420, ATF 115 Ia 207).

46. In particular, when the restriction lies in the rule itself, the principle of proportionality imposes that the rule provides for exceptions and gives the opportunity to the judge to apply those exceptions when the circumstances of the case make it necessary.

“Lorsque la restriction réside dans un acte normatif, la règle de la proportionnalité au sens restreint veut qu’en principe cet acte prévoie lui-même des dérogations et permette ainsi à l’autorité de faire des exceptions lorsque les circonstances le justifient. Une obligation générale, prévue par la loi, de restreindre une liberté ne résiste que rarement au grief de violation de la proportionnalité. Trop rigoureuse, elle empêche l’autorité chargée de l’appliquer de procéder, dans chaque cas, à une pesée des intérêts privés et publics opposés”.

(AUER/MALINVERNI/HOTTELIER, *op. cit.*, p. 113 and the jurisprudence quoted ZBL 1993 425, ATF 113 Ia 126, ATF 113 Ia 325)

47. Applying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athlete concerned, in particular his personality rights (see *i.a.* CAS 2001/A/317). In the meantime substantial elements of the doctrine of proportionality have been implemented in the body of rules and regulations of many national and international sport federations – including the Respondent – by adopting the World Anti-Doping Code, which provides a mechanism for reducing or eliminating sanctions *i.a.* in cases of “no fault or negligence” or “no significant fault or negligence” on the part of the suspected athlete.

48. However, the Panel holds that the mere adoption of the WADA Code (here FINA-Rule DC 10.5 being of interest) by a respective Federation does not force the conclusion that there is no other possibility for greater or lesser reduction of a sanction than allowed by DC 10.5. The

mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality *a priori* for every thinkable case.

49. The aforementioned considerations even seem to find support in the commentaries on the World Anti-Doping Code provisions 10.5.1. and 10.5.2. These commentaries stress the need for flexibility at least in extreme and unique circumstances.
50. However, this does not mean that nothing has changed, whereby in spite of the provisions of the World Anti-Doping Code (here DC 10.5), a Panel feels itself free to still apply a potentially more-forgiving principle of proportionality.

The Panel is bound to respect the freedom of associations to establish their own rules, a right which in many legal traditions derives from respective national constitutions and was largely upheld by the European Court of Justice for this reason (see judgement of the Court of First Instance in case T-313/02 “Meca-Medina/Majcen” with references to case law of the ECJ). Therefore, one cannot deny that the bare rule provided in DC 10.5 restricts and substantially limits respectively the CAS Panels’ discretion in reducing a suspension. The Panel recognizes that a mere “uncomfortable feeling” alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (see CAS 2004/A/690 note 86 with reference to the Swiss Federal Supreme Court). However, the Panel considers, not without hesitation, that there should be no further reduction of penalty in the present matter, considering the circumstances of Appellant’s case. Nevertheless, the possibility to have a future case which would not fit in properly with one of the definitions provided by art. 10.5 of the WADA Code must be seriously envisaged. In such a situation, the CAS might stick to its previous case law regarding the principle of proportionality in relation to regulations other than the World Anti-Doping Code (see the references quoted at para. 44 above).

51. In the case at hand, no special and mitigating circumstances – for instance that this one year ban is equivalent to a two year suspension because competitions will occur at the end of the period of ineligibility whose successful completion is necessary for competing in the next season – has been established by the Appellant. For these motives, it is not obvious that the one year suspension is completely disproportionate in the above mentioned sense. Accordingly, the facts of this case do not force the Panel to consider any further reduction of the contested one year penalty.
52. The only provision which might justify a reduction here is Article 10.3 of the World Anti-Doping Code (*i.e.*, DC 10.3), embodying the legal idea that certain uses of banned substances can indicate an unintentional – and unharmed – violation. Accordingly, a warning or a

maximum one-year sanction may be levied in cases involving the use of “specified substances”. Although the manner of application of the banned substance in the case at hand (the external use of a medical cream between the fifth and fourth toe) speaks in favour of a finding that the Appellant did not intend to enhance her performance, “Clostebol” is not a “specified substance”. Nothing exists in the legislative history of DC 10.3 to indicate that the Panel can apply this legal idea to expand this list to *applications* of non-“specified substances”.

That is, because it is not clear that this is an unintentional loophole in the legislation, which could then be filled by the Panel, DC 10.3 will not be applied to validate a reduction of the fixed sanction in the case at hand.

53. One more question in relation with the commencement of the sanction needs to be answered. The Italian Swimming Federation suspended the Appellant with immediate effect on September 30, 2004. The sanction imposed on the Appellant by the FINA Doping Panel is a period of ineligibility of one year starting on December 9, 2004.
54. Article DC 10.8 provides:
“Where required by fairness, such as delays in the hearing process, or other aspects of Doping Control not attributable to the Competitor, the period of ineligibility may start at an earlier date commencing as early as the date of Sample Collection”.
55. As the Appellant was effectively suspended from September 30, 2004 onwards, the Panel is of the opinion that fairness requires that the sanction should not last more than one year and should therefore end on September 30, 2005. Therefore, as requested by the Appellant, the commencement of the sanction shall be September 30, 2004 and not December 9, 2004.

The Court of Arbitration for Sport rules that:

1. The appeal filed by S. is partially upheld.
2. The decision of the FINA is confirmed with the exception of the commencement of the sanction that shall be September 30, 2004.

(...)