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The GUERRERO Doping Saga: Proportionality Questioned

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→ ***Doping – Disciplinary litigation – FIFA Regulations – World Anti-Doping Code – Sporting sanctions – Proportionality – FIFA Disciplinary Committee – FIFA Appeal Committee – Court of Arbitration for Sport (CAS)***

"Seldom has the law been as big an ass as in the case of Peru centre forward Paolo GUERRERO"[1]

Introduction

The above quote - from "*The Sun*" in the UK - was no doubt sensationalist, and typical of a tabloid newspaper. However, the sentiment behind it was largely echoed by the sporting world when, in 2017, the Court of Arbitration for Sport (CAS) confirmed that Paolo *GUERRERO* had been declared ineligible to play football (for 14 months) following an inadvertent anti-doping rule violation (ADRV). Indeed, not only did it appear that Mr *GUERRERO*'s ADRV had stemmed from the unintentional consumption of coca tea, the CAS decision meant that the Peruvian star (and captain of the National Team) would not be permitted to play for Peru in its first appearance in the FIFA World Cup Finals since 1982.

The decision sparked both legal and public appeals, with even Mr *GUERRERO*'s rivals campaigning for him to be able to take part in the World Cup.[2] The legal proceedings that followed saw Mr *GUERRERO* obtain an injunction from the Swiss Federal Supreme Court, which provisionally suspended the CAS ban to allow him to play in the World Cup. However, the Supreme Court reinstated the ban after the end of the World Cup, pending the resolution of Mr *GUERRERO*'s request to set aside the CAS award.

Since a lot has been said about this case, in particular on social media, this contribution is an attempt to explain, in as summary form as possible, the legal particularities of Mr *GUERRERO*'s case at all levels - from the FIFA internal bodies, to the CAS, and all the way to the Swiss Federal Supreme Court. To do so we set out in the following sections: the factual and procedural background; Mr *GUERRERO*'s explanation for the ADRV; and the main legal issues raised by Mr *GUERRERO*'s defence, some of which are of particular interest from an anti-doping perspective.[3]

Factual and Procedural Background

The Adverse Analytical Finding and the Provisional Suspension

On 5 October 2017, as part of the 2018 FIFA World Cup qualifiers, Mr *GUERRERO* played for the Peruvian national team in a match against Argentina in Buenos Aires. Following the match, he was selected for an in-competition anti-doping control.

1 www.thesun.co.uk

2 https://fifpro.org

3 The author must disclose that he is currently representing FIFA in the proceedings pending in the Swiss Federal Supreme Court and will thus not discuss the specifics of these proceedings on the merits. As far as the CAS proceedings are concerned, the present contribution is exclusively based on the information arising out of the published award.

On 25 October 2017, the WADA-accredited Cologne laboratory (Laboratory) confirmed the presence of the cocaine metabolite benzoylecgonine in Mr *Guerrero*'s urine A Sample. This substance is a so-called non-Specified Substance, included on the WADA 2017 Prohibited List under Section S6 "*Stimulants*". It is prohibited only in competition (more on this classification below).[4] The concentration of benzoylecgonine in Mr *Guerrero*'s A Sample was 77ng/mL.

On 2 November 2017, the FIFA Anti-Doping Unit informed Mr *Guerrero* of the Adverse Analytical Finding (AAF) and, on 3 November 2017, the Chairman of the FIFA Disciplinary Committee (FIFA DC) passed a decision provisionally suspending Mr *Guerrero* from participating in football matches for a period of 30 days.

On 10 November 2017, the Laboratory informed FIFA that the analysis of Mr *Guerrero*'s B Sample had confirmed the presence of the cocaine metabolite benzoylecgonine. The concentration of benzoylecgonine in Mr *Guerrero*'s B Sample was 42ng/mL.

The FIFA proceedings

The FIFA DC proceedings began with the opening of a file against Mr *Guerrero* in early November 2017. On the merits,[5] the FIFA DC proceedings consisted of both a written and an oral phase, with a hearing held in Zurich on 30 November 2017. On 7 December 2017, the FIFA DC rendered its decision, imposing a period of ineligibility of one year on Mr *Guerrero* (see below for the reasons behind the FIFA DC decision). This meant that, unless Mr *Guerrero* succeeded with an appeal to the FIFA Appeal Committee (FIFA AC), he would not be eligible to play in the FIFA World Cup in July 2018.

Mr *Guerrero* immediately filed an appeal with the FIFA AC. On 20 December 2017, following review of Mr *Guerrero*'s reasons for appeal, the FIFA AC partially upheld Mr *Guerrero*'s appeal and reduced the period of ineligibility imposed on him to six months (see below for the reasons behind the FIFA AC decision). The FIFA AC decision was notified to the Parties on 26 January 2018. Importantly, as Mr *Guerrero*'s period of ineligibility would run from 20 December 2017, and the provisional suspension served by Mr *Guerrero* (since 3 November 2017) would be taken into account, this meant that Mr *Guerrero* would, after all, be eligible to take part in the 2018 FIFA World Cup.

The CAS proceedings

On 29 January 2018, Mr *Guerrero* filed an appeal against the FIFA AC decision with the CAS (CAS 2018/A/5546), requesting that the FIFA AC decision be annulled and no period of ineligibility be imposed on him.

WADA requested to intervene in these proceedings on 1 February 2018, but noted that it would, in any event, be filing its own appeal. On 19 February 2018,[6] WADA filed its appeal against the decision (CAS 2018/A/5571), requesting that Mr *Guerrero*'s period of ineligibility be increased to 22 months. On 6 March 2018, CAS consolidated the two appeals, meaning that the case would be heard - and the decision issued - by the same Panel of arbitrators: the Honourable *Michael J Beloff* (President), Prof. *Massimo Coccia*, and Mr *Jeffrey G. Benz*.

A hearing was held in Lausanne, Switzerland, on 3 May 2018. On 14 May 2018, the CAS Panel issued the operative part of its award, increasing the length of Mr *Guerrero*'s ban (from 6 months) to 14 months and thus precluding his participation in the World Cup.[7] The same day, the CAS Court Office published a press release in which it explained the main rationale of the Panel's award, namely, that the "*CAS Panel [...] accepted that [Mr Guerrero] did not attempt to enhance his performance by ingesting the prohibited substance*" but a 14 month ban was more appropriate "*[c]onsidering that, in case of no significant fault or negligence, the sanction should, in accordance with the applicable FIFA rules, be in the range of 1 to 2 years.*"[8]

4 www.wada-ama.org

5 Procedurally, as an initial step in the FIFA proceedings, Mr *Guerrero* appealed the provisional suspension that had been imposed on him. This appeal was rejected by both the FIFA DC (on 9 November 2017) and the FIFA Appeals Committee (FIFA AC) (on 14 November 2017) respectively. As no decision had yet been taken on the merits of Mr *Guerrero*'s case, on 3 December 2017, Mr *Guerrero*'s provisional suspension was extended for another 20 days.

6 With respect to the timing of WADA's Statement of Appeal, according to Article 80(1.2) of the FIFA Anti-Doping Rules, WADA benefits from a later deadline than either the player or FIFA. Specifically, the filing deadline for WADA *"shall be the later of: a) Twenty-one days after the last day on which any other party in the case could have appealed; or b) Twenty-one days after WADA's receipt of the complete file relating to the decision"*.

7 The reasoned award was issued on 30 July 2018 and is available here: www.tas-cas.org

8 Available at www.tas-cas.org

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The Swiss Federal Supreme Court proceedings

On 25 May 2018, Mr *GUERRERO* filed an action to set aside the CAS award in the Swiss Federal Supreme Court, requesting also that the CAS award be stayed until a decision was taken on the merits of his action (this would have allowed him to participate in the World Cup pending the resolution of his case). Interestingly, the action to set aside was filed without knowing the grounds of the CAS award as this is permitted under Swiss Law.[9] On 30 May 2018, the President of the competent division of the Swiss Federal Supreme Court issued an *ex parte* order granting the stay of the CAS award. The order took into account "*the damage that Mr. GUERRERO, who was 34 years old, would suffer if he would be barred from participating in the competition that will constitute the pinnacle of his career, while the CAS press release indicates that the did not act intentionally, nor with significant negligence.*"[10]

After the World Cup, WADA filed a request for the lifting of the stay, enclosing a copy of the CAS reasoned award, which had been published in the meantime. On 6 August 2018, the Supreme Court forwarded WADA's request to the parties "*for information*" but without inviting any comment or fixing any time limit to answer. Two weeks later, in what is an unprecedented order, the Court issued a second order lifting the stay granted on 30 May 2018 on the ground that Mr *GUERRERO*'s counsels did not react to WADA's request.

On 6 September 2018, Mr *GUERRERO* filed a new request for a stay, which was rejected on 27 September 2018 on the ground that "*it was not clear on a prima facie analysis that his action to set aside the CAS award was very likely to be successful*".[11]

On 17 October 2018,[12] Mr *GUERRERO* and FIFA both filed an action to set aside the CAS Award.[13]

On 19 November 2018, the Swiss Federal Supreme Court dismissed FIFA's action on the ground that, since the ban imposed by the CAS was against Mr *GUERRERO*, FIFA did not have a personal interest to sue (despite having been a party in the CAS proceedings and despite the fact that the CAS award annulled the decision of the FIFA AC and rejected FIFA's prayers for relief in the CAS proceedings).[14]

The Supreme Court is expected to issue its decision on the merits of Mr *GUERRERO*'s action to set aside the CAS award in the first half of 2019.

Mr GUERRERO's Explanation

Prior to considering the respective FIFA and CAS decisions, and giving an indication of the stakes in the Swiss Federal Supreme Court, it is worth setting out the crux of Mr *GUERRERO*'s defence. In short, Mr *GUERRERO* submitted that the most probable source of the cocaine metabolite in his urine sample was his ingestion of tea containing coca leaves on 5 October 2017 in the *Swissotel* in Lima, Peru, where the Peruvian National Team was staying before travelling to Buenos Aires for the match in question. In support of the likelihood of this explanation, Mr *GUERRERO* submitted that:[15]

- He was aware of the relevant anti-doping regulations and the list of Prohibited Substances. He had always been very cautious not to ingest any prohibited substances and had always been against doping.
- He had an unblemished anti-doping record throughout his career, and was an ambassador for drug free sport.
- The very low concentration of the single cocaine metabolite benzoylecgonine in his urine was compatible with an inadvertent and unintentional use of a contaminated product (as opposed to the use of cocaine).
- During his stay at the *Swissotel* in Lima, he had ingested two different teas:

9 *KAUFMANN-KOHLER/RIGOZZI*, International Arbitration - Law and Practice in Switzerland, 2015, no. 8.98.

10 Free translation of the French original available at www.bger.ch

11 This time, the Swiss Federal Supreme Court did not issue a press release and this quote is a free translation of the French original of the unpublished order.

12 The 30-day time limit to file an action to set aside an arbitral award in the Swiss Federal Supreme Court starts on the day after the notification of the original of the reasoned award. In the present case, the original reasoned award (communicated by fax on 13 July 2018) was notified on 17 September 2018.

13 Mr *GUERRERO*'s brief was an expanded version of the original application of 25 May 2018, which was filed against the unreasoned award.

14 This decision appears difficult to reconcile with the test normally applied by the Swiss Federal Supreme Court (including when the action to set aside is brought by WADA) that *"La recourante, qui a pris part à la procédure devant le TAS, est particulièrement touchée par la décision attaquée, car celle-ci entraîne le refus de ce tribunal arbitral de donner suite à son appel. Elle a ainsi un intérêt personnel, actuel et digne de protection à ce que cette décision n'ait pas été rendue en violation des garanties invoquées par elle, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF) "* (Decision 4A_692/2016 of 20 April 2017, at par 2.4.).

15 According to the CAS Panel, there were additional *"theoretical possibilities"* submitted by Mr *GUERRERO* (such as water contamination), however, these had *"no evidential substratum whatsoever and the Panel therefore discount[ed] them right away"* (see par. 67 of the CAS decision). Based on the Award it is not possible to determine on which exact grounds these additional possibilities were disregarded.

- The first tea was - as far as he understood - an anise tea, recommended by the Peruvian team's nutritionist to treat a stomach ache (the First Tea). Mr *Guerrero* consumed this tea under the supervision of the nutritionist and in the national team's private dining room - in which strict food and beverage protocols had been put in place.

- The second tea was drunk in the national team's visitors room (the Second Tea). Mr *Guerrero* recalled asking for an anise tea, however submitted that he may have been given a coca tea instead, or a tea contaminated with coca leaves, in particular considering: (i) the culture of coca tea ingestion in Peru; and (ii) the fact that the *Swissotel* had coca tea available to customers at the time that he was there.

➥ Finally, during his stay at the Hotel *Intercontinental* in Buenos Aires, he ingested a third tea - a black tea from a sealed bag which was prepared by the same nutritionist (the Third Tea).[16]

Considering the above, Mr *Guerrero* submitted that: (i) the most likely source of the substance in his urine was one of the above teas (in particular the Second Tea); and (ii) in the circumstances, and in particular considering that he believed the food and beverage protocol was in place also in the visitor's room of the Swissotel in Peru, he should not be considered to have committed any fault or negligence by consuming any of the teas in question.[17]

Legal Issues

It is no secret that it was difficult for many - in particular those unfamiliar with the anti-doping system - to understand the decision to suspend Mr *Guerrero* for even six months, considering that the source of his ADRV appeared to be the inadvertent ingestion of coca tea. Thus, we set out below the key elements of both the sanctioning regime for cocaine and the respective decisions (in brief) to attempt to explain the sanction(s) imposed on Mr *Guerrero* and the restrictive nature of anti-doping regulations when it comes to cocaine. Rather than consider the decisions individually, we address below the key principles and the way that each legal instance addressed them.

The Sanctioning Regime for the Prohibited Substance - Cocaine

Presence of a non-Specified Substance prohibited only "*In-Competition*"

Mr *Guerrero*'s case was governed by the 2015 version of the FIFA Anti-Doping Regulations (FIFA ADR),[18] which reflect the relevant provisions of the World Anti-Doping Code (WADA Code) and were applicable at the time of the AAF.[19]

Article 6 of the FIFA ADR (corresponding to Article 2.1 of the WADA Code) provides that the "*Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample*" constitutes an ADRV. The Prohibited Substances are set out in the Prohibited List published by WADA on an annual basis.

As noted above, cocaine is a so-called "*non-Specified Substance*", prohibited "*In-Competition*" only, and included on the WADA 2017 Prohibited List under Section S6 "*Stimulants*".[20]

According to the WADA Code, a "*Specified Substance*" is not "*considered less important or less dangerous than other doping substances [it is simply] more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance.*"[21] Thus, in the case of cocaine the inverse is true - cocaine is considered more likely than other (specified) substances to have been used to enhance sport performance.

In addition, cocaine is prohibited "*In-Competition*" only. However, this does not mean that only the "*use*" of cocaine during a competition period will be a violation. Rather, the "*presence*" of cocaine (or even a metabolite of cocaine) in a sample collected in-competition will also be considered an ADRV, even if the substance was ingested out-of-competition.

16 According to the FIFA AC decision, this tea was tested by an independent laboratory in the United States, which confirmed it was negative for cocaine and coca leaves.

17 Interestingly, it appears from the FIFA AC decision and the CAS award that Mr *Guerrero* also initially raised a defence in relation to: (i) alleged departures from the WADA International Standards; and (ii) the concentration of the cocaine metabolite in his urine sample (suggesting that there was not, in fact, an AAF under the relevant rules). As these elements were not discussed in the CAS award, it appears that any such defence was abandoned at some stage during the proceedings.

18 Available at https://no-doping.fifa.com

19 See par. 60 of the CAS award.

20 www.wada-ama.org

21 Comment to Article 4.2.2 of the WADA Code.

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Thus, while an athlete can use (or ingest) cocaine (or indeed coca leaves) out-of-competition, if the substance or its metabolite(s) remains in the athlete's system during competition he or she will be sanctioned under the anti-doping rules.

This classification of cocaine has a direct impact on the applicable sanctioning regime (as set out in both the FIFA ADR and the WADA Code) as follows:

The default suspension

As a non-Specified Substance, the default period of ineligibility is four years, unless the player can establish that the ADRV was not intentional.[22] Cocaine being a substance prohibited only in-competition, the player can establish that the ADRV was not intentional by proving that it "*was used Used Out-of-Competition in a context unrelated to sport performance*".[23] If the player can establish that the ADRV was not intentional, the default period of ineligibility is two years.[24]

The paramount role of the "source of the substance"

This two-year suspension can only be eliminated or further reduced if the athlete can establish the source of the substance, *i.e.* how it entered into his or her system.[25]

Elimination of the (default) suspension

If the player can establish, based on the source of the substance, that he or she bears "*No Fault or Negligence*" the (default) suspension will be eliminated. "*No Fault or Negligence*" is defined as the Player establishing "*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*".

Reduction of the (default) suspension

If the player cannot prove "*No Fault or Negligence*", the sanction can only be reduced[26] (*i.e.* it cannot be completely eliminated) and only if the player establishes: (i) that the AAF arose as a result of either a "*Contaminated Product*" (defined as "*a product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable internet search*"); or (ii) "*No Significant Fault or Negligence*" applies to the case (defined as the player establishing that "*his 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*").

If the athlete proves that the substance came from a "*Contaminated Product*", the minimum sanction shall be a reprimand and no period of ineligibility (and the maximum sanction two years) depending on the athlete's degree of fault. However, if an athlete proves only "*No Significant Fault or Negligence*" the reduced period of ineligibility may be not less than the period of ineligibility otherwise applicable - *i.e.* in the case of cocaine the minimum sanction for a first offence is one year.

In summary, for Mr *GUERRERO* to avoid a period of ineligibility altogether, he would have needed to prove that: (i) his violation was not intentional; and (ii) he either committed No Fault or Negligence, or was the victim of a Contaminated Product. To the contrary, if Mr *GUERRERO* was only able to establish No Significant Fault or Negligence, the minimum sanction available under the anti-doping regulations would be a period of ineligibility of one year.[27]

Prior to considering the application of this sanctioning regime to Mr *GUERRERO*'s case, it is worth briefly mentioning here that, as discussed previously in the context of the CAS decision on the *Therese JOHAUG* matter,[28] if cocaine had been classified by WADA as a Specified Substance, the minimum sanction applicable in the case would have been a reprimand (*i.e.* the same as for a Contaminated Product).[29] However, as a non-Specified Substance (*i.e.* a substance considered more likely to be used to enhance performance),

22 Article 19(1) of the FIFA Anti-Doping Regulations, Article 10.2.1.1 of the WADA Code.

23 Article 19(3) of the FIFA Anti-Doping Regulations, Article 10.2.3 of the WADA Code.

24 Article 19(2) of the FIFA Anti-Doping Regulations, Article 10.2.2 of the WADA Code.

25 This requirement is contained in Article 22(1)(b) of the FIFA ADR and 10.5.1.2 WADA Code for Contaminated Products, and in the definitions of No Fault or Negligence and No Significant Fault or Negligence in the FIFA ADR and WADA Code.

26 We note that there are additional, non-fault related, reductions that an athlete may also rely on, but these were not a factor in Mr *GUERRERO*'s case and thus are not discussed in the present article.

27 It is worth briefly mentioning here that, had cocaine been classified by WADA as a Specified Substance, the minimum sanction applicable would have been a reprimand (*i.e.* the same as for No Fault or Negligence or No Significant Fault or Negligence).

28 CAS 2017/A/5015 *International Ski Federation (FIS) v. Therese JOHAUG & the Norwegian Olympic and Paralympic Committee and Confederation of Sports* and CAS 2017/A/5110 *Therese JOHAUG v. The Norwegian Olympic and Paralympic Committee and Confederation of Sports*, available at: www.tas-cas.org

29 http://wadc-commentary.com

it was not possible to reduce the sanction below twelve months. Considering that an athlete who is able to prove No Significant Fault or Negligence has also proven a lack of intention (*i.e.* that the product was not consumed for the purpose of the enhancement of sport performance), it is unclear why this distinction remains in the WADA Code (and other anti-doping regulations). Ultimately, however, this is a question for the drafters of the WADA Code - and as it was not addressed in the *GUERRERO* decision(s) it is not discussed further here.

Application of the Sanctioning Regime to Mr GUERRERO's case

Source of Mr *GUERRERO*'s cocaine AAF

Considering the sanctioning regime, the first thing for Mr *GUERRERO* to do was to prove the source of the substance and that his ADRV was not intentional.[30] As per Article 66(2) of the FIFA ADR (replicating Article 3.1 of the WADA Code), Mr *GUERRERO* had to prove this on the "*balance of probabilities*".

With respect to the source of the substance, it was accepted by the FIFA DC, the FIFA AC and the CAS that the cocaine metabolite in Mr *GUERRERO*'s urine sample was most likely to have been contained the Second Tea that he ingested in the Swissotel in Lima, Peru. The findings on this point were most developed by the CAS Panel, which held that it was "*on balance satisfied that Mr GUERRERO has established to a standard of not less than 51% or, to use the vernacular, a standard just over the line, that the source of the prohibited substance was coca tea.*"[31]

In coming to its conclusion, the CAS Panel took into account the following elements:

- The First and Third Teas were unlikely to be the source considering that: (i) the First Tea was drunk in an area with strict food and beverage controls and under the supervision of the nutritionist; and (ii) the Third Tea was drunk in a country which lacks a "*coca culture*" and the concentration of the metabolite was too low to be consistent with consumption on the date in question.
- The Second Tea was more likely to be the source of the AAF than drug use for the following reasons: whilst either scenario (coca tea two days before the test, or cocaine use 4-7 days before the test) was possible, the use of cocaine was unlikely given that: (i) a hair test conducted on Mr *GUERRERO* eliminated the possibility that he was a habitual user of cocaine; (ii) it would be "*unwise, albeit not unheard of*" for a footballer to use cocaine so close to an important match - particularly considering cocaine is so easily capable of detection; and (iii) Mr *GUERRERO* was a "*poster boy*" for drug free sport and the Panel considered the "*unlikelihood of him running such a risk*" of damaging his reputation.
- Moreover, there was positive evidence on the file in support of the Second Tea being the source of the substance, namely: (i) it was accepted by all parties that drinking coca tea was part of Peruvian culture - thus more likely to occur (whether deliberately or inadvertently) whilst in Peru; (ii) the Swissotel had coca tea available for its guests at the material time; (iii) the Panel accepted that Mr *GUERRERO* drank the Second Tea in the visitor's area - *i.e.* where the food and beverage protocols were not in place; and (iv) the subsequent conduct of the Swisshotel (being uncooperative in the proceedings and eventually ceasing to serve coca tea) indicated that the hotel was concerned it might be held responsible for Mr *GUERRERO*'s positive test and was concealing any tracks that might have indicated it served him a drink containing a prohibited substance.

On that basis, the Panel rejected WADA's contention that this was a case "*where a Player simply denies use of a prohibited substance and asks, without more, to infer an innocent explanation for its presence in his system.*" To the contrary, the Panel considered that there was a "*coherent [and] sufficiently convincing evidence-based case*" that the Second Tea was the source of the ADRV.[32]

30 It is important to note that, as per CAS jurisprudence, it is now generally accepted that an athlete need not prove the source of the substance in order to prove a lack of intention, however, while *"there could be cases, although extremely rare ones, in which a Panel may be willing to accept that an ADRV was not intentional although the source of the substance had not been established […]as a general matter, proof of source must be considered an important and even critical first step in any exculpation of intent (CAS 2016/A/4534, par. 37)"*; see CAS 2016/A/828 par. 136.

31 See par. 68 of the CAS award.

32 See par. 69-70 of the CAS award

Conclusion on the (un)intentional nature of Mr *Guerrero*'s ADRV

With respect to "*intention*", each legal instance (at FIFA and CAS) accepted that Mr *Guerrero*'s ADRV was not intentional. In fact, at the CAS level it was agreed by all parties, including WADA, that whether or not the source of Mr *Guerrero*'s ADRV was cocaine or coca tea, his ingestion of the Prohibited Substance occurred out-of-competition in a context unrelated to sport performance (within the meaning of Article 19(3) of the FIFA ADR and Article 10.2.3 of the WADA Code).

However, as noted above, "*unintentional*" with the meaning of anti-doping regulations does not mean that a player's sanction is or will be eliminated (or even further reduced), it only means that the default sanction applicable to the case is a two-year period of ineligibility. Thus, having accepted that the source of the ADRV was the Second Tea, the Panel next considered Mr *Guerrero*'s degree of fault in consuming same.

Mr *Guerrero*'s Degree of Fault

Having convinced three tribunals that the ADRV was likely to have stemmed from the inadvertent ingestion of coca tea, the obvious question remains - why did the respective panels come to such different conclusions (FIFA DC - 12 months; FIFA AC - 6 months; and CAS - 14 months)? The short answer is that each Panel had a different opinion on: (i) Mr *Guerrero*'s degree of fault; and (ii) whether the principle of proportionality could be applied to his case.

The reasoning contained in the FIFA and CAS decisions is set out below to attempt to explain the divergence in approach between the respective panels.

No Fault or Negligence

The one thing that each Panel fully agreed on, is that Mr *Guerrero* failed to establish No Fault or Negligence or that the source of the substance was a Contaminated Product.

As to "*No Fault or Negligence*", the FIFA AC compared Mr *Guerrero*'s behaviour when drinking the First Tea (in an area subject to strict protocols) and the Second Tea (in an area without such protocols and without verifying precisely what tea had been given to him) and held that:

> "*The Player's lack of caution cannot be shifted neither to the Association for not having implemented in the visitor's room the same protocols regarding food and beverage that had been set up in the dining room, nor to the waiter that served the Second Tea to him. The Regulations are absolutely clear in this sense and establish that the Player is the ultimate responsible for any Prohibited Substance that entered his system. An opposite interpretation, as suggested by the Appellant, would lead to a considerable threat to the fight against doping.*"

In dismissing the Rider's defence, the FIFA AC also distinguished two cases in which No Fault or Negligence had, in the past, been accepted for cocaine - specifically in circumstances where the relevant athlete had unknowingly kissed someone who had been using cocaine.[33] The FIFA AC stated that: "*the reasonable expectation to ingest a prohibited substance is completely different for an athlete that has intimate contact with another person than from the one of the Player that drank a tea already prepared by an unknown person in a country where the consumption of coca leaf tea is spread and common.*"

As for the CAS Panel, it held as follows:

> *There were a number of ways in which Mr Guerrero could, instead of relying on assumptions, have discharged his primary personal duty as an athlete to ensure that no prohibited substance entered his body. He could have inquired as to what protocols operated and where in the hotel. He could have asked specifically what teabags had been put in the jug or jugs in T2. He could have insisted on having the bags brought to him so that he could scrutinize the label (as he claimed to have done with T1) and himself carry out or at least supervise the infusion of the tea. The Panel finds unassailable the decision of the FIFA Disciplinary Committee (endorsed by the FIFA Appeal Committee) that it is not possible to describe Mr Guerrero as being guilty of NFN, especially since the comment on the relevant WADA Article 10.4, on which the FIFA ADR are based, refers to the availability of this plea as*

33 See CAS 2009/A/1926 *International Tennis Federation (ITF) v. Richard Gasquet* and CAS 2009/A/1930 *World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet* and the SDRCC decision DT 16-0249 *CCES v. Shawn Barber:* www.crdsc-sdrcc.ca.

> *to sanction "only in exceptional circumstances", an approach confirmed in CAS 2017/A/5015 & CAS 2017/A/5110: "a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, [the Athlete] must have exercised the 'utmost caution' in avoiding doping. As noted in CAS 2011/A/2518, the Athlete's fault is 'measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance'"* (par. 185).

As far as a Contaminated Product was concerned, both the FIFA DC and the FIFA AC held that Mr *GUERRERO* had not established - even on the balance of probabilities - that the source of the substance was a contaminated product. From the content of the CAS award it appears that this defence was not raised again by Mr *GUERRERO* during the CAS proceedings.

No Significant Fault or Negligence

As far as No Significant Fault or Negligence was concerned, and while each tribunal accepted that this defence was established by Mr *GUERRERO*, the panels diverged in their application of this principle to the facts of Mr *GUERRERO*'s case.

The FIFA DC held that while Mr *GUERRERO* bore a certain degree of fault or negligence in ingesting the relevant tea, given the particular circumstances of the case he should be entitled to the maximum reduction available under the express terms of the FIFA ADR, *i.e.* a one-year sanction.

The FIFA AC endorsed this approach, and went on to apply the principles developed in the *CILIC* CAS award[34] and Stewart CAS award[35] by considering both the "*objective*" and "*subjective*" levels of fault of Mr *GUERRERO*.[36] The FIFA AC applied these principles as follows:

> "*With regard to the objective element, it must be noted that while the Player could be reasonably expected to read the label of the beverage he was about to ingest or at least ascertain the ingredients – as he did with the First Tea – (especially knowing that coca leaf tea is a common beverage in Peru), the Committee recalls that the Substance is prohibited in competition only and it was taken out-of-competition (the Player testing positive in competition). Thus, a lighter standard of care should apply as the illicit behaviour lies in the fact that the Player* "returned to competition too early, or at least earlier than when the substance he had taken out-of-competition had cleared his system for doping testing purposes in competition". [...]
>
> *In this particular case, the Committee has no reason to disbelieve that the Player, even though he was aware of the common and frequent use of coca leaf tea throughout his country, thought being in a protected area of the hotel, where the same protocol of other areas had been put in place, and that the tea that he requested complied with the strict rules on food and beverage implemented by the Association. This opinion is reinforced by the fact that a previous tea had been provided to him immediately after lunch (i.e. the First Tea) and consisted of an anise tea as he diligently verified.*
>
> *As a consequence, the Committee concurs with the FIFA Disciplinary Committee and concludes that the Player bears No Significant Fault or Negligence, and that his degree of fault can be classified in the lowest range within the light degree of fault.*
>
> *In this respect, the Committee notes that the FIFA Disciplinary Committee took note of all the circumstances surrounding the facts of the case and decided, based on the strict application of art. 22 par. 2 of the Regulations, to impose a one-year period of ineligibility."*

Whilst the FIFA AC went on to further reduce this period on the grounds of proportionality (see below), it is clear that it applied the FIFA ADR (and the *CILIC* guidelines) in precisely the same way as the FIFA DC, holding that Mr *GUERRERO* was entitled to the maximum possible reduction under the FIFA ADR and WADA Code.

To the contrary, and whilst the CAS Panel also applied the *CILIC* guidelines to the case, and also concluded that Mr *GUERRERO* bore a "*light*" degree of fault, it considered that a 14-month sanction was more appropriate.

34 CAS 2013/A/3327 *Marin CILIC v. International Tennis Federation* and CAS 2013/A/3335 *International Tennis Federation v. Marin CILIC*

35 CAS 2015/A/3876 *James STEWART Jr. v. Federation Internationale de Motocyclisme*

36 As per the *CILIC* award *"the objective element describes the standard of care that could have been expected from a reasonable person in the athlete's situation; the subjective element describes what could have been expected from that particular athlete, in light of his personal capacities."*

The CAS Panel based its decision on the following:

> "*(i) The Prohibited substance was in tea, not in a medicine or supplement where the risk of it being contaminated with such substance is inherently more likely to occur than in a common or garden drink, even taking account of the Peruvian context;*
>
> *(ii) Mr GUERRERO's belief, borne of long experience of the artificially cocooned life of an international footballer, that the team officials would, as had been the case in the past, ensured the safety of any food or drink served to the Players in designated areas, separate from the main body of the hotel, was far from unreasonable. A reasonable belief that an athlete was not risking the entry into his body of a Prohibited substance-a subjective factor in the CILIC taxonomy (para 73) is not a defence to an ADRV nor does it establish that there has been NFN; but it certainly bears weightily on the evaluation degree of fault.*
>
> *Therefore, the Panel, subject only to considerations of proportionality which will be next addressed, cannot reduce the period of ineligibility to less than one year, but would reduce it to near that limit, i.e. 1 year and 2 months*."

Whilst the CAS Panel went on to consider the application of proportionality (see further below) it did not, unfortunately, provide an explanation as to why it considered 14 months to be a more appropriate sanction than 12 months.

In this respect, and while there is no doubt that a panel may depart from a sanction rendered by a prior instance, or disagree with the precise sanction that results from the application of a legal test, it certainly would have been beneficial to users of the CAS if the Panel had explained the reasons for the additional two months it imposed on the athlete. This is particularly so considering the oft-quoted CAS jurisprudence that:

> "*…[a Panel's] powers to review the facts and the law of the case are neither excluded nor limited. However, the Panel is mindful of the jurisprudence according to which a CAS panel "would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally […] pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so" (cf. CAS 2010/A/2283 para. 14.36; CAS 2011/A/2518 para. 15; CAS 2011/A/2645 para. 44).I*"[37]

Thus, while there is clearly no impediment to a Panel's scope or power of review in CAS proceedings, it may be desirable in the future to have minor alterations to a sanction be accompanied with detailed reasoning as to why a Panel has departed from the sanction imposed by the prior instance.

37 Most recently expressed in CAS 2018/A/5808 *AC Milan v. UEFA* at par. 134.

Proportionality and the Panel's scope of review

Interestingly, and coming to the final point on sanctioning, the key point of departure between the FIFA AC decision (the shortest sanction) and the CAS decision (the longest sanction) also indirectly concerned the Panel's power or scope of review. Specifically, there was a marked difference in how the FIFA AC and CAS approached the application of the principle of proportionality.

In general

As an initial observation, it is worth noting that in the recent CAS 2018/A/5808 *AC Milan v. UEFA* award at (par. 135) the Panel noted that:

> "*[…] according to Swiss law, no limited review applies from the very outset to questions of law. Whether and to what extent a federation is bound by the principle of proportionality or the principle of equal treatment when exercising its disciplinary powers is, however, a question of law (cf. CAS 2013/A/3139, para. 86) and not an issue within the free discretion of a federation.*"[38]

38 The Panel was referring here to the following extract from CAS 2013/A/3139: *"As a starting point, the Panel observes that UEFA is a legal entity domiciled in Switzerland, and as such subject to Swiss Law. Under Swiss Law – as under most legal systems – sporting associations have a wide margin of autonomy to regulate their own affairs (see CAS 2005/C/976&986, par. 123 and 142 with reference to Swiss Law; CAS 2007/A/1217, par. 11.1) and possess the power (i) to adopt rules of conduct to be followed by their direct and indirect members and (ii) to apply disciplinary sanctions to members who violate those rules, on condition that their own rules and certain general principles of law – such as the right to be heard and proportionality – be respected (CAS 2011/A/2426, par. 62; cf. M. Baddeley, L'association sportive face au droit, Bale, 1994, pp. 107 ff., 218 ff.; M. BELOFF, T. KERR, M. DEMETRIOU, Sports Law, Oxford, 1999, pp. 171 ff.)".*

The principle of proportionality has been expressed as a "*widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement*".[39] In this respect, and whilst the WADA Code suggests that it has been "*drafted giving consideration to the principles of proportionality and human rights*", it has also been noted that:

> "*Even after the entry into force of the WADC, the CAS has recognized that any antidoping sanction inflicted by a sports federation – that is, a private association – must in any event be consistent with the principle of proportionality:*
>
> *The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.*
>
> *A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim (CAS 2005/C/976 & 986 FIFA & WADA, paras. 138-139, footnotes and italics omitted).*"[40]

Despite this, the FIFA AC and the CAS Panel took markedly different approaches to the application of this principle, as follows:

The approach of the FIFA AC

The FIFA AC considered not only that it was entitled to apply the principle of proportionality to the case, but that Mr *Guerrero*'s sanction must be further reduced upon doing so.

The FIFA AC first noted that proportionality had been understood in CAS case law to mean that: "*there must be a reasonable balance between the kind of misconduct and the sanction*" (CAS 2005/C/976 FIFA & WADA, par. 138}, or stated otherwise *"[t]o be proportionate, the sanction must not exceed what is reasonably required in the search of a justifiable aim"* (CAS 2005/C/976 FIFA & WADA, par. 139)."

The FIFA AC then suggested that even if the WADA Code has been repeatedly found to be proportional in its approach to sanctions,[41] the FIFA AC "*nevertheless [held] a duty to address whether a sanction is proportionate. To reference an obiter dictum from a seminal CAS case,* "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" *(CAS 2005/A/830. Squizzato v. FINA, par. 10.24).*"

In assessing whether the application of this principle ought to be applied to reduce Mr *Guerrero*'s sanction, the FIFA AC first accepted the "*longstanding notion reflected in CAS case law that the principle of proportionality demands a reduction of an otherwise applicable sanction only in truly exceptional circumstances (see, for example, CAS 2016/A/4534 Villanueva v. FINA, par. 51)*". However, it then went on to explain why, in its opinion, Mr *Guerrero*'s case demonstrated precisely such exceptional circumstances:

- The legitimate aims of anti-doping are to "*protect the spirit of sport*", "*promote health*" and "*help ensure a level playing field in sport*".
- The circumstances of Mr *Guerrero*'s ADRV demonstrated that his conduct did not fall within the main target conduct of anti-doping regulation, and therefore the justifiable interest of imposing a significant sanction was diminished.
- A 12-month ban (as opposed to a six-month ban) would not render the sanction "*more effective*" nor be capable of greater deterrence by, for example, encouraging greater diligence.
- Finally, reducing the ban to six months would be within the spirit, if not the wording, of the FIFA ADR's sanctioning regime for inadvertent

39 CAS 1999/A/246 *Ward v. FEI.*

40 See CAS 2010/A/2268 *I v. FIA* at par. 133.

41 See CAS 2017/A/5015 *FIS v. Johaug*, par. 227.

violations (in particular the 2015 Code provisions dealing with Contaminated Products, cannabinoids, and Specified Substances).

Thus, in conclusion, the FIFA AC held that:

> *"Such particular circumstances as set forth above - when analysed altogether - are considered by the Committee to be a "perfect storm" of factors that are sufficiently exceptional and unique so as to depart from the strict application of the Regulations and justify the imposition of a lower sanction against the Player, even though they are not analogous to previous cases in which such principle has been deemed to be applicable (CAS 2005/A/830, TAS 2007/A/1252 or CAS 2010/A/2268).*
>
> *As already stated, taking into consideration all the aforementioned unique and specific circumstances and factors, and in particular that the Committee considers that a period of ineligibility of one year would correspond to an excessively severe sanction, disproportionate to the negligent behaviour penalised and contrary to the purpose of the Regulations.*
>
> *In sum, this sanction constitutes a suitable measure in view of the specific circumstances of the case; while respecting the principle of proportionality, it effectively sanctions the anti-doping rule violation committed by the Player and fulfils the discouraging and deterrent effect that disciplinary measures entail - namely in what concerns doping."*

WADA appealed this element of the decision in the CAS proceedings, and, as we now know, was successful.

The approach of the CAS Panel

As already noted - and in any event clear from the significant difference in the sanction ultimately imposed - the CAS Panel did not share the approach of the FIFA AC as to whether proportionality could further reduce Mr *GUERRERO*'s sanction. To the contrary, and somewhat surprisingly, the Panel appears to have taken the position that it was "*constrained*" by the provisions of the FIFA ADR to the extent that it could not even apply the test of proportionality to the particular circumstances of Mr *GUERRERO*'s case.

Specifically, the Panel first noted that if it had been empowered to determine the period of ineligibility "*ex aequo et bono*", it "*could entertain with some sympathy*" FIFA's position that - in the circumstances of the case - Mr *GUERRERO*'s sanction should not exceed six months. However, the Panel considered that it was:

> *"[…] indeed constrained by the FIFA ADR read together with the WADC 2015, and there are three main features of those instruments which leave no scope for the deployment of the concept of proportionality over and above that inherent in the instrument itself:*
>
> 1. *Where, as here, a player is guilty only with NSFN a CAS Panel as any other body vested with responsibility is entitled to take account of proportionality in deciding where in the range of 1 to 2 years the period of ineligibility should be fixed;*
> 2. *To allow proportionality further to lower the period to below one year would make a nonsense of the prescribed minimum;*
> 3. *Even though the classification of cocaine as a non-specified substance, in contrast to other plant-based prohibited substances which are classified as specified substances, is open to question, it must be recognized that the criteria for including substances on the WADA Prohibited List (and, implicitly, their classification within it) are the result of the application of rational criteria (see Art. 4.3.1 WADC 2015) and a challenge to either is expressly proscribed (Art. 4.3.3). The different classification designedly carries with it different consequences, which the Panel is not free to ignore;*
> 4. *The definition of Fault itself for the purposes of the WADC 2015 expressly excludes as a factor to be taken into account in assessing the degree of fault, inter alia, "the timing of the sporting calendar" as well as the athlete's loss "of opportunity to earn large sums of money during the period of ineligibility."*

Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet

further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated:

"The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim" (par. 51).

In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction" (emphasis added), (par. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see www.wadaama.org.

Contrary to FIFA's argument, the WADC 2015 does provide for the way to deal with a case such as Mr GUERRERO's from the perspective of the Code; the present case is no casus omissus. The WADC 2015 was designed not only to punish cheating, but to protect athletes' health and, above all, to ensure fair competition and the level playing field, and has thus set up a detailed framework which balances the interest of those athletes who commit ADRVs with that of those who do not.

The Panel is conscious of the much-quoted legal adage "Hard cases make bad law", and the Panel cannot be tempted to breach the boundaries of the WADC (or FIFA ADR) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm.

It is in the Panel's view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the lex lata, and not some version of the lex ferenda."

Final remarks

At the end of the day, therefore, the difference in the treatment of Mr GUERRERO's case arose from divergent positions on the relevance and application of proportionality in anti-doping proceedings. In this respect, and whilst one can certainly understand the CAS Panel's desire to maintain legal certainty, the above limitation of the Panel's scope or power of review in anti-doping proceedings is both surprising and, in a sense, undesirable. Indeed, unless one is prepared to accept that WADA is an unfaultable regulator that can anticipate any and all situations that can occur in practice, one fails to understand on what basis the minimum sanctions provided for by the WADA Code would be immune from judicial scrutiny (and thus limit the athlete's access to justice).

This is particularly so given that the WADA Code itself stresses that anti-doping rules "*are intended to be applied in a manner which respects the principles of proportionality and human rights*" (emphasis added).[42] The FIFA AC's position appears to be more in line with this approach than the CAS Panel's. With specific respect to human rights, the CAS Panel referred to the legal opinion provided by a previous President of the European Court of Human Rights (the Costa Opinion).[43] According to the CAS Panel, the COSTA Opinion validated the view that the principle of proportionality was "*built into*" in the sanctioning regime of the WADA Code and that the Panel should, therefore, "*adhere to the WADC*".[44] This part of the CAS Award is far from being convincing taking into account the specificities of Mr GUERRERO's case. Indeed, the COSTA Opinion does not discuss the proportionality implications of the fact that under the WADA Code an athlete in the same situation as Mr GUERRERO - *i.e.* bearing the same level of fault - could have benefitted from a complete reduction of the sanction to a reprimand if the substance contained in the tea happened to be a Specified Substance like marijuana (instead of cocaine).

Moreover, the CAS Panel's argument that allowing the application of the principle of proportionality would *de facto*

42 See the Introduction to the WADA Code.
43 Available at www.wada-ama.org
44 See par. 87-90 of the CAS award.

destroy the system is equally unconvincing as it assumes that the hearing panels, including at the CAS, are not capable of distinguishing between: (i) the vast majority of the situations in which the sanction provided for by the WADA Code is proportionate; and (ii) the rare cases where it is established that it is not.[45] As suggested by Ms *Emily WISNOSKY*,[46] a more balanced approach would surely be to conduct the test for proportionality in every case in which it is raised, and determine whether the sanction truly is proportionate. Indeed, not only is there a built-in failsafe to possible "*torrents*" resulting from the application of proportionality (*i.e.* the clear position that proportionality only applies in "*truly exceptional circumstances*"), if the WADA Code truly has been drafted with proportionality in mind, its sanctioning regime ought to - in all but the most exceptional cases - be able to pass the proportionality test. If not, then the drafters undertaking the "*iterative process of review of the WADC*" will have clear and convincing indications of which provisions need reconsideration.

Whether Mr *GUERRERO* will prevail with his proportionality argument in front of the Supreme Court remains to be seen. Under Swiss arbitration law an award can be set aside on the merits only if it is inconsistent with public policy.

> ***A more balanced approach would surely be to conduct the test for proportionality in every case in which it is raised, and determine whether the sanction truly is proportionate***

While this is a notoriously very narrow standard, it is worth noting that the only time an award was set aside on this basis was precisely when a CAS Panel "*blindly*" applied the sanctions provided for by the applicable regulation, without considering whether such sanction was proportionate or not.[47] The upcoming decision of the Swiss Federal Supreme Court will certainly make for an interesting reading. What matters at this stage is to emphasise that even in the (statistically likely) case that Mr *GUERRERO*'s sanction will be considered consistent with public policy, this should not be interpreted as the Swiss Federal Supreme Court vouching for the CAS Award, precisely because of the extremely narrow standard applied by the Supreme Court. Rather, and irrespective of the final outcome, Mr *GUERRERO*'s case provides an opportunity for the drafters of the next version of the WADA Code to consider whether the sanctioning regime in a case such as Mr *GUERRERO*'s is truly proportionate, or whether serious amendments should be considered in order to focus on the true objective of anti-doping regulations.

45 See par. 89 of the CAS award. The *"flood gate"* argument appears to be further contradicted by the Panel's own observation that, until today, in only one case under the previous version of the WADA Code has a CAS Panel held that the circumstances of the case were truly exceptional to a point that the minimum sanction provided for by the Code had to be disregarded (see par. 86 of the CAS award).

46 During the proceedings of the 2018 UEFA Anti-Doping Symposium (22-23 November 2018), publication forthcoming.

47 See SFT 4A_558/2011, Judgment of 27 March 2012 (*MATUZALEM*).

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